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HAMILTON COUNTY CLERK OF COURTS**

COMMON PLEAS DIVISION

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TRACY WINKLER
Clerk of Courts
Hamilton County, Ohio
CONFIRMATION 408256**

**ANNE TERLESKY AND ALL
OTHERS SIMILARLY
SITUATED**

A 1502332

vs.

FIFTH DIMENSION INC

**FILING TYPE: INITIAL FILING (IN COUNTY) WITH JURY
DEMAND**

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EFR200

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ANNE TERLESKY, and all others similarly situated, 1318 Park Ridge Pl. Cincinnati, Ohio 45208	:	Case No.
	:	
	:	Judge
	:	
Plaintiff,	:	PLAINTIFF’S CLASS ACTION COMPLAINT--JURY DEMAND
	:	
vs.	:	
	:	
FIFTH DIMENSION, INC. c/o Bert Beveridge REGISTERED AGENT 12101 Moore Road Austin, Texas 78719	:	
	:	
Defendant.	:	

NATURE OF THE CASE

1. This is a class action case brought on behalf of all purchasers of vodka (“Vodka”) manufactured, distributed, marketed, and/or sold by FIFTH DIMENSION, INC. dba Tito’s Handmade Vodka (the “Defendant”). Through a fraudulent, unlawful, deceptive and unfair course of conduct, the Defendant, manufactured, marketed, and/or sold their “TITO’S HANDMADE” Vodka to residents of Ohio with the false representation that the Vodka was “handmade” when, in actuality, the Vodka is made via a highly-mechanized process and without human hands. There is simply nothing “handmade” about the Vodka, under any definition of the term, because the Vodka is: (1) made from commercially manufactured "neutral grain spirit" (“NGS”) that is trucked and pumped into TITO’s industrial facility; (2) distilled in a large industrial complex with modern, technologically advanced stills; and (3) produced and bottled in extremely large quantities (i.e., it is “mass produced”). The Vodka is sold through various retailers in Ohio.

PARTIES

2. Plaintiff is an individual residing in Hamilton County, Ohio, who purchased Vodka at a retailer in Hamilton County, Ohio.

3. Defendant is a corporation that is organized and exists under the laws of the State of Texas. Its business address (as listed on the Texas Secretary of State website) is 12101 Moore Road, Austin, Texas 78719. The Defendant can be served via its registered agent for service of process: Bert Beveridge, 12101 Moore Road, Austin, Texas 78719.

JURISDICTION AND VENUE

4. This Court has jurisdiction in this matter because the Defendant routinely transacts business in Hamilton County, Ohio.

5. Venue in this Court because the Defendant does business in Hamilton County and Plaintiff's transaction took place in Hamilton County.

GENERAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

6. Plaintiff realleges and incorporates herein by reference all of the allegations contained in this complaint as though fully set forth herein.

7. Defendant manufactured, marketed, and/or sold Vodka with printed labels that prominently claimed the Vodka was "Handmade."

8. Defendant manufactured, marketed, and/or sold Vodka with printed bottle labels that also prominently claimed that the Vodka was "Crafted in an Old Fashioned Pot Still by America's Original Microdistillery."

9. On information and belief, the Vodka was made, manufactured and/or produced in "massive buildings containing ten floor-to-ceiling stills and bottling 500 cases an hour" using automated machinery that is the antithesis of "handmade" that is in direct contradiction to both

the “Handmade” representation and the “Crafted in an Old Fashioned Pot Still” representation on the product.

10. Defendant marketed and represented to the general public that the Vodka was “Handmade” and, in doing so, concealed the highly automated nature of the Vodka manufacturing and bottling process. Defendant also concealed the fact that the Vodka is no longer made in old fashioned pot stills of the variety the Defendant proudly displayed in the 2013 article in Forbes magazine. The article suggests that a Forbes photographer was purposefully directed away by the Tito’s brand manager from “massive buildings containing ten floor-to-ceiling stills and bottling 500 cases an hour and into the shack with the original still, cobbled from two Dr. Pepper kegs and a turkey-frying rig to cook bushels of corn into booze.” The disclosure of this information was necessary in order to make Defendant’s representations truthful and not misleading.

11. Consumers are particularly vulnerable to these kinds of false and deceptive labeling and marketing practices. Most consumers possess very limited knowledge of the likelihood that products, including the Vodka at issue herein, that are claimed to be “Handmade” are in fact: (1) made from commercially manufactured NGS that is trucked and pumped into the Defendant’s industrial facility; (2) distilled in a large industrial complex with modern, technologically advanced stills; and (3) produced and bottled in extremely large quantities (i.e., it is “mass produced”). This entire process is devoid of the caring touch of human hands. This is a material factor in many individuals’ purchasing decisions, as they believe they are purchasing a product made in small amounts that is of inherently superior quality.

