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"SAFE HARBOR" ON THE ROCKS: TTB LABEL APPROVAL FOR BEER, WINE, AND SPIRITS, AND THE UNCERTAIN STATUS OF THE "SAFE HARBOR" DEFENSE

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INTRODUCTION: THE SPIRITED REVOLUTION

"*Today was in the hands of the ultimate court; The Court of Public Opinion and in it I got an answer to my Question; Our IPA's TM has limits.*"
–Tony Magee, Founder of Lagunitas Brewing Company[1]

American beer, wine, and spirits have come a long way since the dry days of Prohibition and the Great Depression. Indeed, from 1920 till close to the turn of the twenty-first century, the alcoholic beverage landscape in the United States was bleak and bland. What was once a 2,783 brewery industry in 1915 shrank to a mere 684 breweries in 1940[2]; and by the 1970s, Anheuser-Busch alone accounted for as much as one-fourth of all beer sold in the United States (U.S.), while over-two thirds of beer was produced by the top ten breweries in the country.[3] Wine, too, took almost half a century after the Twenty-First Amendment was passed to recover its pre-Prohibition success.[4] And in 1960 *Fortune* magazine ran an article that forebodingly declared, "No one writes happily about liquor."[5]

Now, the alcoholic beverage industry is in the midst of a revolution. In 1970 there were only four hundred wineries in America, but today there are more than seven thousand, and America has surpassed France and Italy as the world's top wine market.[6] The beer business, in particular, is booming: there were 3,464 breweries in 2014 (not counting the seventeen hundred new ones planned for 2015), and beer production has doubled to over twenty-five million barrels a year.[7] Domestic and foreign breweries are being purchased for billions of dollars as small brewers race to attract the attention of investors, while the biggest producers compete to partner with the most popular craft breweries.[8] The spirits industry is poised to replicate the same rejuvenated success of wine and beer[9]—

[1] LagunitasT (@lagunitasT), TWITTER (Jan. 13, 2015, 8:15 PM), https://twitter.com/lagunitasT/status/555216638643933184 [hereinafter Magee Twitter].

[2] TOM ACITELLI, THE AUDACITY OF HOPS 6–7 (2013).

[3] *Id.* at 28–29.

[4] Mary Orlin, *The Legacy of Prohibition on Wine 80 Years Later*, HUFFINGTON POST (Feb. 4, 2014), http://www.huffingtonpost.com/mary-orlin/the-legacy-of-prohibition_b_4385186.html.

[5] Shelley DuBois, *The New United States of Booze*, FORTUNE (Feb. 19, 2013), http://fortune.com/2013/02/19/the-new-united-states-of-booze/.

[6] *Wine Revolution: As Drinkers and Growers, U.S. Declares Independence*, NPR (Mar. 16, 2013), http://www.npr.org/sections/thesalt/2013/03/16/174431437/wine-revolution-as-drinkers-and-growers-u-s-declares-independence.

[7] Michael D. Kanach & Daniel J. Christopherson, *Trademarks in the Golden Age of Craft Beer*, LANDSLIDE (2015), http://www.americanbar.org/publications/landslide/2015-16/november-december/trademarks_the_golden_age_craft_beer.html.

[8] *See, e.g.*, Tripp Mickle, *Heineken Buys 50% Stake in Lagunitas Brewing*, THE WALL STREET JOURNAL (Sep. 8, 2015), http://www.wsj.com/articles/heineken-buys-50-stake-in-lagunitas-brewing-1441744398; John Kell, *Anheuser-Busch is on a Craft Beer Bender*, FORTUNE (Sep. 23, 2015), http://fortune.com/2015/09/23/anheuser-busch-golden-road (on Anheuser-Busch's purchase of Golden Road Brewery in Los Angeles); Chad Bray & Michael J. de la Merced, *Anheuser-Busch InBev and SABMiller to Join*, N.Y. TIMES (Oct. 13, 2015), http://www.nytimes.com/2015/10/14/business/dealbook/anheuser-busch-inbev-sabmiller-beer-merger.html; Jennifer Kaplan, *Constellation to Buy Ballast Point Brewing for $1 Billion*, BLOOMBERG BUSINESS (Nov. 16, 2015), http://www.bloomberg.com/news/articles/2015-11-16/constellation-to-acquire-ballast-point-brewery-for-1-billion.

[9] Chris Morris, *Craft Distilleries: The Next Local Liquor Boom?*, FORTUNE (Aug. 1, 2015), http://fortune.com/2015/08/01/distilleries-craft-beer-liquor/.

Kentucky, for example, now has more barrels of bourbon than people living in the state.[10]

But just as America is "in the golden age for craft beer" and spirits, so are we in a golden age of legal disputes—especially those involving trademark, unfair competition, and consumer information.[11] The United States Patent and Trademark Office (USPTO), for example, had to approve over five thousand new trademarks in 2015 alone, and producers are doing everything they can to protect their brands.[12] Interestingly, brewers are finding that, even after filing for trademark recognition with the USPTO, their trademarks' protections are not infinite. Lagunitas Brewing Company, for example, had to back down from suing Sierra Nevada Brewing Company for infringing on their "IPA" (Indian pale ale) text because of the public backlash against the lawsuit.[13] Indeed, Lagunitas' founder, Tony Magee, famously declared on Twitter his realization that "[o]ur IPA's TM [trademark] has limits."[14]

Trademark issues with the USPTO are not the only legal challenges facing liquor producers. To sell in interstate commerce, brewers, distillers, and vintners need their products' labels to be approved by the Alcohol and Tobacco Tax and Trade Bureau (TTB). The TTB has to review an overwhelming number of applications: it approved 17,773 labels for beer alone in 2014,[15] and has to review several hundred thousand applications in total each year.[16] The TTB, in approving these labels, must ensure that information contained in them is not misleading.[17]

Yet recently, consumers have brought several lawsuits claiming that the labels *are* misleading.[18] Producers have increasingly countered that when a federal agency such as the TTB approves their labels, they should have a "safe harbor" from such lawsuits. As we shall see below, however, the courts are not so sure. If producers like Tony Magee are finding that their beverage trademarks have limits, they are similarly finding that the label approvals they get from the

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[10] Fred Minnick, *Bourbon Boom Sets Record*, fredminnick.com (May 18, 2016), http://www.fredminnick.com/2016/05/18/bourbon-boom-sets-records/.

[11] Kanach & Christopherson, *supra* note 7.

[12] *See generally*, David Kluft, *A Trademark Year in Wine and Beer 2015: Our Holiday Buyer's Guide to Disputed Beverages*, TRADEMARK & COPYRIGHT LAW BLOG (Dec. 1, 2015), http://www.trademarkandcopyrightlawblog.com/2015/12/a-trademark-year-in-wine-and-beer-2015-our-holiday-buyers-guide-to-disputed-beverages (listing well over one hundred trademark disputes in the alcoholic beverage industry during the 2015 calendar year).

[13] *Id.*

[14] Magee Twitter, *supra* note 1.

[15] Kanach & Christopherson, *supra* note 7.

[16] Robert C. Lehrman, *Judge Miller Not Too Impressed with TTB System or Tito Approvals*, LEHRMAN BEVERAGE LAW: BEVLOG (Nov. 21, 2015), http://www.bevlaw.com/bevlog/vodka/judge-miller-not-too-impressed-with-ttb-system-or-tito.

[17] 27 U.S.C. § 205(e) (2015) (the TTB, in reviewing these labels, must "*prohibit deception* of the consumer" and "*provide* the consumer with *adequate information as to the identity* and quality of the products") (emphasis added).

[18] *See, e.g.*, *Beck's Beer Settlement Includes Payouts for up to 1.7m U.S. Households*, THE GUARDIAN (Oct. 20, 2015), http://www.theguardian.com/lifeandstyle/2015/oct/20/becks-beer-settlement-payout-germany-st-louis [hereinafter *Beck's Beer Settlement*] (Anheuser-Busch claimed that Beck's beer is "German" when it is in fact brewed in St. Louis, Missouri); Harry Bradford, *If You Bought Kirin Beer in the Last 5 Years, You Could Get $12*, HUFFINGTON POST (Jan. 21, 2015), http://www.huffingtonpost.com/2015/01/07/kirin-beer-money_n_6430732.html (Anheuser-Busch claimed that Kirin is "Japanese" when it is in fact brewed in America).

TTB have limits as well.

This Note examines the TTB's label review process and the judicial split regarding the "safe harbor" doctrine in the context of alcoholic beverage labels. This Note observes that the judicial split is a result of the tension between two conflicting priorities stemming from the TTB's purpose and identity: on one hand, courts want to defer to the TTB as a federal agency enforcing federal law, but on the other hand, courts aim to uphold the central purpose of the Federal Alcohol Administration (FAA) Act—protecting consumers from misinformation. Ultimately, this Note argues that the latter position is correct: by refraining from deferring to the TTB simply because it is a federal agency, courts can hold the TTB and producers more accountable for providing consumers with accurate information.

First, I shall assess the procedures and purposes of the TTB's label approval process: I will examine the role of various players in the alcoholic beverage regulatory regime—including Congress, the TTB, the states, and the courts—and analyze the TTB's relation to U.S. trademark law and European appellations law. Second, I shall examine prominent cases in recent years that grapple with the "safe harbor" defense raised by producers being sued for deceptive claims on their labels. Third, I offer some practical solutions for the courts, TTB, and producers of the alcoholic beverage industry moving forward.

I. THE REGULATION OF ALCOHOLIC BEVERAGE LABELS: A DISTILLED SUMMARY

A. *The Role of Congress: Where the TTB Derives its Legal Authority*

The TTB derives its regulatory authority from Congress. After the repeal of Prohibition in 1933 by the Twenty-First Amendment,[19] Congress passed and President Franklin D. Roosevelt signed the Federal Alcohol Administration (FAA) Act[20] in 1935, which generally governs the labeling of alcoholic beverages.[21] Congress charged the Secretary of Treasury, who has overseen taxation of such commodities as alcohol since 1789,[22] with promulgating regulations to put the FAA Act into effect.[23] The Secretary of Treasury, in turn, delegated this duty to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).[24] After the Homeland Security Act reorganized the ATF, the Secretary of Treasury delegated FAA rule-making authority to the TTB.[25] The TTB,

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[19] U.S. CONST. AMEND. XXI.

