



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2013**

ON THE FOLLOWING MEASURE:

H.B. NO. 1126, H.D. 1, RELATING TO ADVERTISING AND MARKETING.

BEFORE THE:

HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

DATE: Monday, February 25, 2013 **TIME:** 2:30 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): David M. Louie, Attorney General, or
Margaret S. Ahn, Deputy Attorney General

Chair McKelvey and Members of the Committee:

The Department of the Attorney General provides the following comments regarding constitutional issues in this bill.

This bill regulates the labeling of beer sold or distributed in the State, if “Hawaii,” “Hawaiian,” or “any geographical area within Hawaii,” or “any Hawaiian word or statement, design, symbol, or device” appears on the label that “tends to create the impression that the beer was produced in the place or region other than that of actual production.” This bill further mandates that beer sold or distributed in the State that is labeled with “any Hawaiian brand name or adjective, Hawaiian word or statement, design, or device” shall also be labeled with the name of the bottler and place where the beer was bottled or canned. This bill further prohibits the use of any appellation of origin on a beer label unless at least seventy-five percent of the beer’s volume is derived from fruit or agricultural products grown and fermented in the region, the beer is fully produced and finished within the region, and the beer conforms to the requirements of the region.

First, article III, section 14, of the Hawaii State Constitution provides that each law shall embrace but one subject, which shall be expressed in its title. This bill—Relating to Advertising and Marketing—could be challenged on the grounds that its title does not embrace just one subject.

Second, this bill may also be challenged under the First Amendment and Commerce Clause of the United States Constitution. Product labeling constitutes commercial speech subject to the protections of the First Amendment. Under a First Amendment challenge, the court would examine whether the labeling the State seeks to regulate is inherently likely to deceive or has in

fact been deceptive. If the State is unable to prove this, and the labeling is only “potentially misleading,” then the State would be required to prove that its governmental interest in regulating the labeling is substantial, that the interest is directly advanced by the regulations, and that the regulations are not more extensive than necessary. Bronco Wine Co. v. Jolly, 129 Cal. App. 4th 988, 1004 (2005), *cert. denied*, 546 U.S. 1150 (2006). Furthermore, this burden of proof would not be satisfied by “mere speculation or conjecture.” The State would be required to “demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree.” Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995) (regulation prohibiting beer labels from displaying alcohol content with the purpose of suppressing strength wars found to be a violation of the First Amendment). This bill lacks findings and evidence to this end. If such evidence exists, then verifiable references to the evidence that shows the real and substantial harm to the State that will be directly and materially alleviated by these regulations should be inserted into the bill.

As this bill regulates all beer sold or distributed in the State without regard to where it is manufactured, it will affect interstate commerce, and under a Commerce Clause challenge, the court would examine whether the burden on interstate commerce is excessive in relation to the State’s interests that are furthered by the regulations. Bronco Wine Co., 129 Cal. App. 4th at 1022. Again, this bill lacks findings and evidence with respect to what the State’s interests are and how they will be furthered. Verifiable references to evidence that shows the state interests furthered by these regulations should be inserted into the bill. We are particularly concerned that the last section on page 3 of the bill regulating the use of any appellation of origin on beer labels would likely be found to be unconstitutional. We therefore respectfully recommend that this section be deleted.

Finally, the terms “Hawaiian design, symbol, or device” are vague and should be defined.



MAUI BREWING CO.

19 February 2013

State of Hawaii
Committee on Consumer Protection & Commerce
Rep. Angus L. K. McKelvey, Chair
Rep. Derek S.K. Kawakami, Vice Chair

Re: STRONG SUPPORT, HB1126, Relating to Advertising and Marketing

Aloha Senators, I appreciate you taking the time to review this very important measure. My name is Garrett W. Marrero. I am the Founder and President of Maui Brewing Co. I started this company in 2005 with my wife, Melanie, with the main goal of making authentic Hawaiian craft beer. Our first year we brewed approximately 320 barrels of beer in Lahaina, this past year we produced more than 19,000 barrels. We are Hawaii's largest craft brewery.

This bill will protect Hawaiian manufacturing. Although there is an extremely high cost to produce in Hawaii we, as do many others, believe that a product marketed should be true to what it says it is. We have an enormous fan base here and abroad that support us for our innovation and further for our commitment to our local community. We simply will not put a product in the market and try to pass it off as local if it was not brewed here.

