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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MARY SWEARINGEN and ROBERT E. FIGY, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

SANTA CRUZ NATURAL, INC.,

Defendant.

Case No. 3:13-cv-04291-SI

PLAINTIFFS' NOTICE OF MOTION AND MOTION TO ALTER OR AMEND JUDGMENT AND/OR FOR RELIEF FROM JUDGMENT

Hearing Date:	June 27, 2014
Time:	9:00 a.m.
Courtroom:	10
Judge:	Hon. Susan Illston
Action Filed:	August 16, 2013

.

NOTICE OF MOTION AND MOTION

TO DEFENDANT AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on June 27, 2014 at 9:00 a.m., or as soon thereafter as may be heard, in Courtroom 10 of this Court, located at 19th Floor, 450 Golden Gate Avenue, San Francisco, California 94102, before the Honorable Susan Y. Illston, Plaintiffs Mary Swearingen and Robert E. Figy will and hereby move the Court for an order vacating the final judgment in this case and reverse its decision to dismiss Plaintiffs' claims under the primary jurisdiction doctrine and to resume proceedings, or, in the alternative, to stay rather than dismiss the case if the Court concludes that the primary jurisdiction should apply.

This motion is made pursuant to Federal Rules of Civil Procedure 59(e) and 60 (b), and is based on the following grounds:

(1) The Court erred in ruling that the primary jurisdiction doctrine applies to Plaintiffs' claims because whether it is legal under California's Sherman Law to use the term "evaporated cane juice" to describe sugar on food ingredient lists is neither an issue of first impression with the FDA nor a particularly complicated question that Congress has committed to the FDA or requiring the FDA's expertise. The court further erred in disregarding the FDA's long established position that the use of "evaporated cane juice" on food labels is illegal, and in giving essentially preemptive effect to an anticipated FDA finding that would not be legally binding and would be entitled to the same level of deference as the FDA's prior pronouncements only to the extent that it is consistent with those prior pronouncements. Under the circumstances of this case, it was clear error and manifestly unjust to dismiss Plaintiffs' claims under the primary jurisdiction doctrine.

(2) Even if the primary jurisdiction were properly applicable to Plaintiffs' claims, it would be an abuse of discretion to dismiss Plaintiffs' claims rather than stay them for two independent reasons. First, dismissal is improper where there is a danger that the plaintiffs could suffer prejudice due to the action of statutes of limitations. Second, it is also improper to dismiss rather than stay where, as here, further judicial proceedings are contemplated after the administrative agency renders its decision. Under the circumstances of this case, it was clear error and manifestly unjust to dismiss Plaintiffs' claims, even if without prejudice.

For these reasons Plaintiffs respectfully move the Court to vacate the final judgment entered in this case and reinstate this case. Plaintiffs request that the Court reconsider and reverse its decision to apply the primary jurisdiction to this case and vacate the order granting Defendant's motion to dismiss, or, in the alternative, if the Court remains of the opinion that the doctrine should apply, to stay the case rather than dismiss.

DATED: April 30, 2014

Respectfully submitted,

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STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Court's decision to apply the primary jurisdiction doctrine constituted clear error or was manifestly unjust.

2. If the primary jurisdiction applies, whether the Court's decision to dismiss rather than stay Plaintiffs' claims constituted clear error or was manifestly unjust.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs Mary Swearingen and Robert E. Figy, individually and on behalf of all others similarly situated, bring this motion pursuant to Rule 59(e) and/or Rule 60(b) Federal Rules of Civil Procedure, and respectfully request that the Court reconsider[1] its decision to dismiss this case pursuant to the primary jurisdiction doctrine.

I. Introduction

Plaintiffs filed this case individually and on behalf of all others similarly situated, alleging various causes of action revolving around Defendant's illegal use of the term "evaporated cane juice" ("ECJ") in the ingredient list on its food labels. *See* First Amended Complaint ("FAC"), Dkt. 23. Defendant filed a motion to dismiss listing seventeen separate issues, the seventh of which was: "Whether the Court should defer to the primary jurisdiction of the federal Food and Drug Administration ("FDA")." *See* Dkt. 24 at 3 of 35. The primary jurisdiction issue is one that had been raised in a number of other cases making similar ECJ claims, and had been rejected with near unanimity. After Plaintiffs filed their response, the FDA issued a notice that it was reopening the comment period on its 2009 Draft Guidance on ECJ. *See Draft Guidance for Industry on Ingredients Declared as Evaporated Cane Juice; Reopening of Comment Period; Request for Comments, Data, and Information*,

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[1] This is *not* a motion for reconsideration under Civil Local Rule 7-9, which applies only to interlocutory orders. *See Yanting Zhang v. Safeco Ins. Co. of Am., Inc.*, No. C 12-1430 CW, 2013 U.S. Dist. LEXIS 162545 at *3-5 (N.D. Cal. Nov. 14, 2013) (relief under Local Rule 7-9 not available after entry of judgment; relief must be sought under FRCP 59 or 60). Because Local Rule 7-9 does not apply to post-judgment motions, neither does its requirement of a motion for leave. *See id.* "As the Rule's plain text makes clear, Rule 7-9 applies to motions seeking reconsideration of interlocutory orders. The Rule does not apply after the Court has entered final judgment." *Johnson v. CFS II, Inc.*, No.: 12-CV-01091-LHK, 2013 U.S. Dist. LEXIS 178542 at *3 (N.D. Cal. Dec. 19, 2013); *see also, e.g.*, *Nidec Corp. v. Victor Co. of Japan*, No. C 05-0686 SBA, 2007 U.S. Dist. LEXIS 86414 at *8 (N.D. Cal. Nov. 16, 2007) ("As is clear from the plain language of the rule, Local Rule 7-9 applies to interlocutory orders, and does not apply to final judgments."); *Carr v. Allied Waste Sys. of Alameda*, No. C 10-0715 PJH, 2011 U.S. Dist. LEXIS 108483 at *1-2 (N.D. Cal. Sept. 21, 2011) (observing that Local Rule 7-9 applied to motions for reconsideration filed before a final judgment is entered, and Rule 59(e) and 60(b) control after a final judgment has been entered). In particular, Local Rule 7-9's requirement of a motion for leave does not apply to post-judgment motions. *Lucas v. Silva*, No. C 07-1673 CW (PR), 2012 U.S. Dist. LEXIS 30886 (N.D. Cal. Mar. 8, 2012) ("Defendants oppose Plaintiff's motion on the ground that Plaintiff did not obtain Court permission to file a motion for reconsideration in accordance with the Northern District's Civil Local Rule 7-9(a). Because Rule 7-9(a) only applies to pre-judgment motions for reconsideration, however, it is not applicable herein.")

79 Fed. Reg. 12507 (March 5, 2014) ("Notice"). Defendant argued in its reply brief essentially that the Notice rendered all of the prior ECJ primary jurisdiction decisions obsolete (save for the one outlier that it vindicated). *See* Dkt. 33. Shortly thereafter, the Court cancelled the scheduled hearing and entered an order dismissing Plaintiffs' claims without prejudice under the primary jurisdiction doctrine. *See* Dkt. 37. Plaintiffs were not afforded the opportunity to address the Notice in this case, although the Court did consider a supplemental brief filed by Plaintiff Figy in another case.

In granting Defendant's motion to dismiss, the Court said the Notice states that "the FDA has not resolved the issue of whether ECJ is the common or usual name of the ingredient at issue and that the FDA is engaged in active rulemaking on the issue." Dkt. 37 at 5. In fact, the FDA is not engaged in rulemaking at all with respect to ECJ, and its final guidance document will be no more binding that the draft. Further, the Court erred in disregarding the fact that the FDA has consistently maintained for at least 14 years that the use of the term ECJ on food labels is illegal, and essentially treating the issue as a matter of first impression merely because boilerplate disclaimers state that the 2009 Draft Guidance is not final.

Moreover, the Court's decision appears to be premised on the incorrect assumption that a reversal of the FDA's longstanding position would be entitled to some preemptive effect and would retroactively nullify the FDA's previous position. The FDA has said nothing that indicates that it is planning to reverse itself and suddenly bless the use of ECJ to describe the particular type of sugar Defendant adds to its products (nor is there any way the FDA could do so and still stay true to the regulations). No matter what the FDA might say in a final guidance document, dismissal of Plaintiffs' claims was improper.

But even if the primary jurisdiction doctrine were properly applicable to the claims alleged in the FAC the Court's decision to dismiss rather than stay is an abuse of discretion where, as here, there is a danger that the plaintiffs could suffer prejudice due to the action of statutes of limitations. It is also an abuse of discretion to dismiss rather than stay where, as here, further judicial proceedings are contemplated after the administrative agency renders its decision. Under the circumstances of this case, it was clear error to dismiss Plaintiffs' claims, even if without prejudice.

II. Statement of Facts

The facts supporting Plaintiff's motion are set out in the FAC and Plaintiffs' prior briefing in opposition to the motion to dismiss.

III. Legal Standard

A. Rule 59(e)

District courts have the power to "alter or amend" a judgment by motion under Rule 59(e). FED. R. CIV. P. 59(e). Rule 59(e) provides an efficient mechanism by which the trial court can correct otherwise erroneous judgment without implicating the appellate process. *Clipper Express v. Rocky Mt. Motor Traffic Bureau*, 674 F.2d 1252, 1260 (9th Cir. 1982). "Since specific grounds for a motion to amend or alter are not listed in the rule, the district court enjoys considerable discretion in granting or denying the motion." *McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999) (en banc) (per curiam) (internal quotation marks omitted). "Rule 59(e) amendments are appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Dixon v. Wallowa County*, 336 F.3d 1013, 1022 (9th Cir. 2003) (internal quotation marks omitted).

