UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LISA ROSILLO, et al.,

Plaintiffs,

v.

ANNIE'S HOMEGROWN INC., et al.,

Defendants.

Case No. 17-cv-02474-JSW

ORDER STAYING CASE AND DENYING DEFENDANTS' MOTION TO DISMISS WITHOUT PREJUDICE

Re: Dkt. No. 35

Now before the Court for consideration is Defendants' motion to dismiss Plaintiffs' amended complaint. While Defendants contend that the Court should dismiss Plaintiffs' claims for failure to state a claim, they alternatively argue that the Court should stay this action under the primary jurisdiction doctrine. The Court has carefully considered the parties' papers, relevant legal authority, and record in this case, and the Court finds the motion suitable for disposition without oral argument. *See* N.D. Civ. L.R. 7-1(b). For the reasons set forth below, the Court STAYS this case pursuant to the primary jurisdiction doctrine. Defendants' motion to dismiss is DENIED without prejudice to Defendants renewing the motion once the stay is lifted.

BACKGROUND

Defendants Annie's Homegrown Inc. and General Mills, Inc. ("Defendants") manufacture, market, and distribute "Annie's Naturals" products throughout the United States. (Dkt. No. 25, First Amended Complaint ("FAC") ¶ 9-10.) The primary focus of the Annie's Naturals product line is that they are "natural" and therefore better than non-natural products. (*Id.* ¶ 17.) Plaintiffs allege that Defendants market the Annie's Naturals product in this way in an attempt to "capitalize" on the growing market for natural products and, specifically, consumers' willingness to pay a price premium for such products. (*Id.*) Plaintiffs assert that Defendants market the

Annie's Naturals products as "natural" by including the words "Annie's Naturals" on two places on the front of the packaging and once on the back. (*Id.* ¶ 19.)

Contrary to the "natural" representation, Plaintiffs state that the Annie's Naturals products actually contain "synthetic and highly chemically processed ingredients" such as "xanthan gum." (*Id.* ¶¶ 20, 21.) "Xanthan gum" is a "thickening agent that, according [to] the FDA regulations, is a synthetic substance." (*Id.* ¶ 25.) Plaintiffs assert that xanthan gum is not "natural" but is "instead manufactured through fermentation or carbohydrates and subsequent treatment of the byproduct with isopropyl alcohol." (*Id.*) Because Annie's Naturals products allegedly contain such "non-natural" ingredients, Plaintiffs believe that Defendants have engaged in misleading advertising.

In July 2016, Plaintiff Lisa Rosillo purchased a bottle of Annie's Naturals Balsamic Vinaigrette Salad Dressing from a Target store in Apple Valley, California. (*Id.* ¶ 7.) Ms. Rosillo alleges that she was "specifically interested in purchasing natural salad dressing" and, based on the "Annie's Natural" label, believed it was a "natural food product." (*Id.*) Had she known that the product included "non-natural" ingredients, Ms. Rosillo claims she would not have purchased the product. (*Id.*) Plaintiff Jesse Kohn makes similar allegations regarding a bottle of Annie's Naturals Sesame Ginger Vinaigrette Salad Dressing and Annie's Naturals Goddess Dressing he purchased from a Whole Foods store in New York. (*Id.* ¶ 8.)

In light of the above, Plaintiffs assert eleven causes of action: (1) Violation of the California Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750, *et seq.*; (2) violation of California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500, *et seq.*; (3) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq.*; (4) violation of the Magnuson-Moss Warranty Act ("MMWA"), 15 U.S.C. §§ 2301, *et seq.*; (5) violation of New York General Business Law § 349; (6) false advertising in violation of New York General Business Law § 350; (7) breach of express warranty; (8) breach of the implied warranty of merchantability; (9) unjust enrichment; (10) negligent misrepresentation; and (11) fraud.

DISCUSSION

Defendants have moved to dismiss all of Plaintiffs' claims under Federal Rule of Civil Procedure 12(b)(6). Alternatively, Defendants argue that because the Food and Drug Administration ("FDA") has commenced regulatory proceedings to explore whether, and to what extent, it should regulate the term "natural" on food labels, the Court should stay this case under the primary jurisdiction doctrine. Because the Court agrees that a stay is appropriate, the Court need not consider Defendants' arguments relating to the merits of Plaintiffs' claims.

"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 does not require that the court lack jurisdiction, but rather it is a "prudential" doctrine, "under which 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 determination of whether an action should be stayed pursuant to the primary jurisdiction doctrine is a matter for the Court's discretion. *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002). In considering this issue, courts have "traditionally employed such factors as (1) the 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." *Id.* (citing *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987)).

Defendants contend that a stay is appropriate because in November 2015, the FDA established a docket to "receive information and comments on the use of the term 'natural' in the labeling of human food products." *Use of the Term "Natural" in the Labeling of Human Food Products; Request for Information and Comments*, 80 Fed. Reg. 69905-01, 69905 (Nov. 12, 2015). The FDA invited comments on "when, if ever, the use of the term ["natural"] is false or misleading" and whether the FDA should define the term "natural" or prohibit the use of the term

in food labeling. *Id.* at 69908. Additionally, the FDA asked "[s]hould the manner in which an ingredient is produced or sourced affect whether a food containing that ingredient may be labeled as 'natural?'" *Id.* at 69909. The FDA extended the comment period through May 10, 2016. *See Extension of Comment Period*, 80 Fed. Reg. 80718-01, 80719 (Dec. 28, 2015).

Consumers have brought numerous cases around the country against food manufacturers, alleging that they have falsely and deceptively labeled their food products as "natural." In the wake of the FDA's request for comments regarding the use of the term "natural" on labels, many (but by no means all) of the courts hearing these cases have opted to stay the cases pending completion of the FDA's regulatory process. After considering the *Syntek* factors, the Court agrees with this approach and concludes that a stay is appropriate.

First, this case squarely presents the question of whether, consistent with California's consumer protection statutes, Defendants could label its products as "natural" despite the presence of xanthan gum. As Plaintiffs point out in their opposition brief this is technically a distinct question from how the FDA chooses to regulate (or not regulate) the term "natural." California's consumer protection statutes do not require a consumer to show that a given product was misbranded under federal law. Instead, the plaintiff need only show that the complained of label would be deceptive to a reasonable consumer. *See, e.g.*, *Anderson v. The Hain Celestial Group, Inc.*, 87 F. Supp. 3d 1226, 1236 (N.D. Cal. 2015). Some courts have relied on this to deny motions to stay consumer actions pending the FDA's actions. *See, e.g.*, *Burton v. Hodgson Mill, Inc.*, No. 16-cv-1081-MJR-RJD, 2017 WL 1282882 (S.D. Ill. Apr. 6, 2017) ("[T]he FDA's eventual formal definition [of the term 'natural'] has no bearing on a reasonable consumer's perception at the time this product was advertised and purchased.").

However, the FDA's guidance on when, and how, the term "natural" may be used on product labels is relevant to the question of how a "reasonable consumer" would understand that term. Perhaps nothing highlights this relevance more than Plaintiffs' own amended complaint which cites the FDA's (and the U.S. Department of Agriculture's) current guidance regarding the term natural to support their allegations that the Defendants' products are not "natural" and are therefore misleading. (*See* FAC ¶¶ 23-24.) Further, courts have recognized that FDA guidance on

the term "natural" is relevant to the question of how a reasonable consumer would understand that term. *See, e.g.*, *Ivie v. Kraft Foods Glob., Inc.*, No. 12-cv-02554-RMW, 2013 WL 685372, at *12 (N.D. Cal. Feb. 25, 2013) ("The FDA's 2009 industry guidance statement is relevant to the issue of whether these labels could be deceptive or misleading to a reasonable consumer[.]"); *see also In re Kind LLC "Healthy and All Natural" Litig.*, 209 F. Supp. 3d 689, 696 (S.D.N.Y. 2016) ("FDA Guidance could explain whether ingredients such as soy protein isolate and citrus pectin should be considered 'natural.'"). Accordingly, because the FDA is currently considering an issue that is highly relevant to the central dispute in this case, the Court finds the first *Syntek* factor weighs in favor of a stay.