[20] 27 U.S.C. §§ 201–219 (2015). The Supreme Court also declined to declare the FAA Act unconstitutional and valid. *See* Julia Lynn Titolo, Note, *A Trademark Holder's Hangover: Reconciling The Lanham Act with the Alcohol and Tobacco Tax and Trade Bureau's System of Designating American Viticultural Areas*, 17 J. INTELL. PROP. L. 173, 185 (Fall 2009) (citing William Jameson & Co. v. Morgenthau, 307 U.S. 171 (1939)).

[21] Cruz v. Anheuser-Busch, LLC, No. CV 14-09670 AB (ASx), 2015 U.S. Dist. LEXIS 76027, at *7–8 (C.D. Cal., June 3, 2015).

[22] *The TTB Story*, ALCOHOL & TOBACCO TAX & TRADE BUREAU, http://www.ttb.gov/about/history.shtml (last visited Jan. 26, 2017).

[23] 27 U.S.C. § 202(h).

[24] *Cruz*, 2015 U.S. Dist. LEXIS 76027, at *8; Titolo, *supra* note 20, at 186. *See also* 27 U.S.C. § 202(h).

[25] *Cruz*, 2015 U.S. Dist. LEXIS 76027, at *8 (citing 6 U.S.C. §§ 203, 212(a)(1)).

therefore, is now the primary federal regulatory authority that oversees spirits, wines, beer, and their labels (as well as tobacco products, firearms, and ammunition).[26]

The three central purposes of the FAA Act—which are, therefore, the central purposes of the TTB —are to "ensure the integrity of the industry" by issuing, suspending, and revoking permits; to "protect consumers" by requiring producers to have a Certificate of Label Approval (COLA) and by ensuring that the information on the labels is accurate; and to "preclude unfair trade practice."[27] The FAA Act requires the TTB to promulgate labeling and packaging regulations for producers of alcoholic beverages.[28] These labeling regulations must particularly focus on prohibiting "deception of the consumer" and providing "the consumer with adequate information."[29]

B. *The Role of the TTB: How the TTB Regulates Labels*

The TTB's regulation of labels are found in Title 27 of the Code of Federal Regulations, Chapter I, Subchapter A. Part 4 prescribes label regulations for wine, Part 5 prescribes label regulations for distilled spirits, Part 7 prescribes label regulations for beer and malt beverages, and Part 13 describes the requirements for label proceedings. The regulations police any label statement "that is false or untrue in any particular, or that, irrespective of falsity, directly, or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific or technical matter, tends to create a misleading impression."[30] In prohibiting misleading statements, the TTB refrains from forbidding statements that are considered "mere puffery," which are "[s]ubjective, unverifiable claims" distinct from "specific, quantifiable statements of fact that refer to a product's absolute characteristics."[31]

The TTB enforces its regulations mainly by requiring alcohol labels to have a COLA.[32] The TTB requires any producer of alcoholic beverages who sells in

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[26] *Statutory Authority and Responsibilities*, ALCOHOL & TOBACCO TAX & TRADE BUREAU, http://www.ttb.gov/about/stat_auth.shtml (last visited Jan. 26, 2017) [hereinafter *TTB Statutory Authority*]. There was some initial conflict about whether the FAA Act or the Federal Food, Drug, and Cosmetic Act should have jurisdiction over alcoholic beverages since the purpose of both acts is to ensure that information represented on labels of products to be consumed is accurate and not misleading. However, the Food and Drug Administration (FDA) never appealed when the 1976 *Brown-Forman* case held that "Congress intended to grant exclusive jurisdiction over alcoholic beverage labeling to the ATF when it enacted the FAA," and the ATF and now the TTB has regulated alcoholic beverage labels since. *See Cruz*, 2015 U.S. Dist. LEXIS 76027, at *8–9 (citing Brown-Foreman Distillers Corp. v. Mathews, 435 F. Supp. 5 (W.D. Ky. 1976)).

[27] *TTB Statutory Authority*, *supra* note 26.

[28] 27 U.S.C. § 205(e) (2015).

[29] *Id.*

[30] 27 C.F.R. § 5.42 (2016) (prohibited practices for liquor labels). *See also* 27 C.F.R. §§ 4.39 (2016) (prohibited practices for wine labels), 7.29 (prohibited practices for beer labels).

[31] Marty v. Anheuser-Busch Cos., 43 F. Supp. 3d 1333, 1342 (S.D. Fla. 2014) (internal quotes omitted). *See also* Parent v. MillerCoors LLC, No. 3:15-cv-1204-GPC-WVG, 2015 U.S. Dist. LEXIS 145071, at *23–24 (S.D. Cal. Oct. 26, 2015) (citing Vitt v. Apple Computer, Inc., 469 Fed.Appx. 605, 607 (9th Cir. 2012) (affirming the finding that descriptors . . . were "generalized, non-actionable puffery because they are inherently vague and generalized terms and not factual representations that a given standard has been met") (internal quotes omitted).

[32] 27 C.F.R. §§ 4.50 (for wine), 5.55 (for liquor), 7.41 (for beer) (2016).

more than one state to get a COLA for a particular bottle or can before selling it.[33] Before issuing a COLA, the TTB evaluates and preapproves an alcohol label to ensure it contains all mandatory information and contains no prohibited information.[34] The TTB protects the integrity of its COLAs through field investigators[35] and procedures that allow consumers to file complaints,[36] amongst other methods. If the TTB determines that a producer has misused a particular COLA, the TTB may revoke the COLA.[37]

There is a distinct difference between TTB "Regulations"[38]—that is, what is found in Title 27 of the Code of Federal Regulations—and TTB "Rulings"[39]—that is, the policy statements written by the TTB that help interpret and apply the Regulations. In short, the Regulations are the legal requirements that the TTB must actually enforce under the FAA Act; whereas the Rulings are simply the TTB's guideposts for helping members of the alcohol industry follow the Regulations.

In *Cruz v. Anheuser-Busch*,[40] the plaintiff complained that Anheuser-Busch (AB) misled customers by placing the Bud *Light* (emphasis added) logo on a case of Lime-R-Rita cans, since the calorie-packed Lime-R-Rita was allegedly anything but "light"; AB countered that TTB Ruling 2004-1 permitted the use of the word "light" so long as nutrition content was listed on the can, and not necessarily on the outer packaging.[41] In holding for AB, the court declined to give the TTB Ruling "the force of law," and instead relied upon the COLA that the TTB granted to AB's Lime-R-Rita packaging. The court reasoned that the TTB's authority to issue COLAs is found in the Code of Federal Regulations, whereas Ruling 2004-1 is not.[42] As we shall see below, however, not all courts are satisfied that they should accept the COLA as having a force of law just because the Code of Federal Regulations allows the TTB to grant them.

C. *The Role of the States: "Safe Harbor" for Practices Permitted Under Federal Law*

Several states have safe harbor provisions that protect conduct permitted by federal law. Florida, for example, protects "[a]n act or practice required or

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[33] *See* 27 C.F.R. §13.21 (2016) (application for a COLA). Producers who distribute within their own states only, and who therefore do not sell in interstate commerce, are not bound by the TTB's COLA requirement. *See* Kanach & Christopherson, *supra* note 7 (citing TTB Ruling 2013-1 (Mar. 27, 2013), http://www.ttb.gov/rulings/2013-1.pdf).

[34] Pye v. Fifth Generation, Inc., No. 4:14cv493-RH/CAS, 2015 U.S. Dist. LEXIS 128594, at *8–9 (N.D. Fla. Sep. 23, 2015).

[35] *Id.*

[36] Hofmann v. Fifth Generation, Inc., No. 14-cv-2569 JM (JLB), 2015 U.S. Dist. LEXIS 65398, at *2 (S.D. Cal. Mar. 18, 2015). *See* 27 C.F.R. § 13.62 (2016) (allowing third party comments on COLAs).

[37] 27 C.F.R. § 13.41 (2016).

[38] *See* U.S. GOV'T PUB. OFF., ELECTRONIC CODE OF FEDERAL REGULATIONS, http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title27/27tab_02.tpl (last visited Jan. 26, 2017).

[39] *See TTB Rulings*, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, http://www.ttb.gov/rulings/ (last visited Jan. 26, 2017).

[40] Cruz v. Anheuser-Busch, LLC, No. CV 14-09670 AB (ASx), 2015 U.S. Dist. LEXIS 76027 (C.D. Cal., June 3, 2015).

[41] *Id.* at *2–4, *13–14. *See also* ALCOHOL & TOBACCO TAX & TRADE BUREAU, TTB RULING 2004-1 (2004) [hereinafter TTB RULING 2004-1]

[42] *Id.* at *16–17.

specifically permitted by federal or state law."[43] Illinois immunizes parties if they are doing something "specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States."[44] New York offers a "complete defense" to an act or practice that "complies with the rules and regulations of . . . any official department, division, commission, or agency of the United States."[45] States do not need to have explicit statutory provisions to provide safe harbors, either: the California Supreme Court, for example, has recognized the safe harbor defense despite the lack of a statutory provision.[46]

The key question is whether the TTB's actions, by virtue of the fact that Congress has specifically authorized the TTB to regulate alcohol, have the effect and force of federal law. Courts have attempted to resolve this question.

D. *The Role of the Courts: How Much Do Courts Defer to the TTB's COLAs?*

Courts will give "broad deference" to a federal agency's actions so long as they meet the requirements of the Supreme Court's 1984 ruling in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[47] *Chevron* held that if courts ascertain "that Congress had an intention on the precise question at issue, that intention is the law and must be given effect"[48]; and so if Congress intended to empower agency actions to have the force of federal law, then courts should intervene only when the agency has exceeded the authority Congress intended to give it.[49]

In 2001, *United States v. Mead Corp.*[50] expanded upon the requirements necessary to trigger *Chevron* deference for federal agencies: agency action *could* have the "effect of law" *only* when the agency "provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[51] The Administrative Procedure Act ensures this fairness and deliberation by requiring agencies to allow the public to participate in the rule-making procedure.[52] In *Mead*, the Court held that

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[43] FLA. STAT. § 501.212(1) (LexisNexis 2017).

[44] 815 ILL. COMP. STAT. § 505/10b(1) (LexisNexis 2017).

[45] N.Y. GEN. BUS. LAW § 349(d) (LexisNexis 2017).

[46] Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 973 P.2d 527, 541 (Cal. 1999) ("Specific legislation may limit the judiciary's power to declare conduct unfair. If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination.").

[47] Cruz v. Anheuser-Busch, LLC, No. CV 14-09670 AB (ASx), 2015 U.S. Dist. LEXIS 76027, at *15–16 (C.D. Cal., June 3, 2015) (citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

[48] *Chevron*, 467 U.S. at 843 n.9.