B. Rule 60(b)

Rule 60(b) allows a party to seek reconsideration of a "final judgment, order, or proceeding" when one of the following is shown: "(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged . . .; or (6) any other reason justifying relief." FED. R. CIV. P. 60(b).

Under Rule 60(b)(1), "mistake, inadvertence, surprise, or excusable neglect" are all recognized as grounds for relief from a final judgment. The "mistake" provision in Rule 60(b)(1) provides for the reconsideration of judgments where: (1) a party has made an excusable litigation mistake or an attorney in the litigation has acted without authority from a party; or (2) where the judge has made a substantive mistake of law or fact in the final judgment or order. *Cashner v. Freedom Stores, Inc.*, 98 F.3d

572, 576 (10th Cir. 1996). "Neglect" encompasses negligence and carelessness. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388-394 (1993) (word carries its ordinary, contemporary, common meaning). Whether a particular instance of neglect is "excusable" is an equitable determination.

In making the determination, a court must take account of all relevant circumstances, including (1) the danger of prejudice to the adverse party; (2) the length of any delay caused by the neglect and its effect on the proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the moving party; and (4) whether the moving party acted in good faith. *Id.* at 395 (interpreting "excusable neglect" in context of Bankruptcy Rule. 9006(b)(1), but analyzing term as used in other federal rules, including Rule 60(b)(1)); s*ee Canfield v. Van Atta Buick/GMC Truck, Inc.,* 127 F.3d 248, 249-250 (2d Cir. 1997) (*Pioneer* interpretation of "excusable neglect" applies to FED. R. CIV. P. 60(b)(1)). Relief under Rule 60(b)(1) is not limited to mistake or inadvertence by the movant, but also extends to legal errors in a court's orders. *See, e.g., Kingvision Pay-Per-View v. Lake Alice Bar*, 168 F.3d 347, 350 (9th Cir. 1999). Refusal to grant relief for clear legal error is abuse of discretion. *McDowell v. Calderon*, 197 F.3d at 1255 n.4.

Rule 60(b)(6) is a catch-all provision that is used sparingly as an equitable remedy to prevent manifest injustice. *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). It affords courts the discretion and power "to vacate judgments whenever such action is appropriate to accomplish justice." *Phelps v. Alameida*, 569 F.3d 1120, 1135 (9th Cir. 2009).

Rule 60(b) motions are addressed to the sound discretion of the district court. *Martella v. Marine Cooks & Stewards Union, Seafarers Int'l Union of N. Am., AFL-CIO*, 448 F.2d 729, 730 (9th Cir. 1971). Rule 60(b) motions should be liberally construed to see that cases are tried on the merits and to dispense with "technical procedural problems." *Rodgers v. Watt*, 722 F.2d 456, 459 (9th Cir. 1983).

IV. Argument and Authorities

A. Dismissal of Plaintiffs' claims under the primary jurisdiction doctrine would be clear error and an abuse of discretion.

"The primary jurisdiction doctrine allows courts to stay proceedings or to dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an

administrative agency. . . and is to be used only if a claim involves an issue of first impression or a particularly complicated issue Congress has committed to a regulatory agency." *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). Whether "evaporated cane juice" ("ECJ") is a legally permissible way to refer to the sugar Defendant adds to its products is neither a question of first impression with the FDA nor a particularly complicated issue.

As numerous courts in this district have recognized, given the FDA's long history with ECJ, the issue is not one of first impression. *See, e.g., Ross v. Clover Stornetta Farms*, No. C -13-01517 EDL, 2014 U.S. Dist. LEXIS 5408 at *37-39 (N.D. Cal. Jan. 14, 2014); *Werdebaugh v. Blue Diamond Growers*, No.: 12-CV-02724-LHK, 2013 U.S. Dist. LEXIS 144178 at *39 (N.D. Cal. Oct. 2, 2013). Reopening the comment period on the 2009 Draft Guidance did not change any of that. The FDA has never indicated that the use of ECJ on food labels is permissible under existing regulation, nor has it indicated that it plans to change that position in the future. Boilerplate language about the non-final nature of the 2009 Draft Guidance and speculation that the FDA *might* reverse itself when it finalized its ECJ guidance does not wipe out everything that the FDA has been saying for the past 14 years and somehow retroactively transform this into an issue of first impression.

