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**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF CALIFORNIA**

BRENDAN PEACOCK, on Behalf of Himself, and All Others Similarly Situated,

Plaintiff,

v.

PABST BREWING COMPANY, LLC,

Defendant.

CASE NO. 2:18-CV-00568-TLN-CKD

**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

| | |
|---|---|
| Hearing Date: | June 28, 2018 |
| Time: | 2:00 p.m. |
| Courtroom: | 2 |
| Judge: | Hon. Troy L. Nunley |
| Action Filed: | March 15, 2018 |

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**CONSTITUTIONAL PROVISIONS**

Plaintiff Brendan Peacock ("Plaintiff") files this response in opposition to the motion to dismiss, [Dkt. Nos. 19, *et seq.*], filed by defendant Pabst Brewing Company, LLC ("Defendant") and, accordingly states:

## I. INTRODUCTION

This is a false advertising case regarding the origin of Defendant's beer products. Defendant falsely creates the impression in the minds of its consumers that its Olympia beer products are exclusively brewed using artesian water in Washington, when in fact, the beers are now brewed in a mass-production brewery located in Los Angeles County, California. As a result of Defendant's false advertising regarding the origin of its beer products, Plaintiff brings a class action against Defendant under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§17200, *et seq.*, on behalf of all purchasers of the beer products.

Defendant seeks dismissal on the basis that its marketing campaign is somehow innocuous. For instance, Defendant states, "A reasonable consumer would view the label and advertising for Olympia beer as either being a vague and meaningless slogan or simply a slogan that evokes the spirit or feeling of the Northwest." [Dkt. No. 19-1, pg. 1]. Defendant fundamentally misunderstands the allegations and the law. "Labels matter." *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 889 (Cal. 2001) . And it is hornbook law that the ultimate factual issue of what a reasonable consumer would perceive from a given advertising campaign is not appropriate for adjudication at the pleading stage. *Williams v. Gerber Products*, 552 F.3d 934 (9th Cir. 2008).

Plaintiff here has sufficiently pled Defendant's liability under the UCL for the false advertising of Olympia beer. Indeed, Plaintiff's allegations here are nearly identical to allegations in other class actions seeking redress against beer companies from false origin advertising that have survived the pleading stage. *See, e.g., Broomfield v. Craft Brew Alliance, Inc.*, No. 17-cv-01027-BLF, 2017 WL 3838453, at *6-*7 (N.D. Cal. Sept. 1, 2017) ("Considered together in context, these statements and images amount to specific and measurable

representations that could deceive consumers into believing that they were purchasing beer made in Kona, Hawaii at the specific brewery location listed and depicted on the package."); *Peacock v. The 21st Amendment Brewery Café, LLC*, No. 17-cv-01918-JST, 2018 WL 452153, at *5 (N.D. Cal. Jan. 17, 2018), ("[I]t would be reasonable for a consumer looking at 21st Amendment's carton map to believe that its beer was brewed in California."); *Marty v. Anheuser-Busch Cos., LLC*, 43 F. Supp. 3d 1333, 1341 (S.D. Fla. 2014) ("In sum, the undersigned finds that the 'Product of USA' disclaimer on the label and the statement 'BRAUEREI BECK & CO., BECK'S © BEER, ST. LOUIS, MO' underneath the carton do not warrant the dismissal of the plaintiffs' state law consumer protection claims."). Indeed, beer companies have settled multiple false origin advertising claims like the false origin claim at issue here for substantial classwide relief.[1]

For the reasons more fully stated herein, Plaintiff respectfully asks this Court to deny Defendant's motion to dismiss.

## II. PLAINTIFF STATES A CLAIM UNDER THE UCL

### A. The Contours of a UCL Claim

Plaintiff alleges that Defendant has violated the UCL. "[T]he primary purpose of the unfair competition law . . . is to protect the public from unscrupulous business practices." *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy*, 4 Cal. App. 4th 963, 975 (1992); *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009). The UCL imposes strict liability on anyone who violates its prohibitions and the "scope of the UCL is quite broad." *McKell v. Washington Mutual, Inc.*, 142 Cal. App. 4th 1457, 1471 (2006); *see also Cortez v. Purolator Air Filtration*

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[1] *See, e.g., Marty et al. v. Anheuser-Busch Companies, LLC*, Case No. 13-cv-23656 (S.D. Fla.), http://www.wsj.com/articles/judge-approves-settlement-overbecks-beer-1445397277 (last visited, July 26, 2016) ("A U.S. magistrate judge in Miami gave final approval to an estimated $20 million settlement of a class-action lawsuit claiming that Anheuser-Busch InBev NV, the maker of Beck's, duped American consumers into believing that the St. Louis-brewed beer was an authentic German pilsner.")

*Prods. Co.*, 23 Cal. 4th 163, 181 (2000) ("[P]laintiff need not show that a UCL defendant intended to injure anyone through its unfair or unlawful conduct.").

In order to prove a violation of the UCL, a plaintiff must show that: (1) the defendant engaged in a business act or practice that was either unlawful, unfair, or fraudulent; or (2) engaged in advertising that was unfair, deceptive, untrue, or misleading. *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (Cal. 1999).

An "unlawful" business act or practice includes "any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Saunders v. Super. Ct.*, 27 Cal. App. 4th 832, 838-39 (Cal. Ct. App. 1994).

In order to determine whether a business act or practice is "unfair," courts utilize a balancing test. *Klein v. Earth Elements Inc.*, 59 Cal. App. 4th 965, 969 (Cal. Ct. App. 1997). Under the balancing test, a business act or practice is unfair if the harm to the victims outweighs the utility of the act. *Id.*

A "fraudulent" business act or practice means any business act or practice that is likely to deceive members of the public. *Klein*, 59 Cal. App. 4th at 970.

A UCL claim for unfair, deceptive, untrue, or misleading advertising may be based on representations to the public which are: (1) untrue; (2) accurate on some level, but nonetheless tend to mislead or deceive; and (3) perfectly true statements couched in such a manner that they is likely to mislead or deceive consumers, such as by failure to disclose other relevant information. *Paduano v. Am. Honda Motor Co., Inc.*, 169 Cal. App. 4th 1453, 1469 (Cal. Ct. App. 2009); *see also Tobacco II*, 46 Cal. 4th at 312 (liability under the UCL rests on whether the public is "likely to be deceived," which is determined by the effect the advertisement would have on "the reasonable consumer").

## III. DEFENDANT'S REQUEST FOR DISMISSAL LACKS MERIT

**A. Standards of Review**

This Court has previously articulated the standard of review for a motion to dismiss under Rule 12(b)(6) as follows:

> Federal Rule of Civil Procedure 8(a) requires that a pleading contain a short and plain statement of the claim showing that the pleader is entitled to relief. On a motion to dismiss, the factual allegations of the complaint are assumed to be true. A court is bound to give the plaintiff the benefit of every reasonable inference to be drawn from the well-pleaded allegations of the complaint. The plaintiff need not allege specific facts beyond those necessary to state his claim and the grounds showing entitlement to relief. A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.
>
> Nevertheless, a court need not assume the truth of legal conclusions cast in the form of factual allegations. While Rule 8(a) does not require detailed factual allegations, it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation. A pleading is insufficient if it offers mere labels and conclusions or a formulaic recitation of the elements of a cause of action. Additionally, it is inappropriate to assume that the plaintiff can prove facts that it has not alleged or that the defendants have violated the . . .laws in ways that have not been alleged.
>
> Ultimately, a court may not dismiss a complaint in which the plaintiff has alleged enough facts to state a claim to relief that is plausible on its face. While the plausibility requirement is not akin to a probability requirement, it demands more than a sheer possibility that a defendant has acted unlawfully. This plausibility inquiry is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.

*Shannon v. County of Sacramento*, No. 2:13–cv–01834 TLN CKD, 2014 WL 3735441, at *2 (E.D. Cal. July 28, 2014) (Nunley, J.) (internal citations and quotations omitted).

This Court has also previously articulated the standard of review for a motion to dismiss under Rule 9(b) as follows:

> Claims sounding in fraud or mistake are subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) which requires that a plaintiff alleging fraud must state with particularity the circumstances constituting fraud. The Court notes that Plaintiffs' CLRA claim as well as their Unfair Competition Law ("UCL") claim, are subject to the heightened pleading standard set forth in Federal Rule of Civil Procedure 9(b). To satisfy the heightened standard under Rule 9(b), the allegations must be 'specific enough to give defendants notice of the particular misconduct which is alleged to constitute the

> fraud charged so that they can defend against the charge and not just deny that they have done anything wrong. However, the heightened pleading requirements of Rule 9(b) do not apply to allegations of knowledge, intent, or other conditions of a person's mind. Rule 9(b) explicitly states that scienter may be alleged generally. This does not mean, that conclusory allegations of knowledge or intent suffice. Rather, Rule 9(b) merely excuses a party from pleading scienter under an elevated pleading standard; the less rigid—though still operative—strictures of Rule 8 must be satisfied.

