

ILLINOIS BUSINESS LAW JOURNAL

LIQUID ALOHA: A CASE ON BEER BREWED ON THE SHORES OF THE HAWAIIAN ISLANDS OR THE BANKS OF THE BIG MUDDY

❖ NOTE ❖

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TABLE OF CONTENTS

I.	INTRODUCTION.....	285
II.	BACKGROUND: <i>CILLONI V. CRAFT BREW ALLIANCE</i>	287
	A. The Lawsuit: A Six-Pack of Claims	287
	B. Craft Brew Alliance and Kona Brewing: Waves of Paradise	289
III.	ANALYSIS: FERMENTATION TIME	291
	A. A Beer Brewed on the Banks of the Mississippi Instead of the Rhine	293
	B. The Cool Islands Tastes of Jamaica in Pennsylvania.....	295
IV.	RECOMMENDED OUTCOME.....	297
V.	CONCLUSION.....	300

I. INTRODUCTION

Three tan, shirtless men and a woman, wearing bright yellow, paddle near the beach, a wave crashing over their backs.¹ Beyond the ocean, a beach

¹ See *Big Wave Golden Ale*, KONA BREWING CO., <http://konabrewingco.com/blog/beers/big-wave-golden-ale/> (last visited July 28, 2017); *Craft Beers*, SUPERIOR BEVERAGE, http://www.superiorbeverage.net/beer_type/craft-beers/#prettyPhoto (last visited July 28, 2017); *Kona Brewing Co. Big Wave Golden Ale 6 Pack*, HYVEE, <https://www.hy-vee.com/grocery/PD21904899/Kona-Brewing-Co-Big-Wave-Golden-Ale-6-Pack> (last visited July 28, 2017); *New labels will show not all Kona Brewing*

gradually shifts into a mountain.² The scene is framed by island foliage, including blue orchids and palm trees.³ Above the scene, the packaging reads “Brewing *Liquid Aloha* since ’94.”⁴ This is the packaging for a six-pack of Kona Brewing Co. Big Wave Golden Ale.⁵ The image is printed on every side of the package, and every bottle.⁶ The bottle also includes the Kona Brewing Co. logo: a gecko.⁷ The islands of Hawaii almost float on the top of the brown glass, rainbow-ing the words “Liquid Aloha.”⁸ The colors of the box include an oceanic teal-blue juxtaposed with whites, greens, yellows. All colors that one might associate with Hawaii.⁹ In the liquor aisle of a grocery store, it pops out as the taste of an island.¹⁰

On the bottom of the box, it reads that Kona Brewing Co. is located in Kona, Hawaii.¹¹ Kona Brewing was created by a father and son pair, that wanted to create “fresh local island brews local island brews made with spirit, passion and quality.”¹² Kona’s website claims that the company has a desire to protect the Hawaiian environment, and that Kona’s headquarters is where the brewery was original founded on Hawaii’s biggest island.¹³ Even the handle of the box exclaims “Catch a Wave!”¹⁴

On the side of each bottle, written vertically, is a list of the locations of Kona, HI; Portland, OR; Woodinville, WA; Portsmouth, NH; and Memphis, TN.¹⁵ Where is the Big Wave Golden Ale brewed? On the beaches of Hawaii or the banks of the Mississippi river in Memphis?

On Feb. 28, 2017, Sara Cilloni and Simone Zimmer, along with their lawyer Aubry Wand, filed a class action lawsuit against Craft Brew Alliance,

Co. beer is made in Hawaii, PACIFIC BUSINESS NEWS (Nov. 27, 2012 3:03 PM), <https://www.bizjournals.com/pacific/blog/2012/11/new-labels-will-show-not-all-kona.html>.

² See *id.*

³ See *id.*

⁴ See *id.*

⁵ See *id.*

⁶ See *id.*

⁷ See *id.*

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.*

¹¹ See *id.*

¹² *About Us*, KONA BREWING CO., <http://konabrewingco.com/about/> (last visited Aug. 27, 2017).

¹³ *Id.*

¹⁴ See KONA BREWING CO., *supra* note 1; see also *supra* text accompanying note 7.

¹⁵ See *id.*

Inc. (CBA), the corporate owners of Kona Brewing Company.¹⁶ The complaint alleges that “[t]hrough false and deceptive advertising, Craft Brew intentionally misleads consumers into believing that Kona Brewing Company beer (a brand of Craft Brew) is a local beer made in Hawaii. In actuality, the beer is made in the continental United States.”¹⁷ The Plaintiffs continue to claim that consumers purchased the beer because they reasonably believed that the beer was brewed in the Hawaiian Islands, and as such, they have suffered an economic injury.¹⁸ Among other things, the Plaintiffs are looking for restitution or any other equitable relief, along with expenses and attorneys’ fees.¹⁹

The purpose of this Note is to explore the merits of *Cilloni v. Craft Brew Alliance, Inc.* Part II of this Note explores the background of the case (Section A), Kona Brewing, and Craft Brew Alliance (Section B). Part III analyzes the merits of the case (Section A), and the arguments Craft Brew Alliance will use to dismiss the case (Section B). Part IV proposes an outcome for the case.

