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8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**

10 BRENDAN PEACOCK, on Behalf of
11 Himself, and All Others Similarly
Situating,

12 Plaintiff,

13 vs.

14 PABST BREWING COMPANY, LLC,

15 Defendant.

Case No. 2:18-cv-00568-TLN-CKD

**DEFENDANT PABST BREWING
COMPANY, LLC'S REPLY BRIEF
IN SUPPORT OF MOTION TO
DISMISS FIRST AMENDED
COMPLAINT OF PLAINTIFF
BRENDAN PEACOCK**

Complaint Filed: March 15, 2018

Hearing Date: Vacated

Hearing Time: Vacated

Courtroom: 2

Judge: Hon. Troy L. Nunley

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1 **I. INTRODUCTION**

2 Before Plaintiff’s putative class action claim can proceed beyond the
3 pleading stage, Plaintiff must be able to articulate a viable individual claim for false
4 advertising. Plaintiff’s Opposition confirms that his individual claim does not and
5 cannot pass muster as a matter of law because it is based on puffery and an
6 unreasonable interpretation of the Olympia Beer label and advertising. As a result,
7 Plaintiff’s First Amended Complaint (“FAC”) should be dismissed in its entirety.

8 Plaintiff’s Opposition ignores the arguments raised in Pabst’s motion to
9 dismiss and instead focuses on strawman arguments Pabst did not assert. The
10 Opposition also parrots in a conclusory fashion the allegations in the First Amended
11 Complaint, which repeat Plaintiff’s unreasonable and implausible assumptions
12 about Olympia Beer, but do not rebut the arguments in the motion that demonstrate
13 why Plaintiff’s assumptions are unreasonable and implausible. Moreover, Plaintiff
14 does not mention, much less address, his failure to satisfy the heightened pleading
15 requirements under Rule 9(b) , thereby conceding that argument.

16 Plaintiff’s Opposition argues that his claim should survive because he
17 subjectively believed (unreasonably and implausibly) that the drawing of a generic
18 waterfall on the Olympia Beer can mean that the water used to brew Olympia Beer
19 was exclusively sourced from “artesian” water from Tumwater, Washington
20 notwithstanding the undisputed facts that the Olympia label does not include the
21 words “artesian” or “Tumwater,” does not specify the location of the depiction of a
22 waterfall, which is simply an artist’s rendering, does not state that the water used to
23 brew the beer is from Washington, and does not make any geographic
24 representation regarding the brewing location of the beer, all of which defeats
25 Plaintiff’s claim and distinguishes this case from the prior cases Plaintiff cites.

26 Plaintiff’s Opposition also fails to address the fact that: (i) the phrase “It’s the
27 Water” does not appear anywhere on the outside packaging of Olympia Beer and
28 therefore could not have impacted his buying decision; (ii) Pabst’s website makes

1 no reference to the water used to brew Olympia Beer and therefore cannot support
2 his claim; (iii) a comment to the Facebook post Plaintiff allegedly relied upon
3 specifically states that Olympia is no longer brewed in Washington; therefore
4 Plaintiff must have known Olympia is not brewed in Washington; and (iv) the
5 Wikipedia page Plaintiff relies upon states that the Olympia brewery in Washington
6 closed in 2003, further reinforcing the fact that Plaintiff either knew or should have
7 known that Olympia is not brewed in Washington.

8 As Plaintiff concedes, this Court can dismiss the FAC without leave to
9 amend if the Court finds that the claim is based on puffery or unreasonable
10 interpretations of the Olympia Beer label and advertising. Based on the unrebutted
11 arguments in Pabst's opening brief, and the reasons detailed below, the Court can
12 and should grant Pabst's motion to dismiss without leave to amend.

13 **II. PLAINTIFF'S CLAIM FAILS AS A MATTER LAW BECAUSE IT IS**
14 **BASED ON PUFFERY AND UNREASONABLE AND IMPLAUSIBLE**
15 **ASSUMPTIONS.**

16 Plaintiff concedes as he must that this Court can dismiss his claim if it
17 determines that the claim is based on puffery (meaning no factual representations
18 have been made regarding the issue) or that no reasonable consumer could be
19 misled by the advertising at issue (even if the named plaintiff claims to have been
20 misled by the advertisement at issue). Here, Plaintiff's claim fails on both counts.

21 **A. Plaintiff's Claim Fails Because it is Not Based on Any Factual**
22 **Representations.**

23 In Pabst's motion to dismiss, Pabst dissected each of the allegedly misleading
24 forms of advertisement articulated in Plaintiff's FAC and showed that none of the
25 allegations is based on a representation of fact. The advertising claims at issue are
26 mere puffery. In response, Plaintiff did not counter any of these arguments.
27 Instead, Plaintiff resorts to vague notions of consumer protection without providing
28 the required concrete allegations of factual representations to support his claim.

