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5 **UNITED STATES DISTRICT COURT**
6 **NORTHERN DISTRICT OF CALIFORNIA**
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8 **ELIZABETH COX**, individually and on behalf
9 of all others similarly situated,

10 Plaintiffs,

11 vs.

12 **GRUMA CORPORATION**, *et al.*,

13 Defendant.

Case No.: 12-CV-6502 YGR

ORDER GRANTING MOTION TO DISMISS IN PART (DKT. NO. 37) AND FOR REFERRAL TO THE UNITED STATES FOOD AND DRUG ADMINISTRATION

United States District Court
Northern District of California

14 Defendant Gruma Corporation filed its motion to dismiss (Dkt. No. 37) based upon primary
15 jurisdiction, among other grounds. Plaintiff opposed the motion, and the Court considered the
16 parties’ arguments, as well as the parties’ supplemental submissions (Dkt. Nos. 58, 64, and 67).
17 Having carefully considered the submissions of the parties, the Court **GRANTS** the Motion, in part,
18 on grounds of primary jurisdiction, as set forth herein.

19 Plaintiff brings this putative class action alleging that the labels on certain of Gruma
20 Corporation’s food products, as well as its advertising and marketing, are false and misleading in
21 violation of the California Unfair Competition Law, Bus. & Prof. Code section 17200 *et seq.*
22 (“UCL”); the California False Advertising Law, Cal. Bus. & Prof. Code section 17500 (“FAL”);
23 the Consumers Legal Remedies Act, Cal. Civ. Code section 1750 *et seq.* (“CLRA”). Plaintiff
24 alleges that, because Defendant’s Products contain genetically modified organisms (“GMOs”) in
25 the form of corn grown from bioengineered, genetically modified seeds, Defendant’s labels
26 indicating the Products are “All Natural” are false and misleading. (Plaintiff’s Amended Class
27 Action Complaint [Dkt. No. 33, “FAC”] ¶¶ 39-43.)
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1 “The primary jurisdiction doctrine allows courts to stay proceedings or to dismiss a
2 complaint without prejudice pending the resolution of an issue within the special competence of an
3 administrative agency... and is to be used only if a claim involves an issue of first impression or a
4 particularly complicated issue Congress has committed to a regulatory agency.” *Clark v. Time*
5 *Warner Cable*, 523 F. 3d 1110, 1114 (9th Cir. 2008). A court traditionally weighs four factors in
6 deciding whether to apply the primary jurisdiction doctrine: “(1) the need to resolve an issue that
7 (2) has been placed by Congress within the jurisdiction of an administrative body having
8 regulatory authority (3) pursuant to a statute that subjects an industry or activity subjects an
9 industry or activity to a comprehensive regulatory authority that (4) requires expertise or
10 uniformity in administration.” *Syntek Semiconductor Co. v. Microchip Tech., Inc.*, 307 F.3d 775,
11 781 (9th Cir.2002) (amended).

12 The FDA has regulatory authority over food labeling. *See* 21 U.S.C. § 341 *et seq.* The
13 Food, Drug, and Cosmetics Act (FDCA) establishes a uniform federal scheme of food regulation to
14 ensure that food is labeled in a manner that does not mislead consumers. *See* 21 U.S.C. § 341 *et*
15 *seq.* Food labeling enforcement is a matter that Congress has indicated requires the FDA’s
16 expertise and uniformity in administration. Congress amended the FDCA through the passage of
17 the Nutrition Labeling and Education Act (NLEA) to “clarify and to strengthen” the FDA’s “legal
18 authority to require nutrition labeling on foods, and to establish the circumstances under which
19 claims may be made about nutrients in foods.” H.R. Rep. No. 101-538, at 7, *reprinted in* 1990
20 U.S.C.C.A.N. 3336, 3337. No state may “directly or indirectly establish. . . any requirement for
21 the labeling of food that is not *identical* to the [FDCA].” 21 U.S.C. § 343-1(a) (emphasis supplied).

22 Focusing particularly on the issues alleged in the FAC, there are no FDA rules requiring
23 that products containing GMO or bioengineered ingredients be labeled as such. The FDA has
24 issued nonbinding industry guidance indicating that it “is not aware of any data or other
25 information that would form a basis for concluding that the fact that a food or its ingredients was
26 produced using bioengineering is a material fact that must be disclosed FDA is therefore
27 reaffirming its decision to not require special labeling of all bioengineered foods.” (Defendant’s
28 Request for Judicial Notice, Exh. A [“Guidance for Industry: Voluntary Labeling Indicating

1 Whether Foods Have or Have Not Been Developed Using Bioengineering; Draft Guidance,”
2 released for comment January 2001] at 2.) With respect to the use of the term “natural” on food
3 labels, the agency has published non-binding guidance defining that term to mean that “nothing
4 artificial or synthetic (including all color additives regardless of source) has been included in, or
5 has been added to, a food that would not normally be expected to be in the food.” 58 Fed. Reg.
6 2302, 2407 (Jan. 6, 1993). However, the parties appear to be in agreement that the FDA has not
7 addressed, even informally, the question of whether foods containing GMO or bioengineered
8 ingredients may be labeled “natural” or “all natural,” or whether GMO or bioengineered
9 ingredients would be considered “artificial or synthetic.”

10 Thus, as Plaintiff concedes, “[t]he FAC identifies a gaping hole in the current regulatory
11 landscape for ‘natural’ claims and GMOs, laying out how there is no direct regulation by the FDA
12 of the term ‘natural,’ nor any requirement that a company disclose on a food product’s label
13 whether it contains GMOs.” (Plaintiff’s Memorandum of Points and Authorities in Opposition
14 [Dkt. No. 47, “Oppo.”] at 1:12-15, citing FAC at ¶¶ 20-25.) However, Plaintiff wrongly concludes
15 that there is no agency charged with determining whether food labels may properly state that GMO
16 products can be labeled “all natural.” The FDCA and NLEA unquestionably and squarely give that
17 authority to the FDA.

18 Under these circumstances, deference to the FDA’s regulatory authority is the appropriate
19 course. *Pom Wonderful, LLC v. Coca-Cola Co.*, 679 F.3d 1170, 1176 (9th Cir. 2012); *Clark*, 523
20 F.3d at 1114. Otherwise, the Court would risk “usurp[ing] the FDA’s interpretive authority[,]” and
21 “undermining, through private litigation, the FDA’s considered judgments.” *Pom Wonderful*, 679
22 F.3d at 1176, 1178.

23 Therefore, the Court **ORDERS** as follows:

24 (1) pursuant to 21 C.F.R. § 10.25(c), this Court hereby **REFERS** to the FDA, for an
25 administrative determination, the question of whether and under what circumstances food products
26 containing ingredients produced using bioengineered seed may or may not be labeled “Natural” or
27 “All Natural” or “100% Natural”;

28 (2) this action is **STAYED** for a period of six (6) months from the date of this Order, which

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period may be extended by further order of the Court upon a showing of good cause, including an indication from the FDA that it intends to resolve the issue;

(3) the parties and counsel will cooperate in expediting the presentation and explanation of this question to the FDA and will notify this Court promptly of any determination by the FDA;

(4) the request to except the parties pending discovery dispute from the stay is **DENIED** without prejudice to a showing of good cause why such dispute should be resolved by the Court during the pendency of the stay; and

(5) the Defendant's motion is **GRANTED** with respect to primary jurisdiction only, and is otherwise denied without prejudice to re-filing upon an order dissolving the stay ordered herein.

IT IS SO ORDERED. This Order terminates Docket No. 37.

Date: July 11, 2013



YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE