

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

BIG STORM BREWERY LLC,

Plaintiff,

v.

DUE SOUTH BREWING CO. INC.,

Defendant.

CASE NO.:

**COMPLAINT FOR
DECLARATORY JUDGMENT,
INJUNCTIVE RELIEF SOUGHT**

Plaintiff Big Storm Brewery LLC (“Big Storm” or “Plaintiff”), by its undersigned counsel, for its complaint against Defendant Due South Brewing Co. Inc. (“Due South” or “Defendant”) alleges as follows:

NATURE OF THE ACTION

1. This case arises out of Defendant’s claim that it owns the exclusive right, at least in Florida, to use the Saffir-Simpson Hurricane Wind Scale categories to describe the strength (or alcohol by volume content) of craft beers.

2. Despite its lack of any federal or state registrations for the designation “Category”; despite the lack of any evidence that the term “Category” when used in connection with craft beers is associated exclusively with Defendant; despite the fact that Defendant did not create and has no ownership interest in the wind category designations; despite the fact that Big Storm began its use of “Category” to describe its Belgian beers in February 2016 without objection by Defendant; and despite the fact that Big Storm uses the “Category” designation solely to describe the strength of its Belgian beers, Defendant, after Big Storm had launched four separate Belgian beers and began using “Category 1” through “Category 4” to describe the increasing strength of the beers, demanded that Big Storm cease use of “Category 3” and “Category 4.”

3. Specifically, on July 15, 2016, Defendant sent Big Storm a cease and desist letter claiming that Big Storm's use of the "Category 3" and "Category 4" designations constituted trademark infringement and dilution of Defendant's purported "common law trademark rights" in the phrases "Category 3" and "Category 4" for beer. The letter states that in order for Big Storm to "avoid legal action," it must "immediately cease and desist from any and all . . . use of the 'Category 3' and 'Category 4'" designations. A copy of the cease and desist letter is attached as **Exhibit A**.

4. In light of the unqualified threat and demand made by Defendant, there is a substantial controversy between the parties, who have adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. Accordingly, Big Storm seeks a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, that (i) its use of the "Category" designations from the Saffir-Simpson Hurricane Wind Scale to describe the strength of its beers constitutes trademark fair use under Section 33(b)(4) of the Lanham Act, 15 U.S.C. § 1115(b)(4); (ii) there is no likelihood of confusion arising from Big Storm's use of the "Category" designations in connection with its beers; (iii) Big Storm's use of the "Category" designations does not dilute any rights Defendant may have in the phrases "Category 3" and "Category 4;" (iv) Big Storm has not violated any purported rights of Defendant, including under Florida law; and (v) Big Storm has not engaged in any acts of unfair competition with Defendant.

PARTIES

5. Plaintiff Big Storm Brewery LLC is a Florida limited liability company with its principal place of business at 4912 Creekside Drive, Clearwater, Florida 33760.

6. Upon information and belief, Defendant Due South Brewing Co. Inc. is a Florida corporation with its principal place of business at 2900 High Ridge Road, Suite #3, Boynton Beach, Florida 33426.

JURISDICTION AND VENUE

7. This Court has jurisdiction under 28 U.S.C. § 2201 to declare the rights of any party seeking a declaration and under Section 39 of The Lanham Act, 15 U.S.C. § 1121, because this action arises from Defendant's unmeritorious claims that Big Storm's use of the "Category" designations infringes and/or dilutes Defendant's purported rights. The Court also has jurisdiction under 28 U.S.C. §§ 1331 and 1338(a).

8. The Court has personal jurisdiction over Defendant under Fla. Stat. § 48.193(1) because (i) Defendant resides in this State and/or is operating, conducting, engaging in, and carrying on a business in this State and (ii) the events giving rise to this Complaint occurred in this State and/or had effects in this State.

9. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) in that a substantial part of the events giving rise to the claims occurred in this District.

FACTS GIVING RISE TO THIS ACTION

A. Big Storm

10. Founded in 2012, Big Storm is a Florida-based craft beer manufacturer that caters to craft beer enthusiasts and regular beer drinkers alike.

