

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS		RECEIPT # <u>70982</u> AMOUNT \$ <u>250.00</u> SUMMONS ISSUED <u>9</u> LOCAL RULE 4.1 <u>9</u> WAIVER FORM <u>9</u> MCF ISSUED <u>9</u> BY DPTY. CLK. <u>9</u> DATE <u>3-10-06</u>
----- GATHER INC., Plaintiff, v. GATHEROO, LLC and WARECORP, Defendants. -----	2006 MAR 10 A 11:50 U.S. DISTRICT COURT DISTRICT OF MASS. Civil Action No. <u>06-10440-PBS</u> COMPLAINT AND DEMAND FOR JURY TRIAL	X

The plaintiff, Gather Inc. ("Gather"), for its complaint against the defendants, Gatheroo, LLC ("Gatheroo") and Warecorp (collectively referred to hereinafter as "defendants"), states that:

NATURE OF THE ACTION

1. In this action the plaintiff, Gather Inc., seeks to recover damages and to obtain a preliminary and a permanent injunction for the defendants' trademark infringement under common law; for the defendants' infringement of the plaintiff's trade name; for trademark infringement and false designation of origin under the Lanham Act; for dilution under Mass. Gen. Laws ch. 110B, §12; and for the defendants' unfair competition.

JURISDICTION AND VENUE

2. This court has jurisdiction of the subject matter of this action under 28 U.S.C. §§1331, 1367(a), and 1338, the Lanham Act, Title 15 of the United States Code, and principles of supplemental and ancillary jurisdiction.

3. Venue is proper in this Court pursuant to 28 U.S.C. §§1391(b) and 1391(c).

THE PARTIES

4. The plaintiff, Gather Inc., is a Delaware corporation with a place of business at 85 Devonshire Street, Third Floor, Boston, MA 02109.

5. The defendant Gatheroo, LLC, is a Minnesota limited liability company with a place of business at 3611 Farmington Road, Minnetonka, MN 55305.

6. The defendant Warecorp is a Minnesota corporation with a place of business at 3611 Farmington Road, Minnetonka, MN 55305.

FACTUAL BACKGROUND

The Plaintiff's Rights

7. The plaintiff is in the business of providing integrated online community and communication services, providing for social networking, user publishing, search capabilities, email communications, and advertising targeting, placement, tracking, and reporting services, with broad commercial applications in the online community and networking market.

8. On information and belief, beginning at least as early as January 25, 1999, the GATHER.COM domain name, then registered to Mr. Craig Chaddock, was used to provide online community services on a website at www.gather.com, and Mr. Chaddock operated the site to provide a community image sharing resource and to provide community-wide information related to non-profit organizations and charities.

9. On February 17, 2005, the plaintiff Gather Inc., known at the time as Sufficiently Advanced Technology Corporation, acquired by assignment all rights and goodwill associated with the GATHER.COM domain name from Mr. Chaddock.

10. On February 17, 2005, the plaintiff registered the domain name GATHERINC.COM.

11. On February 17, 2005, Gather applied to register the GATHER mark with the United States Patent and Trademark Office ("USPTO"). This application has been assigned serial number 78/569,911.

12. On February 17, 2005, Gather applied to register the GATHER.COM mark with the USPTO. This application has been assigned serial number 78/569,922.

13. On February 25, 2005, the GATHER.COM domain name was transferred to the plaintiff's Network Solutions account.

14. Since March 18, 2005, the plaintiff has used "Gather" and "Gather Inc." as corporate names to identify the company and to distinguish its services provided at the GATHER.COM website. On March 18, 2005, the plaintiff filed a change of name with the Secretary of State for the State of Delaware.

15. On March 21, 2005, MPR placed content on its website stating that APMG is the controlling shareholder of Gather Inc., a forprofit company that will provide community and commerce services to the public radio audience. Beginning on January 26, 2005, MPR's website had provided information about Sufficiently Advanced Technology Corporation, the name of the corporation before the change of name to Gather Inc.

16. Since at least as early as March 2005, the plaintiff has used the marks GATHER and GATHER.COM continuously in interstate commerce as brand names for its services.

17. On March 29, 2005, Gather applied to register a logo that includes GATHER and a design. This application has been assigned serial number 78/597,499.

18. On March 2, 2005 web content became publicly available through the domain name GATHER.COM, and from that time to the present GATHER.COM and GATHERINC.COM have both pointed to the same IP address resulting in the same content being seen by entering either domain name.

19. The plaintiff has obtained the rights to a number of additional domain names comprised of "GATHER" and different top-level domains, the letters that follow the final dot, and all of these domain names point to the same IP address resulting in the same content being seen by entering any of these domain names.

20. At the plaintiff's website at www.gather.com, the plaintiff provides services related to online communities including providing the capability for members to search for other members based on common interests, join and host groups organized by common interests, create individual member profiles, upload and store digital photographs and images, upload and manage documents, and maintain and contribute to group message boards.

