

**IN THE UNITED STATES COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION**

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CLINTON WILSON,

Plaintiff,

v.

FIFTH GENERATION, INC.,

Defendant

DEBRA P. HACKETT, CLK
U.S. DISTRICT COURT
MIDDLE DISTRICT ALA

Case No.: 3:15-CV-501-WHA-SRW

Class Action

DEMAND FOR JURY TRIAL

CLASS ACTION COMPLAINT

Plaintiff Clinton Wilson, by and through undersigned counsel, files this class action complaint against Defendant Fifth Generation, Inc. on behalf of himself and all other similarly situated. In support thereof, Plaintiff states the following:

NATURE OF THE CASE

1. Fifth Generation manufactures, distributes, markets, and sells vodka under the Tito's Handmade Vodka label (referred to herein as "Tito's Vodka"). It produces more than fifteen million bottles of Tito's Vodka a year, recognizing annual revenue of more than \$100 million. Fifth Generation uniformly markets and represents the Tito's Vodka as "Crafted in an Old Fashioned Pot Still by America's Original Microdistillery" and that Tito's Vodka is "Handmade."

2. Fifth Generation's representations are false. Tito's Vodka is not

“handmade” and “crafted in an old fashioned pot still,” nor is it made by a “microdistillery.” Rather, it is manufactured by and through a mechanized and automated process—which does not use “old fashioned pot stills”—in an enormous industrial facility.

3. Fifth Generation knows that consumers believe that products bearing this type of representations are of a high quality and thus worth a premium price. Plaintiff and hundreds of Alabama and Georgia citizens relied upon Fifth Generation’s misrepresentations, and have been harmed as a direct result, in that each purchased Tito’s Vodka.

4. Fifth Generation’s conduct violates Alabama’s Deceptive Trade Practices Act, Georgia’s Uniform Deceptive Trade Practices Act, Georgia’s Fair Business Practices Act, and has caused Fifth Generation to be unjustly enriched at its customers’ expense.

5. Finally, this case presents the prototypical situation for class treatment. Fifth Generation’s conduct is uniform among all putative class members. The application of shared law to this uniform course of conduct will determine liability for the class as a whole, ensuring that the rights of thousands of consumers are vindicated through the efficiency of a single trial.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. §

1332(d). Diversity jurisdiction exists as Defendant is a citizen of a state other than the state of which Plaintiff is a citizen. Plaintiff, on behalf of himself and the putative class, seeks more than \$5,000,000, and has a good faith basis to believe that more than \$5,000,000 is at issue in this case. Plaintiff seeks attorneys' fees and treble damages, as well as injunctive relief prohibiting Defendant from selling the falsely marketed and deceptive Tito's Vodka. More than one hundred members are included in the putative class.

7. Venue in this case is proper under 28 U.S.C. § 1391 and 28 U.S.C. § 1441 in the United States Court for the Middle District of Alabama in that a substantial portion of Defendant's conduct which forms the basis of this action occurred in this judicial district. Plaintiff purchased the products at issue in multiple locations including within this judicial district. Defendant does business in this judicial district and has received and continue to receive substantial revenue and profits from the excessive fees in this judicial district. Defendant's conduct directly damaged individuals and entities that reside in this judicial district, including Plaintiff, and Defendant did, or reasonably should have, anticipated that this conduct would subject it to the jurisdiction of this Court. Defendant was subject to personal jurisdiction in this judicial district at the time this action was commenced and is deemed to reside in this judicial district.

PARTIES

8. Plaintiff Clint Wilson is a citizen of Alabama who resides in Auburn, Alabama. Plaintiff's experience with the conduct complained of herein is typical of the experience of the putative class. Plaintiff has purchased Tito's Vodka numerous times, including on May 8, 2015, in Alexander City, Alabama, and on May 13, 2015, in West Point, Georgia. At these times, Fifth Generation made representations to Plaintiff about Tito's Vodka, including that these products were "handmade" and "crafted" in "an old fashioned pot still." Fifth Generation made these representations on multiple places, including on the containers of the product themselves. Plaintiff relied upon these representations in purchasing Tito's Vodka and in paying more for Tito's Vodka than he would have otherwise, and was damaged as a result.