Maui Brewing Co. currently has more than 60 employees, 100% of our team in Hawaii. We provide comprehensive healthcare, as well as full matching 401k and profit sharing to our team. We are a Hawaii corporation established in 2004, created here, based here, always have brewed here, always will brew here. We are committed to sustainability and to our community. We are distributed in 11 States, 5 countries and sold more than 19,000 barrels of beer last year. We are a true Craft Brewery, as defined by the Brewers Association, a national trade organization. We are the leader in Hawaiian produced beer sales in Hawaii. I, myself, travel personally to all our markets and host tastings, promotions, beer dinners, and general events. These activities directly promote Hawaii in every way. We've been featured on several news and television shows promoting our products and the great things Hawaii has to offer.

Maui Brewing Co. is a leader in supporting local agriculture and manufacturing. We primarily use locally raised vegetables and greens at our brewpub, we exclusively serve locally raised beef, we make our own root beer from local cane, honey and even big island vanilla. Many of our beer styles use local ingredients as well, Breadfruit, Guava, Mango, Tangerine, Ginger, Coffee, Chocolate, KonaRed coffee fruit and even Maui Onions to name just a few. We purchase 100% of our aluminum cans from Ball Corp, in Kapolei, where the cans are manufactured.

HANDCRAFTED ALES & LAGERS BREWED WITH ALOHA
910 HONDAPILANI HWY #55, LAHAINA, MAUI, HI 96761
877.628.4273 • 808.669.0191 FAX

Although Malt and Hops must be shipped in, the same for nearly ALL breweries around the world, this in no way detracts from what makes an authentic Hawaiian beer. Our competitors, producing an overwhelming majority of their beer in the mainland, would have you believe that it is not environmentally responsible to brew locally and export. I'd ask, why then do they brew foreign and import? We have proven that responsible manufacturing can be successful in Hawaii!

We believe that the same protection offered to other Hawaiian products like coffee and koa, etc., be given to protect the appellation that is "Hawaii" or "Hawaiian", to all authentic local products. We, as a State, are proud; This pride deserves to be protected against profiteering by marketers of products that merely "look" local.

I would encourage you to also consider that some breweries that brew "Hawaiian Themed" beer in the mainland do in fact label the true origins. It is a good choice to demonstrate integrity and true origin.

Keep in mind that even Kona Brewing Co., strong opponents of this bill for obvious reasons, has complied with legislation in other States demanding a true origin statement. I've attached a copy of a compliant Kona label, similar to what HB1126 would require. It is not a matter of "can" they put a statement of origin on the label, it is do they "want" to? We believe this is to conceal the truth behind the product image. Texas is one of the States that requires the origin statement as a protection to consumers, we should do the same in Hawaii. It protects consumers and allows them to choose a product based on accurate information AND protects the proud appellation of "Hawaii". If Kona can label accurately in Texas, they can label accurately in Hawaii.

Further, the single opposition to this bill is the one that we believe most misrepresents its origins, however in any testimony has yet to declare just why they do not wish labeling to be required. I think the answer is simple. HB1126 protects consumers, small business, and manufacturing jobs in Hawaii by protecting the appellation that is "Hawaii".

In Craft Beer we share a belief that what we do is about integrity, innovation, and having a "sense of place". We want to protect our home, our State, and our economy from confusing marketing practices that serve to discount the value of true locally made products.

Mahalo,



Garrett W. Marrero

Founder

808.280.4687

G@MauiBrewingCo.com



February 24, 2013

HB1126 : OPPOSITION

Dear Chair Mckelvey, Chair, Vice Chair Kawakami and distinguished members of the Committee on Consumer Protection & Commerce.

My name is Mattson Davis and I'm the President of Kona Brewing Company and live in Kailua-Kona, HI. I OPPOSE HB1126.

In 1997 I was asked to move and manage a small struggling brewery in Kailua-Kona. The Kona Brewing Co. My job was to run the brewery, open a restaurant/pub and get the company profitable and sustainable. Annual sales were less than \$1M.

The first thing I realized was the fragile nature of the islands environment and the extreme cost of manufacturing in Hawaii. This has challenged our exceptional team of employees for over 19 years and they've done well, supported by the community and the consumer- local and visiting. We've created a successful and stainable business model that respects Hawaii; it's residents and the visitors.