21. As a host of online communities and networks, the plaintiff is developing, marketing and providing its services to internet users based on, for example, common interest in particular subjects or activities. As is typical of such online communities, considerable and constant growth of the community membership is essential to the plaintiff's success.

22. The plaintiff developed its website content until the “alpha” launch on May 20, 2005 at a private location on the internet. On June 15, 2005, a number of individuals were invited to the “alpha” version at the private location..

23. At least as early as May 10, 2005, word of the plaintiff’s site appeared on the internet including postings on two websites. The first appeared on the website www.scripting.com asking “What is gather.com.” The second, answering the first, appeared on a website known as “the peachyblog” located at www.peachyblog.com, and suggested a few possibilities including that it is a social networking service.

24. As a result of these postings, on May 10, 2005 Gather posted a welcome message on its website identifying itself as a growing company in Boston’s financial district, indicating that it was not quite ready to roll out its service, and inviting individuals to provide information in order to be invited when the website is ready.

25. Gather began receiving information from individuals in response to this welcome message on May 10, 2005.

The Defendants’ Actions

26. Michael Milkovich registered the domain name GATHEROO.COM on May 19, 2005, shortly after gather.com was the subject of postings on scripting.com and the peachyblog and put the welcome message on www.gather.com, and as the plaintiff prepared for its May 20, 2005 “alpha” launch. Mr. Milkovich holds positions with the defendants Gatheroo and Warecorp.

27. The defendant Gatheroo was incorporated shortly after that, on June 16, 2005.

28. The defendants maintain a website with the domain name gatheroo.com, where they market services for communication and networking applications for an online community.

29. According to Warecorp's website at www.warecorp.com, the defendant Warecorp creates Gatheroo.

30. The gatheroo.com website contains terms used as metatags. Metatags are embedded codes within a website identifiable by internet search engines, and metatags increase the likelihood that users searching with a search engine will receive gatheroo.com as a "hit" when searching for one of the terms in the metatags.

31. The defendants' metatags include the terms "gather," "meetup," and "civicspace." The plaintiff's website at GATHER.COM, and websites at MEETUP.COM and CIVICSPACELAB.COM, are all online communities competitive with the defendants' website.

32. The defendants placed the plaintiff's trademark "gather" in the website's metatags in order to attract individuals searching for the plaintiff's website to the defendants' website at gatheroo.com.

33. As stated on the defendants' website, the defendants recruit members to their online community, thereby expanding its membership.

34. The defendants' use of [GATHEROO](http://GATHEROO.COM), GATHEROO.COM, and Gatheroo, LLC for their services infringes the rights of the plaintiff and is likely to cause confusion, to cause mistake, or to deceive as to the origin, sponsorship, affiliation with or approval by the plaintiff of the services of the defendants.

35. By letter dated August 29, 2005, the plaintiff gave notice to the defendants of the plaintiff's rights and the defendants' infringement.

36. Just over a week later, on September 7, 2005, Dr. Randall Kindley, co-founder of Gatheroo, LLC, stated in an email to MPR, including Mr. Kling who is Chairman of the plaintiff and President and CEO of MPR, "we are creating a startup [Gatheroo] to rival gather.com, the Boston based social networking site," and referred to GATHER.COM as an "outstate competitor."

37. On September 6, 2005, the defendants' counsel contacted the plaintiff's counsel and requested additional information to respond to the August 29, 2005 letter. The plaintiff, through counsel, provided the defendants' counsel with all materials requested and made multiple requests for a promised substantive response. The defendants' response, which did not come until October 28, 2005, asserted spurious defenses, which were not grounded in legal precedent and were inconsistent with established legal precedent, and represented that Gatheroo, LLC would continue to use Gatheroo.com in its business. The plaintiff made a further attempt to resolve the matter in a letter on December 5, 2005, advising the defendants' counsel of the weakness in the defendants' assertions, and demanding that the defendants not proceed with their proposed activities under the Gatheroo name.

38. In the face of the notice provided by the plaintiff when the defendants were just creating Gatheroo, the defendants proceeded with implementation of their active website using the domain name GATHEROO.COM, and neglected and refused to cease their use of GATHEROO, GATHEROO.COM and Gatheroo, LLC.

39. On or about, January 9, 2006, the defendants introduced "Gatheroo Alpha" via its website and began actively recruiting members for its online community.

40. As one member of the current GATHEROO.COM website can invite a non-member to join, membership at GATHEROO.COM can grow exponentially, leading to a rapid increase in the total number of members.

41. By letter dated January 24, 2006, the defendants' counsel referred to a process for responding to the December 5, 2005 letter from the plaintiff's counsel, and stated, "When that process is done I will get back to you."