11. Big Storm makes a wide variety of beers, including its well-known signature brands Arcus IPA, Wavemaker Amber Ale, Helicity Pilsner, and Oats In Hose Oatmeal Stout. Big Storm uses locally-sourced ingredients to create beers with a subtle sweetness and clean finish that have earned a reputation for being exceptionally drinkable. Big Storm's beers have

received recognition in the Florida Beer Championship, including awards in 2016 for best in show, as well as the receipt of gold, silver and bronze awards each year since 2013.

12. Big Storm products currently are available throughout Florida and are found in a wide range of locations including grocery stores, liquor stores, mini marts, bars and restaurants.

B. Big Storm's 2016 Belgian-Style Hurricane Series of Beer

13. In February 2016, Big Storm launched its new Belgian Single beer. Given Big Storm's location in Florida and Florida's location in the hurricane corridor, Big Storm adopted the Saffir-Simpson Hurricane Wind Scale categories, developed in 1971 to describe wind strength, to describe the strength of its Belgian beers. In the case of the Belgian Single, Big Storm used the designation "Category 1" to identify the strength—*i.e.*, a low ABV (alcohol by volume) of 6.0. The "Category 1" designation corresponds to the "Single" designation. Big Storm's Belgian Single received a silver medal in 2016 in the Florida Beer Championship.

14. The launch of Belgian Single was closely followed by Big Storm's launch of Belgian Dubbel in March 2016, whose ABV of 6.6 is higher than its Belgian Single. To describe the increased strength, Big Storm uses the term "Category 2." The Category 2 designation corresponds to the "Dubbel" designation.

15. Following the introduction by Big Storm of the Belgian Single and Belgian Dubbel beers, Due South did not raise any objection to or suggest that Big Storm could not use "Category" designations generally or "Category" designations other than "Category 1" and "Category 2" to describe the strength of the beer.

16. Big Storm continued with the development of its hurricane series of Belgian beers introducing its Belgian Tripel beer (with an ABV of 9.2) on May 18, 2016 and its Belgian Quadrupel beer (with an ABV of 10.6) on June 17, 2016. The strengths of those products were described, respectively, as "Category 3" corresponding to the term "Tripel" and "Category 4"

corresponding to the term “Quadrupel.” This use was a continuation of Big Storm’s prior and unobjected to use of the “Category” designations.

17. Mirroring the five categories of the Saffir-Simpson Hurricane Wind Scale, Big Storm plans to launch the fifth and final beer in its hurricane series, “Belgian Quintupel,” later this Summer, and intends to describe its strength using the term “Category 5,” since it will have a higher ABV than the prior four Belgian beers.

18. Big Storm’s Belgian-style hurricane series of beer currently is sold only on tap and primarily in Big Storm’s two BIG STORM BREWING branded taprooms in Odessa and Clearwater, Florida. The Belgian-style series of beer currently is not sold in cans and Big Storm has no intention to provide the product other than on tap. Big Storm has begun to expand its distribution of its Belgian Single and Belgian Dubbel by selling kegs of the beer to its distributors and seeks to ensure that its current and future sales are free from objection by and interference from Defendant.

19. Big Storm uses the “Category” designations only as a ratings system to colorfully describe the strength of Big Storm’s Belgian-style beer in terms that most Floridians—familiar with hurricane season and the Saffir-Simpson Hurricane Wind Scale—can appreciate. Further, the “Category” references mirror the actual names of the products: Belgian Single (Category 1), Belgian Dubbell (Category 2), Belgian Tripel (Category 3), Belgian Quadrupel (Category 4), and Belgian Quintupel (Category 5). The “Category” designations are not being used as trademarks to identify Big Storm as the source of the beer and Big Storm has never asserted or claimed trademark rights in any “Category” designation.

20. Big Storm is not the only brewer to use “Category” designations to describe its beer strength. By way of example only, Zea Rotisserie & Brewery offers “Category 5 Ale;” Anheuser Busch offers “Hurricane Category 5” malt liquor; and Holy City Brewery offers