9. Defendant Fifth Generation, Inc. is a foreign corporation with its principal place of business in Austin, Texas. Its appointed agent for service of process is Bert Beveridge, 12101 Moore Road, Austin, Texas 78712. Defendant does not maintain a place of business and does not keep assets in Alabama or Georgia.

CLASS ACTION ALLEGATIONS

10. Plaintiff brings this case as a putative class action and proposes two classes.

The Alabama Class is defined as follows:

All individuals who purchased Tito's Vodka in Alabama for personal, family, or household use from August 4, 2011 through the date of class notice.

The Georgia Class is defined as follows:

All individuals who purchased Tito's Vodka in Georgia for personal, family, or household purposes from August 4, 2011 through the date of class notice.

11. Plaintiff excludes from the proposed class any person in bankruptcy as of the date of class notice, any person whose obligations have been discharged in bankruptcy, the Judge to whom this case is assigned, any member of the Judge's staff, and any member of the Judge's immediate family. Plaintiff maintains the right to create additional subclasses or classes, if necessary, and to revise this definition to maintain a cohesive class that does not require individual inquiry to determine liability.

12. All information necessary to identify the class members and to determine the damages suffered by those members is in Defendant's or third parties' possession or control.

I. Existence and Predominance of Common Questions of Law and Fact

13. There are common questions of law and fact of general interest to the classes. These common questions of law and fact predominate over any questions

affecting only individual members of the classes. These common questions include, but are not limited to, the following:

- a. Whether Fifth Generation represented Tito's Vodka as "crafted in an old fashion pot still";
- b. Whether Tito's Vodka is crafted in an old fashion pot still;
- c. Whether Fifth Generation represented Tito's Vodka as "handmade";
- d. Whether Tito's Vodka is handmade;
- e. Whether Fifth Generation represented that Tito's Vodka is made in a "microdistillery;"
- f. Whether Tito's Vodka is made in a microdistillery;
- g. Whether Fifth Generation represented Tito's Vodka as having characteristics and qualities that it does not have;
- h. Whether Fifth Generation represented Tito's Vodka as being of a particular standard, quality or grade when it is of another;
- i. Whether Fifth Generation advertised Tito's Vodka with the intent not to sell it as advertised;
- j. Whether Fifth Generation engaging in other unconscionable, false, misleading, or deceptive act or practice through the marketing and sale of Tito's Vodka;
- k. Whether Fifth Generation acted knowingly in its deceptive and

misleading conduct;

- l. Whether Fifth Generation has violated the Alabama Deceptive Trade Practices Act, Alabama Code § 8-19-3, *et seq.*;
- m. Whether Fifth Generation has violated Georgia's Fair Business Practices Act, Georgia Code § 10-1-393;
- n. Whether Fifth Generation has violated Georgia's Uniform Deceptive Trade Practices Act, Georgia Code § 10-1-370, *et seq.*;
- o. Whether Fifth Generation has been unjustly enriched by selling Tito's Vodka.

II. Typicality and Numerosity

14. The claims of Plaintiff are typical of the claims of the classes. The total number of members of each putative class exceeds one hundred (100) members.

III. Adequacy of Representation

15. Plaintiff will fairly and adequately protect the interests of the members of the classes and has no interest antagonistic to those of other class members. Plaintiff has retained experienced class counsel competent to prosecute class actions and such counsel are financially able to represent the classes.

IV. Superiority

16. The class action is superior to other available methods for the fair and

efficient adjudication of this controversy since individual joinder of all members of each class is impracticable. The interests of judicial economy favor adjudicating the claims for classes rather than for Plaintiff on an individual basis.

