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d.b.a. MAKER'S MARK

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAFORA NOWROUZI AND TRAVIS WILLIAMS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

MAKER'S MARK DISTILLERY, INC., d.b.a. MAKER'S MARK,

Defendant.

Case No. 3-14-cv-02885 JAH NLS
Pleading Type: Class Action

DEFENDANT MAKER'S MARK DISTILLERY, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS COMPLAINT

Hearing Date: March 2, 2015
Time: 2:30 p.m
Courtroom: 13B
Judge: Hon. John A. Houston

Complaint Filed: December 5, 2014

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In their Complaint, Plaintiffs Safora Nowrouzi and Travis Williams ("Plaintiffs") contend that the statement "handmade," printed on the label of Maker's Mark® bourbon, is false and misleading. Plaintiffs claim the "handmade" statement is false because videos and photographs on Maker's Mark Distillery, Inc. d/b/a Maker's Mark ("Maker's Mark")'s own website show that machines are used for parts of the production process, and thus, Plaintiffs claim, the bourbon is not "created by a hand process." Plaintiffs allege violations of California's Unfair Competition Law ("UCL") and False Advertising Law ("FAL"), as well as claims for intentional and negligent misrepresentations. All of Plaintiffs' claims turn on this same alleged misrepresentation, and they all fail for the reasons set forth below.

First, all of Plaintiffs' claims fail under California's safe harbor doctrine. Before distribution, the challenged Maker's Mark label was reviewed and ***pre-approved*** by the Alcohol and Tobacco Tax and Trade Bureau ("TTB"), the federal agency charged with enforcing labeling requirements for alcoholic beverages pursuant to the Federal Alcohol Administration Act ("FAAA"). The TTB's preapproval of the Maker's Mark label is an express indication that Maker's Mark's label complies with federal alcohol labeling law, and the pre-approval permitted Maker's Mark to use the label on its product. As such, any claim premised on the contents of the Maker's Mark label is precluded under California's safe harbor doctrine.

Second, Plaintiffs fail to allege facts from which the Court may plausibly infer that the "handmade" statement on the Maker's Mark label would mislead a reasonable consumer. The reasonable consumer analysis starts, of course, with common sense. And common sense dictates that "handmade" bourbon does not mean, as Plaintiffs would have it, that every step of the process—from grinding the grain to affixing the label on the bottle—was done by hand and without the use of any machinery. Moreover, as evident from Plaintiffs' own allegations and information referenced in

their Complaint, the Maker's Mark label could not have misled a reasonable consumer to believe that the entire process for making the bourbon was done by hand, because Maker's Mark publicly discloses its process for making bourbon. Indeed, as Plaintiffs allege in their Complaint, Maker's Mark's public website contains detailed information about the production process. What's more, the Maker's Mark label expressly invites consumers to visit its website and contains the website address. Given these facts, a reasonable consumer could not plausibly believe that the bourbon is literally made entirely by hand and without the use of any machinery.

Third, Plaintiffs' intentional misrepresentation cause of action fails as a matter of law because their own allegations establish that Maker's Mark did not have the requisite intent to deceive. Plaintiffs rely exclusively on information they allege is available on Maker's Mark's own website as purported evidence of the "truth" about the Maker's Mark production process. But in doing so, Plaintiffs have pled themselves out of a claim for intentional misrepresentation: Maker's Mark's public disclosure of the "true" production process on its website negates any inference that Maker's Mark intended to deceive consumers about the process for making its bourbon. This conclusion is bolstered by the fact that the Maker's Mark label explicitly invites consumers to visit its website, where more information about the production process can be found. Given these alleged facts, Plaintiffs' intentional misrepresentation claim plainly fails.

Finally, Plaintiffs' cause of action for negligent misrepresentation—for which they seek only economic damages—fails under the well-established economic loss doctrine. Accordingly, and as set forth below, all of Plaintiffs' claims should be dismissed with prejudice.

II. STATEMENT OF ALLEGED FACTS

Maker's Mark Distillery, Inc. d/b/a Maker's Mark manufactures, markets and sells bourbon whisky products. *See* Compl. ¶¶ 2, 25. On December 5, 2014, Plaintiffs Safora Nowrouzi and Travis Williams filed their Complaint, purportedly on behalf of

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all California consumers who purchased Maker's Mark bourbon from December 5, 2010 through December 5, 2014. *Id.* ¶ 123. The Complaint purports to state claims under California state law: the UCL; the FAL; intentional misrepresentation; and negligent misrepresentation.