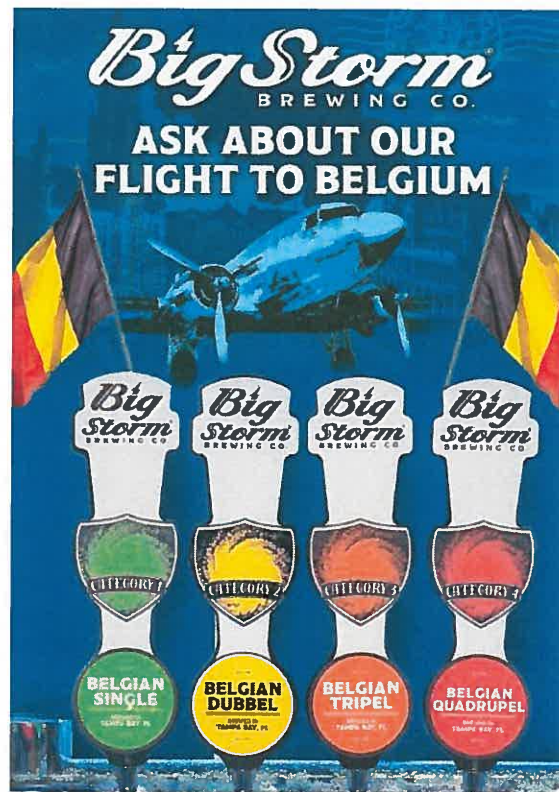
“Category 2 IPA” and “Category 3 IPA.” Such use demonstrates that “Category” functions as a ratings designation, not as a symbol or designation of source. Upon information and belief, Defendant has knowledge of some or all of these third-party uses, and has never demanded that anyone other than Big Storm cease use.

21. That the reference to Category 1 through Category 5 by Big Storm is not intended to be and is not trademark usage is evidenced by the fact that Big Storm never uses the “Category” rating alone on any materials. Rather, whenever these strength ratings are used they are used together with Big Storm’s well-known and federally-registered trademark BIG STORM, which is always more prominently displayed, its long-used shield design, and the name or type of the product. Below are representative examples of how Big Storm uses the “Category” designation.

Tap Handles



Print Ad



22. Big Storm has used the imagery shown above or similar imagery on its tap handles, in print advertising, and in social media. In all cases the source of the beer being promoted, Big Storm, is prominently displayed.

23. As a result of the fact that Big Storm is not using the “Category” designation as a trademark and that it always uses its well-known BIG STORM house mark whenever it uses the term “Category,” an appreciable number of ordinarily prudent consumers are not likely to be confused as to the source or sponsorship of Big Storm’s products or to believe they are associated with Due South due to the common use of the same ratings system.

C. Defendant Due South’s Beer and Threat of Legal Action

24. Defendant Due South is a Florida-based craft beer maker whose products, upon information and belief, are sold primarily on the East Coast of Florida.

25. Due South has been coexisting with the BIG STORM brand of beers for years without any confusion and each of DUE SOUTH and BIG STORM have created their own goodwill and commercial impression in their respective house marks.

26. Due South offers an India Pale Ale that it calls “Category 3 IPA” to describe the strength of the beer which has an ABV of 6.1.

27. Due South offers an Red India Pale Ale that it calls “Category 4 IPA” to describe the stronger strength of this beer which has an ABV of 7.7.

28. Due South offers an Imperial India Pale Ale that it calls “Category 5 IPA” to describe the even stronger alcohol content of this beer, which has an ABV of 8.5, and is described by Due South as the “most powerful” in Due South’s IPA series.

29. Upon information and belief, Due South’s IPA series currently is only sold on the East Coast of Florida. However, upon information and belief, Due South intends to expand distribution to the West Coast, and specifically to the area between Tampa and Fort Myers where

Big Storm's use of the "Category" designation generally and its use of "Category 3" and "Category 4" pre-dates Defendant's use in this territory.

30. Due South's use of the designation "Category" is taken from the Saffir-Simpson Hurricane Wind Scale, which Due South did not create and to which it can claim no proprietary rights.

31. Due South uses the "Category" designation to describe the strength of its beers and to identify the relative ABV of its beers.

32. Upon information and belief, Due South adopted the reference to "Category" because consumers in Florida are familiar with the use of "Category" to describe or characterize strength and to play on the recognition of the hurricane ratings. In fact, Due South has promoted the launch of some of its beers described using the "Category" designation by advertising a "Hurricane Preparedness Week," and holding a "Hurricane Party."

