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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

NADINE SAUBERS, JEANNE  
BURNS, DENELDA NORWOOD,  
JENNIFER POPLIN, WENDY  
PEREL, and JAMES WALDRON,  
individually and on behalf of all others  
similarly situated,

Plaintiffs,

vs.

KASHI COMPANY,

Defendant.

CASE NO. 13CV899 JLS (BLM)

**ORDER GRANTING MOTION TO  
DISMISS SECOND  
CONSOLIDATED AMENDED  
CLASS ACTION COMPLAINT**

(ECF No. 32)

Presently before the Court is Defendant Kashi Company's ("Kashi") Motion to Dismiss Second Consolidated Amended Class Action Complaint. (Mot. to Dismiss, ECF No. 32). Also before the Court are Plaintiffs Nadine Saubers, Jeanne Burns, Denelda Norwood, Jennifer Poplin, Wendy Perel, and James Waldron's ("Plaintiffs") response in opposition, (Resp. in Opp'n, ECF No. 35), and Kashi's reply in support. (Reply in Supp., ECF No. 38.) The motion hearing that was scheduled for January 16, 2014 was vacated and the matter taken under submission without oral argument pursuant to Civil Local Rule 7.1(d)(1). Having considered the parties' arguments and the law, the Court **GRANTS** Kashi's motion and **DISMISSES** this action **WITHOUT PREJUDICE** pursuant to the doctrine of

1 primary jurisdiction.

## 2 BACKGROUND

3 In this consumer class action, Plaintiffs allege that over 75 different food  
4 products manufactured by Kashi are “misbranded” because they list “evaporated  
5 cane juice,” or variations of that term, as an ingredient on the products’ packaging.  
6 (Am. Compl. ¶¶ 1, 3, ECF No. 28.) Plaintiffs maintain that such labeling is false and  
7 misleading because “evaporated cane juice” is merely ordinary sugar, a fact that  
8 Kashi deliberately conceals in order to appeal to health-conscious consumers  
9 seeking “natural, healthy, and nutritious foods, including [foods with] reduced  
10 sugars [as well as] sugars or sweeteners with reduced glycemic [indices] and  
11 glycemic loads.” (*Id.* at ¶¶ 3, 6.)

12 Based on these allegations, Plaintiffs bring claims against Kashi pursuant to  
13 California’s Sherman Food, Drug, and Cosmetic Law, Cal. Health & Safety Code §§  
14 109875 *et seq.*, Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*,  
15 False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, *et seq.*, Consumer Legal  
16 Remedies Act, Cal. Civ. Code §§ 1750, *et seq.*, New Jersey’s Truth-in-Consumer  
17 Contract, Warranty, and Notice Act, N.J.S.A. §§ 56:12-14 to 12-18, Consumer  
18 Fraud Act, N.J.S.A. §§ 56:8–1, and common law claims for unjust enrichment and  
19 restitution. (*Id.* at ¶ 1.) Plaintiffs’ state law claims rely heavily on informal  
20 guidance issued by the U.S. Food and Drug Administration (“FDA”) on October 7,  
21 2009, indicating that “evaporated cane juice” is not the common or usual name of  
22 any sweetener and that the use of this phrase in food labeling is deceptive and  
23 misleading. (*Id.* at ¶¶ 3, 42–44, 58–62, 66–69, 79.) Plaintiffs’ amended pleading  
24 also references warning letters issued by the FDA in recent years to various food  
25 manufacturers, ostensibly reiterating the FDA’s view that the term “evaporated cane  
26 juice” is improper and that its use in food labeling to refer to sweeteners derived  
27 from sugar cane syrup constitutes “misbranding” in violation of existing FDA  
28 regulations. (*Id.* at ¶ 43.)

