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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

SCOTT WELK, INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS SIMILARLY
SITUATED,

Plaintiffs,

vs.
BEAM SUNTORY IMPORT CO. AND
JIM BEAM BRANDS CO.,

Defendants.

CASE NO. 15cv328-LAB (JMA)
ORDER OF DISMISSAL

This putative class action against Beam Suntory Import and Jim Beam Brands (collectively, "Jim Beam") centers on the use of the word "handcrafted" on Jim Beam Bourbon bottle labels. Scott Welk's complaint alleges the labels are misleading because the bourbon isn't handcrafted. He asserts causes of action for violation of California's false advertising law, Cal. Bus. & Prof. Code § 17500 *et seq.* ("FAL"), violation of California's unfair competition law, *id.* at § 17200 *et seq.* ("UCL"), intentional misrepresentation, and negligent misrepresentation. Jim Beam has filed a motion to dismiss, arguing (1) under California's safe harbor doctrine, its compliance with federal labeling law insulates it from Welk's claims, (2) Welk fails to state a plausible claim because he hasn't alleged facts to show that the label would mislead a reasonable consumer, and (3) the economic loss doctrine bars Welk's negligent misrepresentation claim. (Docket no. 5.)

1 **I. Background**

2 **A. Jim Beam Bourbon Label**

3 Welk includes a copy of the Jim Beam Bourbon label in his complaint. (Docket no.
4 1 at ¶¶ 32, 33.) The label covers the front and two sides of the bottle. (*Id.* at ¶ 32.) One of
5 the side labels includes a depiction of a sketched barrel, with the word "HANDCRAFTED"
6 above the barrel, the phrase "SINCE 1795" next to the barrel, and the phrase "FAMILY
7 RECIPE" below the barrel. (*Id.*)

8 **B. Alleged Misrepresentation**

9 Welk alleges that, based on the label, he believed "Jim Beam Bourbon was of superior
10 quality by virtue of it being crafted by hand, rather than by a machine, and relied on said
11 misrepresentation in purchasing the product." (*Id.* at ¶ 35.) Relying on a definition from
12 Merriam-Webster's online thesaurus, Welk contends that "handcrafted" means "created by
13 a hand process rather than by a machine." (*Id.* at ¶ 70.) Thus, according to Welk, "the
14 reasonable consumer" would believe that "Jim Beam Bourbon was crafted by hand." (*Id.*)
15 He explains, "'[h]andcrafted' and 'handmade' are terms that consumers have long associated
16 with higher quality manufacturing and high-end products. This association and public
17 perception is evident in the marketplace where manufacturers charge a premium for
18 'handcrafted' or 'handmade' goods." (*Id.* at ¶ 17.) But, he alleges, "Jim Beam Bourbon is
19 actually manufactured using a mechanized and/or automated process, resembling a modern
20 day assembly line and requiring little to no human supervision, assistance or
21 involvement" (*Id.* at ¶ 36.)

22 **II. Judicial Notice of Label and Certificates of Label Approval**

23 Jim Beam seeks judicial notice of its label and certificates of label approval issued by
24 the Alcohol and Tobacco Tax and Trade Bureau ("TTB"). (Docket no. 5-2.) "Although
25 generally the scope of review on a motion to dismiss for failure to state a claim is limited to
26 the Complaint, a court may consider evidence on which the complaint necessarily relies if:
27 (1) the complaint refers to the document; (2) the document is central to the plaintiff[']s claim;
28 and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion."

1 *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (internal quotation marks
2 and citations omitted). Rule 201(b) permits judicial notice of a fact when it's "not subject to
3 reasonable dispute because it: (1) is generally known within the trial court's territorial
4 jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy
5 cannot reasonably be questioned." The records and reports of administrative bodies are
6 proper subjects of judicial notice, as long as their authenticity or accuracy is not disputed.
7 See *Mack v. South Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986), *overruled*
8 *on other grounds by Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991).

9 The Court will consider the label in ruling on Jim Beam's motion to dismiss because
10 the complaint refers to it, it's central to Welk's claim, and Welk doesn't question its
11 authenticity. *Daniels-Hall*, 629 F.3d at 998. The TTB certificates are public records and,
12 while Welk opposes judicial notice of the TTB certificates, he doesn't question their
13 authenticity. Thus, they're appropriate for judicial notice. See, e.g., *Hofmann v. Fifth*
14 *Generation, Inc.*, No. 14-cv-2569, Docket no. 15 (S.D. Cal. Mar. 18, 2015) (taking judicial
15 notice of TTB certificates of label approval as "records and reports of administrative bodies").

