

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

FILED: AUGUST 25, 2008

08CV4831

JUDGE NORGLE

MAGISTRATE JUDGE SCHENKIER

YM

7SEARCH.COM, INC.,

Plaintiff,

v.

MCAFEE, INC.,

Defendant.

Civil Action No. _____

COMPLAINT

Plaintiff, 7Search.com, Inc. ("7Search"), through its undersigned counsel, hereby sets forth its Complaint against Defendant, McAfee, Inc. ("McAfee"), and alleges as follows:

NATURE OF ACTION

This is an action for unfair business practices, under Section 43 of the Lanham Act, 15 U.S.C. §1125(a), Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.*, Illinois Uniform Deceptive Trade Practices Act, 815 ILCS 510/1 *et seq.*, and common law business defamation, trade disparagement and unfair competition, stemming from Defendant McAfee's false, deceptive, confusing and/or misleading statements and representations, in commerce, regarding 7Search's reputation, software products, services and/or websites.

Parties

1. 7Search.com, Inc. is a corporation organized under the laws of the State of Illinois, with its principal place of business at 3960 N. Avondale Avenue, Chicago, IL 60641.

2. Upon information and belief, McAfee, Inc. is a corporation organized under the laws of the State of Delaware, with its principal place of business at 3965 Freedom Circle, Santa Clara, California 95054-1203.

Jurisdiction And Venue

3. This civil action arises under the Trademark Act of 1946 (15 U.S.C. et seq.) and sets forth claims for false or misleading representations of fact (15 U.S.C. § 1125), as well violations of the Illinois Consumer Fraud and Deceptive Business Practices Act and Illinois Uniform Deceptive Trade Practices Act, under 815 ILCS 510/1 et seq., 815 ILCS 505/1 et. seq., and claims for business defamation, trade disparagement and unfair competition under Illinois common law.

4. This Court has jurisdiction over this action under 28 U.S.C. § §1331 and 1338. In addition, the Court has jurisdiction pursuant to 28 U.S.C. § 1332(a) in that the matter in controversy exceeds \$75,000, exclusive of interest and costs, and is between citizens of different states. This Court also has supplemental jurisdiction of claims arising under state law pursuant to 28 U.S.C. §§1338(b) and 1367.

5. This Court has personal jurisdiction over McAfee pursuant to, among others, 735 ILCS 5/2-209, in that McAfee has committed the acts complained of herein in this district, and/or transacts business within this district.

6. Venue in this judicial district is proper under 28 U.S.C. §1391 because McAfee has caused tortious injury in, is subject to personal jurisdiction in, and may be found in, this judicial district.

Facts Common To All Claims

7. 7Search.com, Inc. has been in business since 1999, operating 7Search.com, a leading pay-per-click search engine that provides thousands of Web entrepreneurs with an

economical and measurable opportunity to obtain Internet traffic and generate revenue through their online presence.

8. Upon information and belief, McAfee has registered the domain name siteadviser.com, and operates and controls a website accessible through the address <http://www.siteadviser.com>.

9. McAfee offers through its www.siteadviser.com website what it terms its "web safety tool", namely, its "SiteAdvisor" and "SiteAdvisor Plus" software programs. Through these software programs, available through McAfee's internet sites, including www.siteadviser.com, McAfee names and classifies what it perceives to be Internet security threats (such as adware, spyware, viruses, worms, unauthorized intrusions, "potentially unwanted programs" etc.) detected on a software program being operated by a computer user. McAfee's software then advises such user of the potential level of risk created by such perceived security threats. McAfee, through McAfee SiteAdvisor, names and classifies both third party websites and software downloads available on those sites.

10. At the SiteAdvisor.com website, McAfee's "Terms of Service" states that it tests websites, downloadable programs, and registration/signup forms using a variety of automated and manual techniques. The results of its tests are reported in various summary and detailed formats on the website and via the company's software products. On its website, McAfee claims that its test results are supplemented with feedback from their users, comments from Web site owners, and analysis from its own employees. McAfee additionally claims on its site that its software summarizes its safety results by using red, yellow and green ratings. See McAfee SiteAdvisor Terms of Service and additional pages from SiteAdvisor.com, attached as **Exhibit A**.

11. McAfee's SiteAdvisor.com website has an "Analysis" tab where users can enter website addresses and find out what rating has been given to that site by McAfee. McAfee also displays at this location various information about the safety and reputation of third party sites. See copy of Analysis Page for 7Search.com, as an example, attached as **Exhibit B**.

12. Since at least September, 2007 McAfee, through its SiteAdvisor product, has employed a rating system that rates third-party websites with green, yellow or red ratings. McAfee provides these color-coded ratings for websites accessed through a browser or through links in e-mails or instant messaging.

