

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THOMAS IGLESIAS,
Plaintiff,

v.

FERRARA CANDY CO.,
Defendant.

Case No. [17-cv-00849-VC](#)

**ORDER DENYING MOTION TO
DISMISS**

Re: Dkt. No. 28

For the reasons below, the motion is denied.

1. Applying the primary jurisdiction doctrine is not warranted. Existing FDA regulations define "nonfunctional slack-fill." 21 C.F.R. § 100.100. This case therefore does not involve a question for which courts lack a "clear indication of how FDA would view the issue," or "require[] resolution of an issue of first impression." *Hood v. Wholesoy & Co.*, No. 12-cv-05550-YGR, 2013 WL 3553979, at *5 (N.D. Cal. July 12, 2013); *see Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 760 (9th Cir. 2015) (quoting *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008)). Whether empty space is required by the machines used to seal the container, to protect the contents of the package, or to fulfill some specific function required of the packaging, etc., are not "particularly complicated" questions requiring agency "expertise" in administration. *See Astiana*, 783 F.3d at 760.

2. The complaint adequately alleges that the defendant's candy products contain nonfunctional slack-fill, for exactly the reasons described by Judge O'Connell in *Escobar v. Just Born, Inc.* Order re Defendant's Motion to Dismiss, No. 17-cv-01826-BRO, at *19-21 (C.D. Cal. June 12, 2017) (Dkt. No. 25).

3. Also for the reasons stated by Judge O'Connell, the complaint adequately alleges that the packaging is likely to deceive a reasonable consumer. *Id.* at *12-18.

IT IS SO ORDERED.

Dated: July 25, 2017



VINCE CHHABRIA
United States District Judge