

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

DIMITRIC SALTERS and A.G.
WASEEM individually and on behalf
of all others similarly situated,

JURY TRIAL DEMANDED

Plaintiffs,

Case No. 4:14-cv-00659-RH-CAS

v.

BEAM SUNTORY, INC. and
MAKER'S MARK DISTILLERY,
INC., d.b.a. MAKER'S MARK

Defendants.

PLAINTIFFS' FIRST AMENDED CLASS ACTION COMPLAINT

Plaintiffs, Dimitric Salters and A.G. Waseem, ("hereinafter collectively referred to as Plaintiffs"), individually, and on behalf of all other similarly situated persons (hereinafter "the Class"), by and through their undersigned counsel, bring this First Amended Class Action Complaint against Defendants, Beam Suntory, Inc., and Maker's Mark Distillery, Inc., d.b.a. Maker's Mark a brand of Beam Suntory, Inc., (hereinafter collectively referred to as "Defendants" or "Maker's Mark").

SUMMARY OF THE CASE

1. Defendants, Beam Suntory, Inc., through its brand Maker's Mark, produces whisky products labeled as "Handmade," sold under the brand name "Maker's Mark Kentucky Straight Bourbon Whisky"¹ (hereinafter "Whisky" or "Maker's Mark Whisky"). Defendants

¹ © 2014 MAKER'S MARK KENTUCKY STRAIGHT BOURBON WHISKY HANDMADE

distill, bottle, label, advertise and sell Maker's Mark Whisky, through false advertising and deceptive trade practices.

2. Through unlawful, deceptive and unfair trade practices, and false advertising and marketing, Defendants manufactured, marketed, and/or sold their "handmade" Whisky to consumers with the false representation that the Whisky was "handmade"² when, in actuality, the Whisky is made via a highly-mechanized process, which is devoid of human hands. There is simply nothing "handmade" about the Whisky, under any definition of the term, since photos and video footage of the Defendants' manufacturing procedure show Defendants employ mechanized and/or automated methods to manufacture and bottle their Whisky, including but not limited to: (1) the process involved in grinding/breaking up the grains; (2) the process involved in mixing the grains with other ingredients, such as yeast and water; (3) the process involved in transferring this mixture into the fermenting location; and (4) the process involved in bottling the whisky. The Whisky is sold through various retailers in Florida and throughout the United States.

3. Maker's Mark Whiskey is not "Handmade" as the term would be understood by any reasonable consumer viewing the Marker's Mark Whiskey label. First, a reasonable consumer would believe that Whiskey purported to be "Handmade" was produced from scratch, rather than from a mass produced neutral grain spirit. Second, Defendants' product is distilled in a large industrial complex, with modern technologically advanced equipment. A reasonable consumer would believe that the Whiskey purporting to be "Handmade" was was produced without the use of automated, technologically advanced stills. Finally, Maker's Mark Whiskey is produced and bottled in extremely large quantities, a reasonable consumer would believe that Whiskey purporting to be "Handmade" was produced in small batches.

² The Oxford Dictionary defined the term "handmade" as "[m]ade by hand, not by machine, and typically therefore of superior quality."

4. Defendants knowingly and purposefully failed to disclose to their consumers that Maker's Mark Whisky is not actually "handmade," as advertised on the product's label. Defendants knowingly and purposefully falsely advertised and deceptively marketed to consumers that Maker's Mark Whisky is "America's only handmade bourbon whisky – never mass produced." To this day, Defendants have taken no meaningful steps to clear up consumers' misconceptions regarding their product.

5. As a consequence of Defendants' unfair and deceptive practices, Plaintiffs, and members of the Class, have purchased Maker's Mark Whisky under the false impressions that Defendants' product is of a higher quality, is handmade, is crafted in an old fashioned manner, and is otherwise as advertised on the product's label.

6. Significantly, **each** consumer has been exposed to the **same** material misrepresentations and/or omissions, which are prominently displayed on the product packaging for Maker's Mark Whisky prior to purchasing the product.

7. Defendants' "handmade" Whisky mislead consumers into believing the product is "handmade" when, in actuality it is not.

8. All photos as well as video footage, obtained from Defendants' own websites, evidence that the Defendants' manufacturing process is, in fact, contrary to "handmade," and is a rather mechanical and highly automated method.

9. Said photos and video footage represent Defendants' manufacturing process, titled "Maker's Mark Distillery Tour"³ (herein after "Tour Video") and "Maker's Mark Bourbon

³ See <https://www.youtube.com/watch?v=TkAtdtewjb0>

Factory,”⁴ (herein after “Factory Video”), undoubtedly illustrate a mechanized and/or automated, as opposed to the alleged “handmade,” manufacturing method.

10. Plaintiffs did not view said photos and video footage of Defendants’ manufacturing process *before* purchasing Defendants’ product, and had no knowledge of the existence of the same prior to purchasing Defendants’ product.

11. The information found on the Defendants’ website was discovered by Plaintiffs’ counsel *after* Plaintiffs purchased Defendants’ offending product.

12. A reasonable consumer is not likely to review Defendants’ website prior to purchasing Defendants’ offending product.

13. The information found on Defendants’ website is not included on the label because the Defendants are intentionally trying to mislead consumers into believing that their bourbon is “Handmade.”

14. “Handmade” is a term that consumers tend to identify with top quality manufacturing and production and that is advertently linked to superior, high-end, costly products. This association and common perception is discernible in the marketplace where manufacturers charge premium prices for “handmade” goods. A 750 milliliter bottle of whisky, similar to Defendants’ product, for example, may range in price from as little as \$12.99 to \$24.99.⁵ Defendants’ alleged “Handmade” 750 Milliliter bottle of Whisky sells for \$31.99.⁶

15. Defendants utilize identical labels on all their Maker’s Mark Whisky. The term “Handmade” is prominently placed on said labels in bold font on the front of the bottle, and

⁴ See <https://www.youtube.com/watch?v=22PrqoJb3rM>

⁵ See, the price listing for “whiskeys” on the website of Holiday Wine Celler, a retailer of alcohol, and available at: <http://www.holidaywinecellar.com/spirits/whiskey-whisky>

⁶ See, http://www.holidaywinecellar.com/p-6215-makers-mark.aspx?utm_source=froogle&utm_medium=csc&utm_content=564&utm_campaign=Spirits&gclid=CNyyhb7tvsICFY_m7AodxTEAJg

twice more on the side of the label. *See* ¶ 49, 50, 51. The words, “Maker’s Mark is Americas only handmade bourbon whisky – never mass produced,” and “[w]e’re proud of our unique and full-flavored handmade bourbon,” may further be found on the side of the labels. Additionally, Defendants’ website states: “[w]hile most distilleries use a modern hammer mill to break up their grains, Maker’s Mark uses an old antique roller mill, which is less efficient, but reduces the chance of scorching the grain and creating a bitter taste.”⁷ This description is made in an attempt to market the whisky as one of sophisticated quality due, in part, to it being made by hand. Consequently, Defendants propel consumers to continue to purchase, at an ultimately unnecessarily higher price, their whisky on the mere premise that it is of superior craftsmanship.

16. However, in direct contrast to Defendants’ allegations, their whisky is primarily or entirely made by mechanized and automated processes, as demonstrated by the photos and video footage of Defendants’ manufacturing processes. *See* ¶ 60, 64, 67, 69, 71, 72, 75; Pg.3 n. 3 and 4.

17. As a direct consequence of Defendants’ unfair and deceptive practices, Plaintiffs and other similarly situated consumers have purchased Maker’s Mark Whisky under the erroneous impression that the whisky is of superior quality due to the allegation that it is “Handmade” and, consequently worth a higher price as compared to other similar whiskies.

