

Erica A. Reed, Esq.
FULBRIGHT & JAWORSKI L.L.P.
666 Fifth Avenue
New York, New York 10103-3198
(212) 318-3000

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Attorneys for Plaintiff:
The Great Atlantic and Pacific Tea Company, Inc.

	x	
	:	Superior Court Of New Jersey
THE GREAT ATLANTIC AND PACIFIC TEA	:	Law Division
COMPANY, INC.	:	
	:	Hunterdon County
Plaintiff,	:	Docket No. <u>L-515-07</u>
	:	
v.	:	Civil Action
	:	COMPLAINT
MARK A. D'AVELLA and MATTHEW	:	
D'AVELLA	:	
	:	
Defendants.	:	
	x	

Plaintiff The Great Atlantic and Pacific Tea Company, Inc. ("A&P"), by way of complaint against defendants Mark A. D'Avella and Matthew D'Avella, says:

Background

1. Plaintiff A&P is a corporation organized and existing under the laws of the State of Maryland, with its principal place of business in Montvale, New Jersey.
2. Defendant Mark A. D'Avella resides at 536 W. Hill Road, Glen Gardner, New Jersey.
3. Defendant Matthew D'Avella resides at 536 W. Hill Road, Glen Gardner, New Jersey.

BATCH:	
NO#	<u>394</u>
DATE	<u>8-24-07</u>
PAYMENT:	<u>CASH</u>
CHECK/MO#	<u>68450</u>
AMOUNT	<u>200</u>
PREPARER:	<u>mal</u>

4. During the relevant period herein, defendants Mark and Matthew D'Avella were both employed by A&P in plaintiff's store located at Route 513 and Little Brook Road, Califon, New Jersey 07830, (the "Califon A&P").

5. During the period of their employment by A&P, and without the permission of A&P, the defendants made a rap video on the premises of the Califon A&P (the "Rap Video").

6. The Rap Video features A&P employees, the defendants Mark and Matthew D'Avella, performing a rap song, on information and belief, authored by them entitled "Produce Paradise."

7. This Rap Video depicts defendants Mark and Matthew D'Avella performing their rap song in various recognizable areas of the Califon A&P, including the fresh produce department, the corner bakery, the stock room and the employee bathroom.

8. While performing in the Rap Video, at least one defendant is wearing a hat with a recognizable A&P logo (the "A&P Logo").

9. Within the Rap Video, defendants sing various disparaging and disgusting lyrics pertaining to produce and groceries, and the store in general, including:

- "But don't come up to me acting all rude because I won't be afraid to pee in your food"
- "Produce. Produce. What you see is what you get, except the cut fruit, now that's some nasty shit"
- "I got the worst cold, because my rhymes are sick, I open and close packages just for a lick"
- "Now stick with your gut, take some advice, it ain't safe in our produce paradise"
- "Excuse me sir, where did this grow? Bitch, do I look Mexican, I don't know"

- “And if you in the store about to drop a duke, the down stairs bathroom ain’t good for you”

10. Within the Rap Video, defendants are depicted doing various disparaging and disgusting things to produce and groceries, and in and around the produce and grocery areas, including:

- licking packaged produce and putting it back on the selling shelf;
- kissing produce;
- hitting each other in the genital area with produce;
- urinating on produce;
- standing next to each other with produce sticking out of their pants; and
- taking bites of various produce and letting it fall out of their mouths.

11. Within the Rap Video, defendants depict a store flyer with various disparaging and disgusting text including text referring to fresh cut fruit as "Nasty Shit".

12. The Rap Video is published, and is currently accessible and viewable, on YouTube, an internet accessible website where amateur and professional videos are viewed. The web address for the Rap Video is: <http://www.youtube.com/watch?v=y5iDpxvcNFE>.

13. The Rap Video is also published, promoted and accessible (via web link), and is discussed by defendants on their own website, FakeLaugh. The web address for defendants' website is <http://www.fakelaugh.com/fakelaugh.html>.