In addition, this case does not involve a particularly complicated issue "within the special competence of an administrative agency." As Judge Koh observed in *Brazil v. Dole Food Co.*, 935 F. Supp. 2d 947 (N.D. Cal. 2013), evaluating whether a food label is misleading is not a "particularly complicated issue that Congress has committed to a regulatory agency." *Id.* at 960 (quoting *Brown v. MCI Worldcom Network Servs., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002)). As the Ninth Circuit noted in *MCI WorldCom*, the doctrine of primary jurisdiction "does not require that all claims within an agency's purview be decided by the agency." *Brown* 277 F.3d at 1172 (emphasis added). "Nor is it intended to 'secure expert advice' for the courts from regulatory agencies every time a court is presented with an issue conceivably within the agency's ambit." *Id.* Because this case does not involve an issue of first impression or involve issues "within the special competence of an administrative agency," the invocation of primary jurisdiction would violate the Ninth Circuit's holding in *Clark* that primary jurisdiction "is to be used only if a claim involves an issue of first impression or a particularly

complicated issue Congress has committed to a regulatory agency." *Clark*, 523 F.3d at 1114.

In determining that the primary jurisdiction doctrine should apply to this case, the Court acknowledged that Plaintiffs brought the FDA's history with ECJ to the Court's attention, but disregarded everything other than the non-final nature of the 2009 Draft Guidance and the reopening of the comment period. The Court's decision errs in giving short shrift to the numerous pronouncements by the FDA on the illegality of the use of ECJ on food ingredient lists going back to the 2000 Guidance Letter (which had no disclaimer indicating that it was non-final or merely preliminary) and the numerous warning letters that the FDA sent out both before and after the 2009 Draft Guidance was issued (which are issued only on matters that the FDA considers to be of regulatory significance). *See* FAC Dkt. 23 at ¶¶ 51-53. Moreover, even the notice of the 2009 Draft Guidance published in the Federal Register ("2009 Notice") demonstrates that, regardless of any disclaimers about the non-final nature of 2009 Draft Guidance, the FDA's current policy at the time the guidance was issued was that the use of ECJ was illegal. For instance, the 2009 Notice states:

> The intent of this draft guidance is to advise industry of FDA's view that the common or usual name for the solid or dried form of sugar cane syrup is "dried cane syrup," and that sweeteners derived from sugar cane syrup should not be declared on food labels as "evaporated cane juice" because that term falsely suggests that the sweeteners are juice.
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> * * *
>
> FDA's current policy is that sweeteners derived from sugar cane syrup should not be declared as "evaporated cane juice" because that term falsely suggests that the sweeteners are juice as defined in 21 CFR 120.1(a).

Draft Guidance for Industry: Ingredients Declared as Evaporated Cane Juice; Availability (Notice), 74 Fed. Reg. 51610 (Oct. 7, 2009).

The Court's decision to disregard everything other than the non-final nature of the 2009 Draft Guidance and the reopening of the comment period appears to be tied to the Court's conclusion that "the FDA is engaged in active rulemaking on the issue." *See* Dkt 37 at 5. In reciting the legal standard, the Court also cited an agency's involvement in "formal rulemaking procedures" as a justification for invoking the primary jurisdiction doctrine. Dkt 37 at 3. Producing guidance documents is not the same as formal rulemaking.

FDA guidance documents are not the equivalent of rules or regulations, and they are not entitled to preemptive effect. *See, e.g., Koenig v. Boulder Brands, Inc.*, No. 13-CV-1186 (ER), 2014 U.S. Dist. LEXIS 12629 at *27 (S.D.N.Y. Jan. 29, 2014) ("As it is non-binding guidance, the FDA's Compliance Policy Guide 'is not entitled to preemptive effect.'" (quoting *In re Frito-Lay North Amer., Inc. All Natural Litig.*, No. 12 MD 2413 (RRM) (RLM), 2013 U.S. Dist. LEXIS 123824 at *32 (E.D.N.Y. 2013) (holding that FDA's nonbinding guidance on "natural" not entitled to preemptive effect)); *Hitt v. Ariz. Beverage Co., LLC*, No. 08-CV-809, 2009 U.S. Dist. LEXIS 109702 at *2-5 (S.D. Cal. Nov. 24, 2009) (no express and implied preemption based on FDA's non-binding "natural" guidance); *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 342 (3d Cir. 2009) ("We believe that neither the FDA policy statement regarding the use of the term 'natural' nor the FDA's letter indicating that some forms of [high fructose corn syrup] may be classified as 'natural' have the force of law required to preempt conflicting state law"" and rejecting obstacle preemption argument).