*Rossi v. Whirlpool Corp.*, No. 2:12–cv–00125, 2013 WL 5781673, at *9 (E.D. Cal. Oct. 25, 2013) (Nunley, J.) (internal citations, footnotes and quotations omitted).

As explained below, Defendant does not meet this standard for dismissal.

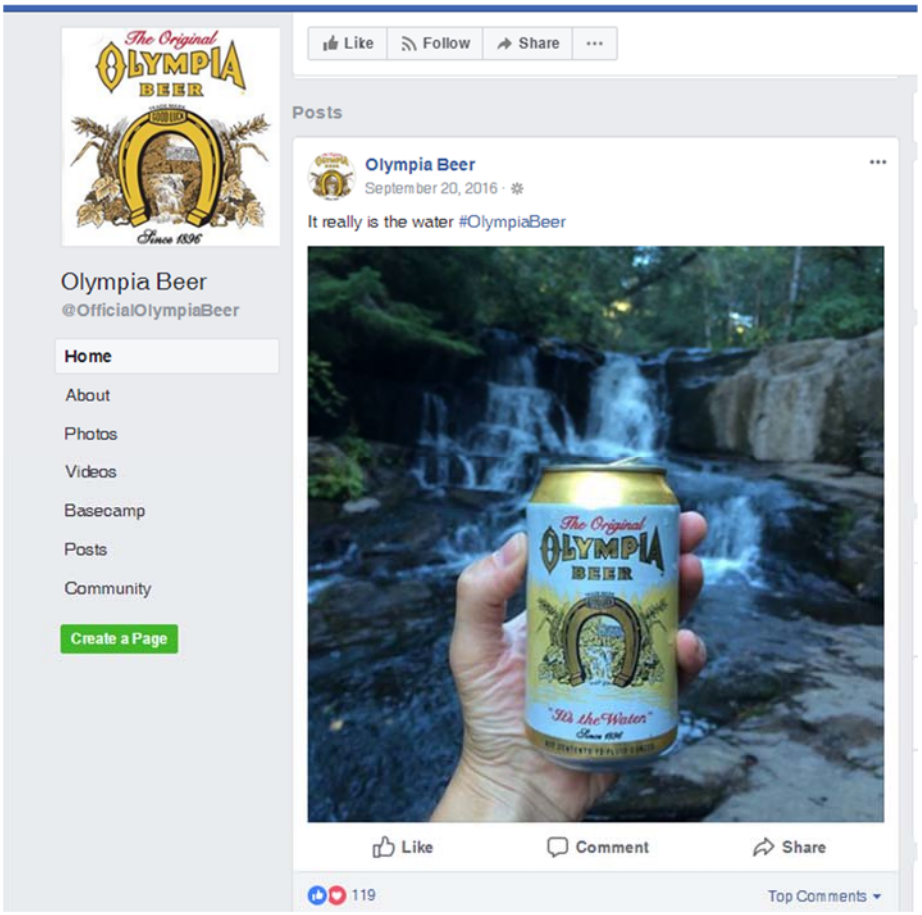
**B. There Are Actionable Misrepresentations and Omissions under the UCL**

Plaintiff alleges that Defendant falsely creates the impression in the minds of its consumers that its Olympia beer products are exclusively brewed using artesian water in Washington, when in fact, the beers are now brewed in a mass-production brewery located in Los Angeles County, California. [Dkt. No. 14, ¶¶1, 6-23].

Plaintiff alleges that Defendant manages to successfully and falsely advertise the origin of its beer given the fact that Olympia beer products were, for many generations, exclusively brewed using artesian water in Washington. [Dkt. No. 14, ¶¶1, 6-23]. After a series of mergers, acquisitions and consolidations, the brewing process now takes place in mega-brewery located in Irvindale, California. [Dkt. No. 14, ¶¶1, 6-23]. Yet, Plaintiff alleges that Defendant nonetheless portrays the historical brewing location as the site of where the Olympia beer products are brewed, through a sequence and conglomeration of sophisticated advertising techniques. [Dkt. No. 14, ¶¶1, 6-23].

