

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO**

UNDER THE WEATHER, LLC,

Plaintiff,

v.

CHRISTMAS TREE SHOPS, INC.

and

LION SPORTS INC.,

Defendants.

CASE NO.: 1:18-cv-197

JUDGE:

COMPLAINT

JURY DEMAND

Plaintiff Under the Weather, LLC (“Under the Weather”), complains and alleges as follows against Defendants Christmas Tree Shops, Inc. (“Christmas Tree Shops”) and Lion Sports Inc. (“Lion Sports”):

NATURE OF THE ACTION

1. Inspired by countless weekends spent braving the elements to watch his children participate in outdoor sports, Eric Pescovitz set out to design a personal enclosure to protect outdoor spectators from the elements. In 2010, this goal became a reality as Mr. Pescovitz started his company, Under the Weather, to promote and sell his inventive personal pop-up pods to the public.

2. Since 2010, Mr. Pescovitz has invested in intellectual property to protect his innovations and business. Such investments have resulted in fourteen issued United States design patents, with several patent applications pending in the United States Patent and Trademark Office. The success of Mr. Pescovitz’s business and his tireless promotion of his

company and products has resulted in Under the Weather becoming a leader in the personal pop-up pod market.

3. Despite the intellectual property rights of Under the Weather, its innovations have been the subject of widespread imitation by its competitors who have attempted to capitalize on Under the Weather's success. One such imitator is Lion Sports, which markets and sells a pop-up pod that copies Under the Weather's inventive design in violation of Under the Weather's intellectual property rights. Lion Sports sells or has sold its pop-up pod through various Christmas Tree Shops retail locations throughout the United States and through on-line marketplaces such as amazon.com and walmart.com.

THE PARTIES

4. Under the Weather is an Ohio limited liability company with a principal place of business located at 5218 Wooster Road, Cincinnati, Ohio 45241.

5. On information and belief, Christmas Tree Shops is a Massachusetts corporation with a principle place of business located at 650 Liberty Avenue, Union, New Jersey 07083.

6. On information and belief, Lion Sports is a New York corporation with a principal place of business located at 701 Koehler Avenue, Suite 2, Ronkonkoma, New York 11779.

JURISDICTION AND VENUE

7. This is a civil action against Defendants Christmas Tree Shops and Lion Sports for patent infringement under the patent laws of the United States, 35 U.S.C. § 1, et seq.

8. The Court has subject matter jurisdiction over this action under 28 U.S.C. § 1331 because it involves a federal question and under 28 U.S.C. § 1338 because it involves an Act to Congress related to patents.

9. This Court has specific personal jurisdiction over Christmas Tree Shops and Lion Sports because, among other things, Lion Sports has supplied products that infringe Under the Weather's intellectual property to Christmas Tree Shops, Christmas Tree Shops has sold the infringing Lion Sports products in Ohio and in this judicial district, and Christmas Tree Shops continue to offer to sell infringing Lion Sports products in Ohio and in this judicial district.

10. This Court has general personal jurisdiction over Christmas Tree Shops and Lion Sports because, among other things, on information and belief, Christmas Tree Shops and Lion Sports each regularly solicits and transacts business in Ohio and in this judicial district; Christmas Tree Shops and Lion Sports each engages in a persistent course of conducting business in Ohio and in this judicial district; and Christmas Tree Shops and Lion Sports each derives substantial revenue from goods that infringe Under the Weather's intellectual property rights that are sold in Ohio and in this judicial district.

11. Venue is proper in this judicial district under 28 U.S.C. §1400.

RELEVANT FACTS

12. Under the Weather is the owner of U.S. Patent No. D691,688 (the "'688 Patent'"), which is titled "Personal Enclosure," which was duly and lawfully issued on October 15, 2013, to Eric Frank Pescovitz as inventor. A true and correct copy of the '688 Patent is attached hereto as Exhibit A. Under the Weather is the owner of all right, title and interest in the '688 Patent, including the right to sue and recover damages for infringement of the '688 Patent and obtain a preliminary or permanent injunction.

13. Under the Weather is the owner of U.S. Patent No. D691,689 (the "'689 Patent'"), which is titled "Personal Enclosure Side," which was duly and lawfully issued on October 15, 2013, to Eric Frank Pescovitz as inventor. A true and correct copy of the '689 Patent is attached

hereto as Exhibit B. Under the Weather is the owner of all right, title and interest in the ‘689 Patent, including the right to sue and recover damages for infringement of the ‘689 Patent and obtain a preliminary or permanent injunction.

14. Under the Weather is the owner of U.S. Patent No. D691,690 (the “‘690 Patent”), which is titled “Personal Enclosure Front,” which was duly and lawfully issued on October 15, 2013, to Eric Frank Pescovitz as inventor. A true and correct copy of the ‘690 Patent is attached hereto as Exhibit C. Under the Weather is the owner of all right, title and interest in the ‘690 Patent, including the right to sue and recover damages for infringement of the ‘690 Patent and obtain a preliminary or permanent injunction.

15. Under the Weather is the owner of U.S. Patent No. D711,996 (the “‘996 Patent,” and collectively with the ‘688, ‘689, and ‘690 Patents the “Patents-in-Suit”), which is titled “Personal Enclosure,” which was duly and lawfully issued on August 26, 2014, to Eric Frank Pescovitz as inventor. A true and correct copy of the ‘996 Patent is attached hereto as Exhibit D. Under the Weather is the owner of all right, title and interest in the ‘996 Patent, including the right to sue and recover damages for infringement of the ‘996 Patent and obtain a preliminary or permanent injunction.

16. Lion Sports sells and distributes a pop-up pod that it markets as “All-Weather Sports Pod” (“Lion Sports Pop-Up Pod”). True and accurate photographs of the Lion Sports Pop-Up Pod and its packaging are attached as Exhibit E.

17. Lion Sports Pop-Up Pods have been sold and continue to be offered for sale through Christmas Tree Shops retail stores. A true and accurate copy of photographs of the Lion Sports Pop-Up Pod as offered for sale at Christmas Tree Shops retail stores is attached as Exhibit F. On information and belief, Lion Sports has provided approximately 2000 Lion Sports Pop-Up

Pods to Christmas Tree Shops for sale at its more than 70 locations, including a Christmas Tree Shops retail store located at 2264 Miamisburg Centerville Road, South Towne Center, Dayton, Ohio 45459 (the “CTS Dayton Store”). The CTS Dayton Store is a regular and established place of business for Christmas Tree Shops.

18. Lion Sports has offered for sale and sold Lion Sports Pop-Up Pods on the ecommerce website walmart.com. A true and accurate copy of the Lion Sports Pop-Up Pods webpage from walmart.com captured on August 10, 2017, is attached as Exhibit G.

19. Lion Sports has offered for sale Lion Sports Pop-Up Pods on the ecommerce website amazon.com. A true and accurate copy of the Lion Sports Pop-Up Pods webpage from amazon.com captured on August 17, 2017, is attached as Exhibit H.

20. On August 11, 2017, counsel for Under the Weather sent a letter to counsel for the Christmas Tree Shops identifying the Patents-in-Suit and stating that Under the Weather believes that the Lion Sports Pop-Up Pods infringe the Patents-in-Suit.

21. On September 8, 2017, Under the Weather filed a complaint against the Christmas Tree Shops and Lion Sport alleging patent infringement substantially as alleged herein and included claim charts showing Under the Weather’s allegations of patent infringement. The September 8, 2017 complaint was not served upon either Plaintiff because Under the Weather and the Christmas Tree Shops engaged in good faith negotiations, which have yet to result in an agreeable settlement between the parties.

COUNT I

Infringement of the ‘688 Patent

22. Under the Weather incorporates by reference the allegations set forth in Paragraphs 1-21 of this Complaint as thought fully set forth herein.

23. Christmas Tree Shops has infringed and continues to infringe the '688 Patent by selling, and/or offering to sell in the United States the Lion Sports Pop-Up Pod, which embodies the design covered by the '688 Patent. *See* Exhibit I for an exemplary chart comparing the Lion Sports Pop-Up Pod to the '688 Patent.

24. Lion Sports has infringed and continues to infringe the '688 Patent by using, selling, and/or offering to sell in the United States and/or importing into the United States the Lion Sports Pop-Up Pod, which embodies the design covered by the '688 Patent. *See* Exhibit I.

25. On information and belief, Christmas Tree Shops was aware of the '688 Patent prior to the filing of this Complaint.

26. On information and belief, Lion Sports was aware of the '688 Patent prior to the filing of this Complaint.

27. On information and belief, Christmas Tree Shops' infringement of the '688 Patent has been and continues to be intentional, willful, and without regard to Under the Weather's rights.

28. On information and belief, Lion Sports' infringement of the '688 Patent has been and continues to be intentional, willful, and without regard to Under the Weather's rights.

29. On information and belief, Christmas Tree Shops has gained profits by virtue of its infringement of the '688 Patent.

30. On information and belief, Lion Sports has gained profits by virtue of its infringement of the '688 Patent.

31. Under the Weather has been, and continues to be, damaged by such infringement of the '688 Patent.

COUNT II

Infringement of the '689 Patent

32. Under the Weather incorporates by reference the allegations set forth in Paragraphs 1-31 of this Complaint as thought fully set forth herein.

33. Christmas Tree Shops has infringed and continues to infringe the '689 Patent by selling, and/or offering to sell in the United States the Lion Sports Pop-Up Pod, which embodies the design covered by the '689 Patent. *See* Exhibit I for an exemplary chart comparing the Lion Sports Pop-Up Pod to the '689 Patent.

34. Lion Sports has infringed and continues to infringe the '689 Patent by using, selling, and/or offering to sell in the United States and/or importing into the United States the Lion Sports Pop-Up Pod, which embodies the design covered by the '689 Patent. *See* Exhibit I.

35. On information and belief, Christmas Tree Shops was aware of the '689 Patent prior to the filing of this Complaint.

36. On information and belief, Lion Sports was aware of the '689 Patent prior to the filing of this Complaint.

37. On information and belief, Christmas Tree Shops' infringement of the '689 Patent has been and continues to be intentional, willful, and without regard to Under the Weather's rights.

38. On information and belief, Lion Sports' infringement of the '689 Patent has been and continues to be intentional, willful, and without regard to Under the Weather's rights.

39. On information and belief, Christmas Tree Shops has gained profits by virtue of its infringement of the '689 Patent.

40. On information and belief, Lion Sports has gained profits by virtue of its infringement of the '689 Patent.

41. Under the Weather has been, and continues to be, damaged by such infringement of the '689 Patent.

COUNT III

Infringement of the '690 Patent

42. Under the Weather incorporates by reference the allegations set forth in Paragraphs 1-41 of this Complaint as thought fully set forth herein.

43. Christmas Tree Shops has infringed and continues to infringe the '690 Patent by selling, and/or offering to sell in the United States the Lion Sports Pop-Up Pod, which embodies the design covered by the '690 Patent. *See* Exhibit I for an exemplary chart comparing the Lion Sports Pop-Up Pod to the '690 Patent.

44. Lion Sports has infringed and continues to infringe the '690 Patent by using, selling, and/or offering to sell in the United States and/or importing into the United States the Lion Sports Pop-Up Pod, which embodies the design covered by the '690 Patent. *See* Exhibit I.

45. On information and belief, Christmas Tree Shops was aware of the '690 Patent prior to the filing of this Complaint.

46. On information and belief, Lion Sports was aware of the '690 Patent prior to the filing of this Complaint.

47. On information and belief, Christmas Tree Shops' infringement of the '690 Patent has been and continues to be intentional, willful, and without regard to Under the Weather's rights.

48. On information and belief, Lion Sports' infringement of the '690 Patent has been and continues to be intentional, willful, and without regard to Under the Weather's rights.

