

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WALL CONCEPTS PLUS, INC.)	CASE NO. 1:04CV3874
2490 Lee Boulevard)	
Suite 312)	JUDGE CYNTHIA M. RUFE
Cleveland Heights, Ohio 44118)	
)	
Plaintiff,)	
)	
v.)	
)	
QVC, INC.)	
1200 Wilson Drive at Studio Park)	
West Chester, Pennsylvania 19380)	
)	
and)	SECOND AMENDED COMPLAINT
)	(Jury Demand Endorsed Herein)
ALLIED COMMUNICATIONS, INC.)	
c/o its Statutory Agent)	
Alan B. Cohn)	
c/o Abrams Anton P.A.)	
2021 Tyler St.)	
Hollywood, Florida 33020)	
)	
Defendants.)	

Now comes Plaintiff, Wall Concepts Plus, Inc. (“Wall Concepts”), by and through its counsel, and for its Complaint against the Defendants, QVC, Inc. (“QVC”) and Allied Communications, Inc. (“Allied”) alleges the following:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff, Wall Concepts, is an Ohio corporation with its principal place of business in Cleveland Heights, Ohio.
2. Defendant, QVC, is a corporation organized and existing under the laws of Pennsylvania having its corporate headquarters at 1200 Wilson Drive at Studio Park, West Chester, Pennsylvania 19380.
3. Defendant, Allied, is a corporation organized and existing under the laws of Florida having its principal place of business at 3111 North University Dr., Coral Springs, Florida 33065.
4. The Court has jurisdiction of this action on the following basis:
 - a. Under 28 U.S.C. §1331 as this action arises under the laws of the United States.
 - b. Under 28 U.S.C. §§1338 (a) and (b) as this action arises under laws involving patents and trademarks and asserts a claim of unfair competition relating to patent and trademark law.
 - c. Under 28 U.S.C. §1367 pursuant to the doctrine of supplemental jurisdiction since this action alleges state law violations that are part of the same case or controversy as those claims arising under the laws of the United States.
 - d. Defendants are subject to personal jurisdiction in this Court in view of the fact that Defendants transact business in the State of Ohio, soliciting sales and selling the infringing goods in the State of Ohio; and the matters giving rise to this action arise within the State of Ohio.

FACTS COMMON TO ALL CLAIMS

5. Wall Concepts *inter alia* manufactures and sells patterned sponges and sponge devices for applying paint and decorating walls. One such set of product sold by Wall Concepts

includes sponge-based paint applicators sold under the trade names of “Sponge Prints,” with a trademark registration no. 2532679 (issued on January 22, 2002, by the United States Patent and Trademark Office), and “Sponge Prince,” with a trademark registration no. 2398451 (issued on October 24, 2000 by the United States Patent and Trademark Office).

6. Wall Concepts is the sole and exclusive owner of the entire right, title, and interest to United States Patent No. 5,832,832 (“832 patent”) and United States Patent No. 5,857,411 (“411 patent”) both entitled, “wall decoration paint applying device”.

7. The Patents relate to a two-piece, hand-held device that includes as its two pieces a holder and a detachable, imprinting element. The imprinting element is made of a sponge body with an ornamental design embossed into the printing face.

8. Wall Concepts, as owner of the patents and trademarks, has the exclusive authority to prevent others from making, selling, and/or using the 832 and 411 patents, and “Sponge Prince” and “Sponge Prints” trademarks.

9. Defendants made, used, offered, and sold a product with infringing elements. The product is QVC Product No. F7172 entitled “Paint Design Home Decor Sponge Kit with Trim Tool,” as advertised on QVC’s website (*i.e.*, www.qvc.com), in connection with the claimed subject matter in Wall Concepts patents.

10. Wall Concepts’ patents and QVC Product No. F7172 produced by Allied are paint applying devices, consisting of a sponge body, with a hand grip, and a pattern imprinting device.

11. Defendants do not own the 832 or 411 patents. Defendants do not have a license to make, use, offer to sell, or sell the product encompassed in the 832 patent or 411 patent except as that particular product.

