

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION**

IHOP CORP.; INTERNATIONAL)
HOUSE OF PANCAKES, INC.; IHOP)
HOLDINGS, LLC; IHOP)
FRANCHISING, LLC; and IHOP IP, LLC,)

Plaintiff,)

v.)

JOHN LANGLEY individually and d/b/a)
IT'S HOP'N,)

Defendant.)

CAUSE NO. _____

VERIFIED COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF

Plaintiffs, IHOP CORP.; INTERNATIONAL HOUSE OF PANCAKES, INC.; IHOP HOLDINGS, LLC; IHOP FRANCHISING LLC; and IHOP IP, LLC (collectively, "IHOP"), for their complaint against Defendant John Langley ("Langley") individually and d/b/a It's Hop'n ("It's Hop'n") allege:

Nature of the Case

1. This is an action for (i) federal trademark infringement; (ii) unfair competition under the Lanham Act (15 U.S.C. § 1114(1) and 1125(a)); (iii) common law trademark infringement; (iv) common law unfair competition; and (v) violations of the North Carolina Unfair and Deceptive Trade Practices Act (N.C. Gen. Stat. § 75-1.1(a)).

2. It's Hop'n is unlawfully passing itself off as an IHOP franchise or IHOP-affiliated restaurant. IHOP now seeks injunctive and other relief against It's Hop'n because of its improper use of IHOP's trademarks and trade dress in a restaurant designed to mislead customers into believing that it is an authorized IHOP franchise. In so doing, It's Hop'n has willfully copied certain distinctive features of IHOP restaurants in violation of North Carolina and federal

law. It's Hop'n's acts of passing itself off as an IHOP franchise or as otherwise affiliated with IHOP puts IHOP at risk of losing its customers and profits, and also puts IHOP's goodwill at risk.

Parties, Jurisdiction, and Venue

3. IHOP Corp. is a Delaware corporation with its principal place of business in Glendale, California.

4. International House of Pancakes, Inc. is a Delaware corporation with its principal place of business in Glendale, California. International House of Pancakes, Inc. is a wholly owned subsidiary of IHOP Corp.

5. IHOP Holdings, LLC is a Delaware limited liability company with its principal place of business in Glendale, California. IHOP Holdings, LLC is a wholly owned subsidiary of International House of Pancakes, Inc.

6. IHOP Franchising, LLC is a Delaware limited liability company with its principal place of business in Glendale, California. IHOP Franchising, LLC is a wholly owned subsidiary of IHOP Holdings, LLC.

7. IHOP IP, LLC is a Delaware limited liability company with its principal place of business in Glendale, California. IHOP IP, LLC is a wholly owned subsidiary of IHOP Franchising, LLC.

8. IHOP is a well-known restaurant owner and franchisor throughout the United States specializing in pancakes and breakfast food.

9. Langley is an individual who, on information and belief, is a resident and citizen of the State of North Carolina. On information and belief, Langley is the owner and operator of a restaurant operating under the name It's Hop'n. It's Hop'n is located at 1424 Bragg Boulevard, Fayetteville, North Carolina 28301.

10. IHOP's causes of action arise under the Lanham Act, as amended, 15 U.S.C. §§1051 *et seq.*, the North Carolina Unfair Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1(a), and the common law of North Carolina. This Court has jurisdiction over these claims under 15 U.S.C. §1121, 28 U.S.C. § 2201, 28 U.S.C. § 1331 and §1338(a) and (b), and supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

11. Additionally, this Court has diversity jurisdiction over this matter pursuant to 28 U.S.C. § 1332 because the matter in controversy exceeds \$75,000, exclusive of interest and costs, and is between citizens of different states.

12. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) because a substantial portion of the events and omissions giving rise to the claim occurred in this District.

ALLEGATIONS COMMON TO ALL COUNTS

The Business of IHOP

13. IHOP, founded in 1958, operates and franchises restaurants specializing in pancakes and breakfast food. IHOP franchises over 1300 stores throughout the United States, Canada, and Mexico, and utilizes uniform décor and marketing materials in its business.