49. On information and belief, Christmas Tree Shops has gained profits by virtue of its infringement of the '690 Patent.

50. On information and belief, Lion Sports has gained profits by virtue of its infringement of the '690 Patent.

51. Under the Weather has been, and continues to be, damaged by such infringement of the '690 Patent.

COUNT IV

Infringement of the '996 Patent

52. Under the Weather incorporates by reference the allegations set forth in Paragraphs 1-51 of this Complaint as thought fully set forth herein.

53. Christmas Tree Shops has infringed and continues to infringe the '996 Patent by selling, and/or offering to sell in the United States the Lion Sports Pop-Up Pod, which embodies the design covered by the '996 Patent. *See* Exhibit I for an exemplary chart comparing the Lion Sports Pop-Up Pod to the '996 Patent.

54. Lion Sports has infringed and continues to infringe the '996 Patent by using, selling, and/or offering to sell in the United States and/or importing into the United States the Lion Sports Pop-Up Pod, which embodies the design covered by the '996 Patent. *See* Exhibit I.

55. On information and belief, Christmas Tree Shops was aware of the '996 Patent prior to the filing of this Complaint.

56. On information and belief, Lion Sports was aware of the '996 Patent prior to the filing of this Complaint.

57. On information and belief, Christmas Tree Shops' infringement of the '996 Patent has been and continues to be intentional, willful, and without regard to Under the Weather's rights.

58. On information and belief, Lion Sports' infringement of the '996 Patent has been and continues to be intentional, willful, and without regard to Under the Weather's rights.

59. On information and belief, Christmas Tree Shops has gained profits by virtue of its infringement of the '996 Patent.

60. On information and belief, Lion Sports has gained profits by virtue of its infringement of the '996 Patent.

61. Under the Weather has been, and continues to be, damaged by such infringement of the '996 Patent.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Under the Weather respectfully requests relief and judgment as follows:

1. A judgement that Defendant Christmas Tree Shops has infringed each of the Patents-in-Suit;

2. A judgment that Defendant Lion Sports has infringed each of the Patents-in-Suit;

3. Temporarily, preliminarily, and permanently enjoin Defendant Christmas Tree Shops, its employees, agents, officers, directors, attorneys, successors, affiliates, subsidiaries and assigns, and all those in active concert and participation with Defendant Christmas Tree Shops, from infringing the Patents-in-Suit;

4. Temporarily, preliminarily, and permanently enjoin Defendant Lion Sports, its employees, agents, officers, directors, attorneys, successors, affiliates, subsidiaries and assigns,

and all those in active concert and participation with Defendant Lion Sports, from infringing the Patents-in-Suit;

5. Award Plaintiff Under the Weather its actual damages in an amount to be proved at trial and/or as otherwise provided by law, as a result of Christmas Tree Shops' infringement of the Patents-in-Suit;

6. Award Plaintiff Under the Weather its actual damages in an amount to be proved at trial and/or as otherwise provided by law, as a result of Lion Sports' infringement of the Patents-in-Suit;

7. Award Plaintiff Under the Weather the total profit realized by Christmas Tree Shops as a result of the infringement of the Patents-in-Suit;

8. Award Plaintiff Under the Weather the total profit realized by Lion Sports as a result of the infringement of the Patents-in-Suit;

9. Award Plaintiff Under the Weather all of Christmas Tree Shops' profits, pursuant to 35 U.S.C. § 289, together with prejudgment interest;

10. Award Plaintiff Under the Weather all of Defendant Lion Sports' profits, pursuant to 35 U.S.C. § 289, together with prejudgment interest;

11. Enter judgment that this case is exceptional and award Under the Weather their reasonable attorneys' fees, costs, and expenses, under 35 U.S.C. § 285; and

12. Award Plaintiff Under the Weather such other and further relief as is just and proper.

Dated: March 21, 2018

Respectfully submitted,

/s/Risto Pribisich

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DEMAND FOR JURY TRIAL

Plaintiff Under the Weather, LLC hereby makes demand for a trial by jury pursuant to Rule 38 of the Federal Rules of Civil Procedure as to all issues of this lawsuit.

Dated: March 21, 2018

Respectfully submitted,

/s/Risto Pribisich
*One of the Attorneys for Plaintiff
Under the Weather, LLC*