Plaintiffs allege that in November 2014—just weeks before their lawyer filed this Complaint—they purchased Maker's Mark bourbon. *Id.* ¶¶ 32–33. According to their Complaint, Plaintiffs purchased the bourbon because it bore the statement "handmade" on its label, and this allegedly led Plaintiffs to believe the bourbon "was of superior quality" for which they were willing to spend comparatively more than they would for a lesser quality comparative product. *Id.* ¶¶ 34, 63. Plaintiffs do not allege that they suffered any personal injury or property damage as a result of their purchase of the Maker's Mark bourbon, only that they either would not have purchased the bourbon—or would have paid less for it—had they known that it "was not handmade." *Id.* ¶ 21.

Plaintiffs allege they were misled by the bourbon's label because Maker's Mark's production process involves "little to no human supervision, assistance or involvement." *Id.* ¶ 35. Plaintiffs allege that photos and video footage present on Maker's Mark's own website demonstrate in detail the "mechanized and/or automated" process used to produce the bourbon. *See, e.g., id.* ¶¶ 14, 15, 18, 35. Although Plaintiffs did not include in their Complaint a photograph of the full label on Maker's Mark bottles, it lists Maker's Mark's website and encourages consumers to visit it, which Plaintiffs apparently did. (*See* Exhibit A to Request for Judicial Notice, attached as Exhibit 1 (full label of Maker's Mark bottle).) It also invites consumers to visit the Maker's Mark distillery in Loretto, Kentucky. *Id.* Plaintiffs argue it was false or misleading for Maker's Mark to describe its bourbon made by this process as "handmade," relying on the definition provided in the Meridian Webster dictionary (*i.e.*, "created by a hand process rather than by a machine"). *Id.* ¶ 65.

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III. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure ("Rule") 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A complaint fails to state a claim under Rule 12(b)(6) unless it contains "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. v. Twombly*, 550 U.S. 544, 547 (2007). The court should not accept unreasonable inferences or unwarranted deductions of fact. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (noting that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice"). In other words, a complaint must allege "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. Rather, the factual allegations "must be enough to raise a right to relief above the speculative level." *Id.* Where, as here, the complaint contains unsupported factual allegations and implausible theories of relief, Rule 12(b)(6) requires that the complaint be dismissed. *Id.* at 547.

Although a motion to dismiss may be granted with leave to amend, leave to amend is not required where "any amendment would be futile." *See Leadsinger, Inc. v. BMG Music Publ'g*, 429 F. Supp. 2d 1190, 1197 (C.D. Cal. 2005); *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988) (citation omitted) (futility means that "no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense").

IV. ARGUMENT

A. Plaintiffs' Claims Fail Because the Maker's Mark Label is Affirmatively Authorized Under State and Federal Law

Plaintiffs claim that Maker's Mark's use of the statement "handmade" on its bourbon label is in violation of California state law. But it is well established that Maker's Mark's compliance with federal law and regulations insulates it from Plaintiffs' claims. *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.

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4th 163, 182 (1999); *see also Alvarez v. Chevron Corp*., 656 F.3d 925, 934 (9th Cir. 2011) (applying the *Cel-Tech* safe harbor to a UCL claim and applying a similar safe harbor to the CLRA claims). As the California Supreme Court has held, California's safe harbor doctrine applies with extra force in the context of consumer protection laws: "Although the unfair competition law's scope is sweeping, it is not unlimited. … 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*, 20 Cal. 4th at 182. Thus, where a defendant "complie[s] with the relevant [federal] regulations," its conduct is not subject to UCL or FAL claims. *Pom Wonderful LLC v. Coca Cola Co.*, 2013 WL 543361, at *5 (N.D. Cal. April 16, 2013) (finding that the safe harbor doctrine provided a separate and independent basis for dismissing UCL and FAL claims); *see also Ebner v. Fresh Inc*., No. SACV 13-00477 JVS, 2013 WL 9760035, at *6 (C.D. Cal. Sept. 11, 2013) (finding that compliance with FDA labeling regulations insulated cosmetic manufacturer from UCL and FAL liability under California safe harbor doctrine); *Davis v. HSBC Bank Nev*., 691 F.3d 1152, 1165–66 (9th Cir. 2012) (affirming dismissal of UCL claim based on safe harbor provided by federal regulations).

Plaintiffs nevertheless seek to hold Maker's Mark liable under state law for doing precisely what the federal government has permitted. But because Plaintiffs cannot "assault th[e] harbor" of federal regulations through the guise of California consumer protection claims, all their claims must fail. *Cel-Tech*, 20 Cal. 4th at 182. In particular, the "TTB" is the federal agency charged with promulgating regulations regarding the labeling of distilled spirits, wines, and malt beverages pursuant to the FAAA. The TTB also enforces FAAA regulations regarding the labeling of distilled spirits, including 27 U.S.C. § 205(e)'s prohibition of false and misleading statements. *See* http://www.ttb.gov/main_pages/memo-understanding.shtml;

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http://www.ttb.gov/about/ stat_auth.shtml; 27 U.S.C. § 205(e). To ensure a distilled spirit label "complies with applicable laws and regulations," the TTB reviews and approves distilled spirit labels prior to the products' distribution or sale. *See* 27 C.F.R. § 13.1, 13.21. This review includes the mandate in Section 27 U.S.C. § 205(e) that the label not be false or misleading: "[e]xamples of advertising areas that TTB will review include … [s]tatements that are false, misleading, or deceptive…." *See* http://www.ttb.gov/consumer/labeling_advertising.shtml"); *see also* 27 U.S.C. § 205; 27 C.F.R. § 5.65(a).

When a federal agency reviews and pre-approves labels for regulatory compliance, courts across the country have consistently applied state law safe harbor provisions. While the California Supreme Court has expressly recognized such a safe harbor for California, the California courts have not yet had occasion to apply it in this scenario. *Cel-Tech*, 20 Cal. 4th at 182-185. The repeated application in other jurisdictions, including one applying California law, however, demonstrates that application here fits squarely within the *Cel-Tech* rationale. *See In re Celexa & Lexapro Mktg. & Sales Practices Litig*., 2014 WL 866571, at *3 (D. Mass. Mar. 5, 2014) (applying California law) (UCL and FAL claims based on allegations that prescription drug label was "misleading and inadequate" barred as a matter of law by the California safe harbor provision where drug labels are subject to FDA's preapproval process). For instance, in *Kuenzig v. Hormel Foods Corp.*, 505 F. App'x 937 (11th Cir. 2013) (*per curiam*), the Eleventh Circuit affirmed the district court's dismissal of the plaintiff's "putative class-action complaint alleging that [the defendant] misled consumers into believing its lunch meat products contained fewer fat-calories than they actually did." *Id*. at 938-39. In affirming, the court reasoned that the "[t]he labels complied with federal regulations regarding the use of percentage fat-free claims and ***were approved by [the appropriate federal agency] prior to their commercial use***." *Id*. (emphasis added). For these reasons, the court held that the defendants "could not be liable pursuant to [Florida]'s safe harbor provision."

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Id. Other courts have done the same. *See Prohias v. Pfizer, Inc.*, 490 F. Supp. 2d 1228, 1234 (S.D. Fla. 2007) (applying safe harbor where "the FDA approved the prescription drug … to reduce the risk of heart attacks …," the drug's "FDA approved label specifically include[d] this indication," and "[a]ccordingly, any advertisements that stated or implied that [the drug] reduced the risk of heart disease or heart attacks simply marketed an approved use of the drug"); *DePriest v. AstraZeneca Pharmaceuticals, L.P.*, 351 S.W.3d 173-78 (Ark. 2009) (applying safe harbor where the "FDA is vested with the authority to approve labeling for any new drug," "the FDA regulates prescription drug advertising," the FDA specifically approved the labeling for the prescription drug at issue thus determining "that the information is not false or misleading," and the defendant's "advertising for [the drug] is supported by FDA-approved labeling").