As for the second and third factors, it cannot be denied that Congress has, through the Food, Drug and Cosmetic Act, 21 U.S.C. § 301, *et seq.*, subjected food labeling to a comprehensive regulatory framework administered by the FDA. *See, e.g.*, *Figy v. Lifeway Foods, Inc.*, No. 13-cv-04828-TEH, 2014 WL 1779251, at *2 (N.D. Cal. May 5, 2014) ("Congress vested the FDA with comprehensive regulatory authority to address the issue of proper declaration of food labels. The FDCA imposes a comprehensive regulatory framework that requires uniformity in administration." (citation omitted)); *Reese v. Odwalla, Inc.*, 30 F. Supp. 3d 935 (2014) ("Congress has vested the FDA with regulatory authority over food labeling, charging the agency with creating a uniform national scheme of regulation to ensure that food is labeled in a manner that does not mislead consumers.").

Finally, the Ninth Circuit has found that whether a given ingredient or compound can be classified as "natural" is a "a particularly complicated issue that Congress has committed to the FDA" and that "[o]btaining expert advice from that agency would help ensure uniformity in administration of the comprehensive regulatory regime established by the FDCA." *Astiana v. The Hain Celestial Group, Inc.*, 783 F.3d 753, 761 (9th Cir. 2015) (citation and internal quotation marks omitted); *see also Kane v. Chobani, LLC*, 645 F. App'x 593, 594 (9th Cir. 2016) ("The delineation of the scope and permissible usage of the term[] 'natural' . . . in connection with food products '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." (citation and internal quotation marks omitted)). Awaiting guidance from the FDA on the use of the term "natural" on food labels will help ensure that there are not conflicting judicial rulings, indirectly resulting in a patchwork of disclosure requirements which would require manufacturers to print different labels for different states. *In re Kind*, 209 F. Supp. 3d at 696. The fourth *Syntek* factor therefore supports issuance of a stay.

Plaintiffs argue, however, that a stay is inappropriate because it is speculative to think the FDA will actually use its rulemaking powers to regulate the term "natural." Specifically, they argue that the "extended silence" from the FDA since the May 2016 comment closing period suggests new rulemaking is unlikely. The Court is unpersuaded. The Court notes that in a recent bill report accompanying the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Bill, 2018, the Committee on Appropriations included the following statement:

> *Natural Definition* — The Committee commends the FDA for taking the first step towards defining the term "natural" and regulating its use on food labeling by requesting public comment on a number of relevant questions in a November 2015 Federal Register notice. The Committee directs FDA to provide a report within 60 days of enactment of this Act on the actions and timeframe for defining "natural" so that there is a uniform national standard for the labeling claims and consumers and food producers have certainty about the meaning of the term.

H.R. Rep. No. 115-232, at 72 (2017). The appropriations bill remains pending in Congress and, as a result, the FDA's 60 day deadline for reporting to the committee has not yet commenced. Nonetheless, the Court believes that the congressional interest reflected in this committee report makes it likely that the FDA will address, in a relatively short amount of time, the use of the term "natural" on food labels.

CONCLUSION

For the foregoing reasons, and after considering the relevant factors, the Court finds that it is appropriate to stay this action pursuant to the primary jurisdiction.

Accordingly this action is STAYED until the FDA's regulatory process regarding use of the term "natural" on food labeling is completed. The Court DENIES Defendants' motion to dismiss without prejudice to Defendants renewing and renoticing the motion once the Court lifts

the stay.

Within two weeks of the FDA completing its process: (1) Defendant shall renotice its motion to dismiss; (2) the parties shall submit a joint status report providing notice of the FDA's action; and (3) the parties shall submit cross-supplemental briefs (not to exceed 10 pages) on Defendants' motion to dismiss to address the impact, if any, on the FDA's new guidance.

If the FDA's rulemaking is not complete on January 15, 2018, the parties shall file a joint status report by January 19, 2018 which sets forth the parties' positions (not to exceed five pages per side) on whether the stay should continue.

IT IS SO ORDERED.

Dated: October 17, 2017

JEFFREY S. WHITE
United States District Judge