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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

**ROBIN REESE**, individually and on behalf of  
all others similarly situated,

Plaintiff,

v.

**ODWALLA, INC. AND THE COCA-COLA CO.,**

Defendants.

**Case No.: 13-CV-947 YGR**

**ORDER GRANTING MOTION TO DISMISS IN  
PART AND STAYING CASE**

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Plaintiff Robin Reese (“Plaintiff”) brings this putative class action against Defendants Odwalla, Inc. and The Coca-Cola Company (“Defendants”) alleging that certain of Defendants’ products have labels that do not comply with the requirements of the federal Food, Drug, and Cosmetics Act (“FDCA”), as adopted by the California Sherman Law, Cal. Health & Safety Code section 109875, et seq. (“Sherman Law”). Plaintiff alleges seven claims under California law: (1) violation of the California Unfair Competition Law (“UCL”); (2) violation of Cal. Business and Professions Code section 17200, based on unfair, unlawful and fraudulent conduct; (3) violation of the California False Advertising Law (“FAL”); (4) violation of California Business and Professions Code section 17500, for misleading and untrue advertising; (5) violation of the California Consumer Legal Remedies Act, Cal. Civil Code section 1750, et seq.; (6) misrepresentation of goods to consumers; and (7) quasi-contract relief based upon an unjust enrichment theory.

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Defendants have filed a Motion to Dismiss or, in the Alternative, to Strike Portions of Plaintiff’s Complaint on the grounds that Plaintiff’s complaint does not state a predicate claim for violation of the California Sherman Law; her claims are preempted by federal law; at a minimum, the Court should defer under the primary jurisdiction doctrine; and the claims for nationwide class relief and the claims against the Fanta Zero Orange product should be stricken. (Dkt. No. 28.)

1 Having carefully considered the papers submitted and the pleadings in this action, and for  
2 the reasons set forth below, the Court hereby **GRANTS** the Motion to Dismiss **IN PART** and **STAYS**  
3 the instant action.<sup>1</sup>

4 **I. SUMMARY OF ALLEGATIONS**

5 Plaintiff alleges that Defendants currently make and market a number of beverages and  
6 energy bars which list “Evaporated Cane Juice” or “Organic Evaporated Cane Juice” as an  
7 ingredient. Plaintiffs allege that all such products are misbranded because the use of the term  
8 “Evaporated Cane Juice” (hereinafter, sometimes, “ECJ”) is a violation of federal and California  
9 law governing food labeling. Specifically, Plaintiff alleges that the FDA has stated:

- 10 • the term ‘evaporated cane juice’ is not the common or usual name of any type of sweetener,  
11 including dried cane syrup.
- 12 • ECJ is required to be identified either as “sugar” or “cane syrup,” both of which have  
13 standards of identity set forth in federal regulations (21 C.F.R. § 168.130, 21 C.F.R. §  
14 101.4(b)(20) and §184.1854) sweeteners derived from sugar cane syrup should not be listed  
15 in the ingredient declaration by names which suggest that the ingredients are juice, such as  
16 ‘evaporated cane juice.’
- 17 • The term ECJ is “false and misleading” under section 403(a)(1) of the FDCA (21 U.S.C. §  
18 343(a)(1)) because it fails reveal the basic nature of the food and its characterizing  
19 properties (i.e., that the ingredients are sugars or syrups) as required by 21 C.F.R. §§ 101.3  
20 and 102.5.

21 (Complaint ¶14.) Pursuant to the Sherman Law, California has adopted these federal labeling  
22 requirements as state law. California Health & Safety Code section 110100.

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25 <sup>1</sup> The parties have each submitted numerous documents for judicial notice in connection  
26 with the motion and opposition. The Court rules as follows on those requests:

27 Defendants’ Request for Judicial Notice (Dkt. No. 29) is **GRANTED** as to Exh. A, J, K, L-O,  
28 and P-T, and **DENIED** as to Exh. B-I.

Plaintiff’s Request for Judicial Notice (Dkt. No. 36-1) is **GRANTED** as to Exh. 1-8, and  
**DENIED** as to Exhibit 9.

The Court takes notice of the documents but not the truth of any matters asserted therein.

1 Plaintiff alleges that the term ECJ misleads consumers into paying a premium price for  
2 inferior or undesirable ingredients or for products that contain ingredients not listed on the label and  
3 that she would not have purchased these products had she known that they contained “sugar  
4 masquerading as evaporated cane juice.” (Id. at ¶76.) Had Plaintiff known that the term ECJ was  
5 unlawful, and the products were misbranded, she would not have bought them. (Id. at ¶¶ 78, 79.)