As described above, the TTB's process here includes a review to ensure labels do not contain "[a]ny 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." 27 C.F.R. § 5.65.; 27 C.F.R. §§ 13.1, *et. seq.* It is thus nearly identical to the pre-approval processes in *Kuenzig* (where the USDA reviewed meat and poultry products for compliance with the Federal Meat Inspection Act's similar regulations) and in cases where prescription drug labels and medical devices are also expressly pre-approved. *See, e.g., Barnes v. Campbell Soup Co.*, 2013 WL 5530017, at *5 (N.D. Cal. 2013) (precluding state law claims where the USDA and Food Safety and Inspection Service "previously approved of Defendant's … [label], [the label] cannot be construed, as a matter of law, as false or misleading"); *Meaunrit v. ConAgra Foods Inc.*, 2010 WL 2867393, at *7 (N.D. Cal. 2010) (dismissing state causes of action "[b]ecause the pre-approval process [under the FMIA] includes a determination of whether the labeling is false and misleading, and the gravamen of plaintiff's attack on the label concerns whether those instructions are accurate"); *Trazo v. Nestle USA, Inc.*,

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2013 WL 4083218, at *7 (N.D. Cal. Aug. 9, 2013) (claims against Nestle's Lean Pockets and Hot Pockets dismissed because "meat products are pre-approved by the USDA, which first reviews the labels, considers whether they are false or misleading, and approves them…The Hot Pockets and Lean Pockets in question have the USDA-approved sticker on the label, indicating that they have gone through the process); *Reigal v. Medtronic, Inc.*, 552 U.S. 312, 321 (2008) (plaintiff's state law claims barred because the FDA provided pre-approval of the pharmaceutical label in dispute)*; In re Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig.*, 623 F.3d 1200, 1203 (8th Cir. 2010) (same); *Perez v. Nidek Co.*, 711 F.3d 1109, 1118 (9th Cir. 2013) (affirming dismissal of common-law claims challenging the safety and effectiveness of a medical device that had received premarket approval from the FDA). The same result is appropriate here, and all of Plaintiffs' claims, as they arise under state law, should therefore be dismissed under California's safe harbor doctrine. *Cel-Tech*, 20 Cal. 4th at 182.

B. Even if Plaintiffs' Claims Were Not Barred by the Safe Harbor Doctrine, They Should be Dismissed

1. Plaintiffs Fail to State a Claim Under the UCL or the FAL Because They Have Not Plausibly Alleged a Likelihood of Deception

Plaintiffs' claims for false advertising under the FAL and UCL are governed by the reasonable consumer standard. *See Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995); *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 506-07 (2003) (reasonable consumer standard applies to UCL false advertising claims); *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1360 (2003) (same with respect to FAL advertising claims). Thus, to state a claim under those statutes, Plaintiffs must plausibly plead that "members of the public are likely to be deceived" by the alleged false advertising statement. *Brod v. Sioux Honey Ass'n Coop.*, 927 F. Supp. 2d 811, 828 (N.D. Cal. 2013) (citing *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995)). "Likely to be deceived" implies more than a mere possibility of

misunderstanding—"likelihood" is measured in terms of whether a significant portion of the general consumer public could be misled. *Lavie* 105 Cal. App. 4th at 508. Further, "where a court can conclude as a matter of law that members of the public are not likely to be deceived by the product packaging, dismissal is appropriate." *Werbel ex rel. v. Pepsico, Inc.*, 2010 WL 2673860, at *4 (N.D. Cal. July 2, 2010) (dismissing UCL and FAL claims with prejudice where no reasonable consumer would likely be deceived by statement on product packaging).

As an initial matter, the term "handmade," as used on the Maker's Mark label, is not a "specific and measurable claim," and therefore cannot mislead a reasonable consumer as a matter of law. *See Vitt v. Apple Computer, Inc.*, 469 F. App'x 605, 607 (9th Cir. 2012) (explaining that an actionable false advertisement requires "a 'specific and measurable claim' capable of being proved false or of being reasonably interpreted as a statement of objective fact") (quoting *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731 (9th Cir. 1999)). Far from being a "[a] factual representation[] that a given standard has been met" (*id.* at 607), "handmade," particularly in the context of distilled spirits, is a general, subjective term that is not subject to measurement. Plaintiffs all but concede that there is no established standard for the use of the term "handmade" in connection with the production of distilled spirits, as evidenced by their reliance on the dictionary's definition of "handmade": "created by a hand process rather than a machine" (*see* Compl. ¶ 65). But even that definition is lacks the required quantifiable specificity. For example, it fails to specify what a "hand process" is, and whether such a process may include mechanized components that are directed by hand. Not only is the term "handmade" generalized and vague, the Maker's Mark label does not include numerical or other quantifiers (such as "100%" or "all"), that could arguably make the representation more objective. Because the term "handmade" on the Maker's Mark label is not a "specific and measurable claim," it cannot reasonably be interpreted in the manner Plaintiffs allege. *See Vitt*, 469 F. App'x at 607.