12. In 2002, Wall Concepts had a profitable business relationship with the Home Shopping Network (“HSN”). While Wall Concepts was working with HSN, QVC (with whom Wall Concepts had a prior relationship in 2000-01; See, May 15, 2000 contract attached hereto as Exhibit A) approached some of the suppliers who worked with Wall Concepts, specifically, individuals at Prime Design, and attempted to induce them to stop doing business with Wall Concepts and to violate the intellectual property rights of Wall Concepts and enter into business and a continuous relationship with QVC.

13. QVC then entered into conversations with and attempted to induce Wall Concepts to cease its business relationship with HSN and to engage in business solely with QVC.

14. Because of the pressure from and representations made by QVC, Wall Concepts signed an illusory and coerced contract with QVC in January of 2003. The contract is illegal by its terms and is part of the vehicle of misconduct here. (The January 6, 2003 contract is attached hereto as Ex. B).

15. QVC’s Product No. F7172 was manufactured or produced by Allied, and was used, offered for sale, and sold by Defendants with full knowledge of the 832 and 411 patents and sponge trademarks and the ownership of the 832 and 411 patents and sponge trademarks by Wall Concepts.

FIRST CLAIM FOR RELIEF
(Patent Infringement by QVC and Allied)

16. Wall Concepts reincorporates and realleges all preceding statements and allegations as though expressly rewritten herein.

17. QVC’s acts of making, using, offering to sell, and selling QVC Product No. F7172 constitute a willful infringement under 35 U.S.C. §§ 271, 281-285 of Wall Concept’s 832

and 411 patents.

18. Allied provides QVC with Product No. F7172.

19. Wall Concepts provided actual notice of the 832 and 411 patents to QVC.

20. Defendants' actions have caused irreparable injury to Wall Concepts for which there is no adequate remedy at law.

21. Defendants will continue to infringe Wall Concepts' patents by the manufacture and sale of QVC Product No. F7172 unless enjoined from doing so by this Court.

22. Defendants' actions will continue to harm Wall Concepts by continuing to damage its business and business reputation in a manner for which there is inadequate compensation at law.

23. Defendants' actions have harmed Wall Concepts in that it has lost sales and suffered monetary damages in an amount yet to be ascertained.

24. Defendants have caused and are likely to continue causing substantial injury to the public and to Wall Concepts who is entitled to injunctive relief and to recover Defendants' profits, actual damages, enhanced profits and damages, costs, and reasonable attorneys fees.

SECOND CLAIM FOR RELIEF
(Unfair Competition by QVC and Allied)

25. Wall Concepts reincorporates and realleges all preceding statements and allegations as though expressly rewritten herein.

26. QVC's sale of Product No. F7172, provided by Allied, has caused and is likely to cause confusion, deception, and mistake by creating the false and misleading impression that its goods are manufactured or distributed by Wall Concepts and are affiliated, connected, or

associated with Wall Concepts, or have the sponsorship, endorsement, or approval of Wall Concepts.

27. Defendants made false representations, false descriptions, and false designations of origin of their goods in violation of 15 U.S.C. § 1125(a) and Defendants' activities have caused and, unless enjoined by this Court, will continue to cause a likelihood of confusion and deception of members of the trade and public and, additionally, injury to Wall Concepts' goodwill.

THIRD CLAIM FOR RELIEF
(Trademark Infringement by QVC and Allied)

28. Wall Concepts reincorporates and realleges all preceding statements and allegations as though expressly rewritten herein.

29. Wall Concepts uses the trademarks of "Sponge Prince" and "Sponge Prints," both registered with the United States Patent and Trademark Office.

30. QVC promoted and marketed competing products through the use of the name "Sponge Prints," including the promotion of the same through its website.

31. When a person visited the QVC website and searched under the name "Sponge Prints," he or she was directed to a "Paint Design Home Decor Sponge Kit with Trim Tool," manufactured by Allied. Using the promotional facilities of QVC, potential Wall Concepts customers were directed on the website, through the registered trademark of Wall Concepts, to Allied's competing product line.

32. Defendants' actions were likely to cause confusion in the minds of potential Wall Concepts customers, causing monetary and other damage to Wall Concepts.

FOURTH CLAIM FOR RELIEF
(Fraud by QVC)

33. Wall Concepts reincorporates and realleges all preceding statements and

allegations as though expressly rewritten herein.