For instance, Defendant literally has a picture of the artesian waters from Washington in its advertising, including on the beer cans themselves, from where Olympia beer used to be brewed for generations. [Dkt. No. 14, ¶¶1, 6-23]. Defendant falsely reinforces that Olympia beer is still brewed where it is depicted, including through the slogan "It's the Water . . . Since 1896." [Dkt. No. 14, ¶¶1, 6-23]. The waterfalls outside of the old Washington brewery and the

depiction of these waterfalls on the cans of Olympia beer are expressly are detailed in the complaint. [Dkt. No. 14, ¶¶1, 6-23]. Likewise, Defendant also uses Internet and social media advertising to further falsely reinforce that Olympia beer is exclusively brewed using artesian waters from Washington, where Olympia beer used to be brewed, including additional photographs of artesian waters. [Dkt. No. 14, ¶¶1, 6-23].




Thus, Plaintiff alleges that Defendant creates the impression in the minds of consumers that the beer is exclusively brewed using artesian water in Washington, when (as Defendant even acknowledges), that is not true. [Dkt. No. 14, ¶¶1, 6-23]. *Compare, e.g., Johnson v. General Mills*, 278 F.R.D. 548, 551 (C.D. Cal. 2011) (". . . Mr. Johnson correctly notes that California law permits him to seek relief for future purchasers of the product who were misled by the lingering impressions made by the advertising campaign.").

### C. This Court Must Employ the Objective Reasonable Consumer Test and Find that Plaintiff Sufficiently Alleges False Advertising under the UCL, Since it Is Otherwise Inappropriate for this Court to Accept Defendant's Fact-Based Arguments on a Motion to Dismiss About How Consumers Perceive the Olympia Beer Advertising

Defendant spends a lot of time making fact-based arguments about how consumers perceive the Olympia beer advertising. These fact-based arguments are a wasted effort at this

motion to dismiss stage, as the parties must instead present competing evidence (including expert evidence) about the perceptions of consumers to the trier of fact. Because this Court is faced with a motion to dismiss a false advertising case brought under the UCL, this Court must employ the reasonable consumer test:

> Under the reasonable consumer standard, Plaintiffs must allege facts to show that the alleged misrepresentations are "likely to deceive" reasonable consumers. Because the "reasonable consumer" inquiry is an objective standard, claims may be dismissed as a matter of law where an alleged statement amounts to "mere puffery" or "in the context, is such that no reasonable consumer could be misled" in the manner claimed by the plaintiff.

*Broomfield*, 2017 WL 3838453, at *5 (internal citations and quotations omitted). Thus, right here and now, the issue is whether Plaintiff sufficiently alleges that a reasonable consumer is led to believe that Defendant's beer products are exclusively brewed using artesian water in Washington.

And at this pleading stage, it is inappropriate for this Court to make factual determinations about what reasonable consumer believe. "Courts have recognized that the deceptive nature of a business practice under California's consumer protection statutes is usually a question of fact that is inappropriate for decision on demurrer or a motion to dismiss." *Broomfield*, 2017 WL 3838453, at *5 (internal citations and quotations omitted).

Thus, at this pleading stage, this Court's objective application of the reasonable consumer test requires this Court to find that Plaintiff has set forth plausible allegations of false advertising, as other courts in false origin beer labelling cases have found. *See, e.g.*, *Broomfield*, 2017 WL 3838453, at *6-*7 ("Considered together in context, these statements and images amount to specific and measurable representations that could deceive consumers into believing that they were purchasing beer made in Kona, Hawaii at the specific brewery location listed and depicted on the package."); *Peacock*, 2017 WL 3838453, at *5 (N.D. Cal. Jan. 17, 2018), ("[I]t would be reasonable for a consumer looking at 21st Amendment's carton map to believe that its beer was brewed in California."); *Marty v. Anheuser-Busch Cos., LLC*, 43 F. Supp. 3d 1333, 1341 (S.D.

Fla. 2014) ("In sum, the undersigned finds that the 'Product of USA' disclaimer on the label and the statement 'BRAUEREI BECK & CO., BECK'S © BEER, ST. LOUIS, MO' underneath the carton do not warrant the dismissal of the plaintiffs' state law consumer protection claims.").

