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SANTA CRUZ NATURAL, INC.

[Additional Counsel on Signature Page]

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

SANTA CRUZ NATURAL, INC.,

Defendant.

Case No. 13-CV-4291-SI

**JOINT STATUS REPORT  
REGARDING STAY OF LITIGATION**

The Hon. Susan Illston  
Date: July 7, 2016  
Time: 1:00 p.m.  
Place: Courtroom 1, 17<sup>th</sup> Floor

1 Defendant Santa Cruz Natural, Inc. (“SCN”) and Plaintiffs Mary Swearingen and Robert  
 2 Figy, by and through their respective counsel of record, submit the following Joint Status Report  
 3 in response to the Court’s June 16, 2016 Order Setting Status Conference. [Dkt. No. 59]. In light  
 4 of FDA’s May 25, 2016 final guidance entitled “Ingredients Declared as Evaporated Cane Juice,”  
 5 the parties state their positions as follows:

6 1. Santa Cruz Natural submits that the next appropriate step would be for it to file,  
 7 and the Court to hear, a brief motion to extend the stay based on food litigation appeals pending  
 8 before the Ninth Circuit in *Jones v. ConAgra Foods, Inc.*, No. 14-16327 (9th Cir. filed July 14,  
 9 2014), *Brazil v. Dole Packaged Foods, LLC*, No. 14-17480 (9th Cir. filed Dec. 17, 2014), and  
 10 *Kosta v. Del Monte Foods, Inc.*, No. 15-16974 (9th Cir. filed Oct. 2, 2015).

11 Plaintiffs oppose the stay of this case as unnecessary because it will not promote the  
 12 orderly course of justice and will prejudice Plaintiffs.

13 2. In the event the Court is not inclined to hear a motion to stay before proceeding to  
 14 other issues, Santa Cruz Natural requests that the Court reinstate Santa Cruz Natural’s Motion to  
 15 Dismiss the First Amended Complaint [Dkt. No. 24] and consider and resolve any asserted  
 16 grounds for dismissal that were not addressed in the Court’s primary jurisdiction orders, before  
 17 the parties proceed to discovery or the Court sets remaining case deadlines.

18 Plaintiffs have no objection to the Court taking up Santa Cruz’s Motion to Dismiss prior  
 19 to proceeding with discovery.

## 20 **I. Motion to Stay**

### 21 Defendant’s Position:

22 There are currently three appeals in food litigation cases pending before the Ninth Circuit  
 23 that bear directly on discovery, class certification, and merits issues in this case: *Jones v.*  
 24 *ConAgra Foods, Inc.*, No. 14-16327 (9th Cir. filed July 14, 2014), *Brazil v. Dole Packaged*  
 25 *Foods, LLC*, No. 14-17480 (9th Cir. filed Dec. 17, 2014), and *Kosta v. Del Monte Foods, Inc.*,  
 26 No. 15-16974 (9th Cir. filed Oct. 2, 2015). The *Jones* and *Brazil* appeals are currently being  
 27 considered for hearing on the Ninth Circuit’s September oral argument calendar. The *Kosta*  
 28 appeal is not currently set for hearing.

1 In deciding those appeals, the Ninth Circuit will likely rule on key class action questions  
 2 regarding ascertainability, commonality, predominance, class damages, injunctive standing, and  
 3 deception and materiality. The outcome of these cases will very likely impact the scope of class  
 4 and merits discovery in this matter, and would also provide the Court with substantial guidance  
 5 on important legal issues. For all of these reasons and others, Santa Cruz Natural submits that the  
 6 stay should be extended in this case.

7 Santa Cruz Natural accordingly proposes, as the next appropriate step, to file a short  
 8 Motion to Stay briefing these issues. Because the outcome of the Ninth Circuit appeals could  
 9 potentially impact the legal issues addressed in Santa Cruz Natural's Motion to Dismiss the FAC,  
 10 Santa Cruz Natural proposes that the Motion to Stay be resolved before its motion to dismiss.

