

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

RSR Sales, Inc.,  
d/b/a Echo Valley Quality Home & Garden Products,  
a Michigan corporation,

Plaintiff,

v.

Case No.: 2:12-cv-10719-PDB-MKM  
Hon. Paul D. Borman  
Magistrate Judge Mona K. Majzoub

Lowe's Companies, Inc.,  
a North Carolina corporation,  
L.G. Sourcing, Inc.,  
a North Carolina corporation, and  
Lowe's Home Centers, Inc.,  
a North Carolina corporation,

Defendants.

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**FIRST AMENDED COMPLAINT AND RELIANCE UPON DEMAND FOR JURY  
TRIAL**

PLAINTIFF, RSR Sales, Inc. d/b/a Echo Valley Quality Home & Garden Products  
("RSR"), as against Defendants Lowe's Companies, Inc. ("Lowe's"), Lowe's Home Centers,  
Inc. ("LHC") and L.G. Sourcing, Inc., hereby alleges as follows:

## **I. THE PARTIES**

1. Plaintiff RSR is a corporation organized under the laws of Michigan with offices at 232 Haeussler Ct., Ann Arbor, MI 48103 and often uses the assumed name and trademark Echo Valley Quality Home & Garden Products and the trademark Echo Valley in connection with the products at issue here.

2. Defendant Lowe's is a corporation organized under the laws of North Carolina, with offices at 1000 Lowe's Boulevard, Mooresville, NC 28117.

3. Defendant L.G. Sourcing, Inc. is a wholly owned subsidiary of Lowe's Companies, Inc., with offices at 1605 Curtis Bridge Road, Wilkesboro, NC 28697.

4. Defendant LHC is a corporation organized under the laws of North Carolina, with offices at 1605 Curtis Bridge Road, Wilkesboro, NC 28697 and is, upon information and belief, a related corporation to the other two defendants.

## **II. JURISDICTION**

5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a), as this action relates to patent and copyright infringement. This Court has personal jurisdiction over Defendants because Defendants have committed acts of infringement in violation of 35 U.S.C. § 271 and have placed infringing products into the stream of commerce, through established distribution channels, with the knowledge and/or understanding that such products are used and sold in this District. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391 and 1400(b).

6. Jurisdiction is further conferred on this Court by 15 U.S.C. § 1123, as this action involves violations of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), with venue being proper under 28 U.S.C. § 1391(b)(2).

7. This Court also has jurisdiction pursuant to 15 U.S.C. § 1332(a) because there is complete diversity of citizenship between the Plaintiff and all Defendants and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

8. The state law claims asserted herein are pendent to Plaintiff's federal claims, over which this Court has supplemental jurisdiction pursuant to 15 U.S.C. § 1367(a). These claims relate to violations of the Michigan Consumer Protection Act, MCL § 445.901 *et seq*; and are amenable to the jurisdiction of this Court under Michigan's long arm statute, MCL § 600.705.

### **III. GENERAL ALLEGATIONS**

9. Plaintiff RSR has been engaged in the design, importation and sale of a variety of products relating to home and/or garden décor under the name EchoValley for about 25 years. Plaintiff's product line includes wrought iron fixtures, statuary, bird feeders, garden markers, garden stakes, and "gazing globes." Among its most popular items are patented gazing globes, including photo-active material enabling the globes to glow in the dark. Since 2008, RSR has marked its products with the patent number in accordance with 35 U.S.C. § 287.

10. Defendants Lowe's and LHC (collectively the "Lowe's Defendants") are associated with the well-known home improvement retailer which, according to its website, operates over 1,725 stores in the United States, Canada and Mexico, and without discovery appear to be indistinguishable for purposes of this lawsuit.

11. RSR has been calling on the Lowe's Defendants for years to sell its products, including its glow-in-the-dark gazing globes. One such appointment, scheduled for November, 2007 between an employee of RSR and a buyer for the Lowe's Defendants, was unexpectedly cancelled. In an effort to continue the relationship, RSR sent an email to the buyer, indicating

that glow-in-the-dark products purchased from others might be subject to RSR's patented intellectual property rights.

12. Despite being placed on notice of RSR's exclusive rights, beginning in 2012, the Lowe's Defendants began selling a counterfeit gazing ball, which they call "garden treasures," distributed by Defendant L.G. Sourcing, and bearing item #0352383, made in China. The product, said to be "solar powered" on the packaging thereof, includes photo-active material in a glow-in-the-dark swirl pattern identical to the design created by RSR, the resulting article and method of manufacture being protected by RSR's patent.

