

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS**

**DALLAS DIVISION**

**LakeSouth Holdings, LLC,**

*Plaintiff,*

v.

**Ace Hardware Corporation,**

*Defendant.*

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Civil Action No. \_\_\_\_\_

**JURY TRIAL DEMANDED**

**ORIGINAL COMPLAINT FOR PATENT INFRINGEMENT**

COMES NOW Plaintiff, LakeSouth Holdings, LLC, and files this Original Complaint for patent infringement against Defendant, Ace Hardware Corporation (“Ace”), and alleges as follows:

**NATURE OF THE SUIT**

1. This is a claim for patent infringement arising under the patent laws of the United States, Title 35 of the United States Code.

**THE PARTIES**

2. Plaintiff, LakeSouth Holdings, LLC (“Plaintiff” or “LakeSouth”), is a Delaware limited liability company with its principal place of business located at P.O. Box 93883, Southlake, Texas 76092, which is in the Northern District of Texas.

3. Defendant, Ace Hardware Corporation (“Ace”), is a Delaware corporation with its principal place of business at 1300 Kensington Ct., Oak Brook, IL 60521. Ace is registered to do business in Texas and may be served via its registered agent, Corporation Service Company d/b/a

CSC – Lawyers Incorporating Service Company, at 211 E. 7th Street, Suite 620, Austin, Texas 78701.

### **JURISDICTION AND VENUE**

4. This action arises under the patent laws of the United States, 35 U.S.C. § 101, *et seq.* This Court’s jurisdiction over this action is proper under the above statutes, including 35 U.S.C. § 271, *et seq.*, 28 U.S.C. § 1331 (federal question jurisdiction), and § 1338 (jurisdiction over patent actions).

5. Upon information and belief, Ace, directly and/or through subsidiaries, agents, representatives, or intermediaries, has transacted business in this District, has committed and continues to commit and/or induce acts of patent infringement in this District, and has one or more regular and established places of business in this District under the language of 28 U.S.C. § 1400(b) including, but not limited to, 1101 E. Pleasant Run Road, Wilmer, TX 75172, 7331 Gaston Ave Suite 120, Dallas, TX 75214, and 12895 Josey Lane Ste. 140, Dallas, TX 75234. Thus, venue is proper in this district as to Ace under 28 U.S.C. § 1400(b).

6. Upon information and belief, Ace has conducted and does conduct substantial business in this forum, directly and/or through subsidiaries, agents, representatives, or intermediaries, such substantial business including but not limited to: (i) at least a portion of the infringements alleged herein; (ii) purposefully and voluntarily placing one or more infringing products into the stream of commerce with the expectation that they will be purchased by consumers in this forum; or (iii) regularly doing or soliciting business, engaging in other persistent courses of conduct, or deriving substantial revenue from goods and services provided to individuals in Texas and in this judicial district. Thus, Ace is subject to this Court’s specific and

general personal jurisdiction pursuant to due process and the Texas Long Arm Statute. Venue is proper in the Northern District of Texas as to Ace pursuant to 28 U.S.C. § 1400(b).

### **THE ASSERTED PATENTS**

7. Mr. Gregory G. Kuelbs is a Texas resident and a prolific inventor. Mr. Kuelbs is a named inventor on more than 40 patents. Mr. Kuelbs lives in Westlake, Texas, which is in the Northern District of Texas.

8. This cause of action asserts infringement of United States Patent No. 6,612,713 (the “’713 Patent”) and United States Patent No. 8,794,781 (the “’781 Patent”) (collectively, the “Asserted Patents”).

9. The ’713 Patent, entitled “Umbrella Apparatus,” duly and legally issued on September 2, 2003, from U.S. Application No. 10/068,424, filed on February 7, 2002, naming as inventor Mr. Kuelbs. A true and correct copy of the ’713 Patent is attached hereto as **Exhibit A** and is incorporated by reference.

10. The ’713 Patent claims priority to Provisional Application No. 60/267,018, filed on February 7, 2001.

11. The ’713 Patent also claims priority to Provisional Application No. 60/335,933, filed on November 2, 2001.

12. The ’781 Patent, entitled “Umbrella Apparatus,” duly and legally issued on August 5, 2014, from U.S. Patent Application No. 10/650,537, filed on August 28, 2003, naming as inventor Mr. Kuelbs. A true and correct copy of the ’781 Patent is attached hereto as **Exhibit B** and is incorporated by reference.