33. Due South does not use "Category 3," "Category 4," or "Category 5" alone on its beer or on its marketing materials. Rather, upon information and belief, these terms are always presented with the prominently displayed DUE SOUTH house mark, Due South's compass logo, and various color blocking and linear graphics on its cans, as shown below:



34. Due South does not own any federal or state trademark registrations for the terms "Category 3," "Category 4," or "Category 5," or any other mark that includes in whole or in part "Category."

35. Five months after Big Storm began using the “Category” rankings, Due South’s counsel, on July 15, 2016, sent a cease and desist letter to Big Storm demanding that Big Storm immediately cease using “Category 3” and “Category 4” to describe the strength of its Belgian-style beers. See Exhibit A. The letter did not object to Big Storm’s other “Category” ratings.

36. In its letter, Due South claims “common law trademark rights” in these specific ratings designations, but fails to set forth any facts to support its legal claim that these ratings designations, when used to describe the ABV of beer, were associated exclusively with Due South at the time of Big Storm’s adoption of the “Category” ratings scale.

37. The letter accuses Big Storm of trademark infringement and dilution and explicitly threatens to take “legal action” unless Big Storm “immediately ceases and desists from any all . . . use of the ‘Category 3’ and ‘Category 4’” designations. The letter includes a form for Big Storm to sign agreeing to immediately cease and desist from any and all further use of the “Category 3” and “Category 4” designations.

38. In addition to making its legal threats directly to Big Storm, upon information and belief, Due South also made its threats public by going to the local press. An August 1, 2016 article in the *Broward Palm Beach New Times* reported that Due South’s owner “hasn’t entirely ruled out litigation . . . even if the disputed [Big Storm] labels are fair use.” See Exhibit B. Due South’s owner is quoted in this article as saying he might pursue litigation notwithstanding Big Storm’s fair use defense because “[j]ust because you are allowed to do something, it doesn’t make it right.” This news story—which was the direct result of Due South’s unmeritorious demand letter—has led some people to advocate on social media that consumers should “quit buying Big Storm Brewing Co. beer.” See Exhibit C.

39. Due South’s threats came after Big Storm had spent substantial sums to advertise and promote its Belgian beers.

40. As a result of Due South's legal threats and claims of infringement and dilution, and its continuing acrimonious statements in the press about Big Storm, Big Storm has been put in the untenable position of not knowing if or when Due South may sue or take other action against Big Storm or otherwise interfere with Big Storm's selling, advertising, and promotion of its hurricane series of Belgian beers. Due South's threats and public statements cast a cloud over Big Storm's business and harm Big Storm's business in the eyes of consumers.

41. Furthermore, upon information and belief, in order to help its expansion into Big Storm's geographic area, Due South is likely to continue to threaten Big Storm in order to unfairly compete with and gain an advantage over Big Storm.

42. In order to resolve this situation, Big Storm now brings this action for a declaratory judgment to establish that: (i) its use of the "Category" designations from the Saffir-Simpson Hurricane Wind Scale in connection with describing the strength of its beers constitutes trademark fair use under Section 33(b)(4) of the Lanham Act, 15 U.S.C. § 1115(b)(4); (ii) there is no likelihood of confusion as to the source, sponsorship or affiliation of Big Storm's series of Belgian beer arising from Big Storm's use of the "Category" designations to describe its beers; (iii) Big Storm's use of the "Category" designations to describe its beers does not dilute any purported rights Defendant may have in the phrases "Category 3" and "Category 4;" (iv) Big Storm's use of "Category" has not violated any purported rights of Defendant, including under Florida law; and (v) by using the designation "Category" Big Storm has not engaged in any acts of unfair competition with Defendant.

COUNT I
CLAIM FOR DECLARATORY JUDGMENT OF TRADEMARK FAIR USE

43. Plaintiff realleges and incorporates by reference each of the allegations set forth in paragraphs 1 through 42 as if fully set forth herein.

44. Big Storm's use of the "Category" designation is to fairly and in good faith describe and identify the strength of Big Storm's Belgian-style beer in terms that Floridians can appreciate.

45. Big Storm's fair use of the designation is further shown by (i) the fact that third parties use the same designations to identify the strength of their product, (ii) Big Storm's lack of any claim of trademark ownership in any "Category" designation, (iii) Big Storm's use of its well-known and federally-registered house mark BIG STORM on all materials that include the "Category" designation, (iv) Big Storm's inconsistent use of the term (including the fact that it does not even appear on tap room menus); and (v) Big Storm's inclusion of the identification of the type of beer and the product name (*e.g.*, BELGIAN TRIPEL) on the product.

46. Because Big Storm is using the "Category" designation in a non-trademark way and in good faith to describe its products, Big Storm is entitled to a declaration that such use is protected as fair use pursuant to Section 33(b)(4) of the Lanham Act, 15 U.S.C. § 1115(b)(4), and that as a result the use does not violate any rights of Due South.

COUNT II
CLAIM FOR DECLARATORY JUDGMENT OF NON-INFRINGEMENT

47. Big Storm realleges and incorporates by reference each of the allegations set forth in paragraphs 1 through 42 as if fully set forth herein.

48. Due South owns no registrations for the marks CATEGORY 3 or CATEGORY 4, but rather claims to own "common law rights" in these phrases. Upon information and belief, and assuming for purposes of this Complaint only and without waiver of any defenses of Big Storm that Due South could establish that it had acquired "common law rights" in CATEGORY 3 and CATEGORY 4 prior to Big Storm's use of the "Category" designation, any such rights are extremely weak.

49. Due South did not create the “Category” designations it claims to own, the designations are inherently weak as they function as a ratings system to measure strength, Due South is using the designations to describe the strength of its beers, and the designations are used by third parties for the same purpose that they are used by Due South.

50. All of Big Storm’s use of the “Category” designations are in connection with the well-known and federally-registered trademark BIG STORM, Plaintiff’s shield logo, and the identification of the type of beer, *e.g.*, BELGIAN TRIPEL and BELGIAN QUADRUPEL. None of these marks, words or designs are used by Due South.

51. Big Storm has taken no action to associate itself or its products with Due South or its products.

52. Due South uses on its packaging for beers sold under the “Category” designation its DUE SOUTH house mark, its compass logo, and various color blocking and linear graphics. Big Storm does not use any of these elements.

53. The context in which Big Storm uses the “Category” designation is dissimilar to the context in which Due South uses the term.

54. Plaintiff and Defendant each prominently display its respective house mark – BIG STORM and DUE SOUTH – on all material that bear the term “Category”. These house marks have coexisted in the same geographic area for years without confusion and serve to distinguish the parties’ goods and to identify the source of the parties’ goods.

55. The Parties are not using the “Category” designation for the same types of beer.

56. Big Storm is aware of no actual confusion caused by its use of the “Category” designations.

57. Big Storm's use of the "Category" designations in connection with its beer has not caused, and is not likely to cause, confusion, mistake or deception as to the source, origin, sponsorship or approval of Big Storm's products.

58. Big Storm's use of the "Category" designations in connection with its beer does not violate any rights of Due South, including any rights under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), under Fla. Stat. § 495.131, or under Florida's common law of infringement or unfair competition.

59. Big Storm is entitled to a declaration that its use of the "Category" designations in connection with its beer is not likely to create confusion in the marketplace with Due South's beer and that Big Storm has not violated Section 43(a) of The Lanham Act, 15 U.S.C. § 1125(a), or applicable Florida state law, and has not through its use of "Category" engaged in any acts that would constitute unfair business practices or unfair competition under applicable law.

COUNT III
CLAIM FOR DECLARATORY JUDGMENT OF NO DILUTION

60. Big Storm realleges and incorporates by reference each of the allegations set forth in paragraphs 1 through 42 as if fully set forth herein.

61. In its demand letter, Due South asserts that Big Storm is liable for trademark dilution, though it is not clear whether it makes such a claim under Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c), under the Florida dilution statute, Fla. Stat. § 495.151, or both.

62. Under both Section 43(c) of the Lanham Act and the Florida dilution statute, in order for there to be dilution, the claimant's alleged trademark must be "famous." To be "famous" in the context of a trademark dilution claim, the mark must have a degree of distinctiveness and strength beyond that needed to serve as a trademark, it must be truly prominent and renowned, *e.g.*, BUDWEISER beer, CAMEL cigarettes, BARBIE dolls.

63. Due South's alleged CATEGORY 3 and CATEGORY 4 marks are not famous under the federal and Florida dilution statutes.

64. Big Storm is entitled to a declaration that its use of the "Category" designations in connection with its beer is not diluting and is not likely to dilute any trademark rights Due South may own in CATEGORY 3 or CATEGORY 4 and that Big Storm has not violated Section 43(c) of The Lanham Act, 15 U.S.C. § 1125(c), or Florida Statute § 495.151.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Big Storm requests that this Court enter judgment against Defendant Due South and in favor of Big Storm on its claims as follows:

(a) declaring that Big Storm, in the promotion and sale of its Belgian-style beer featuring the "Category" designations, has not infringed on any rights, including any trademark-related rights, of Due South and that Big Storm has the lawful right to use "Category" designations on or in connection with its products, and to advertise and promote the same with the "Category" designations;

(b) declaring that (i) Big Storm's use of the "Category" designations from the Saffir-Simpson Hurricane Wind Scale in connection with beer constitutes trademark fair use under Section 33(b)(4) of the Lanham Act, 15 U.S.C. § 1115(b)(4); (ii) there is no likelihood of confusion arising from Big Storm's use of the "Category" designations in connection with its beers; (iii) Big Storm's use of the "Category" designations does not dilute any rights Due South may have in the phrases "Category 3" and "Category 4;" (iv) Big Storm has not violated any purported rights of Due South, including under Florida law by its use of the designation

“Category” to describe its beer; and (v) Big Storm has not engaged in any acts of unfair competition with Due South by its use of the designation “Category” to describe its beer;

(c) permanently enjoining Due South from asserting claims or filing actions against Big Storm arising out of Big Storm’s use of the “Category” designations to describe the strength of its beer, or interfering in any way with Big Storm’s use of the “Category” designations on beer;

(d) awarding Big Storm any and all damages sustained by it as a result of Due South’s threats of legal action and any other interference by Due South with Big Storm’s business activities; and

(e) awarding Big Storm its costs in this action, including attorneys’ fees, together with such other and further relief as the Court may deem just and proper.

Dated: August 22, 2016

BAJO CUVA COHEN TURKEL P.A.

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JS 44 (Rev. 11/15)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Big Storm Brewery LLC

DEFENDANTS

Due South Brewing Co. Inc.

(b) County of Residence of First Listed Plaintiff
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys (Firm Name, Address, and Telephone Number)

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|-----------------------------------------|----------------------------|----------------------------|---------------------------------------------------------------|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input checked="" type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 550 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. 2201, 28 U.S.C. 1331 and 1338, 15 U.S.C. 1115 and 1121

Brief description of cause:

Declaratory relief regarding alleged trademark infringement

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$ Declaratory & Injunctive Relief

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

08/22/2016

SIGNATURE OF ATTORNEY OF RECORD

Bl B

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

EXHIBIT A

R. MAX LOHMAN*^
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* Board Certified Specialist – City, County, and Local Government Law
^ Admitted to practice in United States Tax Court

VIA FEDERAL EXPRESS

July 15, 2016

Mr. Leo J. Govoni
President
Big Storm Brewing Co.
4912 Creekside Drive
Clearwater, Florida 33760

Re: Infringement and/or Dilution of Trademark Rights of DUE SOUTH BREWING CO., INC.

Dear Mr. Govoni:

This law firm represents Due South Brewing Co, Inc. (hereinafter “Due South”) in connection with its intellectual property rights. Your use of “Category 3” and “Category 4” is a violation of Due South’s common law trademark rights, common law service mark rights, and trade name rights, and this letter constitutes Due South’s demand that you cease and desist any and all use of the “Category 3” and “Category 4” names. You should immediately forward this letter to your attorney.

Due South is a privately owned brewery offering premium craft beer to consumers in the Palm Beach County and South Florida areas, throughout Florida, Pennsylvania, and internationally in Spain. Due South was registered as a Florida corporation in April 2012 and has continually used both “Category 3” and “Category 4” (the “Marks”) throughout Florida as one of its brand names since that time. Since its incorporation, Due South has continually used the Marks in advertising campaigns and in the community, including through its website at www.duesouthales.com which Due South registered on or about March 2012. In addition, Due South has been actively involved in the community in its efforts to further promote its brand including its sponsorship of numerous events. As a result of these efforts, Due South’s customers, and the general public, have come to recognize Due South as a well-established and successful craft brewery.

Recently, Due South became aware of your use of the “Category 3” and “Category 4” names, in conjunction with your new “Belgian Tripel” and “Belgian Quadrupel” beers respectively.

Due South appropriated its common law exclusive right to the Marks by its actual prior and continuous use in commerce. Under both Federal law and Florida state law, common law trademark infringement occurs when a party utilizes a trade or service mark that creates a likelihood of consumer confusion. Common law trademark dilution occurs when a party’s unauthorized use of a distinctive mark

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diminishes consumer goodwill by competitors or non-competitors. As you are undoubtedly aware, the names you are using for your beers are exactly the same as Due South's Marks.

Due South appropriated its common law exclusive right to the Marks by its actual prior and continuous use in commerce.¹ Under both Federal law and Florida state law, common law trademark infringement occurs when a party utilizes a trade or service mark that creates a likelihood of consumer confusion. Common law trademark dilution occurs when a party's unauthorized use of a distinctive mark diminishes consumer goodwill by competitors or non-competitors. As you are undoubtedly aware, the names you are using for your beers are exactly the same as Due South's Marks.

Because of your use of "Category 3" and "Category 4", Due South has already witnessed actual confusion in the market. Since you debuted your "Hurricane Series" on or about July 12, 2016, Due South has received numerous telephone calls from consumers and other individuals in the craft beer industry questioning your use of Due South's Marks and whether your beers' names are connected or related to Due South's Marks.

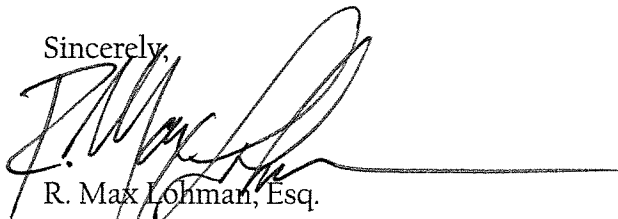
In less than one week, Due South has received over thirty (30) reports of actual consumer confusion and/or diminution of consumer goodwill. This presumably represents a small portion of consumers who are confused but never take the time to find another way to contact Due South and report the confusion caused by your use of these beer names.

Due South has several options under Florida law to enforce its legal rights in the Marks. If Due South were to file a lawsuit against you, it would be entitled to seek: (1) preliminary and permanent injunctions; (2) actual monetary damages; (3) disgorging of any profits you have realized through your use of the Marks; (4) reimbursement of attorney's fees required to prosecute a lawsuit against you; and (5) monetary damages for damage to Due South's goodwill in the market.

Please be advised that Due South will undertake all appropriate steps to protect its Marks and its associated goodwill. You can avoid legal action by immediately ceasing and desisting from any and all infringing activity including use of the "Category 3" and "Category 4". You must cease and desist all promotion and/or marketing of "Category 3" and "Category 4". You are hereby put on notice that Due South and I will be monitoring your illegal use of these Marks. Additionally, you must execute a copy of this letter and send it to this firm within ten (10) days of the receipt of this letter. I recommend you consult with an attorney before taking any action.

If you or your attorney have any questions, please feel free to contact me.

Sincerely,



R. Max Lohman, Esq.

cc: Client

¹ See *United States v. Steffens*, 100 U.S. 82, 25 L. Ed. 550 (1879); *J. McCarthy, Trademarks and Unfair Competition* Sec. 16:1, at 720 (2d Ed.1984); *Junior Food Stores of W. Fla. v. Junior Food Stores, Inc.*, 226 So. 2d 393, 396 (Fla.1969)

I, Leo J. Govoni, personally and on behalf of Big Storm Brewing Co., agree to immediately cease and desist from any and all further use of "Category 3" and "Category 4". In the event this agreement is breached by me or Big Storm Brewing Co., Due South Brewing Co., Inc. shall be entitled to costs, attorney's fees, and collection costs related to any claims and/or action brought to enforce this agreement and shall be free to pursue all rights it had as of the date of this letter as if this letter had never been signed. I certify that I have the authority to enter into this agreement on behalf of Big Storm Brewing Co.

By: _____ Dated: _____
Leo J. Govoni, President

Both individually and on behalf of Big Storm Brewing Co.

EXHIBIT B



Big Storm Brewing to Due South: Other Breweries Use "Category" in Their Beer Labels Too

BY DAVID MINSKY

MONDAY, AUGUST 1, 2016 AT 11:07 A.M.



