

**Unfair competition claims against Kona beer packaging withstand motion to dismiss United States - Andrews Kurth Kenyon LLP**

**Geographical indications/appellations of origin  
Unfair use**

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- **CBA alleged to have intentionally misled consumers that Kona beer was brewed in Hawaii**
- **Court found packaging misleading, but no unequivocal statement that beer brewed in Hawaii**
- **Denied CBA's motion to dismiss for out-of-state members of alleged nationwide class**

On September 1 2017 Justice Freeman in the US District Court for the Northern District of California issued an opinion partly denying a motion to dismiss in *Broomfield v Craft Brew Alliance, Inc.*

Craft Brew Alliance, Inc (CBA) was a publically traded conglomerate that acquired Kona Brewing Company in 2010. Kona had been brewing its draft beer in Hawaii since the company began in 1994. However, all of its bottled and canned beers, as well as its draft beer sold outside of Hawaii, were brewed in the continental United States. Three individuals alleged on behalf of themselves and three putative classes of consumers that CBA had intentionally misled consumers into believing that Kona beer was brewed exclusively in Hawaii.

The plaintiffs adequately pled causes of action for fraud, as well as for violations of California consumer protection statutes, which prohibit:

- unfair methods of competition or deceptive acts or practices;
- unlawful, unfair or fraudulent business acts or practices; and
- unfair, deceptive, untrue or misleading advertising.

The statutes apply the “reasonable consumer” test, an objective standard which requires a plaintiff to present facts which demonstrate that the alleged misrepresentations are “likely to deceive” reasonable consumers. In order to be actionable, a statement must be more than just generalised, vague and unspecified assertions amounting to “mere puffery”. It must be specific and measurable and capable of being proven true or false or reasonably interpreted as a statement of objective fact.

The court found that there were specific and measurable representations of fact that could deceive a reasonable consumer on the outer packaging of the beers, which contained the address of the Hawaiian brewery, the map of Hawaii identifying Kona's brewery on the Big Island and the statement “visit our brewery and pubs whenever you are in Hawaii”. CBA argued that the labels on the beer identified all of Kona's brewing locations. The court rejected this argument because the beer labels were obstructed by the exterior packaging and were not visible to the consumer at the time of purchase. Further, the labels still contained the Hawaii factory location and the plaintiffs alleged that no bottled or canned beer with the Kona label is actually brewed in Hawaii.

However, the plaintiffs did not adequately plead causes of action for violation of express or implied warranty. While the court found that a reasonable consumer could be misled by the representations on the packaging for Kona beer, it did not find that these representations amounted to an unequivocal statement or promise to the consumer that Kona beer was brewed exclusively in Hawaii. The plaintiffs also lacked standing to pursue injunctive relief because they could not demonstrate a likelihood that the requested relief would redress the alleged injury. The court explained that based on the plaintiffs' own allegations, they would not have purchased Kona beer had they known the beer was brewed in the continental United States. An injunction would not prevent future harm – now that the plaintiffs know the beer is not brewed in Hawaii, they presumably will not purchase it.

The court denied CBA's motion to dismiss with respect to out-of-state members of the alleged nationwide class. CBA argued that the court cannot exercise specific personal jurisdiction over CBA as to claims by out-of-state plaintiffs which were not injured in California. The court deferred consideration of CBA's argument until the parties brief their positions in light of *Bristol-Myers Squibb Co v Superior Court of California, San Francisco Cty*, 137 S Ct 1773 (2017), a recent case in which the US Supreme Court reversed the California Supreme Court and held that California could not exercise specific jurisdiction with respect to claims by non-residents who did not allege harm in California.

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