Beer; brand names. The Tax Trade Bureau of the Federal government requires that a brewer either put his primary place of business or the locations where the beer is produced. In 2012 we modified our label to list all 4 locations where we brew instead of the primary place of business. Our goal was to be transparent and make all the labels the same – The label of ours that's been called out -found in Texas - was changed in March of 2012 with the rest of them.

Beer; name and address of bottler. Our beer is not brewed by any other bottler- we own all the breweries where are beer is brewed- Kona, HI- Woodinville, WA- Portland, OR- Portsmouth, NH.

Beer; appellation of origin. Beer is made from Malt, Hops, Yeast and Water, with water being the largest part in VOLUME and less than 1% the COST. In Hawaii- all Malt, Hops and Yeast are imported. Water is not, however it's a very limited resource – The USDA has declared many areas

of Hawaii to be in a DROUGHT- Water isn't considered a Agricultural Product in the State of Hawaii and doesn't qualify as a Local Product .

By Volume	Approximate %	By Cost	Approximate %
Water	93	Water	1
Ethanol	4		
Complex carbs (unfermentables)	3		
Protein	0.5		
Hops Extract	0.0026		
Yeast	<.001	Yeast	4
		Malt	82
		Hops	13

We use many Hawaiian grown items to enhance our specialty beers: Lilikoi, Cacao, Vanilla, Ginger, Coffee (7,000 lbs last year) and Citrus to name a few- but these are less than .2% of the total ingredients used to make beer.

Electricity is what's left- - 90% of which in Hawaii is made from fossil fuels – oil that that- shipped in.

How does this comprise being an appellation like Napa, Sonoma, Bordeaux or Parma?

I believe that the Attorney Generals office has several concerns with this part of the bill as well.

Some Facts about Kona Brewing Co:

Our Company:

- Kona Brewing Co. was established in HI in 1994
- We are a Hawaiian LLC - our headquarters is in Kailua-Kona, HI.
- Kona Brewing Co has 175 employees in Hawaii
- Our annual payroll was \$4.4M in 2012 up 23% from 2010.
- Annual Sales in Hawaii in 2012 were over \$ 24M
- Our Hawaii Beer Excise tax in 2012 was over \$1.1M up 27% vs. 2010

Our Commitment:

- We are leaders in sustainability- one of the first companies in HI to have a Sustainability Coordinator in 2005.
- In 2010 we installed a 229kw solar system that provides our brewery and pub in Kona with 50% of our power needs.
- We divert over 80% of our total waste-
- By using bulk grain instead of bagged- we are saving 2 Olympic size swimming pools of trash.
- In 2012 we won the Hawaii Green Business.
- Our Kona Pub is a 4 Star Green Restaurant Association and our Pub on Oahu is 3 star- the only 2 GRA restaurants in the state.

- We were the first commercial business on the west side of Hawaii to have recycle pick up
- We support numerous Hawaiian Environmental Organizations like- Malama Muanalua, Surf Rider, Kokua Foundation, Duke Kahanamoku Foundation and many many more.... Donating over \$300K in 2012. We believe in paying forward.
- We founded the Kona Brewers Festival to celebrate our anniversary in 1995 and have raised over \$600K, this years event sold out in 72 hours and is estimated to raise over \$100K for educational and environmental causes.
- Through our manufacturing practices we save over 2.5 million car miles a year.
- **Our Journey:**
- We are now distributed in 35 states and 15 countries.
- We've grown to be a top 10 national craft brewer- by comparison- Sam Adams is #1
- We are the leader in craft beer sales in Hawaii-
- We promote Hawaii everywhere we're sold- I just returned from a 14 day 5 state tour where I had 27 media interviews-
- As of last week we've brewed over 140,000 bbls (2,000,000 cases) of beer in Kona, HI.
- We glorify Hawaii wherever we go. In January we captured 368 MILLION IMPRESSIONS through the introduction of our product in the Midwest.

Question- why is this bill written for beer only? Why not wine and spirits or the rest of the market? Do you recognize the fragile balance of Hawaii's environment? Is manufacturing an industry we want to encourage with our limited resources and high cost of shipping?

This is merely competition manipulating the legislature to gain a competitive advantage.

