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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION**

FILED  
CLERK OF COURT  
2014 FEB 11 PM 1:17

KM Innovations LLC

Plaintiffs,

v.

Opportunities, Inc.,

Defendant.

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

**JURY TRIAL DEMANDED**

**1 : 14 -cv- 0 1 9 9 SEB -DML**

**COMPLAINT FOR TRADE DRESS INFRINGEMENT**

KM Innovations LLC ("KM"), by counsel, for its Complaint against Defendant Opportunities, Inc. (hereinafter "Opportunities") allege and state:

Parties

1. KM is a limited liability company organized and existing under the laws of the State of Indiana, with its principal place of business at 3892 South Spiceland Road, New Castle, Indiana 47362.

2. Upon information and belief, Opportunities is a corporation organized and existing under the laws of the State of Iowa, with its principal place of business at 25648 680<sup>th</sup> Avenue, Colo, Iowa 50056.

Nature of the Action

3. Upon information and believe, Opportunities imports, sells and/or is offering to sell polyester-based indoor snowballs (hereinafter the "Infringing Snowballs"), which are a low quality knock-off of KM's famous SNOWTIME

anytime!<sup>TM</sup> patent pending indoor synthetic fiber snowballs (hereinafter the “SNOWTIME anytime!<sup>TM</sup> Snowballs”).

4. KM’s SNOWTIME anytime!<sup>TM</sup> product packaging (i.e. –trade dress) is distinctive, non-functional and serves as a source designator of KM’s SNOWTIME anytime!<sup>TM</sup> Snowballs.

5. Upon information and belief, Opportunities has deliberately copied the distinctive features of KM’s trade dress to trade on the goodwill associated with KM’s trade dress and its SNOWTIME anytime!<sup>TM</sup> Snowballs.

6. Opportunities’ Infringing Snowballs lack many of the qualities and features of KM’s SNOWTIME anytime!<sup>TM</sup> Snowballs. Upon inspection after purchase, consumers would find that Opportunities’ Infringing Snowballs are of a lesser quality than KM’s SNOWTIME anytime!<sup>TM</sup> Snowballs thereby damaging the reputation of KM’s SNOWTIME anytime!<sup>TM</sup> Snowballs as consumers would be confused into believing that these inferior Infringing Snowballs are KM’s SNOWTIME anytime!<sup>TM</sup> Snowballs.

7. Opportunities has (and continues to) infringed KM’s famous and distinctive trade dress and committed unfair competition in violation of 15 U.S.C. § 1125(a).

#### **Jurisdiction and Venue**

8. This Court has subject matter jurisdiction under one or more of the following statutes: 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1332 (diversity), and 28 U.S.C. § 1338 (unfair competition).

9. Upon information and belief, this Court has personal jurisdiction over Opportunities because, *inter alia*, Opportunities has committed, or aided, abetted, contributed to, or participated in, acts of trade dress infringement and unfair competition in the State of Indiana and in this Judicial District. Upon information and belief, Opportunities has sold its Infringing Snowballs to customers in this Judicial District or to customers who own or are otherwise in control of businesses in this Judicial District. In particular, KM was able to purchase a set of the Infringing Snowballs at Cynthia's Hallmark® located at 1584 North State St., Greenfield, IN 46140.

10. Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391(b) and (c) because Opportunities transacts business within this District by offering for sale and selling its Infringing Snowballs in Indiana and KM's trade dress rights are being damaged by Opportunities' acts of infringement. Opportunities' Infringing Snowballs have been and upon information and belief are still being sold for example at Cynthia's Hallmark® in Greenfield, Indiana.

#### **Factual Background**

11. KM's members, Juanita Donica and Dianne Syme (mother and daughter), conceived of the idea of the SNOWTIME anytime!™ Snowballs at a Christmas party that was being held for Dianne's three daughters in December 2012.

12. At this particular Christmas party, with about 40 children in attendance, Juanita and Dianne had gone through all of the scheduled games that

they had planned for the children quicker than thought with still about an hour remaining before the party was scheduled to be over. Juanita and Dianne could see the big “B” word starting to erupt, the word mom’s hate to hear, meaning we are “bored.”

13. Juanita and Dianne have always been creative with planning parties, but this situation looked a little scary. As they began to walk around the house trying to find something to keep the children entertained, they entered the utility room where they spotted a large bag of pillow stuffing. They both looked at each other and simultaneously thought of an indoor snowball fight.

14. Juanita and Dianne grabbed the stuffing and tore it into small pieces and rolled them into balls as best they could do with that type of material. They then took the balls into the living room and started throwing them at the children and the children went wild with excitement. An hour later the children were still throwing the balls that had been created and were laughing and giggling with joy.