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Plaintiffs' proffered interpretation of the "handmade" statement does not comport with common sense, which negates any inference that it is likely to mislead a reasonable consumer. Indeed, the Ninth Circuit has directed district courts to apply a "common sense" standard at the pleading stage for false advertising claims. In *Stuart v. Cadbury Adams USA, LLC*, the Ninth Circuit affirmed dismissal of a UCL claim that "def[ied] common sense." 458 F. App'x 689, 690 (9th Cir. 2011).[1] In *Stuart*, the plaintiff complained that the claim that Trident White gum "removes stains" was misleading because Cadbury failed to mention that a consumer must also practice oral hygiene to maintain clean teeth. *Id.* at 691. The Ninth Circuit reasoned that "[o]nly an unreasonable consumer would be confused or deceived by Cadbury's failure to clarify that Trident White gum works only if consumers continue to brush and floss regularly." *Id.*; *see also Carrea v. Dreyer's Grand Ice Cream, Inc.*, 475 F. App'x 113, 115 (9th Cir. 2012) (affirming dismissal of UCL claim because "it strains credulity" to argue that a reasonable consumer would be misled to think that ice cream with "chocolate coating topped with nuts" is healthier than competing brands); *Williamson v. Apple, Inc.*, 2012 WL 3835104, at *1, 6 (N.D. Cal. Sept. 4, 2012) (dismissing UCL claim of plaintiff with a shattered iPhone who challenged Apple's statement that the glass it uses for the phones is "comparable in strength to sapphire crystal" because "it is a well-known fact of life that glass can break under impact" and it would require "a suspension of logic" to think otherwise); *Stearns v. Select Comfort Retail Corp.*, 2009 WL 1635931, at *11 (N.D. Cal. June 5, 2009) (intentional misrepresentation claim dismissed based on statement that beds would be "maintenance free" and that a purchaser would receive "constant and wear free support night after night" because "no product is ever maintenance-free" and "no consumer reasonably could have that expectation.")

[1] As an unpublished decision, *Stuart* is not binding on this Court. The decision is nonetheless persuasive authority. *See, e.g., Martinez v. Holland*, No. 13cv3007–GPC (WVG), 2014 WL 6810747, at *20 n.2 (S.D. Cal. Dec. 2, 2014) ("Although . . . not binding precedent, unpublished decisions have persuasive value and indicate how the Ninth Circuit applies binding authority.").

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Here, a common-sense, reasonable interpretation of Maker's Mark's "handmade" claim cannot be that Maker's Mark employees break up the grain with their hands, stir the mixture by hand, distill and ferment the alcohol without the use of any machinery, make by the glass bottles by hand, fill each bottle by hand, and handwrite the labels on the bottles. The claim "handmade" cannot reasonably be interpreted to mean, as Plaintiffs would have this Court believe, that every step of the Maker's Mark bourbon production process must be accomplished solely by hand. As Plaintiffs point out in their Complaint, Maker's Mark is a distilled spirit (a *consumable* good) sold throughout the United States. It of course must be prepared consistent with health and safety regulations and in a clean and sanitary manner. Not even the least sophisticated consumer of bourbon—and certainly not a reasonable consumer—would understand that this consumed drink, made from combining various ingredients together in different ways, would be literally and entirely made with human hands. *See Lavie*, 105 Cal. App. 4th at 510 (the "likely to deceive" standard is an objective one based on the reasonable consumer, not "exceptionally acute" nor the "least sophisticated consumer"). Accordingly, the Court should dismiss Plaintiffs' claims.

Moreover, the "handmade" representation is not misleading because, as Plaintiffs highlight in their Complaint, videos and photographs allegedly available on Maker's Mark's own public website demonstrates the actual production process for its bourbon. *See* Compl. ¶ 15, 17-18, 37. Additionally, the label itself describes in some detail that each individual batch of Maker's Mark is less than 19 barrels, that Maker's Mark uses the sour-mash method (starting each new batch fermentation by using some mash from the last batch), and invites consumers to visit www.makersmark.com. (*See* Exhibit A to Request for Judicial Notice.) A statement cannot be misleading where the advertiser expressly discloses to the buying public the objective facts underlying that statement. *See, e.g., Porras v. StubHub, Inc.*, 2012 WL 3835073, at *6 (N.D. Cal. Sept. 4, 2012); *Manchouck v. Mondelez Int'l Inc.*, 2013 WL 5400285, at *3 (N.D. Cal.