17. Questions of law and fact predominate over any questions affecting only individual members.

FACTUAL ALLEGATIONS

18. Fifth Generation is one of the fastest growing manufacturers of vodka in the United States. It has manufactured, marketed, and sold Tito's Handmade Vodka since 1997. Upon information and belief, Fifth Generation has gone from selling less than twenty thousand bottles of Tito's Vodka a year to selling more than fifteen million bottles a year, currently recognizing an annual revenue of more than one hundred million dollars.

19. Since it began production of Tito's Vodka, Fifth Generation has used the same representations on its label, which has not changed substantively at any time. On the label, Fifth Generation represents that Tito's Vodka is "handmade" and "crafted in an old fashioned pot still by America's original microdistillery."

20. These representations are not—and have not been during the statutory period—true. Tito's Vodka is not "handmade" in a "microdistillery." Nor is it made in an "old fashioned pot still." Rather, Tito's Vodka is produced in a massive factory through a highly automated and industrialized process using

modern equipment. Additionally, Fifth Generation has failed to disclose material facts it was under a duty to disclose to its customers, including the true nature of the production facility and process used to make Tito's Vodka.

21. Fifth Generation has knowingly and intentionally used its fraudulent scheme to rapidly expand its brand (and profit). Its rapid expansion is based upon a falsehood. The false representations on the bottle are part of a larger marketing scheme which intends to mislead customers into believing that Tito's Vodka is a micro-distilled, handcrafted product which is different from the lower priced, mass produced vodkas on the market, and therefore worth a premium. Fifth Generation has actual knowledge of the deceptive and false nature of its representations. To the extent Fifth Generation does not have actual knowledge, it reasonably should have such knowledge given the surrounding circumstances. Fifth Generation has acted intentionally at all times; misrepresenting and selling defective products through a deceptive narrative to gain profit at its customers' expense.

22. Fifth Generation's false and misleading conduct is likely to deceive a reasonable consumer and did in fact mislead consumers, including each member of the putative classes and Plaintiff, who paid for Tito's Vodka when they would not have but for Fifth Generation's false and misleading conduct and paid more for Tito's Vodka than they should have. Plaintiff and putative class members have been directly harmed as a result.

23. As described herein, Fifth Generation has engaged in unconscionable, false, misleading, and deceptive practices in the conduct of trade or commerce that is likely to cause confusion or misunderstanding. Such conduct violates Alabama's Deceptive Trade Practices Act, Georgia's Uniform Deceptive Trade Practices Act, and Georgia's Fair Business Practices Act. *See* Ala. Code § 8-19-5; Ga. Code § 10-1-372; Ga. Code § 10-1-393.

24. No putative class member could have discovered (or reasonably should have discovered) the deceptive conduct described herein.

COUNT ONE
VIOLATION OF THE ALABAMA DECEPTIVE TRADE PRACTICES
ACT
(Alabama Code § 8-19-1 *et seq.*)
On Behalf Of The Alabama Class

25. All allegations and paragraphs in this complaint are incorporated by reference.

26. Fifth Generation manufacturing, marketing, and selling of Tito's Homemade Vodka constitutes the conduct of trade and commerce and the sale of goods to consumers within the definition of Alabama Code §§ 8-19-3 and 8-19-5.

27. Fifth Generation is a "person" as within the definition of Alabama Code § 8-19-3.

28. Plaintiff and each member of the putative Alabama Class is a "consumer" within the definition of Alabama Code § 8-19-3.