II. BACKGROUND: *CILLONI V. CRAFT BREW ALLIANCE*

A. The Lawsuit: A Six-Pack of Claims

The lawsuit alleges that CBA violated California’s False Advertising Law (FAL), Consumer Legal Remedies Act (CLRA), Unfair Competition Law (UCL), breached the express warranty, negligently misrepresented, and was unjustly enriched.²⁰ They claim that “consumers purchased Kona Brewing Co. beer because they reasonably believed—based on Craft Brew’s advertising and labeling—that this beer originates from Hawaii.”²¹ Overall, the plaintiffs are arguing that “Craft Brew intentionally misleads consumers into believing that Kona Brewing Company beer is a local beer made in Hawaii,” instead of being brewed in Oregon, Washington Tennessee, or New Hampshire.²² The complaint continues that for CBA and Kona to maximize profits, CBA has capitalized on the brand image of Hawaii.²³ Down to the name, the entire

¹⁶ Complaint at ¶ 1, *Cilloni v. Craft Brew Alliance, Inc.* No. 5:17-cv-01027 (N.D. Cal. filed Feb. 28, 2017).

¹⁷ *Id.* ¶ 1.

¹⁸ *Id.* ¶ 4.

¹⁹ *Id.* ¶¶ 4, 5.

²⁰ *Id.* ¶ 5.

²¹ *Id.* ¶ 4.

²² *Id.*

²³ *Id.* ¶ 20

brand image of Kona floats on the images of Hawaii, and CBA uses Hawaii's popularity to sell beer, so the complaint alleges.²⁴

Plaintiffs claim that Hawaii is a powerful brand image, and that using the cool island breezes of the islands, CBA profits unjustly.²⁵ Because of these images, consumers are, allegedly, willing to pay a premium for Hawaiian products.²⁶ The Plaintiffs claim that they reasonably believed that the beers were brewed in Hawaii, and then imported into the continental United States.²⁷ This was a main factor in purchasing the product.²⁸

For Count I through III, Plaintiffs rely on three California state laws: FAL, CLRA, and UCL.²⁹ FAL makes it unlawful for any "corporation . . . to make or disseminate or cause to be made or disseminated . . . 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."³⁰

The CLRA makes a series of enumerated methods of unfair competition illegal in California, including using "deceptive representations or designations of geographic origin in connection with goods or services."³¹ It also prohibits "[a]dvertising goods or services with intent not to sell them as advertised."³² Finally, the UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."³³

The other claims in the case are that CBA breached an express warranty, negligently misrepresented their product, and were unjustly enriched.³⁴ For an express warranty, the "Craft Brew issued an express warranty that these brands of beer were in fact made in Hawaii."³⁵ For negligent misrepresentation, CBA knew or should have known their representations were false, and then did nothing to correct the misrepresentation.³⁶ For unjust enrichment, because CBA was deceptive, "Plaintiffs and Class members have suffered a detriment while Craft Brew has received a benefit."³⁷

²⁴ *Id.*

²⁵ *Id.* ¶ 82.

²⁶ *Id.* ¶ 83.

²⁷ *Id.* ¶ 90.

²⁸ *Id.*

²⁹ *Id.* ¶ 5.

³⁰ Cal. Bus. & Prof. Code § 17500 (1998) (the dissemination can include "any other manner or means whatever, including over the Internet, any statement. . .").

³¹ Cal. Civ. Code § 1770(a)(4) (2017).

³² Cal. Civ. Code § 1770(a)(9) (2017).

³³ Cal. Bus. & Prof. Code § 17200 (1992).

³⁴ Complaint, *supra* note 16, ¶ 147.

³⁵ *Id.* ¶ 134.

³⁶ *Id.* ¶ 138.

³⁷ *Id.* ¶ 146.