Sept. 26, 2013) (dismissal of claim premised on statement that cookies were "made with real fruit" where "the list of ingredients on the packaging serves notice to consumers that the products contain 'Raspberry Purée' and 'Strawberry Purée' respectively"); *Thomas v. Costco Wholesale Corp.*, No. 5:12-CV-02908 EJD, 2013 WL 1435292, at *5 (N.D. Cal. Apr. 9, 2013) ("no trans fat" claim on label was non-actionable where it was "clearly stated on the labeling of the product [plaintiff] purchased"). Plaintiffs cannot plausibly contend that Maker's Mark misleads anyone about the nature of the process for producing Maker's Mark when the label itself describes it and points consumers directly to Maker's Mark's website, which Plaintiffs allege contains the various videos and photos showing the "true" process for making Maker's Mark.

Porras v. StubHub, Inc. is instructive on this point. There, the court dismissed the plaintiffs' UCL, FAL and misrepresentation claims, in which the plaintiff alleged that the terms "guarantee," "100% confidence," "authentic," and "valid" with respect to the resale of tickets by third-party sellers through StubHub's website were misleading and confusing. 2012 WL 3835073 at *1. The plaintiff argued that such advertisements implied that all tickets purchased through StubHub's website would be valid for entry, when in fact they were not. *Id*. The court dismissed the plaintiffs' claims because StubHub disclosed on its website the facts supporting its advertisements: "Given StubHub's express acknowledgment [in its Guarantee] that the tickets might be invalid, available for purchasers to review on StubHub's website, StubHub's statements cannot be deemed 'untrue or misleading.'" *Id*. at *6.

Here, too, Maker's Mark discloses to its consumers the information necessary for them to understand the handmade process. As Plaintiffs themselves allege, Maker's Mark made several videos for its website demonstrating the steps that comprise the manufacture of its bourbon—indeed, the website apparently constitutes the entire basis for Plaintiffs' challenge to the "handmade" label. *See* Compl. ¶¶ 14-15, 37-57. But that very website shows human hands are involved at several other

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points in the Maker's Mark bourbon production process, including for example hand-turning of the barrels in which the bourbon is aged and hand-dipping of Maker's Mark's signature red wax bottle seal. *See* https://www.makersmark.com/making-makers/wax/uniquely-hand-dipped; https://www.makersmark.com/making-makers/wood/thats-how-we-roll (both last accessed on January 13, 2015).[2] Additionally, Plaintiffs' Complaint makes clear that the label on the Maker's Mark bottle encourages consumers to visit the Maker's Mark website, where more details about the production process can be found. *See* Compl. ¶ 51; *see also* Exhibit A to Maker's Mark's Request for Judicial Notice. Maker's Mark provides notice to consumers of exactly how its bourbon is made, and no reasonable consumer can plausibly be misled to believe that Maker's Mark manufactures its bourbon completely by hand, without using any machines or automation, as the Complaint alleges. As such, Plaintiffs fail to state a claim and their Complaint must be dismissed.

2. Plaintiffs Cannot State a Claim For Intentional Misrepresentation

To state a claim for intentional misrepresentation under California law, a plaintiff must plead seven elements with particularity: (1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for the truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff

[2] This Court may consider Maker's Mark website in ruling on a Rule 12(b)(6) motion to dismiss given Plaintiffs' extensive reliance on the website in their Complaint. *See Daniels-Hack v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (explaining that courts may consider documents incorporated into a Complaint by reference on a Rule 12(b)(6) motion to dismiss); *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (courts have the authority to consider a document in ruling on a Rule 12(b)(6) motion to dismiss even if the plaintiff does not physically attach the document if the plaintiff's complaint necessarily relies upon it and no party disputes its authenticity). Plaintiffs do not dispute the website's authenticity, and indeed they rely on the website extensively throughout their Complaint. (*See* Compl. ¶¶ 14-15, 17, 37-57.)

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reasonably relied on the representation; (6) the plaintiff was harmed; and (7) the plaintiff's reliance on the representation was a substantial factor in causing that harm to the plaintiff. *Manderville v. PCG & S Group, Inc.*, 146 Cal. App. 4th 1486, 1498 (2007). Here, Plaintiffs' intentional misrepresentation claim fails for two reasons. First, as set forth above, Plaintiffs have not and cannot plead that the challenged statement would mislead a reasonable consumer such that they could have reasonably relied on it. Thus, that statement cannot form the basis of an intentional misrepresentation (*i.e.*, fraud) claim. *See Stuart*, 458 F. App'x at 691-92 (affirming dismissal of fraud claim where the challenged statement could not, as a matter of law, have misled a reasonable person).