6 In her UCL claims, Plaintiff alleges that: “Defendants sold Plaintiff and the Class  
7 Misbranded Food Products that were not capable of being sold or held legally and which had no  
8 economic value and were legally worthless.” (Complaint ¶101.) Plaintiff alleges that she and  
9 others in the putative class “suffered a substantial injury by virtue of buying Defendants’  
10 Misbranded Food Products that they would not have purchased absent Defendants’ illegal  
11 conduct.” (Id. ¶ 108.) She further alleges that Defendants sold “unsalable misbranded products that  
12 were illegal to possess” (id. ¶109), and that “Defendants’ fraud and deception caused Plaintiff and  
13 the Class to purchase Defendants’ Misbranded Food Products that they would otherwise not have  
14 purchased had they known the true nature of those products” (id. ¶ 118). Her allegations in support  
15 of her FAL, CLRA, and unjust enrichment claims are much the same. (See Complaint ¶¶ 124, 125,  
16 132, 141, 151.)

## 17 **II. DISCUSSION**

18 The viability of Plaintiff’s claims turns on the question of whether the FDA has determined,  
19 as Plaintiff alleges, that the use of the term ECJ is “unlawful,” and that this ingredient must be  
20 named “sugar” or “cane syrup” on the label in order to comply with federal, and therefore state,  
21 law.

### 22 **A. THIS COURT’S PRIOR DECISION IN HOOD V. WHOLESOY**

23 Examining the identical question in a prior decision, this Court previously found that the  
24 FDA’s position on ECJ was “unsettled” and no uniform enforcement standard had yet been  
25 determined. See Hood v. Wholesoy, 12-cv-5550 YGR, July 12, 2013 Order Granting Motion to  
26 Dismiss, Dkt. No. 31. The Court so found in the context of Congress’ grant of authority to the  
27 FDA to “establish a uniform federal scheme of food regulation to ensure that food is labeled in a  
28 manner that does not mislead consumers” See 21 U.S.C. § 341 et seq. The FDA had issued

1 guidance in October 2009 advising that the term ECJ was not a “common or usual name for any  
2 type of sweetener” and therefore should not be used. (Defendants’ Request for Judicial Notice,  
3 Dkt. No. 29, Exh. A, Guidance For Industry: Ingredients Declared as Evaporated Cane Juice  
4 [2009 Draft Guidance”].) That same document stated that the FDA’s Guidance “should only be  
5 viewed as recommendations,” was non-binding, and not legally enforceable. The FDA solicited  
6 comments on the tentative view expressed therein. Consequently, in the Hood case, this Court  
7 found, under the circumstances and arguments raised there, it was appropriate to defer to the FDA  
8 to say what the proper rules should be with respect to ECJ, rather than render a decision that would  
9 “usurp the FDA’s interpretive authority” to establish a rule in the first instance. Hood, supra, at 11,  
10 citing Pom Wonderful, LLC v. Coca-Cola Co., 679 F.3d 1170, 1176 (9th Cir. 2012) cert. granted,  
11 134 S.Ct. 895 (January 10, 2014), and Clark v. Time Warner Cable, 523 F. 3d 1110, 1114 (9th Cir.  
12 2008). Thus, the Court dismissed the action in Hood without prejudice, consistent with the primary  
13 jurisdiction doctrine.

14 In opposition to the motion to dismiss here, Plaintiff attempts to distinguish the Hood  
15 decision, arguing that notwithstanding the tentative nature of the 2009 Draft Guidance, “the  
16 position of the FDA has always been, and continues to be, that the use of the term ‘evaporated cane  
17 juice’ is unlawful.” (Oppo. at vii:10-11.) Plaintiff argues that specific FDA regulations have been  
18 violated, including the requirement that ingredients be listed by their common or usual name,  
19 including an established standard of identity.<sup>2</sup> Here, Plaintiff argues, the FDA has a standard of  
20 identity for “sugar” and for “cane sirup/syrup,” and ECJ falls into these broadly defined standards,

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22 <sup>2</sup> The FDA has established “standards of identity” for a limited number of foods and  
23 beverages. A standard of identity is a regulation setting forth the ingredients contained in a  
24 particular food or beverage, such that “thereafter a commodity cannot be introduced into interstate  
25 commerce which ‘purports to be or is represented as’ the food which has been thus defined unless it  
26 is composed of the required ingredients.” 62 Cases, More or Less, Each Containing Six Jars of  
27 Jam v. United States, 340 U.S. 593, 598 (1951). For the many products that do not have  
28 established formal standards of identity, the FDCA “declares a food misbranded ‘[u]nless its label  
bears (1) the common or usual name of the food, if any there be, and (2) in case it is fabricated from  
two or more ingredients, the common and usual name of each such ingredient[.]’” Brod v. Sioux  
Honey Assoc., 895 F.Supp.2d 972, 980 (N.D. Cal. 2013) (no standard of identity for honey, so  
common and usual name must be used); see also 21 C.F.R. § 101.4(a)(1) (requiring ingredients to  
be “listed by [their] common or usual name”).

1 so it must be identified by one of those names or else products bearing that ingredient name are  
2 misbranded.

3 **B. RECENT FDA ACTION**

4 On March 5, 2014, the FDA published a Notice that reopened the comment period on its  
5 Draft Guidance of 2009, and specifically requested comments, data, and information on ECJ. The  
6 Notice stated, in part:

7 We have not reached a final decision on the common or usual name for this  
8 ingredient and are reopening the comment period to request further comments,  
9 data, and information about the basic nature and characterizing properties of the  
ingredient sometimes declared as “evaporated cane juice,” how this ingredient is  
produced, and how it compares with other sweeteners.

10 (Notice.) The Comment period ends May 5, 2014. Among the questions the FDA has posed in the  
11 Notice are: “How is ‘evaporated cane juice’ manufactured? Specifically, how is its method of  
12 manufacture different from that of other sweeteners made from sugar cane (such as cane sugar,  
13 cane syrup, etc.)?” and “Does the name ‘evaporated cane juice’ adequately convey the basic nature  
14 of the food and its characterizing properties or ingredients, consistent with the principles in §  
15 102.5(a)?” (Id.) The Notice closes by indicating that “[a]fter reviewing the comments received,  
16 [the FDA] intends to revise the draft guidance, if appropriate, and issue it in final form, in  
17 accordance with FDA's good guidance practice regulations in 21 C.F.R. 10.115.” (Id.)<sup>3</sup>

18 **C. PRIMARY JURISDICTION**

19 “The primary jurisdiction doctrine allows courts to stay proceedings or to dismiss a  
20 complaint without prejudice pending the resolution of an issue within the special competence of  
21 an administrative agency... and is to be used only if a claim involves an issue of first impression  
22 or a particularly complicated issue Congress has committed to a regulatory agency.” *Clark v.*  
23 *Time Warner Cable*, 523 F. 3d 1110, 1114 (9th Cir. 2008). The doctrine is to be employed when  
24 “protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which  
25 administers the scheme.” *General Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir.1987) (quoting  
26 *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 353 (1963)); accord *Syntek*

27 <sup>3</sup> The Court directed the parties to file supplemental briefing on the effect of the Notice,  
28 which they did on March 14, 2014. (See Dkt. Nos. 57, 58, 59.) The Court has considered those  
supplemental briefs in reaching this decision.

1 Semiconductor Co., Ltd. v. Microchip Tech. Inc., 307 F.3d 775, 781 (9th Cir. 2002). A court  
2 traditionally weighs four factors in deciding whether to apply the primary jurisdiction doctrine:  
3 “(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an  
4 administrative body having regulatory authority (3) pursuant to a statute that subjects an industry  
5 or activity subjects an industry or activity to a comprehensive regulatory authority that (4)  
6 requires expertise or uniformity in administration.” Syntek, 307 F.3d at 781. “[T]he doctrine is a  
7 ‘prudential’ one, under which a court determines that an otherwise cognizable claim implicates  
8 technical and policy questions that should be addressed in the first instance by the agency with  
9 regulatory authority over the relevant industry rather than by the judicial branch.” Clark, 523  
10 F.3d at 1114. “Normally, if the court concludes that the dispute which forms the basis of the  
11 action is within the agency’s primary jurisdiction, the case should be dismissed without prejudice  
12 so that the parties may pursue their administrative remedies.” Syntek, 307 F.3d at 782; Astiana v.  
13 Hain Celestial Grp., Inc., 905 F. Supp. 2d 1013, 1015 (N.D. Cal. 2012) (if doctrine applies, court  
14 can either stay proceedings or dismiss the case without prejudice.)

15 **D. APPLICATION OF THE PRIMARY JURISDICTION DOCTRINE HERE**

16 The Court finds that the Syntek factors are met here. In this case, the dispute to be  
17 resolved is whether ECJ is the “common and usual name” of any ingredient or if use of that  
18 ingredient name is misleading and prohibited under the FDCA.

19 The issue of proper declaration of ingredients on food labels is one as to which Congress  
20 vested the FDA with comprehensive regulatory authority. “Congress has regulated food and  
21 beverage labeling for more than 100 years.” Holk v. Snapple Beverage Corp., 575 F.3d 329, 331  
22 (3d Cir. 2009). It did so first in the federal Food and Drugs Act of 1906, Ch. 3915, 34 Stat. 768,  
23 then in the federal Food, Drug, and Cosmetic Act (FDCA) of 1938, 21 U.S.C. § 301 et seq..  
24 “Misbranding was one of the chief evils Congress sought to stop” through this legislation. 62  
25 Cases, More or Less, Each Containing Six Jars of Jam, 340 U.S. at 596. In 1990, Congress  
26 amended the FDCA to address nutrition labeling in the Nutrition Labeling and Education Act  
27 (NLEA), Pub. L. No. 101-535, 104 Stat. 2353. Through this legislation, Congress has vested the  
28 FDA with regulatory authority over food labeling, charging the agency with creating a uniform

1 national scheme of regulation to ensure that food is labeled in a manner that does not mislead  
2 consumers. See 21 U.S.C. § 341 et seq. Congress’ 1990 amendments were intended to “clarify  
3 and to strengthen” the FDA’s “legal authority to require nutrition labeling on foods, and to  
4 establish the circumstances under which claims may be made about nutrients in foods.” H.R.  
5 Rep. No. 101-538, at 7, reprinted in 1990 U.S.C.C.A.N. 3336, 3337.