Sincerely,

Mattson C. Davis
 President
 Kona Brewing Co.



Thomas Kerns
Big Island Brewhaus
64-1066 Mamalahoa Hwy.
Kamuela, Big Island
Hawaii, 96743
BigIslandBrewhaus@Yahoo.com
808-276-3301

Aloha Honorable Legislators,

I am writing in support of HB 1126; a bill that deems to take confusion out of the marketplace of beer industry labeling. We feel that if a beer is to be considered "Hawaiian" that it must indeed be brewed and packaged 100% in the State of Hawaii. The common practice of brewing elsewhere by a brewer of Hawaiian origin or otherwise and then labeling said beer without indication of actual origin of manufacture can and does promote confusion to consumers as to its actual origin. Consumers actually value locally made products for several reasons including: supporting local businesses and families, quality and freshness versus a product made more than 2,000 miles away and then shipped potentially compromising quality or character of a food or agricultural product. The challenge is similar with other agricultural as well as locally made products.

The value of creating a product locally using many local resources including but not limited to water, power, shipping, agriculture, and other related Hawaiian businesses costs more and yet supports the State's economy in a broad way. A company that is allowed to create a product posing as locally made when not in fact made locally can save the inherent higher costs of local production while selling a product that is actually not "Hawaiian" and does not support the economy of the State in the same manner a locally brewed beer does. A label requiring actual origin of brewing/production and packaging should be required to help preserve the appellation of "Made in Hawaii" and encourage a quality based Hawaiian brewing industry to continue to flourish. Craft beer consumers are discriminating enough to want to read the labels for this type of information. If "truthful origin labeling" is not required integrity suffers and consumers will be denied access to truthful, valuable information about the product.

Thank-you for your support,
Sincerely,

Thomas Kerns
Big Island Brewhaus
64-1066 Mamalahoa Hwy.
Kamuela, Big Island
Hawaii, 96743
BigIslandBrewhaus@Yahoo.com
808-276-3301

kawakami2 - Rise

From: mailinglist@capitol.hawaii.gov
Sent: Friday, February 22, 2013 9:55 AM
To: CPCtestimony
Cc: steinjustin@gmail.com
Subject: Submitted testimony for HB1126 on Feb 25, 2013 14:30PM

HB1126

Submitted on: 2/22/2013

Testimony for CPC on Feb 25, 2013 14:30PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Justin Stein	Individual	Support	No

Comments: Aloha Honorable Legislators, I am writing in support of HB 1126; a bill that deems to take confusion out of the marketplace of beer industry labeling. I feel that if a beer is to be considered "Hawaiian" that it must indeed be brewed and packaged 100% in the State of Hawaii. The common practice of brewing elsewhere by a brewer of Hawaiian origin or otherwise and then labeling said beer without indication of actual origin of manufacture can and does promote confusion to consumers as to its actual origin. Consumers actually value locally made products for several reasons including: supporting local businesses and families, quality and freshness versus a product made more than 2,000 miles away and then shipped potentially compromising quality or character of a food or agricultural product. The challenge is similar with other agricultural as well as locally made products. The value of creating a product locally using many local resources including but not limited to water, power, shipping, agriculture, and other related Hawaiian businesses costs more and yet supports the State's economy in a broad way. A company that is allowed to create a product posing as locally made when not in fact made locally can save the inherent higher costs of local production while selling a product that is actually not "Hawaiian" and does not support the economy of the State in the same manner a locally brewed beer does. A label requiring actual origin of brewing/production and packaging should be required to help preserve the appellation of "Made in Hawaii" and encourage a quality based Hawaiian brewing industry to continue to flourish. Craft beer consumers are discriminating enough to want to read the labels for this type of information. If "truthful origin labeling" is not required integrity suffers and consumers will be denied access to truthful, valuable information about the product. Thank-you for your support, Sincerely, Justin Stein

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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kawakami2 - Rise

From: mailinglist@capitol.hawaii.gov
Sent: Friday, February 22, 2013 10:15 AM
To: CPCtestimony
Cc: palolo.tom@gmail.com
Subject: Submitted testimony for HB1126 on Feb 25, 2013 14:30PM

HB1126

Submitted on: 2/22/2013

Testimony for CPC on Feb 25, 2013 14:30PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Tom Eisen	Individual	Support	No

Comments: Let's not dilute our world-renown Hawaiian brand; any product that purports to be Hawaiian, needs to clearly and accurately state on the label that it was, in fact, made in Hawaii. 'Nuff said!

