

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

MARIO ALIANO, individually, and)
on behalf of all others similarly situated,)
)
Plaintiff,)
)
v.)
)
WHISTLEPIG, LLC, and)
GOAMERICAGO BEVERAGES, LLC,)
)
Defendants.)

No. 14 cv 10148
Magistrate Judge Sheila M. Finnegan
(consent for all purposes)

FIRST AMENDED CLASS ACTION COMPLAINT

Plaintiff Mario Aliano (“Plaintiff”), on behalf of himself and all others similarly situated, by and through counsel at Zimmerman Law Offices, P.C., brings this action against Defendants WHISTLEPIG, LLC, and GOAMERICAGO BEVERAGES, LLC (collectively, “Defendants”), as follows:

NATURE OF THE CASE

1. The craft distillery industry is experiencing a momentous surge. As of last year, there were more than 450 independent, craft distilleries in America, whereas a decade ago there were fewer than 40, according to the American Distilling Institute. This explosion has been fueled, in large part, by the growing interest in hand-crafted, artisan, and locally made products.

2. Defendants own the whiskey brand Whistlepig Straight Rye Whiskey (“Whistlepig”). Defendants’ marketing and advertising of Whistlepig on its website and its label portrays Whistlepig as a craft whiskey produced on a small farm in Vermont. Indeed, at all relevant times, Whistlepig’s website discussed a modest farmhouse dedicated to raising pigs and making Whistlepig whiskey, and stated that “[f]rom a small farm in Vermont, we boldly aspire to

create the world's greatest rye whiskey....”

3. Prior to October 12, 2014, Defendants' website also credited the Whistlepig farm with growing certified organic rye grain to be distilled into Whistlepig.

4. Defendants prominently represent on Whistlepig's label in all capital letters that it is “HAND BOTTLED AT WHISTLEPIG FARM, SHOREHAM, VERMONT.”

5. On Whistlepig's website, Defendants credit Dave Pickerell as its “Master Distiller.” The website goes on to say that when he joined Whistlepig, his only goal was to “create the finest rye whiskey.”

6. Defendants' website also characterizes Whistlepig as “the nation's first ‘farm-to-bottle’ single-estate distillery.”

7. Defendants market Whistlepig in this manner because due to the large number of different brands of rye whiskey on the market, consumers are making purchasing decisions while standing at the store looking at whiskey labels, or they compare the marketing and advertising representations made by different companies, and Defendants want consumers to believe that they are buying unique, premium whiskey, not sourced whiskey from a bulk producer.

8. As such, based on Defendants' representations in their marketing and advertising, consumers looking for craft whiskey (instead of mass-produced whiskey) have purchased hundreds of thousands of bottles of Whistlepig at a premium price as compared to other lower-priced whiskey products.

9. However, Defendants' marketing and advertising is intentionally false and misleading. Although Defendants' headquarters are in Shoreham, Vermont, neither Whistlepig, nor the ingredients used in making Whistlepig, are from the Vermont farm. Whistlepig is distilled and aged by Alberta Distillers, Ltd.'s (“ADL”) factory in Alberta, Canada—a massive

complex that produces and distills industrial-sized quantities of beverage-grade alcohol, including whiskey from numerous other brands—and Defendants purchase their rye whiskey for Whistlepig from ADL.

10. Although it was not widely publicized, and Plaintiff did not become aware of it until after purchasing Whistlepig, Defendants recently admitted that ADL is the source of Whistlepig whiskey.¹ As such, Whistlepig is unquestionably not made on a humble farm from locally grown rye. Rather, it is made with the same 100% rye recipe that other ADL rye whiskeys are made with.

11. Thousands of consumers across the country have been injured by Defendants' deceptive marketing practices, including Plaintiff. They all have purchased Whistlepig and paid a premium for it in reliance on the Defendants' representations that it was produced on and with ingredients from a small farm in Vermont, while not being aware of the actual origin of its whiskey.

12. Plaintiff, on behalf of himself and on behalf of a class of similarly situated individuals, brings this lawsuit seeking injunctive relief, damages, and restitution, together with costs and reasonable attorneys' fees.

