

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA

_____	)
DUCTCAP PRODUCTS, INC.	)
	)
Plaintiff,	)
	)
v.	)
	)
DAVCO ENTERPRISES, INC.	)
	)
Defendant.	)
_____	)

Civil No. 08cv179 RHK/AJB

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**COMPLAINT**

Comes now the Plaintiff, and for its Complaint against Defendant, states and alleges as follows:

**THE PARTIES**

1. Plaintiff, Ductcap Products, Inc. ("Ductcap"), is a Minnesota corporation, having a principal place of business at 2763 Fairway Drive, Willmar, Minnesota 56201.
2. Upon information and belief, Defendant, Davco Enterprises, Inc., is a California corporation doing business as Design Polymeric, having a principal place of business at 11609 Martens River Circle, Fountain Valley, California 92708.

**BACKGROUND FACTS**

3. Plaintiff Ductcap is engaged in the business of selling flexible duct covers.
4. Among other uses, Ductcap's duct covers protect the internal components of unfinished heating, ventilation, and air-conditioning ("HVAC") ductwork from moisture, dirt, and debris.

**SCANNED**  
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5. On April 5, 2005, United States Patent No. 6,874,541 (hereinafter “the ‘541 patent”) entitled TEMPORARY DUCT COVER was duly and legally issued to Plaintiff Ductcap, and since that date Plaintiff has been, and still is, the owner of this patent. A copy of the ‘541 patent is attached as Exhibit A to the Complaint.

6. Plaintiff Ductcap also owns the mark DUCTCAP, which since October 5, 2004, has been registered on the supplemental trademark register of the United States Patent and Trademark Office, Reg. No. 2,892,099.

7. Defendant Design Polymeric is engaged in the business of making, selling, and distributing sealants, adhesives, and other products for the HVAC industry.

8. From about June 2004 to about August 2006, Plaintiff Ductcap sold its patented duct covers to Defendant Design Polymeric.

9. Design Polymeric distributed Ductcap’s duct covers in interstate commerce.

10. As shown on its website at [www.designpoly.com/about.htm](http://www.designpoly.com/about.htm), Design Polymeric is “aggressively looking at new technology to solve industrial problems and to expand market share.”

11. In or around August 2006, Defendant Design Polymeric began selling and offering for sale its own brand of flexible duct covers in interstate commerce and circulated a letter on or about August 15, 2006 to its “valued” customers (see Exhibit B to the Complaint), which reads in part as follows:

DP is excited about our new and improved DP Cover that will replace our current Duct Caps. Please make sure your customers are aware of these changes.

When we receive an order we will ship what is left of the “old” Duct Caps and then filter in the “new” DP Covers.

12. Defendant Design Polymeric identifies its flexible duct covers as DP Covers and describes them on its website at [www.designpoly.com/accessories.htm](http://www.designpoly.com/accessories.htm) as “re-usable protective plastic bags with an elastic keep designed to provide protection from moisture, dust, debris and paint.”

13. Attached as Exhibit C is a copy of a document posted on Design Polymeric’s website showing the specifications of its DP Covers.

14. Through its advertising and words, Defendant has misled and confused Ductcap’s customers as to the source of Ductcap’s patented, flexible duct covers.

15. Attached as Exhibit D is correspondence from one of Ductcap’s customers demonstrating the confusion created by Defendant Design Polymeric’s dissemination of misleading and confusing information and advertising.

16. Defendant Design Polymeric sells its DP Covers through a network of distributors.

17. Defendant’s network of distributors distributes its products throughout the United States, including the state of Minnesota.

### **JURISDICTION**

18. Plaintiff Ductcap repeats the allegations above as if fully set forth herein.

19. This action involves claims of patent infringement and false designation of origin and source arising under the Acts of Congress and Minnesota law.

