

1 JOHN H. DONBOLI (SBN: 205218)
E-mail: jdonboli@delmarlawgroup.com
2 JL SEAN SLATTERY (SBN: 210965)
E-mail: sslattery@delmarlawgroup.com
3 DEL MAR LAW GROUP, LLP
12250 El Camino Real, Suite 120
4 San Diego, CA 92130
Telephone: (858) 793-6244
5 Facsimile: (858) 793-6005

6 JONATHAN W. CUNEO
Email: jonc@cuneolaw.com
7 TAYLOR ASEN
Email: tasen@cuneolaw.com
8 CUNEO GILBERT & LaDUCA, LLP
507 C Street, NW
9 Washington, DC
Telephone: (202) 789-3960
10 Facsimile: (202) 789-1813

11 Attorneys for Plaintiff: GARY HOFMANN, an individual and on behalf
12 of all others similarly situated

13 UNITED STATES DISTRICT COURT
14 SOUTHERN DISTRICT OF CALIFORNIA
15

16 GARY HOFMANN, an individual and
on behalf of all others similarly situated,

17 Plaintiff,

18 vs.
19

20 FIFTH GENERATION, INC., a Texas
corporation; and DOES 1 through 100,
21 inclusive,

22 Defendants.
23
24
25
26
27

Civil Action No.:14-cv-2569-JM-JLB

CLASS ACTION

**SECOND AMENDED
NATIONWIDE COMPLAINT
FOR:**

- (1) VIOLATION OF BUSINESS & PROFESSIONS CODE § 17200 *ET SEQ.* (CALIFORNIA UNFAIR COMPETITION LAW);
- (2) VIOLATION OF BUSINESS & PROFESSIONS CODE § 17500 *ET SEQ.* (FALSE ADVERTISING);

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- (3) VIOLATION OF CONSUMERS LEGAL REMEDIES ACT (CIVIL CODE § 1750 *ET SEQ.*);
 - (4) NEGLIGENT MISREPRESENTATION
- DEMAND FOR JURY TRIAL
[FRCP 38]**

COMES NOW, plaintiff GARY HOFMANN (“Plaintiff”), as an individual and on behalf of the general public and all others similarly situated, by his undersigned attorneys, alleges as follows:

NATURE OF THE CASE

1. This is a nationwide class action case brought on behalf of all purchasers of vodka (“Vodka”) manufactured, distributed, marketed, and/or sold by FIFTH GENERATION, INC. dba Tito’s Handmade Vodka (hereinafter “TITO’S”). Through a fraudulent, unlawful, deceptive and unfair course of conduct, TITO’S, and DOES 1 through 100 (collectively “Defendants”), manufactured, marketed, and/or sold their “TITO’S HANDMADE” Vodka to the general public with the false representation that the Vodka was “handmade” when, in actuality, the Vodka is made via a highly-mechanized process that is devoid of human hands. There is simply nothing “handmade” about the Vodka, under any definition of the term,¹ 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,

¹ The Oxford Dictionary defines the term “handmade” as “[m]ade by hand, not by machine, and typically therefore of superior quality.”

1 technologically advanced stills; and (3) produced and bottled in extremely large
2 quantities (i.e., it is “mass produced”). The Vodka is sold through various retailers
3 in California and throughout the nation.

4 **PARTIES**

5 2. Plaintiff is an individual residing in San Diego, California.

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

11 4. Plaintiff is ignorant of the true names and capacities of the defendants
12 sued herein as DOES 1-100, inclusive; therefore, Plaintiff sues these defendants by
13 such fictitious names. Plaintiff is informed and believes that each of the fictitious
14 named defendants are legally responsible in some manner for the occurrences
15 herein alleged, assisted in and about the wrongs complained herein by providing
16 financial support, advice, resources or other assistance. Plaintiff will amend the
17 complaint to allege their true names and capacities when ascertained.

18 5. Plaintiff is informed and believes that all defendants were agents,
19 servants and employees of their co-defendants, and in doing the things hereinafter
20 mentioned, were acting within the scope of their authority as such agents, servants
21 and employees with the permission and consent of their co-defendants.

22 **JURISDICTION AND VENUE**

23 6. This Court has jurisdiction in this matter because Defendants
24 routinely transact business in San Diego County.

