

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
STATESVILLE DIVISION

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U.S. DISTRICT COURT  
WEST. DIST. OF N.C.

LOWE'S COMPANIES, INC., )  
LOWE'S HIW, INC. and )  
LOWE'S HOME CENTERS, INC., )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
PELICAN PRODUCTS, INC., )  
 )  
Defendant. )  
\_\_\_\_\_ )

CIVIL ACTION NO.: 5:00cv147-V

Jury Trial Demanded

**COMPLAINT FOR DECLARATORY RELIEF**

Plaintiffs LOWE'S COMPANIES, INC., LOWE'S HIW, and LOWE'S HOME CENTERS, INC., for their Complaint against Defendant PELICAN PRODUCTS, INC., allege as follows:

1. This is an action for Declaratory Judgment, injunctive and other relief brought under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.
2. Plaintiff Lowe's Companies, Inc. (hereinafter referred to as "Lowe's Companies") is a corporation organized and existing under the laws of the State of North Carolina, having a principal place of business at 1605 Curtis Bridge Road, Wilkesboro, North Carolina 28697, and is doing business in this State and District.
3. Plaintiff Lowe's HIW, Inc. (hereinafter referred to as "Lowe's HIW") is a wholly owned subsidiary of Lowe's Companies and is a corporation organized and existing under the laws of the State of Washington, having a principle place of business in Renton, Washington.

4. Plaintiff Lowe's Home Centers, Inc. (hereinafter referred to as "Lowe's Home Centers") is a wholly owned subsidiary of Lowe's Companies and is a corporation organized and existing under the laws of the State of North Carolina, having a principal place of business at Highway 268, North Wilkesboro, North Carolina 28656.

5. Upon information and belief, Defendant Pelican Products, Incorporated (hereinafter referred to as "Pelican Products" or "Defendant") is a corporation organized and existing under the laws of the State of California, having a principal place of business at 23215 Early Avenue, Torrance, California 90505. On information and belief, Pelican Products is in the business of manufacturing flashlights and advertising, selling and/or offering for sale flashlights nationwide, including in North Carolina.

6. Defendant Pelican Products has alleged that it has title to and is the owner of whatever rights, if any, may exist in United States Design Patent No. 383,558 issued September 9, 1997 ("the '558 design patent," copy attached as Exhibit A), and United States Design Patent No. 303,846 issued October 3, 1989 ("The '846 design patent," copy attached as Exhibit B).

7. Defendant Pelican Products has alleged that it has rights in its flashlight and packaging designs under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

8. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1338, and 15 U.S.C. § 1121, because this action arises under the laws of the United States, and particularly under Acts of Congress relating to patents and trademarks. This Court also has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332 because the amount in controversy exceeds seventy-five thousand dollars (\$75,000.00) exclusive of interest and costs, and is between citizens of different States. This Court may declare the

rights and other legal relations of the parties in this case under 28 U.S.C. § 2201, and Rule 57, Fed.R.Civ.P., because an actual and justiciable controversy exists concerning the rights of, and legal relations between, Plaintiffs and Defendant.

9. This Court has in personam jurisdiction over Defendant Pelican Products under N.C. Gen. Stat. § 1-75.4 because, among other things, the injury caused to Plaintiffs occurred in the State of North Carolina as a result of Defendant Pelican Products' actions within the State of North Carolina, and because, upon information and belief, the flashlight products and packaging of Defendant that are in issue in this case are, or have been, sold or offered for sale within the State of North Carolina.

10. Venue is proper in this Court under the provisions of 28 U.S.C. § 1391 because, among other things, a substantial part of the events giving rise to Plaintiffs' claims occurred in this District.

### **FIRST CAUSE OF ACTION**

#### **DECLARATORY JUDGMENT REGARDING ALLEGATIONS OF PATENT INFRINGEMENT**

11. Plaintiffs incorporate by reference paragraphs 1-10 herein.

12. There is a justiciable controversy between Plaintiffs and Defendant concerning the alleged infringement and invalidity of the '558 and '846 design patents. Defendant Pelican Products has accused Plaintiff Lowe's Companies of infringing both the '558 and the '846 design patents.

13. These allegations place a cloud over Lowe's HIW's, Lowe's Home Centers' and Lowe's Companies' right to purchase, and/or sell the allegedly infringing flashlights and will

cause uncertainty among customers and prospective customers and elsewhere in the marketplace, leading Plaintiffs to lose sales and business opportunities.