13. The ’781 Patent is a continuation of the ’713 Patent and claims priority to it.

14. The '781 Patent also claims priority to Provisional Application No. 60/267,018, filed on February 7, 2001.

15. The '781 Patent also claims priority to Provisional Application No. 60/335,933, filed on November 2, 2001.

16. On November 12, 2013, World Factory, Inc., assigned all right, title, and interest in and to the '713 Patent to LakeSouth. A true and correct copy of the assignment agreement is attached as **Exhibit C**.

17. The assignment agreement referenced in paragraph 16 above and attached as **Exhibit C** included an assignment of the “right to file or pursue and non-provisional applications, divisions, re-examinations, reissues, substitutions, continuations, continuations-in-part, and extensions of or to the Patents . . . .”

18. At the time of the assignment agreement referenced in paragraph 16 above and attached as **Exhibit C**, the '781 Patent was pending as a continuation of the '713 Patent.

19. The assignment agreement referenced in paragraph 16 above and attached as **Exhibit C** was an effective assignment of all right, title, and interest in and to the '781 Patent (which was then pending as a continuation application) to LakeSouth.

20. LakeSouth is the owner and assignee of all rights, title, and interest in and under the '713 Patent and '781 Patent.

21. LakeSouth has standing to sue for infringement of the '713 Patent and the '781 Patent.

22. On information and belief, to the extent any marking was required by 35 U.S.C. § 287, LakeSouth and all predecessors in interest to the '713 Patent and '781 Patent have complied with any such requirements.

23. On information and belief, all licensees of the '713 Patent and the '781 Patent are in compliance with any marking required by 35 U.S.C. § 287.

### **REEXAMINATIONS OF THE ASSERTED PATENTS**

24. On August 12, 2005, Southern Sales & Marketing Group, Inc. ("Southern Sales") filed a Petition for *Inter Partes* Reexamination of the '713 Patent.

25. On September 9, 2005, the United States Patent & Trademark Office (the "USPTO") granted Southern Sales's Petition for *Inter Partes* Reexamination of the '713 Patent.

26. On September 23, 2013, the USPTO issued an *Inter Partes* Reexamination Certificate for the '713 Patent. A true and correct copy of the reexamination certificate is attached as **Exhibit D** and is incorporated by reference.

27. On November 18, 2016, Petitioner Yotrio Corporation filed a Petition for *Inter Partes* Review of Claims 2, 4, 15, 16, 24, 25, and 28 of the '713 Patent (the "'713 IPR Petition") at the USPTO Patent Trial and Appeal Board ("PTAB").

28. The '713 IPR Petition asserted U.S. Patent No. 2,960,094 (the "Small '094 Patent") as prior art against the '713 Patent.

29. The '713 IPR Petition asserted U.S. Patent No. 6,089,297 (the "Wu '297 Patent") as prior art against the '713 Patent.

30. The '713 IPR Petition asserted U.S. Patent No. 5,758,948 (the "Hale '948 Patent") as prior art against the '713 Patent.

31. The '713 IPR Petition asserted U.S. Patent No. 6,439,249 (the "Pan '249 Patent") as prior art against the '713 Patent.

32. The '713 IPR Petition asserted U.S. Patent No. 4,999,060 (the "Szekely '060 Patent") as prior art against the '713 Patent.

33. The PTAB declined to institute an IPR on the '713 Patent in an Order dated May 15, 2017. A true and correct copy of the PTAB's Order denying the '713 IPR Petition on the '713 Patent is attached as **Exhibit E** and is incorporated by reference.

34. The PTAB stated on page 9 of its Order denying the '713 IPR Petition, "the Petition presents 'the same prior art' previously considered by the Office."

35. The PTAB also stated on page 9 of its Order denying the '713 IPR Petition, "we find that Small, Pan, Wu I/II, and Hale have been before the Office in connection with the prosecution of the subject patent in a manner that supports our exercise of discretion to deny institution."