12. Consumers generally believe that “Handmade” products are of higher quality than

non-handmade counterparts. Due to Defendant's scheme to defraud the market, members of the general public were fraudulently induced to purchase Defendant's Vodka at inflated prices. Ohio laws are designed to protect consumers from this type of false representation and predatory conduct. Defendant's scheme to defraud consumers is ongoing and will victimize consumers each and every day until altered by judicial intervention.

THE PLAINTIFF'S TRANSACTION

13. Approximately once every month for the past several years, Plaintiff purchased TITO's Vodka at the Kroger's in Hyde Park located in Hamilton County. At the time of purchase, the product itself was prominently marked with a "Handmade" label when in fact there was nothing "Handmade" about the product. The product was also labeled as being "Crafted in an Old Fashioned Pot Still by America's Original Microdistillery."

14. When Plaintiff, and Class Members, purchased the Vodka, they saw and relied upon the "Handmade" representation that is prominently displayed on all of TITO's Vodka products. This reliance on the "Handmade" label to make their purchasing decisions is typical of most Ohio consumers.

15. Plaintiff and Class Members were deceived as a result of Defendant's false labeling. Their purchasing decisions were supported by the "Handmade" representation made by Defendant, which is absent from most (if not all) of Defendant's competitors. Plaintiff believed at the time he purchased the Vodka that he was in fact buying a high-quality product made by human hands that was not made in large industrial vats in mass quantities, etc.

16. Plaintiff suffered an "injury in fact" because Plaintiff's money was taken by Defendant as a result of Defendant's false "Handmade" claim set forth on the offending product. Furthermore, he suffered an "injury in fact" by paying for something he believed was genuinely

“Handmade,” when it was not. Essentially, the Vodka is not worth the purchase price paid. Plaintiff and Class Members are entitled to monetary damages; the specific measure of which is the subject of expert testimony. Plaintiff and Class Members were undoubtedly injured as a result of Defendant’s false "Handmade" representations that are at issue in this litigation.

CLASS ALLEGATIONS

17. Plaintiff brings this action on behalf of herself as an individual and on behalf of all other persons similarly residing in the State of Ohio who purchased Defendant’s Vodka (the “Class”). Specifically excluded from the Class are any persons who have a controlling interest in the Defendant, any of Defendant’s parent companies, subsidiaries, and Defendant’s officers, directors, managers, shareholders and members of their immediate families, and their heirs, successors and assigns. The Class also does not include any persons who previously filed suit against Defendant for similar violations of Ohio law and/or the Judge presiding over this matter and his or her judicial staff.

18. The members of the Class are so numerous that joinder of all members is impracticable. The disposition of their claims in a class action will provide substantial benefits to the parties and the Court. On information and belief, the exact number and identities of the members of the Class are ascertainable from the records in Defendant’s possession or that of Defendant’s retail customers.

19. There is a well-defined community of interest in the questions of law and fact involved in this case.

20. All causes of action herein have been brought and may properly be maintained as a class action because there is a well-defined community of interest in the litigation and the proposed class is easily ascertainable:

a. Numerosity: On information and belief, the Class is so numerous that the individual joinder of all members would be impracticable.

b. Common Questions Predominate: Common questions of law and fact exist as to all members of the Class, and those questions clearly predominate over any questions that might affect members individually. These common questions of law and fact include, for example, whether Defendant violated Ohio Consumer Protection Statutes by misrepresenting the “Handmade” nature of the Vodka because of the highly automated nature of the manufacturing of the Vodka and whether Defendant’s actions in this regard constitute an unfair, unlawful, or fraudulent business practice.

c. Typicality: On information and belief, Plaintiff’s claims are typical of the claims of the members of the Class. Plaintiff and all members of the Class sustained damages arising out of Defendant’s common course of conduct complained herein.

d. Adequacy: Plaintiff will fairly and adequately protect the interests of the members of the Class because Plaintiff has no interests which are adverse to the interests of absent class members and because Plaintiff has retained counsel who possesses significant litigation experience regarding alleged violations of consumer statutes.

e. Superiority: A class action is superior to other available means for the fair and efficient adjudication of this controversy since individual joinder of all members would be impracticable. Class action treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently and without the unnecessary duplication of effort and expense that numerous individual actions would engender. Furthermore, since most class members’ individual claims for damages are likely to be modest, the expenses and burdens of litigating individual actions would make it difficult or impossible for individual

members of the Class to redress the wrongs done to them. An important public interest will be served by addressing the matter as a class action, substantial economies to the litigants and to the judicial system will be realized and the potential for inconsistent or contradictory judgments will be avoided.

