

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

HUMULUS LUPULUS ENTERPRISES, INC. §
d/b/a REAL ALE BREWING COMPANY §
Plaintiff, §

vs.

Civil Action No. 1:16-cv-963

FIREMAN’S BREW, INC. §
Defendant. §

JURY TRIAL DEMANDED

COMPLAINT FOR TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION

Plaintiff Humulus Lupulus Enterprises, Inc. d/b/a Real Ale Brewing Company (“Real Ale”), appearing through its undersigned counsel, hereby files this Complaint against Defendant Fireman’s Brew, Inc. (“Defendant”).

PRELIMINARY STATEMENT

1. Real Ale has been making craft beer in Texas for two decades. The company got its start in 1996 as a tiny operation in the basement of an antique store in downtown Blanco, Texas. Since then, Real Ale has grown into a 61,000-barrel-per-year statewide craft beer stalwart with national acclaim.

2. Much of Real Ale’s growth traces back to the introduction of its now-flagship Firemans #4 beer in 2002. In the nearly 14 years since, Firemans #4 has become Real Ale’s most popular and best-selling beer. First sold in kegs in 2002, and in bottles in 2007, Firemans #4 won a silver medal at the Great American Beer Festival in the Golden/Blond Ale category in 2012. And with the popularity of Firemans #4 and its other beers, Real Ale placed in

the national Top 50 Craft Brewing Companies list published by The Brewers Association in 2011.

3. While Real Ale has achieved national notoriety, the company has remained uniquely Texan. Real Ale has spent a great deal of time and money in developing the FIREMANS brand and trademark over the years, particularly in Texas. Currently, customers can find Firemans #4 in every major city throughout the state.

4. In June 2016, Real Ale was surprised to learn that Defendant, a company founded nine years after Real Ale and located nearly 1,000 miles from the nearest Texas state line, had begun selling beer under the same “Fireman’s” name in Austin and other cities in Texas. Moreover, one of the beers that Defendant was selling under the “Fireman’s” name was also a blonde ale, much like Real Ale’s own Firemans #4.

5. Because Defendant is selling beer under a confusingly similar “Fireman’s” name, there is a likelihood of confusion with Real Ale’s longstanding FIREMANS mark. And because Defendant began using the “Fireman’s” name in Texas well after Real Ale did, Defendant should not be permitted to market its beer in Texas in the face of Real Ale’s superior common law rights to the FIREMANS mark.

6. Accordingly, on June 27, 2016, Real Ale sent a cease-and-desist letter to Defendant asking Defendant to withdraw from the Texas market. But instead of taking Real Ale’s letter seriously, Defendant’s lawyers sought to dispute Real Ale’s 14 years of FIREMANS branding and the substantial goodwill and recognition associated with Real Ale’s FIREMANS trademark.

7. Moreover, Defendant’s lawyers have not responded since Real Ale provided proof to Defendant on July 14, 2016 that Firemans #4 was indeed first sold in Texas as early as

September 4, 2002. Consequently, Real Ale files this action for trademark infringement and unfair competition against Defendant.

THE PARTIES

8. Plaintiff Real Ale is a Texas corporation, with its principal office at 231 San Saba Court, Blanco, Texas 78606.

9. On information and belief, Defendant is a California corporation, with an address at 6433 Topanga Canyon Boulevard #189, Woodland Hills, California 91303. On information and belief, Defendant's business address is 20954 Osborne St., Canoga Park, California 91304. On information and belief, Defendant's registered agent for service of process is located at 21550 Oxnard Street, Suite 900, Woodland Hills, California 91367.

NATURE OF ACTION AND JURISDICTION

10. This is an action for trademark infringement under the Trademark Act of 1946, as amended, 15 U.S.C. § 1051 *et seq.* ("Lanham Act"); and trademark infringement and unfair competition under Texas common law.

11. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 because this Court has original jurisdiction over causes of action arising under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

12. Furthermore, this Court has diversity jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332 because the amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and this action is between citizens of different states. Plaintiff is a citizen of the State of Texas and, on information and belief, Defendant is a citizen of the State of California.

13. This Court has supplemental jurisdiction over the causes of action arising under the laws of the State of Texas pursuant to 28 U.S.C. § 1367 because such causes of action are so related to claims over which this Court has original jurisdiction.

14. This Court has personal jurisdiction over Defendant because Defendant has purposefully availed itself of the benefits of conducting business in Texas by selling infringing products, namely its “Fireman’s” products, within the State of Texas and this judicial district.

15. Venue in this case is proper in this judicial district under 28 U.S.C. § 1391(b) because, on information and belief, a substantial part of the events giving rise to this action took place in this judicial district.

STATEMENT OF FACTS AND ALLEGATIONS

Real Ale’s Superior Rights in the FIREMANS Marks

16. Plaintiff Real Ale is a Texas craft brewing company founded in 1996. Real Ale makes craft beer in Blanco, Texas, and sells its craft beer throughout the state of Texas.