1 For example, Plaintiff argues that the depiction of a generic waterfall on the
2 Olympia Beer can allegedly “creates the impression in the minds of consumers”
3 that Olympia is exclusively brewed using “artesian” water from Tumwater. (Opp’n
4 at 5:11-14.) But Plaintiff fails to tie this argument to any representation of fact that
5 Pabst made. Plaintiff also argues that Pabst allegedly falsely advertises Olympia
6 beer “through a sequence and conglomeration of sophisticated advertising
7 techniques” but fails to specify what representations of fact support this vague
8 notion of consumer protection.

9 Plaintiff also argues that it is inappropriate for this Court to make a
10 determination regarding puffery at the pleading stage. Not so. As articulated in
11 *Dumas v. Diageo PLC*, No. 15cv1681 BTM(BLM), 2016 U.S. Dist. LEXIS 46691
12 (S.D. Cal. Apr. 6, 2016), it is appropriate for a district court to dismiss a false
13 advertising claim at the pleading stage if it is based on puffery or unreasonable
14 interpretations of the advertising at issue.

15 In *Dumas*, the court granted defendant’s motion to dismiss on the ground that
16 the allegedly misleading phrase “The Taste of Jamaica” was puffery because it was
17 only a “vague and meaningless phrase” that the plaintiffs unreasonably interpreted.
18 The *Dumas* court further found that the challenged phrases were simply “a vague,
19 colorful expression of Red Stripe’s association with Jamaica and cannot reasonably
20 be construed as a designation of origin.” *Id.* at *14-15. Here, as in *Dumas*, this
21 Court is empowered to find that the challenged phrases and images merely
22 constitute puffery that cannot serve as the basis of a false advertising claim.

23 **B. Plaintiff’s Individual Claim Fails as a Matter of Law Because it is**
24 **Based on Unreasonable and Implausible Interpretations of Pabst’s**
25 **Advertising.**

26 Plaintiff’s claim also fails because it requires an unreasonable and
27 implausible interpretation of the generic waterfall and historical narrative cited in
28 the FAC. For example, Plaintiff’s mantra that he was misled to believe that

1 Olympia beer is “exclusively brewed using artesian water in Washington” is a
2 fiction of Plaintiff’s own making. No reasonable consumer would come to this
3 same conclusion by reviewing an artistic depiction of a generic waterfall, a
4 historical narrative, or by reading the phrase “It’s the Water” on a beer can. The
5 narrative Plaintiff pushes in his Opposition is one that is unique to his own
6 unreasonable sensibilities and one carefully crafted as part of his career as a
7 professional plaintiff who seeks to sue food and beverage companies after
8 conducting rigorous and unique research into the origins of a product. It is wholly
9 unreasonable to conclude that any other consumer, let alone a “reasonable”
10 consumer, would conduct the same tortured path of research that Plaintiff
11 conducted before purchasing Olympia Beer.

12 In support of his argument, Plaintiff relies upon three cases: (i) *Broomfield v.*
13 *Craft Brew Alliance, Inc.*, 2017 U.S. Dist. LEXIS 142572 *21-22, (N.D. Cal.
14 September 1, 2017) (“*Broomfield I*”); (ii) *Peacock v. The 21st Amendment Brewery*
15 *Cafe, LLC*, 2018 U.S. Dist. LEXIS 7537 *, 2018 WL 452153 (N.D. Cal. January
16 17, 2018); and (iii) *Marty v. Anheuser-Busch Cos., LLC*, 43 F. Supp. 3d 1333, 2014
17 U.S. Dist. LEXIS 124180 (S.D. Fla. September 5, 2014). None of these cases
18 supports Plaintiff’s claim.

19 For example, Plaintiff argues that the allegations in this case are “nearly
20 identical” to those found in *Broomfield v. Craft Brew Alliance, Inc.* and therefore
21 should survive the pleading stage. Plaintiff’s reading of the *Broomfield I* case is
22 wrong—as is Plaintiff’s conclusion that the decision supports Plaintiff’s arguments
23 here. On the contrary, the *Broomfield I* court’s analysis, as articulated in Pabst’s
24 motion, supports dismissal of Plaintiff’s claim. For example, the language in
25 *Broomfield I* that Plaintiff quotes ignores the court’s recognition that the pictures of
26 a surfboard and the phrase “Liquid Aloha” were insufficient to support a false
27 advertising claim. The claim in *Broomfield I* survived a motion to dismiss because
28 the label contained a Hawaiian address, map of Hawaii, and statement that

1 consumers could visit the brewery on the Big Island of Hawaii. No such analogous
2 facts are alleged or are present here.