16 **III. Discussion**

17 **A. Legal Standard**

18 A 12(b)(6) motion to dismiss for failure to state a claim challenges the legal sufficiency
19 of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The Court must accept
20 all factual allegations as true and construe them in the light most favorable to Welk. *Cedars*
21 *Sinai Med. Ctr. v. Nat'l League of Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir. 2007).
22 To defeat Jim Beam's motion to dismiss, Welk's factual allegations need not be detailed, but
23 they must be sufficient to "raise a right to relief above the speculative level" See *Bell*
24 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Threadbare recitals of the elements of a
25 cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*,
26 556 U.S. 662, 678 (2009).

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B. Analysis

1. California's Safe Harbor Doctrine

The California Supreme Court has explained:

Although the unfair competition law's scope is sweeping, it is not unlimited Specific legislation may limit the judiciary's power to declare 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. When specific legislation provides a "safe harbor," plaintiffs may not use the general unfair competition law to assault that harbor.

Cel-Tech Comms. Inc. v. L.A. Cellular Tel. Co., 20 Cal.4th 163, 182 (1999). Under the safe harbor doctrine, "[t]o forestall an action under the unfair competition law, another provision must actually 'bar' the action or clearly permit the conduct." *Id.* at 183. Jim Beam argues that California's safe harbor doctrine bars Welk's suit because the TTB reviewed and pre-approved its labels to ensure they comply with applicable laws and regulations, including determining whether the label is false and misleading. (Docket no. 5 at 4–8.) But, the TTB certificates don't reveal whether the TTB specifically investigated and approved the veracity of Jim Beam's use of the term "handcrafted." See *Nowrouzi v. Maker's Mark Distillery, Inc.*, 2015 WL 4523551, at *4–5 (S.D. Cal. July 27, 2015); *Hofmann*, No. 14-cv-2569, Docket no. 15. Thus, the scope of the TTB's review isn't properly before the Court at this stage of the case. Jim Beam's motion to dismiss under the safe harbor doctrine is **DENIED**.

2. UCL and FAL Claims

The UCL prohibits any "unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. The FAL makes it unlawful for a business to disseminate any statement "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." *Id.* at § 17500. UCL and FAL claims are governed by the "reasonable consumer" test. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). Under that standard, Welk must "show that members of the public are likely to be deceived." *Id.* (internal quotation marks omitted). "A 'reasonable consumer' is the ordinary consumer acting reasonably under the circumstances, and is not versed in the art of inspecting and judging a product, in the process of its preparation or

1 manufacture." *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 682 (2006)
2 (internal citation and quotation marks omitted). "[W]here a court can conclude as a matter
3 of law that members of the public are not likely to be deceived by the product packaging,
4 dismissal is appropriate." *Werbel ex rel. v. Pepsico, Inc.*, 2010 WL 2673860, at *3 (N.D. Cal.
5 July 2, 2010).

6 "Although misdescriptions of specific or absolute characteristics of a product are
7 actionable, generalized, vague, and unspecified assertions constitute mere puffery upon
8 which a reasonable consumer could not rely." *McKinney v. Google, Inc.*, 2011 WL 3862120,
9 at *6 (N.D. Cal. Aug. 30, 2011) (internal quotation marks, citations, and brackets omitted).
10 "[T]o be actionable as an affirmative misrepresentation, a statement must make a specific
11 and measurable claim, capable of being proved false or of being reasonably interpreted as
12 a statement of objective fact." *Vitt v. Apple Computer, Inc.*, 469 Fed. Appx. 605, 607 (9th Cir.
13 2012) (internal quotation marks omitted) (affirming finding that descriptors "mobile,"
14 "durable," "portable," "rugged," "built to withstand reasonable shock," "reliable," "high
15 performance," "high value," an "affordable choice," and an "ideal student laptop" were
16 "generalized, non-actionable puffery because they are 'inherently vague and generalized
17 terms' and 'not factual representations that a given standard has been met'").

18 Jim Beam argues that Welk's claims fail under the reasonable consumer test. (Docket
19 no. 5 at 9.) Courts confronted a similar question in *Hofmann*, No. 14-cv-2569, Docket no.
20 15; *Salters v. Beam Suntory, Inc.*, 2015 WL 2124939 (N.D. Fla. May 1, 2015); and *Nowrouzi*,
21 2015 WL 4523551. In *Hofmann*, the court denied a motion to dismiss under the reasonable
22 consumer standard, explaining:

23 In the court's view, the representation that vodka that is (allegedly)
24 massproduced in automated modern stills from commercially manufactured
25 neutral grain spirit is nonetheless "Handmade" in old-fashioned pot stills
arguably could mislead a reasonable consumer.