14. A&P has received at least one customer complaint, so far, from a longstanding customer who viewed the Rap Video on the YouTube website, and who recognized not only the Califon A&P Store as the store in the Rap Video, but also defendants Mark and Matthew D'Avella as employees of that store. This customer, understandably, was disgusted and

distressed by the scenes depicted in the video. Also understandably, this customer informed A&P that she would not be shopping in its stores in the future owing to the repulsive acts depicted and performed by defendants in the Rap Video. Given the false and disparaging statements and depictions concerning A&P and its products within the Rap Video, it is likely that numerous other customers of A&P will have similar reactions.

15. According to the YouTube website, as of 4:16 p.m. on August 21, 2007 the Rap Video has been viewed over 1,800 times since its August 6, 2007 posting.

16. The Rap Video has harmed A&P's reputation and business. If permitted to continue to publish the Rap Video, defendants will cause further real, substantial and irreparable harm to A&P's reputation and business, in that more and more customers and potential customers will become aware of the Rap Video, or view the Rap Video, and will discontinue their patronage of A&P stores based on the false, defamatory, and disgusting statements and depictions therein.

First Count
(Defamation)

17. A&P repeats the allegations stated in paragraphs 1 through 16 above as if set forth at length herein.

18. The Rap Video, as published by defendants Mark and Matthew D'Avella on YouTube and on their own website, FakeLaugh, and as described above, contains numerous false and defamatory statements that are injurious to the reputation and livelihood of A&P.

19. The Rap Video, as published by defendants Mark and Matthew D'Avella on YouTube and on their own website, FakeLaugh, as described above, contains numerous false and defamatory depictions of the treatment of produce by A&P employees.

20. The Rap Video has been published by defendants on the internet, including the two websites described above, and has been accessed and viewed by on at least 1,800 separate occasions since its publication, including a viewing by the A&P customer, described above, who brought the Rap Video to A&P's attention on August 11, 2007.

21. Defendants continue to maliciously publish the Rap Video as of the date this complaint is filed, as A&P has requested defendants to cease and desist from libeling, defaming, mischaracterizing and intentionally disparaging A&P and its products and to remove the Rap Video from YouTube and from their own website, FakeLaugh, which request has been rejected by defendants.

22. Defendants published the Rap Video, with its numerous false and defamatory statements and depictions concerning A&P produce and other products and services with knowledge that such statements and depictions were false.

WHEREFORE, plaintiff demands judgment against defendants for compensatory damages in an amount not less than one million dollars, punitive damages, that the Court issue Permanent Injunctive Relief against defendants prohibiting the further publication of the Rap Video and requiring defendants to remove it from YouTube and from their website FakeLaugh, and from any and all other sites on which it is published, or on which a link to it is available, prejudgment and postjudgment interest, costs of suit, and such other relief as the Court deems equitable and just.

Second Count
(Business and Product Disparagement)

23. A&P repeats the allegations stated above in paragraphs 1 through 22 as if set forth at length herein.

24. The Rap Video contains numerous statements and depictions that are disparaging to the quality of A&P's products, to its treatment of its produce, and to its business practices.

25. These disparaging and false statements and depictions were made knowingly and recklessly by defendants, to interfere with A&P's relations with its customers and to prevent customers from shopping at A&P stores, resulting in lost profits to A&P. Alternatively, defendants recognized or should have recognized that their statements and depictions in the Rap Video were likely to bring about financial harm to A&P.

WHEREFORE, plaintiff demands judgment against defendants for compensatory damages in an amount not less than one million dollars, punitive damages, that the Court issue Permanent Injunctive Relief against defendants prohibiting the further publication of the Rap Video and requiring defendants to remove it from YouTube and from their website FakeLaugh, and from any and all other sites on which it is published, or on which a link to it is available, prejudgment and postjudgment interest, costs of suit, and such other relief as the Court deems equitable and just.