The class that the plaintiffs are looking to create included anyone who purchased something from Kona Brewing in the previous four years.³⁸

B. Craft Brew Alliance and Kona Brewing: Waves of Paradise

Kona Brewing was founded in 1994 by a father and son team, on Kailua-Kona.³⁹ Their first beer was shipped around Hawaii in February of 1995.⁴⁰ Currently, Kona brews 12,000 barrels of beer annually on Kailua-Kona⁴¹, or the equivalent of 310,000 gallons of beer.⁴² The company sold more than one million cases of beer in Hawaii in 2014.⁴³

Four main Kona beers can be found in all 50 states, and 26 countries: Longboard Island Lager, Big Wave Golden Ale, Fire Rock Pale Ale, and Castaway IPA.⁴⁴ The tagline of each beer is thematically expressive of Hawaii and Hawaiian living.⁴⁵ For the Longboard Island Lager, the website pays homage to Waikiki Beach, “Longboard surfing in the shadow of Diamond Head has been a tradition for over 100 years at Waikiki beach. Our Longboard Lager pays tribute to this grand history.”⁴⁶ The bottle label shows a scene of two tan people on longboards, enjoying the waves in front of a beach, with a mountain scape behind them.⁴⁷ For the Fire Rock Pale Ale, “[t]he power and copper glow of molten lava flowing to the sea from the Big Island’s Kilauea Caldera is evoked in our Fire Rock Pale Ale.”⁴⁸ The bottle label shows a scene of a tan women watching lava flow down a mountain scape into the ocean below, complete with steam where lava meets ocean.⁴⁹ Some of the other beer names include Wailua Ale, Koko Brown, Pipeline Porter, Black Sand Porter,

³⁸ *Id.* ¶ Class.

³⁹ *Press Kit*, KONA BREWING CO. (2011), <http://konabrewingco.com/wp-content/blogs.dir/2/files/2011/05/PressKit.pdf>.

⁴⁰ *Id.*

⁴¹ KONA BREWING CO., *supra* note 12.

⁴² *Brewery*, KONA BREWING CO., <http://konabrewingco.com/brewery/> (last visited Aug. 27, 2017).

⁴³ *Brands*, CRAFT BREW ALLIANCE, <http://craftbrew.com/brands/> (last visited Aug. 27, 2017).

⁴⁴ KONA BREWING CO., *supra* note 12.

⁴⁵ *Complaint*, *supra* note 16, ¶ 19.

⁴⁶ *Longboard Lager*, KONA BREWING CO., <http://konabrewingco.com/blog/beers/longboard-lager/> (last visited Aug. 27, 2017).

⁴⁷ *Id.*

⁴⁸ *Fire Rock Pale Ale*, KONA BREWING CO., <http://konabrewingco.com/blog/beers/fire-rock-pale-ale/> (last visited Aug. 27, 2017).

⁴⁹ *Id.*

Hula Hefeweizen, Old Blowhole Barley Wine, Lavaman Red Ale, Oceanic Organic Saison, and Big Island Ginger Beer.⁵⁰

In 2007, Kona Brewing was the 24th largest craft brewery in the United States, based on production.⁵¹ “In 2016, Kona grew sales to retailers by 17%; its growth alone was larger than 90% of the growth of all craft breweries.”⁵² In 2017, it is considered the 10th largest craft brewery.⁵³ According to the complaint, Kona brewing shipped 154,700 barrels in 2014 and 168,200 barrels in 2015.⁵⁴ For 2015, that would have been equivalent to 27 million twelve-ounce bottles.⁵⁵

For 52 weeks, ending in Feb. 25, 2017, Kona sold forty-nine million dollars of beer (retail sales).⁵⁶ This accounted for 1.7% of the total share of the craft beer market.

Kona joined CBA in 2010, eventually becoming CBA’s largest brand.⁵⁷ Currently, Kona owns nine percent of CBA’s stock. Kona Brewing does produce most of its beer in the continental United States, in a partnership with CBA.⁵⁸ The beer is mostly brewed and bottled in Portland, Oregon, Woodinville, Washington, Memphis, Tennessee, and Portsmouth, New Hampshire.⁵⁹

CBA was founded in 2008, when two Northwest breweries merged.⁶⁰ Their brands include Red Hook, Widmer Brother Brewing, Omission, Square Mile Cider Co, and Resignation Brewery.⁶¹ The company promotes itself as having more than three decades of craft beer experience, being able to guide its brands through the beer landscape, and “meet the increasing consumer

⁵⁰ *Our Award Winning Beers*, KONA BREWING CO., <http://konabrewingco.com/news/awards/> (last visited Aug. 27, 2017).

⁵¹ KONA BREWING CO., *supra* note 39.

⁵² *2016 Annual Report*, CRAFT BREW ALLIANCE (2016), <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NjYzMzAyfENoaWxkSUQ9MzcwNjUyfFR5cGU9MQ==>.

⁵³ *Investor Presentation*, CRAFT BREW ALLIANCE (Mar. 2017), <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MzQxMzM5fENoaWxkSUQ9LTf8VHlwZT0z&t=1&cb=636009106603206278>.

⁵⁴ Complaint, *supra* note 16, ¶ 17.

⁵⁵ *Id.*

⁵⁶ CRAFT BREW ALLIANCE, *supra* note 53.