PARTIES

13. Plaintiff is a natural person and citizen of the State of Illinois.

14. Defendant Whistlepig, LLC, is a limited liability company existing under the laws of the State of Delaware, with its principal place of business located at 2139 Quiet Valley Road, Shoreham, Vermont, 05770. Whistlepig, LLC does business in this District, and nationwide.

¹ Davin De Kergommeaux, *A Revealing Chat With WhistlePig's Raj Bhakta*, Whiskey Advocate, March 19th, 2014, available at <http://whiskyadvocate.com/whisky/2014/03/19/a-revealing-chat-with-whistlepigs-raj-bhatka>.

15. Defendant Goamericago Beverages, LLC, is a limited liability company existing under the laws of the State of Delaware, with its principal place of business located at 1030 Palmer Road, Shoreham, Vermont, 05770. Goamericago Beverages, LLC does business in this District, and nationwide.

JURISDICTION AND VENUE

16. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332, because the proposed Class contains more than 100 members, at least one Class member belongs to a different state than the Defendants, and the amount in controversy exceeds \$5,000,000, exclusive of costs and interest.

17. This Court has personal jurisdiction over Defendants because the conduct complained of herein occurred in the District and Defendants conducted business in the District.

18. Venue in this District is proper because a substantial part of the events occurred in the District.

SUBSTANTIVE ALLEGATIONS

19. Defendants launched Whistlepig in 2010.

20. In order to distinguish itself as an artisanal, craft rye whiskey, Defendants market and advertise Whistlepig as being made on a small farm in Vermont from rye grown on site.

21. Defendants represent to consumers that Whistlepig is an authentic Vermont product unique from the hundreds of other whiskeys on the market.

22. Although Plaintiff did not attend any of the Whistlepig sponsored events, at these events Defendants, their representatives, and their agents represented Whistlepig as being from

Vermont and being from locally grown rye.² This further illustrates Defendants' misleading marketing campaign.

23. To further give the illusion of a small farm-based operation, as of at least October 12, 2014, Defendants' website described the Whistlepig production process at Defendants' farm. The description included farm fields growing rye, the "bottling room where the bottles are labeled and filled by hand" located in an old cow milking parlor, and "barns, which once housed over 200 cows," that "now serve as warehouse space for aging the whiskey."

24. Defendants prominently represent on Whistlepig's label in all capital letters that it is "HAND BOTTLED AT WHISTLEPIG FARM, SHOREHAM, VERMONT." Pictures of the bottle are included below.



25. On Whistlepig's website, Defendants credit Dave Pickerell as its "Master Distiller." The website goes on to say that he "is one of the nation's preeminent master distillers" and that when he joined Whistlepig, his only goal was to "create the finest rye whiskey." Defendants' website also characterizes Whistlepig as "the nation's first 'farm-to-bottle' single-

² Davin De Kergommeaux, *Whistlepig Farms is Not a Distillery*, November 13, 2013, available at <http://www.canadianwhisky.org/news-views/whistlepig-farms-is-not-a-distillery.html>.

estate distillery.” The purpose of these representations is to give the impression that Defendants are actually distilling Whistlepig on their farm in Vermont.

26. Defendants’ marketing and advertising strategy revolves around deceiving consumers into believing that Whistlepig is an authentic, craft whiskey product so that Defendants can charge premium prices for Whistlepig.

27. Defendants’ marketing efforts on Defendants’ website and on Whistlepig’s label created the overall impression that Whistlepig is a unique Vermont product. However, Defendants’ whiskey is made in bulk at ADL’s factory in Canada. ADL specializes in bulk industrial alcohol manufacturing.

28. Defendants purchase rye whiskey made from the same 100% rye recipe that ADL uses for its other whiskeys. The only activity that occurs in Vermont is the filling of the bottles.

29. Rye whiskeys sold under different brand names by different companies using the same bulk rye whiskey manufactured by ADL used in creating Whistlepig sell for much lower prices.

30. Consumers, s, like Plaintiff, have purchased Whistlepig because Defendants’ stated processes used to make the whiskey, place of origin, and unique recipe are material factors in their willingness to pay a premium for the product.

