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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARC CABRERA,

Plaintiff,

v.
FIFTH GENERATION, INC., a Texas
corporation; and DOES 1 through 100,
inclusive,

Defendants.

Case No.: 14cv2990 JM(JLB)
Related Case No: 14cv2569 JM(JLB)

**ORDER DENYING DEFENDANT
FIFTH GENERATION’S MOTION
FOR SUMMARY JUDGMENT**

This order addresses Defendant Fifth Generation, Inc.’s (“Fifth Generation”) motion for summary judgment filed on August 28, 2015. (Doc. No. 41). The matters were fully briefed and were found suitable for resolution without oral argument pursuant to Local Rule 7.1(d)(1).

For the reasons set forth below, the court denies Defendant’s motion for summary judgment.

BACKGROUND

Plaintiff Marc Cabrera (“Cabrera”) complains that the labeling of Fifth Generation’s product called Tito’s Handmade Vodka (“Tito’s”) is false because, in reality, the vodka is manufactured using mechanized and/or automated processes, which involves “little to no human supervision, assistance or involvement.” (Doc. No. 3, ¶¶ 1,

1 33). On December 22, 2014, Cabrera initiated this lawsuit. (Doc. No. 1). On December
2 24, 2014, Cabrera filed the operative first amended complaint (“FAC”) as a putative
3 nationwide class action on behalf of retail purchasers of Tito’s during the last four years.
4 (Doc. No. 3). On March 25, 2015, this action was deemed related to Hofmann v. Fifth
5 Generation, Inc. and Does 1-100, No. 14cv2569 (S.D. Cal.) (“the Hofmann action”) and
6 was transferred to this court pursuant to the low number rule of Local Rule 40.1. (Doc.
7 No. 18).

8 Plaintiff alleges that on December 16, 2014, he purchased Tito’s at a CVS
9 Pharmacy store in San Diego, California. (Doc. No. 3, ¶ 31). It displayed a label
10 prominently claiming the vodka is “Handmade” and “Crafted in an Old Fashioned Pot
11 Still by America’s Original Microdistillery.” (Id. at ¶¶ 30, 31). He claims that he saw the
12 label, relied on it, and believed he was buying a superior quality product by virtue of it
13 being made by hand rather than by a machine. (Id. at ¶ 32).

14 He claims that the Tito’s labeling is false and misleading because, in reality, the
15 vodka is mass-produced in large quantities with the use of mechanized and automated
16 machinery, not human hands. (Id. at ¶¶ 2, 16). He quotes a 2013 Forbes magazine article
17 on Tito’s that described “massive buildings containing ten floor-to-ceiling stills and
18 bottling 500 cases an hour.” (Id. at ¶ 16).

19 He alleges further that when Fifth Generation represented to the public that Tito’s
20 is “Handmade,” it concealed the highly automated nature of the manufacture and bottling
21 process. (Id. at ¶ 21). He contends that “Handmade” and “Handcrafted” are terms that
22 consumers have long associated with higher quality manufacturing and high-end
23 products, and therefore, when he and other consumers purchased Tito’s, they were under
24 the false impression that the vodka was of superior quality. (Id. at ¶¶ 18, 22).

25 Consequently, Plaintiff claims, he and other consumers were fraudulently induced
26 to pay inflated prices for vodka they believed was genuinely handmade, when it was not.
27 (Id. at ¶¶ 24, 25). On that basis, he asserts four causes of action under California law:
28 (1) violation of California’s False Advertising Law (“FAL”), Business & Professions

1 Code § 17500 *et seq.*; (2) violation of California’s Unfair Competition Law (“UCL”),
2 Business & Professions Code § 17200 *et seq.*; (3) negligent misrepresentation; and (4)
3 intentional misrepresentation. (*Id.* at ¶¶ 45–97).

4 On August 28, 2015, Fifth Generation filed a motion for summary judgment.
5 (“Motion”) (Doc. No. ¶ 41). On October 5, 2015, Plaintiff filed an opposition to
6 Defendant’s motion (“Opposition”) (Doc. No. ¶ 48). On October 9, 2015, Defendant
7 filed a reply (“Reply”) (Doc. No. ¶ 49).

8 LEGAL STANDARD

9 A moving party is entitled to summary judgment where “there is no genuine issue
10 as to any material fact” Fed. R. Civ. P. 56(c); Prison Legal News v. Lehman, 397
11 F.3d 692, 698 (9th Cir. 2005). The court must examine the evidence in the light most
12 favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655
13 (1962). While Rule 56 contains “no express or implied requirement . . . that the moving
14 party support its motion with affidavits or other similar materials negating the opponent’s
15 claim,” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986), “the moving party bears the
16 burden of proof at trial, [and] it must come forward with evidence which would entitle it
17 to a directed verdict if the evidence were uncontroverted at trial.” Houghton v. South,
18 965 F.2d 1532, 1536 (9th Cir. 1992).

19 If the moving party meets its initial burden of production, the burden shifts to the
20 non-moving party to go beyond the pleadings by citing materials in the record to show a
21 genuine issue for trial. Celotex, 477 U.S. at 324 (citation omitted). The opposing party
22 also may not rely solely on conclusory allegations unsupported by factual data. Taylor v.
23 List, 880 F.2d 1040, 1045 (9th Cir. 1989). Nevertheless, the ultimate burden of persuasion
24 on the motion remains with the moving party. Nissan Fire & Marine Ins. Co., Ltd. v. Fritz
25 Cos., 210 F.3d 1099, 1102 (9th Cir. 2000). Doubt as to the existence of any issue of
26 material fact requires denial of the motion. Anderson v. Liberty Lobby, Inc., 477 U.S.
27 242, 255 (1986).

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1 **DISCUSSION**

2 **A. The Safe Harbor**

3 Fifth Generation first raised its safe harbor argument in its motion to dismiss the
4 related Hofmann Action, where it argued that plaintiff Gary Hofmann’s UCL and CLRA
5 were barred by the safe-harbor exception to California’s consumer-protection laws.
6 (Hofmann Action, Doc. No. 8, p. 12-13).

7 In Cel-Tech Communications v. Los Angeles Cellular Telephone Co., 20 Cal. 4th
8 163 (1999), the California Supreme Court recognized a safe harbor under the UCL for
9 actions that the law actually bars, or for conduct the law “clearly permit[s].” Id. at 183.
10 The Court explained:

11 Although the unfair competition law’s scope is sweeping, it is not unlimited.
12 Courts may not simply impose their own notions of the day as to what is fair
13 or unfair. Specific legislation may limit the judiciary’s power to declare
14 conduct unfair. If the Legislature has permitted certain conduct or considered
a situation and concluded no action should lie, courts may not override that
determination.

15 Id. at 182. In short, “[a] plaintiff may . . . not plead around an absolute bar to relief
16 simply by recasting the cause of action as one for unfair competition.” Id. (internal
17 quotation marks omitted). The Ninth Circuit has recognized that the safe harbor applies
18 to claims brought under the CLRA. See Alvarez v. Chevron Corp., 656 F.3d 925, 933–
19 34 (9th Cir. 2011) (applying the safe harbor to a CLRA claim). The Ninth Circuit has
20 also recently extended the safe harbor to protect conduct authorized by regulation. See
21 Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1169 & n.8 (9th Cir. 2012)
22 (“California intermediate courts agree with our conclusion that regulations can create safe
23 harbors.”).