### **COUNT I – PATENT INFRINGEMENT**

13. RSR re-alleges and incorporates herein by reference as though fully set forth hereunder each and every allegation contained in paragraphs 1 through 12 above.

14. RSR is the owner of U.S. Patent No. 7,252,889, entitled "'Glow-in-the-Dark' Gazing Globes and Other Ornaments, Particularly for Gardens," attached hereto as **Exhibit A**.

15. Since its date of issuance, the '889 patent remains in full force and effect, and Plaintiff is the owner of all right and title therein.

16. The "garden treasures" gazing ball distributed by L.G. Sourcing and sold by the Lowe's Defendants infringes the '889 Patent.

17. Defendants' infringement of RSR's '889 Patent has caused RSR to sustain monetary damage, loss including lost sales and profits, and injury in an amount to be determined at trial.

18. Particularly in light of the fact that the Lowe's Defendants were placed on notice of RSR's patent rights subsequent to the issuance of the '889 Patent, Defendants have infringed the '889 Patent knowingly, willfully, and in bad faith, so as to justify the assessment of treble

damages against them in an amount to be determined at the time of trial, and as an exceptional case awarding RSR reasonable attorneys' fees and costs incurred in bringing this action under 35 U.S.C. § 285.

19. Defendants' infringement of the '889 Patent has caused irreparable damage, loss, and injury to RSR for which it has no adequate remedy at law, and RSR will continue to suffer irreparable damage, loss, and injury unless Defendants are enjoined by this Court.

### **COUNT II – INFRINGEMENT OF COPYRIGHT**

20. RSR re-alleges and incorporates herein by reference as though fully set forth hereunder each and every allegation contained in paragraphs 1 through 19 above.

21. RSR is the owner of United States Copyright Registration Nos. TXul-252-249 and VA1-656-194 (**Exhibits B and C**), which protect gazing globes featuring a decorative swirl pattern, which may incorporate glow-in-the-dark material.

22. Defendants' "garden treasures" gazing ball features a decorative swirl pattern, including glow-in-the-dark material, which is substantially similar to that used and protected by RSR.

23. The "garden treasures" gazing ball distributed by L.G. Sourcing and sold by the Lowe's Defendants infringes RSR's Copyright Registration Nos. TXul-252-249 and VA1-656-194.

24. Defendants' infringement of RSR's Registered Copyrights has caused RSR to sustain monetary damage, loss including lost sales and profits, and injury in an amount to be determined at trial.

25. Defendants' infringement of RSR's Registered Copyrights entitles Plaintiff to an award of the actual damages suffered as a result of the infringement and any profits of the

Defendants that are attributable to the infringement not taken into account in computing the actual damages pursuant to 17 U.S.C. § 504(b) or, alternatively, at the election of Plaintiff at any time prior to final judgment, an award of statutory damages based on willful infringement, as set forth in 17 U.S.C. § 504(c).

26. Defendants' infringement of RSR's Registered Copyrights has caused irreparable damage, loss, and injury to RSR for which it has no adequate remedy at law, and RSR will continue to suffer irreparable damage, loss, and injury unless Defendants are enjoined by this Court.

### **COUNT III – VIOLATION OF THE LANHAM ACT**

27. RSR re-alleges and incorporates herein by reference as though fully set forth hereunder each and every allegation contained in paragraphs 1 through 26 above.

28. RSR'S glow-in-the-dark gazing globes are inherently distinctive, are non-functional and have acquired secondary meaning.

29. RSR owns a protectable trade dress in a clearly articulated design or combination of elements in its glow-in-the-dark gazing globes.

30. RSR's trade dress in its glow-in-the-dark gazing globes includes semi-transparent blue-tinted glass with a helical swirl pattern of greenish granules that comprise the glow-in-the-dark material.

31. The public has come to associate the total image of RSR's glow-in-the-dark gazing globes with RSR itself and with its quality, goodwill, sponsorship, authorization, approval and sanction.

