UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES – GENERAL**

Case No. 8:17-cv-110-JLS-JCGx Date: October 11, 2017
Title: Susan Tran v. Sioux Honey Association, Cooperative

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

| Terry Guerrero | N/A |
|---|---|
| Deputy Clerk | Court Reporter |

| ATTORNEYS PRESENT FOR PLAINTIFF: | ATTORNEYS PRESENT FOR DEFENDANTS: |
|---|---|
| Not Present | Not Present |

**PROCEEDINGS: (IN CHAMBERS) ORDER STAYING THE ACTION PENDING REFERRAL TO THE FDA (Doc. 41)**

Before the Court is a Motion to Dismiss First Amended Complaint filed by Defendant Sioux Honey Association, Cooperative. (Mot., Doc. 41.) Plaintiff Susan Tran opposed and Sioux Honey replied. (Opp., Doc. 43; Reply, Doc. 46.) Having taken the matter under submission and considered the parties' briefs and oral arguments, the Court concludes that a stay in this matter is appropriate based on the doctrine of primary jurisdiction. Accordingly, the Court STAYS the action pending resolution by the FDA of a central issue in this case.

## I. BACKGROUND

Sioux Honey manufactures, markets, and distributes honey in retail stores in California and throughout the United States under various trademarks, including Sue Bee and Aunt Sue's. (FAC ¶ 20, Doc. 34.) Tran alleges that Sioux Honey makes material misrepresentations about its honey products. Specifically, Tran alleges that around June 2013, she began purchasing Sue Bee honey approximately once every month from a Von's grocery store in Grover Beach, California.[1] (*Id.* ¶ 21.) In making these purchases,

[1] The products at issue in this case are Sue Bee Clover Honey, Aunt Sue's Farmers Market Clover Honey, and Aunt Sue's Raw Honey (collectively, the "Sue Bee Products"). (*Id.* ¶ 7.)

Tran saw and relied upon the labels on Sue Bee Products representing the honey to be "Pure" or "100% Pure." (*Id.* ¶ 22.) Tran alleges that Sioux Honey's Sue Bee Products in fact are not "Pure" or "100% Pure" because they allegedly contain glyphosate, a synthetic chemical and herbicide. (*Id.* ¶¶ 4, 37, 40.) Glyphosate is allegedly a potent biocide and human endocrine disruptor with detrimental health effects, and a potential carcinogen. (*Id.* ¶¶ 5, 44–45, 49–50.) Based on Sioux Honey's alleged misrepresentations and omissions, Tran filed the instant class action on January 23, 2017. (Compl., Doc. 1.) Tran then filed her First Amended Complaint on April 6, 2017. (FAC.) In her FAC, Tran asserts the following claims against Sioux Honey: (1) violation of California's Consumers Legal Remedies Act ("CLRA"); (2) violation of California's False Advertising Law ("FAL"); and (3) violation of California's Unfair Competition Law ("UCL"). (*Id.* ¶¶ 108–47.)

Sioux Honey moved to dismiss the FAC. At the hearing held on this Motion, the Court focused the parties on the issue of whether the use of "pure" in Sioux Honey's labelling was misleading. (Transcript of Oral Argument at 2:18-3:5.)

## II. DISCUSSION

"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." *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). The doctrine is prudential, and applies when "a court determines that an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch." *Id.* The doctrine applies "only if a claim 'requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency' . . . and if 'protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme.'" *Id.* (quoting *Brown v. MCI WorldCom Network Servs.*, 277 F.3d 1166, 1172 (9th Cir. 2002)). The case must present a "far-reaching question that

'requires expertise or uniformity in administration.'" *Brown*, 277 F.3d at 1172 (quoting *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987)).

"When a district court determines that primary jurisdiction applies, it enables a 'referral' of the issue to the relevant agency." *Clark*, 523 F.3d at 1115 (citing *Reiter v. Cooper*, 507 U.S. 258, 268 (1993)). This means the court "either stays proceedings or dismisses the case without prejudice," and the parties seek an administrative ruling—there is no formal transfer between the court and the agency. *Id*. (citing *Syntek Semiconductor Co., Ltd. V. Microchip Tech. Inc.*, 307 F.3d 7775, 782 n.3 (9th Cir. 2002)).

No fixed formula exists for applying the doctrine, but courts have traditionally examined the following factors: "(1) [a] need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." *Clark* at 1115. (quoting *Syntek*, 307 F.3d at 781). "[C]ourts must also consider whether invoking primary jurisdiction would needlessly delay the resolution of claims." *Astiana v. Hain Celestial Group, Inc.*, 783 F.3d 753, 760 (9th Cir. 2015) (citations omitted). In *Astiana*, the Ninth Circuit stated that '[u]nder our precedent, 'efficiency' is the 'deciding factor' in whether to invoke primary jurisdiction." *Id*. (citing *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1165 (9th Cir. 2007)).

Tran's complaint, although ostensibly about the meaning of the terms "Pure" or "100% Pure," is really about what constitutes a safe level of glyphosate in honey. Tran's claims that Sioux Honey's labels are false and misleading are premised on the presence of trace amounts of glyphosate in Sioux Honey's honey products and their potential harmful effects on human health. Much of her complaint is spent detailing the origins of glyphosate, what it is, how it can be harmful to humans, the research done on its effects on human health, what health agencies have done to regulate its use, and how much glyphosate reasonable consumers expect in "pure" foods. (FAC ¶¶ 4–6, 37, 39–52, 55–56.) At the hearing on the motion to dismiss, Tran's argument focused on glyphosate's alleged harmful effects. When the Court asked Tran's counsel whether the claim that the honey is "100% Pure" would also be misleading should the honey contain trace amounts

of a bee leg or a speck of dirt rather than glyphosate, counsel responded, "I think you need to look at it in context: bee leg versus biocide." (Transcript at 14:10-14:16.) Counsel further distinguished bee legs or dirt from glyphosate based on "[t]he question of harm" or the threat of "kidney or liver damage." (*Id*. at 15:2, 15:4.) Later, Tran's counsel analogized the presence of glyphosate in honey to the presence of PCB or agent orange. (*Id*. at 20:10.) These assertions indicate that Tran's contention that she was misled depends on on the harmful nature of glyphosate. Moreover, it is undisputed that no tolerance level has been set for glyphosate in honey and no labeling requirement exists with respect to glyphosate in honey either. The Court is thus unable to conclude whether the "Pure" and "100% Pure" labeling was misleading without guidance from the FDA on glyphosate's toxicity.

The FDCA places these issues squarely within the regulatory authority of the FDA and EPA. The FDCA prohibits the adulteration of food by pesticide chemical residue and bars any such residue in amounts deemed unsafe within the meaning of the statute. 21 U.S.C. § 342(a)(2)(B). The EPA sets the tolerance levels for chemicals that may be present in trace amounts in foods. 21 U.S.C. § 346a(b)(1) ("The [EPA] may issue regulations establishing, modifying, or revoking a tolerance for a pesticide chemical residue in or on a food . . ."); 40 C.F.R. § 180.7 (setting forth the requirements for filing a petition proposing tolerances for pesticide residues); *see also Nat. Res. Def. Council v. Johnson*, 461 F.3d 164, 167 (2d Cir. 2006) (explaining the statutory and regulatory scheme empowering the EPA to regulate agricultural pesticides). The FDA has the authority to promulgate labeling requirements for food. *See* 21 U.S.C. § 343. Congress plainly intended food labeling to be uniform in administration based on the FDCA's express preemption provisions with respect to food labeling. *See* 21 U.S.C. § 343-1(a)(2)–(3) (prohibiting any State or political subdivision of a State from establishing any requirement for the labeling of food of the type required by various sections of the FDCA). If the FDA were to promulgate labeling regulations regarding glyphosate content in honey, Tran's claims may be preempted.

Given this context, the Court concludes that the FDA should be given the opportunity to bring its expertise to bear on appropriate tolerance levels for glyphosate in honey and on labeling requirements regarding the same. A referral at this time would not

be inefficient or otherwise inappropriate. As Sioux Honey notes, the EPA is currently conducting its periodic registration review of glyphosate (expected to conclude in 2017), which includes an assessment of glyphosate's risk to human health. EPA Office of Pesticide Programs, EPA-HQ-OPP-2016-0385-0094, Glyphosate Issue Paper: Evaluation of Carcinogenic Potential (Sept. 12, 2016). As Tran notes, recent research indicates that glyphosate may be a carcinogen and can cause liver and kidney damage even at "safe" levels, and health agencies in France and California have taken action to further regulate its use. (FAC ¶¶ 44–50.) Moreover, glyphosate has unexpectedly been found in several other foods in addition to honey. *See* Stephanie Strom, *Traces of Controversial Herbicide Are Found in Ben & Jerry's Ice Cream*, N.Y. Times, Jul. 25, 2017, https://www.nytimes.com/2017/07/25/dining/ben-and-jerrys-ice-cream-herbicide-glyphosate.html?smprod=nytcore-iphone&smid=nytcore-iphone-share (reporting trace amounts of glyphosate in Ben & Jerry's ice cream as well as Quaker Oats, Cheerios, Ritz Crackers, and Stacy's Simply Naked Pita Chips). Although the research on glyphosate may be up for debate, the EPA and FDA have the requisite expertise to evaluate this research and determine what levels of glyphosate in honey can be considered "safe" and whether consumers should be informed of its presence through labeling. A reasonable consumer's understanding of the terms "Pure" or "100% Pure" with respect to trace amounts of glyphosate in honey is closely related to whether those trace amounts are safe for human consumption. Therefore, the FDA's input would shed clarity on what a reasonable consumer would understand the terms "Pure" or "100% Pure" to mean–the central issue in this lawsuit.

Finally, the FDA is better situated than the Court to define the terms "Pure" or "100% Pure," whether for food labeling in general or in the context of glyphosate content in honey in particular. Not only does the FDA have experience defining such terms for food labeling (*e.g.*, organic), but it has the capacity to gather facts and comments from the wider public to help define the term. Although it declined to define the term "pure" in the context of bottled water and juice, it also did not completely rule out the possibility of defining the term in the future. *See* 60 Fed. Reg. at 57099 ("The agency is not convinced that it should use its resources to define the term 'pure' at this time but . . . . the agency will continue to deal with this issue on a case-by-case basis."). Therefore, the Court concludes that seeking agency input is the most appropriate way to move forward. Because the gravamen of the complaint is based on alleged misrepresentations and omissions in labeling, the Court will refer the matter to the FDA.

## IV. CONCLUSION

For the foregoing reasons, pursuant to 21 C.F.R. § 10.25(c), the Court REFERS to the FDA for an administrative determination the question of whether and under what circumstances food products containing glyphosate may or may not be labeled "Pure" or "100% Pure." The Court STAYS the action for a period of six (6) months from the date of this Order, which period may be extended by further order of the Court upon a showing of good cause, including indication from the FDA that it intends to provide clarification and guidance on glyphosate's toxicity and labeling requirements. The parties and counsel will cooperate in expediting the presentation and explanation of this question to the FDA and will notify the Court promptly of any determination by the FDA, including any determination not to address the issue. All pending pretrial dates are VACATED pending the stay.

Initials of Preparer: tg