24 In its order granting in part and denying in part Fifth Generation’s motion to
25 dismiss in the Hofmann Action (Hofmann Action, Doc. No. 15), this court remarked that
26 the dispute with respect to the safe harbor argument centered on what kind of government
27 authorization was sufficient to invoke the safe harbor doctrine. The court rejected Fifth
28 Generation’s safe harbor argument for the following reasons: (1) it did not cite any

1 authority to show that the safe harbor extended to information agency action of the type
2 at issue in this case; (2) it did not meaningfully address the distinctions raised by Plaintiff
3 with respect to two relevant cases – Koenig v. Snapple Beverage Corp., 713 F. Supp. 2d
4 1066 (E.D. Cal. 2010) and In re Celexa & Lexapro Marketing & Sales Practices
5 Litigation, 2014 WL 866571 (D. Mass. Mar 5, 2014); (3) its claims that TTB specifically
6 investigated and approved of the “Handmade” term were not properly before the court
7 and could not be considered at that stage; and (4) from the regulations it provided to the
8 court and the apparent absence of any guidance from TTB regarding the meaning of the
9 word “Handmade,” it was not clear that such representations were necessarily within
10 TTB’s regulatory purview. This court also pointed out that the principles set out in Reid
11 v. Johnson & Johnson, 780 F.3d 952 (9th Cir. 2015), which was decided after the briefing
12 on this matter was complete, were likely to be instructive going forward, since in that
13 case the Ninth Circuit joined the Third Circuit in holding that “[c]reation of federal law
14 should demand at least the same formality for purposes of preemption as it does
15 for purposes of *Chevron* deference.” Id. at 964. In doing so, the Ninth Circuit agreed
16 with Fellner v. Tri-Union Seafoods, L.L.C., 539 F.3d 237 (3d Cir. 2008), which
17 Plaintiff’s case, Koenig, relied on for its conclusion regarding the safe harbor, see 713 F.
18 Supp. 2d. at 1074–75.

19 In this motion, Fifth Generation reasserts and more fully develops the safe harbor
20 argument previously asserted in the Hofmann action. First, Fifth Generation argues that
21 the safe harbor doctrine does not have the same formality requirement as the federal
22 preemption doctrine by attempting to make distinctions between the two doctrines.
23 Second, Fifth Generation contends that TTB’s authorization of Tito’s label bars
24 Plaintiff’s claims under the safe harbor doctrine because (1) a certificate of label
25 authorization (“COLA”) is a regulatory approval of a label’s compliance with federal
26 law; (2) the COLA for Tito’s “Handmade” vodka label triggers the safe harbor doctrine
27 as to any claims based on allegations that the label is misleading; and (3) although not
28 necessary, other evidence establishes that the COLA was issued after TTB overcame any

1 concerns about the word “Handmade.”

2 **1. The California Safe Harbor and the Federal Preemption Doctrines**

3 Fifth Generation argues that California’s safe harbor doctrine prohibits any claims
4 based on conduct that state or federal law has considered and permitted, and does so by
5 attempting to distinguish the California safe harbor from the federal preemption doctrine.
6 First, Fifth Generation argues that while the preemption doctrine is rooted in the
7 Supremacy Clause of the United States Constitution, see Fid. Fed. Sav. & Loan Ass’n v.
8 De La Cuesta, 458 U.S. 141, 152 (1982), the safe harbor doctrine was recognized by the
9 California Supreme Court when construing the meaning of “unfair competition” under
10 the UCL, see Cel-Tech, 20 Cal. 4th at 180-82. (Motion, p. 12). Second, while there is a
11 presumption against federal preemption in order to protect traditional state power, see
12 Wyeth v. Levine, 555 U.S. 555, 565 (2009), there is no presumption when applying the
13 safe harbor because it was created by the California Supreme Court based on its
14 conclusion that the legislature did not intend for court decisions about what constitutes
15 unfair competition to prohibit conduct that has been otherwise authorized by law, see
16 Cel-Tech, 20 Cal. 4th at 182. (Motion, pp. 12-13). Third, the Ninth Circuit’s refusal to
17 give preemptive effect to agency actions absent a showing of formality of that action is
18 rooted in the requirement of a showing that “Congress intended the agency’s
19 pronouncement to carry the binding and exclusive force of federal law,” Reid, 780 F.3d
20 at 964, while no such showing of Congressional intent of exclusivity is required in
21 applying the safe harbor, which has been recognized in a spirit of judicial deference to
22 prior state or federal legislative or regulatory action. (Motion, p. 13). Finally, at a later
23 point in the motion, Fifth Generation also argues that Koenig is inapposite to this case
24 “because the Food and Drug Administration has had nothing to do with regulating
25 alcohol beverages since 1976.” (Id. at 16).