14. Upon information and belief, Plaintiffs have not infringed either the '558 design patent or the '846 design patent.

15. Upon information and belief, the '558 design patent and the '846 design patent are invalid for failure to comply with the provisions of one or more sections of the Patent Act, 35 U.S.C. §§ 1, *et seq.*

16. As a direct and proximate result of Pelican Products' assertion of the '558 and '846 design patents against goods purchased and/or sold by Lowe's HIW, Lowe's Home Centers and/or Lowe's Companies, Plaintiffs are suffering irreparable injury to their reputation and goodwill in an amount that cannot presently be ascertained and cannot be adequately compensated by monetary relief alone.

## **SECOND CAUSE OF ACTION**

### **DECLARATORY JUDGMENT REGARDING ALLEGATIONS OF TRADE DRESS INFRINGEMENT**

17. Plaintiffs incorporate by reference paragraphs 1-16 herein.

18. There is a justiciable controversy between Plaintiffs and Defendant concerning the alleged violation of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Defendant Pelican Products has accused Plaintiff Lowe's Companies of trade dress infringement or otherwise unfairly competing with Defendants in violation of section 43(a) of the Lanham Act by selling, advertising, and offering for sale flashlights and packaging having an appearance that is alleged to be similar to designs and packaging of Defendant's flashlight products.

19. These allegations place a cloud over Lowe's HIW's, Lowe's Home Centers' and Lowe's Companies' right to purchase, and/or sell the allegedly infringing flashlights and will cause uncertainty among customers and prospective customers and elsewhere in the marketplace, leading Plaintiffs to lose sales and business opportunities.

20. Upon information and belief, Plaintiffs have not infringed any trade dress rights of Defendant Pelican Products under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), or otherwise unfairly competed with Defendant.

21. Upon information and belief, Defendant Pelican Products does not have any recognizable trade dress rights in its flashlight designs and packaging under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

22. As a direct and proximate result of Pelican Products' allegations of unfair competition and trade dress infringement against goods purchased and/or sold by Lowe's HIW, Lowe's Home Centers and/or Lowe's Companies, Plaintiffs are suffering irreparable injury to their reputation and goodwill in an amount that cannot presently be ascertained and cannot be adequately compensated by monetary relief alone.

WHEREFORE, Plaintiffs Lowe's HIW, Lowe's Home Centers and Lowe's Companies pray for judgment:

- A. Declaring that Plaintiffs have not infringed United States Design Patent Nos. 383,558 and 303,846;
- B. Declaring that United States Design Patent Nos. 383,558 and 303,846 are invalid;
- C. Permanently enjoining Defendant Pelican Products and its successors and assigns

from asserting United States Design Patent Nos. 383,558 and 303,846 against Plaintiffs with respect to any flashlights purchased and/or sold by Lowe's HIW, Lowe's Home Centers and/or Lowe's Companies;

D. Declaring that Plaintiffs have not infringed any purported trade dress rights of Defendant or otherwise violated the provisions of 15 U.S.C. § 1125(a) or otherwise unfairly competed with Defendants;

E. Declaring that Defendant has no trade dress rights under 15 U.S.C. § 1125(a) or otherwise in its flashlight designs or the packaging therefor;

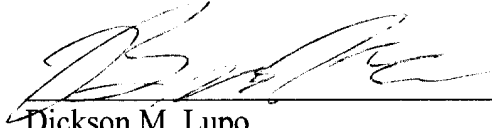
F. Permanently enjoining Defendant Pelican Products and its successors and assigns from asserting trade dress infringement, or unfair competition claims against Plaintiffs with respect to any flashlights purchased and/or sold by Lowe's HIW, Lowe's Home Centers and/or Lowe's Companies;

G. Granting Plaintiffs their costs, declaring this case to be "exceptional" within the meaning of 35 U.S.C. § 285 and 15 U.S.C. § 1117(a) and awarding Plaintiffs their reasonable attorneys' fees and other litigation expenses, together with such further and additional legal and equitable relief as the Court may deem just and proper.

Plaintiffs hereby demand a trial by jury on all issues so triable.

This 21<sup>st</sup> day of September, 2000.

Respectfully submitted,



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**NOTE:**

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SCANNED DOCUMENT.**

**PLEASE SEE THE CASE  
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OR OTHER MATERIAL  
WHICH HAS NOT BEEN  
SCANNED.**