32. Defendants' "garden treasures" gazing balls are substantially identical in size, shape, color, design, texture, name and in total, overall impression to RSR's glow-in-the-dark

gazing globe, including identical shades of blue and green color, with the blue shade formed in the glass, resulting in a relatively fine or smooth texture or appearance, and with the greenish granules adhered to the inside of the globe, exhibiting a rougher texture and appearance, and also including a helical swirl pattern extending top to bottom and around the globe in an identical or nearly identical pattern of revolution. The two products are depicted in side-by-side photographs immediately below:



(Plaintiff's Glow-in-the-Dark Gazing Globe)



(Defendants' Garden Treasures Gazing Ball)



(Plaintiff's Product in Box)



(Defendants' Product in Box)

33. Defendants' use of RSR's trade dress in connection with the sale and distribution of "garden treasures" gazing balls constitutes trade dress infringement and unfair competition in violation of the Lanham Act, 15 U.S.C. § 1125, on the grounds that such use is likely to cause confusion, mistake, and deception as to the origin, source, sponsorship, affiliation or connection with or of the goods sold by Defendants.

34. Defendants' sale and distribution of their "garden treasures" gazing balls is intended and likely to mislead or confuse consumers and potential consumers into believing that Defendants' goods are affiliated, connected or originating with, or are sponsored, authorized, approved, or sanctioned by RSR, or that RSR's goods are affiliated with, or are sponsored, authorized, approved, or sanctioned by Defendants.

35. Defendants' use of RSR's trade dress in connection with the sale and distribution of "garden treasures" gazing balls constitutes false representation and false designation of origin in violation of the Lanham Act, 15 U.S.C. § 1125, on the grounds that such use tends to describe or represent that the goods sold by Defendants originate from, are somehow affiliated, connected, associated or originating with, or are sponsored, authorized, approved or sanctioned by RSR, or that RSR's goods originate from, are somehow affiliated with, or are sponsored, authorized, approved or sanctioned by Defendants.

36. Defendants' infringement of RSR's distinctive trade dress has caused and is likely to cause RSR to sustain monetary damage, loss including lost sales and profits, and injury in an amount to be determined at trial.

37. Defendants have engaged, and continue to engage, in the acts described above knowingly, willfully, and in bad faith, so as to justify the assessment of treble damages



pursuant to 15 U.S.C. § 1117(a) against them in an amount to be determined at the time of trial, along with RSR's reasonable attorneys' fees and costs in this action.

38. Defendants' "garden treasures" gazing balls, though substantially identical in appearance to RSR's products, are poorly made and inferior in quality. For at least this reason, Defendants have caused and are likely to cause irreparable damages, loss, and injury to RSR for which it has no adequate remedy at law, and RSR will continue to suffer irreparable damage, loss, and injury unless Defendants are enjoined by this Court.

**COUNT IV – VIOLATION OF THE  
MICHIGAN CONSUMER PROTECTION ACT**

39. RSR re-alleges and incorporates herein by reference as though fully set forth hereunder each and every allegation contained in paragraphs 1 through 38, above.

40. Defendants' sale and distribution of their "garden treasures" gazing balls represents unfair, unconscionable, or deceptive methods, acts, or practices in conduct of trade or commerce in violation of Michigan's Consumer Protection Act, MCL § 445.901 *et seq.*

41. Defendants' sale and distribution of their "garden treasures" gazing balls is causing actual and likely a probability of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services in violation of MCL § 445.903(1)(a).

42. Through the sale and distribution of their "garden treasures" gazing balls, Defendants are representing that the goods have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have, or that their companies have sponsorship, approval, status, affiliation, or connection that Defendants do not have, in violation of MCL § 445.903(1)(c).

43. Under the Michigan Consumer Protection Act, Plaintiff may obtain a declaratory judgment that a method, act, or practice is unlawful pursuant to MCL § 445.911(1)(a).

44. Plaintiff is entitled to recover actual damages, together with reasonable attorneys' fees under MCL § 445.911(2) against Defendants for their violation of the Michigan Consumer Protection Act.

**COUNT V – UNFAIR COMPETITION  
UNDER MICHIGAN COMMON LAW**

45. RSR re-alleges and incorporates herein by reference as though fully set forth hereunder each and every allegation contained in paragraphs 1 through 44 above

46. Defendants have wrongfully used the distinctive trade dress associated with RSR's glow-in-the-dark gazing globes and wrongfully mimicked and counterfeited the total, overall commercial impression associated with that product to induce the purchase of the "garden treasures" gazing balls and to deceive consumers, potential consumers and the public in general.

47. Defendants' actions have created confusion and the likelihood of confusion in the marketplace.

48. Defendants have unfairly competed with RSR by selling and distributing a product that has led and will lead to confusion as to its origin, sponsorship, manufacturing, and approval through the total commercial impression created by its size, shape, color, design, texture, and name.

49. As a direct and proximate result of Defendants' unfair competition, RSR has suffered damages.

**COUNT VI – UNJUST ENRICHMENT  
UNDER MICHIGAN COMMON LAW**

50. RSR re-alleges and incorporates herein by reference as though fully set forth hereunder each and every allegation contained in paragraphs 1 through 49 above.

51. Defendants have been unjustly enriched by:

- (a) Receiving the benefit of RSR’s investment of time, technology, effort, money and expertise in developing and marketing its glow-in-the-dark gazing globes; and
- (b) The above-described acts of unfair competition and intellectual property infringement.

52. Defendants are “reaping where they have not sown” by receiving profit for and benefit from an inferior quality knockoff product, based upon RSR’s invention, development and marketing of its glow-in-the-dark gazing globes, and through RSR’s infusion of capital, technology, time, expertise and effort in the development of its legitimate product.

53. In the interest of justice and equity, Defendants should be enjoined from any further wrongful activity in this regard, should be ordered to repay RSR all of Defendants’ wrongfully gained profit, and to reimburse RSR for a portion of its financial and equitable contributions toward the development and marketing of its glow-in-the-dark gazing globes.

54. Alternatively, the Court should declare that all profits and other ill gotten gain realized by Defendants from the sale of the “garden treasures” gazing ball is subject to and shall be held in a constructive trust for RSR’s ultimate benefit.

55. RSR has suffered damages, as described above, as a direct result of Defendants being unjustly enriched.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff RSR requests the following relief in the form of a declaration, injunction and judgment:

(a) A determination that Plaintiff's '889 Patent, Copyright Registrations, and Trade Dress rights are valid and enforceable as against Defendants;

(b) A determination that Defendants' manufacture, distribution, use, sale, offers for sale, and importation of the "garden treasures" gazing balls infringe upon RSR's '889 Patent;

(c) A determination that Defendants' "garden treasures" gazing balls are substantially similar to the articles protected by U.S. Copyright Registration Nos. TXu1-252-249 and VA1-656-194, and that Defendants have infringed upon those Registered Copyrights;

(d) A determination that RSR is entitled to the damages specified under 17 U.S.C. § 504(b) or, at the election of Plaintiff, to statutory damages under 17 U.S.C. § 504(c), as well as costs and attorneys' fees under 17 U.S.C. § 505, due to the fact that RSR registered its Copyrights prior to Defendants' infringements and that such infringements are willful and deliberate;

(e) A determination that Defendants' "garden treasures" gazing balls infringe RSR's Trade Dress rights and constitute unfair competition in violation of the Lanham Act, the Michigan Consumer Protection Act and Michigan Common Law;

(f) A cumulative monetary award compensating RSR for its damage, loss, and injury, and such other and further relief as this Court deems proper and just under each count of the Complaint, in an amount to be determined at trial;

(g) A determination that Defendants have infringed upon RSR's intellectual property rights knowingly, willfully, and in bad faith and that the circumstances and/or

exceptional nature of the case justify separate assessments of up to treble damages under 35 U.S.C. § 284 and 15 U.S.C. § 1117(a) in an amount to be determined at the time of trial, along with RSR's reasonable attorneys' fees and costs in this action pursuant to 35 U.S.C. § 285, 15 U.S.C. § 1117(a), 17 U.S.C. § 505 and M.C.L. 445.911(2);

(h) An Order requiring Defendants to deliver up and destroy all products and packaging in inventory in violation of RSR's intellectual property rights;

(i) An Order requiring the Lowe's Defendants to demand that all of their retailers selling products in violation of RSR's intellectual property rights destroy those products;

(j) An injunction requiring Defendants to cease and desist and refrain from any further sale of products in violation of RSR's intellectual property rights;

(k) A declaration under M.C.L. 445.911(1)(a) that Defendants' methods, acts and practices with respect to the sale of products in violation with the Michigan Consumer Protection Act constitute unlawful practices under Section 3 of the Act; and

(l) An award of pre-judgment and post-judgment interest on all monies to be paid to RSR by Defendants.

**RELIANCE UPON PREVIOUS DEMAND FOR JURY TRIAL**

Plaintiff restates and relies upon its previous request for a jury trial.

Respectfully submitted this 3<sup>rd</sup> day of April, 2012.

/s/Anthony P. Patti

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 3<sup>rd</sup> day of April, 2012, I electronically filed the foregoing paper with the Court using the ECF system which will send notification of such filing to the following:

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