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Aloha:

I write to support passage of HB 1126, the “truth in labeling” bill that tries to clarify through accurate labeling the true place of manufacturing of a Hawaiian-made beer. If a beer is to be considered "Hawaiian," it should be brewed and packaged 100% in the State of Hawaii. Large manufacturers are brewing and bottling their beer at a lower cost on the mainland, then shipping it to Hawaii and still claiming on the label that it is made in Hawaii. This does a disservice to those beer brewers and bottlers that are spending the extra time, resources, and money to manufacture their beer using local labor and inputs, and trying to guarantee a fresh, high quality, local product on the shelves. It also puts them at a competitive disadvantage. It also does a disservice to those beer buyers who are looking to buy truly Hawaiian products, and trying to support local products and businesses. It seems only fair that if beer is to be labeled Hawaiian beer, it should be actually made in Hawaii.

Thank you for the opportunity to support this bill.

Mich Parke

kawakami2 - Rise

From: Doug Lamerson [doug.lamerson@gmail.com]
Sent: Friday, February 22, 2013 10:32 AM
To: CPCtestimony
Subject: HB 1126 HD1 STRONG SUPPORT

Aloha Representatives,

I am a 35-year resident of Hawai'i, employed in the education and research sector. In recent years it has been my distinct pleasure to observe and support the emergence of a "Made in Hawai'i business ethos. This trend is heartening for reasons both economical and psychological. The economic benefits deriving from enterprises that seek to optimize both human and natural local resources are self-evident. Perhaps less obvious is the pride and confidence the success of these efforts instills in our Island community. For too long time Hawai'i has found it necessary to define itself in relation to the continent. Now, however, a new generation of creative and entrepreneurial talent is increasingly giving fuller voice to a distinctive, unique Hawai'i identity. This trend should be encouraged and supported. Unfortunately, this positive direction is undermined when misrepresentations of what is genuinely the product of our Islands are permitted to persist and even flourish.

Such is the case with our fledgling brewing industry. It is a regrettable fact that millions of beer drinkers in Hawai'i and the mainland are under the reasonable impression that the high visibility, Hawaii-branded beer they purchase originates in our tropical islands when, in fact, it is actually brewed in the distinctly un-tropical Northwest or New England. The profits from these sales accrue to a mainland corporation. It is incumbent upon lawmakers to protect the viability and integrity of what it means to be made in Hawai'i. I urge you to support the efforts of our local entrepreneurs who are truly invested in the well-being of our Island community by insuring that others are not permitted to cheapen those efforts through misleading representations. **Please support HB 1126 HD 1.**

Mahalo,

Doug Lamerson
Manoa

Aloha Honorable Legislators,

I am writing in strong support of HB 1126 HD 1; a bill that will support efforts to take confusion out of the marketplace of beer industry labeling. I feel that if a beer is to be considered "Hawaiian" that it must indeed be brewed and packaged 100% in the State of Hawaii. The increasingly common practice of brewing elsewhere by a brewer of Hawaiian origin or otherwise and then labeling said beer without indication of actual origin of manufacture can and does promote confusion to consumers as to its actual origin. Consumers actually value locally made products for several reasons including: supporting local businesses and families, quality and freshness versus a product made more than 2,000 miles away and then shipped potentially compromising quality or character of a food or agricultural product. The challenge is similar with other agricultural as well as locally made products.

The value of creating a product locally using many local resources including but not limited to water, power, shipping, agriculture, and other related Hawaiian businesses costs more and yet supports the State's economy in a broad way. A company that is allowed to create a product posing as locally made when not in fact made locally can save the inherent higher costs of local production while selling a product that is actually not "Hawaiian" and does not support the economy of the State in the same manner a locally brewed beer does. A label requiring actual origin of brewing/production and packaging should be required to help preserve the appellation of "Made in Hawaii" and encourage a quality based Hawaiian brewing industry to continue to flourish. Craft beer consumers are discriminating enough to want to read the labels for this type of information. If "truthful origin labeling" is not required integrity suffers and consumers will be denied access to truthful, valuable information about the product.

Mahalo for your support,

James Bayley