

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

ATLEISURE, LLC	)	
	)	
Plaintiff,	)	
	)	Case No. 6:22-cv-682-WWB-DAB
v.	)	
	)	
LOWE'S HOME CENTERS, LLC	)	
	)	
Defendant.	)	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff ATLeisure, LLC ("ATLeisure"), hereby files this response to Defendant Lowe's Home Centers, LLC's ("LHC") motion for summary judgment and shows the Court as follows:

I. MARKING ATLEISURE PRODUCTS WITH THE '492 PATENT.

ATLeisure is the owner of U.S. Patent No. 8,104,492 ("the '492 patent"), which is embodied by certain of ATLeisure's products, as well as products offered by LHC. Since the patent issued, ATLeisure has taken reasonable steps to mark its own products. Starting in 2013, the standard procedures and quality inspections of ATLeisure offset umbrellas included a tag sewn into the umbrella displaying the '492 patent. (Declaration of Jason Bliss, Ex. 1, ¶3.) In 2019, ATLeisure learned that its factory inadvertently used tags that did not include the patent number (despite prior use of the correct tag) on a portion of the products manufactured for 2020. (*Id.*, ¶4.) Upon discovery, ATLeisure demanded the correct tag be used on all subsequent umbrellas manufactured. (*Id.*) This is the only instance of which ATLeisure is aware that its products did not include the

patent number in at least one location since 2013. (*Id.*) More recently ATLeisure has required that the patent number also be printed in the product manual and/or on the product box. (*Id.*, ¶5.) In total, ATLeisure is aware of less than 1% of ATLeisure's total sales since 2013 being sold without markings, namely the portion of 2020 umbrellas manufactured that omitted the patent number from the sewn tag. (*Id.*, ¶6.)

II. ATLEISURE LICENSEES

ATLeisure has licensed the '492 patent on numerous occasions. With most of the licenses, there is an express provision that requires the licensee to mark. In several others there is no express requirement. However, ATLeisure entered a license agreement in 2012 and a separate license agreement with in 2013. Neither includes an express marking provision. ATLeisure does not contest that the Federal Circuit held in *Arctic Cat Inc. v. Bombardier Rec. Prods.*, 950 F.3d 860, 864 (Fed. Cir. 2020) that that "[a] patentee's licensees must also comply with §287." Here, the two licenses identified by LHC appear to be manufacturing products that infringe the '492 patent, but ATLeisure is unaware of any marking of the '492 patent. Given the *Arctic Cat* holding, ATLeisure recognizes these sales preclude constructive notice of the '492 patent.

III. ACTUAL NOTICE

Regardless of constructive notice, ATLeisure can still seek damages based on actual notice. As LHC acknowledges, there is evidence that ATLeisure sent notice to the registered agent of LHC. (MSJ, Att. 13.) This notice was sent to LHC's registered agent¹. (See *id.*) Additionally, it is possible discovery will reveal earlier notice to LHC. In particular,

¹ LHC's registered agent is identified in its filings in North Carolina at the following address, which was also used by ATLeisure for notice:

https://www.sosnc.gov/online_services/search/Business_Registration_Results

the manufacturer of certain accused LHC umbrellas is MWH (Hong Hong) Co., Ltd. (Ex. 2 [2nd Supp Disc. Of LHC].) ATLeisure previously sued Sunvilla Corporation (Case No. 1:20-cv-04662-TWT, N.D. Ga.) asserting the '492 patent against Sunvilla's offset umbrellas under identical theories of infringement. Importantly, MWH and Sunvilla are related entities. (Bliss Decl., ¶7.) As such, there is a question of fact as to whether LHC received notice prior to the letter from ATLeisure on January 25, 2022.

There are more than six months remaining in discovery and to the extent there were exchanges between LHC and MWH regarding the '492 patent and the assertion of the same infringement theories against analogous products from a related company, there may be fact questions on notice prior to January 25, 2022. Accordingly, while the Court could conclude damages begin as of the date of actual notice, whether actual notice occurred on January 25, 2022 or sometime earlier remains uncertain.²

IV. CONCLUSION

As set forth above, while the Court could conclude that constructive notice of infringement under the '492 patent is not appropriate under these facts, the motion should be denied to the extent it seeks a finding that actual notice cannot be established prior to January 25, 2022.

Respectfully submitted, February 17, 2023.

By: /s/ Ryan T. Santurri
 Ryan T. Santurri
 Florida Bar No. 15698
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 ALLEN, DYER, DOPPELT + GILCHRIST, P.A.
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² Alternatively, ATLeisure requests the Court defer a decision on actual notice prior to January 25 2022, pursuant to Rule 56(d).

407.841.2330
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I also certify that I have electronically filed a copy of the foregoing and understand that notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system and that parties may access this filing through the CM/ECF system.