34. Representations were made by QVC regarding Wall Concepts' relationship with HSN that were material to the transaction at hand, which was the entry into the contract with QVC. Other concealment of fact, such as contact with Wall Concept's suppliers, were done with the intent to induce Wall Concepts into signing the contract with QVC.

35. QVC Buyer Cindy Zontek and assistant buyer Patti Goodyear made representations to Charles Zuchowski and Robert Schneider of Wall Concepts on the telephone and in person from October 2002 through January 2003 enticing them to leave HSN and resume Wall Concepts' relationship with QVC.

36. Mr. Zuchowski and Mr. Schneider were told by the aforementioned individuals and various representatives of QVC that QVC has a larger audience than HSN and that QVC could sell more products.

37. Representatives from QVC induced Wall Concepts into entering into the January 6, 2003 contract by making the industry seem promising. When Wall Concepts representatives expressed concern because the contract mandated no performance by QVC, they were assured that it did not need to be in the contract because "you have my word." The contract was merely a vehicle to destroy Wall Concepts.

38. These representations and/or concealments were made falsely and with such utter disregard for the falsity that falsity could be inferred. The representations and/or concealments were made with the intent of misleading Wall Concepts into relying on them and this reliance was justifiable.

39. As a result of Wall Concept's reliance on the representations and/or concealments

of QVC regarding potential sales of their patent and trademark protected products, Wall Concepts has suffered sever and significant damages.

40. As a result of QVC's fraud Wall Concepts has suffered monetary damages.

FIFTH CLAIM FOR RELIEF
(Negligent Misrepresentation by QVC)

41. Wall Concepts reincorporates and realleges all preceding statements and allegations as though expressly rewritten herein.

42. QVC, in the course of its business, supplied false information to Wall Concepts to induce it to enter into an illegal and illusory contract replete with illegal terms, exclusivity provisions, and choice of venue provisions.

43. As a result of these misrepresentations, which Wall Concepts justifiably relied on, Wall Concepts suffered pecuniary loss.

44. As a result of Defendants' breach of duty, Wall Concepts has suffered monetary damages.

SIXTH CLAIM FOR RELIEF
**(Tortious Interference with Contract and
Prospective Business Advantage by QVC and Allied)**

45. Wall Concepts reincorporates and realleges all preceding statements and allegations as though expressly rewritten herein.

46. Wall Concepts had a contract with HSN, and various suppliers which QVC had knowledge of, but intentionally interfered with the business relationship between Wall Concepts and HSN and others.

47. QVC had no justification for interfering in Wall Concepts' business relationships.

48. Additionally, Allied interfered with the contract between Wall Concepts and QVC without justification.

49. Both Defendants interfered with Wall Concepts' prospective business advantage, causing monetary and other damage to Wall Concepts.

SEVENTH CLAIM FOR RELIEF
**(Ohio Claims of Trademark Dilution and Injury to
Business Reputation by QVC and Allied)**

50. Wall Concepts reincorporates and realleges all preceding statements and allegations as though expressly rewritten herein.

51. The activities of Defendants constituted unlawful dilution of Plaintiff's "Sponge Prints" and "Sponge Prince" trademarks.

52. Defendant's willful and unauthorized use of Wall Concepts' trademarks in connection with Allied's QVC Product No. F7172 was likely to injure the business reputation of Wall Concepts or dilute the distinctive quality of Wall Concepts' "Sponge Prints" and "Sponge Prince" in violation of Ohio law.

53. If the illegal conduct of Defendants is not enjoined, Wall Concepts will suffer irreparable injury for which it will have no adequate remedy at law.

EIGHTH CLAIM FOR RELIEF
(Breach of Contract by QVC)

54. Wall Concepts reincorporates and realleges all preceding statements and allegations as though expressly written herein.

55. Wall Concepts entered into two separate and distinct contracts with QVC, on May 15, 2000 and January 6, 2003. (Both contracts are attached hereto as Exhibits A & B).

56. QVC breached the May 15, 2000 contract by failing to abide by its terms and by negotiating with Wall Concepts' suppliers in a manner which breached the language of the contract, specifically, but not limited to, at section 13(c).

57. QVC breached section 13(c) of the May 15, 2000 contract, for example, by making direct contact with, and improperly negotiating with, Prime Industries of Lorain, Ohio (the supplier of the underlying product to Wall Concepts), utilizing Wall Concepts' confidential information.

