

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Court File No.: _____

Lulu's Food Mart & Deli Inc.,
d/b/a Lulu's Market & Deli,

Plaintiff,

COMPLAINT

vs.

The Firefly Group, Inc.,
d/b/a Lulu's Public House,

Defendant.

Plaintiff Lulu's Food Mart & Deli Inc., d/b/a Lulu's Market & Deli, for its Complaint against Defendant, The Firefly Group, Inc., d/b/a/ Lulu's Public House, states:

THE PARTIES

1. Plaintiff Lulu's Food Mart & Deli Inc., d/b/a Lulu's Market & Deli is a Minnesota corporation with its principal place of business at 1626 Selby Avenue, St. Paul, MN 55104.

2. Defendant The Firefly Group, Inc., is a Minnesota corporation, with its principal place of business at 1325 Sibley Memorial Hwy, Mendota, Minnesota, 55150-1414, which will operate a concessions stand at the Minnesota State Fair operating under the name Lulu's Public House.

JURISDICTION AND VENUE

3. This is an action for common law trademark infringement and unfair competition arising out of the Defendant's actions in advertising and marketing its plan to operate a concessions stand at the Minnesota State Fair under the name "Lulu's Public House," a name that is so similar to the Plaintiff's own service mark that it is likely to confuse, mislead, or deceive Plaintiff's ordinary consumers.

4. These common law claims arise under Minnesota law and the events underlying this Complaint all have taken or will take place in the State of Minnesota, County of Ramsey. As a result, the Minnesota state courts, through their general jurisdiction governing civil suits in the State of Minnesota, have subject matter jurisdiction over the Plaintiff's claims.

5. Venue is proper pursuant to Minn. Stat. § 542.09 because the cause of action in this matter arose in Ramsey County.

INTRODUCTION

6. The common law has long protected the rights of business owners who operate under a service mark such as the Plaintiff's service mark "Lulu's Market & Deli" from unfair competition by others whose operations would mislead and confuse consumers.

7. The Defendant intends to operate a concessions stand at the Minnesota State Fair under the name "Lulu's Public House," which name is so similar to the Plaintiff's own service mark "Lulu's Market & Deli" that it has caused and is likely to cause ordinary consumers to be confused, misled, or deceived, thus constituting common law trademark infringement.

8. By operating a concessions stand at the Minnesota State Fair using the confusingly similar name "Lulu's Public House," the Defendant will thereby unfairly enter into direct competition with the Plaintiff's business in a geographic area in which the Plaintiff has worked for years to develop consumer recognition of the Plaintiff's service mark "Lulu's Market & Deli."

9. The Defendant's unfair competition and common law trademark infringement includes its use of the name "Lulu's Public House," and its sale of food items under that name that are likely to confuse, mislead, or deceive ordinary consumers into believing that the Defendant's operation is associated, affiliated, or other related to the Plaintiff's business.

PLAINTIFF'S RIGHTS

10. The restaurant operated by the Plaintiff under the service mark Lulu's Market & Deli, or commonly referred to by consumers and in the press by the sole name "Lulu's," has been located at the intersection of Selby Avenue and N. Fry St. in St. Paul, Minnesota, for the past 17 years.

11. Before the Plaintiff began operating Lulu's Market & Deli in 2010, under previous ownership, the restaurant and market had continuously operated under the Lulu's Market & Deli name for 13 years.

12. The Plaintiff began operating the Lulu's Market & Deli restaurant in 2010 after purchasing the business from its previous owners.