26 As this court has already discussed at length in its order denying Fifth Generation’s
27 motion for summary judgment in the Hofmann Action (Hofmann Action, Doc. No. 70),
28 Fifth Generation’s argument that the alleged distinctions between the safe harbor and the

1 preemption doctrines render the “formality” requirement discussed in Reid irrelevant to
2 the safe harbor doctrine is unpersuasive. Fifth Generation failed to provide the court with
3 any meaningful explanation as to why the differing origins of the federal preemption and
4 the safe harbor doctrines bear on the issue of whether the formality requirement discussed
5 in Koenig and Reid should be applied to the safe harbor doctrine as well. The court is
6 similarly not persuaded that the presumption against federal preemption and the
7 requirement of Congressional intent of exclusivity distinguish the federal preemption
8 from the safe harbor doctrine to the extent that the “formality” requirement is simply not
9 relevant to the safe harbor doctrine.

10 **2. TTB’s Authorization of Tito’s Label**

11 Fifth Generation next argues that because TTB specifically authorized Tito’s label,
12 Plaintiff’s claims are barred under the safe harbor doctrine. Namely, Fifth Generation
13 states that TTB has approved every single variation of the labels for Tito’s Handmade
14 Vodka, and has done so after questioning and examining the particular term “Handmade”
15 on at least two separate occasions. (Motion, p. 13).

16 First, Fifth Generation contends that a COLA constitutes a regulatory approval of a
17 label’s compliance with federal law and that TTB’s alcohol-label approval process is a
18 “formal agency action that results in the creation of a property right in the regulated
19 entity in the form of a COLA.” (Id. at 14). Fifth Generation states that TTB’s rule-
20 making authority under the FAAA has been delegated from the Secretary of the Treasury,
21 and relies on a district court case, Cruz v. Anheuser-Busch, LLC, for the proposition that
22 it is this delegation that confers upon TTB’s regulations, and specifically the COLA, “the
23 exclusive effect of federal law.” 2015 WL 3561536, at *4 (C.D. Cal. June 3, 2015)
24 (“[t]he TTB has exclusive jurisdiction in regulating the labels on alcoholic beverages
25 because Congress expressly granted exclusive authority to the Treasury Department who
26 in turn delegated its duties to the TTB.”). Fifth Generation further contends that under
27 FAAA and TTB regulations, “no distilled spirit may be bottled or removed from a plant
28 unless the TTB has first issued a COLA approving the bottle labels under the FAAA,”

1 and that TTB regulations provide specific administrative procedures for challenging an
2 alcohol label that Plaintiff could have, but has not, pursued in lieu of this action.
3 (Motion, p. 14).

4 Second, Fifth Generation argues that this case is exactly the type of situation for
5 which the safe harbor exists. Fifth Generation relies on Cruz, where the court examined
6 the effect of TTB’s COLA, concluding that a COLA has the force of federal law and bars
7 a claim that the approved label is misleading. 2015 WL 3561536, at *6. As in this case,
8 the plaintiff in Cruz brought a UCL claim, alleging that the word “light” on the label for
9 Anheuser-Busch’s Rita products was misleading. Id. at *1. Fifth Generation argues that
10 as in Cruz, this court should find that the COLA here has the force of federal law and
11 bars Plaintiff’s claims.