31. Defendants know that consumers are willing to pay more for a craft, Vermont-based rye whiskey because the quality would be higher, and Defendants know that Plaintiff and other consumers believe they are paying costs associated with higher-quality ingredients and for small-scale production.

32. However, consumers have paid that premium based on Defendants' deceptive marketing and advertising strategy. Had they known that Defendants' misrepresentations regarding Whistlepig were false, they would have not have purchased Whistlepig.

FACTS RELATING TO PLAINTIFF

33. In determining which brands of alcohol to purchase, Plaintiff researched and continues to research the details of the various brands of alcohol, including Whistlepig. Prior to purchasing Whistlepig in October, 2014, Plaintiff consulted internet websites and product labels for various brands of whiskey, including Whistlepig, and compared the representations in the marketing and advertising materials for each brand of rye whiskey.

34. Based on the research he conducted and the false and misleading representations made by Defendants on Whistlepig's label and on its website, in October, 2014, Plaintiff purchased a bottle of Whistlepig for his personal use.

35. None of the marketing or advertising materials that Plaintiff saw on Defendants' website or on Whistlepig's label prior to purchasing Whistlepig disclosed that Whistlepig is distilled and aged in Canada, that it is mass produced by ADL, or that it is not made on a small farm in Vermont.

36. Prior to purchasing Whistlepig, Plaintiff did not see, and was not aware of, any statements or articles in which Defendants or their agents admitted—or any other third-party alleged—that ADL was the source of Whistlepig, or that Whistlepig was not distilled on a small farm in Vermont.

37. Had Plaintiff known the truth about Whistlepig, he would not have purchased it.

CLASS ALLEGATIONS

38. **Class Definition:** Plaintiff brings this action pursuant to Fed. R. Civ. P. 23(a), (b)(2), and (b)(3) on behalf of himself and a nationwide Class of similarly situated individuals, defined as follows:

All persons who purchased a bottle or bottles of Whistlepig in the United States.

Subclass A: all Illinois consumers who purchased a bottle or bottles of Whistlepig.

Excluded from the Class are: (1) Defendants, Defendants' agents, subsidiaries, parents, successors, predecessors, and any entity in which Defendants or their parents have a controlling interest, and those entities' current and former employees, officers, and directors; (2) the Judge to whom this case is assigned and the Judge's immediate family; (3) any person who executes and files a timely request for exclusion from the Class; (4) any person who has had their claims in this matter finally adjudicated and/or otherwise released; and (5) the legal representatives, successors and assigns of any such excluded person.

39. **Numerosity:** The exact number of Class members is unknown and is not available to Plaintiff at this time, but individual joinder in this case is impracticable. Defendants operate a multi-million dollar business selling Whistlepig.³ According to Defendants' website, Whistlepig is sold in cities across the country, ranging from New York to Los Angeles. Thus, the Class likely consists of thousands of individuals. Class members can be easily identified through Defendants' records or by other means.

40. **Commonality and Predominance:** There are several questions of law and fact common to the claims of Plaintiff and the Class members, and those questions predominate over any questions that may affect individual Class members. Common questions include, but are not limited to, the following:

- a. Whether Defendants misrepresented that Whistlepig is produced in Vermont;

³ Ron Shems, *Community Forum: Why WhistlePig is not a farm*, Addison County Independent, February 28, 2013, available at <http://www.addisonindependent.com/?q=node/15659>.

- b. Whether Defendants misrepresented that Whistlepig is made from ingredients grown on a small farm in Vermont;
- c. Whether Defendants failed to disclose that the rye whiskey that eventually becomes Whistlepig is mass-produced by a company in Canada;
- d. Whether Defendants' conduct violates the Illinois Consumer Fraud and Deceptive Business Practices Act;
- e. Whether Defendants' marketing and advertising statements create a likelihood of deception, or have the capacity to deceive;
- f. Whether Defendants' conduct was fraudulent or misleading; and
- g. Whether Defendants' conduct resulted in unjust enrichment to Defendants.

41. **Typicality.** Plaintiff's claims are typical of the claims of the Class and Subclass members. All are based on the same legal and factual issues. Plaintiff and each of the Class and members purchased Whistlepig. Moreover, Defendants' aforementioned misrepresentations and omissions were uniformly made to Plaintiff and all Class members.