⁵⁷ *Id.*

⁵⁸ Complaint, *supra* note 16, ¶ 74.

⁵⁹ *Id.*

⁶⁰ *About*, CRAFT BREW ALLIANCE, <http://craftbrew.com/about/> (last visited Aug. 27, 2017).

⁶¹ *Brands*, CRAFT BREW ALLIANCE, <http://craftbrew.com/brands/> (last visited Aug. 27, 2017).

demand for authentic local brews.”⁶² CBA’s corporate goal is to be a leader in brewing and branding craft beers.⁶³ CBA has targeted a consumer trend to move toward “authentic, local, artisanal” beers.⁶⁴

CBA states on their website that “[t]he Hawaii born and Hawaii-based craft brewery prides itself on brewing the freshest beer of exceptional quality, closest to market.”⁶⁵ To make the “freshest beer,” CBA uses the brewers in Portland, Woodinville, Portsmouth, and Memphis to brew and bottle Kona.⁶⁶

CBA has a long-standing partnership with Anheuser-Busch, where Anheuser-Busch acts as a wholesaler and distributor for the CBA brands, including Kona Brewing.⁶⁷ Anheuser-Busch has a thirty-two percent ownership stake in CBA.⁶⁸ CBA publicly trades on Nasdaq.⁶⁹ For a 52-week range, ending on June 18, 2017, CBA’s stock was up roughly 90%, with a range of \$7.50 to \$22.40.

III. ANALYSIS: FERMENTATION TIME

This is not the first time that a beer company has been sued for “misleading” the public.⁷⁰ Anheuser-Busch has been sued for Leffe not being brewed by monks, for Beck’s being made in St. Louis and not Germany, and for Kirin Ichiban not being brewed in Japan.⁷¹ Walmart and MillerCoors were accused of creating a craft beer that isn’t made in a craft brewery.⁷² MillerCoors was taken to court over water; Coors Light is not always brewed with ice-cold Rocky Mountain stream water, as their advertisements claim.⁷³

⁶² CRAFT BREW ALLIANCE, *supra* note 60.

⁶³ CRAFT BREW ALLIANCE, *supra* note 53.

⁶⁴ *Id.*

⁶⁵ CRAFT BREW ALLIANCE, *supra* note 60.

⁶⁶ *Craft Brew Alliance, Inc.*, NASDAQ, Aug. 5, 2015, <http://secfilings.nasdaq.com/filingFrameset.asp?FilingID=10843167&RcvdDate=8/5/2015&CoN%20ame=CRAFTB%CC%88REWA%CC%88LLIANCE%E2%80%B2I%CC%88NC.&FormType=10-Q&View=orig>.

⁶⁷ CRAFT BREW ALLIANCE, *supra* note 53.

⁶⁸ *Id.*

⁶⁹ NASDAQ, *supra* note 66.

⁷⁰ Nick Hines, *7 Time Big Beer Was Sued for Misleading the Public*, VINEPAIR, <https://vinepair.com/articles/7-times-breweries-sued-misleading-labels/> (last visited Aug. 27, 2017).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

Red Stripe was sued because their beer was brewed in Pennsylvania, and not the easy-going island of Jamaica.⁷⁴

As is typical in these beer misrepresentation cases, the defendant brewer's first litigation move is to file for a Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP).⁷⁵ FRCP 12(b)(6) states that a defendant can assert a defense that the plaintiff made a "failure to state a claim upon which relief can be granted."⁷⁶ If the motion is granted, most of these beer lawsuits disappear into long-forgotten blog posts; if the motion is denied, the brewer typically settles the claim.⁷⁷ For the standard of review, a claim does not require a "detailed factual allegations," but "[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do."⁷⁸ The district court will be generally limited to the four corners of the complaint, and the court will accept the non-moving party's facts as true, while construing the complaint in the non-moving party's favor.⁷⁹ The complaint must contain enough factual allegations "to raise a right to relief above the speculative level."⁸⁰

Essentially, Celloni will need to provide enough facts in their complaint that shows Kona Brewing misled consumers, and that the complaint should continue. Once a court determines the factual allegations, it will typically employ the "reasonable consumer test."⁸¹ Under the Reasonable Consumer Test, a plaintiff must show that the public is likely to be deceived by beer company.⁸² For Celloni, because the complaint uses California law, the California Supreme Court has interpreted the reasonable consumer to be protected from false advertising and advertising, while true, actually misleads or has a likelihood to mislead the public.⁸³ However, statements that are "puffery" are not misrepresentations, and are instead considered assertions of

⁷⁴ *Red Stripe sued over misleading 'Jamaican' beer claims*, FOX NEWS (Aug. 4, 2015), <http://www.foxnews.com/food-drink/2015/08/04/red-stripe-sued-over-misleading-jamaican-beer-claims.html>

⁷⁵ *Id.*

⁷⁶ FED. R. CIV. P. 12(b)(6).