1 On March 5, 2014, the FDA published a notice in the Federal Register  
2 inviting a new round of comments regarding the October 7, 2009 draft guidance.  
3 See Draft Guidance for Industry on Ingredients Declared as Evaporated Cane Juice;  
4 Reopening of Comment Period; Request for Comments, Data, and Information, 79  
5 Fed. Reg. 12507 (Mar. 5, 2014). In the notice, the FDA states that it has “not  
6 reached a final decision on the common or usual name for [sweeteners derived from  
7 sugar cane syrup] and [that it is] reopening the comment period to request further  
8 comments, data, and information about the basic nature and characterizing properties  
9 of the ingredient sometimes declared as ‘evaporated cane juice,’ how this ingredient  
10 is produced, and how it compares with other sweeteners.” *Id.*

11 Kashi now moves to dismiss or stay Plaintiffs’ claims pursuant to the doctrine  
12 of primary jurisdiction, among other grounds, arguing that Plaintiffs should not be  
13 allowed to proceed with their suit until the FDA has finalized its position regarding  
14 the common or usual name for the sweetener often referred to as “evaporated cane  
15 juice.” (Mot. to Dismiss, ECF No. 32.) As the Court ultimately agrees that the  
16 doctrine of primary jurisdiction counsels dismissal of all of Plaintiffs’ claims  
17 without prejudice at this time, the Court does not address the numerous other  
18 arguments raised by Kashi’s motion.

### 19 LEGAL STANDARD

20 “The primary jurisdiction doctrine allows courts to stay proceedings or to  
21 dismiss a complaint without prejudice pending the resolution of an issue within the  
22 special competence of an administrative agency.” *Clark v. Time Warner Cable*, 523  
23 F.3d 1110, 1114 (9th Cir. 2008). “[T]he doctrine is a ‘prudential’ one, under which  
24 a court determines that an otherwise cognizable claim implicates technical and  
25 policy questions that should be addressed in the first instance by the agency with  
26 regulatory authority over the relevant industry rather than by the judicial branch.”  
27 *Id.* (citing *Syntek Semiconductor Co. v. Microchip Tech., Inc.*, 307 F.3d 775, 780  
28 (9th Cir. 2002)). The doctrine principally applies where there is “(1) a need to

1 resolve an issue that (2) has been placed by Congress within the jurisdiction of an  
2 administrative body having regulatory authority (3) pursuant to a statute that  
3 subjects an industry or activity to a comprehensive regulatory authority that (4)  
4 requires expertise or uniformity in administration.” *Id.* (citing *Syntek*, 307 F.3d at  
5 781). Primary jurisdiction may be invoked when an agency is addressing an issue  
6 through formal rule-making procedures, as well as through adjudicative procedures.  
7 *Swearingen v. Santa Cruz Natural, Inc.*, Case No. 13-04291 SI, 2014 WL 1339775  
8 at \*2 (N.D. Cal. Apr. 2, 2014) (citation omitted).

### 9 DISCUSSION

10 In its motion, Kashi argues that Plaintiffs’ claims should be dismissed under  
11 the primary jurisdiction doctrine because the FDA is the administrative agency  
12 charged with regulating the content of food labels and the FDA’s October 7, 2009  
13 draft guidance regarding the use of the term “evaporated cane juice” to describe  
14 sugar cane-based sweeteners is merely preliminary, non-binding, and subject to  
15 further review by the agency. (Mot. to Dismiss 22–24, ECF No. 32.) In its  
16 supplemental filings, Kashi calls specific attention to the FDA’s March 5, 2014  
17 notice in the Federal Register, emphasizing that the notice solicits a new round of  
18 comments regarding the draft guidance on “evaporated cane juice” and indicates that  
19 the agency intends to revise the guidance, if appropriate, and then issue it in final  
20 form. (*See* Notice of Suppl. Authority in Supp. of Def.’s Mot. to Dismiss, ECF No.  
21 46; Notice of Suppl. Authority in Supp. of Def’s Mot. to Dismiss, ECF No. 50.)