Dated: February 17, 2023.

/s/ Ryan T. Santurri
Ryan T. Santurri
Florida Bar No. 15698
Email: rsanturri@allender.com

Exhibit 1

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

ATLEISURE, LLC

Plaintiff,

v.

LOWE'S HOME CENTERS, LLC

Defendant.

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Case No. 6:22-cv-682-WWB-DAB

DECLARATION OF JASON BLISS

I, Jason Bliss, declare as follows:

1. My name is Jason Bliss. I am over the age of majority and legally competent to testify to the true facts stated herein.

2. I am currently the Vice President of Plaintiff, ATLeisure, LLC ("ATLeisure"). I have served as the Vice President since September 12th, 2011.

3. Starting in 2013, the standard procedures and quality inspections of ATLeisure offset umbrellas included a tag sewn into the umbrella displaying the '492 patent.

4. In 2019, ATLeisure learned that its factory inadvertently used tags that did not include the patent number (despite prior use of the correct tag) on a portion of the products manufactured for 2020. Upon discovering the error,

ATLeisure demanded the correct tag be used on all subsequent umbrellas manufactured. This is the only instance of which ATLeisure is aware that its products did not include the patent number in at least one location since 2013.

5. More recently ATLeisure has required that the patent number also be printed in the product manual and/or on the product box.

6. In total, ATLeisure is aware of less than 1% of ATLeisure's total sales since 2013 being sold without markings, namely the portion of 2020 umbrellas manufactured that omitted the patent number from the sewn tag.

7. ATLeisure previously sued Sunvilla under the '492 patent for Sunvilla's offset umbrellas. I have learned that MWH is the manufacturer of some of the accused products in this action, and MWH is a corporate relative of Sunvilla.

I declare under penalties of perjury of the laws of the United States of America that the above and foregoing is true and correct

DATED this 18th day of February, 2023.



JASON BLISS

Exhibit 2

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

ATLEISURE, LLC,

Plaintiff,

v.

Case No. 6:22-cv-00682-WWB-GJK

LOWE'S HOME CENTERS, LLC

Defendant.

**LOWE'S HOME CENTERS, LLC'S SECOND SUPPLEMENTAL RULE 26 INITIAL
DISCLOSURES**

Pursuant to Fed. R. Civ. P. 26(a)(1), Defendant Lowe's Home Centers, LLC ("LHC"), by and through undersigned counsel, makes the following supplemental disclosures. These disclosures may identify potentially discoverable information regarding Atleisure, LLC ("Atleisure's") claims against LHC based on LHC'S current knowledge, information, and belief. LHC reserves the right to further amend, modify, or supplement these disclosures as additional evidence, discovery, and information become available. Also, in making these disclosures, LHC does not represent that it has yet identified every document, information, fact, person, witness, or entity required by Rule 26(a)(1). Rather, LHC'S disclosures are not intended to limit the use of any subsequently obtained information.

In making these disclosures, LHC in no way concedes the relevance or admissibility of any of the below disclosed information and does not waive any attorney-client privilege or the attorney work product doctrine, or any other applicable privilege, doctrine, or immunity.

LHC also submits these disclosures subject to and without waiving its right to protection from the disclosure of confidential information, and any production of proprietary or other protected information or materials will only be produced pursuant to a protective order.

I. Individuals Likely to Have Discoverable Information Relating to LHC'S Claims and Defenses

Based upon LHC'S current understanding of the scope of this action, the persons identified below are the individuals who are likely to have discoverable information that LHC may use to support its claims and defenses, other than for impeachment purposes:

Jordan Reitzel Associate Merchant, Seasonal & Outdoor Living This person may have knowledge of LHC, the accused products, certain financial information related to the accused products, information in documents produced by LHC, information related to LHC's defenses, terms of the LMSBA, Lowe's use of Sunvilla Corp. as umbrella supplier, and related matters.	This person can be reached by contacting counsel for Defendant.
Jason Bliss Vice President Atleisure, LLC This person is believed to have knowledge of the matters alleged in the complaint, the '492 patent, maintenance fees, Atleisure corporate structure and operations, patent ownership, embodying products and marking, alleged damages, and related issues.	This person can be reached by contacting counsel for Plaintiff.
Bill Browne CEO	This person can be reached by contacting counsel for Plaintiff.