13. McAfee SiteAdvisor is a popular product and widely in use throughout the United States, including in Illinois. It is used as part of a user's browser extension.

14. When a user accesses a website, which has been flagged with a red rating, or any site linking to any of these sites, the user sees a Red "X" Warning (red rating), as illustrated below:



15. McAfee does not publicly provide definitions for its green, yellow or red rating, nor does it provide information on the exact criteria used for determining a site's rating, or the process through which its ratings are created.

16. On or about September, 2007, McAfee began offering its SiteAdvisor and SiteAdvisor Plus Toolbars to the public. These Toolbars are widely used by computer users throughout the United States, including Illinois, and they display McAfee's purported rating of a web site when a computer user who has the Toolbar accesses a particular site.

17. On or about September, 2007, everyone who had either of these popular McAfee toolbars began automatically seeing McAfee's rating of the 7Search.com website.

18. Since at least as early as September, 2007, McAfee SiteAdvisor has rated the site 7Search.com with a red rating, suggesting it is a detected Internet security threat, and stating that, "Feedback from credible users suggests that downloads on this site may contain what some people would consider adware, spyware, or other potentially unwanted programs".

19. Prior to 2003, 7Search offered a download called the 7FaSST Search Toolbar, which users could install after reading and agreeing to a EULA that fully explained the functionality of the toolbar. This download could be uninstalled from the Add/Remove program interface. The 7FaSST Search Toolbar allowed users to search the Internet from their browser and to see "One-Click SiteDetails" about the open site including, *inter alia*, site age, associated e-mail and physical addresses, popularity, date of last update and website traffic ranking numbers. This toolbar has not been promoted or available for download since 2003.

20. Since at least 2003 there have been no direct downloads available on the 7Search.com site.

21. McAfee's SiteAdvisor.com site states that 7Search.com lists no negative test results from McAfee's own e-mail and download tests, and no annoyances are listed. Currently, the 7Search.com site is described as "linked to green sites." Therefore, the basis for the red rating appears to be either due to reviews of third-parties unaffiliated with McAfee, or criteria used by McAfee SiteAdvisor that is undisclosed to the public.

22. The statement on McAfee's site that "Feedback from credible users suggests that downloads on this site may contain what some people would consider adware, spyware, or other

potentially unwanted programs" is false and/or misleading because there are no downloads available on McAfee's site.

23. When a user with the McAfee SiteAdvisor Toolbar accesses a search results list that includes 7Search.com, or accesses the 7Search.com website itself, it receives a "use caution" warning, as well as a large "red rating" pop-up blocker that states: "When we tested this site, we found downloads that some people consider adware, spyware, or other potentially unwanted programs" and forces the user to click on either "allow" or "block" in order to proceed. See copy of screenshots attached as **Exhibit C**.

24. McAfee continues to incorrectly and falsely advise the public that 7Search.com contains downloads that are adware, spyware, or other potentially unwanted programs, when it is aware that there is no software on that site at all.

25. On October 1, 2007, 7Search gave written notice to McAfee concerning 7Search's objections to the misrepresentations of facts being made and published by McAfee concerning the 7Search.com website. A copy of 7Search's notice to McAfee is attached hereto as **Exhibit D**.

26. By way of that notice, as well as its subsequent protests, 7Search demanded, *inter alia*, that McAfee promptly delete from its website all references to 7Search.com providing software that is "adware, spyware or viruses" and change its red rating to a green rating for 7Search.com.

27. Rather than comply with 7Search's requests, McAfee has continued to willfully and knowingly publish the false and/or misleading statements concerning 7Search, its reputation, products, services and/or 7Search's website.

28. 7Search's business is being injured by McAfee's false and misleading representations regarding 7Search's reputation, business, products and services and it is clear that only judicial intervention will allow 7Search to obtain the relief it requires.

29. McAfee's explicit or implicit classification of 7Search's 7Search.com website is false, deceptive, confusing and/or misleading and is inconsistent with industry standards.

30. McAfee has recently partnered with Yahoo! for a product called SearchScan, which shows users when sites are considered to have dangerous downloads. When 7Search.com shows up in a computer user's Yahoo! search results, the website link is marked with the statement, "Use Caution", thereby deterring users from going to 7Search's website. This statement is false, deceptive, confusing and/or misleading and is being generated as a direct result of McAfee's improper negative rating of the 7Search.com website. A screenshot of the warning is attached as **Exhibit E**.