42. **Adequacy of Representation:** Plaintiff will fairly and adequately represent and protect the interests of the Class, and has retained counsel competent and experienced in complex class actions. Plaintiff has no interest antagonistic to those of the Class, and Defendants have no defenses unique to Plaintiff.

43. **Superiority:** Class proceedings are also superior to all other available methods for the fair and efficient adjudication of this controversy because joinder of all parties is impracticable. Further, it would be virtually impossible for the individual members of the Class to obtain effective relief because the damages suffered by individual Class members are likely to be relatively small, especially given the burden and cost of individually conducting the complex litigation necessitated by Defendants' actions. Even if Class members were able or willing to

pursue such individual litigation, a class action would still be preferable due to the fact that a multiplicity of individual actions would likely increase the expense and time of litigation given the complex legal and factual controversies presented in this Complaint. A class action, on the other hand, provides the benefits of fewer management difficulties, single adjudication, economy of scale, and comprehensive supervision by a single Court, and would result in reduced time, effort and expense for all parties and the Court, and ultimately, the uniformity of decisions.

44. By making the uniform misleading marketing statements detailed above, Defendants have acted and refused to act on grounds generally applicable to the proposed Class and Subclass, making appropriate final injunctive relief with respect to the proposed Class and Subclass as a whole.

COUNT I
Violation of the Illinois Consumer Fraud and Deceptive Trade Practices Act
(815 ILCS § 505/1, *et seq.*)
(On behalf of Plaintiff and Subclass A)

45. Plaintiff incorporates by reference the allegations in paragraphs 1-44 as if fully set forth herein.

46. The Illinois Consumer Fraud and Deceptive Business Practices Act (“ICFA”), 815 ILCS §§ 505/1, *et seq.*, provides protection to consumers by mandating fair competition in commercial markets for goods and services.

47. The ICFA prohibits any deceptive, unlawful, unfair, or fraudulent business acts or practices including using deception, fraud, false pretenses, false promises, false advertising, misrepresentation, or the concealment, suppression, or omission of any material fact, or the use or employment of any practice described in Section 2 of the “Uniform Deceptive Trade Practices Act”. 815 ILCS § 505/2.

48. The ICFA applies to Defendants' acts as described herein because it applies to transactions involving the sale of goods or services to consumers.

49. Defendants are "persons" as defined by section 505/1(c) of the ICFA.

50. Plaintiff and each member of Subclass A are "consumers" as defined by section 505/1(e) of the ICFA.

51. Whistlepig constitutes "merchandise" under the meaning of section 505/1(b) and its sale is within the meaning of "trade" or "commerce" under the ICFA.

52. Defendants' misrepresentations and omissions regarding the true origin of Whistlepig are deceptive and unfair acts or practices prohibited by Chapter 2 of ICFA.

53. Defendants violated the ICFA when they misrepresented and omitted facts regarding Whistlepig being mass produced by ADL in order to create the impression upon consumers that Whistlepig was a unique, premium craft rye whiskey.

54. Whistlepig's material selling point is Defendants' misrepresentations that Whistlepig is an authentic, Vermont product made from locally grown ingredients, which differentiates it from other brands of rye whiskey. Accordingly, it was the central reason consumers chose to purchase Whistlepig over other alternatives, and to pay a premium for it.

55. Plaintiff and the members of Subclass A relied upon Defendants' misrepresentations and omissions when they purchased bottles of Whistlepig.

56. If Plaintiff and the members of Subclass A had been aware of the true origin of the Defendants' whiskey, the content thereof, and the other facts set forth above, they would not have purchased Whistlepig.

57. As a result of Defendants' material misrepresentations and omissions regarding Whistlepig, Defendants violated section 510/2(a)(2) of the Uniform Deceptive Trade Practices

Act (“DTPA”) which proscribes causing “likelihood of confusion or of misunderstanding as to the source” of goods.

58. Defendants also violated section 510/2(a)(4) of the DTPA by using “deceptive representations or designations of geographic origin in connection with goods.”

59. Defendants also violated section 510/2(a)(5) of the DTPA by representing that Whistlepig has characteristics and ingredients that it does not have, such as that it is a craft cocktail with a unique recipe that is made in Vermont from locally grown ingredients.