Guidance documents may be entitled to some level of deference. Courts ordinarily give deference to an agency's interpretation of its own ambiguous regulations brief. *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997); *I.N.S. v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189-90 (1991) ("an agency's reasonable, consistently held interpretation of its own regulation is entitled to deference"). However, *Auer* deference may not apply when the agency adopts a new interpretation that is inconsistent with its prior interpretation or when such deference would result in unfair surprise to one of the litigants. *Independent Training & Apprenticeship Program v. Cal. Dep't of Indus. Rels.*, 730 F.3d 1024, 1034-35(9th Cir. 2013). Thus, the FDA's longstanding position that the use of ECJ on food labels violates the common or usual name requirement or other applicable regulations would be entitled to deference, while an abrupt about-face may not. *See, e.g.*, *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due."); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991) ("As a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views."); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446, n. 30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier

interpretation is 'entitled to considerably less deference,' than a consistently held agency view." (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981))). As the Ninth Circuit put it: "We decline to afford controlling deference where an agency pulls the rug out from under litigants that have relied on a long-established, prior interpretation of a regulation…." *Independent Training & Apprenticeship Program v. Cal. Dep't of Indus. Rels.*, 730 F.3d at 1035.

In the case of ECJ, the FDA might reasonably back off of its suggestion that ECJ could be labeled as "dried cane syrup" if the FDA were to learn that it was mistaken about how ECJ is made,[2] but there is no way it could say that ECJ is legal for labels without doing serious violence to its longstanding interpretation of the regulations. No matter what the FDA might learn from the comments, the ingredient that Defendant calls ECJ is still not "juice" as the FDA has interpreted the term, and the term ECJ does not reveal the basic nature of the food and its characterizing properties (*i.e.*, that the ingredients are sugars or syrups)," as required under 21 C.F.R. § 102.5(a). Nothing the FDA might learn from the comments is going to change that, and a reversal by the FDA would not be worthy of serious consideration, much less controlling deference.

Invoking Primary Jurisdiction ignores the fact, recognized by other Courts and treatises that the ECJ claims at issue here are premised on settled, final enacted regulations that are not under

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[2] Nothing in the Notice indicates that the FDA is going to change its position on the illegality of the use of the term ECJ. At most, it indicates that the FDA might reconsider its suggestion in the 2009 Guidance that "dried cane syrup" might be an appropriate name for the ingredient. *See* Notice, 79 Fed. Reg. at 12508 (noting diversity of views on "dried cane syrup").

"Cane syrup" has an FDA standard of identity (21 C.F.R. § 168.130) that is separate from FDA's definition of sucrose. By definition, "cane sirup" (or "cane syrup") is "the liquid food derived by concentration and heat treatment of the juice of sugarcane (*Saccharum officinarum* L.) or by solution in water of sugarcane concrete made from such juice." 21 C.F.R. § 168.130(a). During the initial comment period on the 2009 Draft Guidance, various industry commentators asserted that "dried cane syrup" was not an appropriate name for ECJ because "cane sirup" is by definition a liquid, whereas the ingredient labeled as ECJ is not a liquid, and that ECJ does not go through a syrup phase. This adequately explains the FDA's request for information on how the ingredient is made. However, if these comments are well taken and "dried cane syrup" is not an appropriate name for the ingredient, that would leave only "sugar," or some variation thereof, as a permissible alternative. It would not change the FDA's determination that ECJ is misleading and violated the common or usual name requirement. If 21 C.F.R. § 168.130 is inapplicable, it would simply mean that this ingredient must be called "sugar." While the FDA's suggestion that "dried cane syrup" might be an appropriate way to disclose the ingredient Defendant calls ECJ on its labels may have been ill-considered, that does not amount even to a suggestion that ECJ would ever be acceptable.

reconsideration or in any state of flux such as 21 CFR § 101.4(b)(20) (mandating that sucrose obtained from the evaporation of cane juice be labeled as sugar). These include 21 CFR § 101.4 (mandating identification of ingredients by their common and usual name and the labeling of sucrose as sugar) and 21 CFR § 101.2.5 (detailing the guidelines for utilizing common and usual food names). These regulations have been held sufficient even absent the FDA guidance. *Samet v. Procter & Gamble Co.,* 2013 U.S. Dist. LEXIS 86432 at *28-29 (N.D. Cal. 2013) (rejecting primary jurisdiction for ECJ claims and stating "As alleged, Defendants' products contain "sugar," which should be cited by its "common or usual name" under the FDA regulations. This is sufficient to proceed no matter what final guidance may be issued by the agency.'); *Trazo v. Nestlé USA, Inc.*, 2013 U.S. Dist. LEXIS 113534 at *21-22, 29-30 (N.D. Cal. 2013) ("Plaintiffs allege that the term "evaporated cane juice" therefore should not be used in conjunction with any type of sweetener. These facts are sufficient to "nudge[]" Plaintiffs' claim that Nestlé's Buitoni Shrimp & Lobster Ravioli violated 21 C.F.R. § 102.5(d) "across the line from conceivable to plausible;" no more is required.").

