

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Lion's Tap, Inc.,)	
)	Civil Action No. _____
Plaintiff,)	
)	
v.)	COMPLAINT
)	(Trademark Infringement)
McDonald's Corporation,)	
)	<u>JURY TRIAL DEMANDED</u>
Defendant.)	

For its Complaint against McDonald's Corporation, Lion's Tap, Inc. states and alleges the following:

INTRODUCTION

1. This is a case of David versus Goliath.
2. "David" is the family owned Lion's Tap restaurant located in Eden Prairie, Minnesota. Lion's Tap's hamburgers have been an institution in the metro area since the 1950's. Lion's Tap's fresh ground beef, which is individually pattied daily, and its own "secret" seasoning are just two of the reasons for the success and reputation of Lion's Tap's hamburgers. Lion's Tap's hamburgers are simple, hearty, and juicy. Napkins are plentiful and necessary. Starting at least as early as August 2005, Lion's Tap began using the trademark "WHO'S YOUR PATTY?" in conjunction with its famous hamburgers.
3. "Goliath" is the fast food trailblazer and innovator McDonald's Corporation. McDonald's touts itself as the leading global foodservice retailer with more than 31,000 local restaurants serving more than 58 million people in 118 countries each day. McDonald's, pioneers of the fast food "breakfast" and the "happy meal," has made trademarks such as "HAVE YOU HAD YOUR BREAK TODAY" and "I'M LOVIN' IT!" staples of popular culture.

4. So -- where's the beef between our local favorite "David" (Lion's Tap) and the mighty global "Goliath" (McDonald's)? In a move worthy of the Hamburglar or Captain Crook, McDonald's recently started utilizing Lion's Tap's "WHO'S YOUR PATTY?" trademark in conjunction with McDonald's Angus Burgers. Lion's Tap is forced to "Grimmace" and commence this lawsuit to protect its valuable "WHO'S YOUR PATTY?" trademark.

PARTIES

5. Plaintiff Lion's Tap, Inc. ("Lion's Tap") is a Minnesota corporation with its principal place of business at 16180 Flying Cloud Drive, Eden Prairie, Minnesota 55347.

6. Upon information and belief, Defendant McDonald's Corporation ("McDonald's") is a Delaware corporation having its principal place of business at One McDonald's Plaza, Oak Brook, Illinois 60523.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction under 15 U.S.C. § 1125, and 28 U.S.C. § 1338(a) in that this case arises under the Trademark Laws of the United States, 15 U.S.C. §§ 1051, *et seq.*

8. This Court has subject matter jurisdiction of the unfair competition claims herein under the provisions of 28 U.S.C. § 1338(b) in that said claims are joined with a substantial and related claim under the Trademark Laws of the United States, 15 U.S.C. §§ 1051, *et seq.*

9. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 in that Lion's Tap and McDonald's are citizens of different states, and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

10. This Court has subject matter jurisdiction of all claims herein arising under state law pursuant to 28 U.S.C. § 1367.

11. Venue is proper under 28 U.S.C. §§ 1391(b) and (c), and § 1395.

12. This Court has personal jurisdiction over McDonald's, which does business in Minnesota.

LION'S TAP MARKS

13. Lion's Tap has established, through continuous, long-term use in commerce, common law rights in the mark "WHO'S YOUR PATTY?" Commencing at least as early as August 2005, Lion's Tap has used the "WHO'S YOUR PATTY?" mark continually in interstate commerce and commerce affecting interstate commerce to identify certain of its goods and services and to distinguish such goods and services from those made and sold by others. The services and goods include, without limitation, restaurant, bar and catering services, take-out restaurant services, and hamburgers.

14. Lion's Tap is also the registered owner of Minnesota Registration No. 3457032-2 covering the standard character mark "WHO'S YOUR PATTY?" (hereinafter referred to as the "WHO'S YOUR PATTY? Word Mark"). The Certificate of Registration for the WHO'S YOUR PATTY? Word Mark was issued on August 18, 2009. Said registration is now outstanding and valid. A true and correct copy of the Registration Certificate is attached hereto as Exhibit A.

15. Lion's Tap is also the owner of an application with the United States Patent and Trademark Office for federal registration of its "WHO'S YOUR PATTY" standard character mark (Serial Number 77812553.) (The common law and state and federal registrations/applications are hereinafter referred to jointly as the "WHO'S YOUR PATTY? Marks.")