26 No. 14-cv-2569, Docket no. 15 at 14. In *Salters*, the court found the opposite and granted
27 a similar motion to dismiss, explaining:

28 [N]o reasonable person would understand "handmade" in this context to mean
literally made by hand. No reasonable person would understand "handmade"

1 in this context to mean substantial equipment was not used. If "handmade"
2 means only made from scratch, or in small units, or in a carefully monitored
3 process, then the plaintiffs have alleged no facts plausibly suggesting the
4 statement is untrue. If "handmade" is understood to mean something else—
some ill-defined effort to glom onto a trend toward products like craft beer—the
statement is the kind of puffery that cannot support claims of this kind. In all
events, the plaintiffs have not stated a claim on which relief can be granted.

5 2015 WL 2124939, at *3. In *Nowrouzi*, the court agreed with *Salters*, and granted a whisky
6 company's motion to dismiss claims based on its use of the term "handmade." 2015 WL
7 4523551, at *7.

8 The Court finds *Salters* and *Nowrouzi* persuasive. Welk's proposed definition of the
9 word "handcrafted" doesn't fit the process of making bourbon. To make bourbon, grains are
10 ground into "mash" and cooked; then yeast is added, and the mixture ferments; then the
11 mixture is distilled, i.e., heated until the alcohol turns to vapor; then the alcohol is cooled until
12 it returns to liquid form, and transferred to barrels for aging. *Indus. & Trade Summary*,
13 USITC Pub. No. 3373, 2000 WL 1876666 (Nov. 2000), *7. Fermentation, distillation, and
14 aging are necessary to meet the legal definition of bourbon. See 27 C.F.R. §§ 5.11,
15 5.22(b)(1)(I). Machines, including stills and other equipment, have *always* been necessary
16 to make bourbon. See Henry Crowgey, *Kentucky Bourbon: The Early Years of*
17 *Whiskeymaking* 34, 59 (2008). A reasonable consumer wouldn't interpret the word
18 "handcrafted" on a bourbon bottle to mean that the product is literally "created by a hand
19 process rather than by a machine." Thus, it isn't "reasonably interpreted as a statement of
20 objective fact." *Vitt*, 469 Fed. Appx. at 607. And if Jim Beam uses the term "handcrafted"
21 to appeal to consumers' loose association of the term with "higher quality manufacturing and
22 high-end products," as Welk suggests, then it isn't "specific and measurable." *Id.* Instead
23 it's "generalized, vague, and unspecified" and therefore inactionable as "mere puffery."
24 *McKinney*, 2011 WL 3862120, at *6; see also *Salters*, 2015 WL 2124939, at *3.

25 3. Intentional Misrepresentation Claim

26 To state a claim for intentional misrepresentation under California law, a plaintiff must
27 plead, among other things, that "the defendant intended that the plaintiff rely on the
28 representation" and "the plaintiff reasonably relied on the representation." *Manderville v.*

1 *PCG & S Group, Inc.*, 146 Cal. App. 4th 1486, 1498 (2007). Jim Beam seeks dismissal of
2 Welk's intentional misrepresentation claim, arguing these elements aren't met because (1)
3 its use of "handcrafted" wouldn't mislead a reasonable consumer and (2) Welk hasn't alleged
4 fraudulent intent. (Docket no. 5 at 15.) The Court agrees. Welk's intentional
5 misrepresentation claim fails for the same reason his UCL and FAL claims fail—the use of
6 "handcrafted" on Jim Beam's bourbon bottle wouldn't mislead a reasonable consumer. See
7 *Nowrouzi*, 2015 WL 4523551, at *7–8.

8 **4. Negligent Misrepresentation Claim**

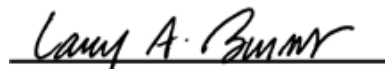
9 Jim Beam contends that the economic loss doctrine bars Welk's negligent
10 misrepresentation claim (Docket no. 5 at 16–17), and Welk concedes that it does, (Docket
11 no. 8 at 24.) The Court agrees. See *Kalitta Air, LLC v. Cent. Texas Airborne Sys., Inc.*, 315
12 Fed. Appx. 603, 605 (9th Cir. 2008).

13 **IV. Conclusion**

14 The Court **GRANTS** Jim Beam's motion to dismiss. No amendment would cure
15 Welk's allegation that Jim Beam's use of the term "handcrafted" is misleading. See
16 *Nowrouzi*, 2015 WL 4523551, at *7–8. Thus, this case is **DISMISSED WITH PREJUDICE.**

17 **IT IS SO ORDERED.**

18 DATED: August 21, 2015

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20 **HONORABLE LARRY ALAN BURNS**
21 United States District Judge

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