3
4 Specifically, the *Broomfield I* court reasoned:

5 **If the Consolidated Complaint [*21] solely alleged pictures**
6 **of surfboards and the vague phrase “Liquid Aloha” on the**
7 **beer packaging, the case would end there.** However, the
8 Court finds that the Hawaiian address, the map of Hawaii
9 identifying Kona's brewery on the Big Island, and the statement
10 “visit our brewery and pubs whenever you are in Hawaii,” are
11 not mere puffery but are specific and measurable
12 representations of fact that could deceive a reasonable
13 consumer into believing that the six- and twelve-packs of Kona
14 beer were brewed in Hawaii. These representations are
15 distinguishable from those on the packaging of Red Stripe Beer
16 in *Dumas v. Diageo PLC*, No. 15-cv-1681, 2016 U.S. Dist.
17 LEXIS 46691, 2016 WL 1367511, at *6 (S.D. Cal. Apr. 6,
18 2016), a case on which CBA heavily relies in its motion. Mot.
19 10, 13. The *Dumas* court granted defendant’s motion to dismiss
20 a complaint alleging that Red Stripe Beer engaged in unfair and
21 deceptive practices by misleading consumers into overpaying
22 for Red Stripe under the mistaken impression that the beer was
23 made in Jamaica. 2016 U.S. Dist. LEXIS 46691, 2016 WL
24 1367511, at *6. **The Court agrees with CBA that many of the**
25 **representations challenged by Plaintiffs in the Consolidated**
26 **Complaint are non-actionable along the lines of those found**
27 **to be “vague and meaningless” in *Dumas*. *Id.* For example,**
28 **the phrase “Liquid Aloha” [*22] on every package of Kona**
beer is akin to the slogan “The Taste of Jamaica” on the
packaging for Red Stripe. In addition, merely referencing
Hawaii and its culture on the packaging is not enough on its
own to confuse a reasonable consumer regarding the origin
of the beer. See *Pernod Ricard USA, LLC v. Bacardi U.S.A.,*
***Inc.*, 653 F.3d 241, 253 (3d Cir. 2011) (reference to “Havana**
Club” on bottle of rum not misleading when bottle clearly
stated the product was “Puerto Rican Rum.”)

27 However, there is no equivalent in *Dumas* to Plaintiffs’
28 allegations regarding the Hawaiian address, the map of Hawaii

1 that identifies the Kona brewery, and the invitation to “visit our
2 brewery” in Kona. These representations go beyond those held
3 to be non-actionable in *Dumas*, and they do more than evoke
4 the “spirit” of Hawaii or indicate that the beer is “Hawaiian-
5 style.” Considered together in context, these statements and
6 images amount to specific and measurable representations that
7 could deceive consumers into believing that they were
8 purchasing beer made in Kona, Hawaii at the specific brewery
9 location listed and depicted on the package.

10 *Broomfield v. Craft Brew Alliance, Inc.*, 2017 U.S. Dist. LEXIS 142572 *21-22,
11 (N.D. Cal. September 1, 2017).

12 Here, like *Broomfield I*, the challenged elements of the Olympia Beer label
13 (drawing of a generic waterfall and phrase “It’s the Water”) are non-actionable
14 puffery. Unlike *Broomfield I*, the Olympia Beer label does not contain a Tumwater,
15 Washington address, a map of Washington, or an invitation to visit Olympia’s
16 brewery in Washington. As a result, the reasoning in *Broomfield I* supports Pabst’s
17 argument that Plaintiff’s claim should be dismissed as puffery.

18 The court’s decision in *Peacock v. The 21st Amendment Brewery Cafe, LLC*,
19 2018 U.S. Dist. LEXIS 7537, 2018 WL 452153 (N.D. Cal. January 17, 2018) also
20 supports dismissal here. In that case, the court found that the California map with
21 an “X” marking the “Brewery” supported a false advertising claim. Here, unlike
22 the label in 21st Amendment Brewery, Olympia Beer does not feature any such
23 specific, measurable geographic designation.

24 Finally, in *Marty v. Anheuser-Busch Cos., LLC*, 43 F. Supp. 3d 1333, 2014
25 U.S. Dist. LEXIS 124180 (S.D. Fla. September 5, 2014), the court relied upon the
26 specific measurable geographic designations on the label including the phrases
27 “Originated in Germany,” “German Quality,” and “Brewed Under the German
28 Purity Law of 1516” as compared to a disclaimer listed underneath each carton
stating that it is a “Product of USA, Brauerei Beck & Co., St. Louis, MO” in
permitting a false advertising claim to survive the pleading stage. Here, unlike the

1 label in *Marty v. Anheuser-Busch*, the Olympia Beer label contains no specific,
2 measurable geographic designations. Nor does Pabst rely upon any disclaimer,
3 which further distinguishes the holding and analysis of *Marty v. Anheuser-Busch*.