29. As set out herein, Fifth Generation has each engaged in deceptive practices in the course of its business through the deceptive marketing, advertising, and selling of Tito's Homemade Vodka including by:

- (1) causing confusion or misunderstanding as to the source of Tito's Vodka—particularly, that it “handmade” and “crafted in an old fashioned pot” in a “microdistillery” when it is not (*See* Ala. Code § 8-19-5(2));
- (2) representing that Tito's Vodka has characteristics and qualities which it does not have—particularly that it is “handmade.” (*See* Ala. Code § 8-19-5(5));
- (3) advertising Tito's Vodka with the intent to sell it not as advertised—particularly advertising that it is “handmade” in a “microdistillery,” “crafted in an old fashioned pot still,” when it is mass-produced in a large, automated industrial facility. (*See* Ala. Code § 8-19-5(9)); and
- (4) engaging in other unconscionable, false, misleading, or deceptive acts or practices (Alabama Code § 8-19-5(27));

30. Fifth Generation acted knowingly, with actual awareness or such awareness as a reasonable person should have considering all the surrounding circumstances.

31. Fifth Generation does not maintain a place of business and does not

keep assets in Alabama.

32. Neither Plaintiff, nor any member of the putative Alabama Class, reasonably could have discovered (or did in fact discover) the nature of the deceptive conduct described herein.

33. As a direct result of Fifth Generation's violations of the Alabama Deceptive Trade Practices Act, Plaintiff and each member of the putative class has been damaged, including in that each purchased Tito's Vodka when they would not have otherwise and paid more for Tito's Vodka than they should have.

COUNT TWO
VIOLATION OF GEORGIA'S FAIR BUSINESS PRACTICES ACT
(Ga. Code § 10-1-393, *et seq.*)
On Behalf Of The Georgia Class

34. All allegations and paragraphs in this complaint are incorporated by reference.

35. Fifth Generation manufacturing, marketing, and selling of Tito's Handmade Vodka constitutes the conduct of consumer transactions in trade and commerce within the definition of Georgia Code §§ 10-1-392 and 10-1-393.

36. Fifth Generation is a "person" as within the definition of Georgia Code § 10-1-392.

37. Plaintiff and each member of the putative Georgia Class is a "consumer" within the definition of Georgia Code § 10-1-392.

38. As set out herein, Fifth Generation has each engaged in unfair and

deceptive acts and practices in the course of its business through the deceptive marketing, advertising, and selling of Tito's Handmade Vodka including by:

- (1) causing actual confusion or actual misunderstanding as to the source of Tito's Vodka—particularly, that it “handmade” and “crafted in an old fashioned pot” in a “microdistillery” when it is not. (*See Georgia Code § 10-1-392(b)(2)*);
- (2) representing that Tito's Vodka has characteristics and qualities which it does not have—particularly that it is “handmade.” (*See Georgia Code § 10-1-392(b)(5)*);
- (3) advertising Tito's Vodka with the intent to sell it not as advertised—particularly advertising that it is “handmade” in a “microdistillery,” “crafted in an old fashioned pot still,” when it is mass-produced in a large, automated industrial facility. (*See Georgia Code § 10-1-392(b)(9)*); and
- (4) engaging in other unfair, misleading, or deceptive acts or practices (*See Georgia Code § 10-1-392(a)*);

39. Fifth Generation acted knowingly, with actual awareness or such awareness as a reasonable person should have considering all the surrounding circumstances.

40. Fifth Generation does not maintain a place of business and does not

keep assets in Georgia.

41. As a direct result of Fifth Generation's violations of the Georgia Fair Business Practices Act, Plaintiff and each member of the putative class has been damaged, including in that each purchased Tito's Vodka when they would not have otherwise and paid more for Tito's Vodka than they should have.

COUNT THREE
VIOLATION OF GEORGIA'S UNIFORM DECEPTIVE TRADE
PRACTICES ACT
(Ga. Code § 10-1-372, *et seq.*)
On Behalf Of The Georgia Class

42. All allegations and paragraphs in this complaint are incorporated by reference.

43. Fifth Generation manufacturing, marketing, and selling of Tito's Handmade Vodka constitutes the conduct of consumer transactions in the course of its business within the definition of Georgia Code §§ 10-1-371 and 10-1-372.