Atleisure, LLC This person is believed to have knowledge of the matters alleged in the complaint, the '492 patent, maintenance fees, Atleisure corporate structure and operations, patent ownership, embodying products and marking, alleged damages, and related issues.	
Ross Boone Designer Atleisure, LLC This person is believed to have knowledge of the matters alleged in the complaint, the '492 patent, maintenance fees, Atleisure corporate structure and operations, patent ownership, embodying products and marking, alleged damages, and related issues.	Atlanta, Georgia.
Wu Wei Dan Inventor Yada Technology This person is believed to have knowledge of conception and reduction of practice of the '492 patent, inventorship, prior art, patents in China, ownership of the '492 patent and related business deals, and related matters	Location not currently known.
James J. Claus, Esq. Patent attorney reg. #62173 This person is believed to have knowledge of the failure of Atleisure, LLC to make maintenance payments on multiple patents, their expiration/forfeiture, and statements made to revive the '492 patent.	This person can be reached at: 4516 NW 37th Terrace Gainesville, FL 32605 (352) 258-0131
Patent attorneys at Kilpatrick Townsend & Stockton LLP Attorneys at this firm are believed to have knowledge of prosecution of the '492 patent and communications with the inventor, maintenance fees, and related	These persons can be reached by contacting counsel for Plaintiff.

matters.	
Jeffrey Breloski, Esq. This person is believed to have knowledge of the failure of Atleisure, LLC to make maintenance payments on multiple patents, their expiration/forfeiture, and statements made to revive the '492 patent.	This person can be reached by contacting counsel for Plaintiff.
Dennemeyer & Co., LLC Persons associated with this business entity are believed to have knowledge of Atleisure patent maintenance fees, payment and nonpayment of fees, expiration of patent(s), patent prosecution, communications with Atleisure, and related matters.	2 North Riverside Plaza Suite 1500 Chicago, IL 60606 (312) 380-6500
Technical Expert Financial Expert These witnesses will have knowledge of the matters contained in their expert report and depositions, of certain of LHC's defenses, the accused products, certain financial information related to the accused products (financial expert), alleged damages (financial expert), information in documents produced by LHC, prior art and alleged infringement (technical expert), and related matters.	This person can be reached by contacting counsel for Defendant.

II. Documents That May Bear on LHC'S Claims or Defenses

Categories of documents, electronically stored information, and tangible things that LHC may use to support its claims or defenses in this matter may include the following:

- a. Documents relating to the marketing of any accused product(s), including LHC documents that relate to the accused products and/or accused functionality; and
- b. Documents relating to the importation, purchase, sale, and/or offer for sale

of the accused products and/or accused functionality, potentially including sales agreements, contracts, and financial reports related to LHC'S purchase and/or sale of the accused products and/or functionality.

c. Documents regarding the invalidity and unenforceability of the asserted patent, along with documents showing the accused products' noninfringement of the asserted patent.

d. Documents pertaining to Atleisure's claims and LHC's defenses, including Atleisure's lack of standing to assert the patent in suit, inequitable conduct in reviving the asserted patent, relevant license(s) and covenant not to sue, prior art, and related matters.

e. Documents pertaining to ATLeisure's and/or its agent/licensee's failure to mark certain of its products that ATLeisure claims embody the '492 patented technology, including the Backyard Creations 10' x 13' offset umbrella, sold through Menard, model no. UMB-952371 and RST Brands Portofino 10ft. Resort Cantilever Umbrellas sold through at least Home Depot, model no. OP-MKT10-PORII-K. Such documents also include at least two licenses in which Atleisure failed to require its '492 patent licensee to mark embodying products and documents showing that Atleisure took no other steps to compel such licensees to mark embodying products with the '492 patent number.

f. Documents related to change in LHC umbrella supplier from MWH (Hong Kong) Co., Ltd. to Sunvilla Corporation, including status of Sunvilla Corporation as licensee of U.S. patent 8,104,492 ("492 patent") and establishing that sale of products by Sunvilla (a licensee of the '492 patent) exhausts Atleisure's right to collect further royalties or damages for alleged infringement of the '492 patent.

LHC'S relevant and responsive non-privileged documents are primarily located at its headquarters at 1000 Lowe's Boulevard, Mooresville, NC 28117 and at the address of its counsel of record, Law Office of Steven Malin, PLLC, 1400 Preston Rd, Suite 400, Plano, TX 75093.

III. Computation of Damages

LHC is not seeking damages from Atleisure in this action, although LHC expressly reserves its right to seek attorneys' fees and/or costs from Atleisure and/or Atleisure's counsel in connection with this action.

IV. Insurance Coverage

LHC is currently unaware of any applicable insurance agreement to satisfy or indemnify against any judgment.

LHC'S investigation of the claims and defenses in this matter is ongoing, and LHC reserves the right to supplement these Initial Disclosures and to rely on and to offer as evidence at trial additional documents or testimony from additional witnesses not identified herein but subsequently made known to the other parties during the discovery process or in writing.

Respectfully submitted,

LAW OFFICE OF STEVE MALIN, PLLC



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Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 5, 2023, the foregoing document served on all parties identified on the attached Service List in the manner specified.

/s/ Steven Malin

SERVICE LIST

Service via email

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