Second, Plaintiffs have not—and cannot—allege that Maker's Mark acted with the requisite fraudulent intent to deceive in light of Plaintiffs' own allegations concerning Maker's Mark's production process, which it fully disclosed on its own website. In other words, Plaintiffs allege that Maker's Mark itself disclosed the "truth" about its distilling and bottling process on its website—which is completely inconsistent with the conclusory allegations that Maker's Mark intended to defraud. *Compare, e.g.*, Compl. ¶¶ 37-57 (allegations describing Maker's Mark's website, photos, and video footage) with Compl. ¶¶ 111, 114, 116 (alleging Maker's Mark "knew that its whisky was not 'handmade,'" but "intentionally made the misrepresentations" to "induc[e] the public"). If Maker's Mark intended to defraud consumers it certainly would not describe its production process on its label, direct consumers reading that label to visit its website, direct consumers on that label to visit its distillery in Kentucky, and post what Plaintiffs describe as accurate depictions of the Maker's Mark process. Maker's Mark's public disclosure of its production process is entirely inconsistent with any fraudulent intent, and Plaintiffs' specific allegations on that score trump their conclusory allegations of intent. *See Chem. Device Corp. v. Am. Cyanamid Co.*, No. C-89-1739 WHO, 1990 WL 56164, at *3 (N.D. Cal. Jan. 11, 1990) ("the court is not bound to accept conclusory legal

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allegations in the complaint when more specific allegations in the pleadings are at variance with those conclusions") (citation omitted); *see also Sprewell v. Golden State Warriors*, 266 F.3d 979, 988-89 (9th Cir. 2001) (affirming dismissal of the plaintiff's claim, explaining that a plaintiff can plead himself out of a claim by including in his complaint and exhibits thereto detail contrary to his claims); *see also Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295–96 (9th Cir.1998) ("[W]e are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint."). Plaintiffs' intentional misrepresentation claim should be dismissed accordingly.

3. The Economic Loss Doctrine Bars Plaintiffs' Negligent Misrepresentation Claims

The well-established economic loss doctrine bars Plaintiffs' negligent misrepresentation claim, which is based solely on alleged economic injury. Under California law, "[i]n the absence of (1) personal injury, (2) physical damage to property, (3) a 'special relationship' existing between the parties, or (4) some other common law exception to the rule, recovery of purely economic loss is foreclosed." *Kalitta Air, LLC v. Cent. Tex. Airborne Sys., Inc.*, 315 F. App'x 603, 605 (9th Cir. 2008) (quoting *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 804 (Cal. 1979). Plaintiffs do not allege personal injury or property damage, only that they would not have purchased the product or would have paid less for the product absent the "handmade" statement. Compl. ¶ 21. Courts have routinely held that the economic loss doctrine bars negligent misrepresentation claims based on economic injury in consumer class actions. *See, e.g., Minkler v. Apple, Inc.*, 2014 WL 4100613, at *6 (N.D. Cal. Aug. 20, 2014) (negligent misrepresentation claim dismissed pursuant to the "economic loss" rule, where plaintiff alleged she would not have purchased the iPhone 5 had she known of an alleged Apply Maps defect); *Ladore v. Sony Computer Entm't Am., LLC*, 2014 WL 7187159, at *8-9 (N.D. Cal. Dec. 16, 2014) (negligent misrepresentation claim dismissed pursuant to the "economic loss" rule where plaintiff alleged only

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economic damages as a result of his purchase of allegedly defective Sony product); *Vavak v. Abbott Labs., Inc*., 2011 WL 10550065, at *4-6 (C.D. Cal. June 17, 2011) (negligent misrepresentation claims based solely on money damages incurred from the purchase price barred by the "economic loss" rule where purchaser alleged that she would not have paid for allegedly defective baby formula). As Plaintiffs have not and cannot establish the required injury to avoid the economic loss doctrine, their negligent misrepresentation claim should be dismissed as a matter of law.

V. CONCLUSION

For the foregoing reasons, Maker's Mark respectfully requests that the Court dismiss Plaintiffs' Complaint with prejudice as set forth herein.

Dated: January 16, 2015

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