IHOP's Trademarks

14. IHOP has adopted and used in interstate commerce certain trademarks (the "IHOP Marks"), which have been registered with the United States Patent and Trademark Office in connection with its operation of company-owned and franchised restaurants:

<u>Description</u>	<u>Goods/services covered</u>	<u>Registration #</u>	<u>Registration date</u>
IHOP'N Go	Restaurant services	76/677371	May 24, 2007*
IHOP	Restaurant services	77/105192	February 22, 2007*
IHOP (stylized)	Restaurant services	77/105181	February 12, 2007*

IHOP'N Go Carry Out restaurant	Restaurant and carry out food services	76/677373	May 24, 2007*
IHOP New banner Logo	Restaurant services	2942609	April 19, 2005
IHOP Restaurant (black and white)	Restaurant services	77/105379	February 12, 2007*
IHOP Restaurant (color)	Restaurant services	77/105388	February 12, 2007*
THIS IS MY IHOP RESTAURANT	Restaurant services	3005563	October 11, 2005
IHOP RESTAURANT	Restaurant Services	3003423	October 4, 2005
IHOP (and design)	Restaurant services	2332311	March 21, 2000

*Registration pending, serial number and date of filing are listed.

15. IHOP uses and has used the Marks to identify its business activities and products in interstate commerce in connection with company-owned and franchised restaurants, and the Marks are intended to distinguish IHOP's activities in this regard from those who are not so authorized. In addition, IHOP has prominently displayed the Marks in its advertising materials. IHOP has acquired a valuable reputation and goodwill among the public as a result of such consumer association. IHOP has utilized its Marks for a substantial period of time and has established goodwill in the Marks.

IHOP's Trade Dress

16. Since 1958, when IHOP first began franchising restaurants, it has consistently used a distinctive trade dress and package design in its franchises.

17. Specifically, IHOP has made use of the following design features in IHOP franchises: (1) the distinctive blue roof of the restaurants, and the A-shaped frame of the

restaurants (collectively the "IHOP Trade Dress"). Images of the IHOP Trade Dress are attached hereto as Exhibit A.

18. At a substantial cost, IHOP has extensively advertised and promoted its franchises in various media, including television, radio, print, and internet advertising. These marketing and promotional efforts have routinely included the IHOP Trade Dress. As a result of IHOP's extensive sales, advertising, promotion, and publicity, and through favorable industry acceptance and recognition, the IHOP Trade Dress has become an asset of incalculable value as a symbol of IHOP, its quality restaurants, and goodwill.

19. Upon seeing the IHOP Trade Dress, IHOP's customers recognize IHOP franchises as signifying IHOP and its high quality restaurants.

20. The IHOP Trade Dress is non-functional and not necessary for others to compete with IHOP in the restaurant industry.

21. The IHOP Trade Dress has acquired distinctiveness over the 50 years that IHOP has incorporated it into its franchises. As such, the IHOP Trade Dress has developed a secondary meaning, in that the public associates the IHOP Trade Dress with IHOP and recognizes that franchises using the IHOP Trade Dress are affiliated with IHOP.

22. By the acts described below, Langley has willfully engaged in unfair and deceptive practices, and deliberately traded on IHOP's goodwill and reputation to IHOP's irreparable injury.

The Fayetteville Restaurant

23. From 1973 to 2003, an IHOP-franchised restaurant operated at 1424 Bragg Boulevard, Fayetteville, North Carolina 28301 ("the Fayetteville IHOP"). In 2003, the Fayetteville IHOP closed.

24. Prior to closure of the former Fayetteville IHOP, IHOP debranded its Fayetteville restaurant.

25. Upon information and belief, at some time after IHOP debranded the Fayetteville restaurant, the roof was painted to a blue color to make it identical to the IHOP Trade Dress. Langley has since opened a restaurant called "It's Hop'n" in that building. A copy of the menu used by Langley in the operation of his restaurant, using the "It's Hop'n" name, is attached as Exhibit B.

26. The "It's Hop'n" name is used in the Fayetteville telephone directory to reach the restaurant.

27. Both the name and appearance of It's Hop'n are confusingly similar to IHOP's Trade Dress and Marks, and incorporate many distinctive characteristics of IHOP's facilities. *See Photograph of It's Hop'n, attached hereto as Exhibit C.*

28. In copying IHOP's trade dress and distinctive décor, It's Hop'n seeks to pass itself off as affiliated with IHOP, and to confuse customers into believing that It's Hop'n is an authorized IHOP franchise or otherwise affiliated with IHOP.

29. The name It's Hop'n is confusing similar to the IHOP Marks and constitutes unlawful passing off, in violation of IHOP's rights in the IHOP Marks.

30. It's Hop'n is using IHOP's Trade Dress as a way to pass itself off as affiliated with IHOP.

31. In its efforts to protect its Marks and Trade Dress, on March 17, 2008, IHOP sent a letter to Langley to demand that It's Hop'n cease its use of the IHOP Marks and Trade Dress. *See March 17, 2008 Correspondence, attached hereto as Exhibit D.*

32. Langley responded to IHOP's letter by refusing to modify the appearance of It's Hop'n. Instead, Langley offered to sell It's Hop'n to IHOP.

33. To date, It's Hop'n has made no changes to its décor, and continues to try to pass itself off as affiliated with IHOP by incorporating the Marks and Trade Dress of IHOP.

34. None of the Marks or Trade Dress copied by It's Hop'n are functional or necessary for Langley or any other restaurateur to compete with IHOP. In fact, multiple other chain restaurants operate in the United States and do not use these elements.

35. It's Hop'n's copying of the IHOP Marks and Trade Dress is an intentional and willful attempt to pass off It's Hop'n as an IHOP franchise so that Langley can benefit from IHOP's reputation for quality food and service. On information and belief, It's Hop'n's actions are intended to make a profit at IHOP's expense.

36. An authorized IHOP franchise operates in Fayetteville, North Carolina at 1935 Skibo Road in close proximity (a mere five miles) to It's Hop'n. It's Hop'n is thus a direct competitor of IHOP within Fayetteville, North Carolina.

37. Without authorization, license, or authority of IHOP, Langley is promoting It's Hop'n, which incorporates the IHOP Marks and Trade Dress.

38. At the time Langley engaged in the acts complained of herein, he had actual knowledge of the IHOP Marks and Trade Dress and the valuable reputation and goodwill symbolized by these distinctive features.

39. In fact, Langley's son, Justin Langley, has acknowledged that it is the goodwill built up by IHOP that It's Hop'n relies upon in promoting its business. In an interview with the Fayetteville Observer, Justin Langley noted "[e]verybody that comes has a story. How they used

to come here and spend all night with their friends, just enjoying themselves.” See “Owners say business is Hop’n,” Fayetteville Observer, March 14, 2008, attached hereto as Exhibit E.

40. The Fayetteville Observer article also notes the similarities in the appearance of It’s Hop’n to IHOP’s Trade Dress. Specifically, the article notes, “For years, the site at 1424 Bragg Blvd. was an IHOP. The old IHOP architecture is still familiar in the building’s steep blue roof...Langley, whose father John Langley owns the restaurant, hopes to recreate those days with It’s Hop’n. Even the restaurant’s name is a play on IHOP.” Ex. E.

41. Langley’s boldness is not limited to his willingness to boast about the similarities of It’s Hop’n to IHOP. In contacting IHOP by telephone to discuss its concern over It’s Hop’n’s use of the IHOP Marks and Trade Dress, Langley even identified himself as “the infringer.”

42. Upon information and belief, the aforesaid intentional acts by Langley in commerce were for the purpose of, and with the willful intention of, trading on IHOP’s goodwill and reputation and for giving It’s Hop’n a marketing opportunity it otherwise would not have had.

FIRST CLAIM FOR RELIEF
(Federal Trademark Infringement)

43. IHOP incorporates by reference each allegation contained in Paragraph 1 through 42 as if fully set forth herein.

44. It’s Hop’n has made commercial use of the IHOP Marks in connection with services that It’s Hop’n has provided through interstate commerce.

45. It’s Hop’n’s use of the IHOP Marks is likely to cause confusion, or to cause mistake or to deceive consumers, in violation of 15 U.S.C. §1114.

46. It’s Hop’n has committed these acts willfully and with the intent to trade on the reputation and goodwill of IHOP.

47. As a result of It's Hop'n's conduct, IHOP has suffered and, absent the intervention of the Court, will continue to suffer irreparable harm for which there is no adequate remedy at law.

48. As a result of It's Hop'n's conduct, IHOP has also suffered actual damages.

SECOND CLAIM FOR RELIEF
(Federal Unfair Competition)
(§ 43(a)(1) of the Lanham Act)

49. IHOP incorporates by reference each allegation contained in Paragraph 1 through 48 as if fully set forth herein.

50. Defendant is willfully attempting to trade upon the goodwill of the IHOP Marks and Trade Dress and restaurant appearance. Langley's unfair practices falsely create the impression that It's Hop'n is affiliated with IHOP, and constitute unfair competition.

51. Defendant's unauthorized use of the IHOP Marks and Trade Dress constitutes false description and false or misleading representation that It's Hop'n is affiliated with IHOP.

52. Defendant's actions are calculated to cause actual confusion and are likely to cause confusion or mistake among purchasers as to the true affiliation of It's Hop'n and to trade on IHOP's goodwill in violation of § 43(a)(1) of the Lanham Act, 15 U.S.C. § 1125(a)(1).

53. Defendant's actions constitute intentional, willful, and bad faith attempts to deceive or to create mistake or confusion in the minds of IHOP's customers and of the public generally. Langley intends to trade on IHOP's goodwill and to create the false impression of a connection, affiliation, association, or approval of or between, IHOP and It's Hop'n, all causing irreparable damage and injury to IHOP.

54. As a result of Defendant's conduct, IHOP has suffered and, absent the intervention of the Court, will continue to suffer irreparable harm for which there is no adequate remedy at law.

55. As a result of Defendant's conduct, IHOP has also suffered actual damages.

THIRD CLAIM FOR RELIEF
(Common Law Trademark Infringement)

56. IHOP incorporates by reference each allegation contained in Paragraph 1 through 55 as if fully set forth herein.

57. As a result of its continuous and substantially exclusive use, IHOP has established extensive goodwill as to the IHOP Marks and Trade Dress in connection with the services it provides long before It's Hop'n's first use of the IHOP Marks and Trade Dress.

58. Defendant's use of the IHOP Marks and Trade Dress constitutes an infringement of IHOP's common law rights. As a result, IHOP has suffered irreparable injury and has no adequate remedy at law.

59. As a result of Defendant's conduct, IHOP has suffered and, absent the intervention of the Court, will continue to suffer irreparable harm for which there is no adequate remedy at law.

60. As a result of Defendant's conduct, IHOP has also suffered actual damages.

FOURTH CLAIM FOR RELIEF
(Common Law Unfair Competition)

61. IHOP incorporates by reference each allegation contained in Paragraph 1 through 60 as if fully set forth herein.

62. Defendant's use of the IHOP Marks and Trade Dress at It's Hop'n violates IHOP's rights. Langley undertook such use with full knowledge of IHOP's rights, for the purpose of trading upon IHOP's goodwill and reputation and the passing off of It's Hop'n as an IHOP-affiliated restaurant.

63. Defendant's use of the IHOP Marks and Trade Dress at It's Hop'n constitutes unfair competition and infringement of IHOP's common law rights.

64. Defendant's use of the Trade Dress further constitutes intentional and willful conduct.

65. As a result of Defendant's conduct, IHOP has suffered and, absent the intervention of the Court, will continue to suffer irreparable harm for which there exists no adequate remedy at law.

66. As a result of It's Hop'n's conduct, IHOP has also suffered actual damages.

FIFTH CLAIM FOR RELIEF
(Violation of North Carolina Unfair and Deceptive Trade Practices Act)
(N.C. Gen. Stat. § 75-1.1(a))

67. IHOP incorporates by reference each allegation contained in Paragraph 1 through 66 as if fully set forth herein.

68. Langley's passing off of It's Hop'n by using the IHOP Marks and Trade Dress constitutes an unfair and deceptive trade practice in violation of N.C. Gen. Stat. § 75-1.1(a).

69. Defendant's passing off has the tendency to deceive and is unfair because it offends established public policy and is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.

70. Further, Defendant's use of the IHOP Marks and Trade Dress constitutes intentional and willful conduct.

71. As a result of Defendant's conduct, IHOP has suffered and, absent the intervention of the Court, will continue to suffer irreparable harm for which there is no adequate remedy at law.

72. As a result of Defendant's conduct, IHOP has also suffered actual damages.

WHEREFORE, IHOP requests the Court to award the following relief:

(a) Judgment on all counts against Langley and in favor of IHOP;

(b) A preliminary and permanent injunction enjoining and restraining Langley and any subsidiaries, related companies, associates, agents, servants, employees, officers, directors, representatives, successors, assigns, attorneys and all persons that act in concert and participation with them, who learn of the injunction through personal service or otherwise:

(1) From using the IHOP Marks and Trade Dress;

(2) From incorporating in It's Hop'n or other restaurants that or any other confusingly similar aspects to the IHOP Marks and Trade Dress;

(3) From representing through words or conduct that It's Hop'n is franchised, authorized, sponsored, affiliated, endorsed or otherwise connected with IHOP; and

(4) From any other conduct that causes, or is likely to cause, confusion, mistake, deception, or misunderstanding as to the source, affiliation, connection, or association of It's Hop'n with IHOP;

(c) An accounting of and award to IHOP in the amount of:

(1) Langley's profits as a result of its misconduct;

(2) Damages sustained by IHOP on account of Langley's misconduct; and

(3) Treble damages pursuant to N.C. Gen. Stat. § 75-16.1 or punitive damages pursuant to North Carolina common law;

(e) IHOP's costs of this lawsuit including reasonable attorney's fees and expenses, pursuant to N.C. Gen. Stat. § 75-16.1; and

(f) All other just and proper relief.

JURY DEMANDED

IHOP demands a trial by jury on all issues in this case other than its request for injunctive relief.

This the 3rd day of April, 2008.

Respectfully submitted,

**IHOP CORP.; INTERNATIONAL HOUSE OF
PANCAKES, INC.; IHOP HOLDINGS, LLC;
IHOP FRANCHISING, LLC; and IHOP IP,
LLC**

By: /s/ Mack Sperling
One of Their Attorneys

Mack Sperling, N.C. State Bar #11094
D.J. O'Brien, III, N.C. State Bar #35481
**BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.**
Suite 2000 Renaissance Plaza
230 North Elm Street (27401)
Post Office Box 26000
Greensboro, NC 27420-6000
Telephone: 336/271-3125
Facsimile: 336/232-9125
msperling@brookspierce.com

Marc S. Silver
Theodore J. Koerth
BARNES & THORNBURG LLP
One North Wacker Drive
Suite 4400
Chicago, Illinois 60606-2833
Telephone: (312) 357-1313
Facsimile: (312) 759-5649

VERIFICATION

Keith King, being first duly sworn, deposes and says:

That he is Associate General Counsel of International House of Pancakes, Inc., Plaintiff in the above-entitled action; that he has read the Complaint in this matter and knows the contents thereof; that the facts contained therein are true of his own knowledge, based on reasonable inquiry, except as to those matters and things stated upon information and belief, and as to those matters and things he believes them to be true.

Pursuant to 28 U.S.C. § 1746, he declares under penalty of perjury that the foregoing is true and correct.


Keith King