

FILED

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION

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U.S. DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS, FLORIDA

RIB CITY GROUP, INC.

Plaintiff,

v.

CASE NO. 2:09-CV-827-FEM-36 SPC

RCC REST. CORP.,  
D/B/A RIB CITY  
ALE HOUSE, and FRANCIS W.  
RYAN A/K/A FRANK RYAN

Defendants

\_\_\_\_\_ /

COMPLAINT  
(And Jury Demand)

NATURE AND BASIS OF ACTION

1. This is an action by Rib City Group, Inc. ("Rib City") against RCC Restaurant Corp. d/b/a Rib City Ale House ("RCC") and Francis W. Ryan a/k/a Frank Ryan ("Ryan") for trademark infringement, unfair competition, trademark dilution, cyber-piracy, misappropriation of trade secrets, and breach of contract. Rib City seeks injunctive relief and damages for trademark infringement under Section 32 of the Trademark Act of 1946, as amended, 15 U.S.C. §1114 ("the Lanham Act"), for unfair competition under Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a), for infringement of a famous mark under Section 43(c) of the Lanham Act, 15 U.S.C. §1125(c), for forfeiture, cancellation or transfer of a domain name confusingly similar to or dilutive of a famous mark under the Anti-

Cybersquatting Consumer Protection Act, 15 U.S.C. §1125(d), for misappropriation of trade secrets under Florida Statute 688.001 et. seq. and for common law breach of contract.

### PARTIES

2. Rib City Group is a Florida corporation with a principal place of business in Fort Myers, Florida.

3. RCC is a New York business corporation with a principal place of business at 650 Route 112, Port Jefferson Station, Suffolk County, New York.

4. Ryan is a resident of Long Island, New York. On information and belief, he serves as President of RCC and is a director and shareholder.

### JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action pursuant to 15 U.S.C. §1121, and 28 U.S.C. §1331, as this case arises under the Lanham Act, 15 U.S.C. §§ 1114, 1125(a) and (c). Venue is proper in this judicial district pursuant to 28 U.S.C. §1391.

### FACTUAL ALLEGATIONS

#### Rib City Corporate and Trademark History

6. In 1989, a small family-style barbeque restaurant, Rib City Grill was opened in Fort Myers, Florida. The operation was bought by current owners, Paul and Craig Peden in 1995 and in 1998, Rib City Group, Inc. was formed. Since that time, Rib City Group and its affiliated corporations have opened twelve (12) additional restaurants in south Florida.

7. In 2004, Rib City Franchising, LLC entered into a trademark licensing agreement with Rib City Group and began offering Rib City Grill franchises on a national basis. Since that time, Rib City Franchising has experienced steady growth both in the

number of franchise restaurants and national market penetration and by 2008; the total number of franchise locations operating under the Rib City family of marks was twenty-five (25) in eight (8) states throughout the nation.

8. On January 1, 2002, November 25, 2008, and December 9, 2008, the United States Patent and Trademark Office formally issued to Rib City Group registrations for the word and composite marks “Rib City,” “Rib City Grill,” “Rib City Barbeque,” and “Rib City Real BBQ & Great Ribs” in connection with restaurant services in international trademark class 43 (“Rib City family of marks”). True and correct copies of registration information concerning the Rib City family of marks from the USPTO’s website are attached collectively as **Exhibit A**.

9. Rib City, affiliated restaurants, Rib City Franchising, and its franchisees have engaged in substantially exclusive and continuous use of the Rib City Grill and related word and composite marks (“Rib City family of marks”) for restaurant services since 1989.

10. Throughout their history, Rib City, its affiliated restaurants, Rib City Franchising and its franchisees, have actively conducted advertising and promotional activities designed to enhance and promote their restaurants, the Rib City family of marks, and, more recently, the Rib City Grill franchise opportunity. For instance, many of the Rib City Grill locations have their own websites and advertise on various third-party websites.

11. Rib City and its affiliated corporations have registered or protected related internet domain names using the Rib City family of marks, including but not limited to “ribcity.com”, “ribcitygrill.com”, and “ribcitybarbeque.com.”

Initial Wrongdoing by Defendants

12. In November 2006, Ryan was hired as general manager of the East Naples Rib City Grill restaurant in Florida. As general manager, Ryan was afforded access to Rib City's trade secrets, operation manuals, recipes, food preparation techniques, management methods, restaurant layout and design, and marketing information, including but not limited to a proprietary sales management tool used to manage overhead (collectively "confidential information").

13. In April 2007, Ryan resigned as general manager after a female employee alleged that he had created a hostile work environment and/or allowed it to continue.

14. On June 29, 2007, Ryan entered into a separation agreement with East Naples Rib City Grill and its affiliated companies under common control, including Rib City Group, a true and correct copy of which is attached as **Exhibit B** ("separation agreement"). Among other things, Ryan acknowledged in the separation agreement to having received confidential information and agreed not to disclose, utilize, or publish any of such information for a period of ten (10) years from the date of separation.

15. On or about August 5, 2008, according to the New York Department of State Division of Corporations website, RCC was formed as a domestic business corporation with a principal place of business at 650 Route 112, Port Jefferson Station, New York.

16. On November 18, 2008, RCC, or its agent, registered the domain name "Rib City Ale House" with Network Solutions, and at a subsequent date unknown launched a website at that domain name which not only incorporated into its logo and branding all of the material features of the Rib City composite mark (Registration number 2,524,418), including

a smiling pig and the silhouette of a city skyline at night, but also displayed a menu including numerous individual menu items with names and, in some cases, descriptions identical or nearly identical to those on the Rib City menu.

17. In January 2009, RCC opened Rib City Ale House (“Ale House”) at 650 Route 112, Port Jefferson, New York. The Ale House features the same southern style barbeque as Rib City, utilizes a logo and branding incorporating all of the material features of the Rib City composite mark – including the words “Rib City,” the smiling pig, and a silhouette of city skyline at night – and other non-functional aspects of the Rib City trade dress, including the color, font and designs utilized on its signs, awnings and menus. In addition, the Ale House menu features numerous items with names and descriptions either identical to or extremely similar to those on the Rib City menu, including “Three Cheese Fries”, “Buffalo Popcorn Shrimp”, “From the Fields” salads, and “Skyscraper” Sandwiches.

18. On information and belief, the Ale House and Ryan are employing confidential information obtained by Ryan during his employment at the East Naples Rib City Grill, including but not limited to recipes, food preparation techniques and cooking processes.

Rib City Demands Cessation of Trademark Infringement by RCC

19. In January 2009, an Ale House patron, believing the restaurant to be sponsored by or affiliated with Rib City, e-mailed the Rib City website to comment about a dining experience at the Ale House restaurant.

20. Alerted to the Ale House’s existence and its website, Rib City acted promptly to protect its trademark rights. In a letter dated January 27, 2009, Rib City’s attorney,

Lindsey Straus (“Ms. Straus”), demanded that Ale House cease and desist its infringement of the Rib City family of marks and trade dress. A true and correct copy of her January 27 letter is attached as **Exhibit C**.

21. Ale House responded through its attorney, Tamar Y. Durdevani (“Ms. Durdevani”) of the New York law firm of Nixon & Peabody, and began a lengthy email exchange with Ms. Straus which continued over a period of several months.

22. During the exchange, Ms. Duvdevani admitted to her client’s infringement but insisted such infringement was inadvertent and merely a coincidence and that Ale House did not act in bad faith when adopting the name “Rib City Ale House.” On June 29, 2009, Ms. Duvdevani wrote to Ms. Straus stating, “happy to say I do have substantial progress to report. My client has rebranded and selected a new name that does not contain ‘Rib City’. The menus are done and are just waiting to be rolled out with a new sign.” A true and correct copy of the June 29, 2009 e-mail is attached as **Exhibit D**.

**Willful Infringement of Rib City Marks Continues  
Unabated Despite Contrary Assurances**

23. Contrary to the representations of its counsel, RCC’s use of the Rib City family of marks and trade secrets continues unabated. *See Plaintiff’s Composite Exhibit 1.*

As of September 18, 2009:

- a. The large lighted sign over the Ale House’s front entrance still bears the name “Rib City Alehouse.” *See Exhibit 1 to Composite Exhibit 1;*
- b. A smaller sign directly over the front door still bears the name “Rib City Ale House” and the words “Rib City Alehouse” directly under a smiling pig. *Id.*

- c. The awnings over the front windows still bear the same Rib City Ale House/smiling pig logo. *Id.*
- d. The awnings over the windows facing the parking lot at the rear of the restaurant still bear the same Rib City Ale House/smiling pig logo. *Id.*;
- e. A large sign over two (2) doors to the restaurant bears the words “Rib City” to the left of a smiling pig and the words “Ale House” to the right, below which appears the silhouette of a city skyline at night. *Id.*;
- f. A sign on a pole near the street in front of the restaurant bears the name “Rib City Ale House” *Id.*;
- g. A banner sign on a pole near the street in front of the restaurant bears the name “Rib City Ale House” and a smiling pig. *See Exhibit 8 to Composite Exhibit 1;*
- h. A large street sign bears the Rib City/smiling pig/silhouette of city skyline logo. *Id.*;
- i. Interior signage still bears the name “Rib City Ale House” and a smiling pig. *See Exhibit 1 to Composite Exhibit 1;*
- j. Interior promotional materials still bear the words “Rib City Ale House” flanked by smiling pigs, below which appears the phrase “Our City, Your City.” *Id.*;
- k. A poster was promoting the appearance that night of a Beatles tribute band at “The Rib City Alehouse.” *Id.*;

- l. The printed dinner menu bears the Rib City Ale House/smiling pig/silhouette of night sky/“Our City, Your City” logo and includes a statement that “Investment Opportunities Available” and invites interested parties to visit the website at [www.ribcityalehouse.com](http://www.ribcityalehouse.com), which has not been completely taken down but is password protected. *See* Exhibit 2 to Composite Exhibit 1;
  - m. The printed luncheon menu bears the name “Rib City Ale House” against a red brick background. *See* Exhibit 3 to Composite Exhibit 1;
  - n. The take out menu bears the name “Rib City Ale House”, the phrase “Our City, Your City”, the smiling pig, and the Internet address [www.RibCityAleHouse.com](http://www.RibCityAleHouse.com). *See* Exhibit 4 to Composite Exhibit 1 ;
  - o. A flyer promoting the restaurant’s take out and catering services displays the “Rib City Ale House” name and the smiling pig. *See* Exhibit 5 to Composite Exhibit 1;
  - p. The restaurant is still offering a “Rib Rewards Card” in the name of “Rib City Ale House.” *Id.*;
  - q. Gift cards are still available for purchase displaying the Rib City Alehouse/smiling pig/silhouette of city night sky logo. *See* Exhibit 6 to Composite Exhibit 1;
  - r. Customer receipts print out under the name “Rib City Ale House.” *See* Exhibit 7 to Composite Exhibit 1.
24. RCC continues to engage in widespread advertising, both on the internet and through local direct mail, under the name “Rib City Ale House”:



- a. A visitor to [www.CouponClipper.com](http://www.CouponClipper.com) entering “restaurant” and the Ale House’s postal zip code (11776) is directed to a results page on which the Ale House is the first listed restaurant; clicking on the coupons or ad icon to the right of the Ale House name sends the user to a page containing the Ale House address and phone number, three printable coupons expiring 12/31/09 and two thumbnail photographs (which can be enlarged when clicked) of display ads using the Rib City Ale House/smiling pig/“Our City, Your City” logo. **Exhibit E.**
  - b. Ale House was the rear panel advertiser on Clipper Magazine, a 16 page direct mail magazine of advertisements and discount coupons for August and September, 2009. **Exhibit F.**
  - c. Ale House advertises on a website named Long Island Radio Specials ([www.LongIslandDeals.com](http://www.LongIslandDeals.com)) where it has posted an offer for two \$25.00 gift certificates for the price of one, an offer which expires 12/20/09. **Exhibit G.**
  - d. The Ale House advertises on a website named the “Restaurants Web” ([TheRestaurantsWeb.com](http://TheRestaurantsWeb.com)) where it is listed on the home page as a “featured steakhouse”. The site posts photos of the interior of the Ale House, its complete menu and location information. **Exhibit H.**
25. The first page of the results list for a Google™ search using the search term “Rib City Gift Certificates” includes links to both websites offering certificates for Rib City franchisees and one offering gift cards for the Ale House. **Exhibit I.**

26. Patrons of the Ale House have posted unfavorable reviews about the restaurant on the internet:

- a. Two extremely unfavorable reviews are posted on the website “Yelp.com” (www.yelp.com). The first review, dated May 2, 2009, severely criticized the Ale House for the crass conduct of its bar patrons and some of the food sampled, and posts photographs of the front of the Ale House identical to those taken of the restaurant on September 18, 2009. The second, dated June 17, 2009, states that she “would not let [her] worst enemy eat in this place, or any other human being,” says the Ale House is “terrible”, that the service was “horrendous,” and that the restaurant was engaged in racial discrimination. She concluded by advising potential patrons that they would be “better off going to ANY other restaurant in the vicinity.” **Exhibit J.**
- b. A review on the website “UrbanSpoon.com” dated May 29, 2009 said that the take-out meal was one of the worst the review had ever had, described the Ale House as “utter garbage” and recommended eating elsewhere because the food was so bad. A review dated April 29, 2009 praised the baby back ribs and pronounced everything else “forgettable”. **Exhibit K.**

COUNT I

(§32 OF THE LANHAM ACT)

27. Plaintiff incorporates and realleges, as if fully set forth in this paragraph, the allegations of the foregoing paragraphs.

28. RCC and Ryan have, without Plaintiff's consent, used in commerce a colorable imitation of the Rib City family of registered marks in connection with the sale, offering for sale, distribution, and/or advertising of goods or services likely to cause confusion, or to cause mistake, or to deceive in violation of Section 32(1)(a) of the Lanham Act, 15 U.S.C. §1114(1)(a).

29. The infringing acts committed by RCC and Ryan were committed with knowledge that such imitation was intended to be used to cause confusion, or to cause mistake or to deceive, and have caused, and, unless enjoined, will continue to cause damage to Plaintiff.

## COUNT II

### (§43(a) OF THE LANHAM ACT)

30. Plaintiff incorporates and realleges, as if fully set forth in this paragraph, the allegations of the foregoing paragraphs.

31. The Rib City marks, as more fully described above, are well established marks that serve to identify the goods and services sponsored, approved by, authorized by, associated with, or affiliated exclusively with Rib City.

32. As evidenced by the federal registrations and their long, continued and exclusive use, the Rib City family of marks has acquired distinctiveness and secondary meaning in connection with restaurant services, including sit-down service and take-out restaurant services provided by Rib City and its affiliated corporations and franchisees.

33. Prior to opening the Ale House, Defendants had actual and constructive knowledge of the use and ownership by Rib City of the Rib City family of marks and were aware of the advertising and promotional activities sponsored by Plaintiff.

34. Defendants, in connection with restaurant services almost identical to those offered by Rib City and its affiliates, have used and continue to use, and has expressed an intent to expand, their use of the Rib City family of marks in a manner which is likely to cause confusion, or cause mistake, or to deceive as to the affiliation, connection, or association of such defendants with Rib City, and to the origin, sponsorship, or approval of Defendants' goods, services, and/or commercial activities by Rib City.

35. The Defendants' use of the Rib City family of marks constitutes false designations of origin, false descriptions and false representations in interstate commerce in violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and have caused and will continue to cause irreparable harm to Plaintiff unless and until temporarily, preliminarily, and thereafter permanently enjoined by this Court. Plaintiff has no adequate remedy at law.

36. The Defendants' conduct represents a conscious and intentional effort to misappropriate the Rib City family of marks and non-functional trade dress for the purposes of injuring Rib City and its affiliates, and unjustly enriching Defendants at their expense.

### COUNT III

#### (SECTION 43(c) OF THE LANHAM ACT)

37. Plaintiff incorporates and realleges, as if fully set forth in this paragraph, the allegations of the foregoing paragraphs.

38. The Rib City family of marks are “famous” within the meaning of Section 43(c)(1) and (2) of the Lanham Act.

39. Rib City is the owner of the marks.

40. After the Rib City marks became famous, and after October 6, 2006, the Defendants commenced use of a mark in commerce that is likely to cause dilution by blurring by impairing the distinctiveness of such famous marks, lessening the capacity of such marks to identify and distinguish restaurant services offered by Rib City and its affiliates, and by creating an association arising from the similarity between Defendants’ marks and the Rib City family of marks that harms the reputation of such famous marks.

41. Defendants willfully intended to trade on the recognition of the Rib City marks and cause dilution of such famous marks.

#### COUNT IV

#### (SECTION 43(d) OF THE LANHAM ACT)

42. Plaintiff incorporates and realleges, as if fully set forth in this paragraph, the allegations of the foregoing paragraphs.

43. The Rib City family of marks are “famous” within the meaning of Section 43(c)(1) of the Lanham Act.

44. Rib City is the owner of the Rib City family of marks.

45. Rib City and its affiliates, have used and are using the Rib City family of marks for commercial purposes, including without limitation the Internet domain name “ribcity.com”.

46. On information and belief, the defendant RCC is the authorized licensee of the domain name registrant of the domain name “RibCityAlehouse.com”.

47. The domain name “RibCityAlehouse.com” was confusingly similar to the Rib City family of marks at the time of registration.

48. The Rib City family of marks was famous at the time the domain name “RibCityAlehouse.com” was registered.

49. Through their agent, the Defendants registered and have subsequently used the domain name “RibCityAlehouse.com” with a bad faith intent to profit from the confusingly similar famous marks owned by Rib City, without reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful, and with the intent to tarnish the Rib City marks by creating a likelihood of confusion as to the source, sponsorship, affiliation or endorsement of the site.

#### COUNT V

#### (FLORIDA STATUTE CHAPTER 688.003 (1))

50. Plaintiff incorporates and realleges, as if fully set forth in this paragraph, the allegations of the foregoing paragraphs.

51. At the time he was hired, Ryan was placed on actual notice that the materials, recipes, food preparation processes, and other proprietary information he was given to perform his duties as general manager of the East Naples Rib City Grill were confidential information and constituted trade secrets.

52. On information and belief, Ryan has utilized, and is currently utilizing, trade secrets of the Plaintiff in the operation of the Ale House, including but not limited to recipes,

cooking methods, food preparation methods, and design and decoration concepts made available to him during his employment by East Naples Rib City Grill.

53. Because the acts of the Defendants will continue in the future unless restrained, Plaintiff has no adequate remedy at law for damages.

#### COUNT VI

##### (FLORIDA STATUTE CHAPTER 688.004(1), (2))

54. Plaintiff incorporates and realleges, as if fully set forth in this paragraph, the allegations of the foregoing paragraphs.

55. Defendants have misappropriated the trade secrets of Rib City.

56. Defendants' misappropriation of such trade secrets was willful, intentional and malicious.

57. Rib City has suffered actual damages as a proximate result of the Defendants' misappropriation of trade secrets, and the Defendants have been unjustly enriched by such misappropriation.

#### COUNT VII

##### (COMMON LAW INJUNCTION)

58. Plaintiff incorporates and reallege, as if fully set forth in this paragraph, the allegations of the foregoing paragraphs.

59. Ryan is in open and notorious breach of the separation agreement.

60. Plaintiff has suffered substantial damages as a proximate result of Ryan's breaches of contract.

61. Plaintiff has been irreparably harmed by Ryan's material breaches of contract and has no adequate remedy at law.

**PRAYERS FOR RELIEF**

**WHEREFORE**, Plaintiff respectfully requests that this Court:

A. Enter judgment that Defendants have, without the consent of Rib City, used in commerce a colorable imitation of the Rib City marks in connection with the sale, offering for sale, distribution, and advertising of restaurant services in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive in violation of 15 U.S.C. §1114(1)(a).

B. Enter judgment that Defendants have used false designations of origin, false descriptions, and false representations, in bad faith and in willful violation of 15 U.S.C. § 1125(a); have injured Rib City's business reputation and diluted the distinctive quality of its federally registered and famous marks; have otherwise injured Plaintiff by promoting, advertising, and selling their restaurant services using a colorable imitation of the Rib City marks in willful violation of 15 U.S.C. § 1125 (c)(1); and with bad faith intent to profit from the Rib City marks, has registered, trafficked in, and used, a domain name identical, dilutive or confusingly similar to Rib City's famous marks in violation of 15 U.S.C. §1125(d).

C. Award actual or statutory damages for Defendants' violation of 15 U.S.C. §1125(d)(1) in an amount of not less than \$1,000.00 and not more than \$100,000 per domain name, as the court considers just;

D. Enter an order pursuant to 15 U.S.C. §1125 (d)(IX)(ii)(c) that Defendants forfeit, cancel or transfer the domain name "RibCityAleHouse.com" to Rib City;



E. Issue a preliminary injunction and thereafter a permanent injunction under 15 U.S.C. §1116(a) ordering Defendants and their respective officers, agents, servants, employees, and attorneys, and those persons in active concert with them, to refrain from using, authorizing or employing the name or mark “Rib City” or any colorable imitation of Rib City’s name and marks, including without limitation the use of the internet domain name “RibCityAleHouse.com”, the use of a smiling pig, and the use of the silhouette of a city skyline at night, and to file with the court and serve on the Plaintiff within thirty (30) days of service on Defendants of such injunction a report in writing under oath setting forth in detail the manner and form in which Defendants have complied with the injunction;

F. Award damages to the Plaintiff as provided under 15 U.S.C. §1117(a), including the Defendants’ profits, three times the actual damages sustained by Plaintiff, and reasonable attorneys fees to the Plaintiff as prevailing party, and/or if the court shall find that the amount of recovery based on profits is either inadequate or excessive, to award in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of this case, and the costs of this action;

G. Issue an order under 15 U.S.C. §1118 ordering that all labels, signs, prints, packages, wrappers, receptacles, and advertisements in the possession of Defendants bearing the registered marks or colorable imitation of such marks, shall be delivered and destroyed;

H. Issue a preliminary injunction and thereafter a permanent injunction ordering Defendants and their respective officers, agents, servants, employees, and attorneys, and those persons in active concert with them, to refrain from using, authorizing or employing confidential information in violation of Chapter 688.003 of the Florida statutes.

I. Enter judgment that Defendants' use of the Rib City marks and trade secrets violates Chapter 688.003 Florida Statutes.

J. Enter judgment that Defendants' use of the Rib City marks and trade secrets obtained during defendant Ryan's employment at East Naples Rib City Grill is willful, intentional and malicious in violation of Chapter 688.004 Florida Statutes;

K. Issue a preliminary injunction and thereafter a permanent injunction ordering Defendants and their respective officers, agents, servants, employees, and attorneys, and those persons in active concert with them, to refrain from using, authorizing or employing confidential information in breach of the separation agreement; and/or

H. Such other and further relief as this Court deems appropriate.

Respectfully submitted,

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**SCANNED**

**NOT**

**ATTACHMENT(S)**