25 7. Venue in this judicial district is proper under 28 U.S.C. §§ 1391(b)
26 and 1391(c) in that this is the judicial district in which a substantial part of the acts
27 and omissions giving rise to the claims occurred.

28

1 **GENERAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

2 8. Plaintiff realleges and incorporates herein by reference all of the
3 allegations contained in paragraphs 1 through 7, inclusive, of this complaint as
4 though fully set forth herein.

5 9. During the relevant statutory time period, Defendants manufactured,
6 marketed, and/or sold Vodka with printed labels that prominently claimed the
7 Vodka was “Handmade.”

8 10. During the relevant four year statutory time period, Defendants
9 manufactured, marketed, and/or sold Vodka with printed bottle labels that also
10 prominently claimed that the Vodka was “Crafted in an Old Fashioned Pot Still by
11 America’s Original Microdistillery.” An exemplar image of the label is as follows:



25 11. On information and belief, the Vodka was made, manufactured and/or
26 produced in “massive buildings containing ten floor-to-ceiling stills and bottling
27
28

1 500 cases an hour”² using automated machinery that is the antithesis of
2 “handmade” and that is in direct contradiction to both the “Handmade”
3 representation and the “Crafted in an Old Fashioned Pot Still” representation on
4 the product. Discovery will further reveal the specific automated manner in which
5 the Vodka is made.

6 12. Defendants marketed and represented to the general public that the
7 Vodka was “Handmade” and, in doing so, concealed the highly automated nature
8 of the Vodka manufacturing and bottling process. Defendants also concealed the
9 fact that the Vodka is no longer made in old fashioned pot stills of the variety
10 TITO’s proudly displayed in the 2013 Forbes article (i.e., in a shack containing a
11 pot still cobbled from two Dr. Pepper kegs and a turkey-frying rig to cook bushels
12 of corn). The disclosure of this information was necessary in order to make
13 Defendants’ representations truthful and not misleading. Defendants possess
14 superior knowledge of the true facts that were not disclosed, thereby tolling the
15 running of any applicable statute of limitations.

16 13. Consumers are particularly vulnerable to these kinds of false and
17 deceptive labeling practices. Most consumers possess very limited knowledge of
18 the likelihood that products, including the Vodka at issue herein, that are claimed
19 to be “Handmade” are in fact: (1) made from commercially manufactured NGS
20 that is trucked and pumped into TITO’s industrial facility; (2) distilled in a large
21 industrial complex with modern, technologically advanced stills; and (3) produced
22 and bottled in extremely large quantities (i.e., it is “mass produced”). This entire
23 process is devoid of the caring touch of human hands. This is a material factor in
24

25 ² A 2013 article in Forbes magazine noted that the Forbes photographer was
26 purposefully directed away by the Tito’s brand manager from “massive buildings
27 containing ten floor-to-ceiling stills and bottling 500 cases an hour and into the
28 shack with the original still, cobbled from two Dr. Pepper kegs and a turkey-frying
rig to cook bushels of corn into booze.”

1 many individuals' purchasing decisions, as they believe they are purchasing a
2 product made in small amounts that is of inherently superior quality.

3 14. Consumers generally believe that "Handmade" products are of higher
4 quality than their non-handmade counterparts. Due to Defendants' scheme to
5 defraud the market, members of the general public were fraudulently induced to
6 purchase Defendants' Vodka at inflated prices. California laws are designed to
7 protect consumers from this type of false representation and predatory conduct.
8 Defendants' scheme to defraud consumers is ongoing and will victimize
9 consumers each and every day until altered by judicial intervention.

10 **THE PLAINTIFF TRANSACTION**

11 15. In August 2014, Plaintiff purchased TITO's Vodka at a San Diego
12 BevMo! store. At the time of purchase, the product itself was prominently marked
13 with a "Handmade" label when in fact there was nothing "Handmade" about the
14 product. The product was also labeled as being "Crafted in an Old Fashioned Pot
15 Still by America's Original Microdistillery."

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

20 17. Had Plaintiff and Class Members known the actual facts, they would
21 not have taken such action. Furthermore, Plaintiff and other California consumers
22 had no reason to believe that Defendants would act otherwise than as to rely on the
23 "Handmade" representation.

24 18. Without knowledge, Plaintiff and Class Members acted on the false
25 "Handmade" representation and purchased the Vodka products they did not truly
26 want (in hindsight). Had Plaintiff and Class Members known the actual facts, they
27 would not have taken such action.

28

1 this nationwide class action. California claimants will benefit from this Court's
2 hosting of a nationwide class action because resolution by California courts of the
3 claims of class members outside of California, along with those of class members
4 residing within California, will aid California claimants in their recovery and in the
5 prosecution of this litigation. The pool of discoverable documents relating to the
6 issues set out in the complaint will be larger, the pool of deponents will be larger
7 and the financial consequences to Defendant of an adverse ruling will be more
8 significant. All of these things can only act to benefit the California claimants in
9 their collective prosecution of this litigation, while adding little if any additional
10 burden on the California Courts due to the form contract aspect of the litigation.

11 23. It would be a waste of class resources and to the detriment of class
12 members to require nationwide class members to litigate the issues set out in this
13 complaint in forums all over the nation, having to retain and compensate multiple
14 attorneys, experts and the like, and compensate those multiple attorneys and
15 experts for their services, when one nationwide class counsel can oversee the entire
16 nationwide litigation to their benefit at a fraction of the cost.

17 24. The hosting of a nationwide class would confer a substantial benefit
18 on the California Courts. The nationwide class will promote judicial economy by
19 preventing a multiplicity of litigation in different states and inconsistent judgments
20 on identical issues. A nationwide class is beneficial to California courts for
21 reasons of comity. The adjudication of a nationwide class may increase the
22 damages claimed, but does not amend the legal theories at issue in this case.

23 25. A nationwide class would also produce a beneficiary result as a large
24 number of the Class members reside in California and the adjudication of all
25 claims will have a therapeutic effect on manufacturers outside of California who
26 engage in fraudulent conduct within the state; will aid business enterprises in
27 California by curtailing illegitimate competition; and will avoid the burden of
28

1 multiple cases involving identical claims.

2 26. In addition, California has a special obligation and a compelling
3 interest to control the litigation and ensure the protection of its residents who make
4 up the largest portion of the nationwide class.

5 27. As to class members residing in California, the injury or damages
6 from Defendants' acts arise within the State of California.

7 28. As to class members residing outside of California, claims for the
8 injury or damage from Defendants' acts do not present a significant additional
9 burden to the California courts, as there are no known material variations in laws
10 governing the claims. State law issues will not swamp common issues and defeat
11 predominance.

12 29. Certification of a nationwide class will not require the trial court to
13 adjudicate issues by application of numerous different rules of law from various
14 states and would result in numerous individual adjudications of fact. Instead, the
15 California Unfair Competition Law can be extended to a nationwide class as will
16 be demonstrated with additional evidence at the time of class certification.

17 30. The parties have a substantial connection with California as they
18 routinely transact business in California and, on information and belief, the greatest
19 number of class members per state reside in California. Discovery will confirm the
20 exact numbers on these issues.

21 31. On information and belief, more offending Vodka was sold in
22 California than in any other state. On information and belief, Defendants collected
23 and continue to collect more revenue in California than in any other state and more
24 of the ill-gotten gains were collected in California than in any other state and more
25 of the material misrepresentations were made here. Thus California has a
26 compelling interest to proceed as to the nationwide class action claims. No state
27 has a more compelling interest than California in the prosecution of this action.

28

1 32. The benefit of a nationwide class action to the parties and the courts
2 will be substantial because a nationwide class will result in one judgment. It would
3 be a waste of judicial resources nationwide to require courts all over the nation to
4 entertain identical actions when one action could dispose of the litigation. A
5 nationwide class will be beneficial to Defendants in that it will not have to defend
6 itself with respect to the same allegations in numerous forums.

7 33. On information and belief, Defendants and/or their retail customers,
8 have documents and other information in their collective possession that will
9 demonstrate the special interest that California has in hosting a nationwide class
10 action.

11 Definition of the Subclass

12 34. Subclass members as to Plaintiff's First, Second, Third, and Fourth
13 Causes of Action are all of Defendants' customers who reside in California and/or
14 California individuals who purchased offending Class Products from September
15 15, 2010 to the present.

16 Other Class Allegations:

17 35. Plaintiff alleges no federal claims.

18 36. The members of the Class are so numerous that joinder of all
19 members is impracticable. The disposition of their claims in a class action will
20 provide substantial benefits to the parties and the Court. On information and
21 belief, the exact number and identities of the members of the Class are
22 ascertainable from the records in Defendants' possession or that of Defendants'
23 retail customers (e.g., BevMo!).

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

26 38. All causes of action herein have been brought and may properly be
27 maintained as a class action pursuant to the provisions of Code of Civil Procedure
28

1 § 382 because there is a well-defined community of interest in the litigation and
2 the proposed class is easily ascertainable:

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

5 b. Common Questions Predominate: Common questions of law
6 and fact exist as to all members of the Class, and those questions clearly
7 predominate over any questions that might affect members individually. These
8 common questions of law and fact include, for example, whether Defendants
9 violated Business & Professions Code § 17500 *et seq.* by misrepresenting the
10 “Handmade” nature of the Vodka because of the highly automated nature of the
11 manufacturing of the Vodka and whether Defendants’ actions in this regard
12 constitute an unfair, unlawful, or fraudulent business practice pursuant to Business
13 & Professions Code § 17200 *et seq.*

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

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

23 e. Superiority: A class action is superior to other available means
24 for the fair and efficient adjudication of this controversy since individual joinder of
25 all members would be impracticable. Class action treatment will permit a large
26 number of similarly situated persons to prosecute their common claims in a single
27 forum simultaneously, efficiently and without the unnecessary duplication of effort
28

1 and expense that numerous individual actions would engender. Furthermore, since
2 most class members' individual claims for damages are likely to be modest, the
3 expenses and burdens of litigating individual actions would make it difficult or
4 impossible for individual members of the Class to redress the wrongs done to
5 them. An important public interest will be served by addressing the matter as a
6 class action, substantial economies to the litigants and to the judicial system will be
7 realized and the potential for inconsistent or contradictory judgments will be
8 avoided.

9 **FIRST CLAIM FOR RELIEF**

10 **(Violation of Business & Professions Code § 17200 *et seq.* Against All**
11 **Defendants)**

12 39. Plaintiff realleges and incorporates herein by reference all of the
13 allegations contained in Paragraphs 1 through 38, inclusive, of this complaint as
14 though fully set forth herein.

15 40. Business & Professions Code § 17200 *et seq.* provides that unfair
16 competition means and includes “any unlawful, unfair or fraudulent business act or
17 practice and unfair, deceptive, untrue or misleading marketing.”

18 41. By and through their conduct, including the conduct detailed above,
19 Defendants engaged in activities which constitute unlawful, unfair, and fraudulent
20 business practices prohibited by Business & Professions Code § 17200 *et seq.*

21 42. Beginning at an exact date unknown as yet and continuing up through
22 the present, Defendants committed acts of unfair competition that are prohibited by
23 Business & Professions Code § 17200 *et seq.* Defendants engaged in a pattern of
24 “unfair” business practices that violate the wording and intent of the statutes, by
25 engaging in practices that threaten an incipient violation of law, or violate the
26 policy or spirit of laws because its effects are comparable to or the same as a
27 violation of the law by manufacturing, distributing, and marketing Vodka with a
28

1 false “Handmade” label when the product is in fact: (1) made from commercially
2 manufactured NGS that is trucked and pumped into TITO’s industrial facility; (2)
3 distilled in a large industrial complex with modern, technologically advanced stills;
4 and (3) produced and bottled in extremely large quantities (i.e., it is “mass
5 produced”).

6 a. Alternatively, Defendants engaged in a pattern of “unfair”
7 business practices that violate the wording and intent of the statutes, by engaging
8 in practices that are immoral, unethical, oppressive or unscrupulous, the utility (if
9 any) of which conduct is far outweighed by the harm done to consumers and public
10 policy by manufacturing, distributing, marketing, and advertising Vodka with a
11 false “Handmade” label when the product is in fact: (1) made from commercially
12 manufactured NGS that is trucked and pumped into TITO’s industrial facility; (2)
13 distilled in a large industrial complex with modern, technologically advanced stills;
14 and (3) produced and bottled in extremely large quantities (i.e., it is “mass
15 produced”).

16 b. Alternatively, Defendants engaged in a pattern of “unfair” business
17 practices that violate the wording and intent of the statutes, by engaging in
18 practices wherein: (1) the injury to the consumer was substantial; (2) the injury was
19 not outweighed by any countervailing benefits to consumers or competition; and
20 (3) the injury was of the kind that the consumers themselves could not reasonably
21 have avoided by manufacturing, distributing, marketing, and advertising Vodka
22 with a false “Handmade” label when the product is in fact: (1) made from
23 commercially manufactured NGS that is trucked and pumped into TITO’s
24 industrial facility; (2) distilled in a large industrial complex with modern,
25 technologically advanced stills; and (3) produced and bottled in extremely large
26 quantities (i.e., it is “mass produced”).

27 43. Beginning at an exact date unknown as yet and continuing up through
28

1 the present, Defendants committed acts of unfair competition, including those
2 described above, prohibited by Business & Professions Code § 17200 *et seq.* by
3 engaging in a pattern of “fraudulent” business practices within the meaning of
4 Business & Professions Code § 17200 *et seq.*, by manufacturing, distributing,
5 marketing, and/or selling Vodka products with a false “Handmade” representation
6 when the product is in fact: (1) made from commercially manufactured NGS that is
7 trucked and pumped into TITO’s industrial facility; (2) distilled in a large
8 industrial complex with modern, technologically advanced stills; and (3) produced
9 and bottled in extremely large quantities (i.e., it is “mass produced”).

10 44. Defendants engaged in these unlawful, unfair and fraudulent business
11 practices for the primary purpose of collecting unlawful and unauthorized monies
12 from Plaintiff and all others similarly situated, thereby unjustly enriching
13 Defendants.

14 45. As a result of the repeated violations described herein, Defendants
15 received unearned commercial benefits at the expense of their competitors and the
16 public.

17 46. Defendants’ unlawful, unfair and fraudulent business practices present
18 a continuing threat to the public in that Defendants continue to engage in unlawful
19 conduct.

20 47. Such acts and omissions are unfair and/or fraudulent and constitute a
21 violation of Business & Professions Code § 17200 *et seq.* Plaintiff reserves the
22 right to identify additional violations by Defendants as may be established through
23 discovery.

24 48. As a direct and legal result of their unlawful, unfair and fraudulent
25 conduct described herein, Defendants have been and will be unjustly enriched by
26 the receipt of ill-gotten gains from customers, including Plaintiff, who unwittingly
27 provided their money to Defendants based on Defendants’ fraudulent “Handmade”
28

1 representation.

2 49. Plaintiff suffered an “injury in fact” because Plaintiff’s money was
3 taken by Defendants as a result of Defendants’ false “Handmade” claim set forth
4 on the Vodka.

5 50. In prosecuting this action for the enforcement of important rights
6 affecting the public interest, Plaintiff seeks the recovery of attorneys’ fees pursuant
7 to Code of Civil Procedure § 1021.5, which is available to a prevailing plaintiff
8 who wins relief for the general public.

9 **SECOND CLAIM FOR RELIEF**

10 **(Violation of Business & Professions Code § 17500 *Et Seq.* Against All**
11 **Defendants)**

12 51. Plaintiff realleges and incorporates herein by reference all of the
13 allegations contained in Paragraphs 1 through 50, inclusive, of this complaint as
14 though fully set forth herein.

15 52. Business & Professions Code § 17500 *et seq.* provides that it is
16 “unlawful for any person, firm [or other party] . . . to make or disseminate before
17 the public . . . any statement which is untrue or misleading” in connection with the
18 sale or disposition of goods or services.

19 53. Beginning at an exact date unknown as yet and continuing up through
20 the present, Defendants committed acts of unfair competition, including those set
21 forth above, prohibited by Business & Professions Code § 17500 *et seq.* by
22 engaging in a pattern of false and misleading advertising and business practices
23 that violate the wording and intent of the statutes.

24 54. On information and belief, Defendants engage in unlawful advertising
25 practices with the intent to induce members of the public to purchase goods that
26 they believe to be of a particular quality.

27 55. Defendants’ deceptive advertising practices, including the
28

1 “Handmade” representations detailed herein, present a continuing threat to
2 members of the public in that Defendants continue to engage in the conduct
3 described above.

4 56. Such acts and omissions are unfair and/or deceptive and/or untrue
5 and/or misleading and constitute a violation of Business & Professions Code §
6 17500 *et seq.* Plaintiff reserves the right to identify additional violations by
7 Defendants as may be established through discovery.

8 57. As a direct and legal result of Defendants’ conduct described above,
9 Defendants have been and will be unjustly enriched with ill-gotten gains. Plaintiff
10 and the general public are entitled to restitution and/or reimbursement of the gains
11 Defendants received because of the misdeeds described herein.

12 58. In prosecuting this action for the enforcement of important rights
13 affecting the public interest, Plaintiff seeks the recovery of attorneys’ fees pursuant
14 to Code of Civil Procedure § 1021.5, which is available to a prevailing plaintiff
15 who wins relief for the general public.

16 **THIRD CLAIM FOR RELIEF**

17 **(Violation of Consumers Legal Remedies Act Against Defendants)**

18 59. Plaintiff realleges and incorporates herein by reference all of the
19 allegations contained in Paragraphs 1 through 58, inclusive, of this complaint as
20 though fully set forth herein.

21 60. California Civil Code § 1750 *et seq.* (entitled the Consumers Legal
22 Remedies Act) provides a list of “unfair or deceptive” practices in a “transaction”
23 relating to the sale of “goods” or “services” to a “consumer.” The Legislature’s
24 intent in promulgating the Consumers Legal Remedies Act is expressed in Civil
25 Code § 1760, which provides, *inter alia*, that its terms are to be:

26 [C]onstrued liberally and applied to promote its
27 underlying purposes, which are to protect consumers
28

1 against unfair and deceptive business practices and to
2 provide efficient and economical procedures to secure
3 such protection.

4 61. Defendants' products constituted "goods" as defined in Civil Code §
5 1761(a).

6 62. Plaintiff, and Class members, are each a "Consumer" as defined in
7 Civil Code § 1761(d).

8 63. Plaintiff's purchase of Defendants' Vodka constituted a "transaction"
9 as defined in Civil Code § 1761(e).

10 64. Civil Code § 1770(a)(5) prohibits a defendant from "[r]epresenting
11 that goods or services have sponsorship, approval, characteristics, ingredients,
12 uses, benefits, or quantities which they do not have or that a person has a
13 sponsorship, approval, status, affiliation, or connection which he or she does not
14 have."

15 65. Civil Code § 1770(a)(7) also prohibits a defendant from
16 "[r]epresenting that goods or services are of a particular standard, quality, or grade,
17 or that goods are of a particular style or model, if they are of another."

18 66. Defendants violated Civil Code § 1770(a)(5) and (7) by marketing and
19 representing that their Vodka products are "Handmade" when they are actually: (1)
20 made from commercially manufactured NGS that is trucked and pumped into
21 TITO's industrial facility; (2) distilled in a large industrial complex with modern,
22 technologically advanced stills; and (3) produced and bottled in extremely large
23 quantities (i.e., it is "mass produced") such that there is nothing "Handmade" about
24 the Vodka.

25 67. It is alleged on information and belief that Defendants' violation(s) of
26 the Consumer Legal Remedies Act set forth herein was done with awareness of the
27 fact that the conduct alleged was wrongful and was motivated solely for increased
28

1 profit. It is also alleged on information and belief that Defendants did these acts
2 knowing the harm that would result to Plaintiff and Class Members and that
3 Defendants did these acts notwithstanding that knowledge.

4 68. Plaintiff provided a notice to TITO'S pursuant to the Consumer Legal
5 Remedies Act. Plaintiff and Class Members, however, are not seeking actual
6 and/or statutory damages against TITO's pursuant to Civil Code § 1780.

7 69. As a direct and proximate result of Defendants' violations of the
8 Consumers Legal Remedies Act, Plaintiff and Class members are entitled to the
9 following remedies: (a) a declaration that Defendants violated the Consumers
10 Legal Remedies Act; and (b) an injunction preventing Defendants' unlawful
11 actions.

12 70. Plaintiff suffered an "injury in fact" because Plaintiff's money was
13 taken by Defendants as a result of Defendants' false "Handmade" claims set forth
14 on its Vodka. Furthermore, he suffered an "injury in fact" by paying for a Vodka
15 product that he believed was genuinely "Handmade," when it was not.

16 71. Plaintiff is filing an Affidavit of Venue along with this Complaint to
17 be in compliance with the requirement set forth in Civil Code § 1780(d).

18 **FOURTH CLAIM FOR RELIEF**

19 **(For Negligent Misrepresentation Against All Defendants)**

20 72. Plaintiff realleges and incorporates herein by reference all of the
21 allegations contained in Paragraphs 1 through 71, inclusive, of this complaint as
22 though fully set forth herein.

23 73. During the relevant statutory time period, Defendants made false
24 "Handmade" representations to Plaintiff and Class Members as it pertains to the
25 sale of their Vodka.

26 74. The representation that Defendants' Vodka was "Handmade" was
27 false. The true facts are that the Vodka is: (1) made from commercially
28

1 manufactured NGS that is trucked and pumped into TITO's industrial facility; (2)
2 distilled in a large industrial complex with modern, technologically advanced stills;
3 and (3) produced and bottled in extremely large quantities (i.e., it is "mass
4 produced").

5 75. When Defendants made the representations set forth above, they had
6 no reasonable grounds for believing them to be true.

7 76. Defendants made the representations with the intention of inducing
8 Plaintiff and Class Members to act in reliance upon these representations in the
9 manner hereafter alleged, or with the expectation that they would so act.

10 77. Plaintiff and Class Members, at the time the representations were
11 made by Defendants, and at the time Defendants took the actions herein alleged,
12 were ignorant of the falsity of the representations and believed them to be true. In
13 reliance on these representations, Plaintiff and Class Members were induced to and
14 did pay monies to purchase Defendants' Vodka.

15 78. Had Plaintiff and Class Members known the actual facts, they would
16 not have taken such action. Furthermore, Plaintiff and other California consumers
17 had no reason to believe that Defendants would act otherwise than as to rely on the
18 "Handmade" representation.

19 79. Without knowledge, Plaintiff and Class Members acted on the false
20 "Handmade" representation and purchased the Vodka products they did not truly
21 want (in hindsight). Had Plaintiff and Class Members known the actual facts, they
22 would not have taken such action.

23 80. As a proximate result of the fraudulent conduct of Defendants as
24 herein alleged, Plaintiff and Class Members paid monies to Defendants, through
25 Defendants' regular retail sales channels, to which Defendants are not entitled, and
26 have been damaged in an amount to be proven at trial.

27 81. Plaintiff and Class Members seek the recovery of a large portion of
28

1 their purchase monies, plus prejudgment interest, and reasonable attorneys' fees
2 (pursuant to Code of Civil Procedure § 1021.5) and costs as will be determined at
3 time of trial. The specific amount of Class Members' recovery is the realm of
4 expert testimony and will be established at trial.

5 WHEREFORE, Plaintiff prays for relief and judgment against Defendants,
6 as follows:

7 **PRAYER**

- 8 1. For a judgment declaring this action to be a proper class action;
- 9 2. A declaration that Defendants violated the provisions of California
10 Business & Professions Code § 17200 *et seq.*;
- 11 3. A declaration that Defendants violated the provisions of California
12 Business & Professions Code § 17500 *et seq.*;
- 13 4. A declaration that Defendants violated Civil Code § 1750 *et seq.*;
- 14 5. Pursuant to Business & Professions Code § 17204 and pursuant to the
15 equitable powers of this Court, a judgment enjoining Defendants, their
16 subsidiaries, affiliates, and their successors, agents, servants, officer, directors,
17 employees, and all persons, acting in concert with them, directly or indirectly, from
18 engaging in conduct violative of Business & Professions Code § 17200 *et seq.* as
19 more fully described above;
- 20 6. Pursuant to Business & Professions Code § 17204, a judgment
21 requiring Defendants to provide restitution to compensate, and to restore all
22 persons in interest, including all Class Members, with all monies acquired by
23 means of Defendants' unfair competition, including a refund of the monies Class
24 Members paid to purchase the offending Vodka plus sales taxes;
- 25 7. Plaintiff and each of the other members of the Class recover the
26 amounts by which Defendants have been unjustly enriched;
- 27 8. Plaintiff's reasonable attorneys' fees as it relates to all causes of
28

- 1 action pursuant to Code of Civil Procedure § 1021.5;
2 9. For costs of suit incurred herein;
3 10. For prejudgment interest as allowed by law; and
4 11. For such other and further relief as this Court finds just, equitable and
5 proper, including, but not limited to, the remedy of disgorgement.