⁷⁷ Bill Hogan, *Beer Money: \$20M Settlement in Lawsuit over Beck's Packaging*, CHI. TRIB. (Oct. 20, 2015, 3:04 PM), <http://www.chicagotribune.com/business/ct-becks-misleading-packaging-20151020-story.html>

⁷⁸ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

⁷⁹ *Marty*, 43 F. Supp. 3d at 1338.

⁸⁰ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

⁸¹ *Marty*, 43 F. Supp. 3d at 1342.

⁸² See *Williams v. Gerber Prod. Co.*, 552 F.3d 934, 938 (9th Cir. 2008).

⁸³ *Leoni v. State Bar*, 39 Cal.3d 609, 626 (1985).

brand superiority.⁸⁴ Overall, it's a tough litigation needle to thread for Celloni, as they need to state enough factual allegations to pass an *Iqbal* test, then show that a reasonable consumer would be deceived, and finally, rebut any claims by Kona that the branding is puffery.

By examining the case law and weighing the merits of *Cilloni v. Craft Brew Alliance*, the District Court should not dismiss the case outright. The District Court will do an analysis of the FRCP 12(b)(6) motion to dismiss, the Reasonable Consumer Test, and whether the language used is puffery. The Court should then conclude that the Plaintiffs have met their burden.

A. A Beer Brewed on the Banks of the Mississippi Instead of the Rhine

Cilloni v. Craft Brew Alliance most closely tracks *Marty v. Anheuser-Busch*.⁸⁵ In *Marty*, Anheuser-Busch (AB) was sued, in a class action suit, over the Beck's Beer, and AB's Motion to Dismiss was denied.⁸⁶ The plaintiff's alleged that they purchased Beck's "in reliance on representations contained on the packaging and Beck's history of being an imported beer from Germany."⁸⁷ The plaintiffs alleged that AB misrepresented the brewing location on the beer's packaging, specifically that they were consuming a beer brewed from Germany.⁸⁸ The beer is brewed in St. Louis, Missouri.⁸⁹

First, the descriptions and showings of the product, labeling, and messaging was enough to pass an *Iqbal* and *Twombly* test.⁹⁰ The court mainly focused on the language on the packaging, and how the wording was displayed.⁹¹ From there, the court weaved in the Reasonable Consumer Test. The court found that "[b]ased on the allegations in the Amended Complaint and because the "Product of USA" disclaimer is blocked by the carton, the Court finds that the allegations . . . are sufficient to conclude that a reasonable consumer may be misled to believe that Beck's is an imported beer brewed in Germany."⁹² A Beck's bottle and the packaging contained the words "Originated in Germany," "German Quality," and "Brewed Under the

⁸⁴ Cook, Perkiss and Liehe, Inc. v. Northern Cal. Collection Serv., Inc., 911 F.2d 242, 246 (9th Cir. 1990).

⁸⁵ See *Marty*, 43 F. Supp. 3d at 1333.

⁸⁶ *Id.* at 1335.

⁸⁷ *Id.* (quotations omitted).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 1340.

⁹¹ *Id.*

⁹² *Marty*, 43 F. Supp. 3d at 1342.

German Purity Law of 1516.”⁹³ The words “Product of USA, Brauerei Beck & Co., St. Louis, MO.” were printed on the bottom of every carton, and on every bottle in a small, white font over a metallic label.⁹⁴ The label was further obscured by the carton.⁹⁵ The only way to find the brewery’s location would require that a consumer physically open the packaging and examine each bottle.⁹⁶ The court held that a reasonable consumer is not expected to remove a product from its outer packaging to ascertain the product’s true origin.⁹⁷

The district court also found that that AB did not sufficiently alert the consumer where the beer was brewed when it printed “Product of USA, Brauerei Beck & Co., St. Louis, MO.” on the label.⁹⁸ Even though the label has the words “St. Louis, MO.,” it did not include any indication that this is where the beer was brewed.⁹⁹ If a consumer looked under the carton, he or she would have found specific information on the brewery’s location.¹⁰⁰ Ultimately, the court decided it would be unreasonable for a consumer to pick up a carton, look underneath it, before deciding if the beer was brewed in Germany or not.¹⁰¹

Finally, AB argued that the term “German Quality” was mere puffery, and should not be included under the state consumer protection law.¹⁰² AB argued that “German Quality” amounted to mere puffery, and did not constitute false advertising.¹⁰³ The court characterized specific, quantifiable statements about the product as the opposite of puffery, and thus, the statements could be used to show a false advertising claim.¹⁰⁴ For puffery, the statement cannot be taken in a vacuum and must be viewed in the context of the entire marketing scheme.¹⁰⁵ The court viewed the language in conjunction with “(1) other statements on cartons of Beck’s, (2) allegations of the defendant’s overall marketing campaign and its efforts to maintain Beck’s brand identity as a German beer and (3) Beck’s German heritage including its 139-year history

⁹³ *Id.* at 1340.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 1341.