12 Plaintiff counters that the California safe harbor doctrine is inapplicable in this
13 case because the safe harbor primarily prohibits consumer fraud actions where a state or
14 federal statute “actually bar[s]” or “clearly permit[s]” the conduct at issue. Loeffler v.
15 Target Corp., 58 Cal. 4th 1081, 1125 (2014). Plaintiff argues that Fifth Generation
16 overlooks an important distinction between “(1) not making an activity unlawful, and (2)
17 making that activity lawful.” (Opposition, p. 6). Here, Plaintiff argues there is no
18 statutory or regulatory language that “clearly permits or requires the conduct complained
19 of by Plaintiff.” (Id. at 7). Plaintiff contends that “even if *arguendo* Congress has
20 delegated to the TTB the function of reviewing and approving Defendant’s label, this
21 alone does not bring Defendant’s conduct within the protection of the safe harbor
22 doctrine.” (Id.). This is because TTB’s action does not rise to the level of federal law,
23 “much in the same way as preemption,” Plaintiff argues. (Id. at 8, citing Koenig, 713 F.
24 Supp. 2d at 1076). Additionally, Plaintiff argues that there is no specific language from
25 TTB allowing Fifth Generation to advertise its vodka as “Handmade.” (Id. at 9). Finally,
26 Plaintiff contends that it would “contravene public policy and reason in general to
27 immunize an alcohol manufacturer from consumer fraud suits because the labels of its
28 products had been approved by the TTB.” (Id.).

1 In its Reply, Fifth Generation reiterates the differences between the safe harbor and
2 the preemption doctrines, and further counters that there is no question that TTB’s COLA
3 procedure “clearly permit[s]” the conduct at issue by distinguishing it from the FDA
4 statements in Koenig. First, Fifth Generation argues that COLA procedures are
5 significantly more formal than the agency letters in Koenig because the issuance or denial
6 of a COLA is the end result of a formal regulatory procedure mandated by law before any
7 label may be used in commerce, and that a COLA, unlike an FDA interpretive letter,
8 creates a property right. (Reply, p. 6). Second, the FDA enforcement in Koenig was
9 “purely discretionary – taking into consideration available agency resources and other
10 priorities,” while the FAAA and TTB regulations “*require* the TTB to prohibit statements
11 on labels that are false or misleading.” (Id.) Additionally, as argued by Fifth Generation,
12 in Koenig, “the FDA’s prior refusal to act on the use of the word “natural” did not
13 amount to a formal approval of the word,” while the COLA procedure provided the type
14 of a “deliberative process akin to notice and comment rulemaking” (Id. at 7, citing
15 Koenig, 713 F. Supp. 2d at 1075-1076).

16 Having considered the parties’ arguments, the court finds that Fifth Generation has
17 not established that TTB’s COLA “actually bar[s]” or “clearly permit[s]” the conduct at
18 issue, triggering the safe harbor doctrine. While Cruz did not disagree with Koenig that
19 safe harbor applies only when a regulatory agency conducts a formal regulatory action
20 under Chevron, Cruz summarily held that the issuance of the COLA itself triggered the
21 safe harbor doctrine. This court does not find Cruz persuasive. As this court has already
22 indicated in its order denying Fifth Generation’s motion for summary judgment in the
23 Hofmann Action (Hofmann Action, Doc. No. 70), the principles announced in Reid are
24 instructive and stand for the proposition that a federal regulator’s actions create a safe
25 harbor only under the same circumstances required for preemption. Those circumstances
26 exist when the agency’s actions “[are] the result of a formal, deliberative process akin to
27 notice and comment rulemaking or an adjudicative enforcement action,” and are therefore
28 sufficiently formal to merit Chevron deference. Koenig, 713 F. Supp. 2d at 1076. See

1 also Reid, 780 F.3d at 964. Second, while mindful of Fifth Generation’s arguments
2 differentiating TTB’s COLAs from the FDA statements in Koenig, these are differences
3 of degree and only establish that COLA procedures are *more* formal than the agency
4 letters in Koenig. The COLA procedures remain less formal than those required “of a
5 formal, deliberative process akin to notice and comment rulemaking or an adjudicative
6 enforcement action.” See id. In sum, TTB’s action related to its examination and
7 approval of the term “Handmade” on Tito’s label, including the COLA it issued, is
8 insufficient to trigger the safe harbor doctrine at this juncture in the case.