[49] *Cruz*, 2015 U.S. Dist. LEXIS 76027, at *15–16.

[50] United States v. Mead Corp., 533 U.S. 218, 230 (2001).

[51] *Id.* at 230. *See also* Von Koenig v. Snapple Bev. Co., 713 F. Supp. 2d 1066, 1076 (E.D. Cal. 2010) (demanding a "formal, deliberative process akin to notice and comment rule-making or adjudicative enforcement action" before giving the FDA's policy the rule of law).

[52] *See* Administrative Procedure Act, 5 U.S.C. § 553(c) (2015) ("After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."). *See also* Von Koenig v. Snapple Bev. Co., 713 F. Supp. 2d 1066, 1076 (E.D. Cal. 2010) (demanding a "formal, deliberative process akin to notice and comment rulemaking or adjudicative enforcement action" before giving the FDA's policy the rule of law).

the United States Customs Service's rulings "were not entitled to *Chevron* deference because the agency did not 'generally engage in notice-and-comment practice' when issuing its rulings."[53] Some courts have ruled that the "relatively formal administrative procedures" should involve a "hearing with trial-type procedures,"[54] whereas others have ruled that they should require the same circumstances required for federal preemption.[55]

When alcoholic beverage producers are sued for consumer deception on their labels, they may raise the defense, under certain states' safe harbor provisions, that their labels were approved by the TTB. These producers argue that because Congress intended to give broad authority to the TTB to regulate beverage labels, courts should apply *Chevron* deference to the TTB's actions—particularly, its grant of COLAs. As we shall see later, some courts agree, and some courts do not: it depends on whether or not those courts are satisfied that the TTB's actions are accompanied by the "formal administrative procedure[s]" required under *Mead*, and whether the TTB's label approval process truly prohibits deception of consumers and provides consumers with adequate information under the FAA.

In January 2017, as this Note goes to print, the U.S. House of Representatives passed the Regulatory Accountability Act of 2017, which proposes to eliminate *Chevron* deference to federal agencies.[56] It remains to be seen whether the Senate and President Donald Trump will also approve of the bill. Whatever the result, the bill indicates the growing distrust of Chevron deference.

E. *The Relationship of COLAs to U.S. Trademark and EU Appellations*

Although a full comparison of the TTB, U.S. trademark law, and European Union (EU) appellations law is beyond the scope of this Note, it is helpful to briefly assess their relationship to each other to help understand the purpose of the TTB. The FAA Act governs the TTB,[57] the Lanham Act governs the USPTO,[58] and various international treaties, especially the World Trade Organization's (WTO) Trade-Related Aspects of Intellectual Property Agreement (TRIPS), help protect geographic indications (GIs) and regional appellations.[59]

At first glance, it seems that the TTB is not at all in conflict with either USPTO or European appellation law. After all, the FAA Act, from which the TTB derives its authority, instructs the TTB to prevent consumer deception specifically related to use of someone else's "*trade* or *brand* name"[60]—the domain of U.S. trademark law—and, moreover, includes a provision that recognizes trademark law's first-to-use doctrine.[61] Likewise, the TTB is

[53] Hofmann v. Fifth Generation, Inc., No. 14-cv-2569 JM (JLB), 2015 U.S. Dist. LEXIS 65398, at *17 (S.D. Cal. Mar. 18, 2015) (citing *Mead* at 218-19).

[54] Walls v. United States, 582 F.3d 1358, 1377 (Fed. Cir. 2009).

[55] Reid v. Johnson & Johnson, 780 F.3d 952, 964 (9th Cir. 2015).

[56] Michael Macagnone, *House Passes Bill Ending Chevron Deference*, LAW360 (Jan. 11, 2017), https://www.law360.com/articles/879235/house-passes-bill-ending-chevron-deference.

[57] 27 U.S.C. §§ 201–219 (2015).

[58] 15 U.S.C. § 1501–1141n (2015).

[59] Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 81 (1994) [hereinafter TRIPS].

[60] 27 U.S.C. § 205(e) (2015) (emphasis added).

[61] *Id.* ("nothing herein . . . shall deny the right of any person to use any trade name or brand . . . *not*

responsible for designating and policing American Viticultural Areas (AVAs), which, like European appellations, protects the integrity of regional boundaries and the wine produced in that region.[62]

Yet despite the similarities, the "standards are often not as similar as they appear."[63] Although both the TTB and USPTO prohibit applications for obscene, indecent, or scandalous statements,[64] for example, it seems that the TTB has a higher tolerance for "obscene" statements on labels than the USPTO does for trademarks.[65] Similarly, the USPTO is not concerned with prohibiting the use of spirit terms on their beer marks, whereas the TTB is,[66] and while the TTB's regulations state that the TTB will prohibit deceptive use of other brands, it "will certainly not take time to investigate whether a brand used on a label is owned by a competitor."[67] Indeed, sometimes the TTB's rulings have adversely affected trademark rights—particularly when it comes to AVAs[68]—and one author has noted that it is unclear to what extent the TTB "has embraced the Lanham Act provisions in its regulatory guidelines."[69]

The reason for the underlying conflict is that, although the FAA Act, the Lanham Act, and the TRIPS Agreement have *overlapping* concerns—namely, the protection of producers from unfair competition and the protection of consumers from misinformation and deception[70]—they emphasize different focuses in achieving their similar goals. Ultimately, trademark law and appellation law's primary concern is protecting *producers* (which has the secondary effect of protecting consumers from misinformation), whereas the TTB chiefly aims to protect *consumers* (although by protecting consumers, the TTB has the secondary

effectively registered in the United States Patent and Trademark Office *which has been used by such person or predecessors . . . for a period of at least five years last past*") (emphasis added). U.S. trademark law has adopted a first-to-use doctrine, meaning that regardless of whether a holder has registered the mark or not, the law will protect the first user of the mark. *See* Deborah J. Kemp & Lynn M. Forsythe, *Trademarks and Geographical Indications: A Case of California Champagne*, 10 CHAPMAN L. REV. 257, 263 (2006).

[62] 27 C.F.R. § 4.25 (2016) (appellations of origin). European GI's focus on protecting the products associated with a particular locale or territory. *See* Kemp & Forsythe, *supra* note 61, at 281–82. Interestingly, the TTB regulations on geographic indications on wine labels are quite strict: 85% of the grapes must come from the AVA indicated on the label, *see* 27 C.F.R. § 4.25(e)(3)(ii) (2016), whereas there are no similarly strict regulations for geographic indicators on beer. Perhaps that is why breweries such as Anheuser-Busch have been able to advertise Beck's and Kirin Ichiban beer as "German" and "Japanese," respectively, even though both are actually brewed in America. *See Beck's Beer Settlement*, *supra* note 18; Bradford, *supra*, note 18.

[63] Kanach & Christopherson, *supra* note 7.

[64] *Compare* 27 C.F.R. § 7.29(a)(3) (2016) *with* 15 U.S.C. § 1052(a) (2015) (section 2 of the Lanham Act).

[65] Kanach & Christopherson, *supra* note 7. The TTB approved a label that stated "F*CK ART LET'S DANCE!" (censorship added), when there is "little doubt that the USPTO would refuse an application for that brand under §2(a) [of the Lanham Act]."

[66] 27 C.F.R. § 7.29(a)(7) (2016). This creates the "likely scenario where a brewery smartly secures early rights in a brand through an intent-to-use trademark application, only to learn months or years down the road that the brand cannot be used on a . . . label" under TTB regulations. Kanach & Christopherson, *supra* note 7.

[67] Kanach & Christopherson, *supra* note 7.

[68] Titolo, *supra* note 20, at 175 (noting that when the TTB recognizes a new AVA, it appropriates existing trademark rights).

[69] Kemp & Forsythe, *supra* note 61, at 270–71.

[70] *Compare* 27 U.S.C. § 205(e) (the FAA Act) ("prohibit deception of the consumer" and "provide the consumer with adequate information") *with* 15 U.S.C. § 1127 (2015) (the Lanham Act) ("protect . . . against unfair competition" and "prevent fraud and deception in . . . commerce") *and with* TRIPS, *supra* note 59, at art. 22(2)–(3) ("prevent: the use of any means . . . which misleads the public as to the geographic origin of the good").

effect of protecting producers' brands, as well).

The FAA and Lanham Acts, and the regulations promulgated by the TTB and USPTO, demonstrate the different emphases that the TTB and USPTO have. The Lanham Act's statement of intent focuses largely on the producer: it seeks to protect those who have registered their marks, to prevent unfair competition, and to prevent fraudulent or misleading use of marks.[71] There is no mention of customers or consumers; the emphasis is on protecting the producer who registers his mark. The FAA Act's regulations of labeling, on the other hand, focus squarely on the consumer: it seeks to "prohibit deception of *the consumer*" and "provide *the consumer* with adequate information."[72] Although the FAA Act's labeling protocols seeks to protect producer's brand names, it does so expressly to "prevent deception of the consumer"[73]—emphasis on the consumer. Similarly, although the Lanham Act is concerned with the "likelihood of confusion among consumers,"[74] trademark law applies the test of whether a reasonable consumer would be confused only when it is determining whether a producer's mark is worthy of protection[75]—emphasis on the producer. U.S. trademark law's first-to-use doctrine holds that producer's marks are protectable without registration so long as the producer has started using it; the main point of trademark registration, therefore, is to "give constructive notice to" competing *producers* that producer's mark is valid and protectable.[76] The main point of TTB label registration, on the other hand, is to make sure producers are providing the *customer* with accurate information.[77] We see, then, that although the regulations for trademark registration and TTB label registration achieve the similar goals of protecting producers and consumers, the USPTO's main focus is on protecting the producer's mark, whereas the TTB's main focus is on protecting the consumer from misinformation.

European appellation law, even more so than U.S. trademark law, emphasizes protection of the producer of alcohol, regardless of the customer information. Article 22 of the TRIPS Agreement generally prohibits the use of GIs when they "mislead the public or amount to unfair competition,"[78] but Article 23 holds that, for wine and spirits in particular, there is no need to consider whether use of a GI misleads the public or not. In other words, Article 23 states that alcoholic beverages should *never* use a GI *unless* it is actually from that region,[79] although TRIPS does offer some exceptional protections for terms that were already in use

[71] 15 U.S.C. § 1127 (2015). The point of trademark law is to avoid confusion about the product's source and producer. *See* Kemp & Forsythe, *supra* note 61, at 263–64; Titolo, *supra* note 20, at 179.