6 Plaintiff’s claims here are state law claims based upon the Sherman Law’s incorporation  
7 of the FDCA’s labeling requirements related to standards of identity and use of an ingredient’s  
8 common and usual name. See 21 U.S.C. § 341 (standard of identity), 343(g) [label must bear the  
9 name of the food covered by the standard of identity] and (i) [label must bear common and usual  
10 name of ingredient not covered by standard of identity]. Plaintiff seeks a determination from this  
11 Court as to whether there is a standard of identity promulgated by the FDA under the FDCA that  
12 regulates the ingredient at issue here, or whether ECJ is the “common and usual name” for this  
13 ingredient. This determination is a matter that is not only within the expertise and authority of the  
14 agency, it is before the agency at this moment.

15 Prior to the FDA’s issuance of its Notice on March 5, 2014, other courts of this district  
16 have concluded that deferral under the primary jurisdiction doctrine was not required, including  
17 on the issue of ECJ. Compare Hood, supra, at 8 (citing several cases finding deferral under  
18 primary jurisdiction appropriate) with Swearingen v. Yucatan Foods, L.P., C 13-3544 RS, 2014  
19 WL 553537 (N.D. Cal. Feb. 7, 2014) (declining to defer under primary jurisdiction doctrine on  
20 ECJ issue) citing Morgan v. Wallaby Yogurt Co., Inc., 13-CV-00296-WHO, 2013 WL 5514563  
21 (N.D. Cal. Oct. 4, 2013) (same); Samet v. Proctor & Gamble Co., 12-CV-01891 PSG, 2013 WL  
22 3124647, \*8 (June 18, 2013) (same, finding existing regulation requiring use of “[t]he common or  
23 usual name of a food” sufficient for court to decide ECJ issue). The Court finds that the claims  
24 here rely, as their predicate, on the applicable food labeling laws. The claims turn, first and  
25 foremost, on whether they are “misleading” in the sense that they are considered “misbranded”  
26 under the federal food labeling laws, not on whether the labels are misleading in a general legal  
27 sense. This is because the determination whether label is misleading is governed entirely by its  
28 compliance with the federal regulations in this area. Federal law completely displaces any non-

1 identical requirements in the areas covered by the federal requirements. 21 U.S.C. § 343-1(a)(1)-  
2 (5) (no state may establish any requirement that is not identical to a standard of identity  
3 established under 21 U.S.C. § 341 or 343(g) or any requirement for labeling of the type required  
4 in any of a number of enumerated sections of section 343 that is not identical to that requirement);  
5 21 C.F.R.. § 100.1(c)(4) (state requirement is preempted if it is not identical to the federal  
6 provision, meaning that the state provision differs from the federal or that the state provision  
7 “imposes obligations *or contains provisions... that... are not imposed* by or contained in the  
8 applicable [federal statute or regulation].” [emphasis added]).

9 Leaving aside the question of whether the Court can properly determine, in the first  
10 instance, if ECJ is or is not the “common or usual name” of this ingredient, the FDA’s action  
11 clearly indicates that the agency is exercising its authority in this area. In light of the fact that  
12 FDA has revived its review of the ECJ issue, the Court finds that the FDA’s position on the  
13 lawfulness of the use of that term is not only, as stated in Hood, “not settled,” it is also under  
14 active consideration by the FDA. Any final pronouncement by the FDA in connection with that  
15 process almost certainly would have an effect on the issues in litigation here.

16 **III. CONCLUSION**

17 Accordingly, the Motion to Dismiss is **GRANTED IN PART** on the grounds of primary  
18 jurisdiction.<sup>4</sup> This action is **STAYED**. The Court sets a compliance hearing for **Friday, August 1,**  
19 **2014**, at 9:01 a.m. The parties shall file a joint statement of no more than five pages updating the  
20 Court on the status of the FDA’s action and the parties’ positions as to whether further briefing  
21 concerning the effects of any action or inaction is necessary. Should the parties file their joint  
22 statement timely, the Court may vacate the hearing without the necessity of an appearance.

23 This terminates Docket No. 28.

24 **IT IS SO ORDERED.**

25 Date:

