

**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.

v.

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

Defendants.

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

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

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. 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.

4. 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.

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

5. 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.

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

7. 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.

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

9. "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

10. 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

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

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.

11. 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.

12. 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.

13. 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>

14. 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.

15. 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.

....

16. 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.*

17. 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.

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

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

PARTIES

20. Plaintiffs are residents of Tallahassee, Florida.

21. 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.

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

23. 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.

24. 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

25. 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.

26. 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.

27. 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

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

29. 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 Intentional False Advertising Statute §817.44; 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.

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

31. 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."

32. 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.

33. Had Plaintiffs known that Defendants' Whisky product was falsely represented as "handmade" or "never mass produced," they would not have purchased Defendants' Whisky.

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

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

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

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

38. 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.

39. 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.

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

41. 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.

42. 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.

43. 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).

44. “Compliance with regulations does not immunize misconduct outside the regulatory scope.” *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 133 F. Supp. 2d 162, 175 (E.D.N.Y. 2001); *accord Sclafani v. Barilla Am., Inc.*, 796 N.Y.S.2d 548 (2005). As in *Sclafani*, some of the elements of the relevant packaging and labeling alleged to be deceptive fall outside the scope of the applicable federal regulations.” Making deceptive statements cannot be considered compliance with federal rules, regulations, and statutes. *See People ex rel. Spitzer v. Gen. Elec. Co., Inc.*, 756 N.Y.S.2d 520, 524 (2003).

45. Several courts in previous food labeling cases have held that the FDCA does not preempt state law claims based on requirements identical to FDA regulations. In order to escape preemption by the FDCA “[t]he plaintiff must be suing for conduct that violates the FDCA. *See In re: Medtronic Inc., Sprint Fidelis Leads Prods. Liability Litig.*, 623 F.3d 1200, 1204 (8th Cir. 2010); *Perez v. Nidek Co.*, 711 F. 3d 1109, 1119 (9th Cir. 2013); *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997). Similarly, TTB regulations do not preempt state law claims.

46. 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.

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

47. 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.*

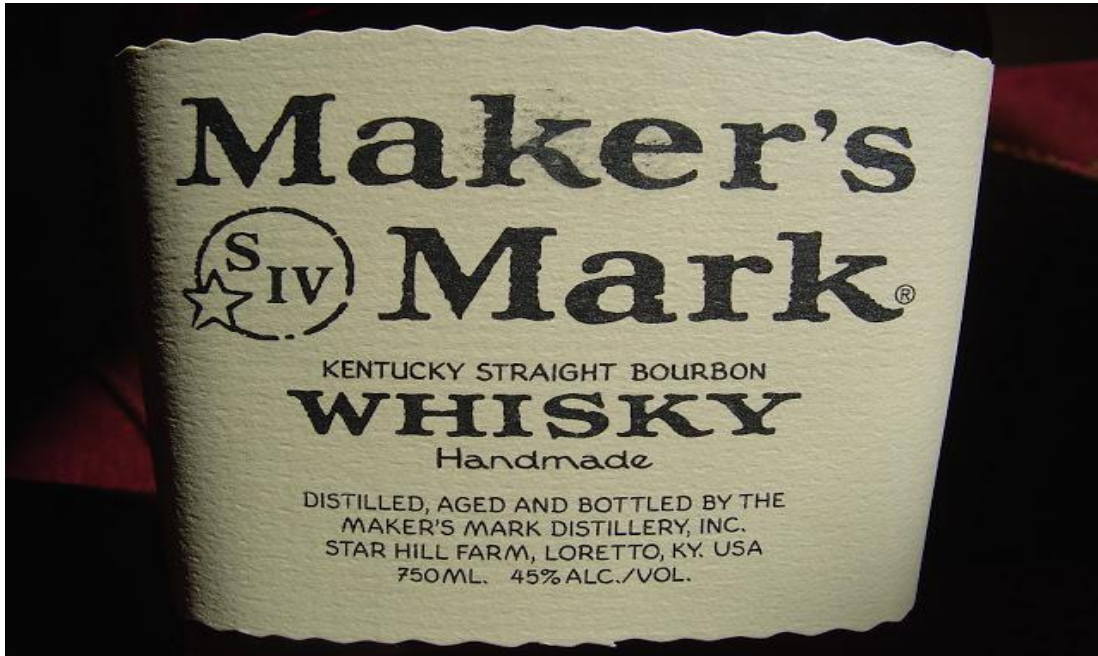
48. Defendants have faced steady production shortages and have, subsequently, attempted to remedy those shortfalls by expanding and mechanizing their facility. This shortage has proved so significant, in fact, that Defendants have even suggested "watering down" their whisky's alcohol content to meet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

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=CNyhb7tvsICFY_m7AodxTEAJg

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

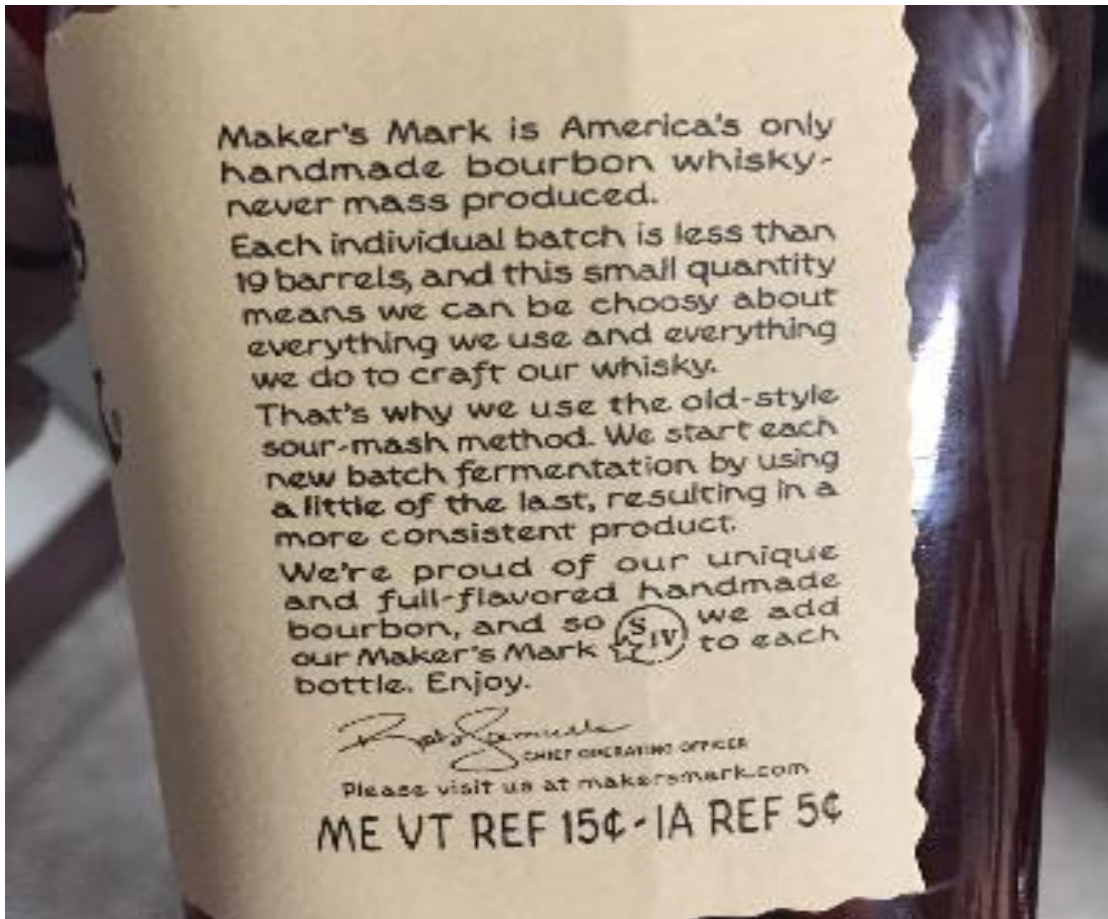
49. All of Defendants' Maker's Mark Whisky product labels prominently display the word "handmade." This word appears a total of three times on the label: Once in big, bold letters on the front of the label, and twice more on the side of the label:



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



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



52. 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.

53. 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.

54. 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.

55. 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.

56. 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.

57. 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

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

59. Defendants claim they use an "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.

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

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



61. 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*, ¶ 60.

62. 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.

63. 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.

64. Defendants' mixing process is shown here:



65. 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.

66. The mixture is then transferred to large fermenting vat. Based on the high volume of liquid transferred, the pictorial evidence below (*See ¶ 67*) 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.

67. Defendants' transferring process of the grain/mash mixture is shown here:



68. 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.

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



70. 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.*

71. Defendants' automated bottling process shown here:



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



73. 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.

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

75. Defendants’ labeling process is shown here:



76. 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.

77. 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.

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

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

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

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

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

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

84. 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.

85. 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.

86. 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.

87. 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

88. 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 Handmade Whisky (the "Class").

89. 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.

90. 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.

91. **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.

92. **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; Merchantability; Usage of Trade Pursuant to §672.314 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.

93. **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 a based on the same legal theories.

94. **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 discharged those duties by vigorously seeking the maximum possible recovery for the Class.

95. **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.

96. 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.

97. 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.

98. 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.

99. 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.

100. 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.

101. 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.

102. 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

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

104. Defendants' conduct constitutes unlawful business acts and practices.

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

106. Florida Consumer Protection Statute §501.204 (2014) prohibits any "unlawful," "fraudulent" or "unfair" business act or practice and any false or misleading advertising. For the reasons discussed above. Defendants have engaged in unfair, false, deceptive, untrue and misleading advertising in violation of Florida Consumer Protection Statute §501 *et. seq.*

107. 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.” Defendants have violated §501.204’s prohibition against engaging in unlawful acts and practices by, *inter alia*, making the false and deceptive representations, and also through their omissions of material facts, as set forth more fully herein, and violating 21 U.S.C. § 205, 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.

108. 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.

109. Defendants’ 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 *et seq.*, in that their 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.

110. 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. Defendants’ 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).

111. There were reasonably available alternatives to further Defendants’ legitimate business interests, other than the conduct described herein.

112. Defendants' 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.

113. Defendants' 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 Defendants' 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. Defendants' deceptively labeled, falsely advertised, and misbranded product have little to no market value.

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

115. Plaintiffs, on behalf of themselves, and all others similarly situated, and the general public, 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 Defendants 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 INTENTIONAL FALSE ADVERTISING STATUTE §817.44

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

117. 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.

118. 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.

119. 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."

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

121. 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).

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

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

124. 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.

125. 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.

126. 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.

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

COUNT III

BREACH OF EXPRESS WARRANTY; MERCHANTABILITY; USAGE OF TRADE PRUSUANT TO § 672.314 FLORIDA STATUTES

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

129. Plaintiffs, and each member of the Class, formed a contract with Defendants at the time Plaintiffs and the other members of the Class purchased Defendants' Whisky product. The terms of that contract include the express and implied promises and affirmations of fact made by Defendants on Maker's Mark Whisky product's packaging and labeling, and through their marketing campaign, as described above. Defendants' Whisky product's 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.

130. At all times, and as detailed above, Defendants expressly warranted that Defendants' Whisky was 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 the product is "handmade."

131. Defendants breached the terms of the contract, including the warranties with Plaintiffs and the Class by selling Maker's Mark Whisky, with the false "Handmade" representation. Defendants breached the terms of the contract, including the warranties with Plaintiffs and the Class by selling Maker's Mark Whisky, with the false "America's only handmade bourbon whisky – never mass produced" representation.

132. Members of the public, including Plaintiffs, reasonably relied upon the skill and judgment of Defendants, and upon said express warranties in purchasing Maker's Mark Whisky.

133. Plaintiffs and the Class purchased Defendants' Maker's Mark Whisky without knowledge that this product is falsely represented as "Handmade" or "America's only handmade bourbon whisky – never mass produced."

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

135. All conditions precedent to Defendants' liability under this contract, including notice, have been performed by Plaintiffs and the Class.

COUNT IV

**BREACH OF IMPLIED WARRANTY PURSUANT TO UNIFORM
COMMERCIAL CODE §2-314 AND FLORIDA STATUTE §672.314**

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

137. 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.

138. At all times, Florida has codified and adopted the provisions of the Uniform Commercial Code governing the implied warranty of merchantability. Fla. Stat. §672.314 (2014).

139. Defendants' Maker's Mark Whisky products are "goods" as defined in the Florida's commercial codes governing the implied warranty of merchantability.

140. As designers, manufacturers, producers, marketers, labelers and sellers of Defendants' Maker's Mark Whisky, Defendants are "merchants" within the meaning of the various states' commercial codes governing the implied warranty of merchantability.

141. By placing Defendants' Maker's Mark Whisky in the stream of commerce, Defendants impliedly warranted that Defendants' Maker's Mark Whisky is reasonably safe and that all claims on their packaging were true, i.e., being "Handmade" and "America's only handmade bourbon whisky – never mass produced."

142. As merchants, Defendants knew that purchasers relied upon them to design, manufacture, label, and sell products that were 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 Defendants' Maker's Mark Whisky.

143. Plaintiffs and the Class members purchased Defendants' Maker's Mark Whisky for their intended purpose.

144. Defendants' Maker's Mark Whisky product's defect was not open or obvious to consumers, including Plaintiffs and the Class, who could not have known about the true nature of the production of Defendants' product.

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

COUNT V
NEGLIGENCE

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

147. 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.

148. 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.

149. 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.

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

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

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

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

COUNT VI

UNJUST ENRICHMENT

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

155. 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.

156. 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.

157. 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.

158. 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.

159. 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: December 11, 2014

Respectfully submitted,

/s/ Tim Howard

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

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