31. McAfee, in conjunction with Yahoo!, has further interfered with 7Search's business and client relations by flagging 7Search's e-mail with a warning. When e-mails are sent by or through 7Search.com, they are marked by McAfee with a prominent red warning banner which states that e-mails from 7Search.com contain "potentially unsafe" links to 7Search.com. A copy of such an e-mail is attached as **Exhibit F**. This statement and the warning banner and flag are false, deceptive, confusing and/or misleading.

32. Customers of 7Search who have opened accounts with 7Search.com have later terminated that business relationship as a result of seeing McAfee's false, deceptive, confusing and/or misleading statements and representations about 7Search.com. Thus, 7Search has lost business and has suffered injury as a direct result of McAfee's false statements about 7Search's products and services.

COUNT I
(Section 43 of the Lanham Act)

33. 7Search hereby realleges and incorporates by reference each of the allegations set forth in Paragraph 1 through 0, as though fully repeated herein.

34. McAfee's explicit and/or implicit representations that 7Search.com contains software that is adware, spyware, contains viruses or is otherwise a potentially unwanted program, are false, deceptive, confusing and/or misleading descriptions or representations of material fact which constitute a willful and intentional misrepresentation of the nature, characteristics, or qualities of 7Search's reputation, products and services, and impugn the quality of those goods and services, all in violation of Section 43(a) of the Lanham Act (15 U.S.C. §1125(a)).

35. McAfee's knowingly false, deceptive, confusing and/or misleading statements are material and have caused, or are likely to cause, injury and harm to the commercial interests of 7Search.

36. McAfee's false, deceptive, confusing and/or misleading statements and misrepresentations have been published in interstate commerce and widely disseminated to the relevant purchasing public.

37. McAfee's false, deceptive, confusing and/or misleading descriptions or representations of fact regarding 7Search and 7Search's reputation, goods and services have been used by McAfee during the commercial advertising or promotion of McAfee's goods and services, including, but not limited to, misrepresentations made on McAfee's website SiteAdvisor.com and on the computers of customers who have downloaded McAfee's SiteAdvisor and SiteAdvisor Plus Toolbar and/or other software products.

38. McAfee has misrepresented and falsely and misleadingly described, in commerce and through commercial communications, the nature, characteristics, properties and qualities of 7Search's reputation, goods and services to others.

39. McAfee's misrepresentations and false and misleading descriptions of facts to others regarding 7Search's reputation, goods and services are material and are likely to influence 7Search's customers' and others' purchasing decisions or are likely to cause confusion or mistake.

40. Upon information and belief, McAfee's false, deceptive, confusing and/or misleading statements and representations have been, and continue to be, willful.

41. McAfee's actions and misrepresentations have caused, and continue to cause, damages to 7Search, in an amount to be determined at trial. McAfee's actions and misrepresentations has caused irreparable injury to 7Search, and unless and until McAfee's continuing actions and misrepresentations are enjoined by this Court, 7Search will continue to suffer irreparable injury because of McAfee's actions and misrepresentations. 7Search has no adequate remedy at law.

COUNT II
(Violation of Illinois Consumer Fraud and Deceptive Business Practices Act -
815 ILCS 505/1 et seq.)

42. 7Search hereby realleges and incorporates by reference each of the allegations set forth in Paragraphs 1 through 41, as though fully repeated herein.

43. McAfee's false, deceptive, confusing and/or misleading statements and ratings regarding 7Search's reputations, products and/or website appear on McAfee's SiteAdvisor.com website, which is available and accessed by the general public, including those in Illinois, as well as on the computer screens of anyone's computer that has downloaded McAfee's SiteAdvisor

software product onto their computer, and/or in e-mails sent from 7Search.com to its own clients and, therefore, involves trade practices that are directed to the market generally.

44. McAfee's misrepresentations and false and misleading descriptions of facts to others regarding 7Search's reputation, goods and services are material and are likely to influence 7Search's customers' and others' purchasing decisions or are likely to cause confusion or mistake.

45. McAfee's false, deceptive, confusing and/or misleading statements and/or representations involve trade practices that are directed to the market generally and its distribution and publication of false, deceptive, confusing and/or misleading statements to the public involve a consumer protection concern.

46. Upon information and belief, McAfee's false, deceptive, confusing and/or misleading statements and representations have been, and continue to be, willful.

47. McAfee has engaged in unlawful and unfair business practices and has conducted untrue, unfair, deceptive and misleading advertising which has injured, and threatens to continue to injure, the business, reputation and property of 7Search. Such commercial conduct on the part of McAfee amounts to deceptive business practices under 815 ILCS 505/1 et seq. and for which 7Search is entitled to actual and punitive damages, an injunction, as well as its reasonable attorneys fees and costs.

48. McAfee's actions and misrepresentations have caused, and continue to cause, damages to 7Search, in an amount to be determined at trial. McAfee's actions and misrepresentations has caused irreparable injury to 7Search, and unless and until McAfee's continuing actions and misrepresentations are enjoined by this Court, 7Search will continue to

suffer irreparable injury because of McAfee's actions and misrepresentations. 7Search has no adequate remedy at law.

COUNT III
(Violation of Illinois Uniform Deceptive Trade Practices Act -
815 ILCS 510/1 et seq.)

49. 7Search hereby realleges and incorporates by reference each of the allegations set forth in Paragraphs 1 through 48, as though fully repeated herein.

50. McAfee has engaged in deceptive trade practices during the course of its business by disparaging the goods, services and business of 7Search by making, displaying and disseminating false, deceptive, confusing and/or misleading representations of fact regarding 7Search's reputation, products, website, services and the company's business in general.

51. McAfee has knowingly and willfully engaged in the false or misleading representation of fact regarding 7Search's reputation, goods, services or business by making, displaying and disseminating such false, deceptive, confusing and/or misleading representations of fact with knowledge of their false and/or misleading nature, and even after the false and/or misleading nature of their statements were called to their attention.

52. McAfee's misrepresentations and false and misleading descriptions of facts to others regarding 7Search's reputation, goods and services are material and are likely to influence 7Search's customers' and others' purchasing decisions or are likely to cause confusion or mistake.

53. 7Search has been damaged or is likely to be damaged by McAfee's deceptive trade practices.

54. Such commercial conduct on the part of McAfee amounts to willful deceptive trade practices under 815 Illinois Compiled Statutes 510, §§1 et seq. and for which 7Search is

entitled to injunctive relief, as well as costs and attorneys' fees under 815 ILCS 510/3 of the Illinois Compiled Statutes.

55. McAfee's actions and misrepresentations have caused, and continue to cause, damages to 7Search, in an amount to be determined at trial. McAfee's actions and misrepresentations has caused irreparable injury to 7Search, and unless and until McAfee's continuing actions and misrepresentations are enjoined by this Court, 7Search will continue to suffer irreparable injury because of McAfee's actions and misrepresentations. 7Search has no adequate remedy at law.

COUNT IV
(Business Defamation)

56. 7Search hereby realleges and incorporates by reference each of the allegations set forth in Paragraphs 1 through 55, as though fully repeated herein.

57. McAfee's false, deceptive, confusing and/or misleading red ratings and the false, deceptive, confusing and/or misleading written statements made and/or posted on its SiteAdvisor.com website have impeached the integrity and reputation of 7Search, thereby damaging 7Search's reputation and have deterred third parties from dealing with 7Search because of McAfee's false and/or misleading statements.

58. McAfee's false, deceptive, confusing and/or misleading statements are defamatory per se and damaging to 7Search.

59. Such commercial conduct on the part of McAfee amounts to willful business defamation under Illinois common law and for which Plaintiff is entitled to actual and/or compensatory damages and injunctive relief.

60. McAfee's actions and misrepresentations have caused, and continue to cause, damages to 7Search, in an amount to be determined at trial. McAfee's actions and

misrepresentations has caused irreparable injury to 7Search, and unless and until McAfee's continuing actions and misrepresentations are enjoined by this Court, 7Search will continue to suffer irreparable injury because of McAfee's actions and misrepresentations. 7Search has no adequate remedy at law

COUNT V
(Trade Disparagement)

61. 7Search hereby realleges and incorporates by reference each of the allegations set forth in Paragraphs 1 through 60, as though fully repeated herein.

62. McAfee's false, deceptive, confusing and/or misleading red ratings and the false, deceptive, confusing and/or misleading statements and representations of fact made and/or posted on its SiteAdvisor.com website have impugned the goods and/or services offered by 7Search.

63. McAfee's false, deceptive, confusing and/or misleading statements are defamatory per se and have disparaged 7Search's business reputation, and goods and services.

64. Such commercial conduct on the part of McAfee amounts to willful trade disparagement under Illinois common law and for which 7Search is entitled to damages and injunctive relief.

65. McAfee's actions and misrepresentations have caused, and continue to cause, damages to 7Search, in an amount to be determined at trial. McAfee's actions and misrepresentations has caused irreparable injury to 7Search, and unless and until McAfee's continuing actions and misrepresentations are enjoined by this Court, 7Search will continue to suffer irreparable injury because of McAfee's actions and misrepresentations. 7Search has no adequate remedy at law.