22 Plaintiffs deny, however, that the FDA’s solicitation of additional comments  
23 regarding the October 7, 2009 draft guidance affects their claims. (*See* Pl.’s Resp. to  
24 Kashi’s Notice of Suppl. Authority 3, ECF No. 47.) According to Plaintiffs, the  
25 FDA’s position that the term “evaporated cane juice” should not be used to describe  
26 sugar cane-based sweeteners has long been settled, as evidenced by the agency’s  
27 willingness to leave the draft guidance unchanged for over 4 years and to issue  
28 numerous warning letters consistent with that perspective. (*Id.*)

1           The Court agrees with Kashi that the primary jurisdiction doctrine counsels  
2 dismissal of Plaintiffs’ claims at this time. To begin with, “[f]ood labeling is within  
3 the special competence of the FDA.” *Swearingen*, 2014 WL 1339775 at \*2 (citing  
4 *Morgan v. Wallaby Yogurt Co., Inc.*, 13-CV-00296-WHO, 2013 WL 5514563 at \*4  
5 (N.D. Cal. Oct. 4, 2013)). “Congress vested the FDA with comprehensive  
6 regulatory authority” over the “proper declaration of ingredients on food labels.”  
7 *Id.* (citing *Reese v. Odwalla, Inc.*, 13-CV-00947-YGR, 2014 WL 1244940 at \*4  
8 (N.D. Cal. Mar. 25, 2014)).

9           Moreover, in this action, Plaintiffs’ claims rely heavily, if not entirely, on the  
10 premise that the FDA has concluded that “evaporated cane juice” is not the common  
11 or usual name for any sweetener. Plaintiffs’ claims each invoke the FDA’s informal  
12 guidance to support their contention that the Kashi products identified in the  
13 amended pleading are misbranded and in violation of the FDA’s food labeling  
14 requirements. (*See* Am. Compl. at ¶¶ 3, 42–44, 58–62, 66–69, 79.) Consequently,  
15 the FDA’s articulation of its considered view on this matter will undoubtedly affect  
16 issues being litigated in this action. Because the FDA has been actively revisiting its  
17 draft guidance since at least March 5, 2014—indicating that the agency’s expert  
18 opinion is still being developed—application of the primary jurisdiction doctrine is  
19 favored. *See Swearingen*, 2014 WL 1339775 at \*3 (“[C]ourts find it particularly  
20 appropriate to defer to an agency when, as is true here, the agency is in the process  
21 of making a determination on a key issue in the litigation.”); *Reese*, 2014 WL  
22 1244940 at \*5 (“In light of the fact that [the] FDA has revived its review of the  
23 [“evaporated cane juice”] issue, the Court finds that the FDA’s position on the  
24 lawfulness of the use of that term is not only . . . ‘not settled,’ it is also under active  
25 consideration by the FDA. Any final pronouncement by the FDA in connection with  
26 that process almost certainly would have an effect on the issues in litigation here.”).

27           Finally, a determination as to the propriety of using the term “evaporated cane  
28 juice” in food labeling involves highly technical considerations, such as how

1 evaporated cane juice is produced, the differences between evaporated cane juice  
2 and other sweeteners, and the ingredient's characterizing properties. *See* Reopening  
3 of Comment Period, 79 Fed. Reg. at 12507. "Resolution of these issues requires the  
4 expertise of the FDA." *Swearingen*, 2014 WL 1339775 at \*3. Allowing the FDA to  
5 resolve this matter in the first instance would permit the Court to benefit from the  
6 agency's technical expertise and would also provide for uniformity in administration  
7 of the agency's food labeling requirements. *Id.* at \*4 ("[A]pplying the doctrine of  
8 primary jurisdiction allows the Court to benefit from the FDA's expertise on food  
9 labeling and will ensure uniformity in administration of the regulations.").

10 Plaintiffs argue that dismissal would be improper and prejudicial on primary  
11 jurisdiction grounds because the FDA has not indicated the time frame within which  
12 it intends to complete its revisions of the October 7, 2009 draft guidance. (*See* Pl.'s  
13 Notice of Suppl. Authority, ECF No. 51 (citing *Gustavson v. Mars, Inc.*, No. 13-cv-  
14 04537, 2014 WL 2604774 at \*10 (N.D. Cal. Jun. 10, 2014)).) Plaintiffs' argument  
15 lacks merit, however, because, unlike the FDA's vague statements regarding a  
16 possible review of general nutrition labeling requirements that were discussed in  
17 *Gustavson*, the FDA's March 5, 2014 notice in the Federal Register indicates that  
18 the agency is specifically reconsidering whether "evaporated cane juice" is a  
19 common or usual name for sweeteners derived from sugar cane syrup and that it has  
20 "not reached a final decision" on the question—the very issue at stake in this  
21 litigation. The March 5, 2014 notice also provides that comments from interested  
22 parties will be accepted until May 5, 2014 and that "[a]fter reviewing the comments  
23 received, [the agency] intend[s] to revise the draft guidance, if appropriate, and issue  
24 it in final form, in accordance with the FDA's good guidance practice regulations in  
25 21 C.F.R. 10.115." *Reopening of Comment Period*, 79 Fed. Reg. at 12508. Thus, it  
26 is clear from the agency's recent notice that there is "an active and ongoing  
27 regulatory process" involving the specific issues raised in this litigation, such that  
28 the court's reasoning in *Gustavson* is inapplicable here. *Gustavson*, 2014 WL

1 2604774 at \*10.

2 Plaintiffs also argue that the U.S. Supreme Court's recent decision in *POM*  
3 *Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2231 (2014) holds that courts  
4 need not defer to the FDA's expertise in suits over deceptive or misleading food  
5 labeling. Plaintiffs reliance on this case is inapposite, however, because *POM*  
6 *Wonderful* makes no mention of the primary jurisdiction doctrine and stands  
7 principally for the proposition that Lanham Act unfair competition claims brought  
8 by a competitor are not *precluded* by the regulatory scheme of the federal Food,  
9 Drug, and Cosmetic Act. 134 S. Ct. at 2241. Because dismissal on the basis of  
10 primary jurisdiction is without prejudice and does not necessarily preclude any  
11 claims brought by a plaintiff, *POM Wonderful's* reasoning does not support  
12 Plaintiffs.

13 Accordingly, the Court finds that Plaintiffs' arguments are without merit and  
14 that the primary jurisdiction doctrine counsels dismissal without prejudice of all of  
15 Plaintiffs' claims at this time. In reaching this conclusion, the Court concurs with  
16 the majority of district courts within the Ninth Circuit that have considered this  
17 question. *See, e.g., Gitson v. Clover Stornetta Farms*, No. C-13-01517 (EDL),  
18 2014 WL 2638203, at \*8 (N.D. Cal. Jun. 9, 2014); *Swearingen v. Late July Snacks*  
19 *LLC*, No. C-13-4324 EMC, 2014 WL 2215878, at \*3 (N.D. Cal. May 29, 2014);  
20 *Swearingen v. Yucatan Foods, L.P.*, No. C 13-3544 RS, 2014 WL 2115790, at \*2  
21 (N.D. Cal. May 20, 2014); *Avila v. Redwood Hill Farm & Creamery, Inc.*, Case No.  
22 5:13-CV-00335-EJD, 2014 WL 2090045, at \*3 (N.D. Cal. May 19, 2014);  
23 *Swearingen v. Attune Foods, Inc.*, Case No. C 13-4541 SBA, 2014 WL 2094016, at  
24 \*3 (N.D. Cal. May 19, 2014); *Figy v. Lifeway Foods, Inc.*, Case No.  
25 13-cv-04828-TEH, 2014 WL 1779251, at \*3-4 (N.D. Cal. May 5, 2014); *Figy v.*  
26 *Amy's Kitchen, Inc.*, No. C 13-03816-SI, 2014 WL 1379915, at \*3 (N.D. Cal. Apr.  
27 9, 2014). The Court **GRANTS** Kashi's motion to dismiss on this basis.

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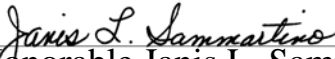
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**CONCLUSION**

For the reasons stated above, the Court **GRANTS** Kashi’s motion to dismiss. The dismissal is **WITHOUT PREJUDICE** to Plaintiffs filing an amended pleading after the FDA has released its final guidance regarding the common or usual name for the sweetener often referred to as “evaporated cane juice.”

**IT IS SO ORDERED.**

DATED: August 11, 2014

  
\_\_\_\_\_  
Honorable Janis L. Sammartino  
United States District Judge