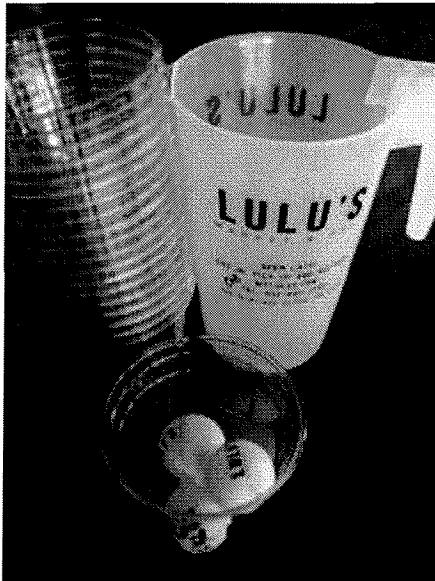
13. After purchasing the Lulu's Market & Deli business in 2010, the Plaintiff has continuously operated the restaurant under that name and has made significant investments in building the Lulu's Market & Deli brand, including rebranding the business to have a more significant focus on the restaurant, remodeling the physical space of the restaurant, revamping the menu, creating new signage, and developing a dine-in, take-out, and delivery food preparation business.

14. The Plaintiff's own logo, which is affixed to the awning outside the restaurant and on all promotional and advertising material, features the Lulu's name prominently.



15. The Plaintiff has also invested significant resources, time, and effort in advertising and marketing through printed publications, radio advertisement, through the internet and social media, as well as promoting the business through several charitable sponsorships for events at nearby schools, for recreational sports teams, all of which have used the Lulu's Market & Deli service mark to refer to the restaurant.

16. In addition, the Plaintiff sells branded merchandise, including T-Shirts, glasses, and games affixed with the Lulu's Market & Deli service mark.



17. Through consistent advertising, marketing, promotion and other efforts to build the Lulu's Market & Deli brand in connection with its operation of the restaurant, and through building goodwill in the restaurant's name with consumers throughout metropolitan area, the Plaintiff has acquired common law rights in the service mark "Lulu's Market & Deli."

18. The Plaintiff's business delivers food within a four-mile radius from the restaurant's location, including the area around the Minnesota State Fair, where the Defendant intends to operate its concessions stand.

DEFENDANT'S WRONGFUL CONDUCT

19. On or about June 26, 2014, the St. Paul Pioneer Press newspaper published an article in its "Eats" section indicating that a new vendor would be operating a concessions stand under the name "Lulu's Public House" at the Minnesota State Fair from August 21, 2014 through September 1, 2014. By operating a concessions stand at the Minnesota State Fair under the "Lulu's Public House" name, the Defendant has engaged in conduct that is likely to cause confusion, mistake, or deception as to the source or origin of the goods offered by Defendant under the Lulu's name in that consumers and potential consumers are likely to believe that such goods are provided by, sponsored by, approved by, licensed by, affiliated or associated with, or in some other way connected to the Plaintiff.

20. Media reports have indicated that among the food items the Defendant will be serving under the "Lulu's Public House" name at the Minnesota State Fair are a "Breakfast Juicy LuLu." The "Breakfast Juicy LuLu" has been described as "[a]n English muffin with two American cheese-stuffed sausage patties[.]" *See* myFOX9.com, "28 New Foods at the Minnesota State Fair in 2014," <http://www.myfoxtwincities.com/story/25869962/28-new-foods-at-minnesota-state-fair-in-2014>. The Plaintiff's menu also includes a Juicy Lucy style cheeseburger known as "The Fair Lucy," which has become the Plaintiff's most popular item. By serving such a similar dish to the Plaintiff's most popular food item, the Defendant has engaged in conduct likely to cause confusion, mistake, or deception as to the source or origin of the goods offered by Defendant and potential consumers are likely to believe that such goods are provided by, sponsored by, approved by, licensed by, affiliated or associated with, or in some other way legitimately connected to the Plaintiff.