COUNT VI
(Common Law Unfair Competition)

66. 7Search hereby realleges and incorporates by reference each of the allegations set forth in Paragraphs 1 through 32, as though fully repeated herein.

67. McAfee has misrepresented and falsely and misleadingly described, in commerce and through commercial communications, the nature, characteristics, properties and qualities of 7Search's reputation, goods and services to others.

68. McAfee's misrepresentations and false and misleading descriptions of facts to others regarding 7Search's reputation, goods and services are material and are likely to influence 7Search's customers' and others' purchasing decisions or are likely to cause confusion or mistake.

69. McAfee's misrepresentations and false and misleading descriptions of facts to others relating to 7Search's reputation, goods and services constitute unfair competition under the common laws of the State of Illinois.

70. McAfee's actions and misrepresentations have caused, and continue to cause, damages to 7Search, in an amount to be determined at trial. McAfee's actions and misrepresentations has caused irreparable injury to 7Search, and unless and until McAfee's continuing actions and misrepresentations are enjoined by this Court, 7Search will continue to suffer irreparable injury because of McAfee's actions and misrepresentations. 7Search has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff 7Search.com, Inc. respectfully requests that this Court enter a judgment against McAfee, Inc. as follows:

- A. declaring that McAfee's statements and representations regarding 7Search's reputation, business, goods and/or services as being a security threat or otherwise harmful or potentially unsafe are false, deceptive, confusing and/or misleading;
- B. ordering McAfee to remove all statements and representations regarding 7Search's reputation, business, goods and/or services as being a security threat or otherwise harmful or potentially unsafe from all services, products, and/or websites owned and/or operated by McAfee;
- C. ordering McAfee to change its ratings of 7Search's reputation, business, goods and/or services from all services, products, and/or websites owned and/or operated by McAfee to a "green rating";
- D. preliminarily and permanently enjoining McAfee from:
- a. making or publishing false, deceptive, confusing and/or misleading statements about 7Search and its reputation, software products and services; and
 - b. mischaracterizing or disparaging 7Search or its reputation, software or websites.,
- E. that the Court grant a mandatory injunction requiring McAfee, Inc. and all others acting in privity with it, or in concert with it, to:
- a. Designate 7Search's 7Search.com website with a green rating as long as those sites continue to function and have the same general attributes as they currently possess.
 - b. Provide definitions on its SiteAdvisor.com website that explain what its green, yellow and red ratings mean;
 - c. Provide explanations on its SiteAdvisor.com website that detail all of the criteria that is used in determining its green, yellow and red ratings and how those factors are weighted; and
 - d. Provide different classifications for harmless but potentially unwanted programs, trackware, adware, spyware, viruses and other harmful programs such that programs that are not truly harmful, are not placed in the same category as harmful software thereby misleading the public as to the characteristics of the subject software or website.
- F. require McAfee SiteAdvisor to remove from its website any third-party reviews that contain false or misleading information once the false or misleading nature of the comment has been called to its attention and demonstrated to be false;
- G. grant an award to 7Search, pursuant to 15 U.S.C. §1117(a), of its actual damages, based on an accounting of McAfee's profits, to compensate 7Search for the harm and damage resulting from McAfee, Inc.'s acts complained of herein;

H. ordering McAfee to pay 7Search the damages that it has incurred as a result of the acts complained of herein, including, but not limited to, an award to 7Search of its lost profits, sales and reputational harm as a result of the acts complained of herein;

I. ordering McAfee to pay 7Search its interest, costs and expenses of this action, and its reasonable attorneys' fees, as a result of the acts complained of herein; and

J. awarding 7Search any other relief that this Court deems just and fit.

JURY DEMAND

Pursuant to Fed. R. Civ. P. 38(b), 7Search.com, Inc. demands a trial by jury of all issues triable of right by a jury.

DATED: August 25, 2008

Respectfully submitted,

7SEARCH.COM, INC.

By: s/ Joseph R. Lanser
One of Its Attorneys

Attorneys for Plaintiff:

Joseph R. Lanser
Jeffrey P. Swatzell
SEYFARTH SHAW LLP
131 South Dearborn Street, 24th Floor
Chicago, Illinois 60603-5577
Telephone: 312-460-5000
Facsimile: 312-460-7000
Email: jlanser@seyfarth.com

Of Counsel:

Nicole M. Meyer, Esquire
Samuel D. Littlepage, Esquire
DICKINSON WRIGHT PLLC
1901 "L" Street, N.W., Suite 800
Washington, D.C. 20036-3506
Telephone: (202) 457-0160
Facsimile: (202) 659-1559
Email: nmeyer@dickinsonwright.com