20. This Court has jurisdiction under 35 U.S.C. §§ 271 and 281-85; 15 U.S.C. §§ 1121 and 1091 *et seq.*; and 28 U.S.C. §§ 1331, 1332(a), 1338(a) and 1367(a).

### **COUNT I** **PATENT INFRINGEMENT**

21. Plaintiff Ductcap repeats the allegations above as if fully set forth herein.

22. Defendant Design Polymerics has infringed the '541 patent through the manufacture, use, sale and/or offer for sale of flexible duct covers including, but not limited to, its DP Covers as described in Exhibit C.

23. Defendant Design Polymerics has induced the infringement of the '541 patent through the manufacture, use, sale and/or offer for sale of flexible duct covers including, but not limited to, its DP Covers as described in Exhibit C.

24. Defendant Design Polymerics has contributed to the infringement of the '541 patent through the manufacture, use, sale and/or offer for sale of flexible duct covers including, but not limited to, its DP Covers as described in Exhibit C.

25. Plaintiff Ductcap has been damaged by Defendant's infringement of said patent and will continue to be damaged in the future unless Defendant is permanently enjoined from infringing said patent, inducing infringement of said patent, and contributing to the infringement of said patent by others.

26. Upon information and belief, Defendant Design Polymerics is aware that the '541 patent was duly and legally issued to Plaintiff Ductcap and Defendant's use, manufacture, sale and/or offer for sale of its duct covers, including but not limited to its DP Covers, infringes said patent.

27. Upon information and belief, Defendant Design Polymerics' infringement of said patent is now and has been intentional, willful, and deliberate, and will continue unless enjoined by the Court.

**COUNT II**  
**VIOLATION OF SECTION 43(a) OF THE LANHAM ACT,**  
**15 U.S.C. § 1125(a)**

28. Plaintiff Ductcap repeats the allegations above as if fully set forth herein.

29. The acts of Defendant Design Polymerics alleged herein are in interstate commerce and are likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association with Plaintiff Ductcap or its commercial activities, or as to the sponsorship or approval by Ductcap of Defendant Design Polymerics' goods, services, or commercial activities. Defendant Design Polymerics' actions further misrepresent the nature, characteristics, or qualities of Defendant's goods, services, or commercial activities.

30. Plaintiff Ductcap has no adequate remedy at law for the foregoing wrongful conduct of Defendant Design Polymerics, in that: (i) Defendant's actions damage and threaten to continue to damage Plaintiff's unique and valuable property, injury to which cannot adequately be compensated by monetary damages; (ii) the damages to Plaintiff Ductcap from Defendant's wrongful actions are not precisely and fully ascertainable; (iii) the wrongful acts of Defendant Design Polymerics injure and threaten to continue to injure Plaintiff's reputation and goodwill; and (iv) the damages resulting to Plaintiff Ductcap from Defendant Design Polymerics' wrongful conduct, and the conduct itself, are continuing, and Plaintiff would be required to bring a multiplicity of suits to achieve full compensation for the injuries caused thereby.

31. Unless restrained, the foregoing wrongful acts of Defendant Design Polymerics will continue to cause irreparable injury to Plaintiff Ductcap, both during the pendency of

this action and thereafter. Therefore, this Court should enter orders preliminarily and permanently enjoining Defendant Design Polymerics and its agents, employees and others acting in concert with it from directly or indirectly: (i) stating or implying that Plaintiff Ductcap is in any way affiliated with Defendant Design Polymerics, or approves or endorses Defendant or its products, services, or commercial activities; (ii) directly or indirectly using the DUCTCAP mark, or any other names, logos or marks that are confusingly similar to the DUCTCAP mark; (iii) using any word, term, name or device or any combination thereof that is likely to cause confusion, mistake or deception as to the affiliation, connection or association with Plaintiff Ductcap of Defendant's goods, services, or commercial activities, or the goods, services or commercial activities of any third party; and (iv) using any word, term, name, device or any combination thereof that is likely to cause confusion, mistake or deception as to the origin, sponsorship or approval by Plaintiff Ductcap of Defendant's goods, services, or commercial activities, or of the goods, services or commercial activities of any third party.

32. Plaintiff Ductcap is further entitled to recover damages sustained in consequence of Defendant's wrongful conduct, in an amount to be determined, to recover Defendant's profits, and to recover its attorneys' fees and other costs herein. Based upon the circumstances of the case, including the willful, deliberate and intentional nature of Defendant Design Polymerics' conduct, including the extent of the unlawful conduct, Plaintiff Ductcap is further entitled, pursuant to 15 U.S.C. § 1117, to recover triple the amount found as actual damages.

**COUNT III**  
**DECEPTIVE TRADE PRACTICES UNDER**  
**THE MINNESOTA DECEPTIVE TRADE PRACTICES ACT**

33. Plaintiff Ductcap repeats the allegations above as if fully set forth herein.

34. The acts of Defendant Design Polymeric in Minnesota constitute willful and knowing deceptive trade practices, in violation of the Minnesota Deceptive Trade Practices Act, Minn. Stat. § 325D.44.

35. Unless restrained, the foregoing wrongful acts of Defendant Design Polymeric will continue to cause irreparable injury to Plaintiff Ductcap, both during the pendency of this action and thereafter.

36. Therefore, this Court should enter orders, preliminarily and permanently enjoining Defendant and its agents, employees and others acting in concert with it, from directly or indirectly causing likelihood of confusion or misunderstanding by another as to the source, sponsorship, approval, affiliation, connection, association, or certification of Ductcap's goods or services.

37. As a direct result of Defendant's wrongful and willful conduct, Plaintiff Ductcap is entitled to damages in excess of \$75,000, as well as recovery of all reasonable attorneys' fees and costs incurred in connection with this action.

**COUNT IV**  
**UNJUST ENRICHMENT**

38. Plaintiff Ductcap repeats the allegations above as if fully set forth herein.

39. Defendant Design Polymeric had knowledge of and access to Plaintiff Ductcap's valuable intellectual property and know-how.

40. Defendant misappropriated Ductcap's intellectual property and know-how to its own benefit.

41. Defendant was not entitled to misappropriate Ductcap's intellectual property and know-how to its own benefit.

42. The acts of Defendant Design Polymerics complained of herein constitute unjust enrichment of Defendant at Ductcap's expense.

43. It would be unjust for Defendant Design Polymerics to retain the benefit.

44. As a direct result of Defendant Design Polymerics' wrongful and willful conduct, Plaintiff Ductcap is entitled to damages in excess of \$75,000.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for judgment that:

- A. United States Patent No. 6,874,541 is valid and has been infringed by Defendant Design Polymerics;
- B. Defendant Design Polymerics, its officers, agents, servants and employees and those persons in active concert or participation with any of them be enjoined from further infringement of United States Patent No. 6,874,541;
- C. An accounting be had for the profits and damages arising out of Defendant Design Polymerics' infringement of United States Patent No. 6,874,541 and false designation of origin, including treble damages for willful infringement as provided by Title 35 U.S.C. § 284, and treble damages for willful violation of the Lanham Act as provided by Title 15 U.S.C. § 1117, with interest;
- D. Defendant Design Polymerics be preliminarily and permanently enjoined from continued use or sale of the Defendant' products used to infringe said patent;




- E. The Court order preliminary and permanent injunctive relief as hereinabove described;
- F. The Court award Ductcap its attorneys' fees, costs, and expenses of the suit herein, and enhanced or statutory damages as provided by law;
- G. The Court award prejudgment and post-judgment interest on all sums awarded; and
- H. Plaintiff be awarded such relief as this Court may deem necessary and proper.

**DEMAND FOR JURY TRIAL**

Plaintiff Ductcap Products, Inc. hereby demands a trial by jury of all issues so triable.

Respectfully Submitted,

Dated: January 18, 2008

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