[72] 27 U.S.C. § 205(e) (2015) (emphases added).

[73] *Id.*

[74] 15 U.S.C. § 1052 (2015).

[75] *Id.* § 1052(d) (2015) (forbidding registration for a mark that is likely "to cause confusion, or to cause mistake, or to deceive"); *Id.* at § 1114 (2015) (placing the burden on the *producer* to argue that his mark should be protected).

[76] Kemp & Forsythe, *supra* note 61, at 263.

[77] In re Anhesuer-Busch Beer Labeling Mktg. & Sales Practices Litig., No. 1:13 MD 2448, 2014 U.S. Dist. LEXIS 76005, at *35–36 (N.D. Oh. June 2, 2014) ("The TTB has stated that the purpose of the labeling regulations is to ensure that consumers are provided with adequate information to inform their purchase of malt beverages.") (citing 27 U.S.C. § 205(f); 27 C.F.R. §7.29(a)(1)).

[78] TRIPS, *supra* note 59 at art. 22(2)–(3).

[79] *Id.* at art. 23.

as generic terms or were already protected by trademark.[80] So, words such as "champagne," "feta," and "bourbon" should not be used to describe products unless they are actually from the Champagne wine region in France, from certain regions in Greece, or from Bourbon County in Kentucky.[81] The European argument for GI protection is that producers need to protect the meaning and renown of their GI's from being watered down[82]: that is why when the Institut National des Appellations d'Origine (INAO)[83] approves the use of GIs, it ascertains that the wine not only is from the geographic region but also meets the expected production standards of that region.[84] When the USPTO indicates geographic region with certification marks, on the other hand, it is concerned only with whether a product is actually from the region indicated on the product, and is not required to certify that the product has met those region's production standards or conditions.[85]

Although European appellation law might be of some benefit to consumers—under a strict TRIPS Article 23 regime, customers will be able to know that their champagne comes from Champagne, France, and not from the Carneros AVA of Napa Valley, for example—the fact is that overemphasis on protecting appellations overwhelmingly protects regions and the producers within them, without much concern for whether consumers have correctly identified information about the product or not.

In 2004 a brewery from Budvar, a region in the Czech Republic, famously sought to prohibit Anheuser-Busch from selling beer under the "Budweiser" name, since Anheuser-Busch produced beer at several international locations, and not in Budvar.[86] The Budvar brewery relied upon European appellation law in its argument. The WTO, in what is now referred to as the "Budweiser Ruling," held against the Budvar brewery and reasoned, in part, that "Budweiser" had become a term that consumers did not associate with the Budvar region.[87] Had the WTO ruled otherwise, all the power and influence would go to the producer, with little left over for consumers.

The FAA Act, the Lanham Act, and European appellations law have similar goals and effects—the protection of producers from unfair competition, and the protection of consumers from misinformation—but they have different focuses. In contrasting the FAA Act with the Lanham Act and European appellations law, we see that the chief purpose and concern of the FAA Act, and therefore of the TTB, is the protection of consumers from misinformation and misleading claims. Keeping this purpose in mind has influenced the way courts have ruled on the

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[80] *Id.* at art. 24(5).

[81] *See generally* Justin Hughes, *Champagne, Feta, and Bourbon: The Spirited Debate About Geographical Indications*, 58 HASTINGS L. J. 299 (2006).

[82] *Id.* at 308–09 (citing Cour d'appel [CA] [regional court of appeal], Paris, Dec. 15, 1993, 1994 E.C.C. 385 (when the perfumer Yves St. Laurent called one of its perfumes "Champagne," it usurped the prestige of the appellation).

[83] The INAO is the French government's committee on geographic indications for wine. *Id.* at 307–08.

[84] *Id.* (citing CODE DE LA PROPRIÉTÉ INTELLECTUELLE [INTELLECTUAL PROPERTY CODE] art. L. 721-1 (ensuring that a geographic indication meets the region's standard expectations for quality and characteristics)).

[85] *Id.* at 309–10 (citing 15 U.S.C. § 1064(5)(C)–(D)).

[86] *See generally* CAROL ROBERTSON, THE LITTLE RED BOOK OF WINE LAW 147–59 (2008).

[87] *Id.* at 158 (citing Ruling by the Panel, WT/DS174/R/15 (Mar. 2005)).

validity of TTB COLAs.

II. BEER, SPIRITS, AND THE CASES THEY COME IN: THE JUDICIAL SPLIT ON "SAFE HARBOR"

A. *Overview: The Tension of Two Conflicting Priorities*

Section I of this Note introduced two key characteristics of the TTB: first, its identity as an administrative agency authorized to promulgate federal regulations, and second, its purpose of protecting consumers from misinformation. In the past three years alone, several lawsuits have been brought against beer and spirits producers regarding misleading statements on their TTB-approved labels and packaging. Many of these producers have increasingly raised the "safe harbor" defense—that is, because the TTB, a federal regulatory agency, approved the labels, the producer's claims on those labels are legal. Remarkably, courts have more or less split evenly on the question of whether the safe harbor defense succeeds or not.

The reason for the split is the tension between the two central characteristics of the TTB: its *identity* as a federal agency and its *purpose* of protecting consumers. Some courts emphasize the former and defer to the TTB's label approval process; these courts allow a safe harbor. Other courts emphasize the TTB's purpose and show skepticism for the TTB's label approvals; these courts refuse to recognize a safe harbor defense.

Cases involving Tito's Handmade Vodka indicates just how fractured the courts are on the safe harbor defense. Fifth Generation, a spirits producer, has been sued by no less than eleven plaintiffs on the same issue: that Tito's Handmade Vodka is made not by hand, but by machine, and therefore the "handmade" claim on the label—which was approved by the TTB—is deceptive at worst and misleading at best.[88] Yet courts from different jurisdictions have approached the safe harbor defense differently: in the Northern District of Illinois and the Northern District of Florida, the courts recognize safe harbor,[89] but the Southern District of California and the Northern District of New York are too skeptical of the TTB approval process—the same process with which the Illinois and Florida district courts had no problem, apparently—to grant safe harbor.[90]

In re Anheuser-Busch Beer Labeling Mktg.[91] is a good illustration of the two conflicting concerns regarding a safe harbor (even though the case does not mention the safe harbor defense at length). In that case, the plaintiffs complained

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[88] *See generally* Robert C. Lehrman, *Tito's Scorecard*, LEHRMAN BEVERAGE LAW: BEVLOG (Dec. 1, 2015), http://www.bevlaw.com/bevlog/vodka/titos-scorecard.

[89] Pye v. Fifth Generation, Inc., No. 4:14cv493-RH/CAS, 2015 U.S. Dist. LEXIS 128594 (N.D. Fla., Sept. 23, 2015); Aliano v. Fifth Generation, Inc., No. 14 C 10086, 2015 U.S. Dist. LEXIS 128104 (N.D. Ill., Sept. 24, 2015).

[90] Hofmann v. Fifth Generation, Inc., No. 4:14cv493-RH/CAS, 2015 U.S. Dist. LEXIS 65398 (S.D. Cal. Mar. 18, 2015); Singleton v. Fifth Generation, Inc., No. 5:15-CV-474 (BKS/TWD), 2016 U.S. Dist. LEXIS 14000 (N.D.N.Y., Jan. 12, 2016).

[91] In re Anhesuer-Busch Beer Labeling Mktg. & Sales Practices Litig., No. 1:13 MD 2448, 2014 U.S. Dist. LEXIS 76005 (N.D. Oh. June 2, 2014).

that the alcohol-by-volume (ABV) percentage stated on Anheuser-Busch products was incorrect.[92] Furthermore, the plaintiffs argued that the TTB's rule, which allowed a 0.3% deviation for ABV percentages stated on product labels, should be invalidated because such a rule went against the TTB's purpose of ensuring that label information was as accurate as possible for the benefit of potential customers.[93] In ruling for Anheuser-Busch, the court stated that it should defer to the TTB's label approval process: "Whether or not this Court agrees . . . , Congress entrusted the TTB with broad discretion in this area [i.e., the labeling of alcoholic beverages] and courts should be extremely reluctant to invalidate a policy determination."[94] At the same time, the court also reasoned that "the true focus of these regulations is to provide the consumer with adequate information . . . concerning the identity and quality of the product, [and] the alcoholic content thereof."[95] In other words, the court was concerned with whether the TTB was fulfilling its purpose of providing customers with accurate product information, and ultimately found that a 0.3% deviation in the stated ABV percentages was not impermissibly misleading to consumers. *In re Anheuser-Busch*, then, highlights the tension between the court's relationship with the TTB and its label approval process: on one hand, courts want to defer to the TTB's authority as a federal agency; on the other hand, courts want to ensure that the TTB stay true to its purpose of providing consumers with accurate information and protection from deception.

Although we will momentarily discuss the two different lines of cases in detail, the Figure below presents a chronological list of court rulings on the safe harbor issue.

FIGURE – CHART OF RECENT "SAFE HARBOR" CASES

CASE	**COURT**	**LABEL DISPUTE**	**"SAFE HARBOR" RULING AND REASONING; CURRENT STATUS OF THE CASE**
Budweiser (*In re Anheuser-Busch Beer Labeling Mktg.)*	N.D. Ohio	Alcohol Content	Complaint dismissed (June 2014). The court does not discuss a "safe harbor" defense at length but recognizes it. The court defers to the TTB's label regulations, which must comply with the TTB's purpose of protecting consumers.
Beck's Beer (*Marty v. Anheuser-Busch*)	S.D. Fla.	"German"	Motion to dismiss granted/denied in part (Sept. 2014). **There is NO safe harbor,** because the producer did not use the label that was actually approved by the TTB. Cased settled in May 2015.

[92] *Id*. at *6–7.

[93] *Id.* at *41–42. The plaintiffs rely on 27 C.F.R. §7.29(a)(1) (2016) (TTB must prohibit "any statement that is false or untrue in any particular, or that, irrespective of falsity . . . tends to create a misleading impression") and 27 U.S.C. § 205(e) (2015) (TTB must ensure that labels 'provide the consumer with adequate information" and are not "likely to mislead the consumer.").

[94] *Id.* at *36.

[95] *Id.* at *43 (citing 27 U.S.C. § 205(f) (2015)).