**D. The Beer Cases Defendant Cites Have No Bearing Here Since Defendant Does Not Tell the Consuming Public that its Beer Is Brewed in a Mega-Brewery Near Los Angeles**

This Court should reject Defendant's reliance on *Parent v. MillerCoors LLC*, No. 3:15-CV-1204-GPCWVG, 2016 WL 3348818, at *1 (S.D. Cal. June 16, 2016), *Dumas v. Diageo PLC*, No. 15cv1681 BTM (BLM), 2016 WL 1367511, at *1 (S.D. Cal. Apr. 6, 2016), and *Cruz v. Anheuser-Busch, LLC*, No. CV 14–09670 AB (ASx), 2015 WL 3561536, at *1 (C.D. Cal. June 3, 2015).

In *Parent*, the Court found that "nowhere in these advertisements is Blue Moon described as or stated to be a craft beer. 2016 WL 3348818, at *6. In *Dumas*, the packaging clearly stated that the beer was "Brewed & bottled by Red Stripe Beer Company Latrobe, PA." 2016 WL 1367511, at 3. *Cruz* was not a false origin beer case, but in any event, in *Cruz*, "there was accurate disclosure of accurate disclosure of the Rita Products' nutrient contents." 2015 WL 3561536, at *10.

Here, in contrast to each of those cases, there an actual, falsifiable impression that Defendant's beer is exclusively brewed using artesian waters from Washington. Defendant ***literally uses pictures of artesian waters from Washington in its advertising***, ***including on the beer cans themselves and in social media advertising***, from where Olympia beer used to be brewed for generations. But contrary to a case like *Dumas*, Defendant does not tell consumers that the locale of its brewing has changed to a mega-brewery outside of Los Angeles. Instead, Defendant falsely reinforces the false impression that Olympia beer is still brewed in Washington ***as depicted on the beer cans themselves and in social media advertising***, including through the slogan "It's the Water . . . Since 1896."

Moreover, as a matter of law, this Court cannot accept Defendant's argument that the totality of Defendant's advertising campaign is all puffery at this pleading stage. Puffery is a fact-based issue adjudicated after the pleading stage. *Johnson v. General Mills*, 278 F.R.D. 548, 550-551 (C.D. Cal. 2012). The issue of puffery will depend upon whether Defendant's marketing campaign is likely "to induce consumer reliance." *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1053 (9th 2008). Consumer surveys, expert testimony, or Defendant's own marketing documentation will be used to determine this issue, after the pleading stage. *Cf.*, *e.g.*, *General Mills*, 278 F.R.D. at 550-551 ("[E]ach generation of packaging cannot be assessed in isolation from the marketing message presented previously").

In fact, Defendant's own exhibit shows that puffery is a fact-based issue that cannot be resolved on a motion to dismiss. [Dkt. No. 19-3, pg. 2 of 14]. In the exhibit, one consumer actually apologizes on behalf of Defendant for the false impression that that Olympia beer is still brewed using artesian waters in Washington: "Grew up in Olympia Wa. Been to the Original Olympia brewery tasking room many times since I turned 21, ***hasn't been brewed here since 2003. Sorry to say!***" [Dkt. No. 19-3, pg. 2 of 14 (emphasis added)]. In other words, Defendant itself has presented evidence showing that the Olympia beer advertising campaign ***is not puffery*** and that consumers falsely believe that Olympia beer is exclusively brewed using artesian waters from Washington. Thus, as stated above, the fact-intensive question about whether Defendant's marketing campaign induces consumer reliance (*i.e.*, whether the marketing campaign is puffery), cannot be decided at this pleading stage.