42. No further communication has been received.

43. There is actual confusion resulting from the defendants' actions. On January 21, 2006, an individual sent an email to the plaintiff's feedback email address saying, "Where do you sign out from gatheroo.com?"

44. One February 8, 2006, actual confusion occurred in an email in which a Gather Inc. investor was mistakenly identified as a Gatheroo, LLC investor.

45. The plaintiff is in imminent danger of suffering further irreparable harm and cannot wait for the "process" to be completed by the defendants.

COUNT I

(Infringement of Common Law Trademarks)

46. The plaintiff repeats and realleges paragraphs 1 through 45 of this complaint as if they were fully set forth.

47. The defendants have infringed and are infringing the plaintiff's common law rights in GATHER and GATHER.COM.

48. The defendants' continued use of these trademarks in violation of Gather's rights is willful.

49. Gather has been and is being damaged by the defendants' infringement of its common law rights.

COUNT II

(Trade Name Infringement)

50. Gather repeats and realleges paragraphs 1 through 49 of this complaint as if they were fully set forth.

51. The defendants infringed and are infringing the plaintiff's trade names.

52. The defendants' continued use of these names in violation of Gather's rights is willful.

53. Gather has been and is being damaged by the defendants' infringement of the plaintiff's trade name.

COUNT III

(Trademark Infringement and False Designation of Origin Under the Lanham Act)

54. Gather repeats and realleges paragraphs 1 through 53 of this complaint as if they were fully set forth.

55. The defendants' actions were and are in violation of 15 U.S.C. §1125(a) (Lanham Act § 43(a)), which imposes liability for the use in commerce of any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin that is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association of a person with another person or as to the origin,

sponsorship, or approval of its goods, services, or commercial activities by another person.

56. The defendants' continued use of these names in violation of Gather's rights is willful.

57. Gather has been and is being damaged as a result of the defendants' violation of 15 U.S.C. § 1125(a).

COUNT IV

(Dilution under Mass. Gen. Laws ch. 110B, §12)

58. Gather repeats and realleges paragraphs 1 through 57 of this complaint as if they were fully set forth.

59. The defendants' use of GATHEROO and GATHEROO.COM in commerce is causing a likelihood of injury to the plaintiff's business reputation and of dilution of the distinct quality of its GATHER and GATHER.COM trademarks.

60. By reason of the foregoing, the plaintiff is entitled to relief under Mass. Gen. Laws ch. 110B, §12.

COUNT V

(Unfair Competition)

61. Gather repeats and realleges paragraphs 1 through 60 of this complaint as if they were fully set forth.

62. The defendants, by their actions, have engaged and are engaging in unfair competition.

63. The plaintiff has been and is being damaged by the defendants' unfair competition.

WHEREFORE, the plaintiff, Gather Inc., demands judgment:

A. Preliminarily and permanently enjoining the defendants, Gatheroo, LLC and Warecorp, from utilizing the term “GATHEROO” or any term incorporating “GATHER,” or any confusingly similar term in any trade name, service mark, trademark, domain name, metatag, or any other use to promote goods or services;

B. Preliminarily and permanently enjoining the defendants, Gatheroo, LLC and Warecorp, from using GATHEROO, GATHEROO.COM, Gatheroo, LLC, or any confusingly similar term as a trade name for a company;

C. Preliminarily and permanently enjoining the defendants from diluting the distinctive quality of the plaintiff’s GATHER and GATHER.COM marks;

D. Preliminarily and permanently enjoining the defendants from engaging in unfair methods of competition with the plaintiff;

E. Determining and awarding the plaintiff its damages resulting from the defendants’ infringement of its common law trademark rights, as alleged in Count I of the complaint, plus interest, costs, and attorneys’ fees;

F. Determining and awarding the plaintiff its damages resulting from the defendants’ infringement of the plaintiff’s trade name, as alleged in Count II of the complaint, plus interest, costs, and attorneys’ fees;

G. Determining and awarding the plaintiff its damages resulting from the defendants’ violation of 15 U.S.C. § 1125(a), as alleged in Count III of the complaint, plus interest, costs, and attorneys’ fees;

H. Determining and awarding the plaintiff its damages from the defendants’ violation of Mass. Gen. Laws ch. 110B, §12, as alleged in Count IV of the complaint;

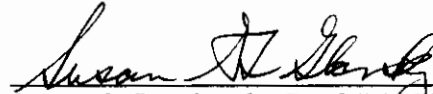
I. Determining and awarding the plaintiff its damages resulting from the defendants' unfair competition with the plaintiff, as alleged in Count V of the complaint, plus interest, costs, and attorneys' fees;

J. Determining that defendants' actions in infringing the plaintiff's rights and in engaging in unfair competition were willful and increasing the award of damages to the plaintiff as a result of those willful actions; and

K. Granting such other and further relief as this Court may deem just and proper.

THE PLAINTIFF DEMANDS A TRIAL BY JURY.

GATHER INC.
By its attorneys,



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