11 Plaintiffs' Position:

12 Plaintiffs oppose a further stay of this case, which has been pending for over three years.  
 13 The prior stay was entered to permit the FDA to further consider the "ECJ" rule. Now that FDA  
 14 has addressed the rule and reaffirmed its position on ECJ, this case should proceed with  
 15 resolution of Santa Cruz's Motion to Dismiss and with discovery. The issues to be addressed by  
 16 the Ninth Circuit in the appeals noted by Santa Cruz concern class certification and will not  
 17 impact discovery. Proceeding with discovery will be orderly as the appeals noted by Santa Cruz  
 18 will likely be resolved before class certification briefing in this matter. *Jones* and *Brazil* are  
 19 currently set for oral argument in September, and *Kosta* has been fully briefed. In all likelihood,  
 20 the parties will still be in the midst of discovery when the Ninth Circuit renders decisions in these  
 21 appeals. See <http://www.ca9.uscourts.gov/content/faq.php> (Ninth Circuit FAQ's explaining that a  
 22 decision is usually issued 3-12 months after oral argument).

23 **II. Santa Cruz Natural's Motion to Dismiss the First Amended Complaint ("FAC")**

24 Defendant's Position:

25 On January 29, 2014, Santa Cruz Natural filed a motion to dismiss the FAC. [Dkt. No.  
 26 24]. The Motion asserted a number of grounds for dismissal, including failure to meet Rule 8 and  
 27 9(b) pleading requirements, failure to allege standing, reliance or injury, including with respect to  
 28 sixteen Santa Cruz Natural products that Plaintiffs never allege that they personally purchased,

1 failure to allege standing to pursue injunctive relief, and failure to state claims for negligence,  
2 negligent misrepresentation, breach of express and implied warranty, money had and received,  
3 and unjust enrichment. Santa Cruz Natural also moved to dismiss on the grounds that Plaintiffs'  
4 claims are expressly and impliedly preempted and that they should be dismissed or stayed under  
5 the doctrine of primary jurisdiction pending the release of FDA's final guidance on ECJ issues.

6 On April 2, 2014, the Court dismissed the FAC without prejudice on grounds of primary  
7 jurisdiction and entered judgment in favor of Santa Cruz Natural. [Dkt. Nos. 37 and 38]. In a  
8 subsequent order, the Court reversed judgment but stayed the action on primary jurisdiction  
9 grounds. [Dkt. No. 47]. Critically, the Court did not address any other of Santa Cruz Natural's  
10 asserted grounds for dismissal. As a result, there has been no ruling on those issues and no  
11 determination as to whether Plaintiffs' claims are adequately pled or whether the action should  
12 proceed on the basis of the FAC.

13 Santa Cruz Natural requests that the Court consider and rule on the remaining grounds  
14 asserted in Santa Cruz Natural's Motion to Dismiss, before the action proceeds into discovery and  
15 before the Court sets other case-related deadlines. Resolution of the Motion to Dismiss will  
16 clarify the scope of the claims at issue in the litigation and determine the proper scope of  
17 discovery and class certification proceedings should the case go forward. Based on meet and  
18 confer discussions with Plaintiffs' counsel, Santa Cruz Natural understands that Plaintiffs agree  
19 with this proposal.

20 The Motion is fully briefed and was submitted to the Court for decision as of the date of  
21 the Court's orders on primary jurisdiction. Because the Motion has been pending since 2014,  
22 however, Santa Cruz Natural believes it would be useful to provide the Court with a brief update  
23 on recent developments and intervening case law. Although Santa Cruz Natural would welcome  
24 guidance from the Court as to its preferred method of proceeding with respect to any additional  
25 submission, it proposes a joint, simultaneous filing, not to exceed 10 total pages (5 pages for each  
26 side) to update the Court on recent developments and any intervening case law relevant to the  
27 grounds raised in the Motion to Dismiss.

28 Plaintiffs' Position: Plaintiffs likewise look forward to the Court's guidance on this issue

1 but have no objection to Santa Cruz's proposal regarding a supplemental submission and  
2 consideration of its remaining arguments on its Motion to Dismiss.

3  
4 Respectfully submitted,

5  
6 Dated: June 30, 2016

HOGAN LOVELLS US LLP

7 By: /s/ J. Christopher Mitchell  
8 J. Christopher Mitchell  
9 Attorneys for Defendant  
SANTA CRUZ NATURAL, INC.

10 Dated: June 30, 2016

PRATT & ASSOCIATES

11 By: /s/ Pierce Gore  
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26 Attorneys for PLAINTIFFS

27 **ATTESTATION**

28 I, J. Christopher Mitchell, attest that Pierce Gore has approved the Joint Status Report  
Regarding Stay of Litigation and consents to its filing in this action.

By: /s/ J. Christopher Mitchell  
J. Christopher Mitchell