36. The PTAB stated on page 11 of its Order denying the '713 IPR Petition, "we find that every one of Petitioner's Grounds in this Petition involves at least two references that have been before the Office during the prosecution of the '713 Patent. Not only has the art been before the Office, but in the case of Small, Pan, and Wu I/II, we find that the Examiner has specifically considered and disposed of these references in an in-depth manner that indicates far more than cursory review."

37. The PTAB stated on page 12 of its Order denying the '713 IPR Petition, "Petitioner also does not provide a compelling reason why we should re-adjudicate substantially the same prior art, applied in substantially the same manner, as that presented during reexamination and considered by the Examiner."

38. On November 18, 2016, Petitioner Yotrio Corporation also filed a Petition for *Inter Partes* Review of Claims 1, 2, 4, and 5 of the '781 Patent at the PTAB (the "'781 IPR Petition").

39. The '781 IPR Petition asserted the Small '094 Patent as prior art against the '781 Patent.

40. The '781 IPR Petition asserted the Wu '297 Patent as prior art against the '781 Patent.

41. The '781 IPR Petition asserted the Hale '948 Patent as prior art against the '781 Patent.

42. The '781 IPR Petition asserted the Pan '249 Patent as prior art against the '781 Patent.

43. The '781 IPR Petition asserted U.S. Patent No. 5,222,799 (the "Sears '799 Patent") as prior art against the '781 Patent.

44. The '781 IPR Petition asserted U.S. Patent No. 727,495 (the "Todd '495 Patent") as prior art against the '781 Patent.

45. The PTAB declined to institute an IPR on the '781 Patent in an Order dated May 15, 2017. A true and correct copy of the PTAB's Order denying the '781 IPR Petition is attached as **Exhibit F** and is incorporated by reference.

46. The PTAB stated on page 10 of its Order denying the '781 IPR Petition, "the Petition presents 'the same prior art' previously considered by the Office."

47. The PTAB also stated on pages 10–11 of its Order denying the '781 IPR Petition, "we find that Small, Pan, Wu I[], and Hale have been before the Office in connection with the examination of the '537 application in a manner that supports our exercise of discretion to deny institution."

48. The PTAB stated on page 11 of its Order denying the '781 IPR Petition, "[t]he Examiner expressly and substantively considered each of Small and Pan with respect to claims of the '537 application."

49. The PTAB stated on page 12 of its Order denying the '781 IPR Petition, "Petitioner does not provide a compelling reason why we should re-adjudicate substantially the same prior art, applied in substantially the same manner, as that presented during prosecution and considered by the Examiner."

#### **CLAIM CONSTRUCTIONS REGARDING THE ASSERTED PATENTS**

50. The '713 Patent has been recently litigated in the Northern District of Texas.

51. On August 10, 2015 in the *LakeSouth Holdings, LLC v. Ace Evert, Inc., et al.*, No. 3:14-cv-1348 (N.D. Texas) case, the Court issued a claim construction order construing various claims terms of the '713 Patent. A true and correct copy of the claim construction order (Dkt. No. 95) is attached hereto as **Exhibit G**.

#### **LICENSEES**

52. Numerous companies have obtained patent licenses to the '713 Patent and '781 Patent as a result of litigation and outside of litigation including Ningbo Everluck Outdoor Products Manufacturing Co., Ningbo Everluck Import and Export Co., Ace Evert, Inc., Ace Evert International, Inc., Blue Wave Products, Inc., J&J Global LLC, LB International, Inc., Plantation Patterns LLC, Sunset Vista Designs Co., Inc., Yotrio Corporation, Yotrio Group, Ltd., Zhejiang Nengfu Tourist Products Co., Ltd., and Leisureway Inc. (collectively, "Licensees").

53. LakeSouth and the Asserted Patents are well-known and recognized in the industry as important. As a result, companies such as Plantation Patterns LLC, have initiated contact with LakeSouth, without prompting by LakeSouth, in order to obtain a license to the Asserted Patents to license solar-powered umbrellas.

54. LakeSouth's Licensees have supplied and/or are supplying solar-powered outdoor and patio umbrellas, licensed under the Asserted Patents, to major retailers, including, but not

limited to Amazon, Target, Wal-Mart, Sears, Bed Bath & Beyond, Lowe’s, Home Depot, Kohl’s, and Tuesday Morning.

**ACE**

55. On information and belief, Ace uses, offers to sell, sells, distributes, and/or imports in the United States various patio and outdoor solar-powered umbrellas.

56. On information and belief, Ace’s website identifies various patio and outdoor solar-powered umbrellas. For example, Ace’s website identifies a product described as “Living Accents 9ft Solar Market Umbrella,” item no. 8462418| 843518066393.

57. “Living Accents” is a registered trademark owned by Ace Hardware Corporation and bearing Registration No. 3333467.

58. To date, LakeSouth has identified the following products from Ace’s website, which LakeSouth believes were supplied by unlicensed suppliers and which LakeSouth asserts infringe the Asserted Patents:

<b>Product Description</b>	<b>Item No.</b>	<b>Number</b>
Living Accents Market 9ft Solar Market Umbrella	8462434	843518066416
Living Accents 9ft Solar Market Umbrella	8462384	843518066379
Living Accents 9ft Solar Market Umbrella	8462392	843518066386
Living Accents 9ft Solar Market Umbrella	8462418	843518066393
Living Accents Offset 10 ft. Dia. Patio Umbrella Tan (UMSCS10E04OBD)	8389173	843518063552

59. LakeSouth accuses of infringing the Asserted Patents those products specifically identified in paragraph 58, as well as any and all, current and prior, reasonably similar solar-powered umbrellas that have the same or equivalent functions and features to the extent relevant

to the claims of the Asserted Patents, specifically including, but not limited to, models with different colors than each specifically identified model number (the “Accused Ace Umbrellas”).

60. Upon information and belief, Ace may obtain at least some of the Accused Ace Umbrellas from AHC Trading Co. and/or Pride Family Brands.

61. The Accused Ace Umbrellas are and have been sold, offered for sale, and/or marketed by Ace through its website at [www.acehardware.com](http://www.acehardware.com) and the Ace Hardware mobile application for phone and tablet devices.

62. Upon information and belief, the Accused Ace Umbrellas are offered for sale and sold within the Northern District of Texas.

63. On information and belief, Ace has sold, shipped, or distributed the Accused Ace Umbrellas at, from, through, and/or to one or more facilities located in the Northern District of Texas, including but not limited to: 1101 E. Pleasant Run Road, Wilmer, TX 75172, 7331 Gaston Ave Suite 120, Dallas, TX 75214, or 12895 Josey Lane STE 140, Dallas, TX 75234.

64. Ace has not obtained a license to the Asserted Patents.

65. Ace needs to obtain a license to the Asserted Patents and cease its ongoing infringement of LakeSouth’s patent rights.

66. Ace has infringed and continues to infringe (literally and/or under the doctrine of equivalents), directly, indirectly, and/or through subsidiaries, agents, representatives, or intermediaries, one or more claims of the Asserted Patents including at least Claims 2, 4, 15, 16, 24, 25 and 28 of the ’713 Patent and/or at least Claims 1, 2, 4, and 5 of the ’781 Patent by using, importing, testing, supplying, causing to be supplied, selling, and/or offering for sale in the United States the Accused Ace Umbrellas.

67. Ace induces its customers to infringe the Asserted Patents. Ace customers have infringed and continue to infringe the '713 Patent and the '781 Patent by using the Accused Ace Umbrellas purchased from Ace. Through its website and mobile applications, product manuals, and/or sales and marketing activities, Ace solicits, instructs, encourages, and aids and abets its customers to purchase and use the Accused Ace Umbrellas, including to use the Accused Ace Umbrellas with a base support. Ace does so with knowledge of the Asserted Patents and knowledge that the induced actions of its customers constitutes infringement.

68. Ace contributes to its customer's infringement of the Asserted Patents. Ace customers infringe the '713 Patent by using certain Accused Ace Umbrellas (those that are not supplied with a base support) in combination with a base support including but not limited to an umbrella base, table, or the ground to support positioning the Accused Ace Umbrellas in an upright position. The Accused Ace Umbrellas constitute a material part of the combination, and Ace has known and still knows its Accused Ace Umbrellas are especially designed, made and/or adapted for use in a way that infringes one or more claims of the '713 Patent. Ace does so with knowledge of the Asserted Patents and knowledge that the actions of its customers constitutes infringement.