60. Plaintiff’s and the members of Subclass A’s expectations that Whistlepig was made in Vermont, and was not made from mass-produced rye whiskey made by ADL in Canada, were reasonable due to the Defendants’ misrepresentations and omissions described herein.

61. Plaintiff and the members of Subclass A saw Defendants’ marketing and advertising materials prior to purchasing Whistlepig, and they reasonably relied on Defendants’ misrepresentations and omissions when they purchased Whistlepig.

62. Defendants’ misrepresentations and omissions regarding the source and manufacturing process of their whiskey were acts likely to mislead the Plaintiff and the members of Subclass A acting reasonably under the circumstances, and thus constitute unfair and deceptive trade practices in violation of ICFA.

63. Defendants knew that they failed to disclose the Canadian origin, the source of their recipe, and the other circumstances regarding the rye whiskey used in making Whistlepig—which is highly relevant and material information—to their customers, and thus violated the ICFA.

64. As a direct and proximate result of Defendants’ violations of the ICFA, the Plaintiff and the members of Subclass A have suffered harm in the form of monies paid in

exchange for Whistlepig because they paid more than what they would have otherwise paid had they know the true nature of the product.

65. Defendants' practices set forth herein offend public policy, were and are immoral, unethical, oppressive, and unscrupulous, and cause substantial injury to consumers.

66. Plaintiff, on behalf of himself and the members of Subclass A, seeks an order (1) requiring the Defendants to cease the deceptive and unfair practices described herein; (2) requiring Defendants to change their marketing and advertising materials, including Whistlepig labels and the Whistlepig website, to adequately disclose the material facts regarding the origin, content, and process of creating Whistlepig; (3) awarding damages, interest, and reasonable attorneys' fees, expenses, and costs to the extent allowable; and/or (4) requiring Defendants to restore to Plaintiff and each member of Subclass A any money acquired by means of unfair competition (restitution).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of Subclass A, prays for an Order as follows:

- A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. 23, and certifying the Class and Subclass A as defined herein;
- B. Designating Plaintiff as representative of the Class and Subclass A and his undersigned counsel as Class Counsel;
- C. Entering judgment in favor of Plaintiff and Subclass A and against Defendants;
- D. Enjoining Defendants' illegal conduct alleged herein and ordering disgorgement of any of their ill-gotten gains;
- E. Awarding Plaintiff and Subclass A compensatory damages, in addition to reasonable attorney's fees and costs; and
- F. Granting all such further and other relief as the Court deems just and appropriate.

COUNT II
Restitution/Unjust Enrichment
(On behalf of Plaintiff and the Class)

67. Plaintiff incorporates by reference the allegations in paragraphs 1-44 as if fully set forth herein.

68. Defendants have acquired and retained money belonging to Plaintiff and the Class as a result of their wrongful conduct: their false and misleading marketing and advertising campaign for Whistlepig. Each individual sale nets Defendants profit at the expense of the consumers.

69. Defendants appreciate or know of such a benefit.

70. Under the principles of equity, Defendants should not be allowed to keep the money belonging to Plaintiff and the members of the Class because Defendants have unjustly received it as a result of its unlawful actions described herein.

71. Plaintiff and the Class have suffered damages as a direct result of Defendants' conduct.

72. Plaintiff, on behalf of himself and the Class, seek restitution for Defendants' unlawful conduct, as well as interest and attorneys' fees and costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the Class, prays for an Order as follows:

- A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. 23, and certifying the Class defined herein;
- B. Designating Plaintiff as representative of the Class and his undersigned counsel as Class Counsel;
- C. Entering judgment in favor of Plaintiff and the Class and against Defendants;

- D. Enjoining Defendants' illegal conduct alleged herein and ordering disgorgement of any of their ill-gotten gains;
- E. Awarding Plaintiff and the Class compensatory damages, in addition to their reasonable attorneys' fees and costs; and
- F. Granting all such further and other relief as the Court deems just and appropriate.

JURY DEMAND

Plaintiff demands trial by jury on all issues so triable.

Plaintiff MARIO ALIANO, individually, and on behalf of all others similarly situated,

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