58. The contact and negotiation with Prime Industries, while utilizing confidential Wall Concepts information gained via Wall Concepts' agreement with QVC, caused a material breach of the contract.

59. Said breach caused material harm to Wall Concepts, of an amount as yet to be determined.

NINTH CLAIM FOR RELIEF
(Unjust Enrichment by QVC)

60. Wall Concepts reincorporates and realleges all proceeding statements and allegations as though expressly written herein.

61. QVC and Wall Concepts entered into a second contractual agreement, on January 6, 2003. The January 6, 2003 contract was illusory and void for lack of consideration; specifically, Section 2(a) of the contract required QVC to neither purchase products from Wall Concepts, promote Wall Concepts' products, nor sell Wall Concepts' products.

62. The January 6, 2003 contract is void for lack of consideration, and therefore, QVC was unjustly enriched by the agreement; there is no evidence of consideration exchanged by

QVC in reciprocation for the ability to legally utilize Wall Concepts' patent and trademark rights.

63. The January 6, 2003 contract never authorized QVC to mislead potential Wall Concepts clients as to the source of the products, and never authorized QVC to pass-off Allied's products as those produced by Wall Concepts.

64. The January 6, 2003 contract contained an unconscionable non-compete clause at section 4 of the agreement, eliminating Wall Concepts' ability to engage other clients.

65. As a result of the illusory contract, QVC was unjustly enriched, and Wall Concepts suffered monetary and other damages.

PRAYER FOR RELIEF

WHEREFORE, Wall Concepts prays that this Honorable Court:

1. Permanently enjoin QVC and its officers, agents, employees, and representatives and those in active concert or participation with them who receive actual notice of the Order, from importing, manufacturing, using, selling, and/or offering for sale devices which infringe the 832 and 411 patents.
2. Issue an order commanding that QVC cease operating as an appropriate remedy under 18 U.S.C. § 1964.
3. Issue an order directing QVC and its officers, agents, employees, and representatives and those acting in concert and participation with them who receive actual notice of the Order, to destroy all infringing products as well as all molds, machines, tooling, or other equipment used in the manufacture of products infringing the 832 and 411 patents.
4. Award Wall Concepts monetary damages adequate to compensate it for past infringement consistent with 35 U.S.C. § 284, up to and including treble damages, together with

costs and prejudgment interest.

5. Award Wall Concepts reasonable attorneys fees pursuant to 35 U.S.C. § 285.
6. Issue a declaratory judgment that the non-compete mandated by QVC is null and void.
7. Set for a jury trial all factual and legal disputes pled herein cognizable by a jury.
8. Grant and award any and all relief found necessary and proper under the circumstances.

Respectfully submitted,

/s/ Joel Levin

Joel Levin (0010671)
LEVIN & ASSOCIATES CO., L.P.A.
The Tower at Erieview, Suite 1100
1301 East 9th Street
Cleveland, Ohio 44114
(216) 928-0600
(216) 928-0016 - Fax

Richard M. Golomb
Golomb & Honik, P.C.
121 South Broad Street, Ninth Floor
Philadelphia, Pennsylvania 19107
(215) 985-9177
(215) 985-4169 - Fax No.

Attorneys for Plaintiff
Validation of Signature Code: JL3916

JURY DEMAND

A trial by jury before the maximum number of jurors allowed by law is hereby demanded.

/s/ Joel Levin

Joel Levin (0010671)

Richard M. Golomb
Attorneys for Plaintiff

Validation of Signature Code: JL3916

SERVICE

The foregoing Second Amended Complaint, has been served by facsimile and ordinary U.S. Mail on this 15th day of March, 2005 upon the following:

Michael R. Greco
Saul Ewing LLP
1200 Liberty Ridge Drive, Suite 200
Wayne, PA 19087-5569

Attorneys for Defendant
QVC, Inc.

Nathaniel Metz
Saul Ewing LLP
Centre Square West
1500 Market Street, 38th Floor
Philadelphia, PA 19102-2186

Allied Communications, Inc.
c/o its Statutory Agent
Alan B. Cohn
c/o Abrams Anton P.A.
2021 Tyler St.
Hollywood, FL 33020

Defendant

/s/ Joel Levin

Joel Levin (0010671)

Richard M. Golomb
Attorneys for Plaintiff

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