16. Lion's Tap has expended considerable time, resources, and effort in promoting the WHO'S YOUR PATTY? Marks and developing substantial goodwill associated therewith.

17. The WHO'S YOUR PATTY? Marks are arbitrary and inherently distinctive when used in conjunction with Lion's Tap's goods and services.

18. Due to the continual use of the WHO'S YOUR PATTY? Marks by Lion's Tap, the WHO'S YOUR PATTY? Marks have come to indicate a single source of Lion's Tap's goods and services. The WHO'S YOUR PATTY? Marks have further come to indicate Lion's Tap as the single source of such quality goods and services.

**MCDONALD'S INFRINGEMENT AND MISUSE OF
LION'S TAP'S WHO'S YOUR PATTY? MARKS**

19. Without Lion's Tap's knowledge or consent, and beginning long after Lion's Tap had established extensive and valuable goodwill in connection with its goods and services identified by the subject marks, McDonald's commenced to use, and is currently using, in interstate commerce and commerce affecting interstate commerce, word marks which include the phrase "WHO'S YOUR PATTY?" in connection with the sale, offering for sale, distribution, advertising, and promotion of its services and goods, including, without limitation, restaurant services, take-out restaurant services, and hamburgers.

20. Such use of said marks by McDonald's is without the permission or authority of Lion's Tap and is likely to cause or has caused confusion, mistake, and deception among consumers and customers.

21. In selecting and using the mark "WHO'S YOUR PATTY?" in connection with the sale and offering for sale of its goods and services, McDonald's has acted and continues to act with the intent and purpose of improperly taking or benefiting from the favorable reputation and valuable goodwill which Lion's Tap has established in the WHO'S YOUR PATTY? Marks, and has caused and continues to cause its goods and services to be passed off as made, authorized, sponsored, or endorsed by or otherwise connected with Lion's Tap.

22. The "WHO'S YOUR PATTY?" marks utilized by McDonalds are colorable imitations of and confusingly similar to Lion's Tap's WHO'S YOUR PATTY? Marks.

23. McDonald's activities are likely to cause confusion, to cause mistake, and to deceive consumers and others as to the source, nature, and quality of the goods and services offered by McDonald's.

24. Lion's Tap has been seriously damaged by McDonald's activities complained of herein, and unless such activities are preliminarily and permanently enjoined, Lion's Tap and its goodwill and reputation will suffer irreparable injury of an insidious and continuing sort that cannot be adequately calculated or compensated in money damages.

COUNT I
TRADEMARK INFRINGEMENT

25. Lion's Tap incorporates the preceding paragraphs as though fully set forth herein.

26. McDonald's acts constitute trademark infringement in violation of Lion's Tap's trademark rights at common law.

27. McDonald's has used, without Lion's Tap's consent, the mark "WHO'S YOUR PATTY?" in connection with rendering its services, and selling, offering for sale, and advertising its goods and/or services.

28. The mark "WHO'S YOUR PATTY?" used by McDonald's is identical to Lion's Tap's WHO'S YOUR PATTY? Marks and is likely to cause confusion or mistake on the part of a consumer of the goods or services or to deceive such a consumer as to the source or origin of the goods or services.

29. McDonald's acts of infringement have caused Lion's Tap damages, and Lion's Tap seeks judgment for McDonald's profits made by McDonald's unauthorized and infringing use of Lion's Tap's trademarks, for the damages sustained by Lion's Tap, and for all costs necessary to remediate the infringing uses and their effects.

COUNT II
STATUTORY UNFAIR COMPETITION

30. Lion's Tap incorporates the preceding paragraphs as though fully set forth herein.

31. McDonald's acts constitute unfair competition in violation of 15 U.S.C. § 1125(a).

32. McDonald's has used marks which are identical to Lion's Tap's WHO'S YOUR PATTY? Marks with the intent to deceive the public into believing that goods and services offered or sold by McDonald's are made by, approved by, sponsored by, or affiliated with Lion's Tap.

33. McDonald's acts as alleged herein were committed with the intent to pass off its goods and services as the goods and services of Lion's Tap, and with the intent to deceive and defraud the public.