Lime-A-Rita (*Cruz v. Anheuser-Busch*)	C.D. Cal.	"Bud-Lite"	Complaint dismissed (June 2015). **There IS safe harbor**, because courts should defer to the TTB's regulations, especially when they are specific.
Jim Beam Bourbon (*Welk v. Beam Suntory*)	S.D. Cal.	"Handcrafted"	Complaint dismissed (August 2015). **There is NO safe harbor**. The court does not defer to the TTB when it is not clear the TTB confirmed the veracity of claims on the label. However, the complaint was dismissed on other grounds.
Tito's Vodka (*Pye v. Fifth Generation*)	N.D. Fla.	"Handmade," "made in an old fashioned pot still"	Motion to dismiss granted/denied in part (Sept. 2015). **There IS safe harbor**, because courts should defer to the TTB's regulations. Motion for Summary Judgment granted on September 2016.
Tito's Vodka (*Aliano v. Fifth Generation*)	N.D. Ill.	"Handmade," "made in an old fashioned pot still"	Complaint dismissed (Sept. 2015). **There IS safe harbor**, because courts should defer to the TTB's regulations.
Blue Moon Beer (*Parent v. MillerCoors*)	S.D. Cal.	"Blue Moon Brewing Company," "Artfully Crafted"	Complaint dismissed (Oct. 2015). **There IS safe harbor** because courts should defer to the TTB's regulations, especially when they are specific.
Tito's Vodka (*Hofmann/Cabrera v. Fifth Generation*)	S.D. Cal.	"Handmade," "made in an old fashioned pot still"	Motion to dismiss denied (Nov. 2015). **There is NO safe harbor**. The court does not defer to the TTB when it is not clear the TTB confirmed the veracity of claims on the label. Joint Motion to Dismiss was granted on May 2016.
Tito's Vodka (*Singleton v. Fifth Generation*)	N.D. N.Y.	"Handmade," "made in an old fashioned pot still"	Motion to dismiss granted/denied in part (Jan. 2016). **There is NO safe harbor**. The court does not defer to the TTB when it is not clear the TTB confirmed the veracity of claims on the label. Court ordered mandatory mediation in February 2016.

B. *Cases Emphasizing Deference to the TTB as a Federal Agency*

As we shall see, two Tito's Handmade Vodka cases, *Aliano v. Fifth Generation*[96] and *Pye*,[97] have come down on the side of deferring to the TTB, as have *Cruz*[98]—which involves Anheuser-Busch's Lime-R-Rita brand—and *Parent*[99]—which involves MillerCoors' Blue Moon. *Aliano v. Fifth Generation* and *Pye* represent the far end of the judicial spectrum, which calls for courts to defer automatically to the TTB's decisions, no matter the circumstance. *Cruz* and *Parent* also prefer to defer to the TTB, although they appear to do so only after they are satisfied that the TTB had sufficient rules and regulations that supported its decisions to grant COLAs to certain products.

[96] No. 14 C 10086, 2015 U.S. Dist. LEXIS 128104 (N.D. Ill., Sept. 24, 2015).
[97] Pye v. Fifth Generation, Inc., No. 4:14cv493-RH/CAS, 2015 U.S. Dist. LEXIS 128594 (N.D. Fla., Sept. 23, 2015).
[98] Cruz v. Anheuser-Busch, LLC, No. CV 14-09670 AB (ASx), 2015 U.S. Dist. LEXIS 76027 (C.D. Cal. June 3, 2015).
[99] Parent v. MillerCoors, LLC., No. 3: 15-cv-1204-GPC-WVG, 2015 U.S. Dist. LEXIS 145071 (S.D. Cal. Oct. 26, 2015).

The general complaint against Fifth Generation, Inc. (FGI), who produces Tito's Handmade Vodka, is that Tito's label states the that vodka is "handmade" and "crafted in an old fashioned pot still," and that, moreover, Tito's website makes similar misleading claims.[100] The Plaintiffs have claimed that such statements are misleading and false because "handmade" implies that the product is "made by hand" or at least "made from scratch or in small units,"[101] when in fact the vodka is "mass-produced in large quantities from commercially manufactured neutral grain spirits that are trucked and pumped into the Tito's facility and distilled in modern, technologically advanced stills."[102] FGI has raised the safe harbor defense in each of these lawsuits.

1. *Aliano v. Fifth Generation* (N.D. Ill.)

Aliano v. Fifth Generation epitomizes the view that courts should defer to the TTB: the court was so confident in the TTB's label approval process that it did not even consider for itself whether FGI's label claims were misleading, and ruled for FGI in a relatively brief opinion. The court hung its hat on the COLA that the TTB granted to Tito's. Because COLA procedures required that "TTB representatives personally inspected the manufacturing process at [FGI]," and because the TTB "has repeatedly approved Tito's label as truthful and appropriate," the court ruled that the COLA, which has been "specifically authorized by the TTB, as a regulatory body," precluded the plaintiffs from successfully accusing Tito's of deceptive label claims.[103]

The court in *Aliano v. Fifth Generation*, however, did not respond to two key arguments made by the plaintiffs. First, the plaintiffs, acknowledging that the COLA provided safe harbor for approved *labels*, suggested that the certificate of *label* approval should not also provide safe harbor for misleading statements on a *website*.[104] Second, the plaintiffs also argued that, in any case, the safe harbor defense should be "inapplicable . . . , because there is no legislation that specifically authorizes the conduct alleged"[105]—in other words, although courts should, under *Chevron* and *Mead*, defer to *legislation*, they are not always bound to defer to *agency action* such as label approvals. This second argument, as we shall see, has led many other courts to deny the safe harbor defense.

2. *Pye v. Fifth Generation* (N.D. Fla.)

Pye is slightly more nuanced than *Aliano v. Fifth Generation* in that *Pye*

[100] *Aliano*, 2015 U.S. Dist. LEXIS 128104, at *1–2; *Pye*, 2015 U.S. Dist. LEXIS 128594, at *1. *See also* Hofmann v. Fifth Generation, Inc., No. 14-cv-2569 JM (JLB), 2015 U.S. Dist. LEXIS 65398, at *2–4 (S.D. Cal. Mar. 18, 2015); Singleton v. Fifth Generation, Inc., No. 5:15-CV-474 (BKS/TWD), 2016 U.S. Dist. LEXIS 14000, at *2–4 (N.D.N.Y., Jan. 12, 2016).

[101] *See, e.g.*, *Pye*, 2015 U.S. Dist. LEXIS 128594, at *5–6. *See generally* TITO'S HANDMADE VODKA, http://www.titosvodka.com/ (last visited February 25, 2016).

[102] *See, e.g.*, *Hofmann*, 2015 U.S. Dist. LEXIS 65398, at *3–4. The plaintiff in *Hofmann* cited, in particular, a 2013 Forbes magazine article that described Tito's "massive buildings containing ten floor-to-ceiling stills and bottling 500 cases an hour." *Id.*

[103] *Aliano*, 2015 U.S. Dist. LEXIS 128104, at *11–12 (internal quotations removed).

[104] *Id.* at *11.

[105] *Id.* at *10–11 (internal quotation marks omitted).

actually did acknowledge that the label claims could be misleading, although it ultimately ruled that the TTB's COLA was dispositive. Specifically, although the court decided that the label's "handmade" claim was *not* misleading to the reasonable consumer,[106] the claim that the vodka was made in an "old fashioned still" *could be* misleading and therefore was a genuine question of material fact that should survive a motion to dismiss.[107] However, the court still found a safe harbor for FGI. The plaintiffs argued that a safe harbor should not apply because of the "high levels of noncompliance found by the TTB during annual audits of labels in the industry" and because the system does not actually protect consumers.[108] Yet the court dismissed the plaintiffs' concerns: "Even if this is so . . . [,] it would not matter. . . . The safe harbor applies." The court reasoned that Florida's safe harbor statute protected "*any* act or practice required or specifically permitted by federal . . . law. There is no exception for unwise or even incompetently enforced . . . laws."[109] Because the TTB is a "regulator charged [by Congress] with ensuring that representations on the Tito's label are not misleading," the court ruled that the TTB should be granted judicial deference, notwithstanding the concerns of the consumers or the questionable rigor of TTB label approval.[110] *Pye*, then, gives the utmost deference to the TTB: even if the TTB performs its job incompetently, it is not for the courts to intervene in TTB decisions.

3. *Cruz v. Anheuser-Busch* (C.D. Cal.)

Cruz and *Parent* make an important shift away from *Aliano v. Fifth Generation* and *Pye*: they deferred to the TTB, but they do so only after making sure that the TTB's grant of a COLA was supported by specific, clear, and thorough TTB regulations.

In *Cruz*, the plaintiff complained that Anheuser-Busch (AB) misled customers by placing the Bud *Light* (emphasis added) logo on a case of Lime-R-Rita cans, even though Lime-R-Rita was not, in fact, "low in calories and carbohydrates"; AB countered that TTB Ruling 2004-1 permitted the use of the word "light" so long as information on nutrition content was listed on the can, and not necessarily on the outer packaging.[111] Although the *Cruz* court did rule that reasonable consumers would not be misled into believing that Lime-R-Ritas were "low in calories and carbohydrates," it also ruled that safe harbor would have immunized AB's conduct.[112]

The court first recognized that, under *Chevron* and *Mead*, the judiciary should defer to the actions of a regulatory agency—in this case, the TTB—when

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[106] The court reasoned that, because no reasonable consumer would actually believe that vodka is made without the aid of any machine whatsoever, the term "handmade" is mere "puffery" that is not actionable. Pye v. Fifth Generation, Inc., No. 4:14cv493-RH/CAS, 2015 U.S. Dist. LEXIS 128594, at *6 (N.D. Fla., Sept. 23, 2015) .

[107] *Id.* at *7.

[108] *Id.* at *9.

[109] *Id.* at *9–10 (emphasis in the original) (internal citations omitted).

[110] *Id.* at *11.

[111] Cruz v. Anheuser-Busch, LLC, No. CV 14-09670 AB (ASx), 2015 U.S. Dist. LEXIS 76027, at *2–4, *13–14 (C.D. Cal. June 3, 2015). *See also* TTB RULING 2004-1, *supra* note 41.