17. Since as early as 2002, and well before Defendant’s use of the “Fireman’s” name in Texas, Real Ale has been making and selling a blonde ale called Firemans #4 in Texas, and the company has been using the distinctive FIREMANS trademark to sell beer in Texas during this entire time period.

18. Consumers, distributors, retailers, and others in the market often refer to Firemans #4 simply as “Firemans.” And since at least 2002, Real Ale has used a variety of FIREMANS marks including FIREMANS #4 and FIREMANS #4 BLONDE ALE in connection with the sale of its Firemans #4 beer (collectively, the “FIREMANS Marks”).

19. One of these FIREMANS Marks, FIREMANS #4 BLONDE ALE, is registered at the United States Patent and Trademark Office (“USPTO”) as Registration No. 3,897,601. This

trademark registration has been in continuous use for five years since its registration in December 28, 2010, and the mark is now incontestable under 15 U.S.C. § 1065.

20. Real Ale first received labeling approval for its Firemans #4 beer from the Texas Alcoholic Beverage Commission (“TABC”) on August 30, 2002. *See Exhibit A* at 1–2. TABC labeling approval is required for beer and other alcoholic beverages to be shipped within the state of Texas.

21. Soon thereafter, Real Ale began selling its Firemans #4 beer, with the first sales in Austin, Texas in September, 2002. Within the next four years, sales of Firemans #4 spread across the state to San Antonio, Houston, Ft. Worth, and Dallas.

22. Firemans #4 beer has since become Real Ale’s best-selling and most popular beer. As such, the FIREMANS Marks have gained substantial goodwill and recognition in the Texas market. Real Ale has devoted a great deal of time and money to building and maintaining this goodwill.

23. As a result of Real Ale’s use and promotion of the FIREMANS Marks in Texas, Real Ale has acquired valuable common law rights in the FIREMANS Marks. The consuming public in Texas widely recognizes and associates the FIREMANS Marks with Real Ale.

Defendant’s Infringement

24. On information and belief, Defendant is based in Woodland Hills, California. On information and belief, Defendant sells three beers—a blonde beer, a brunette beer, and a red ale—all marketed under the name “Fireman’s Brew.”

25. On information and belief, Defendant was incorporated in 2004, eight years after Real Ale’s founding in 1996 and two years after Real Ale’s first use of the FIREMANS Marks in Texas.

26. On May 8, 2006, nearly four years after Real Ale's first use of the FIREMANS Marks in Texas, Defendant filed its first non-abandoned trademark application for the "Fireman's Brew" mark. The application has registered as Registration No. 3,407,687.

27. On information and belief, Defendant first received labelling approval for two of its three beers (the brunette beer and the red ale) from the TABC on January 30, 2015. On information and belief, Defendant received labeling approval for its blonde beer from the TABC on May 16, 2016.

28. On information and belief, Defendant, through its distributors, only recently started selling beer under the "Fireman's Brew" mark in Austin, Texas and other cities in Texas including Alpine, Cedar Park, Katy, and Houston. On information and belief, Defendant currently sells, through its distributors, beer under the "Fireman's Brew" mark at locations in Austin and other cities in Texas.

29. According to press releases of Defendant and its distributors, Defendant, through its distributors, currently sells or plans to sell beer under the "Fireman's Brew" mark in at least Austin, Dallas, Houston, McAllen, Corpus Christi, and El Paso, Texas. *See, e.g., Exhibit B.* Defendant, through its distributors, currently sells or plans to sell beer under the "Fireman's Brew" mark at numerous grocery stores and other outlets in those cities, including several stores in which Real Ale's Firemans #4 blonde ale is also sold.

30. Defendant's use of its "Fireman's" mark in Texas and in commerce is confusingly similar to Real Ale's FIREMANS Marks.

31. Defendant is not affiliated with or sponsored by Real Ale and has never been authorized by Real Ale to use the FIREMANS Marks or any confusingly similar marks in the sale of beer in Texas.

32. Real Ale, through its counsel, notified Defendant of Real Ale's superior common law rights in the FIREMANS Marks on June 27, 2016. At that time, Real Ale requested that Defendant cease and desist using any mark confusingly similar to the FIREMANS Marks in Texas. Defendant, through its counsel, responded on July 7, 2016, attempting to dispute Real Ale's use of the FIREMANS Marks in Texas since as early as 2002.

33. On July 14, 2016, when Real Ale, through its counsel, provided proof of such early use, in the form of a sales receipt between Real Ale and a beer distributor dated September 4, 2002, Defendant did not respond. Defendant has ignored Real Ale's requests and, on information and belief, continues to sell beer in Texas under the confusingly similar "Fireman's Brew" mark.

34. Defendant's unauthorized use of the FIREMANS Marks is likely to cause confusion, to cause mistake and to deceive current and prospective customers of the parties as to the affiliation, connection or association of Defendant with Real Ale, or as to the origin, source, sponsorship, or approval of Defendant's beer and related products by Real Ale.