18. Consumers, including Plaintiffs, were exposed to essentially the same material misrepresentations, due to the fact that the identical labels were prominently placed on all of the Marker’s Mark whisky bottles that were sold, and are currently being sold, throughout the U.S. and the State of Florida.

⁷ *See*, <http://www.makersmark.com/sections/88-slow-and-good>

19. The definition of "food" under the Federal Food, Drug, and Cosmetic Act ("FDCA") includes "articles used for food or drink" and thus includes alcoholic beverages. *See* 21 U.S.C. 321(f). As such, alcoholic beverages are subject to the FDCA adulteration and misbranding provisions, and implementing regulations, related to food. For example, manufacturers of alcoholic beverages are responsible for adhering to the registration of food facilities requirements in 21 CFR part 1 and to the good manufacturing practices in 21 CFR part 110. However, as reflected in the 1987 Memorandum of Understanding (MOU) between the FDA and the Tobacco Tax and Trade Bureau's ("TTB") predecessor agency (ATF) TTB is responsible for the promulgation and enforcement of regulations with respect to the labeling of distilled spirits, wines, and malt beverages pursuant to the Federal Alcohol Administration Act.

20. 27 U.S.C. § 205 prohibits unfair competition and unlawful practices, and is enforced by the TTB pursuant to regulation. TTB's currently effective regulations are contained in Title 27, Chapter I, of the Code of Federal Regulations (27 CFR). Specifically, 27 C.F.R. §5.65 provides in part:

- (a) Restrictions. An advertisement of distilled spirits shall not contain:
 - (1) Any statement that is false or untrue in any material particular, or that, irrespective of falsity, directly, or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific or technical matter tends to create a misleading impression.
 - ...
 - (4) Any statement, design, device, or representation of or relating to analyses, standards or tests, irrespective of falsity, which the appropriate TTB officer finds to be likely to mislead the consumer.
 - ...
- (b) Statements inconsistent with labeling.
 - (1) Advertisements shall not contain any statement concerning a brand or lot of distilled spirits that is inconsistent with any statement on the labeling thereof.
 - (2) Any label depicted on a bottle in an advertisement shall be a reproduction of an approved label.
 - ...

(h) Deceptive advertising techniques. Subliminal or similar techniques are prohibited. “Subliminal or similar techniques,” as used in this part, refers to any device or technique that is used to convey, or attempts to convey, a message to a person by means of images or sounds of a very brief nature that cannot be perceived at a normal level of awareness.

....

21. Under Federal and Florida state law, products such as Defendants’ “handmade” Whisky is “misbranded” if the “labeling is false or misleading in any particular,” or if it does not contain certain information on its labeling. *See* 21 U.S.C. § 343(a); 27 U.S.C. § 205; Florida Food Safety Act § 500 *et seq.*

22. Further, any violation of the TTB’s 27 U.S.C. § 205, and/or the Florida Food Safety Act also constitutes a violation of Florida’s Consumer Protection Statutes §501.201-§501.213, Florida Deceptive and Unfair Trade Practice Act, Breach of Express Warranty; Breach of Implied Warranties for Merchantability and Usage of Trade Pursuant to §672.314 Florida Statutes, Breach of Implied Warranty pursuant to Uniform Commercial Code §2-314, Negligence and Unjust Enrichment. In this action, Plaintiffs asserts claims under these state statutes, as well as under common law.

23. For the reasons stated herein, Defendants’ Maker’s Mark Whisky sold in the United States is misbranded and illegal.

24. Plaintiffs now seek to stop Defendants’ unlawful conduct.

PARTIES

25. Plaintiffs are residents of Tallahassee, Florida.

26. Plaintiff, Dimitric Salters, purchased more than \$50.00 worth of Maker’s Mark Handmade Whisky, a product manufactured by the Defendants, in Tallahassee or Leon County within the four years preceding the filing of this action (the “Class Period”). Specifically, Plaintiff Salters purchased Maker’s Mark Whisky at Colonial Liquors in Tallahassee, Florida, on

more than one occasion, including but not limited to September 2014 and October 2014.

Plaintiff Salters purchased a 750 milliliter bottle for \$29.99 on both occasions. Plaintiff, A.G.

Waseem, purchased more than \$50.00 worth of Maker's Mark Handmade Whisky, a product manufactured by the Defendants, in Tallahassee or Leon County within the Class Period.

Specifically, Plaintiff Waseem purchased Maker's Mark Whisky at Lake Talquin Liquors in Tallahassee, Florida, on more than one occasion, including but not limited to July 2014 and August 2014. Plaintiff Waseem purchased a 750 milliliter bottle for \$29.99 on both occasions.

27. Defendant, Beam Suntory, Inc. is an Illinois corporation, with its principal place of business at 510 Lake Cook Road, Deerfield, IL, 60015.

28. Defendant, Maker's Mark Distillery, Inc., is a brand of Beam Suntory, Inc., and is a corporation organized under the laws of Kentucky with its principle place of business located at 3350 Burks Springs Road, Loretto, Kentucky, 40037.

29. Defendants produce, label, market, advertise, and sell the product described herein nationwide using the name, Maker's Mark Handmade Whisky, including in this State, district, and division.

JURISDICTION AND VENUE

30. This Court has original jurisdiction over this action under 28 U.S.C. § 1332(d) because this is a class action in which: (1) the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs; (2) a member of the class of Plaintiffs is a citizen of a State different from the defendants; and (3) the number of members of all proposed Plaintiffs classes in the aggregate is greater than 100.

31. The Court has personal jurisdiction over Defendants because a substantial portion of the wrongdoings alleged herein occurred in Florida. Defendants also have sufficient minimum

contacts with Florida, and have otherwise intentionally availed themselves of the markets in Florida through the promotion, marketing, and sale of products sufficient to render the exercise of jurisdiction by this Court permissible under traditional notions of fair play and substantial justice.

32. Venue is proper in this District pursuant to 28 U.S.C. § 139(b)(2) and (3) because a substantial part of the events or omissions giving rise to these claims occurred in this District, a substantial part of the property that is the subject of this action is situated in this District, and Defendants are subject to the Court's personal jurisdiction with respect to this action.

FACTS RELEVANT TO ALL CLAIMS

Defendants' Maker's Mark Whisky is misbranded and illegal

33. All containers of Defendants' Maker's Mark Whisky sold in the United States are misbranded and illegal.

34. Their sale constitutes violations of TTB regulations; FDCA regulations; the Florida Food Safety Act; Florida's Consumer Protection Statutes §501.201-§501.213; Florida Deceptive and Unfair Trade Practice Act pursuant to ("FDUTPA"); Florida Misleading Advertising Statute §817.41; Florida Intentional False Advertising Statute §817.44; Breach of Express Warranty Pursuant to §672.313 Florida Statutes; Breach of Implied Warranties for Merchantability and Usage of Trade Pursuant to §§672.314-672.315 Florida Statutes; Breach of Implied Warranty pursuant to Uniform Commercial Code §2-314; Negligence; and Unjust Enrichment.

35. Defendants knowingly and intentionally sold this misbranded product to consumers (including Plaintiffs) with the intent to deceive them.

36. During the relevant statutory time period, Defendants manufactured, marketed, and/or sold Whisky with printed labels that prominently claimed the Whisky was “Handmade” and “never mass produced.”

37. Because Defendants’ Maker’s Mark Whisky containers falsely represent that the product is “handmade” or “never mass produced,” Maker’s Mark Whisky is misbranded under TTB, FDCA and the Florida Food Safety Act.

38. Had Plaintiffs known that Defendants’ Whisky product was falsely represented as “handmade” or “never mass produced,” they would not have purchased Defendants’ Whisky.

39. Had Plaintiffs known that Defendants’ Whisky was an illegally sold product, they would not have purchased the product.

40. Plaintiffs’ reliance was reasonable. A reasonable consumer would have been misled by the Defendants’ actions and intentional misrepresentations.

41. With respect to Defendants’ Maker’s Mark Whisky, Defendants have violated the TTB and FDCA and regulations promulgated thereunder.

42. As a result, Defendants have violated the Florida Food Safety Act. *Inter alia*, Defendants have specifically violated the following Florida Food Safety Act provisions.

43. Defendants have violated Florida Food Safety Act § 500.11(1)(f), because words, statements, or other information required pursuant to the Florida Food Safety Act to appear on the label or labeling are not prominently placed upon the label or labeling with conspicuousness, as compared with other words, statements, designs, or devices in the labeling and in terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

44. Defendants have violated Florida Food Safety Act § 500.04(1), which makes it unlawful to manufacture, sell, deliver, possess, hold, or offer to sell any misbranded food.

45. Defendants have violated Florida Food Safety Act § 500.115, which makes it unlawful to falsely or misleadingly advertise food.

46. Plaintiffs' claims that Defendants' product label is misleading and deceptive do not seek to challenge the product's formal name and labeling in areas for which the Tobacco Tax and Trade Bureau's ("TTB"), or Food and Drug Administration ("FDA") has promulgated regulations implementing the Federal Food Drug and Cosmetic Act ("FDCA"). Plaintiffs' claims do not seek to contest or enforce the TTB, FDCA or FDA regulation requirements. Nor do Plaintiffs seek an interpretation of the TTB or FDA regulations. Instead, Plaintiffs' claims are predicated on the fact that the labeling does not comply with the requirements set forth by the TTB and FDA regulations. Plaintiffs' state law claims do not seek to impose labeling requirements that are not identical to those required by federal regulation.

47. Plaintiffs' state law claims are aimed at Defendants' intentional conduct of naming and labeling which are voluntary, and not specifically required conduct by the TTB or FDA regulations. Defendants selected the name and label described herein in order to maximize the label's deceptive impact upon Plaintiffs and other consumers. Indeed, TTB and FDA regulations did not require Defendants to name their product "Maker's Mark Handmade Whisky," as opposed to "Maker's Mark Whisky" or a myriad of other options. Nor did TTB or FDA regulations require Defendants to state their product is "America's only handmade bourbon whisky – never mass produced." Defendants made that decision because of their marketing strategy. Defendants' marketing mislead consumers into believing that their product is "handmade" and "America's only handmade bourbon whisky – never mass produced".

Defendants' marketing campaign is designed to cause consumers to buy Maker's Mark Whisky as a result of this deceptive message and Defendants have succeeded.

Purchasers of Misbranded Defendants' Maker's Mark Whisky Have Been Injured

48. Defendants manufacture and sell millions of bottles each year. In 2012, Defendants' sales equaled approximately 1.4 million cases, each containing 6 bottles.⁸ This amounts to a total of approximately 8.4 million bottles— a 750-milliliter bottle of Maker's Mark Whisky sells for approximately \$31.99.⁹ For 2013, Beam reported that net sales of Maker's Mark grew by 17 percent, the most of any of the company's "power brands." Sales are forecast to top 2 million cases later this decade, according to the Associated Press. *Id.*

49. Defendants have faced steady production shortages and have, subsequently, attempted to remedy those shortfalls by expanding and mechanizing their facility. This shortage has proved so significant, in fact, that Defendants have even suggested "watering down" their whisky's alcohol content to meet production demands.¹⁰

50. All of Defendants' Maker's Mark Whisky product labels prominently display the word "handmade." This word appears a total of three times on the label: Once in big, bold letters on the front of the label, and twice more on the side of the label:

⁸ See, <http://www.kentucky.com/2014/02/27/3111627/makers-mark-buffalo-trace-plan.html>

⁹ See, http://www.holidaywinecellar.com/p-6215-makers-mark.aspx?utm_source=froogle&utm_medium=csc&utm_content=564&utm_campaign=Spirits&gclid=CNyyhb7tvsICFY_m7AodxTEAJg

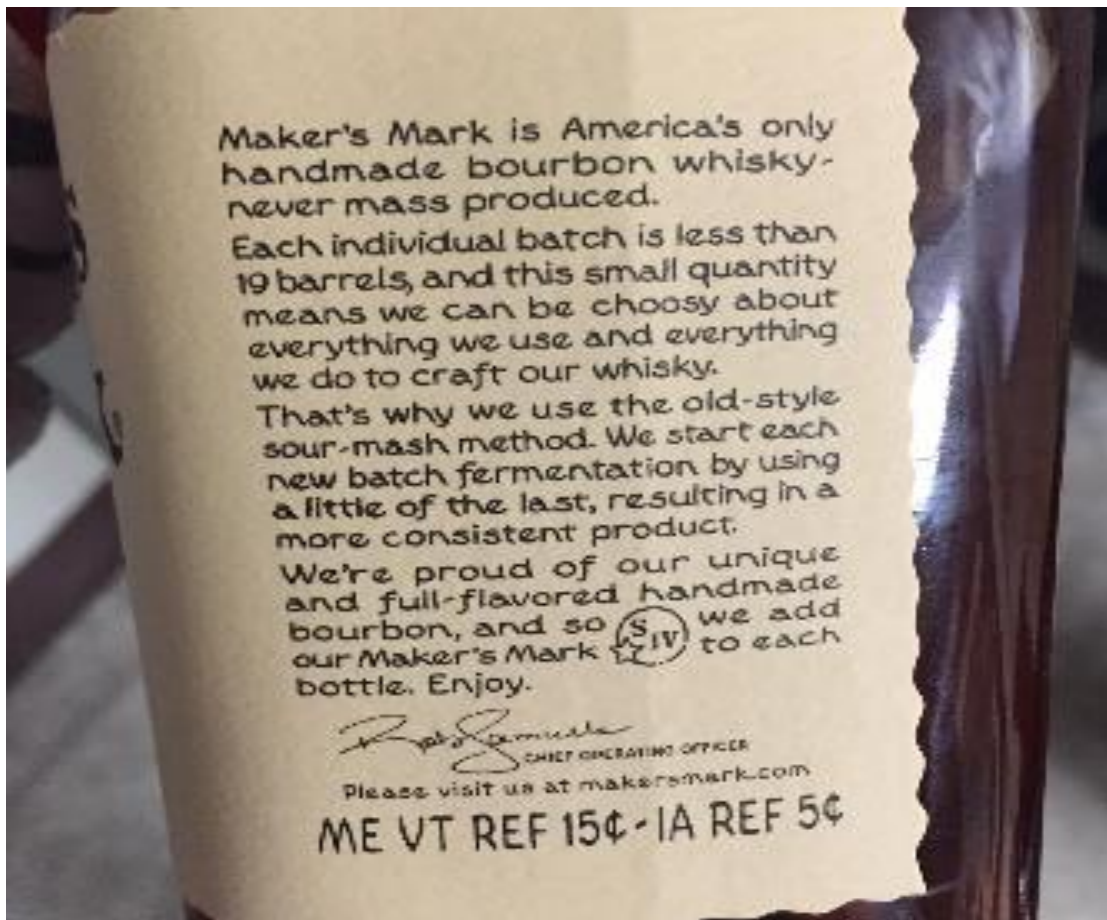
¹⁰ See, <http://www.usatoday.com/story/news/nation/2013/02/11/makers-mark-bourbon/1910773/>



51. Defendants' label prominently claims their product is "Handmade."



52. The side of Defendant's label prominently claims that their product is "America's only handmade bourbon whisky—never mass produced."



53. Defendants marketed and represented to the general public that the Whisky was “Handmade” and, in doing so, concealed the highly automated nature of the Whisky manufacturing and bottling process.

54. Consumers are particularly vulnerable to these kinds of false and deceptive labeling practices. Most consumers possess very limited knowledge of the likelihood that products, including the Whisky at issue herein, that is claimed to be “handmade,” is in fact produced in mass quantities.

55. Consumers generally believe that “handmade” products are of higher quality than their non-handmade counterparts, and are produced in small batches by hand. Due to Defendants’ scheme to defraud the market, members of the general public were fraudulently induced to purchase Defendants’ Whisky at premium prices. Florida laws are designed to protect

consumers from this type of false representation and predatory conduct. Defendants' scheme to defraud consumers is ongoing and will harm consumers each and every day until altered by judicial intervention.

56. Although Defendants allege their whisky is "Handmade," Maker's Mark Whisky is actually produced through the use of little to no human assistance. It is instead made through a highly mechanized process.

57. Defendants' manufacturing process involves a grinding and breaking up of grains, which are, in turn, mixed with yeast and water to make "mash." This mash is then left to ferment in large vats and is later distilled into whisky.

58. Defendants' website claims that, "while most distilleries use a modern hammer mill to break up their grains, Maker's Mark is produced using an old antique roller mill, which is less efficient, but reduces the chance of scorching the grain and creating a bitter taste."¹¹

59. In the Tour Video, Defendants' representative claims that "all" of their grain is processed by said "roller mill."

60. Defendants claim they use and "old antique roller mill" to crush their grain in an effort to describe their manufacturing process, and their product, as "Handmade" as its label claims.

61. This is an illustration of Defendants' "old antique roller mill":

¹¹ See, <https://www.makersmark.com/sections/88-slow-and-good>



62. As the photo depicts, the mill is powered by two electronically driven motors and the entire mechanized and/or automated process is controlled by a set of electronic control panels as seen to left of the machine. *See*, ¶ 61.

63. Defendants' mill is neither old nor antique. Defendants' mill is a modern mechanized and/or automated machine that requires little to no human supervision, assistance or involvement to grind and prepare the grain, which is the primary ingredient in Defendants' whisky.

64. After the grain has been ground, it is placed in a large vat where other ingredients, such as water and yeast, are added. This mixing process is also performed by a machine.

65. Defendants' mixing process is shown here:



66. As the picture above indicates, the grain mash and other ingredients are mixed using a machine. More specifically, a paddle like device, which is attached to an electronic motor, is used to blend the mixture. The motor is mounted onto metal beams that rest above the vat into which the mixture sits. This mixing process is mechanized, automated, and involves little to no human supervision, assistance or involvement; thus, it is clearly not “Handmade” as Defendants advertise.

67. The mixture is then transferred to large fermenting vat. Based on the high volume of liquid transferred, the pictorial evidence below (*See* ¶ 66) and the elaborate piping system shown in the Tour Video, Plaintiffs allege that this transferring process is automated, mechanized, and involves little to no human supervision, assistance or intervention.

68. Defendants’ transferring process of the grain/mash mixture is shown here:



69. The mixture is then allowed to ferment and is then subsequently distilled into the liquor. The Tour Video demonstrates this process and shows various machines used in the fermentation and distillation process. The Tour Video also shows that all, or nearly all, of these machines are connected by an elaborate system of pipes and have an electronic control panel which controls the machine without human intervention, as the machines are shown functioning in the video without human supervision or intervention. On this basis, Plaintiffs allege the fermentation and distillation process are mechanized and/or automated and that therefore Defendants' product is not "Handmade" as Defendants advertise.

70. After the liquor is distilled it is transferred into oak barrels to age by means of a mechanized and/or automated process. *See below.*



71. After Maker's whisky has aged for the appropriate time, the whisky is bottled. Defendants' bottling process involves an elaborate filling system wherein the whisky is pumped through a series of machines and pipes to fill approximately a dozen bottles at a time. The entire process is automated and/or mechanized, and involves little to no human supervision, assistance or involvement. *See*, ¶¶ 71 and 72; the Factory Video.

72. Defendants' automated bottling process shown here:



73. A close up of Defendants' bottling process shown here:



74. As the pictures above indicate, there is virtually no human involvement in this system, other than perhaps the pushing of a button. The Factory Video even shows the entire bottling process occurring without any human involvement whatsoever.

75. Ironically, even the labeling of the bottles, which contain the alleged “Handmade” statement, is achieved by a mechanized and/or automated process. *See* ¶ 76.

76. Defendants’ labeling process is shown here:



77. Thus, based on the photos listed above and the two separate videos depicting Defendants’ manufacturing processes referenced herein, Plaintiffs allege that Defendants utilize a mechanized and/or automated process to manufacture Maker’s Mark Whisky; and therefore, Defendants product is not “Handmade” as Defendants advertise.

78. As a result of Defendants’ unlawful misrepresentations, Plaintiffs and millions of others in Florida and throughout the United States have purchased Defendants’ Maker’s Mark Whisky.

79. Defendants’ labeling as alleged herein is intentionally and knowingly false and misleading, and was designed to increase sales by preying on consumers.

80. Defendants' voluntary misrepresentations are part of their systematic labeling practice, which is inherently deceptive.

81. A reasonable person would attach importance to Defendants' misrepresentations in determining whether to purchase Defendants' Maker's Mark Whisky.

82. Plaintiffs' purchase of Defendants' Maker's Mark Whisky damaged them.

83. Such purchases damaged Plaintiffs because, *inter alia*, misbranded products are illegal and have no economic value.

84. Such purchases damages Plaintiffs because, *inter alia*, Plaintiffs had cheaper alternatives available and paid an unwarranted premium for Defendants' Maker's Mark Whisky.

85. Plaintiffs purchased Maker's Mark Whisky in Tallahassee, Florida within the Class Period. At the time of purchase, the product itself was prominently marked with a "handmade" label when in fact there was nothing "handmade" about the product. The product was also labeled as being "America's only handmade bourbon whisky – never mass produced" when in fact there is nothing handmade about the current manufacturing process.

86. When Plaintiffs and Class Members purchased the Maker's Mark Whisky, they saw and relied upon the "Handmade" representation and "America's only handmade whisky – never mass produced" representation that is prominently displayed on all of Maker's Mark Whisky products. This reliance on the product label to make their purchasing decision is typical of most Florida consumers.

87. Plaintiffs and Class Members were deceived as a result of Defendants' false labeling. Their purchasing decisions were supported by the "handmade" representation made by Defendants, which is absent from most (if not all) of Defendants' competitors. Their purchasing decisions were further supported by the "America's only handmade whisky – never mass

produced” representation which also is absent from most (if not all) of Defendants’ competitors. Plaintiffs believed at the time they purchased the Whisky that they were in fact buying a high-quality product made by human hands that was not made in large industrial vats in mass quantities, etc.

88. Plaintiffs suffered an “injury in fact” because Plaintiffs’ money was taken by Defendants as a result of Defendants’ false claims set forth on the offending product. Furthermore, they suffered an “injury in fact” by paying a premium for a product believed to be genuinely “Handmade,” when it was not. Plaintiffs and Class Members are entitled to monetary damages. Plaintiffs and Class Members were undoubtedly injured as a result of Defendants’ false “handmade” representations that are at issue in this litigation.

CLASS ACTION ALLEGATIONS

89. Plaintiffs bring this action as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3) on behalf of the following class:

All persons in Florida who, within the Class Period, purchased Maker’s Mark Kentucky Straight Bourbon Whisky (the “Class”).

90. The following persons are expressly excluded from the Class: (1) Defendants and their subsidiaries and affiliates; (2) all persons who make a timely election to be excluded from the proposed Class; (3) governmental entities; and (4) the Court to which this case is assigned and its staff.

91. This action can be maintained as a class action because there is a well-defined community of interest in the litigation and the proposed Class is easily ascertainable.

92. **Numerosity:** Based upon Defendants’ publicly available sales data with respect to Maker’s Mark Whisky, it is estimated that the Class numbers are potentially in the millions, and the joinder of all Class members is impracticable.

93. **Common Questions Predominate:** The action involves common questions of law and fact applicable to each Class member that predominate over questions that affect only individual Class members. Thus, proof of a common set of facts will establish the right to each Class member to recover. Questions of law and fact common to each Class member include, for example:

- a. Whether Defendants engaged in unfair, unlawful or deceptive business practices by failing to properly package and label Defendants' Whisky sold to consumers;
- b. Whether the product at issue is misbranded or unlawfully packaged and labeled as a matter of law;
- c. Whether Defendants made unlawful and misleading claims regarding Defendants' Whisky;
- d. Whether Defendants violated Florida's Consumer Protection Statutes §501.201-§501.213; Florida Deceptive and Unfair Trade Practice Act; Florida Intentional False Advertising Statute §817.44; Breach of Express Warranty Pursuant to §672.313 Florida Statutes; Merchantability; Usage of Trade Pursuant to §§672.314-672.315 Florida Statutes; Breach of Implied Warranty pursuant to Uniform Commercial Code §2-314; the Florida Food Safety Act; or the FDCA and regulations promulgated thereunder;
- e. Whether Plaintiffs and the Class are entitled to equitable and/or injunctive relief;
- f. Whether Defendants' unlawful, unfair and/or deceptive practices harmed Plaintiffs and the Class; and
- g. Whether Defendants were unjustly enriched by their deceptive practices.

94. **Typicality:** Plaintiffs' claims are typical of the claims of the Class because Plaintiffs purchase Defendants' products during the Class Period. Defendants' unlawful, unfair,

and fraudulent actions concern the same business practices described herein irrespective of where they occurred or were experienced. The injuries of each member of the Class were caused directly by Defendants' wrongful conduct. In addition, the factual underpinning of Defendants' misconduct is common to all Class members and represents a common thread of misconduct resulting in injury to all members of the Class. Plaintiffs' claims arise from the same practices and course of conduct that give rise to the claims of the Class members and are based on the same legal theories.

95. **Adequacy:** Plaintiffs will fairly and adequately protect the interests of the Class. Neither Plaintiffs nor their counsel have any interests that conflict with or are antagonistic to the interests of the Class members. Plaintiffs have retained highly competent and experienced class action attorneys to represent their interests and those of the members of the Class. Plaintiffs and their counsel have the necessary resources to adequately and vigorously litigate this class action, and Plaintiffs and their counsel are aware of their fiduciary responsibilities to the Class members and will diligently discharge those duties by vigorously seeking the maximum possible recovery for the Class.

96. **Superiority:** There is no plain, speedy, or adequate remedy other than by maintenance of this class action. The prosecution of individual remedies by members of the Class will tend to establish inconsistent standards of conduct for Defendants and result in the impairment of Class members' rights and the disposition of their interests through actions to which they are not parties. Class Action treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of effort and expense that numerous individual actions would create. Further, as the damages suffered by individual members of the Class may be

relatively small, the expense and burden of individual litigation would make it difficult or impossible for individual members of the Class to redress the wrongs done to them, while an important public interest will be served by addressing the matter as a class action. Class treatment of common questions of law and fact would also be superior to multiple individual actions or piecemeal litigation in that class treatment will conserve the resources of the Court and the litigants, and will promote consistency and efficiency of adjudication.

97. The prerequisites to maintaining a class action for injunctive or equitable relief pursuant to Fed. R. Civ. P. 23(b)(2), are met as Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate injunctive or equitable relief with respect to the Class as a whole.

98. The prerequisites to maintaining a class action pursuant to Fed R. Civ. P. 23(b)(3) are met as questions of law or fact common to class members, predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

99. Plaintiffs and their counsel are unaware of any difficulties that are likely to be encountered in the management of this action that would preclude its maintenance as a class action.

100. Plaintiffs are members of the Class they seek to represent. Plaintiffs' claims are typical of the Class members' claims. Plaintiffs will fairly and adequately protect the interests of the Class in that Plaintiffs' claims are typical and representative of the Class.

101. There are no unique defenses which may be asserted against Plaintiffs individually, as distinguished from the Class. The claims of Plaintiffs are the same as those of the Class.

102. No conflicts of interest exist between Plaintiffs and the other Class members. Plaintiffs have retained counsel that is competent and experienced in complex class action litigation. Plaintiffs and their counsel will fairly and adequately represent and protect the interests of the Class.

103. This class action is superior to any other method for the fair and efficient adjudication of this dispute.

CAUSES OF ACTION

COUNT I

VIOLATION OF FLORIDA CONSUMER PROTECTION STATUTES §501.201- §501.213, FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

104. Plaintiffs re-allege and incorporate by reference the allegations contained in paragraphs 1 through 103 above as if fully set forth herein.

105. By creating and disseminating the false and deceptive advertising campaign described herein, Defendant has falsely represented to the public that their product is “handmade” and “never mass produced,” when in fact it is not handmade and is mass produced.

106. Defendants’ conduct constitutes unlawful, unfair and deceptive business acts and trade practices.

107. Defendants sold Maker’s Mark Whisky in Florida and throughout the United States during the Class Period.

108. Florida Consumer Protection Statue §501.204 (2012) prohibits any “unlawful,” “fraudulent” or “unfair” business act or practice and any false or misleading advertising. For the reasons discussed above, Defendant has engaged in unfair, false, deceptive, untrue and misleading advertising in violation of Fla. Stat. §§501.201-501.213 (2014).

109. The Florida Deceptive and Unfair Trade Practices Act also prohibits any, “unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in conduct of any trade or commerce.” Defendant has violated Fla. Stat. §501.204’s prohibition against engaging in unlawful acts and practices by, *inter alia*, making the false and deceptive representations, and also through its omissions of material facts, as set forth more fully herein, and violating 21 U.S.C. §342, 21 U.S.C. §343, 21 U.S.C. §379aa-1, 15 U.S.C. §45 (a)(I), 49 Fed. Reg. 30999 (Aug. 2, 1984), Federal Food, Drug and Cosmetic Act §402(f)(1)(A), and the common law.

110. Plaintiffs and the Class reserve the right to allege other violations of law which constitute other unlawful business acts or practices. Such conduct is ongoing to this date.

111. Defendant’s acts, omissions, misrepresentations, practices and non-disclosures as alleged herein also constitute “unfair” business acts and practices within the meaning of The Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §§501.201-501.213 (2014), in that its conduct is substantially injurious to consumers, offends public policy, and is immoral, unethical, oppressive and unscrupulous as the gravity of the conduct outweighs any alleged benefits attributed to such conduct.

112. As stated in this Complaint, Plaintiffs allege violations of consumer protection, unfair competition, and truth-in-advertising laws in Florida resulting in harm to consumers. Defendant’s conduct constitutes violations of the public policies against engaging in false and misleading advertising, unfair competition and deceptive conduct towards consumers as proscribed by Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §§501.201-501.213 (2014).

113. Defendants intended to deceive consumers about the process for making its bourbon.

114. Defendants' label is likely to mislead a consumer acting reasonably in the circumstances into believing that the Defendants' product is "Handmade."

115. Reasonable consumer are not likely to review Defendants' website prior to purchasing Defendants' product, and therefore, are likely to be deceived by Defendants' label.

116. There were reasonably available alternatives to further Defendant's legitimate business interests, other than the conduct described herein.

117. Defendant's claims, nondisclosures and misleading statements, as more fully set forth above and collectively as a scheme, were false, misleading and likely to deceive the consuming public within the meaning of Florida Deceptive and Unfair Trade Practices Act.

118. Defendant's deceptive conduct constitutes a prohibited practice, which directly and proximately caused and continues to cause substantial injury to Plaintiffs and the other Class members. Plaintiffs and Class members have suffered injury in fact, actual damages, and have lost money as a result of Defendant's unlawful, unfair and fraudulent conduct. Plaintiffs' damages are the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties. Defendant's deceptively labeled, and falsely advertised, and misbranded products have little to no market value.

119. Unless restrained and enjoined, Defendant will continue to engage in the above-described conduct. Accordingly, injunctive relief is appropriate.

120. Florida's safe harbor doctrine will not shield Defendants from liability. Florida's safe harbor provision applies, "the relevant analysis...is whether...the moving party has

demonstrated that a specific federal or state law affirmatively authorized it to engage in the conduct alleged...not whether [the plaintiffs] have demonstrated that [the defendants'] conduct violates a specific rule or regulation.” *State of Fla., Office of Atty. Gen., Dep’t of Legal Affairs v. Tenet Healthcare Corp.*, 420 F. Supp. 2d 1288, 1310 (S.D. Fla. 2005) (emphasis added). To succeed, Defendants must demonstrate that federal or state law permits the specific practice at issue; it is not sufficient for the defendants merely to show that the federal or state government, or an agency thereof, has regulated generally in the area. *See Peters v. Keyes Co.*, No. 10-60162-CIV, 2010 WL 1645095, at *4 (S.D. Fla. Apr. 21, 2010).

121. The “safe harbor” defense does not apply to federal actions which does not rise to the level of federal law, much in the same way as preemption. *See In re Horizon Organic milk Plus DHA Omega-3 Marketing and Sales Practice Litigation*, 955 F.Supp.2d 1311, 1347. (“The FDA’s statement that “[b]ased on the information [WhiteWave has] provided, [the FDA] *would not object at this time to the DHA claims* regarding brain and eye health ... does not constitute approval of WhiteWave’s brain health representations by the FDA. Moreover, even if the letter could be construed as approval, statements made by the FDA in a letter to a corporation about its products are insufficient to accord those statements the weight of federal law to invoke the safe harbor provisions of the consumer fraud statute.”) (*Emphasis in original*).

122. The TTB has made clear that an “approval” of a label does not mean the label is in “compliance” with all TTB regulations. The TTB’s mission is to protect the public which includes ensuring that labels on alcohol beverages contain adequate descriptive information and are not likely to mislead consumers.

123. Established in 2008, TTB’s Alcohol Beverage Sampling Program (ABSP) is a random survey of products in the marketplace to evaluate our success in meeting this mission

and to determine where compliance issues exist.¹² Each year the TTB conducts the ABSP by purchasing products from the marketplace and brings them to their offices for label assessments to determine if products are in compliance with its own labeling regulations. Following the label assessments, the TTB sends the products to their laboratories to undergo a series of analyses to determine compliance with certain information displayed on the product labels. *Id.*

In 2014, the TTB selected 190 distilled spirits, 155 malt beverages, and 105 wines for the 2014 ABSP, with 450 total products included in the survey. After analyzing these products, the TTB found 139 products that were non-compliant. By commodity, the TTB found that 73 distilled spirits products, 46 malt beverage products, and 20 wine products were non-compliant with current TTB regulations, even though these labels were initially “approved” by the TTB.¹³

In 2013, the TTB selected 275 distilled spirits, 239 malt beverages, and 154 wines for the 2013 ABSP, with 668 total products included in the survey. After analyzing these products, the TTB found 190 products that were non-compliant. By commodity, the TTB found that 80 distilled spirits products, 73 malt beverage products, and 37 wine products were non-compliant, even though these labels were initially “approved” by the TTB.¹⁴

In 2012, the TTB selected 246 distilled spirits, 206 malt beverages, and 196 wines for the 2012 ABSP, with 642 total products included in the survey. After analyzing these products, we found 158 products that were non-compliant. By commodity, we found that 85 distilled spirits products, 40 malt beverage products, and 33 wine products were non-compliant, even though these labels were initially “approved” by the TTB.¹⁵

¹² <http://ttb.gov/sampling/index.shtml>

¹³ <http://ttb.gov/pdf/2015-01-07-fy2014-results.pdf>

¹⁴ <http://ttb.gov/pdf/2014-02-10-fy2013-results.pdf>

¹⁵ <http://ttb.gov/pdf/2012absp-results.pdf>

124. FDUTPA's safe harbor provision protects companies from consumer fraud suits resulting from attempts to comply with other state and federal laws. It does not protect companies who receive the blessing of regulators by misrepresenting the veracity of their products' labels. Accordingly, FDUTPA's safe harbor provision does not immunize Defendant's deceptive labeling.

124. Plaintiffs in instant action are suing for conduct that violates the TTB and FDCA, thus Plaintiffs' claims are not preempted. However, Plaintiffs are not suing *because* Defendants' conduct violates the TTB or FDCA. Plaintiffs allege that Defendants' conduct violates Florida state law and Plaintiffs' claims do not exist "solely by virtue of the TTB or FDCA." Plaintiffs' state law claims do not obstruct federal regulation of food labeling.

125. Plaintiffs, on behalf of themselves, and all others similarly situated, seek restitution and disgorgement of all money obtained from Plaintiffs and the members of the Class collected as a result of unfair competitions, an injunction prohibiting Defendant from containing such practices, corrective advertising, including providing notification of the product's health risks, and all other relief this Court deems appropriate, consistent with Florida Deceptive and Unfair Trade Practices Act.

COUNT II

VIOLATION OF FLORIDA MISLEADING ADVERTISING STATUTE §817.41

126. Plaintiffs re-allege and incorporate by reference the allegations contained in paragraphs 1 through 103 above as if fully set forth herein.

127. §817.41, Fla. Stat. prohibits "any person to make or disseminate or cause to be made or disseminated before the general public of the state, or any portion thereof, any misleading advertisement. Such making or dissemination of misleading advertising shall

constitute and is hereby declared to be fraudulent and unlawful, designed and intended for obtaining money or property under false pretenses.”

128. Defendants made false representations of material fact that they knew, or should have known, were false.

129. By creating and disseminating the false and deceptive advertising campaign described herein, Defendants have falsely represented to the public that their product is “handmade” and “never mass produced,” when in fact it is not handmade and is mass produced.

130. Defendants knew, or should have known, that the aforementioned false representations of material fact disseminated by the Defendant were false.

131. Defendants disseminated false representations of material fact with the intent to induce Plaintiffs, and other members of the Class, to rely on said false misrepresentations.

132. The false representations of material fact made by the Defendant were likely to deceive reasonable consumers.

133. The Plaintiffs, and other members of the Class, reasonably relied on the false representations of material fact made by the Defendants.

134. In relying on the false representations of material facts made by the Defendants, the Plaintiff, and other members of the Class, were deceived.

135. As a direct and proximate cause of Defendants’ violation of Florida Statute §817.41, Plaintiffs and the members of the Class, were injured when they paid good money for the Defendants’ illegal and worthless products.

136. As a result of Defendants’ unlawful false advertising practices, Plaintiffs and the members of the Class who purchased Defendants’ products in Florida, are entitled to an order enjoining such future conduct and such other orders and judgments which may be necessary to

disgorge Defendants' ill-gotten gains and to restore to Plaintiffs and the members of the Class any money paid for the Defendants' product.

137. Plaintiffs and the members of the Class are also entitled to costs, including reasonable attorney's fees.

138. Under §817.41, Florida Statutes, Florida Plaintiffs and the members of the class are also entitled to be awarded punitive damages in addition to the actual damages proven.

COUNT III

VIOLATION OF FLORIDA INTENTIONAL FALSE ADVERTISING STATUTE §817.44

139. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 103 above as if fully set forth herein.

140. Defendants knowingly and intentionally engaged in false advertising concerning the true nature of how Maker's Mark Whisky is produced. Defendants' conduct was consumer-oriented and this conduct had a broad impact on consumers at large.

141. Defendants' actions were unlawful and under the circumstances, Defendants had actual knowledge of the falsity, or at the very least ought to have known of the falsity thereof.

142. Fla. Stat. § 817.44 (2014) defines "false advertising" as "invitations for offers for the sale of any property, real or personal, tangible or intangible, or any services, professional or otherwise, by placing or causing to be placed before the general public, by any means whatever, an advertisement describing such property or services as part of a plan or scheme with the intent not to sell such property or services so advertised."

143. Defendants intentionally, falsely advertised that Maker's Mark Whisky is "Handmade" in Florida and throughout the United States.

144. As fully alleged above, by intentionally and knowingly advertising, marketing, distributing and selling mislabeled Maker's Mark Whisky to Plaintiffs and other members of the Class who purchased this product, Defendants engaged in, and continues to engage in, false advertising in violation of Fla. Stat. § 817.44 (2014).

145. Defendants' false marketing, advertising, packaging and labeling of Maker's Mark Whisky were likely to deceive reasonable consumers.

146. Plaintiffs and other members of the Class who purchased Maker's Mark Whisky in Florida were deceived.

147. Absent such injunctive relief, Defendants will continue to falsely and illegally advertise Maker's Mark Whisky to the detriment of consumers in the state of Florida.

148. As a direct and proximate cause of Defendants' violation of Fla. Stat. § 817.44, Plaintiffs and the members of the Class who purchased Maker's Mark Whisky in Florida were injured when they paid good money for this illegal and worthless product.

149. As a result of Defendants' unlawful and deceptive business practices, Plaintiffs and the members of the Class who purchased Maker's Mark Whisky in Florida, pursuant to Fla. Stat. § 817.44, are entitled to an order enjoining such future conduct and such other orders and judgments which may be necessary to disgorge Defendants' ill-gotten gains and to restore to Plaintiffs and the members of the Class who purchased Maker's Mark Whisky in Florida any money paid for Maker's Mark Whisky.

150. Plaintiffs and the members of the Class are also entitled to attorneys' fees.

COUNT IV

BREACH OF EXPRESS WARRANTY PRUSUANT TO § 672.313 FLORIDA STATUTES AND UNIFORM COMMERICAL CODE §2-313

151. Plaintiffs re-allege and incorporate by reference the allegations contained in paragraphs 1 through 103 above as if fully set forth herein.

152. Plaintiffs, and each member of the Class, formed a contract with Defendant at the time Plaintiffs and the other members of the Class purchased the Defendants' products. The terms of that contract included express promises and affirmations of fact made by Defendant on their products' packaging and through its marketing campaign, as described above. The Defendant's products' packaging and advertising constitute express warranties and became part of the basis of the bargain, and is part of a standardized contract between Plaintiffs and the members of the Class on the one end, and Defendants on the other.

153. The Uniform Commercial Code §2-313 provides that express warranties by the seller are created when any affirmation of fact or promise is made by the seller to the buyer which relates to the goods, and thus becomes part of the basis of the bargain, creates an express warranty that the goods shall conform to the affirmation or promise. In addition, any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

154. Florida has codified and adopted the provisions the Uniform Commercial Code governing express warranties. *See* Fla. Stat. §672.313 (2014).

155. Florida holds that an express warranty can be conferred to the ultimate user of the product – either in written form or by direct assurances from the manufacturer/supplier – regardless of technical privity. Florida has long recognized that a person to whom an express warranty is conferred is entitled to enforce that warranty against that warrantor. *See Cedars of Lebanon Hospital Corp. v. European X-Ray Distributors of America, Inc.*, 444 So. 2d 1068 (Fla.

3d DCA 1984); *Cf. Moto Homes of America, Inc. v. O'Donnell*, 400 So. 2d 422 (Fla. 4th DCA 1983) (citing Magnusson-Moss Warranty Act at 15 U.S.C.A. 2310(f)).

156. Plaintiffs, and each member of the Class, formed a contract with Defendant at the time Plaintiffs and the other members of the Class purchased Defendants' products. The terms of that contract include the express and implied promises and affirmations of fact made by Defendants' on their products' packaging and through their marketing campaign, as described above. Defendants' products' packaging and advertising constitutes express and implied warranties, became part of the basis of the bargain, and is part of a standardized contract between Plaintiffs and the members of the Class on the one end, and Defendants on the other.

157. At all times, and as detailed above, Defendants expressly warranted that their products were safe, effective and fit for use by consumers and users, including Plaintiffs and the Class, for their intended use, that they were of merchantable quality, and that they did not produce dangerous side effects.

158. At the time of making these and other warranties with respect to the characteristics of Defendants' products, Defendants knew or should have known that it had breached the terms of the contract, including the express warranties with Plaintiffs and the Class.

159. At the time of making these and other warranties with respect to the safety, efficacy, testing and characteristics of Defendants' products, Defendant knew or should have known that it had breached the terms of the contract, including the express warranties with Plaintiffs and the Class by warranting that: their product was "handmade" and "never mass produced".

160. Members of the public, including Plaintiffs, reasonably relied upon the skill and judgment of Defendants, and upon said express warranties in purchasing Defendants' product.

161. Plaintiffs and the Class purchased Defendants' product without knowledge that the ingredients of the products were different from the name and label.

162. Members of the public, including Plaintiffs, reasonably relied upon the skill and judgment of Defendant, and upon said express warranties, when purchasing Defendants' products.

163. Due to Defendant's wrongful conduct as alleged herein, Plaintiffs and the Class could not have known about the true content of the Defendants' products.

164. As a direct and proximate result of Defendant's breach of its contract, including the breach of express warranties with respect to the Defendant's products, Plaintiffs suffered injuries as set forth above, entitling Plaintiffs to judgment and equitable relief against Defendant, as well as restitution, including all monies paid for the Defendants' products and disgorgement of profits Defendant received from sales of their products, attorneys' fees, punitive damages, and costs, as set forth in the Prayer for Relief.

165. Florida has long recognized that a person to whom an express warranty is conferred is entitled to enforce that warranty against that warrantor. *See Cedars of Lebanon Hospital Corp. v. European X-Ray Distributors of America, Inc.*, 444 So. 2d 1068 (Fla. 3d DCA 1984); *Cf. Moto Homes of America, Inc. v. O'Donnell*, 400 So. 2d 422 (Fla. 4th DCA 1983) (citing Magnusson-Moss Warranty Act at 15 U.S.C.A. 2310(f)).

166. Additionally, in *Smith v. Wm. Wrigley Jr. Co.*, 663 F.Supp.2d 1336 (S.D. Fla. 2009), a case highly analogous to the case at bar, Judge Cohn concluded that the plaintiff's claim for breach of express warranty survived the defendant's motion to dismiss, despite the absence of privity. *Id.* at 1343. In reaching such a finding, the Court found it significant that the express warranty the manufacturer allegedly breached is contained on the packaging of Eclipse gun. *Id.*

(Similarly, the express warranty Defendants breached in the matter before this Court, that their bourbon is “Handmade,” is contained on the packaging of Defendants’ bourbon.)

167. All conditions precedent to Defendant’s liability under this contract, including notice, have been performed by Plaintiffs and the Class.

COUNT V

BREACH OF IMPLIED WARRANTY: MERCHANTABILITY; USAGE OF TRADE PRUSUANT TO § 672.314 FLORIDA STATUTES AND UNIFORM COMMERICAL CODE §2-314

168. Plaintiffs re-allege and incorporate by reference the allegations contained in paragraphs 1 through 103 above as if fully set forth herein.

169. The Uniform Commercial Code §2-314 provides that, unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of the kind.

170. Florida has codified and adopted the provisions the Uniform Commercial Code governing the implied warranty of merchantability. Fla. Stat. §672.314 (2014).

171. Defendants’ products are “goods” as defined in the various states’ commercial codes governing the implied warranty of merchantability, including Florida.

172. As designers, manufacturers, licensors, producers, marketers, and sellers of their products, Defendants are “merchants” within the meaning of the various states’ commercial codes governing the implied warranty of merchantability, including Florida.

173. By placing their products in the stream of commerce, Defendants impliedly warranted that the products are reasonably safe and that all claims on their packaging were true.

174. As merchants of their products, Defendants knew that purchasers relied upon them to design, manufacture, license and sell products that were reasonably safe and not

deceptively marketed, and in fact members of the public, including Plaintiffs, reasonably relied upon the skill and judgment of Defendants and upon said implied warranties in purchasing and consuming Defendants' products.

175. Plaintiffs and the Class members purchased the Defendants' products for their intended purpose.

176. Defendant's products' defects were not open or obvious to consumers, including Plaintiffs and the Class, who could not have known about the true nature and contents of the Defendants' products.

177. Plaintiffs, and each member of the Class, formed a contract with Defendant at the time Plaintiffs and the other members of the Class purchased Defendant's products. The terms of that contract included implied promises and affirmations of fact made by Defendant on the Defendant's products' packaging and through its marketing campaign, as described above. The Defendant's products' packaging and advertising constitute implied warranties, became parts of the basis of the bargain, and are parts of a standardized contract between Plaintiffs and the members of the Class on the one end, and Defendant on the other.

178. At all times, and as detailed above, Defendant impliedly warranted that its products were safe, effective and fit for use by consumers, including Plaintiffs and the Class, for their intended use, that they were of merchantable quality, and that they did not produce dangerous side effects.

179. At the time of making these and other warranties with respect to the safety, efficacy, testing and characteristics of Defendant's products, Defendant knew or should have known that it had breached the terms of the contract, including the implied warranties with Plaintiffs and the Class.

180. Members of the public, including Plaintiffs, reasonably relied upon the skill and judgment of Defendants, and upon said implied warranties, when purchasing Defendant's products.

181. Due to Defendants' wrongful conduct as alleged herein, Plaintiffs and the Class could not have known about the true content of the Defendants' products.

182. As a direct and proximate result of Defendant's breach of implied warranties and breach of merchantability, Plaintiffs and Class members have sustained injuries by purchasing the Defendants' products, which were not as represented, thus entitling Plaintiffs to judgment and equitable relief against Defendant, as well as restitution, including all monies paid for the Defendants' products and disgorgement of profits from Defendant received from sales of the products, attorneys' fees, punitive damages, and costs, as set forth in the Prayer for Relief.

183. All conditions precedent to Defendant's liability under this contract, including notice, has been performed by Plaintiffs and the Class.

COUNT VI

NEGLIGENCE

184. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 102 above as if fully set forth herein.

185. Defendants had a duty to represent their product accurately. Defendants breached that duty by negligently making misrepresentations of fact and omissions of material fact to Plaintiffs and the other Class members about their Maker's Mark Whisky product.

186. Defendant knew, or should have known that the "Handmade" representation on their bourbon was false.

187. Defendants failed to label or advertise their Maker's Mark Whisky product in a lawful manner and violated their duties owed to consumers by purposefully or negligently

engaging in the deceptive conduct described herein with the intent to deceive Plaintiffs, and consumers similarly situated.

188. Plaintiffs and the other Class members, as a direct and proximate cause of Defendants' breach of their duties, were damaged by receiving a worthless product, or at the very least, a misbranded deceptively labeled product, by justifiably relying on Defendants' material misrepresentation that their bourbon was "Handmade."

189. Plaintiffs suffered an 'injury in fact' because Plaintiffs' money was taken by Defendants' as a result of Defendants' false claims set forth on the label of their offending product.

190. As described above, Defendants' actions violated a number of express statutory provisions designed to protect Plaintiffs and the Class.

191. Defendants' illegal actions constitute negligence *per se*.

192. Moreover, the statutory food labeling and misbranding provisions violated by Defendants are strict liability provisions.

193. By reason of the foregoing, Plaintiffs and the other Class members have suffered damages in an amount to be determined at trial.

COUNT VII

UNJUST ENRICHMENT

194. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 103 above as if fully set forth herein.

195. As a result of Defendants' fraudulent and misleading labeling, advertising, marketing, and sales of Defendants' Maker's Mark Whisky, Defendants was unjustly enriched at the expense of Plaintiffs and the Class.

196. Defendants sold Maker's Mark Whisky to Plaintiffs and the Class which was a product that was illegally sold, illegally misbranded, and had no economic value.

197. It would be against equity and good conscience to permit Defendants to retain the ill-gotten benefits it received from Plaintiffs and the Class in light of the fact that the product was not what Defendants purported them to be.

198. Thus, it would be unjust and inequitable for Defendants to retain the benefit without restitution to Plaintiffs and the Class of all monies paid to Defendants for the Whisky product at issue.

199. As a direct and proximate result of Defendants' actions, Plaintiffs and the Class have suffered damages in an amount to be proven at trial.

JURY DEMAND

Plaintiffs hereby demand a trial by jury of their claims.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually, and on behalf of all others similarly situated persons, pray for judgment against Defendants as follows:

A. For an order certifying this case as a Class Action and appointing Plaintiffs and their counsel to represent the Class;

B. That the Court adjudge and decree that Defendants have engaged in the conduct alleged herein;

C. Awarding declaratory and injunctive relief as permitted by law or equity, including: enjoining Defendants from continuing the unlawful practices as set forth herein, and directing Defendants to identify, with Court supervision, victims of their conduct and pay them restitution and disgorgement of all monies acquired by Defendants by means of any act or practice declared by this Court to be wrongful;

- D. Ordering Defendants to engage in a corrective advertising campaign;
- E. Awarding Plaintiffs and the proposed Class members damages;
- F. Awarding restitution and disgorgement to Plaintiffs and the other Class members;
- G. Awarding attorneys' fees and costs; and
- H. Providing such further relief as may be just and proper.

Dated: February 16, 2015

Respectfully submitted,

/s/ Tim Howard

Tim Howard, J.D., Ph.D.

Florida Bar No.: 655325

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