[112] *Cruz*, 2015 U.S. Dist. LEXIS 76027, at *19, *27.

it was clear that Congress' intent was that the agency's regulations have the force of law. Following this logic, the court ruled that because Congress gave "preapproval authority to issue COLAs to endorse a label's compliance with the FAA before the label is released to the public," COLAs have the "exclusive effect of federal law."[113]

However, the court seemed comfortable deferring to the COLA because of the TTB's specific process that went behind granting it. The court noted that TTB Ruling 2004-1 specifically allowed AB to use the word "light" on its labels so long as nutrition information appeared either on the can or the outer packaging.[114] The court emphasized that the TTB Ruling 2004-1 did *not* have the force of law; rather, it laid out one of the TTB's requirements that producers must satisfy before receiving a COLA for their product label. Importantly, the *Cruz* court found that the "COLA regulation is consistent with the statutory objective of the FAA" and that the COLA procedures are "relatively formal" enough to be entitled to judicial deference.[115]

4. *Parent v. MillerCoors* (S.D. Cal.)

The plaintiff of *Parent* complained that Blue Moon beer labels misleadingly implied that Blue Moon was a small-batch craft beer, when it fact it was produced by the popular big-beer producer MillerCoors. The fraudulent claims, according to the plaintiff, were that Blue Moon was "artfully crafted" and that it was brewed by the "Blue Moon Brewing Company" (and not by MillerCoors).[116] Blue Moon Brewing Company is not actually a producer of beer; rather, it is a fictitious business name owned by MillerCoors.[117]

The court sided with MillerCoors but, significantly, did so only after distinguishing its case from *Hofmann v. Fifth Generation*.[118] The *Hofmann* court refused to grant safe harbor to Tito's Handmade Vodka because there was "no TTB regulation [that] specifically authorized the use of 'homemade' on the vodka's label."[119] In *Parent*, on the other hand, the use of a trade name—"Blue Moon Brewing Company"—on a beer label was "specifically authorized by federal [TTB] and state regulations."[120] California has a rule permitting businesses to use fictitious business names as a trade name, and MillerCoors had duly registered its fictitious business name, Blue Moon Brewing Company, in California.[121] Because the TTB had specific regulations on trade names appearing on labels, and because MillerCoors followed these regulations, the court was satisfied that the TTB's process of granting a COLA in this case was

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[113] *Id.*, at *17–18.
[114] *Id.* at *17.
[115] *Id.* at *18–19.
[116] Parent v. MillerCoors, LLC., No. 3: 15-cv-1204-GPC-WVG, 2015 U.S. Dist. LEXIS 145071, at *2–4 (S.D. Cal. Oct. 26, 2015).
[117] *Id.* at *15.
[118] *See* Hofmann v. Fifth Generation, Inc., No. 14-cv-2569 JM (JLB), 2015 U.S. Dist. LEXIS 157378 (S.D. Cal. Nov. 20, 2015).
[119] *Parent*, No. 3:15-cv-1204-GPC-WVG, 2015 U.S. Dist. LEXIS 145071, at *16 (citing *Hofmann*, 2015 U.S. Dist. LEXIS 157378, at *7).
[120] *Id.* at *15 (citing 27 C.F.R. §§ 25.142(a), 25.143(a) (2016)).
[121] *Id.* (citing CAL. CODE REGS. tit. 4, § 130(a)).

thorough enough to give the COLA the effect of federal law.

Interestingly, the court ruled that the "artfully crafted" claim was "mere puffery." Even though there is no TTB definition of "craft" or "craft beer," the "artfully crafted" statement on the label was not "capable of being proved false or of being reasonably interpreted as a statement of objective fact";[122] it therefore ruled that the "artfully crafted" claim was not actionable.

5. *Summary*

We see, then, two sub-threads in the cases that defer to the TTB. On one hand, *Aliano v. Fifth Generation* and *Pye* automatically defer to the TTB solely because it is a federal regulator, regardless of the process that goes behind approving labels; *Pye* in particular boldly states that whether an agency's actions are right or incompetently performed is irrelevant, since a safe harbor should protect *any* federal agency action.[123] On the other hand, *Cruz* and *Parent* defer to the TTB only when they are satisfied that the TTB has other specific regulations that support its decisions to grant COLAs.

C. *Cases Emphasizing the FAA Act's Goal of Providing Accurate Information to Consumers*

We now review another Anheuser-Busch case (*Marty*[124]), which assessed label claims implying that Beck's Beer was brewed in Germany. We also examine three spirits cases where the courts were not satisfied that the TTB ensured that the label information was accurate: one involving Jim Beam Whiskey (*Welk*[125]*)*, and two involving Tito's Handmade Vodka again (*Hofmann*[126] and *Singleton*[127]).

1. *Marty v. Anheuser-Busch* (S.D. Fla.)

Beck's beer used to be produced in Germany, but after it was bought by Anheuser-Busch InBev (AB), its production for the U.S. market was moved in 2012 to St. Louis, where AB brews Budweiser and its other beers.[128] Yet AB still highlighted on the Beck's labels its German origins: the label indicates that the beer "Originated in Germany," had "German Quality," and was "Brewed Under the German Purity Law of 1516."[129] The plaintiff in *Marty* claimed that such claims misled consumers into believing that Beck's was actually brewed in

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[122] *Id.* at *23–25.

[123] Pye v. Fifth Generation, Inc., No. 4:14cv493-RH/CAS, 2015 U.S. Dist. LEXIS 128594, at *9 (N.D. Fla. Sept. 23, 2015).

[124] Marty v. Anheuser-Busch Cos., 43 F. Supp. 3d 1333 (S.D. Fla. 2014).

[125] Welk v. Beam Suntory Imp. Co., 124 F. Supp. 3d 1039 (S.D. Cal. 2015).

[126] Hofmann v. Fifth Generation, Inc., No. 14-cv-2569 JM (JLB), 2015 U.S. Dist. LEXIS 157378 (S.D. Cal. Nov. 20, 2015).

[127] Singleton v. Fifth Generation, Inc., No. 5:15-CV-474 (BKS/TWD), 2016 U.S. Dist. LEXIS 14000 (N.D.N.Y. Jan. 12, 2016).

[128] *Beck's Beer Settlement*, *supra* note 18.

[129] *Marty*, 43 F. Supp. 3d at 1340.

Germany, using a German-specific process, with German ingredients.[130] AB countered that the TTB approved the labels because the bottle label *did* state that the beer was a "Product of USA, Brauerei Beck & Co., St. Louis, MO,"[131] albeit in a font that was extremely difficult to see.

Ultimately, the court ruled that although the TTB approved Beck's label, it would not defer to the label *solely because* the TTB approved it, since it found that AB still deceived consumers in advertising Beck's as a German beer. The court essentially gave four reasons. First, it noted that although the TTB approved the label, the label that actually went on the bottle was different from the label that was submitted to the TTB: the label that the TTB approved was printed on a gray, matte background, and so all the words could be easily seen, whereas the label that actually went on Beck's bottle had several colors, such that "Product of USA" was no longer easily legible.[132] Second, and related to the first point, the court noted that the "Product of USA" claim was difficult, almost impossible, to read: it was miniscule, and it was printed in white font against a "shiny, metallic silver background" that made the font "obscured by overhead lighting."[133] Moreover, although AB placed the "Product of USA" disclaimer on the bottles, it did not do so on the outer packaging, and the court noted that a "reasonable consumer [should not be] required to open a carton or remove a product from its outer packaging in order to ascertain whether representations made on the face of the packaging are misleading."[134] Third, the court found that even if the "Product of USA, Brauerei Beck & Co., St. Louis, MO" disclaimer were legible, it did not sufficiently inform the customer that the product was brewed in America, since the disclaimer did not explicitly include the words "brewed at."[135] Finally, the court found that, the TTB's label approval notwithstanding, AB's other marketing campaigns, which suggested that Beck's was brewed in Germany, misled consumers; and ruled that, even if there was a safe harbor for the *label*, there should be no safe harbor for non-label claims, since the TTB did not actually review them.[136] The court, therefore, denied AB's motion to dismiss, and the case eventually settled.[137]

Marty, then, demonstrates a slight skepticism of the TTB: unlike the *Aliano v. Fifth Generation* and *Pye* courts, *Marty* does not automatically imbue the TTB's COLAs with the force of law. Rather, it recognizes that the TTB is limited: it cannot control the statements of breweries that are made *outside* of the labels, and it does not always police whether the approved label statements and fonts are the same as the statements and fonts that go on the bottle. The *Marty* court is concerned with whether AB has misled the public.

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[130] *Id.* at 1336.
[131] *Id*. at 1340.
[132] *Id.* at 1340–41.
[133] *Id.*
[134] *Id.* at 1341.
[135] *Id.*
[136] *Id.* at 1345.
[137] *Beck's beer settlement*, *supra* note 18.

2. *Welk v. Beam Suntory* (S.D. Cal.)

Welk is similar to the Tito's Vodka Cases in that the plaintiff in *Welk* argued that Jim Beam's label, which stated that the bourbon is "handcrafted," is misleading because the bourbon is actually made by a machine.[138] The court dismissed the complaint on the grounds that no reasonable consumer would actually believe that a "handcrafted" claim "literally" meant that the bourbon production did not involve machines at all.[139] However, the court did not dismiss the complaint without first discrediting the TTB's COLA. The court's ruling on safe harbor is succinct and significant:

> Jim Beam argues that California's safe harbor doctrine bars Welk's suit because the TTB reviewed and pre-approved its labels to . . . [determine] whether the label is false and misleading. But, *the TTB certificates don't reveal whether the TTB specifically investigated and approved the veracity of Jim Beam's use of the term "handcrafted."* . . . Jim Beam's motion to dismiss under the safe harbor doctrine is DENIED.[140]

The *Welk* court refused to defer automatically to the TTB's COLA just because it was a federal agency. Rather, it expressed concern with whether the TTB was fulfilling its purpose of ensuring that the information on labels was accurate.[141]

3. *Hofmann v. Fifth Generation* (S.D. Cal.)[142]

FGI in *Hofmann*, likely relying on its successes in *Aliano v. Fifth Generation*, *Pye*, and *Cruz*, argued that the court should defer to the TTB since it was specifically authorized by Congress to grant COLAs; COLAs, FGI argued, should therefore have the "exclusive effect of federal law."[143] *Hofmann*, like the *Aliano* and *Pye* courts, recognized that *Chevron* demands that courts not intervene in agency action. However, rather than stopping at *Chevron*, the court in *Hofmann* fleshed out the necessary requirements, laid out in subsequent cases, to trigger

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[138] Welk v. Beam Suntory Imp. Co., 124 F. Supp. 3d 1039, 1040–41 (S.D. Cal. 2015).

[139] *Id*. at 1044.

[140] *Id.* at 1042 (emphasis added).