### E. There Is No Preemption Nor Safe Harbor Regarding Defendant's False Advertising, and Defendant Has Failed to Inform this Court that Judge Tigar Already Decided this Issue in *21st Amendment*

Defendant contends that Plaintiff's claims are somehow preempted by 27 CFR §7.25(a)(1). However, Defendant provides no case authority for the proposition that 27 CFR §7.25(a)(1) allows Defendant a safe harbor to falsely advertise to consumers that its beer is exclusively brewed using artesian water in Washington. Indeed, in his recent opinion in *21st*

*Amendment*, Northern District of California Judge Tigar roundly rejected the exact same safe harbor argument Defendant makes here:

> The TTB does address designation of origin on beer labels. The labels must state "the place where [the beer] is bottled or packed," and "[t]he bottler's or packer's principal place of business may be shown in lieu of the actual place where bottled or packed if the address shown is a location where bottling or packing operation takes place." 27 C.F.R. § 7.25. Furthermore, "[t]he appropriate TTB officer may disapprove the listing of a principal place of business if its use would create a false or misleading impression as to the geographic origin of the beer." *Id*. (emphasis added). ***But there is nothing in the TTB that would "bar" a claim under the UCL*** or the CLRA: nothing in the regulatory scheme evinces an intent to occupy the field or limit consumers' remedies, and the regulation is not inconsistent with the UCL or the CLRA. *State v. Altus Fin., S.A.*, 36 Cal. 4th 1284, 1303, 116 P.3d 1175, 1187 (2005) ("[T]he fact that there are alternative remedies under a specific statute does not preclude a UCL remedy, unless the statute itself provides that the remedy is to be exclusive").

*21st Amendment*, 2018 WL 452153 at *7 (emphasis added). ***Defendant is acutely aware of this ruling by Judge Tigar*** having cited the ruling in a prior filing, [Dkt. No. 12-1, pgs. 13, 14, 16], but Defendant nonetheless failed to inform this Court that Judge Tigar explicitly rejected the same "safe harbor" argument Defendant is making to this Court.

Furthermore, at this pleading stage, because there are plausible claims for false advertising under the UCL, this Court cannot, as a matter of law, find that 27 CFR §7.25(a)(1) bars Plaintiff's claims. *See, e.g., Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1163 (2000) ("Authorization of avoidable charges for optional services hardly amounts to permission to mislead customers about such charges."); *Carney v. Verizon Wireless Telecom, Inc*., 2010 WL 1947635, at *6 (S.D. Cal. May 13, 2010) (inaccurate representations regarding otherwise lawful collection of sale tax was not protected by the safe harbor doctrine); *Hofmann v. Fifth Generation, Inc*., No. 14-cv-2569-JM-LB, 2015 WL5440330, at *7 (S.D. Cal. Mar. 18, 2015) (no regulation specifically authorized the use of "homemade" on the vodka's label, and that it was "not clear that such representations are necessarily within the [] regulatory purview.").

Indeed, the Defendant's safe harbor arguments incorporate matters beyond the Plaintiff's complaint that are inappropriate for a motion to dismiss. *See, e.g., Nowrouzi v. Maker's Mark*

*Distillery, Inc.*, No. 14CV2885 JAH, 2015 WL 4523551, at *4–*5 (S.D. Cal. Jul. 27, 2015) (in assessing whether there was safe harbor for the term "handmade," the court stated that it was "limited to considering the allegations set forth in the complaint.").

To be sure, the United States Supreme Court has repeatedly instructed that there is a strong presumption against preemption. *See, e.g., Wyeth v. Levine*, 555 U.S. 555, 129 S. Ct. 1187, 1194–95 (2009). "In areas of traditional state regulation, [a court must] assume that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). The Federal regulation Defendant cites, 27 CFR §7.25(a)(1), is hardly "clear and manifest" that Congress means to allow Defendant to falsely advertise that its beer is exclusively brewed using artesian water in Washington. Stated otherwise: the overall advertising campaign of Defendant falsely portraying its beer as being exclusively brewed using artesian water in Washington is at issue, which is something that, at this stage, this Court cannot find is "clearly and manifestly" blessed by the federal regulation.

**F. Defendant's "Standing" Argument Has No Merit**

Defendant contends that Plaintiff has no standing to sue to stop Defendant from false advertising. This Court should not accept the argument for many reasons.

**1. The Integrity of Our Consumer Protection Laws Depends Upon Allowing Consumers to Come into Court to Stop False Advertising**

False consumer product advertising is not and has never been constitutionally protected. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake"); *Gertz v. Robert Welch*, 418 U.S. 323, 340 (1974) ("But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues.").

Thus, states like California appropriately enact laws like the UCL to stop false advertising. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983) ("The State may deal effectively with false, deceptive, or misleading sales techniques.").

The broad remedial purposes of California's consumer protection laws define their uniquely potent character. *See, e.g., Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy*, 4 Cal. App. 4th 963, 975 (1992) ("[T]he primary purpose of the [UCL] . . . is to protect the public from unscrupulous business practices."); *In re Tobacco II Cases*, 207 P.3d 20, 30 (Cal. 2009) ("[C]onsumer class actions and representative UCL actions serve important roles in the enforcement of consumers' rights.") (internal citation omitted).

Limiting injunctive relief for only those future consumers who do not yet know they have been deceived, as Defendant desires, is a fallacy. None of those future consumers will ever sue because they don't know they are the victims of lies. *See, e.g., Henderson v. Gruma Corp.*, No. CV 10–04173 AHM (AJWx), 2011 WL 1362188, at *8 (C.D. Cal. Apr. 11, 2011) ("While Plaintiffs may not purchase the same [] products as they purchased during the class period, because they are now aware of the true content of the products, to prevent them from bringing suit on behalf of a class in federal court would surely thwart the objective of California's consumer protection laws.").

And the moment those consumers do in fact realize they are being lied to and seek relief from an Article III court on behalf of similarly-situated consumers, Defendant would require the courthouse doors to shut in their faces. Thus, if this Court sees the issue of standing like Defendant does, consumers cannot use federal courts to stop false advertising. And that will destroy the integrity of our current civilization.

Our federal courts were created to, *inter alia*, adjudicate "controversies." U.S. Const. Art. III, §2. Without a court system that actually does, in fact, adjudicate "controversies," like ongoing false consumer product advertising, we will descend into a dystopic world of self-help chaos:

> To permit every lawless capitalist, every law-defying corporation, to take any action, no matter how iniquitous, in the effort to secure an improper profit and to build up privilege, would be ruinous to the Republic and would mark the abandonment of the effort to secure in the industrial world the spirit of democratic fair dealing.

(President Theodore Roosevelt, Eighth State of the Union Address, Dec. 8, 1908).

Thus, this Court should find that Plaintiff has standing to seek injunctive relief. Relatedly, Defendant also does not properly acknowledge that Plaintiff specifically alleges that he was harmed by paying for a falsely-advertised product he would not have otherwise purchased, which is sufficient injury to state a claim. *Kwikset*, 246 P.3d at 877 ("That increment, the extra money paid, is economic injury and affords the consumer standing to sue."); *see also Stanwood v. Mary Kay, Inc.*, 941 F. Supp. 2d 1212, 1218 (C.D. Cal. 2012) ("Ms. Stanwood alleges that she purchased a number of Mary Kay products that she otherwise would not have, including "Concealer Beige 2, Mascara Waterproof Black, Mineral Eye Colors, Compacts and Brushes, and After Sun Replenishing Gel." (SAC ¶ 5.) This is a sufficient injury for standing under the UCL, . . . and under Article III.").

**2. Defendant's Standing Argument Is Not Procedurally Proper, Especially Since it Is a Thinly-Veiled Attack on Class Certification**

Whether Plaintiff has Article III standing to pursue the injunctive relief component of his claims is not appropriate on a motion to dismiss. *See, e.g., Clancy v. The Bromley Tea Company*, 308 F.R.D. 564, 571 (N.D. Cal. 2013) ("[A]pplying the concept of standing to dismiss proposed class action allegations is a category mistake."); *Senne v. Kansas City Royals Baseball Corp.*, 114 F.Supp.3d 906, 926-927 (N.D. Cal. 2015) ("[T]he Motion is DENIED without prejudice to raising the issues of class standing and/or the sufficiency of the class claims after class certification or, where applicable, in the context of the class certification determination.").

Moreover, it would not be appropriate for this Court to accept Defendant's position on standing and make what amounts to a class determination without providing Plaintiff the opportunity to present a motion and evidence in support thereof. *In re Toyota Motor Corp.*

*Hybrid Brake Mktg., Sales, Practices and Prods. Liab. Litig.*, 890 F. Supp. 2d 1210, 1224-25 (C.D. Cal. 2011). As in *Toyota*, here, Defendant "raises factual issues that will require the Court to consider additional evidence beyond the [C]omplaint. . . ., [and t]hese factual questions are more properly resolved on a motion for class certification pursuant to Federal Rule of Civil Procedure 23, . . ." *Id.* Indeed, Rule 23 expressly allows class certification orders to be "altered or amended" at any time before judgment. Fed. R. Civ. P. 23(c)(1)(C).

Thus, this Court should reject Defendant's Article III standing arguments at this stage.

### G. This Court's Initial Pretrial Scheduling Order Does Not Forbid Plaintiff from Filing a First Amended Complaint

Defendant contends that Plaintiff's first amended complaint is somehow forbidden and untimely pursuant to Section II of this Court's initial pretrial scheduling order. [Dkt. No. 3, pg. 2]. Defendant's argument is frivolous and a waste of valuable judicial and party resources.

First, Defendant fails to recognize that Section II of the initial pretrial scheduling order also states that Plaintiff shall amend the complaint "pursuant to the Federal Rules of Civil Procedure." [Dkt. No. 3, pg. 2]. When Defendant filed a motion to dismiss on April 27, 2018, Plaintiff amended the complaint pursuant to the Federal Rules of Civil Procedure – Rule 15(a)(1)(B), within 21 days after Defendant's motion to dismiss. Thus, Plaintiff filed the amended complaint pursuant to the Federal Rules of Civil Procedure, which is exactly what Section II contemplates.

Second, Defendant fails to recognize that Section XII of the initial pretrial scheduling order also states that its finality is conditioned upon the resolution of objections. [Dkt. No. 3, pg. 7]. Plaintiff filed objections to the initial pretrial scheduling order, [Dkt. No. 16], thus rendering Section II of the initial pretrial scheduling order non-final.

Third, this Court's May 21, 2018 order cancelling the hearing on Defendant's first motion to dismiss procedurally allowed Plaintiff to file the first amended complaint. [Dkt. No. 15]. Otherwise, if, as Defendant argues, the first amended complaint were somehow a procedural

nullity, then this Court would have treated it as such and would not have cancelled the hearing on Defendant's first motion to dismiss. Thus, this Court's May 21, 2018 order is the "permi[ssion]" to file a first amended complaint contemplated by Section II of the initial pretrial scheduling order. [Dkt. No. 3, pg. 2]

Fourth, if Section II of the initial pretrial scheduling order is read in the manner Defendant seeks, then Defendant should be deemed to have defaulted to the initial complaint in failing to file a "responsive pleading" to the initial complaint by April 27, 2018, as ordered by this Court. [Dkt. No. 10, pg. 2]. As this Court itself has previously held, "responsive pleadings" are not motions, but are instead answers, affirmative defenses, counterclaims, and cross-claims. *Shellabarger v. Dicharry*, No. 2:13–cv–00188–TLN–CMK, 2014 WL 5797194, at *3 (E.D. Cal. Nov. 6, 2014) (Nunley, J.); *see also Nolen v. Fitzharris*, 450 F.2d 958 (9th Cir. 1971) ("A motion to dismiss is not a 'responsive pleading' within the meaning of the rule.") *Mercedes-Benz USA LLC v. Concours Motors, Inc.*, No. 07C0389, 2009 WL 604199, at *1 (E.D. Wis. Mar. 6, 2009) ("[A] responsive pleading is not a motion."); *Stejic v. Aurora Loan Services, LLC*, No. 09–819–PHX–GMS, 2009 WL 2970497, at *1 (D. Ariz. Sept. 11, 2009) ("[A] responsive pleading includes an answer, or a reply to an answer, but not a motion."). Thus, if this Court accepts Defendant's reading of Section II of the initial pretrial scheduling order, this Court should also issue a default in Plaintiff's favor arising out of Defendant's failure to file a "responsive pleading" to Plaintiff's initial complaint by the court-ordered deadline of April 27, 2018.

Finally, it would be a facially unconstitutional denial of Plaintiff's right to access to courts to read Section II of the initial pretrial scheduling order operate as a bar to the First Amended Complaint Plaintiff has filed. That is especially true since this is a putative class action. *Compare, e.g., Williams v. U.S. Dist. Court*, 658 F.2d 430, 435-437 (6th Cir. 1981) ("[T]he Local Rule tends to discourage communication, and thus to discourage use of the class action device . . . [and] we issue a writ of mandamus to the district court directing it . . . to refrain from enforcing the provisions of Local Rule 3.9.4").

## IV. CONCLUSION

For the reasons stated above and the reasons to be stated *ore tenus* and in other submissions, this Court should summarily deny Defendant's motion to dismiss.

DATED: June 14, 2018

Respectfully submitted,

/s/ Cullin O'Brien
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