35. Defendant's unauthorized use of the FIREMANS Marks falsely designates the origin of its beer and related products.

36. Defendant's unauthorized use of the FIREMANS Marks allows Defendant to trade on and receive the benefit of substantial goodwill in Texas that Real Ale has acquired since 2002 through a large expenditure of time, money, and other resources.

37. Defendant's unauthorized use of the FIREMANS Marks removes from Real Ale the ability to control the nature and quality of products provided under the FIREMANS Marks, and places the valuable reputation and goodwill of Real Ale in the hands of Defendant, over whom Real Ale has no control.

38. Defendant's acts constitute irreparable harm, for which there is no adequate remedy at law, to Real Ale. Unless Defendant is enjoined by this Court, Defendant's acts will continue to cause irreparable harm to Real Ale.

COUNT I
FEDERAL TRADEMARK INFRINGEMENT UNDER 15 U.S.C. 1125(a)

39. Real Ale repeats the allegations above as if fully set forth herein.

40. Defendant's unauthorized use of Real Ale's FIREMANS Marks in commerce is likely to cause confusion or mistake, deceive as to the affiliation, connection, or association of Defendant with Real Ale, and to cause confusion and deceive as to the origin, sponsorship, or approval of Defendant's products by Real Ale, all in violation of Section 43(a) of the Trademark Act of 1946, 15 U.S.C. § 1125(a).

41. Defendant's acts as described above have been willful and are likely to cause confusion among the relevant purchasing public. This confusion unjustly enriches Defendant and constitutes irreparable harm to Real Ale, which will continue unless Defendant is enjoined by this Court.

COUNT II
COMMON LAW TRADEMARK INFRINGEMENT

42. Real Ale repeats the allegations above as if fully set forth herein.

43. This Count arises under the common law of trademarks. Defendant's infringing use of Real Ale's FIREMANS Marks has caused confusion, mistake and/or deception and caused the public to believe that the products offered by Defendant are the same as those of Real Ale, or that such products were authorized, sponsored, approved or endorsed by Real Ale, or that Defendant was or is connected or associated with Real Ale.

44. Defendant's unlawful activities constitute willful and deliberate trademark infringement under the common law of the State of Texas.

45. As a direct and proximate result of Defendant's unlawful activities, Real Ale has suffered injury, including lost sales, and will continue to be injured in the amounts determined according to proof at trial. In addition, Defendant's unlawful activities have caused and will continue to cause, unless enjoined by this Court, substantial, immediate, and irreparable harm, for which there is not an adequate remedy at law, to Real Ale, its business reputation, and its goodwill.

COUNT III
COMMON LAW UNFAIR COMPETITION

46. Real Ale repeats the allegations above as if fully set forth herein.

47. Defendant's unlawful activities have confused, misled, or deceived, and are likely to confuse, mislead, or deceive current or prospective customers and constitutes unfair competition under the common law of the State of Texas.

48. As a direct and proximate result of Defendant's unlawful activities, Real Ale has suffered injury, including lost sales, and will continue to be injured in the amounts determined according to proof at trial. In addition, Defendant's unlawful activities have caused and will continue to cause, unless enjoined by this Court, substantial, immediate, and irreparable harm, for which there is not an adequate remedy at law, to Real Ale, its business reputation, and its goodwill.

PRAYER FOR RELIEF

WHEREFORE, Real Ale respectfully requests and prays that:

A. This Court preliminarily and thereafter permanently enjoin Defendant, its officers, agents, directors, employees, agents, licensees, and other persons who are in active concert or participation with any of them from using the "Fireman's" mark and any other mark that is confusingly similar to Real Ale's FIREMANS Marks in connection with Defendant's goods

throughout the State of Texas, where Real Ale has acquired common law rights to the FIREMANS Marks;

B. This Court order Defendant to take all steps necessary to remove any products using the “Fireman’s” mark and any other mark that is confusingly similar to Real Ale’s FIREMANS Marks from the State of Texas;

C. This Court order Defendant to file with this Court and to serve upon Real Ale, within thirty (30) days after the entry and service on Defendant of an injunction, a report in writing and under oath setting forth in detail the manner and form in which Defendant has complied with such injunction;

D. Real Ale recover all compensatory and exemplary damages in an amount to be proven at trial, together with such fees and expenses as the Court may find reasonable and just, together with pre-judgment and post-judgment interest, as provided by law, and costs of court;

E. Real Ale recover its reasonable attorneys’ fees;

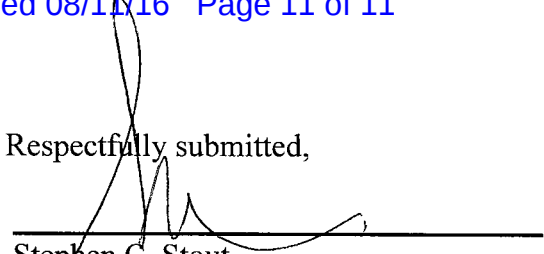
F. Real Ale recover such other relief as this Court may deem appropriate.

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38, Real Ale demands a jury trial on all issues triable of right by a jury.

Dated: August 11, 2016

Respectfully submitted,



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