Third Count
(Federal Trademark Infringement, Dilution, and Unfair Competition)

26. A&P repeats the allegations stated above in paragraphs 1 through 25 as if set forth at length herein.

27. Defendants Mark and Matthew D'Avella promote the Rap Video and other of their videos on their website FakeLaugh.

28. On information and belief, defendants are using the A&P Logo in commerce, in connection with the promotion of their Rap Video. Further, on information and belief, defendants are aspiring rap artists whose use of the A&P Logo and of the Califon A&P premises in the Rap Video to promote their Rap Video, and market their rapping abilities, is likely to

cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association of defendants with A&P, such that a viewer of the Rap Video would surmise that A&P condoned, or sponsored or approved the use of the A&P Logo and/or of the Califon A&P premises in the Rap Video.

29. The A&P Logo is an important element in marketing A&P products and stores because it serves to distinguish A&P's grocery stores and services from others on the market.

30. A&P owns all right, title, and interest in and to all intellectual property associated with the A&P name in the United States.

31. Such rights include, without limitation, the A&P Logo, identified at least by U.S. Reg. No. 1,304,288 and 2,713,141.

32. A&P has spent a substantial amount of money since 1859 to promote its A&P Logo and stores.

33. A&P has been in existence since 1859, and has continuously used the A&P Logo since the early 1900's.

34. The A&P Logo is a protectable trademark.

35. The A&P Logo is famous, well known, and inherently distinctive.

36. The A&P Logo is an inherently distinctive symbol of great consumer goodwill.

37. Long after A&P's first use of the A&P Logo, and fully aware of the A&P Logo and the goodwill associated with it, defendants used the A&P Logo in the Rap Video without authorization and in a manner designed to confuse consumers and to dilute the value of the A&P Logo.

38. Defendants have deliberately and willfully violated A&P's trademark rights in the A&P Logo and are intentionally trading on the immense goodwill developed by using the A&P

Logo so as to cause a likelihood of confusion among consumers and the trade, to dilute the overall value of the A&P Logo and to cause a likelihood that the overall value of the A&P Logo, is being, and will be diluted.

39. Defendants' unauthorized use of the A&P Logo in the manner described above is likely to cause confusion or mistake or to deceive A&P's customers and potential customers and other relevant members of the public, at least as to affiliation, connection, or association between defendants, and A&P, or as to the origin, source, sponsorship, or approval of defendants' Infringing Rap Video.

40. Defendants' unauthorized use of the A&P Logo falsely indicates to the purchasing public that defendants' Rap Video originates with A&P, is affiliated, connected, or associated with A&P, or is sponsored, endorsed, or approved by A&P, or is in some manner related to A&P or its goods or stores.

41. Defendants' unauthorized use of the A&P Logo has diluted, and is likely to continue to dilute the distinctive quality of the A&P Logo.

42. Defendants' unauthorized use of the A&P Logo began after the A&P Logo became famous.

43. A&P has been and continues to be damaged by defendants' activities and conduct. Defendants have profited thereby and, unless enjoined, A&P's business, goodwill, and reputation will suffer irreparable injury, which cannot be adequately calculated or compensated solely by money damages.

44. Such acts constitute trademark infringement and unfair competition, false designation of origin and dilution by tarnishment in violation of Sections 32 and 43(a) of the Lanham Act 15 U.S.C. §§1114 and 1125(a) & (c).

WHEREFORE plaintiff demands judgment against defendants for compensatory damages in an amount not less than one million dollars, and that said damages be trebled, that the Court issue permanent injunctive relief, permanently enjoining defendants from using A&P Logo or A&P premises in any manner, or in connection with any video, from engaging in any other conduct that tends falsely to represent, or is likely to confuse, mislead, or deceive A&P's customers and other members of the public to believe that defendants actions, including the Rap Video and other of defendants' videos, are connected with A&P or are sponsored, approved or affiliated with A&P, from further diluting or infringing the A&P Logo and damaging A&P's goodwill, and requiring defendants to remove the Rap Video from YouTube and from their websitr FakeLaugh and to destroy all copies of the Rap Video and present the court with proof of complaince. Plaintiff further demands prejudgment and postjudgment interest, costs of suit, and such other relief as the Court deems equitable and just.

FULBRIGHT & JAWORSKI L.L.P.
Attorneys for Plaintiff


ERICA REED

Dated: August 24, 2007