44. Fifth Generation is a "person" as within the definition of Georgia Code § 10-1-371.

45. As set out herein, Fifth Generation has each engaged in deceptive trade practices in the course of its business through the deceptive marketing, advertising, and selling of Tito's Handmade Vodka including by:

- (1) causing likelihood of confusion or actual misunderstanding as to the source of Tito's Vodka—particularly, that it "handmade" and "crafted

in an old fashioned pot” in a “microdistillery” when it is not. (*See* Georgia Code § 10-1-372(a)(2));

(2) representing that Tito’s Vodka has characteristics and qualities which it does not have—particularly that it is “handmade.” (*See* Georgia Code § 10-1-372(a)(5));

(3) advertising Tito’s Vodka with the intent to sell it not as advertised—particularly advertising that it is “handmade” in a “microdistillery,” “crafted in an old fashioned pot still,” when it is mass-produced in a large, automated industrial facility. (*See* Georgia Code § 10-1-372(a)(9));

(4) representing Tito’s Vodka as of a particular standard, quality or grade—particularly that it is “handmade”—when it is of another. (*See* Georgia Code § 10-1-372(a)(7)); and

(4) engaging in other unfair, misleading, or deceptive act or practice which creates a likelihood of confusion or of misunderstanding. (*See* Georgia Code § 10-1-372(a)(12));

46. Fifth Generation acted intentionally and knowingly, with actual awareness or such awareness as a reasonable person should have considering all the surrounding circumstances.

47. Fifth Generation does not maintain a place of business and does not

keep assets in Georgia.

48. Neither Plaintiff, nor any member of the putative Georgia Class, reasonably could have discovered (or did in fact discover) the nature of the deceptive conduct described herein.

49. As a direct result of Fifth Generation's violations of the Georgia Uniform Deceptive Trade Practices Act, Plaintiff and each member of the putative class has been damaged, including in that each purchased Tito's Vodka when they would not have otherwise and paid more for Tito's Vodka than they should have.

COUNT FOUR
UNJUST ENRICHMENT
On Behalf Of The Alabama Class And The Georgia Class

50. All allegations and paragraphs in this complaint are incorporated by reference.

51. To the extent necessary, this count is pled in the alternative to the other counts.

52. Fifth Generation received money from Plaintiff and each member of the putative classes, which in justice and equity it should not be permitted to keep. The benefit conferred by Plaintiff and each member of the putative classes was non-gratuitous and Fifth Generation realized value from this benefit. It would be inequitable for Fifth Generation to retain this benefit.

PRAYER FOR RELIEF

Plaintiff, on behalf of herself and each member of the putative class, seeks:

- (1) an order certifying the proposed class and appointing Plaintiff as class representative and Plaintiff's counsel as class counsel;
- (2) three times actual damages;
- (3) to the extent treble damages are not awarded, actual damages or \$100 per class member, whichever is greater;
- (4) exemplary damages;
- (4) reasonable attorney's fees and costs;
- (5) injunctive relief, including an order prohibiting Defendant from selling Tito's Vodka;
- (6) full restitution of all amounts paid to Defendant; and
- (7) all other relief which the Court or jury should find appropriate.

Plaintiff demands a trial of all claims by struck jury.

Dated: August 4, 2015

Respectfully submitted,



/s/ Nicholas W. Armstrong

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Court Name: U S DISTRICT COURT - AL/M
Division: 2
Receipt Number: 4602037848
Cashier ID: kruffin
Transaction Date: 08/05/2015
Payer Name: MONTGOMERY PONDER LLC

CIVIL FILING FEE
For: MONTGOMERY PONDER LLC
Case/Party: D-ALM-3-15-CV-000561-001
Amount: \$400.00

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Amt Tendered: \$400.00

Total Due: \$400.00
Total Tendered: \$400.00
Change Amt: \$0.00

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Wilson v. Fifth Generation, Inc.