4 **C. Plaintiff Concedes That His Claim is Not Pled with the Requisite**
5 **Specificity Under Rule 9(b).**

6 Pabst's motion to dismiss argued that Plaintiff's FAC failed to allege with
7 specificity "the who, what, when, where, and how" of the misconduct charged.
8 Fed. R. Civ. P. 9; *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009).
9 In his opposition, Plaintiff failed to respond to this argument at all, thereby
10 conceding it. As a result, at a minimum, this Court should grant Pabst's motion to
11 dismiss and require Plaintiff to specify what he bought, whether the phrase "It's the
12 Water" was visible at the time of purchase, what the purported "premium price" he
13 paid for the Olympia beer, when he first viewed Pabst's website, when he first
14 viewed the Facebook post at issue and whether he read the comment to the post
15 specifying that Olympia Beer is not brewed in Washington, and whether Plaintiff
16 did any research into Olympia beer (including viewing the byline of the photo for
17 the Tumwater Wikipedia page cited in paragraph 9 to the FAC). Fed. R. Civ. P. 9;
18 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1077 (9th Cir. 2003). Otherwise,
19 Pabst will be prejudiced by Plaintiff's lack of specificity as it will be precluded
20 from defending itself from Plaintiff's claim.

21 **D. Pabst's Use of the Phrase "It's the Water" is Sanctioned By Law,**
22 **Which Provides a Complete Defense.**

23 Plaintiff argues in his opposition that the TTB regulations do not provide
24 Pabst with a "safe harbor to falsely advertise to consumers that its beer is
25 exclusively brewed using artesian water in Washington." (Opp'n at 10:26-28.)
26 Plaintiff's argument fails because it is premised on a strawman argument and a non-
27 existent fact. First, Pabst does not advertise that its beer is "exclusively brewed
28 using artesian water." That is a figment of Plaintiff's imagination, as detailed

1 above. Nor does Pabst contend that the TTB regulations provide it with a safe
2 harbor to “falsely advertise” or that it even provides a blanket safe harbor insulating
3 it from all false advertising claims. Instead, as Pabst argued in its motion to dismiss,
4 TTB regulations do provide Pabst with a safe harbor regarding the location printed
5 on Olympia cans, which lists Pabst’s principal place of business in lieu of the actual
6 place where Olympia is brewed. Plaintiff apparently recognizes that the TTB
7 provides such a safe harbor and that Pabst cannot face any liability based on the
8 location printed on the Olympia label because he does not cite to this fact in his
9 Opposition.

10 **E. Plaintiff Miscomprehends That He Lacks Standing to Seek**
11 **Injunctive Relief.**

12 In Pabst’s motion to dismiss, it argued that Plaintiff lacks standing to obtain
13 an injunction against Pabst and cited to a specific test articulated in *Broomfield I*
14 and *Broomfield v. Craft Brew All., Inc.*, No. 17-cv-01027-BLF, 2017 U.S. Dist.
15 LEXIS 194451 (N.D. Cal. Nov. 27, 2017) (“*Broomfield II*”), which constitutes the
16 current state of the law in the Ninth Circuit regarding standing to pursue an
17 injunction in the context of a false advertising case. As articulated in *Broomfield II*,
18 in order for Plaintiff to have standing to pursue an injunction, he must show that
19 (1) he is unable to rely on Pabst’s representations in the future, or (2) he may
20 purchase the mislabeled product (as is) in the future. Plaintiff does not respond to
21 this test and, instead, cites out-of-date authority and otherwise waxes about
22 consumer protection, class action certification, and constitutional law. Plaintiff also
23 appears to confuse or conflate the issue of Article III standing (which Pabst has not
24 challenged) with the specific rule articulated in the Ninth Circuit regarding standing
25 to seek an injunction (which Pabst has challenged). Plaintiff does not contend that
26 his FAC alleges that he is unable to rely upon Pabst’s representations as they
27 pertain to Olympia Beer or that he may purchase Olympia as is in the future. As a
28 result, the FAC fails to satisfy the standard for standing to request an injunction and

1 the Court should grant Pabst's motion to dismiss.

2 **III. CONCLUSION**

3 Because Plaintiff's claim is exclusively based on puffery and unreasonable
4 interpretations of the Olympia label, the Court should grant Pabst's motion and
5 dismiss the FAC with prejudice.

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DATED: June 21, 2018

BUCHALTER,
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By: /s/ - Oren Bitan

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