COUNT I
(Violation of Ohio Deceptive Trade Practices Act R.C. §4165.01 *et seq.*)

21. Plaintiff realleges the foregoing paragraphs of this Complaint and incorporates them by reference as if fully rewritten here.

22. Defendant has made and continues to make deceptive, false and misleading statements that the Vodka was “Handmade” and that the Vodka was “Crafted in an Old Fashioned Pot Still by America’s Original Microdistillery.”

23. Defendant has unfairly and deceptively represented that goods or services have sponsorship, approval, characteristics, benefits, or qualities that they do not have.

24. Defendant has unfairly and deceptively represented that goods or services are of a particular standard, quality, or grade that they are not.

25. Defendant’s deceptive, false and misleading statements deceived Plaintiff and the Class.

26. Defendant’s deception is material as it influenced Plaintiff’s purchasing and payment decisions.

27. Plaintiff and the Class have been damaged as a direct and proximate result of Defendant’s deception.

28. Defendant have violated the Ohio Deceptive Trade Practices Act, R.C. §4165.01 *et seq.*

29. Plaintiff and the Class are entitled to recover compensatory damages, plus interest, attorneys' fees, and costs.

30. Defendant's conduct was intentional, willful, wanton, malicious, and egregious, entitling Plaintiff and the Class to punitive damages and attorneys' fees in an amount to be determined at trial.

31. Defendant continues to engage in these deceptive and misleading acts and practices, and Plaintiff and the Class continue to be damaged by Defendant's conduct.

32. Accordingly, Plaintiff and the Class are also entitled to injunctive relief to prohibit Defendant from continuing to perpetrate their deceptive scheme.

COUNT II
(Violation of the Ohio Consumer Sales Practices Act R.C. §1345.01 *et seq.*)

33. Plaintiff realleges the foregoing paragraphs of this Complaint and incorporates them by reference as if fully rewritten here.

34. Defendant have committed and continue to commit unfair and deceptive acts or practices in connection with a consumer transaction, namely manufacturing, selling, marketing, packaging and advertising Vodka to consumers with false and misleading statements concerning the nature of the product, as alleged herein. These unfair and deceptive statements include, but not limited to: the Vodka was "Handmade" and that the Vodka was "Crafted in an Old Fashioned Pot Still by America's Original Microdistillery."

35. Defendant has unfairly and deceptively misrepresented that Vodka has sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have.

36. Defendant has unfairly and deceptively misrepresented that Vodka is of a particular standard, quality, grade, style, prescription, or model that it is not.

37. Defendant has committed and continues to commit these unfair and deceptive acts while knowing that Vodka, among others, is not “Handmade” and that the Vodka is not “Crafted in an Old Fashioned Pot Still by America’s Original Microdistillery.”

38. Defendant’s unfair and deceptive practices deceived Plaintiff and the Class.

39. Defendant’s unfair and deceptive practices were material as they influenced Plaintiff’s purchasing and payment decisions.

40. Plaintiff and the Class have been damaged as a direct and proximate result of Defendant’s deceptive and unfair practices.

41. Defendant has violated the Ohio Consumer Sales Practices Act, R.C. §1345.01 *et seq.*

42. Plaintiff and the Class are entitled to recover compensatory damages, plus interest, attorneys’ fees, and costs.

43. Defendant’s conduct was intentional, willful, wanton, malicious, and egregious, entitling Plaintiff and the Class to punitive damages and attorneys’ fees in an amount to be determined at trial.

44. Defendant continue to engage in these deceptive and unfair practices, and Plaintiff and the Class continue to be damaged by Defendant’s conduct. Accordingly, Plaintiff and the Class are also entitled to injunctive relief to prohibit Defendant from continuing to perpetrate their deceptive scheme.

COUNT III
(Unjust Enrichment)

45. Plaintiff realleges the foregoing paragraphs of this Complaint and incorporates them by reference as if fully rewritten here.

46. Defendant has benefitted and been unjustly enriched by their wrongful conduct as alleged herein.

47. Defendant has knowledge of these benefits and has voluntarily accepted and retained these benefits.

48. The circumstances are such that it would be inequitable for Defendant to retain these gains without paying their value to Plaintiff and the Class.