⁹⁷ *Id.* at 1341.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 1342.

¹⁰³ *Id.* (quoting *Edmundson v. Procter & Gamble Co.*, 537 Fed.Appx. 708, 709 (9th Cir. 2013)).

¹⁰⁴ *Id.*

¹⁰⁵ See *Gerber Prod. Co.*, 552 F.3d at 939 n. 3.

of being brewed in Germany.”¹⁰⁶ Ultimately, AB’s puffery argument failed, along with its motion to dismiss.¹⁰⁷

AB had another settlement with Kirin over the brand’s marketing as being brewed in Japan, when in actuality it was brewed in Virginia.¹⁰⁸ Like Becks, Kirin was originally brewed in another country, before being acquired by AB.¹⁰⁹ After which, the beer sold in the United States was made in the United States, even though the label did not include messaging that indicated a brewery location.¹¹⁰ Again like Becks, the bottle included the brewery location that would have been hidden unless a consumer pulled the bottle out of the box.¹¹¹ The original suit claimed that the beer’s marketing violated the Florida Deceptive and Unfair Trade Practices Act.¹¹² As part of the settlement, AB has agreed to include the statement that the beer was “[b]rewed under Kirin’s strict supervision by Anheuser-Busch in Los Angeles, CA and Williamsburg, VA.”¹¹³

Taken together, both cases represent beers that were originally brewed in a foreign location, originally imported into the United States, and eventually purchased by an America corporation (AB). Then, most likely to save money, AB began producing the beer domestically, while making minor alterations to the packaging to indicate the change. Meanwhile, consumers went on believing they were buying a German or Japanese beer, when they were actually drinking a Missourian and Virginian beer. Only on the beer label was reality of the product revealed. This mirrors the facts presented in *Cilloni*.

B. The Cool Islands Tastes of Jamaica in Pennsylvania

On the other side of the brewery location debate, the court in *Dumas v. Diageo PLC* granted the motion to dismiss Aaron Dumas’s complaint that Red Stripe misled consumers into buying a Jamaican beer that is actually brewed in Pennsylvania.¹¹⁴ The defendant made a FRCP 12(b)(6) motion that “should be granted only where a plaintiff’s complaint lacks a ‘cognizable legal theory’

¹⁰⁶ *Marty*, 43 F. Supp. 3d at 1342.

¹⁰⁷ *Id.*

¹⁰⁸ Courtney Jorstad, *Kirin Beer False Advertising Class Action Settlement*, TOP CLASS ACTIONS, Jan. 23, 2015, <http://topclassactions.com/lawsuit-settlements/closed-settlements/48064-kirin-beer-false-advertising-class-action-settlement/>

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* (internal quotations omitted).

¹¹⁴ *Dumas v. Diageo PLC*, No. 15CV1681 BTM(BLM), 2016 WL 1367511, at *1 (S.D. Cal. Apr. 6, 2016).

or sufficient facts to support a cognizable legal theory.”¹¹⁵ The defendant’s main support for dismissing the complaint was that “no reasonable consumer would be misled by the statements made on the Red Stripe packaging and labeling.”¹¹⁶ Under California law, the UCL, FAL, and CLRA, all of which are claimed in the Kona case, are determined by the reasonable consumer standard.¹¹⁷ The court used this standard and dismissed *Dumas*.¹¹⁸

Typically, a deceptive business practice is a question of fact that cannot be decided on a motion to dismiss.¹¹⁹ “[T]here are ‘rare situations’ where it is appropriate to grant a motion to dismiss based on review of the advertisement or product packaging itself.”¹²⁰ For Red Stripe, the court found that the twelve and six-pack containers had “Jamaican Style Lager” and “Taste of Jamaica” printed prominently on the side of packaging.¹²¹ The bottom of the packaging included that the beer was “[b]rewed and bottled by Red Stripe Beer Company Latrobe, PA.” The court boiled the case down to the only facts being the words “Jamaica” and “Jamaican” appear on Red Stripe’s packaging.¹²² This was not enough to support a conclusion that a reasonable consumer would be confused with the product’s origin.¹²³

The court also distinguished itself from *Marty*.¹²⁴ The court made the distinction that “The Taste of Jamaica” was different than “Originated in Germany.”¹²⁵ “Originated in Germany” is a reference to a place of origin. This was then echoed by the use of the “German Purity Law.”¹²⁶ A reasonable consumer could see this and think this is where the beer was born.¹²⁷ Whereas “Taste of Jamaica” is more of an aspirational slogan on what the beer should taste like.¹²⁸

In *Parent v. MillerCoors LLC*, Evan Parent sued MillerCoors over the beer Blue Moon misrepresenting itself as a “craft beer,” and that it is engaged in

¹¹⁵ *Id.* at *2 (citing *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988)).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at *3.