34. McDonald's acts constitute unfair competition and passing off, and have caused Lion's Tap damages, including, without limitation, lost profits, harm to reputation, and costs to remediate the confusion and harm to Lion's Tap's goodwill and reputation caused by McDonald's.

35. Lion's Tap seeks judgment pursuant to 15 U.S.C. § 1117 for McDonald's profits made by McDonald's unfair competition and passing off of Lion's Tap's goods and services, for the damages sustained by Lion's Tap, for all costs necessary to remediate the unfair competition and passing off and their effects, and for the costs, expenses, and reasonable attorneys' fees incurred in bringing the present action.

36. Lion's Tap further seeks judgment for three times the amount of McDonald's profits or Lion's Tap's damages, whichever is greater, due to the nature of McDonald's conduct.

COUNT III
FALSE DESIGNATION OF ORIGIN

37. Lion's Tap incorporates the preceding paragraphs as though fully set forth herein.

38. McDonald's has utilized the designation and mark "WHO'S YOUR PATTY?" in interstate commerce.

39. McDonald's use of said designation and other representations constitute a false designation of origin which is likely to cause confusion, to cause mistake, and to deceive as to the affiliation, connection, or association of McDonald's with Lion's Tap and as to the origin, sponsorship, or approval of McDonald's goods and services by Lion's Tap.

40. McDonald's acts are in violation of 15 U.S.C. § 1125(a) in that McDonald's has used in connection with its goods and services a false designation of origin, or a false or misleading description and representation of fact, which is likely to cause confusion, and to cause mistake, and to deceive as to the affiliation, connection, or association of McDonald's with Lion's Tap and as to the origin, sponsorship, and approval of McDonald's goods, services, and commercial activities by Lion's Tap.

COUNT IV
VIOLATION OF THE MINNESOTA TRADEMARK AND SERVICE MARK STATUTE

41. Lion's Tap incorporates the preceding paragraphs as though fully set forth herein.

42. McDonald's acts constitute trademark and/or service mark infringement in violation of Minnesota Statutes § 333.28.

43. McDonald's has used, without Lion's Tap's consent, the mark "WHO'S YOUR PATTY?" in connection with rendering its services, and selling, offering for sale, and advertising its goods and/or services.

44. The phrase "WHO'S YOUR PATTY?" used by McDonald's is identical to Lion's Tap's WHO'S YOUR PATTY? Marks as to be likely to cause confusion or mistake on the part

of a purchaser of the goods or services or to deceive such a purchaser as to the source or origin of the goods or services.

45. McDonald's has reproduced, copied, and/or colorably imitated Lion's Tap's WHO'S YOUR PATTY? Marks and applied such reproduction to, without limitation, signs, and/or advertisements intended to be used upon or in connection with the sale or other distribution of its goods and/or the sale or rendering of its services.

46. McDonald's acts of infringement have caused Lion's Tap damages, and Lion's Tap seeks judgment pursuant to Minnesota Statutes § 333.29 for McDonald's profits made by its unauthorized and infringing use of Lion's Tap's WHO'S YOUR PATTY? Marks, for the damages suffered by Lion's Tap by reason of McDonald's wrongful conduct, and for the reasonable attorneys' fees incurred in bringing the present action.

47. Lion's Tap further seeks judgment for three times the amount of McDonald's profits, Lion's Tap's damages, and Lion's Tap's reasonable attorneys' fees, due to the nature of McDonald's conduct.

48. Lion's Tap further seeks to enjoin McDonald's from using and/or displaying any imitations of Lion's Tap's WHO'S YOUR PATTY? Marks.

COUNT V
STATE LAW DILUTION

49. Lion's Tap incorporates the preceding paragraphs as though fully set forth herein.

50. McDonald's acts constitute trademark dilution in violation of Minnesota Statutes § 333.285.

51. Lion's Tap's WHO'S YOUR PATTY? Marks are famous in Minnesota.

52. McDonald's has made commercial use of Lion's Tap's WHO'S YOUR PATTY? Marks in connection with goods and services which McDonald's has sold, offered for sale, distributed, and transported in interstate commerce.

53. McDonald's acts have caused dilution of the distinctive quality of Lion's Tap's WHO'S YOUR PATTY? Marks, to the irreparable injury to and damage of Lion's Tap. McDonald's acts have lessened the capacity of Lion's Tap's WHO'S YOUR PATTY? Marks to identify and distinguish Lion's Tap's goods and services. McDonald's acts have blurred the unique association which has heretofore existed between Lion's Tap's WHO'S YOUR PATTY? Marks and the goods and services distributed and sold by Lion's Tap under those marks.

54. McDonald's unlawful, infringing, and dilutive acts were commenced and committed from a time after Lion's Tap's WHO'S YOUR PATTY? Marks became famous.

55. McDonald's committed these acts willfully and with the intent to trade on Lion's Tap's reputation and to cause dilution of Lion's Tap's famous marks.

56. Lion's Tap is entitled to immediate, interlocutory injunctive relief and to permanent injunctive relief prohibiting further use of any marks containing the mark "WHO'S YOUR PATTY?" by McDonald's.

57. Lion's Tap further seeks judgment pursuant to Minnesota Statutes § 333.29 for McDonald's profits made by its unauthorized and dilutive use of Lion's Tap's WHO'S YOUR PATTY? Marks, for the damages suffered by Lion's Tap by reason of McDonald's wrongful conduct, and for the reasonable attorneys' fees incurred in bringing the present action.

58. Lion's Tap further seeks judgment for three times the amount of McDonald's profits, Lion's Tap's damages, and Lion's Tap's reasonable attorneys' fees, due to the nature of McDonald's conduct.

COUNT VI
VIOLATION OF MINNESOTA UNIFORM DECEPTIVE TRADE PRACTICES ACT

59. Lion's Tap incorporates the preceding paragraphs as though fully set forth herein.

60. McDonald's has engaged in deceptive trade practices in violation of the Minnesota Uniform Deceptive Trade Practices Act, Minnesota Statutes § 325D.43, *et seq.*

61. McDonald's actions have caused a likelihood of confusion and/or misunderstanding as to the source, sponsorship, approval, or certification of its goods and/or services with Lion's Tap's goods and/or services.

62. McDonald's actions have caused a likelihood of confusion and/or misunderstanding as to the affiliation, connection, and/or association of itself and its goods and/or services with Lion's Tap and its goods and/or services.

63. As a result of McDonald's actions, Lion's Tap has been or is likely to be injured.

64. As a result of McDonald's actions, Lion's Tap has incurred and will incur attorneys' fees and costs in defending its rights.

65. McDonald's wrongful acts have proximately caused and will continue to cause Lion's Tap substantial injury, including loss of customers, dilution of goodwill, and diminution of opportunity. The harm these wrongful acts will cause to Lion's Tap will be difficult to ascertain if these acts continue. Lion's Tap has no adequate remedy at law. At present, the amount of such damages cannot be fully ascertained by Lion's Tap.

66. Unless McDonald's activities are preliminarily and permanently enjoined, Lion's Tap and its goodwill and reputation will suffer irreparable injury of the insidious and continuing sort that cannot be adequately calculated or compensated with money. Lion's Tap is entitled to an injunction, pursuant to Minn. Stat. § 325D.45, restraining McDonald's and its officers, agents, and employees, and all persons acting in concert with them, from engaging in any further such acts in violation of the Minnesota Uniform Deceptive Trade Practices Act.

COUNT VII
COMMON LAW UNFAIR COMPETITION

67. Lion's Tap incorporates the preceding paragraphs as though fully set forth herein.

68. McDonald's is liable to Lion's Tap for unfair competition under Minnesota law, because McDonald's conduct is tortious and has deprived Lion's Tap of customers and other prospects.

69. McDonald's acts constituting unfair competition have caused Lion's Tap damages as alleged herein.

COUNT VIII
UNJUST ENRICHMENT

70. Lion's Tap incorporates the preceding paragraphs as though fully set forth herein.

71. McDonald's is liable to Lion's Tap for unjust enrichment under Minnesota law.

72. McDonald's has unlawfully received benefits from its infringement of Lion's Tap's WHO'S YOUR PATTY? Marks.

73. McDonald's accepted and retained the benefits knowing that its conduct was unjust and that retaining the benefits was inequitable.

74. McDonald's has been, and continues to be, unjustly enriched by retaining the benefits it has received as a result of its unlawful conduct.

DAMAGES AND INJUNCTIVE RELIEF

75. Lion's Tap incorporates the preceding paragraphs as though fully set forth herein.

76. By reason of McDonald's acts alleged herein, Lion's Tap has suffered and will suffer damage to its business, reputation, and goodwill and the loss of sales and profits Lion's Tap would have made but for McDonald's acts, and will further suffer the costs of remediating the harm to Lion's Tap's goodwill and marks which has resulted. McDonald's has wrongly profited from and been unjustly enriched by its conduct.

77. Lion's Tap is entitled to damages under Minn. Stat. § 333.29 as a result of McDonald's violations of and wrongful and willful conduct under Minn. Stat. §§ 333.28 and 333.285, including, without limitation, all profits derived from McDonald's wrongful use of Lion's Tap's WHO'S YOUR PATTY? Marks, all damages suffered by Lion's Tap by reason of McDonald's wrongful conduct, and its reasonable attorneys' fees. Lion's Tap is further entitled to an award of triple the amount of McDonald's profits, Lion's Tap's damages, and Lion's Tap's reasonable attorneys' fees.

78. Lion's Tap is further entitled to damages for McDonald's violations of Lion's Tap's trademark rights under common law.

79. Upon information and belief, McDonald's intends to continue to do the acts complained of herein unless restrained and enjoined.

80. Lion's Tap's remedy at law is inadequate.

81. Lion's Tap is entitled to an injunction prohibiting McDonald's, and its affiliates, agents, servants, and employees, and anyone acting with their authority or on their behalf, from directly or indirectly using the accused marks or any other mark, word, or name similar to Lion's Tap's WHO'S YOUR PATTY? Marks which is likely to cause confusion or mistake or to deceive.

PRAYER FOR RELIEF

WHEREFORE, Lion's Tap, Inc. prays:

1. That this Court issue an injunction pursuant to 15 U.S.C. § 1116 and Minn. Stat. §§ 333.285 and 333.29, enjoining and restraining McDonald's, and its affiliates, agents, partners, servants, and employees, or anyone acting with their authority or on their behalf, from directly or indirectly using any name, designation, or mark containing the phrase "WHO'S YOUR

PATTY?,” or any other mark, word, designation, or name similar to Lion’s Tap’s WHO’S YOUR PATTY? Marks which is likely to cause confusion or mistake or to deceive.

2. That this Court, pursuant to 15 U.S.C. § 1118 and Minn. Stat. § 333.29, order that all labels, signs, billboards, prints, packages, wrappers, receptacles, and advertisements in the possession or under the control of McDonald’s bearing any name or mark containing the phrase “WHO’S YOUR PATTY?,” or any confusingly similar phrase, and all plates, molds, matrices, and other means of making the same, shall be delivered to Lion’s Tap and destroyed;

3. That the Court find that McDonald’s has knowingly and willfully violated the Minnesota Uniform Deceptive Trade Practices Act;

4. That McDonald’s be required to account to Lion’s Tap for any and all benefits or profits derived by McDonald’s from the use of any mark incorporating the phrase “WHO’S YOUR PATTY?,” or any confusingly similar phrase, including the sale of any and all products and/or services associated with any such mark, and for all damages sustained by Lion’s Tap by reason of said acts of infringement and unfair competition complained of herein;

5. That the costs of this action be awarded to Lion’s Tap;

6. That Lion’s Tap be awarded its reasonable attorneys’ fees due to the exceptional and willful nature of this case;

7. That this Court, pursuant to Minn. Stat. § 333.29, award Lion’s Tap triple the amount of McDonald’s profits, Lion’s Tap’s damages, and Lion’s Tap’s reasonable attorneys’ fees; and

8. That this Court grant such other and further relief as it shall deem just.

DEMAND FOR JURY TRIAL

Trial by jury is hereby demanded for all issues so triable.

Dated: August 28, 2009

BRIGGS AND MORGAN, P.A.

By: s/ Michael M. Lafeber

Jack Y. Perry (#209272)

Michael M. Lafeber (#242871)

Lindsey D. Saunders (#387990)

2200 IDS Center

80 South Eighth Street

Minneapolis, MN 55402-2157

Telephone: (612) 977-8400

Facsimile: (612) 977-8650

ATTORNEYS FOR LION'S TAP, INC.