6 **DEMAND FOR JURY TRIAL**

7 Pursuant to Rule 38, Federal Rules of Civil Procedure, Plaintiff hereby
8 demands a trial by jury with respect to all issues triable to a jury.

9 Dated: March 27, 2015

DEL MAR LAW GROUP, LLP

10
11 By: /s/John H. Donboli
12 John H. Donboli
JL Sean Slattery

13 CUNEO GILBERT & LaDUCIA, LLP
14 Jonathan W. Cuneo
15 Taylor Asen
16 Attorneys for: GARY HOFMANN, an
17 individual and on behalf of all others
18 similarly situated
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA	COURT USE ONLY
<u>ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address):</u> John H. Donboli (SBN: 205218) JL Sean Slattery (SBN: 210965) Tel: (858) 793-6244 DEL MAR LAW GROUP, LLP Fax (858) 793-6005 12250 El Camino Real, Suite 120 San Diego, California 92130	
<u>SHORT CASE TITLE</u> GARY HOFMANN v. FIFTH GENERATION, INC., et al.	DEPT:
<u>ATTORNEYS FOR PLAINTIFF</u> GARY HOFMANN, an individual and on behalf of all others similarly situated	Case No. 3:14-cv-02569-JM-JLB

PROOF OF SERVICE

I, the undersigned, say: I am over 18 years of age, employed in the County of San Diego, California, and that I am not a party to the subject cause. My business address is 12250 El Camino Real, Suite 120, San Diego, California 92130.

On March 27, 2015, I served the following document(s):

1. SECOND AMENDED NATIONWIDE COMPLAINT

on the interested parties as follows:

Ricky L. Shackelford, Esq.
 Email: shackelfordr@gtlaw.com
 Matthew R. Gershman, Esq.
 Email: gershmanm@gtlaw.com
GREENBERG TRAURIG, LLC
 1840 Century Park East, Ste. 1900
 Los Angeles, CA 90067
 Tel: (310) 586-7700
 Fax: (310) 586-7800

Michelle C. Doolin, Esq.
 Email: doolinmc@cooley.com
 Darcie A. Tilly, Esq.
 Email: dtilly@cooley.com
COOLEY LLP
 4401 Eastgate Mall
 San Diego, CA 92121
 Tel: (858) 550-6000
 Fax: (858) 550-6420

Attorneys for Defendant: FIFTH GENERATION, INC.

Attorneys for Defendant: FIFTH GENERATION, INC.

///

1 Jonathan W. Cuneo, Esq.
 2 Email: jonc@cuneolaw.com
 Taylor Asen, Esq.
 3 Email: tasen@cuneolaw.com
 4 **CUNEO GILBERT & LaDUCA, LLP**
 507 C Street, NE
 5 Washington, DC 20002
 6 Tel: (202) 789-3960
 7 Fax: (202) 789-1813

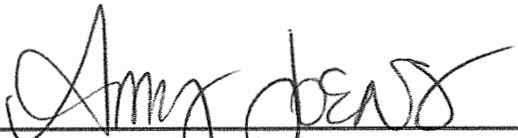
8 *Co-Counsel for Plaintiff: GARY*
 9 *HOFMANN, an individual and on*
 10 *behalf of all others similarly situated*

11 (X) **BY CM/ECF NOTICE OF ELECTRONIC FILING:** I filed the
 12 document(s) with the Clerk of the Court by using the CM/ECF system.
 13 Participants in the case who are registered CM/ECF users will be serve by
 14 the CM/ECF system. Participants in the case who are not registered
 CM/ECF users will be served by mail or by other means permitted by the
 court rules.

15 (X) **BY MAIL.** I am familiar with this firm’s practice of collection and
 16 processing correspondence for mailing with the United States Postal Service,
 17 and that the correspondence shall be deposited with the United States Postal
 18 Service this same day in the ordinary course of business pursuant to Code of
 Civil Procedure §1013a.

19 I declare under penalty of perjury under the laws of the United States of
 20 America that are foregoing is true and correct and that I am employed in the office
 21 of a member of the bar of this Court at whose direction the service was made.

22 Executed on March 27, 2015

23 
 24 _____
 25 Amy Joens