69. Further, the Accused Ace Umbrellas are not staple articles or commodities of commerce suitable for substantial noninfringing uses. For example, the Accused Ace Umbrellas are umbrellas, designed to be used as umbrellas, and have no substantial noninfringing use as something other than an umbrella. Ace has not advertised, marketed, promoted, or represented the Accused Ace Umbrellas as having any use other than as umbrellas.

### **WILLFULNESS**

70. On information and belief, Ace's actions have been with specific intent to cause infringement or Ace has been willfully blind to the resulting infringement because Ace has had

actual knowledge of the '713 Patent and/or the '781 Patent and knowledge that its acts were inducing or contributing to infringement of the Asserted Patents since before the filing of this action.

71. Upon information and belief, Ace's direct and indirect infringement of the '713 Patent and the '781 Patent has been willful.

72. World Factory, Inc. was a company that had made and sold solar powered umbrellas. World Factory, Inc. is the original assignee, and now a non-exclusive licensee of the Asserted Patents.

73. On information and belief, Ace has known about World Factory, Inc. at least by 2014.

74. On information and belief, Ace bought solar powered umbrellas from World Factory, Inc. prior to April 2014.

75. Upon information and belief, Ace had knowledge of the '713 Patent before the filing of this action.

76. Upon information and belief, Ace had knowledge of the '781 Patent before the filing of this action.

77. Despite its knowledge of the '713 Patent and the '781 Patent, Ace has used, sold, offered for sale, and/or imported into the United States the Accused Ace Umbrellas covered by one or more claims of the Asserted Patents.

78. Ace's infringement of the Asserted Patents has been willful and intentional because it has continued its acts of infringement with knowledge of the Asserted Patents and despite the likelihood that its actions constituted infringement of a valid patent.

## **DAMAGES**

79. LakeSouth has been and continues to be damaged as a result of Ace's infringing conduct. Ace is therefore liable to LakeSouth in an amount that adequately compensates LakeSouth for Ace's infringement, which, by law, cannot be less than a reasonable royalty, together with interest and costs as fixed by this Court under 35 U.S.C. § 284.

### **COUNT I – INFRINGEMENT OF THE '713 PATENT**

80. LakeSouth incorporates and realleges the allegations contained in the preceding paragraphs above as if fully set forth herein.

81. Ace has been and is now directly infringing the '713 Patent in violation of 35 U.S.C. § 271(a) by using, selling, offering for sale, and/or importing into the United States products that are covered by at least Claims 2, 4, 15, 16, 24, 25 and 28 of the '713 Patent, including but not limited to the Accused Ace Umbrellas.

82. An exemplary claim chart comparing the "Living Accents Market 9ft Solar Market Umbrella," Item No. 8462418, No. 843518066393, one of the Accused Ace Umbrellas, to Claim 2 of the '713 Patent is attached as **Exhibit H** and incorporated herein by reference.

83. Ace's direct infringement of the '713 Patent is willful.

84. In addition to and/or in the alternative, Ace has been and is now inducing infringement of the '713 Patent in violation of 35 U.S.C. § 271(b) by actively inducing its unlicensed suppliers and its customers to directly infringe the '713 Patent.

85. For example, to satisfy its demand for solar-powered umbrellas among other reasons, Ace encourages its unlicensed suppliers to import, make, sell, and/or offer to sell the Accused Ace Umbrellas.

86. As another example, Ace sells the Accused Ace Umbrellas to its customers for the express purpose of having its customers use the Accused Ace Umbrellas. Through its retail stores, online store, phone and tablet applications, product manuals, and/or sales and marketing activities, Ace solicits, instructs, aids and abets, and encourages its customers to purchase and use the Accused Ace Umbrellas, including to use the Accused Ace Umbrellas with a base support and/or umbrella base.

87. Ace's induced infringement of the '713 Patent is willful.

88. In addition to and/or in the alternative, Ace has been and is now contributorily infringing the '713 Patent, in violation of 35 U.S.C. § 271(c), by offering to sell, selling, and/or importing into the United States the Accused Ace Umbrellas, which are a component of a patented machine, manufacture, combination, or composition, the Accused Ace Umbrellas constituting a material part of the invention, and Ace knowing the same to be especially made or especially adapted for use in a manner that infringes one or more claims of the '713 Patent.

89. The Accused Ace Umbrellas are not a staple article or commodity of commerce suitable for substantial noninfringing use.

90. Ace's contributory infringement of the '713 Patent is willful.

91. On information and belief, Ace has known about the '713 Patent before the filing of this lawsuit.

92. Ace acted despite the likelihood that its actions constituted infringement of a valid patent.

93. Ace was aware that its actions would cause infringement of the '713 Patent and acted with intent to encourage direct infringement of the '713 Patent.

94. As a result of Ace's infringement of the '713 Patent, LakeSouth has suffered and is owed monetary damages that are adequate to compensate it for the infringement under 35 U.S.C. § 284, but in no event less than a reasonable royalty.

## **COUNT II – INFRINGEMENT OF THE '781 PATENT**

95. LakeSouth incorporates and realleges the allegations contained in the preceding paragraphs above as if fully set forth herein.

96. Ace has been and is now directly infringing the '781 Patent in violation of 35 U.S.C. § 271(a) by using, selling, offering for sale, and/or importing into the United States products that are covered by at least Claims 1, 2, 4, and 5 of the '781 Patent, including but not limited to the Accused Ace Umbrellas.

97. An exemplary claim chart comparing "Living Accents Market 9ft Solar Market Umbrella," Item No. 8462418, No. 843518066393, one of the Accused Ace Umbrellas, to Claim 1 of the '781 Patent is attached as **Exhibit I** and incorporated herein by reference.

98. Ace's direct infringement of the '781 Patent is willful.

99. In addition to and/or in the alternative, Ace has been and is now inducing infringement of the '781 Patent in violation of 35 U.S.C. § 271(b) by actively inducing its suppliers and its customers to directly infringe the '781 Patent.

100. For example, to satisfy its demand for solar-powered umbrellas among other reasons, Ace encourages its unlicensed suppliers to import, make, sell, and/or offer to sell the Accused Ace Umbrellas.

101. As another example, Ace sells the Accused Ace Umbrellas to its customers for the express purpose of having its customers use the Accused Ace Umbrellas. Through its website,

mobile application, product manuals, and/or sales and marketing activities, Ace solicits, instructs, aids and abets, and encourages its customers to purchase and use the Accused Ace Umbrellas.

102. Ace's induced infringement of the '781 Patent is willful.

103. On information and belief, Ace has known about the '781 Patent since before the filing of this action.

104. Ace acted despite the likelihood that its actions constituted infringement of a valid patent.

105. Ace was aware that its actions would cause infringement of the '781 Patent and acted with intent to encourage direct infringement of the '781 Patent.

106. As a result of Ace's infringement of the '781 Patent, LakeSouth has suffered and is owed monetary damages that are adequate to compensate it for the infringement under 35 U.S.C. § 284, but in no event less than a reasonable royalty.

#### **DEMAND FOR A JURY TRIAL**

107. Pursuant to Rule 38 of the Federal Rules of Civil Procedure, LakeSouth demands a trial by jury on all issues triable of right by a jury.

#### **PRAYER FOR RELIEF**

108. WHEREFORE, LakeSouth respectfully requests that this Court enter judgment in its favor and grant the following relief:

- a. A judgment that Ace has directly infringed one or more claims of the '713 Patent and '781 Patent;
- b. A judgment that Ace has indirectly infringed one or more claims of the '713 Patent and '781 Patent;
- c. A judgment and order requiring Ace to pay LakeSouth past and future damages under 35 U.S.C. § 284, including for supplemental damages arising from any continuing post-verdict infringement for the time between trial and entry of the final judgment with an accounting, as needed, as provided by 35 U.S.C. § 284;

- d. A judgment and order finding that this is an exceptional case and awarding LakeSouth its reasonable attorneys' fees against Ace pursuant to 35 U.S.C. § 285;
- e. A judgment and order requiring Ace to pay LakeSouth reasonable ongoing royalties on a going-forward basis after final judgment;
- f. A judgment and order requiring Ace to pay LakeSouth pre-judgment and post-judgment interest on the damages award;
- g. A judgment and order requiring Ace to pay LakeSouth's costs; and
- h. Such other and further relief as the Court may deem just and proper.

Dated: January 17, 2018

Respectfully submitted,



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