¹²⁰ *Id.*

¹²¹ *Id.* (emphasis added).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at *5.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

misleading customers.¹²⁹ MillerCoors' motion to dismiss under FRCP 12(b)(6) was ultimately granted by the court.¹³⁰

In the complaint, the plaintiff pointed to three internet advertisements using "Artfully Crafted" as misleading, and the court found that the advertisements were non-actionable puffery.¹³¹ Typically, puffery is non-actionable because it is generalized, vague, and unspecified language, and not a factual representation.¹³² The advertisements described how the beer originated from an independent brewery, which the plaintiff contended made it seem like the brewery was still independently owned.¹³³ However, in these advertisements, the words "craft beer" were never used.¹³⁴

The descriptions of "Artfully Crafted" is different than descriptions that obfuscate the true location of the beer's origin. "Artfully Crafted" is closer to "Jamaican Style." For Kona Brewing, "Artfully Crafted" is similar to "Liquid Aloha." *Parent's* case falls apart because the plaintiff's argument rests on a consumer being confused by "Artfully Crafted." For Kona, the consumer is inundated with imagery, language, and details about Hawaii.

IV. RECOMMENDED OUTCOME

The Northern District of California should follow *Marty* and deny CBA's motion to dismiss the complaint, allowing the case to continue. First, the District Court's *Twombly* and *Iqbal* analysis will show that the complaint is not just a series of accusations.¹³⁵ Under *Iqbal*, the complaint needs to be more than a series of formulaic labels and needs to include some factual allegations that move the complaint from speculative to plausible.¹³⁶ In Cilloni's complaint, there are uses of formulaic labelling. For example, a form of "misrepresentation" is used eighteen times.¹³⁷ "Unlawful" fifteen times.¹³⁸

¹²⁹ *Parent v. MillerCoors LLC*, No. 3:15-CV-1204-GPC-WVG, 2016 WL 3348818, at *1–2 (S.D. Cal. June 16, 2016).

¹³⁰ *Id.* at *5.

¹³¹ *Id.* at *6.

¹³² *Vitt v. Apple Computer, Inc.*, 469 Fed. Appx. 605, 607 (9th Cir. 2012) (The language "mobile," "durable," "portable," "rugged," "reliable," "high performance," and "high value" constituted puffery.)

¹³³ *Parent*, No. 3:15-CV-1204-GPC-WVG, 2016 WL 3348818, at *6.

¹³⁴ *Id.*

¹³⁵ See Complaint, *supra* note 16.

¹³⁶ *Iqbal*, 556 U.S. at 678.

¹³⁷ See Complaint *supra* note 16.

¹³⁸ See *id.*

“Deceptive” twelve times.¹³⁹ “Fraud” five times.¹⁴⁰ This language could be interpreted as labels against CBA, compared to a factual allegation. They are not facts. However, the complaint does build on these labels by describing the content of CBA’s marketing strategy.¹⁴¹

One of the main examples is by highlighting Kona Brewing’s packaging. The language on the packaging contains:

The waves in Hawaii are legendary. In the winter months, the island's north and west coasts see big waves that often climb to 40 feet, with huge curls of white water breaking just off shore. This is just one reason why surfers, body boarders, paddlers and those of just willing to watch from the beach make this pilgrimage. There is no other place on earth like Hawaii. The north shore of Oahu gets all the attention (as it should), but the waves at Makaha are just as sweet. This is the place where the first surf competition in Hawaii was held in 1954 and continues to attract world class pros to ride the giants of winter surf.¹⁴²

This is Big Wave Golden Ale’s description. The complaint describes every beer label and packaging. They describe CBA’s business model, and Kona Brewing’s profitability.¹⁴³ The complaint also states where the beer is brewed.¹⁴⁴ Overall, these factual allegations should be enough for the District Court to move to the next step.

Next, the District Court should turn their attention to the Reasonable Consumer Test, and find that a reasonable person would think that a beer from Kona Brewing was brewed in Hawaii. Everything on the exterior of the packaging points to the beer being imported from the Hawaiian Islands, all the way down to the brewery name: Kona Brewing. After pulling a bottle from the

¹³⁹ See *id.*

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

¹⁴² *Id.* ¶ 34.