21. Media reports have further indicated that among the food items the Defendant will be serving under the “Lulu’s Public House” name at the Minnesota State Fair is a “Prime Rib Taco.” The “Prime Rib Taco” has been described as “[s]liced rotisserie prime rib served in a flour tortilla with sautéed onions and topped with chili con queso.” *See* myFOX9.com, “28 New Foods at the Minnesota State Fair in 2014,” <http://www.myfoxtwincities.com/story/25869962/28-new-foods-at-minnesota-state-fair-in-2014>. The Plaintiff’s menu features a fish taco item. By serving such a taco item under a name similar to the Plaintiff’s own restaurant, the Defendant has engaged in conduct likely to cause confusion, mistake, or deception as to the source or origin of the goods offered by Defendant and potential consumers are likely to believe that such goods are provided by, sponsored by, approved by, licensed by, affiliated or associated with, or in some other way legitimately connected to the Plaintiff.

22. The Defendant has communicated to the Plaintiff its intention to continue to use the name “Lulu’s Public House” in connection with the promotion, advertisement, and operation of its business activities at the Minnesota State Fair.

23. The Defendant’s use of the name “Lulu’s Public House” is without permission or authority of the Plaintiff and is likely to cause confusion, mistake, or deception as to the source or origin of the Defendant’s goods, and is likely to falsely suggest an association, affiliation, sponsorship or license between the Defendant and the Plaintiff.

EFFECT OF THE DEFENDANT’S ACTIVITIES ON THE CONSUMING PUBLIC

24. The Defendant’s unauthorized use of the “Lulu’s” mark in the manner described above is likely to cause confusion, to cause mistake, or to deceive customers and potential

consumers of the parties as to some affiliation, connection, or association between the Defendant and the competing products sold by the parties.

25. The Defendant's conduct has already generated actual customer or consumer confusion. Several of the Plaintiff's customers have contacted the Plaintiff's employees upon hearing reports of the Defendant's entry into the Minnesota State Fair under the name "Lulu's Public House" and mistakenly congratulated the Plaintiff. Other consumers and members of the public have asked the Plaintiff's management whether they could work at the Defendant's operation at the Minnesota State Fair, believing that the two were affiliated, connected, or associated in some way.

26. The Defendant's unauthorized use of the "Lulu's" mark enables the Defendant to trade on and receive the benefit of goodwill built up at great labor and expense by the Plaintiff over several years, and to gain acceptance of its products and services not solely on their own merits, but on the reputation and goodwill of the Plaintiff, the Plaintiff's "Lulu's Market & Deli" service mark, and on the Plaintiff's products and services.

27. The Defendant's unauthorized use of the "Lulu's" mark unjustly enriches the Defendant at the Plaintiff's expense.

28. The Defendant's unauthorized use of the "Lulu's" mark removes from the Plaintiff the ability to control the nature and quality of products and services provided under the "Lulu's" service mark and places the valuable reputation and goodwill of the Plaintiff in the hands of the Defendant, over whom the Plaintiff has no control.

29. Unless the acts of the Defendant are restrained by this Court, they will continue to cause irreparable injury to the Plaintiff's brand and to the unwitting public for which there is no adequate remedy at law.

CLAIM 1: COMMON LAW TRADEMARK INFRINGEMENT

30. The Plaintiff repeats the allegations above as if fully set forth herein.

31. Defendant's use of the "Lulu's Public House" mark is likely to cause confusion, mistake, or deception as to the source or origin of the goods offered by Defendant under the mark in that consumers and potential consumers are likely to believe that such goods are provided by, sponsored by, approved by, licensed by, affiliated or associated with, or in some other way legitimately connected to Plaintiff Lulu's Market & Deli or the products Lulu's Market & Deli offers under its "Lulu's Market & Deli" mark.

32. Defendant's acts constitute trademark infringement under the common law in violation of Lulu's Market & Deli's rights.

33. Defendant's acts were taken in willful, deliberate, and/or intentional disregard of Lulu's Market & Deli's rights.

34. Plaintiff Lulu's Market & Deli has suffered irreparable harm, for which it has no adequate remedy at law, and will continue to suffer irreparable injury unless and until Defendant's infringing acts are enjoined.

CLAIM 2: COMMON LAW UNFAIR COMPETITION

35. The Plaintiff repeats the allegations above as if fully set forth herein.

36. Defendant's unauthorized use of the "Lulu's" mark in connection with its food service business at the Minnesota State Fair is likely to cause confusion, to cause mistake, or to deceive as to the affiliation, connection, or association of the Defendant with Lulu's Market & Deli, or as to the origin, sponsorship, or approval of the Defendant's food products or commercial activities and constitutes common unfair competition under Minnesota state law.

37. As a direct and proximate result of Defendant's unfair competition, Lulu's Market & Deli has suffered and will continue to suffer irreparable harm if Defendant's conduct is not enjoined.

38. Defendant has profited from its unlawful actions and has been unjustly enriched to the detriment of Lulu's Market & Deli. Defendant's unlawful actions have caused Lulu's Market & Deli monetary damage in an amount presently unknown, but in an amount to be determined at trial.

REQUEST FOR JURY TRIAL

39. The Plaintiff hereby requests a trial by jury on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff, Lulu's Market & Deli, prays that the Court enter an order:

A. Preliminarily and permanently enjoining and restraining Defendant, Lulu's Public House, its directors, officers, agents, servants, employees, subsidiaries, affiliates, and all persons in active concert or participation with, through, or under it, at first during the pendency of this action and thereafter perpetually:

1. from committing any acts of infringement and/or unfair competition and from implying a false designation of origin or a false description or representation with respect to Lulu's Market & Deli's "Lulu's" mark;
2. from committing any acts of unfair competition by passing off or enabling others to sell or pass off goods and/or services that are not those of Lulu's Market & Deli;
3. from in any manner any packaging, labels, signs, literature, display cards, or other packaging, advertising, or promotional materials, or other

- materials related to the manufacture and/or sale of food items that bear the marks “Lulu’s” or “Lulu’s Public House,” and/or any other mark, word, design, or name that is confusingly similar to “Lulu’s Market & Deli”; and
4. from making any statements on promotional materials or advertising for Defendant’s goods and/or services that are false or misleading as to source or origin; and
 5. from seeking to register any mark confusingly similar to Lulu’s Market & Deli’s marks.

B. Requiring that Defendant deliver up to Lulu’s Market & Deli any and all containers, signs, packaging materials, printing plates, and advertising or promotional materials, and any materials used in the preparation thereof, which in any way unlawfully use or make reference to Lulu’s Market & Deli’s “Lulu’s” mark in connection with the manufacture and/or sale of food items.

C. Requiring that Defendant, within thirty days after service of notice of entry of judgment or issuance of an injunction pursuant thereto, file with the Court and serve upon Lulu’s Market & Deli’s counsel a written report under oath setting forth details of the manner in which Defendant has complied with the Court’s order pursuant to Paragraphs A and B above.

D. Requiring Defendant to account and pay over to Lulu’s Market & Deli all damages sustained by Lulu’s Market & Deli, Defendant’s profits, Lulu’s Market & Deli’s attorney fees and costs, and ordering that the amount of damages awarded to Lulu’s Market & Deli be increased three times the amount thereof.

E. Awarding Lulu’s Market & Deli such other relief as the Court may deem just and proper.

Respectfully submitted,

Date: August 22, 2014

By: s/ Paul Applebaum

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**ACKNOWLEDGMENT REQUIRED BY
MINNESOTA STATUTE § 549.211**

I hereby acknowledge that, pursuant to MINN. STAT. §549.211, subd. 2, costs, disbursements, and reasonable attorney and witness fees may be awarded to the opposing party or parties in this litigation if the Court should find I acted in bad faith, asserted a claim or defense that is frivolous and that is costly to the other party, asserted and unfounded position solely to delay the ordinary course of the proceedings or to harass, or commit a fraud upon the Court.

Dated: August 22, 2014

s/ Paul Applebaum

Paul Applebaum (#223098)