15. As the children began to leave, Juanita and Dianne could hear the children saying things such as “best party ever,” “I had so much fun,” “great party,” “I don’t want to leave,” and so forth. This is when Juanita and Dianne’s entrepreneur bug kicked in once again because they knew they had a new great idea.

16. In 1996, Juanita and Dianne invented a popular national Christmas product called “The Original Lightcicles.” The Wall Street Journal documented them as “the inventors of icicle lights.” Juanita and Dianne were the recipients of

the Noel Association's prestigious "Christmas Product of the Year" award in a ceremony held in New York City where they beat out such companies as Sylvania, Westinghouse, Phillips and other major companies.

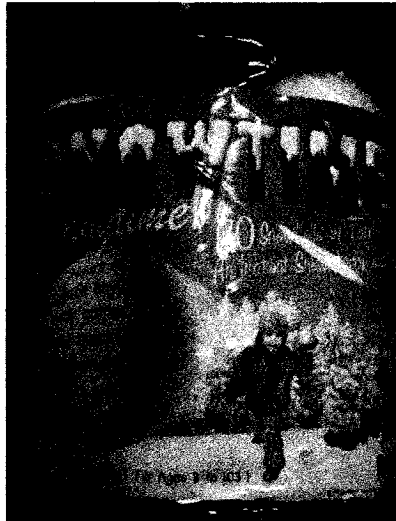
17. With the contacts that Juanita and Dianne had made from their prior invention set forth above, they set off on their new adventure to bring the SNOWTIME anytime!<sup>TM</sup> Snowballs to market.

18. The SNOWTIME anytime!<sup>TM</sup> Snowballs were designed to have the right texture and feel as similar to snow as possible and without the wet and cold, but white as snow. As mothers, they knew that the SNOWTIME anytime!<sup>TM</sup> Snowballs needed to be a "no muss, no fuss, no slush" indoor product that could be machine washable. The SNOWTIME anytime!<sup>TM</sup> Snowballs also had to be indoor friendly, not hurting or harming any objects, gentle in the house. By the end of 2012, Juanita and Dianne had invented a patent pending process for making the unique SNOWTIME anytime!<sup>TM</sup> Snowballs.

19. Juanita and Dianne then began having the SNOWTIME anytime!<sup>TM</sup> Snowballs manufactured using this process and developed a unique product package and label for the indoor snowball product (hereinafter collectively referred to as "KM's Trade Dress Rights").

20. The SNOWTIME anytime!<sup>TM</sup> Snowballs come in a clear package that includes a label on the front that depicts a mountainous background set in a blue and white theme. At the top of the package, the term "SNOWTIME" appears in which the upper part of the lettering has snow covering the top of the letters giving

off the commercial impression of a fresh snow. A representative image of KM's label and package for the SNOWTIME anytime!<sup>TM</sup> Snowballs is set forth below.



As illustrated, the letters used in "SNOWTIME" have a darker blue color compared to the lighter blues used in the rest of the label.

21. In the lower left-hand corner of KM's label a generally circular shaped white and blue snowball appears having wording contained therein.

22. In the lower right-hand corner of KM's label individuals are depicted playing with the SNOWTIME anytime!<sup>TM</sup> Snowballs outdoors like a traditional snowball fight would be played. The individuals are depicted having fun playing with the product and are all dressed in snow suits.

23. KM's package for its SNOWTIME anytime!<sup>TM</sup> Snowballs is clear and includes a blue band that runs around the top and bottom of the package.

24. In November 2012, KM took the SNOWTIME anytime!<sup>TM</sup> Snowballs to the Christmas Gift and Hobby Show in Indianapolis, Indiana. KM won first place

at the show among over 360 vendors promoting products. A picture of the award ribbon received at the Christmas Gift and Hobby Show is set forth below.



As a result, KM and its SNOWTIME anytime!<sup>TM</sup> Snowballs together with the product packaging were featured in media outlets such as the news, newspapers, and so forth.

25. In July 2013 and December 2013, KM's SNOWTIME anytime!<sup>TM</sup> Snowballs and its packaging were featured on QVC. *See* Exhibit A. KM's product received a 5-star review out of 5-stars from 102 out of 106 customers that posted reviews about the SNOWTIME anytime!<sup>TM</sup> Snowballs. *Id.*

26. KM has received numerous other media and print coverage for its famous SNOWTIME anytime!<sup>TM</sup> Snowballs including, but not limited to:

- KTNV-TV (Las Vegas) – Morning reporter interviewed Robert Nickel at the ABC Kids Expo where the SNOWTIME anytime!<sup>TM</sup> Snowballs were showcased.
  - <http://www.fox5vegas.com/video?autoStart=true&topVideoCatNo=default&clipId=9427372>
- PARENTGUIDE News Magazine – Online version featured a giveaway from KM in the October issue. The feature included promotion of the SNOWTIME anytime!<sup>TM</sup> Snowballs on Facebook, Twitter, the newsletter and website.

- <http://www.parentguidenews.com/ForOurFacebookFans/SnowtimeAnytime>
- WITI-TV (Milwaukee) – Presenter featured SNOWTIME anytime!™ Snowballs during a product round-up that aired on August 9, 2013.
  - <http://fox6now.com/2013/08/09/jaymes-duke-ballard-shares-cool-affordable-items/>
- Indy's Child, Cincinnati Parent and Daytona Parent Magazines included KM's SNOWTIME anytime!™ Snowballs in 2013's holiday gift guide.
  - <http://www.indyschild.com/pdf/GiftGuide.pdf>
- Washington Times Newspaper and Washington Times Online featured KM's SNOWTIME anytime!™ Snowballs in 2013's holiday gift guide.
  - <http://c.washingtontimes.com/neighborhood/2013-holiday-gift-guide/2013/dec/3/holiday-gift-toys-girls-and-little-ones/>
- San Diego Family Magazine featured KM's SNOWTIME anytime!™ Snowballs in 2013's best toys gift guide.
  - *See Exhibit B.*
- On February 4, 2014, Disney® used KM's SNOWTIME anytime!™ Snowballs at the premiere of the movie FROZEN.
  - <http://www.youtube.com/watch?v=Qy6C4z2VB6I&list=UUYdNtGaJkrtn04tmsmRrWlw&feature=c4-overview>
    - At about the 2:50 minute mark in the video you can see the children holding up KM's SNOWTIME anytime!™ Snowballs.

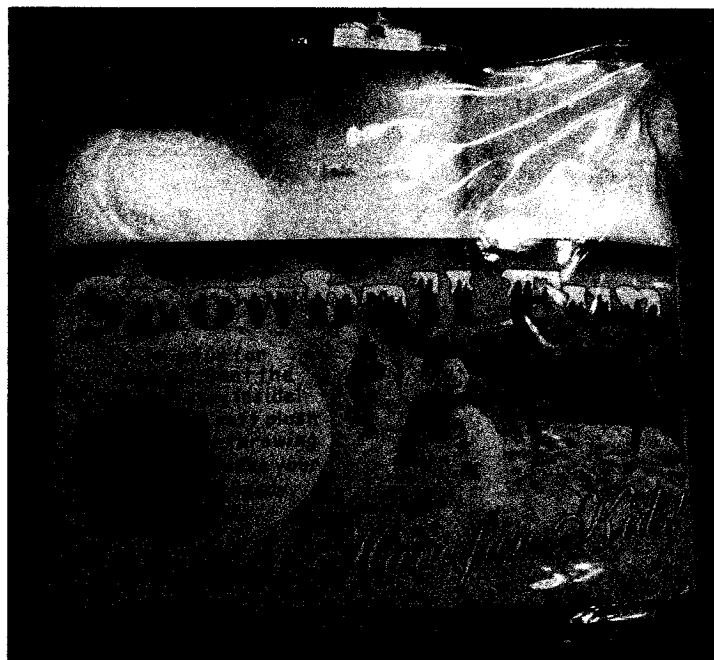
27. KM has spent countless hours and tens of thousands of dollars in marketing, promoting and advertising its SNOWTIME anytime!™ Snowballs in its unique and distinctive package.

28. In 2013, KM sold approximately \$1.9 million of the SNOWTIME anytime!™ Snowballs.

29. In December 2013, Juanita walked into Cynthia's Hallmark® store in Greenfield, Indiana where she discovered the Infringing Snowballs being offered for sale and purchased the product depicted below in paragraph 30.



30. Opportunities' product packaging is strikingly similar to KM's product packaging in that it copies almost all of the distinctive features of KM's product packaging. An image of Opportunities' product packaging is set forth below.



31. As illustrated above, the Infringing Snowballs come in a clear package that includes a label on the front that depicts a mountainous background set in a blue and white theme. At the top of the package, the terms "Snowball Fun" appear in which the upper part of the lettering has snow covering the top of the letters giving off the commercial impression of a fresh snow. As illustrated, the letters used in "Snowball Fun" have a darker blue color compared to the lighter blues used in the rest of the label.

32. In the lower left-hand corner of the Infringing Snowballs' label a generally circular shaped white and blue snowball appears having wording contained therein.

33. In the lower right-hand corner of Infringing Snowballs' label people are depicted playing with the Infringing Snowballs outdoors like a traditional snowball fight would be played. The individuals are depicted having fun playing with the product and are all dressed in snow suits.

34. Further, like KM's package, the Infringing Snowballs' package is clear and includes a blue band that runs around the top and bottom of the package.

35. Opportunities did not included any information on or inside its product packaging that would identify the source of the Infringing Snowballs that was purchased by Juanita.

36. The Infringing Snowballs are inferior in quality to KM's SNOWTIME anytime!<sup>TM</sup> Snowballs.

37. Opportunities' website does not contain any direct contact information such as an address or telephone number where they can be reached.

38. Opportunities' domain name is registered through Domains By Proxy, LLC. *See* Exhibit C. Domains By Proxy is a domain name registrant that allows individuals or businesses to conceal their identity. *Id.*

### Count I

#### Trade Dress Infringement and Unfair Competition

39. KM alleges and incorporates herein paragraphs 1-38 of this Complaint.

40. In 2012, KM introduced its SNOWTIME anytime!<sup>TM</sup> Snowballs into the market and has since received awards, industry recognition, and very positive consumer feedback for its unique synthetic indoor snowball product.

41. As a result of KM's continuous and exclusive promotion and sales of the SNOWTIME anytime!<sup>TM</sup> Snowballs in interstate commerce and the commercial success of the SNOWTIME anytime!<sup>TM</sup> Snowballs, KM's Trade Dress Rights have become distinctive and developed secondary meaning among relevant consumers as an identifier of the source of the SNOWTIME anytime!<sup>TM</sup> Snowballs.

42. KM's Trade Dress Rights are non-functional and entitled to protection as numerous other feasible ways exist in which Opportunities could choose to package its Infringing Snowballs yet it chose to use a trade dress that is strikingly similar to KM's trade dress.

43. Opportunities' copied numerous aspects of KM's Trade Dress Rights in order to unfairly compete with KM's SNOWTIME anytime!<sup>TM</sup> Snowballs and the goodwill associated with KM's product.

44. Opportunities' conduct complained of herein is causing, and is likely to continue to cause in the future, confusion, mistake or deception as to the affiliation, connection or association of Opportunities with KM, and as to the origin, sponsorship or approval of Opportunities' goods, in violation of Section 43 of the Lanham Act, 15 U.S.C. § 1125(a).

45. Opportunities' unauthorized and tortious conduct also has deprived, and will continue to deprive, KM of the ability to control the consumer perception of

its goods marketed under KM's Trade Dress Rights, placing the valuable reputation and goodwill of KM in the hands of Opportunities, over whom KM has no control.

46. Opportunities' knowledge of KM's Trade Dress Rights and reckless disregard for the likely confusion caused by its acts render this case exceptional under 15 U.S.C. § 1117. Opportunities' knowledge of KM's Trade Dress Rights is evident by the striking similarity of its product and package design. Numerous other package designs exist, yet Opportunities chose to imitate and trade on the goodwill associated with KM's SNOWTIME anytime!<sup>TM</sup> Snowballs and KM's Trade Dress Rights. Opportunities is concealing the identity of the source of the goods by not including any material in its package that identifies who is distributing the product in an attempt to associate the Infringing Snowballs with KM's highly successful and distinctive product. Further, Opportunities offers the Infringing Snowballs for sale on its website where it once again conceals the true identity of the company by not providing any direct contact information.

47. As a result of the foregoing, KM has been damaged in an amount to be determined at trial.

48. As a result of Opportunities' conduct, KM has suffered irreparable harm constituting an injury for which it has no adequate remedy at law. Unless this Court enjoins Opportunities' conduct, KM will continue to suffer irreparable harm.

#### **Jury Demand**

49. KM requests a trial by jury for all issues proper for a jury to decide.

**Prayer for Relief**

WHEREFORE, KM prays that this Court grant the following relief:

(a) Judgment that Opportunities' Infringing Snowballs sold in the packaging set forth herein infringe KM's Trade Dress Rights;

(b) Judgment that Opportunities committed unfair competition by selling and offering for sale the Infringing Snowballs in the packaging depicted herein;

(c) An award of damages adequate to compensate KM for Opportunities' infringement of KM's Trade Dress Rights and acts of unfair competition;

(d) An award of damages up to three times the amount found or assessed by the Court in KM's favor and against Opportunities for its willful and deliberate infringement of KM's Trade Dress Rights and Opportunities' acts of unfair competition complained of herein;

(e) An Order permanently enjoining Opportunities, and its affiliates and subsidiaries, and each of their officers, agents, servants and employees, from making, using, offering to sell, or selling in the United States, or importing into the United States any product that infringes KM's Trade Dress Rights, or any confusingly similar product incorporating a colorable imitation of KM's Trade Dress Rights or from otherwise competing unfairly with KM;

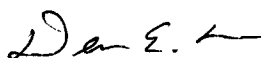
(f) An Order directing Opportunities to file with this Court and serve on KM's attorney, thirty (30) days after the date of entry of any injunction, a report in writing and under oath setting forth in detail the manner and form in which Opportunities has complied with the injunction;

(g) An award to KM of its attorneys' fees, costs and expenses incurred in prosecuting this action; and

(h) All other just and proper relief.

Respectfully submitted,

Dated: February 11, 2014



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