49. Plaintiff and the Class are entitled to the amount of Defendant's wrongful gains, including interest, resulting from its unlawful, unjust and inequitable misconduct as described above.

**COUNT IV
(Promissory Estoppel)**

50. Plaintiff realleges the foregoing paragraphs of this Complaint and incorporates them by reference as if fully rewritten here.

51. Defendant made clear and unambiguous representations and promises concerning the Vodka. Defendant also concealed material facts relating to these representations and promises so as to render them deceptive and misleading.

52. As a result of Defendant's representations, promises, and deceptive practices described herein, Defendant induced Plaintiff and the Class to purchase Vodka.

53. In reasonable reliance upon Defendant's representations and promises, Plaintiff and the Class purchased Vodka.

54. Reliance by Plaintiff and the Class upon Defendant's misrepresentations and promises was reasonably foreseeable.

55. Plaintiff and the Class relied upon Defendant's representations and promises to their detriment, and as a direct and proximate result, Plaintiff and the Class have suffered

damages.

56. Plaintiff and the Class are entitled to compensatory damages, plus interest, attorneys' fees and costs.

COUNT V
(Negligent Misrepresentation)

57. Plaintiff realleges the foregoing paragraphs of this Complaint and incorporates them by reference as if fully rewritten here.

58. Defendant negligently and falsely represented the scope and nature of their Vodka. Defendant's misrepresentations were made in the course of their business and with respect to transactions in which they had a pecuniary interest, and Defendant supplied this false information to Plaintiff and the Class in order to influence and guide their purchasing decisions. Defendant engaged in ongoing, common and uniform misrepresentations to Plaintiff and the Class.

59. Defendant had a duty to exercise reasonable care to make accurate representations and promises to Plaintiff and the Class about the Vodka.

60. Defendant's breached their duty of care by, among others, failing to accurately communicate the statements that the Vodka was "Handmade" and that the Vodka was "Crafted in an Old Fashioned Pot Still by America's Original Microdistillery."

61. Plaintiff and the Class reasonably and justifiably relied upon Defendant's false and negligent representations and suffered damages as a direct and proximate result.

62. Plaintiff and the Class are entitled to compensatory damages, plus interest, attorneys' fees, and costs.

COUNT VI

(Fraud)

63. Plaintiff realleges the foregoing paragraphs of this Complaint and incorporates them by reference as if fully rewritten here.

64. Defendant intended to deceive Plaintiff in making the representations, omissions and concealments as set forth above.

65. Plaintiff's reliance on the representations, omissions, and concealments was reasonable under the circumstances.

66. Defendant had either actual knowledge or reasonably should have known the falsity of its representations and/or actions.

67. Defendant committed the aforementioned acts or practices willfully, recklessly, maliciously and with the intent to injure and defraud Plaintiff such that an award of punitive damages is warranted, as well as prejudgment interest.

COUNT VII

(Declaratory Judgment/Injunctive Relief)

68. Plaintiff realleges the foregoing paragraphs of this Complaint and incorporates them by reference as if fully rewritten here.

69. Defendant has engaged in deceptive and misleading advertising, labeling, and sale of Vodka as set forth above.

70. Plaintiff and the Class seek a declaration that, among others, Defendant has engaged in deceptive and misleading advertising, labeling and sale of Vodka, negligent misrepresentation, and have been unjustly enriched.

71. Plaintiff and the Class also seek preliminary and permanent injunctive relief to enjoin Defendant to stop their deceptive and misleading practices concerning the advertising, labeling, and sale of Vodka.

WHEREFORE, Plaintiff demands relief as follows:

- A. That this action be certified as a class action under Ohio.R.Civ.P. 23;
- B. Compensatory damages for Plaintiff and the Class in an amount to be determined at trial;
- C. Injunctive relief enjoining Defendant from continuing to engage in the aforementioned false, misleading, and deceptive misconduct with regards to the advertising, packaging and labeling of Vodka;
- D. Interest, costs and attorneys' fees;
- E. A declaration that Defendant has committed the violations of law alleged herein;
- F. Judgment for punitive damages;
- G. Judgment for interest at the legal rate on the foregoing sums;
- H. Such other relief this Court deems appropriate.

Respectfully submitted,

GILES LENOX

/s/ Brian T. Giles

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JURY DEMAND

Plaintiff hereby demands a trial by jury.

GILES LENOX

/s/ Brian T. Giles
Brian T. Giles (0072806)