Regarding the "evaporated cane juice" claim, Defendant more specifically argues that the primary jurisdiction should apply because the FDA does not currently have a final position on this issue, and is in the process of developing one. In 2009, the FDA issued a Draft Guidance on the use of the term "evaporated cane juice" specified the document was "nonbinding," "do[es] not establish legally enforceable responsibilities," and was circulated for the purpose of soliciting comments only. While it may be true that the FDA is developing a specific regulation on this issue, there is already an FDA regulation governing the use of evaporated cane juice as an ingredient. 21 C.F.R. 168.130 [sic] requires that "[t]he common or usual name of a food" shall be used to "identify or describe, in as simple and direct terms as possible, the basic nature of the food or its characterizing properties or ingredients." As alleged, Defendant's products contain "sugar," which should be cited by its "common or usual name" under the FDA regulations. This is sufficient to proceed no matter what final guidance may be issued by the agency. *Samet*, 2013 LEXIS 113534, at *28-29 (rejecting primary jurisdiction for ECJ claims).

Furthermore, Plaintiffs brought this suit for violations of California's Sherman Law, which has its own common or usual name requirement that is independent of the FDCA or any incorporated regulations. *See* CAL. HEALTH & SAF. CODE § 110725. This is a California state law that California courts and agencies are ultimately responsible to interpret and enforce. This law is consistent with the language of the federal regulations, and Plaintiffs' claims are consistent with the FDA's current interpretation of those regulations. To the extent the FDA might alter that interpretation in the future, neither it, nor federal courts, can preclude California from enforcing its own laws as they are currently worded and interpreted. By the same token, private parties cannot be precluded from seeking redress for violations of such state laws, to the extent otherwise permitted under state law.[3] The FDA has no regulatory authority over the Sherman Law provisions at issue in this case nor does it have any regulatory authority over the Plaintiffs' UCL or other state law claims. Thus, the factors identified in *Syntek Semiconductor Co. v. Microchip Tech., Inc.*, 307 F.3d 775, 781 (9th Cir. 2002), do not exist. Congress did not commit the interpretation of state law matters to the FDA and thus, under *Clark*, it is inappropriate to invoke primary jurisdiction. *See Lockwood v. Conagra Foods, Inc.*, 597 F. Supp. 2d 1028, 1035 (N.D. Cal. 2009) ("even if the FDA were to formally define 'natural,' federal law would not dispose of plaintiffs' state law [UCL] claims"). This was expressly recognized by the Court in *Trazo v. Nestlé USA, Inc.*, 2013 U.S. Dist. LEXIS 113534 at *21-22, 29-30 (N.D. Cal. 2013):

> By the same token, the court need not yield to the FDA under the doctrine of primary jurisdiction. The FDA does not enforce the California state rights Plaintiffs seek to vindicate. Further, courts in the Northern District of California have generally declined to dismiss the complaint on primary jurisdiction absent concrete evidence that the FDA is currently involved in creating a new regulation concerning the subject of the lawsuit.

Id. at *21-22 n. 55.

[3] Congress has explicitly stated that it does not intend to occupy the field of food and beverage labeling, based on the provisions of the Federal Food, Drug and Cosmetic Act (FDCA) as amended by the Nutrition Labeling and Education Act of 1990 (NLEA). *Lockwood v. Conagra Foods, Inc.*, 597 F. Supp. 2d 1028, 1032 (N.D. Cal. 2009). This is because the FDCA contemplates state regulation and enforcement along with federal regulation. *Id.* "[S]tate law claims [do] not … threaten the integrity of the FDA's regulatory scheme governing misbranded food and do not implicate technical and policy questions that are reserved for the FDA." *See Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 375 (N.D. Cal. 2010).

B. If the Court was correct in ruling that the primary jurisdiction is applicable, it would be clear error and an abuse of discretion to dismiss rather than stay Plaintiffs' claims

1. Where the statute of limitations may be an issue, or further judicial proceedings are contemplated, it is an abuse of discretion to dismiss rather than stay.

To the extent the primary jurisdiction is applicable at all, the only proper course in this case would be to stay, as Judge Gonzalez Rogers did in *Reese v. Odwalla, Inc.*, No.: 13-CV-947 YGR, 2014 U.S. Dist. LEXIS 40341 (N.D. Cal. Mar. 25, 2014), rather than to dismiss on primary jurisdiction. Assuming the Court was correct in applying the doctrine at all, the court still committed a clear error of law in dismissing Plaintiffs' claims rather than staying them, and the dismissal was manifestly unjust, either of which is grounds for a motion to alter or amend the judgment under Rule 59(e), and/or the result of "mistake, inadvertence, surprise or excusable neglect" or alternatively as "any other reason justifying relief" under Rule 60(b).