¹⁴³ *Id.* ¶¶ 16–18 (“Craft Brew’s Chief Executive Officer, Andy Thomas, stated in a May 4, 2016 publication on Craft Brew’s website that “solid second quarter performance” in 2016 reflects, at least in part, “significant progress in strengthening our topline by sustaining Kona’s remarkable growth ...”).

¹⁴⁴ *Id.* ¶ 74. (“Portland, Oregon, Woodinville, Washington, Memphis, Tennessee, and Portsmouth, New Hampshire. . .”).

packaging, a consumer can see in small, vertical lettering on the side of the bottle: “KONA BREWING COMPANY CO KONA HI · PORTLAND, OR · WOODINVILLE, WA · PORTSMOUTH, NH · MEMPHIS, TN. FRESH, RESPONSIBLE, ALWAYS ALOHA.”¹⁴⁵ The vertical lettering means that a consumer must flip the bottle on its side to read.¹⁴⁶ The labeling does not specify exactly where that specific beer was brewed, or even that those locations are breweries. There is nowhere else on the packaging that lets the consumer know where the beer might have been brewed.¹⁴⁷ Only on Kona Brewing’s website can it be found that “[u]nder strict guidance, Kona Brewing Company also produces its bottled beer and mainland draft beer in Portland, Oregon, Woodinville, Washington, Memphis, Tennessee, and Portsmouth, New Hampshire, as part of its partnership with Craft Brew Alliance Inc.”¹⁴⁸

This is directly analogous to Beck’s beer in *Marty*.¹⁴⁹ Like Beck’s, Kona Brewing uses the language of the importing place, while obscuring the actual brew locations.¹⁵⁰ Finally, as the district court in *Marty* stated, “A reasonable consumer is not required to open a carton or remove a product from its outer packaging in order to ascertain whether representations made on the face of the packaging are misleading.”¹⁵¹ Kona Brewing’s labeling can also be contrasted with that of Red Stripe in *Dumas*.¹⁵² Unlike Red Stripe, Kona Brewing does not include the phrase “Hawaiian Style beer.”¹⁵³

Third, CBA is going to argue that the text of Kona Brewing’s marketing is mere puffery. The District Court here should follow the Beck’s analysis, where the district court found that “Germany Quality” was not puffery. All the depictions of Hawaii on Kona Brewing’s packages should also not be considered puffery. Since puffery cannot be taken in a vacuum, all the content pointing toward the beer being brewed in Hawaii. For example, the Longboard Island Lager’s label reads, “A spirited, crisp and refreshing brew, Longboard Island Lager is a smooth ride all the way in. Thirst’s up! Waikiki Beach in Honolulu is the birth place of longboard surfing. Kona Brewing pays tribute to this iconic place with our own Longboard Island Lager.”¹⁵⁴ If a consumer

¹⁴⁵ *Id.* ¶ 64.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* ¶ 65.

¹⁴⁸ *Id.* ¶ 74.

¹⁴⁹ *Marty*, 43 F. Supp. 3d at 1341.

¹⁵⁰ *Marty*, 43 F. Supp. 3d at 1341; Complaint, *supra* note 1, ¶ 74.

¹⁵¹ *Marty*, 43 F. Supp. 3d at 1341.

¹⁵² *Dumas*, No. 15CV1681 BTM(BLM), 2016 WL 1367511, at *1.

¹⁵³ See Complaint, *supra* note 1.

¹⁵⁴ *Id.* ¶ 25 (internal quotation omitted).

picks up a package and reads the bottom of the Longboard Island Lager, they will see “Longboard surfing in the shadow of Diamond Head has been a tradition for over 100 years at Waikiki beach. Our Longboard Island Lager pays tribute to this grand history.”¹⁵⁵ All of this language is amounts to more than the puffery found in “Artfully Crafted.” Instead, it is the same thing as “German Quality.” The language evokes a beer brewed in Hawaii, and not in Portsmouth, New Hampshire.

Kona’s beer, sold in six and twelve-packs, are marketed and sold to make the reasonable consumer think he or she is buying a Hawaiian beer.

V. CONCLUSION

Overall, a motion to dismiss should be denied because Kona Brewing’s bottles and packages are most closely analogous to Beck’s in *Marty v. Anheuser-Busch*. The packaging is meant to evoke a Hawaiian island brew, crafted for a thirsty surfer that can be purchased at a grocery store in Champaign, Illinois. The point of the packaging is to make consumers think they are enjoying a bit of Hawaii, much like Beck’s masquerading as a German beer. Kona Brewing intentionally excluded the breweries’ locations on the exterior of their packaging, and they should have known that a reasonable consumer would look at the packaging and crave imported beer from Hawaii.

¹⁵⁵ *Id.* ¶ 26.