[141] Several other cases have expressed skepticism for the TTB's COLAs when there was no proof that the TTB actually verified that the label information was accurate. *See* Mariano Aliano & Due Fratelli, Inc. v. WhistlePig, LLC, No. 14 C 10148, 2015 U.S. Dist. LEXIS 64401 at *26 (N.D. Ill. May 18, 2015); Aliano v. Louisville Distilling Co., LLC, 115 F. Supp. 3d 921, 932 (N.D. Ill. 2015); Nowrouzi v. Maker's Mark Distillery, Inc., No. 14cv2885 JAH(NLS), 2015 U.S. Dist. LEXIS 97752 at *12 (S.D. Cal. July 27, 2015).

[142] *Hofmann*'s sister case is *Cabrera v. Fifth Generation, Inc.*, No. 14cv2990 JM(JLB), 2015 U.S. Dist. LEXIS 157374 (S.D. Cal. Nov. 20, 2015). *Cabrera* is in the same court, before the same judge, with the same facts, was issued on the same date, and had substantially similar language as *Hofmann*—*Cabrera* just has a different plaintiff. The cases were not officially consolidated. For the purposes of this Note, therefore, I treat *Cabrera* and *Hofmann* the same.

[143] Hofmann v. Fifth Generation, Inc., No. 14-cv-2569 JM (JLB), 2015 U.S. Dist. LEXIS 157378 at *15 (S.D. Cal. Nov. 20, 2015) (citing Cruz v. Anheuser-Busch, LLC, No. CV 14-09670 AB (ASx), 2015 U.S. Dist. LEXIS 76027, at *18).

Chevron deference. It noted that *Mead*, a U.S. Supreme Court case, required relatively formal administrative procedures, such as general notice-and-comment practices, for agency action to have the effect of federal law, and importantly observed that "the sheer number of rulings [of certain agencies] undermines entitlement to *Chevron* deference."[144] It examined *Walls*, a Federal Circuit case, which claimed that a "formal administrative procedure" required "trial-type procedures,"[145] and *Reid*, from the Ninth Circuit, which required strict administrative processes to trigger federal preemption.[146] It also noted that, under the federal district court case *Koenig*, agency action that was unsupported by formal administrative processes should not trigger TTB deference or safe harbor.[147]

In short, the *Hofmann* court recognized that the case law demanded that agency action be accompanied by formal administrative procedures before they can have the effect of federal law. *Hofmann* was not satisfied with FGI's naked claim that the TTB approved the Tito's Handmade Vodka label. It found no evidence that the TTB actually had regulations that supported its decision to approve Tito's label. It therefore denied FGI's motion to dismiss the case so that the parties could proceed to discovery to determine whether Tito's Vodka's label claims were misleading or not.

Interestingly, *Hofmann*, like the *Parent* court, considered what effect "puffery" had on safe harbor defenses, and ended up treating "puffery" in a completely different way from how *Parent* treated it. In *Parent*, the court ruled that because claims that constituted "puffery" could not be objectively measured, *plaintiffs* could not base their claims on such statements.[148] *Hofmann* shows the flip side of that argument: because statements of "puffery" could not be objectively measured on whether they were accurate or not, they could not be assessed by the TTB, and therefore *defendants* could not raise the defense that the TTB approved such statements.[149] The way *Hofmann* understands "puffery" demonstrates that it distrusts the TTB's label approval process and discourages alcoholic beverage producers from relying on the TTB's approval.

4. *Singleton v. Fifth Generation* (N.D.N.Y.)

Singleton complements *Hofmann*: *Hofmann* has an in-depth discussion of when courts should and should not apply *Chevron* deference to federal agencies, whereas *Singleton* paints a broad picture of current case law and reassesses the primary purpose of the FAA Act. Just like the previous Tito's Vodka cases, FGI in *Singleton* argued that courts should not "second-guess the TTB's determination to issue the COLAs" and that the TTB's determination created safe harbor for FGI, and furthermore alleged that COLAs should not be revoked by courts

[144] *Id.* at *21 (citing United States v. Mead Corp., 533 U.S. 218, 218–22 (2001)).
[145] *Id.* at *19 (citing Walls v. United States, 582 F.3d 1358, 1377 (Fed. Cir. 2009)).
[146] *Id.* at *10–11 (citing Reid v. Johnson & Johnson, 780 F.3d 952, 964 (9th Cir. 2015)).
[147] *Id.* at *18–19 (citing Von Koenig v. Snapple Bev. Co., 713 F. Supp. 2d 1066, 1070–76 (E.D. Cal. 2010)).
[148] Parent v. MillerCoors LLC, No. 3:15-cv-1204-GPC-WVG, 2015 U.S. Dist. LEXIS 145071, at *23–25 (S.D. Cal. Oct. 26, 2015).
[149] *Hofmann*, 2015 U.S. Dist. LEXIS 157378 at *19–21.

because they are "protected property interests."[150] The plaintiff, as in FGI's previous cases, argued that FGI's conduct should not trigger safe harbor "because no federal or state law or regulation specifically permits [FGI] to deceptively label its vodka as 'Handmade'"[151]—in other words, that the TTB's COLAs did not have the effect of federal law. The plaintiff further alleged that the COLA "simply demonstrates that the TTB took [FGI]'s word at face value, but does not suggest that the TTB knew the process by which Tito's was actually made or that the TTB ever conducted an investigation to verify Tito's representations."[152]

Singleton reviewed several cases on both sides of the issue. It noted that *Cruz*, *Aliano v. Fifth Generation*, and *Pye*[153] deferred to the TTB but also observed the significant case law—namely, *Hofmann*, *Aliano v. WhistlePig*, *Aliano v. Louisville Distilling*, and *Nowrouzi*[154]—that refused to defer to the TTB's label approval when it was not clear that the TTB actually verified the claims on the label as true and accurate.[155] To help tip the balance of the cases, *Singleton* looked at safe harbor cases outside of the TTB labeling context and ultimately found that a safe harbor "has been applied [only] where a federal law or regulation specifically authorizes the challenged conduct, or a federal agency *specifically* approves the challenged conduct."[156]

Ultimately, *Singleton* concluded that New York's safe harbor statute should apply *only* when the TTB has specific regulations that supports its decisions to grant COLAs: "[t]he record does not reflect whether the TTB investigated or ruled upon the representations that Tito's vodka is 'handmade' and 'crafted in an old-fashioned pot still.'"[157] Moreover, the court took issue with the fact that the TTB approved the label claims even though the TTB had no specific regulations on what "handmade" or "crafted in an old-fashioned pot still" meant. It contrasted the TTB's lack of regulations on the word "handmade" in this case to the presence of an actual TTB regulation in *Cruz*, where the court allowed Anheuser-Busch to place the word "light" on its bottles because it specifically complied with TTB Ruling 2004-1.[158] The *Singleton* further contrasted the

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[150] Singleton v. Fifth Generation, Inc., No. 5:15-CV-474 (BKS/TWD), 2016 U.S. Dist. LEXIS 14000, at *16 (N.D.N.Y. Jan. 12, 2016).

[151] *Id.*

[152] *Id.*

[153] *See* Cruz v. Anheuser-Busch, LLC, 2015 U.S. Dist. LEXIS 76027 (C.D. Cal., June 3, 2015); Aliano v. Fifth Generation, Inc., 2015 U.S. Dist. LEXIS 128104 (N.D. Ill., Sept. 24, 2015); Pye v. Fifth Generation, Inc., 2015 U.S. Dist. LEXIS 128594 (N.D. Fla., Sept. 23, 2015).

[154] *See* Hofmann v. Fifth Generation, Inc., No. 14-cv-2569 JM (JLB), 2015 U.S. Dist. LEXIS 157378 (S.D. Cal. Nov. 20, 2015); Mariano Aliano & Due Fratelli, Inc. v. WhistlePig, LLC, No. 14 C 10148, 2015 U.S. Dist. LEXIS 64401 at *18 (N.D. Ill. May 18, 2015); Aliano v. Louisville Distilling Co., LLC, 115 F. Supp. 3d 921, 932 (N.D. Ill. 2015); Nowrouzi v. Maker's Mark Distillery, Inc., No. 14cv2885 JAH(NLS), 2015 U.S. Dist. LEXIS 97752 at *12 (S.D. Cal. July 27, 2015).

[155] *Singleton*, 2016 U.S. Dist. LEXIS 14000 at *16–23.

[156] *Id.* at *23 (emphasis added) (citing L. Offs. of K.C. Okoli, P.C. v. BNB Bank, N.A., 481 F.App'x 622, 624–26 (2d Cir. 2012)) (finding safe harbor when there were banking "regulations directly on point"); Am. Home Prods. Corp. v. Johnson & Johnson, 672 F. Supp. 135, 144–45 (S.D.N.Y. 1987) (applying safe harbor when "allegedly misleading drug warning labels complied with specific warning requirements issued by the Food and Drug Administration"); Mendelson v. Trans World Airlines, Inc., 466 N.Y.S.2d 168, 170 (N.Y. Sup. Ct. 1983) (safe harbor "barred claims related to overbooking airline flights when a regulation specifically permitted the practice")).

[157] *Id.* at *24.

[158] *Id.* at *25 (citing Cruz v. Anheuser-Busch, LLC, 2015 U.S. Dist. LEXIS 76027, at *13–14 (C.D. Cal., June 3, 2015)).

TTB's lack of regulations for the term "handmade" with its specific regulations governing the term "gluten-free" or the term "organic" on products' labels.[159] *Singleton* ultimately proposed that when the TTB lacks specific regulations on a particular term on a label, courts should resist deferring to TTB action just because the TTB is a federal agency. *Singleton*, then, dismissed FGI's safe harbor defense in its motion to dismiss and ordered the parties to proceed to the discovery phase to determine whether FGI's claims were, in fact, misleading.[160]

Most significantly, *Singleton* reminds us that the TTB's actions should not be given the force of law when the TTB has failed to fulfill the purpose of the FAA Act. The TTB derives its authority from the FAA Act, and the FAA Act "prohibits false and misleading labeling"; therefore, when TTB label approval and the FAA Act's purpose appear to conflict, the "TTB approval is not intended to carry pre-emptive weight."[161]

5. *Summary*

The four cases we just reviewed demonstrate varying levels of skepticism of the TTB's label approval process. *Marty* is the least skeptical: it does not question the rigor of the label approval process, but rather notes that producers will lose their protection if they use labels whose fonts are different from those they submit to the TTB, and that producers' statements on websites and extra-label advertising will not be protected by COLAs. *Welk*, *Hofmann*, and *Singleton*, on the other hand, openly doubt that the grant of a COLA automatically means that the TTB has actually certified that label statements are accurate and true. Those courts prefer to let the cases go to discovery, so that a trial could determine whether a reasonable consumer could be misled by a label's statements or not. Indeed, *Singleton* even questions whether the TTB's label approval process complies with the purposes of the FAA Act at all and emphatically reminds that it is the FAA Act, not the TTB COLAs, which should be dispositive.