The Supreme Court has said that "[r]eferral of the issue to the administrative agency [under the primary jurisdiction doctrine] does not deprive the court of jurisdiction; it has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice." *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993); *Segal v. American Tel. & Tel.* Co., 606 F.2d 842, 845 (9th Cir. 1979) (observing that the proper remedy is to stay the action while the administrative proceedings are pending, unless dismissal would not prejudice the plaintiff's right to obtain relief at an appropriate time). The Supreme Court has also said that when there is a danger that the plaintiffs could suffer prejudice due to the action of statutes of limitations, courts should stay rather than dismiss. *See Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 223 (1966); *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 432-433 (1940); *Mitchell Coal Co. v. Pennsylvania R. Co.*, 230 U.S. 247 (1913); *Davel Communs., Inc. v. Qwest Corp.*, 460 F.3d 1075, 1091 (9th Cir. 2006) (reversing dismissal based on primary jurisdiction doctrine and remanding to determine whether stay was appropriate given potential limitations issues); *Western States Tel. Co. v. American Tel. & Tel. Co.*, No. CV 75-3737-F, 1977 U.S. Dist. LEXIS 15929 at *4-5 (C.D. Cal. 1977) ("The Supreme Court has clearly indicated that one reason a stay is preferable to dismissal in a case such as this is that the limitations period may run to a close during the course of an administrative referral under

primary jurisdiction principles.").

In this case, there is a strong likelihood that Plaintiffs would be unfairly disadvantaged by a dismissal rather than a stay due to the applicable statutes of limitations, which are as short as two years for some of the claims asserted in the FAC, and there is a strong likelihood that at least some portion of all of Plaintiffs' claims could be barred by limitations if Plaintiffs had to wait for the FDA to act and then restart this action with a new complaint. Furthermore, the class period alleged in the current complaint relates back to the filing of the September 16, 2013, filing date of the original Complaint. If Plaintiffs were required to start over with a new complaint, Plaintiffs and the Class would lose the benefit of the September 16, 2013 filing date, and Plaintiffs and the Class would almost certainly lose at least a year off the class period and possibly more.

Furthermore, while limitations would be tolled on absent class members' individual claims from the time the case was filed to the time it was dismissed under *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974), a number of courts have ruled that *American Pipe* tolling does not apply to class claims (*i.e.*, the ability to proceed as a class). *See, e.g., Andrews v. Orr,* 851 F.2d 146, 149 (6th Cir. 1988) (pendency of previously filed class action does not toll limitations period for additional class actions by putative members of original asserted class); *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994) (plaintiffs may not "piggyback" one class action onto another and thus toll statute of limitations indefinitely). Consequently, there is a significant danger that the class period could be shortened by a year or more, which would be a significant disadvantage to the class. Also, because Plaintiffs purchased multiple products during the "Class Period," *see* FAC, Dkt. 23 at ¶27, there is a danger that some of those purchases would be barred by limitations if the Class Period were shortened, because the case would be dismissed and then refiled at a later date. There is no deadline for the FDA to issue a final guidance document, and no mechanism for the Plaintiff or the Court to require the FDA to decide the matter promptly. Consequently, Plaintiff will lose at least some portion of some of his claims while waiting for a final decisions from the FDA (which may never come), and could potentially lose all his claims.

If the Court were to determine that the primary jurisdiction applies, Defendant would not be

unfairly disadvantaged in any way by maintaining the case on the Court's docket until the FDA issues its final guidance or some other event occurs that might cause a stay to be lifted. Plaintiffs and the Class, on the other hand, would be unfairly disadvantaged because dismissing the case would either deprive the Plaintiffs and the Class of some portion of the recovery sought in the FAC, or at least introduce statute of limitations issues that would unnecessarily complicate the case and result in increased expense and delay, even if the Plaintiffs successfully overcame those issues. Under such circumstances, it is an abuse of discretion to dismiss rather than to stay.

The potential prejudice to the Plaintiffs and the Class due to limitations issues is not the only reason that a dismissal would be inappropriate in this case. "[w]here the court suspends proceedings to give preliminary deference to an administrative agency but further judicial proceedings are contemplated, then jurisdiction should ordinarily be retained via a stay of proceedings, not relinquished via a dismissal." *Davel Communs., Inc. v. Qwest Corp.*, 460 F.3d 1075, 1091 (9th Cir. 2006). In fact, the Ninth Circuit has indicated that it would be an abuse of discretion to dismiss rather than stay when further judicial proceedings are contemplated. *See Northern Cal. Dist. Council of Hod Carriers, Bldg. & Constr. Laborers, AFL-CIO v. Opinski*, 673 F.2d 1074, 1076 (9th Cir. 1982) ("The district court exceeded its authority… when it dismissed the action without prejudice. Where a court suspends proceedings in order to give preliminary deference to an independent adjudicating body but further judicial proceedings are contemplated, then jurisdiction should be retained by a stay of proceedings, not relinquished by a dismissal."). In this case, the FDA will most likely stick with its longstanding position that the use of the term "evaporated cane juice" on food labels is illegal.