9 **3. TTB’s Determination that “Handmade” is Not Misleading**

10 Fifth Generation argues that while not necessary, the evidence in this case
11 establishes that the COLA was issued after TTB overcame any concerns about the word
12 “Handmade” because (1) TTB specifically raised questions about the word “Handmade”;
13 (2) it thoroughly inspected Fifth Generation’s facilities as to every aspect of its
14 operations; and (3) it satisfied itself that the labels were in compliance with its labeling
15 regulations and not misleading. (Motion, p. 17). Thus, Fifth Generation submits that
16 “there is no question that the TTB thoroughly reviewed Fifth Generation’s facility,
17 distillation process, and essentially every part of its business and concluded multiple
18 times that the labels for Tito’s Handmade Vodka – and in particular, the term
19 ‘Handmade’ – were not misleading.” (Reply, p. 8).

20 Fifth Generation further details the circumstances under which the COLA was
21 issued in this case, including a letter from Karen Frelove, then-Director of the
22 Advertising, Labeling, and Formulation Division, which states that TTB “[r]eviewed
23 [and] considered all the various information and explanations provided by Mr.
24 Beveridge,” including the label in its totality, and after considering all the information, it
25 concluded that the reference to the word “Handmade” was in compliance with the
26 labeling regulations and not misleading. (Motion, p. 17). These circumstances, Fifth
27 Generation argues, demonstrate that “the labels for Tito’s Handmade Vodka were
28 approved after a rigorous review by officials in the upper echelon of the responsible to

1 federal agency, *not mere self-reporting.*” (Id.).

2 Plaintiff relies on the declaration of Janet Scarlese, the representative of TTB
3 designated to provide sworn testimony in this litigation, for its argument that TTB’s
4 approval of alcohol labels “hinges on self-reporting as the truthfulness of the claims
5 appearing on the label is the responsibility of the submitter who signs the [COLA] under
6 penalty of perjury.” (Opposition, p. 9). Additionally, Plaintiff contends that TTB had no
7 established criteria or definition for the term “Handmade” when it concluded that Fifth
8 Generation’s label complied with federal law. (Id.)

9 According to Scalese, TTB determined that the term “Handmade” constituted
10 “information that was not required” under 27 C.F.R. 5.33(f), and further explained that it
11 was “the responsibility of the submitter who signs the Certificate of Label Approval
12 Application under the penalty of perjury....” (Beveridge Decl., Exh. 10, p. 44). The
13 relevant portion of the Scalese declaration is as follows:

14 There are no standards or regulations that specifically address the use of the
15 term ‘handmade.’ TTB’s labeling specialists do not verify claims such as
16 ‘handmade’ when they review alcohol beverage labels. These terms are
17 considered additional information, or ‘puffery,’ covered under 27 CFR
18 5.33(f). The burden of accuracy of such terms falls on the submitter who is
19 required, under penalty of perjury, to sign the Certificate of Label Approval
20 application. . . . TTB does not have standards or a method to verify
21 statements such as these. They are assumed to be true and correct.

22 Id. at 45.

23 Even assuming that TTB did not rely on the truthfulness of the submitter but
24 determined the meaning of “Handmade” on its own, the fact that the term “Handmade”
25 has no definition in TTB regulations, nor any industry standard is significant. Because
26 TTB considers a term such as “Handmade” to be additional information and/or puffery to
27 be verified by a submitter outside the reach of TTB standards or regulations, it appears
28 that a COLA does not sanction such a term, whether it is to be considered as additional
information or puffery. This raises a genuine issue as to whether TTB determined
“Handmade” not to be misleading, and, if so, whether it was the kind of regulatory action
that “actually bars” or “clearly permit[s]” conduct, see Cel-Tech Communications, 20
Cal. 4th at 183. Therefore, at this juncture, given the tension between the Freelove letter

1 and the Scarlese declaration, Fifth Generation has not established that any TTB
2 “approval” of the term “Handmade” should be given the force of federal law, triggering
3 the California safe harbor doctrine.¹ Further development of the factual record may be
4 helpful in clarifying and resolving this tension.

5 **B. Negligent Misrepresentation Claim**

6 In addition to the safe harbor argument, Fifth Generation also argues that
7 Plaintiff’s negligent misrepresentation claim is barred by the economic loss doctrine. As
8 correctly pointed out by Plaintiff, this argument exceeds the scope of Judge Burkhardt’s
9 amended scheduling order, which provides that “Defendant’s anticipated motion for
10 summary judgment *on the safe harbor issue* shall be filed on or before August 28, 2015.”
11 (Doc. No. ¶ 36) (emphasis added). In its Reply, Fifth Generation contends that this
12 argument does not exceed the scope of the scheduling order, as the determination of its
13 safe harbor argument would be dispositive to the negligent misrepresentation claim as
14 well. (Reply, p. 10, n.6).

15 If that is in fact the case, Fifth Generation failed to make that argument in its
16 Motion, and instead based its argument on the economic loss doctrine. (Motion, p. 19).
17 Only in its Reply did Fifth Generation attempt to connect the negligent misrepresentation
18 claim to the safe harbor argument, erroneously relying on Kallita Air v. Cent. Tx.
19 Airborne Sys., Inc., 2009 WL 1636036, at *5-8 (N.D. Cal. June 8, 2009) for the
20 proposition that “the economic loss doctrine applies unless there are facts that create a
21 special relationship between the buyer and a seller,” and that because TTB defined as a
22 matter of law what the labels for Tito’s Handmade Vodka can say, “that decision
23

24
25 ¹ In his Opposition, Plaintiff also brings forth the argument that the term “Handmade” does not
26 constitute non-actionable puffery, as it is a “specific, measurable, [and] factual assertion that can be
27 proven true or false, and does not fall under the definitions of puffery.” (Opposition, p. 10, n.3).
28 Because this motion for summary judgment was limited to the issue of the safe harbor by Judge
Burkhardt’s amended scheduling order (Doc. No. 36), the court does not address the question of whether
the term “Handmade” constitutes non-actionable puffery outside the context of TTB’s determination that
the term constituted puffery.

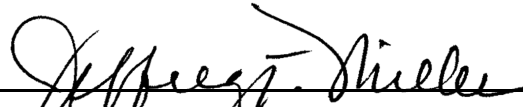
1 effectively precludes any ‘special relationship’ that would be required for the negligent
2 misrepresentation claim to proceed.” (Reply, p, 10, n.6).

3 Fifth Generation cites Kallita for the wrong proposition, since Kallita’s holding as
4 to the special relationship test concerned negligence claims, not negligent
5 misrepresentation claims. 2009 WL 1636036, at *5. In fact, as pointed out by Plaintiff in
6 his Opposition and unaddressed by Fifth Generation in its Reply, Kallita specifically
7 notes that “the economic loss doctrine did not apply to Kallita’s negligent
8 misrepresentation claim and thus that claim was not barred.” Id. at *2. Accordingly, the
9 court rejects Fifth Generation’s attempt to connect the negligent misrepresentation claim
10 to the safe harbor doctrine as it lies outside the scope of Judge Burkhardt’s order
11 permitting the motion for summary judgment to be brought on the safe harbor issue only.
12 (Doc. No. ¶ 36).²

13 Fifth Generation’s motion for summary judgment on the safe harbor issue is
14 denied, and its motion for summary judgment on the intentional and negligent
15 misrepresentation claims are stricken without prejudice.

16 IT IS SO ORDERED.

17
18 DATED: November 20, 2015

19 
20 JEFFREY T. MILLER
21 United States District Judge
22
23
24

25 ² In its Motion, Fifth Generation also argues that Plaintiff’s intentional misrepresentation claim fails
26 because “manufacturer’s generalized statements of ‘quality’ or ‘superiority’ are non-actionable ‘puffing’
27 that cannot be reasonably relied upon as the basis for a deception claim.” (Motion, p. 20). Fifth
28 Generation does not raise the same argument in its Reply. In any case, Fifth Generation’s argument
concerning the intentional representation claim, similar to the negligent representation claim, lies outside
the scope of Judge Burkhardt’s amended scheduling order (Doc. No. 36), and is therefore stricken
without prejudice as well.