III. TAKING A SHOT (AT SOME PRACTICAL THOUGHTS AND SOLUTIONS)

A. *The Courts are Split, but Who is Right?*

We have seen how the tension between the TTB's identity as a federal agency on one hand and the TTB's purpose of providing consumers with accurate

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[159] *Id.* at *24–25 (citing 27 C.F.R. §5.71(b)).

[160] *Id.* at *26. The court cites several other cases that denied the safe harbor defense and ordered the case to move forward into the discovery phase. *See* In re Frito-Lay N. Am., Inc., No. 12-MD-2413 (RRM)(RLM), 2013 U.S. Dist. LEXIS 123824 at *68–69 (E.D.N.Y. Aug. 29, 2013) ("declining to dismiss a . . . claim based on safe harbor where . . . it was not clear that defendant's labeling complied with FDA guidance"); Frey v. Bekins Van Lines, Inc., 748 F.Supp.2d 176, 182 (E.D.N.Y. 2010) (stating that ruling as to applicability of safe harbor was "completely premature" at motion to dismiss stage); Banks v. Consumer Home Mortg., Inc., No. 01-CV-8508 (ILG), 2003 U.S. Dist. LEXIS 8230 at *41 (E.D.N.Y. Mar. 28, 2003) ("safe harbor defense based on disputed compliance with regulations would have to await the completion of discovery").

[161] *Singleton*, 2016 U.S. Dist. LEXIS 14000 at *25–26.

information on the other hand has created a judicial split, with half of the courts siding with producers and the TTB and the other half refusing to defer to the TTB in order to provide adequate information to consumers. The TTB makes determinations and issues rulings, but some courts are reluctant to give the force of law to such determinations and rulings when they apparently come in conflict with the original purpose of the FAA Act—which is to protect consumers from misinformation.

So who is right? Both sides of the debate have legitimate concerns. On one hand, deferring to the TTB seems to help preserve the distinction between the judicial and legislative branch. According to this view, the judiciary should *apply* federal rules and regulations to cases, not to question the rules' legitimacy or, worse, create their own rules. Courts should refrain from second-guessing these laws and regulations because it is Congress' role to legislate, a role which Congress can delegate to a regulatory agency if it so wishes.[162] In fact, the states' safe harbor laws were created for the purpose of preventing the judiciary from legislating from the bench. The California Supreme Court eloquently addressed these concerns in *Cel-Tech Communications*:

> *Courts may not simply impose their own notions of the day* as to what is fair or unfair. Specific legislation may *limit the judiciary's power* to declare conduct unfair. If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, *courts may not override* that determination.[163]

Safe harbors assure that courts uphold federal legislation and regulation—regardless of "[w]hether or not [the courts] agree with" the rules at hand.[164] Indeed, some courts are so concerned about legislating from the bench that they—as epitomized by *Pye*—have ruled that the judiciary should defer to "*any*" act permitted by federal agencies, without any "exception for unwise or even incompetently enforced . . . laws."[165]

Other courts are not so sure that their hands are tied just because the TTB is a federal regulatory agency. *Cruz* and *Parent*, for example, have required something more than just a COLA to defer to the TTB's approval of a label—namely, they have required specific TTB Rulings or regulations that actually support the TTB's decision to allow the use of a certain term on a label. Without specific rulings or regulations backing a COLA, courts cannot be sure that the TTB actually took steps to verify that the information on a label was accurate or, at the very least, not misleading. This was the case in *Welk*, *Hofmann*, and *Singleton*, and also in *Aliano v. WhistlePig*, *Aliano v. Louisville Distilling*, and

[162] In re Anhesuer-Busch Beer Labeling Mktg. & Sales Practices Litig., No. 1:13 MD 2448, 2014 U.S. Dist. LEXIS 76005, at *36 (N.D. Oh. June 2, 2014) ("Congress entrusted the TTB with broad discretion in this area and courts should be extremely reluctant to invalidate a policy determination.").

[163] Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 973 P.2d 527, 541 (Cal. 1999) (emphasis added).

[164] *In re Anheuser-Busch Litigation*, 2014 U.S. District LEXIS 76005, at *36.

[165] Pye v. Fifth Generation, Inc., No. 4:14cv493-RH/CAS,2015 U.S. Dist. LEXIS 128594, at *9–10 (N.D. Fla., Sept. 23, 2015).

Nowrouzi.

These courts ultimately refuse to defer to the TTB's COLAs not because they want to create their own legislation. Rather, these courts refuse to defer automatically to the TTB's unsupported, naked actions because they want to make sure that the intent of the original legislation—the FAA Act—is realized. As *Singleton* observed, the FAA Act is where the TTB derives its authority, and therefore it is the intent of the FAA Act which the courts should uphold—not the arbitrary determinations of the TTB.[166]

Indeed, as a practical matter, it is nearly impossible for the TTB to regulate every word, term, phrase, or image that could go on a label, and the TTB has to examine hundreds of thousands of labels each year—so much that it is reasonable to surmise that the TTB cannot and does not ensure that *each* piece of information on the label is in compliance with the FAA. In such a system, where the TTB is likely overburdened, consumers—who have to rely on products' label statements to determine if they will buy a product or not—are the victims. Protecting these consumers is the very reason that the FAA Act was passed and the TTB was created. When the TTB fails to protect these consumers, courts should be ready to strike down those TTB determinations which do not put into effect the FAA Act's purpose.

B. *Practical Steps for the TTB and Producers*

What of the TTB and producers? Asking the TTB to change and institute even more regulations and a more rigorous label review process would seem to help protect against consumer deception, which is what the FAA Act intended in the first place. However, doing so seems for the moment to be impractical. The TTB seems overwhelmed with the number of labels it has to review each year as it is,[167] and the rapidly growing alcoholic beverage industry is only going to exacerbate the problem unless Congress drastically increases TTB resources and funding. Furthermore, requiring the TTB to assess *every* statement, including brand names, for example, might push the TTB into the domain of the USPTO, which has a more rigorous trademark application process. At this juncture, the most the TTB might be expected to do is to include a disclaimer for its COLAs indicating that, unless there are specific TTB regulations that authorize the use of certain terms of labels, merely having a COLA does not immunize producers from lawsuits alleging customer deception.

The players in the industry who can most readily change their conduct are the producers themselves. They know now from the judicial split on safe harbor that a TTB's COLA alone does not automatically protect their labels, and indeed, the new Congress may very well abolish judicial deference to the TTB.[168] Rather, courts typically will defer to the TTB's COLAs only if they are supported by specific rules and regulations promulgated by the TTB. Producers, therefore, can use the terms "light" or "gluten-free" on their labels, because the TTB has

[166] *Singleton*, 2016 U.S. Dist. LEXIS 14000, at *25–26.
[167] Kanach & Christopherson, *supra* note 7.
[168] Macagnone, *supra* note 56.

specific rulings and regulations permitting their use (so long, of course, that the producers comply with those regulations).[169]

This does not mean that COLAs have no worth to producers—producers still need them if they are going to sell their products across state lines. It just means that producers can no longer raise the COLAs as a defense against claims of deception on their labels (or in their other non-label advertising and marketing, such as on the product websites). It also means that producers should take a hard look at all their labels and make sure that reasonable consumers would not construe the statements on them as misleading.

The case law suggests other practical tips as well: *Marty*, in particular, tells producers that the label font and colors they submit to the TTB should be exactly the same as the label they put on the bottle, that disclaimers should be placed on both the bottle or can *and* the outer packaging, and that the production source should be specifically indicated with the words "brewed at."[170] What is most important, however, is that producers thoughtfully assess what goes on the labels and what does not, especially if the TTB lacks regulations on the terms the producer wants to use. If the producers do so, then not only will the FAA Act's purpose of providing accurate information to consumers be achieved, but producers will be protecting themselves from lawsuits in ways that an unsupported TTB COLA never could.

LAST CALL: CONCLUSION

Beer, wine, and spirits are growing in America, and producers are trying to file every necessary federal application—including to the TTB and USPTO—to sell and protect their product. However, as Tony Magee observed on Twitter, trademark protections offered by the USPTO have limits.[171] And as we have seen in this Note, so do the COLA protections offered by the TTB. Every alcoholic beverage producer, if they want to sell in interstate commerce, must have their labels approved by the TTB. With the growing number of applications, however, it is near-impossible for the TTB to have regulations on *every* term that goes on labels or to verify as accurate *every* statement on every label. It creates a system where the purpose of the FAA Act and the TTB—to provide accurate information to consumers before they purchase alcoholic beverage products—is not being realized. It is the reason that a growing number of courts refuse to grant a safe harbor to producers just because the TTB is a federal agency.

Importantly, when Tony Magee claimed on Twitter that "our TM has limits," he said so not because the USPTO or the judiciary told him so.[172] He said so because he went to the "ultimate Court"—the "Court of Public Opinion."[173] That

[169] Cruz v. Anheuser-Busch, LLC, No. CV 14-09670 AB (ASx), 2015 U.S. Dist. LEXIS 76027, at *13–14 (C.D. Cal., June 3, 2015); TTB RULING 2004-1, *supra* note 41. *Singleton*, 2016 U.S. Dist. LEXIS 14000, at *24–25.

[170] Marty v. Anheuser-Busch Cos., 43 F. Supp. 3d 1333, 1340–41 (S.D. Fla. 2014).

[171] Magee Twitter, *supra* note 1.

[172] *Id.*

[173] *Id.*

is a lesson that can be adopted by the TTB and producers when it comes to COLAs and safe harbor. Ultimately, the purpose of the FAA Act is to serve the public—to help inform the *public* of plethora of products in the beer, wine, and spirits industry. When the public is informed, the public can make choices and purchases that help the alcoholic beverage industry thrive even more. We are in a "golden age" of beer, wine, and spirits,[174] and when the courts, the TTB, the producers, and the public ensure that the purpose of the FAA Act is being realized, this "golden age" is going to get even better.

[174] Kanach & Christopherson, *supra* note 7.