Because Plaintiffs and the Class would be prejudiced due to the statutes of limitations if the case is dismissed rather than stayed, dismissal is inappropriate. Moreover, because further judicial proceedings are contemplated once the FDA issues a final guidance document, it would be an abuse of discretion to dismiss rather than stay.

2. The Court can properly consider whether to stay rather than dismiss.

The "Statement of Issues to be Decided" in Defendant's motion to dismiss Plaintiffs' First Amended Complaint listed seventeen separate issues, the seventh of which was "Whether the Court

should defer to the primary jurisdiction of the federal Food and Drug Administration ("FDA")." *See* Dkt. 24 at 3 of 35. In the body of the memorandum, Defendant stated that when the primary jurisdiction doctrine applies, the court can stay or dismiss without prejudice, and although there was an assertion that the Court should dismiss the case, there was no discussion of when it is permissible to dismiss rather than stay, nor was there any substantial argument that a dismissal rather than a stay would be appropriate under the facts of the case. *See* Dkt. 24 at 30-32 of 35. The argument, both in Defendant's motion and Plaintiffs' response, focused on the applicability of the doctrine rather than on what action the Court should take if it were to determine that the doctrine should apply. Moreover, at the time Plaintiffs filed their response to Defendant's motion to dismiss, the cases in this district were nearly unanimous in ruling that the primary jurisdiction doctrine does not apply to Sherman Law ECJ claims, and the FDA had not yet issued the Notice reopening the comment period. In short, the issue did not appear to be one that required extensive briefing.

To the extent the Court might find that Plaintiffs should have raised the issue sooner, any failure would be attributable to mistake, inadvertence, surprise, or excusable neglect, and correctable under Rule 60(b)(1). Moreover, the Ninth Circuit has observed that "[e]rrors in the trial court may be most speedily corrected by the trial judge. Frequently a trial judge has had to rule on difficult questions under time pressures and without thorough briefing by the parties. A motion for reconsideration may, in some instances, avoid the necessity of an appeal." *United States v. Walker*, 601 F.2d 1051, 1058 (9th Cir. 1979). On appeal, the court "may consider an issue regardless of waiver if the issue is purely one of law and the opposing party will suffer no prejudice or if new issues have become relevant while the appeal was pending because of a change in the law." *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 886 (9th Cir. 2003) ("[W]e may consider an issue regardless of waiver if the issue is purely one of law and the opposing party will suffer no prejudice."); *United States v. Echavarria-Escobar*, 270 F.3d 1265, 1267-68 (9th Cir. 2001) (identifying these as two of four exceptions to the general rule of waiver).

Because the primary jurisdiction issue was decided in the context of a motion to dismiss, it is necessarily purely one of law. *See Davel Commc'ns, Inc. v. Quest Corp.*, 460 F.3d 1075, 1088 (9th Cir.

2006) (noting that the Rule 12(b)(6) standard governs a primary jurisdiction claim). And since the dismissal was without prejudice, there are no grounds on which Defendant could legitimately claim to be prejudiced if the Court were to stay rather than dismiss. Consequently, the purposes of Rule 59(e) would be served by considering the issue now. *See Clipper Express v. Rocky Mt. Motor Traffic Bureau*, 674 F.2d at 1260 ("Rule 59(e) provides an efficient mechanism by which a trial court judge can correct an otherwise erroneous judgment without implicating the appellate process.")

CONCLUSION AND PRAYER

For all the aforementioned reasons, Plaintiffs respectfully request that the Court grant their motion to alter or amend the judgment and/or for relief from judgment, that the Court vacate the final judgment entered in this case and the order granting Defendant's motion to dismiss, and resume proceedings. In the alternative, if the Court is unwilling to reconsider its decision on the applicability of the primary jurisdiction doctrine to Plaintiffs' claims, Plaintiffs request that the court vacate the final judgment and stay the proceedings (rather than dismiss) until the FDA issues its final guidance or such other time as it may seem reasonable to resume the proceedings. Plaintiffs further request that the Court grant Plaintiffs such other and further relief as the Court deems just and proper.

Dated: April 30, 2014

Respectfully submitted,

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MARY SWEARINGEN and ROBERT E. FIGY, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

SANTA CRUZ NATURAL, INC.,

Defendant.

Case No. 3:13-CV-04291-SI

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT AND/OR FOR RELIEF FROM JUDGMENT

Now before the Court is a motion by Plaintiffs to alter or amend the judgment and/or for relief from judgment. Having considered the motion and all associated briefing, the Court is of the opinion that the motion should be GRANTED, and the Judgment, Docket No. 38, and the Order Granting Defendant's Motion to Dismiss Plaintiff's First Amended Complaint, Docket No. 37, are VACATED.

IT IS SO ORDERED.

Dated: _____

_____
SUSAN ILLSTON
UNITED STATES DISTRICT JUDGE