Big Storm Brewing CEO Jonathan Golden contends the use of the word "category" in his beer labels is fair use.

Photo by Doug Fairall

On July 15, [Due South Brewing Company](#) in Boynton Beach sent a [cease-and-desist letter](#) alleging trademark infringement for Tampa-area [Big Storm Brewing's](#) use of the name "category" in a series of its beers. But Big Storm CEO Jonathan Golden disagrees because he says the term is [fair use](#) and taken from the Saffir-Simpson Hurricane Wind Scale – a system used by the federal government to [rate the strength of hurricanes](#).

Not only that, Golden adds, but the beers are different. Big Storm's are Belgian and seasonal, as opposed to Due South's flagships of Category 3-5 IPA.

"There's a point where the beers are distinguishable," Golden told the *New Times*. "The overreaching idea is that no one owns these names."

Additionally, Big Storm is not the only brewery to use the "category" label, as indicated in [its July 22 letter](#) responding to Due South's claim.

At least two other breweries in different states use the Saffir-Simpson term for their beers. Heavy Seas Brewery in Maryland makes a seasonal [Winter Storm Category 5 Ale](#), and [Holy City Brewing](#) in Charleston brews a Category 3 and 4 IPA – the latter of which bears a striking resemblance to Due South's line of IPAs.

But that's not the point, Due South owner Mike Halker says. He claims what it's really about is distribution. Halker says he's called the other breweries and worked it out with them. He describes as a "simple" conversation with Holy City, which hails from his home state of South Carolina.

"If someone is using, let's say, the Category 5 name in Maryland, we don't distribute to Maryland, so it's not a big deal to us," Halker says.

Currently, Due South's beer isn't distributed in all parts of Florida. Halker, however, says he has plans to begin distribution to the section of the coast between Tampa and Fort Myers soon and doesn't want anyone confusing Due South's beers with Big Storm's.

Golden insists the risk of such confusion is low. The name came about when Big Storm developed a seasonal series of five Belgian brews. Golden thought it'd be fitting to add all five hurricane ratings to their labels. The series is mostly confined to his brewery's taproom, he says, except for the Belgian Single Category 1, which has made it into a grand total of three accounts.

In the taproom, the beers are typically referred as simple "Belgians," Golden says, and adds that the "category" word is barely visible.

After spending 30 years as an attorney in the cutthroat world of corporate law, Golden says he has developed a "very healthy respect" for craft breweries and enjoys being a part of the brotherhood of brewers. However, he also believes Halker is picking a fight with Big Storm and was hoping to not put his "lawyer hat" on.

"There is some excellent camaraderie," Golden says, "but when it come to the word 'business,' I expect everyone to protect their intellectual property."

Still, Golden insists in this case, fair use applies.

Halker hasn't entirely ruled out litigation. Even if the disputed labels are fair use, as Golden contends, Halker believes "common sense" should prevail.

Case 8:16-cv-02405-SDM-TGW Document 1-3 Filed 08/22/16 Page 4 of 4 PageID 25
"Just because you're allowed to, it doesn't make it right," Halker says.

If there's one thing both brewers agree on, it's to continue making the beers their fans enjoy. For now, it's simply a battle of words.

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EXHIBIT C



DO YOU KNOW JOHN?

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Intro

- Works at Elite Events Catering, Inc.
- Founder and Editor-in-Chief at Tampa Bay Breweries .com
- Lives in Tampa, Florida

Photos



Friends · 264



John Meyer shared Beer in Florida's post.

July 28 at 12:28pm ·

Can we all please, pretty please quit buying Big Storm Brewing Co. beer? They're an equity corporation that simply wants to take your money and they will ^{REDACTED} over anyone they can to do it.



Beer in Florida

July 28 at 11:54am ·

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Trademark dispute between two Florida breweries.
<http://www.browardpalmbeach.com/.../due-south-brewing-in-trad...>



Due South Brewing in Trademark Dispute with Tampa's Big Storm Brewing

There's a storm brewing between two Florida breweries in a trademark dispute. Mike Halker, owner of Due South Brewing in Boynton Beach, has asked Big Storm...

BROWARDPALMBEACH.COM | BY DAVID MINSKY