

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

)	Case No. C 13-0690 SC
)	
DIANA PARKER, individually and)	<u>ORDER DENYING MOTION TO DISMISS</u>
on behalf of all others)	
similarly situated,)	
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Plaintiff,)	
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v.)	
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J.M. SMUCKER CO.,)	
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Defendant.)	
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I. INTRODUCTION

Now before the Court is Defendant J.M. Smucker Co.'s ("Defendant") motion to dismiss Plaintiff Diana Parker's ("Plaintiff") amended class action complaint. ECF Nos. 16 ("FAC"), 20 ("MTD"). The motion is fully briefed, ECF Nos. 22 ("Opp'n"), 24 ("Reply"), and appropriate for decision without oral argument, Civ. L.R. 7-1(b). For the reasons explained below, the Court DENIES Defendant's motion.

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1 **II. BACKGROUND**

2 Defendant is an Ohio corporation that manufactures a variety
3 of food products, including the four types of Crisco cooking oil at
4 issue in this case: Crisco Pure Vegetable Oil, made from soybean
5 oil; Crisco Pure Canola Oil, made from rapeseed oil; Crisco Pure
6 Corn Oil, made from corn oil; and Crisco Natural Blend Oil, made
7 from combined rapeseed, sunflower, and soybean oil. FAC ¶¶ 9-14
8 (collectively, these products are the "Oils"). Plaintiff is a
9 California resident who purchased Crisco Pure Vegetable Oil. Id. ¶
10 8. She brings this suit on behalf of herself and other people who
11 have purchased the Oils. Id. ¶ 3.

12 Plaintiff's claims are based on a single fact: all of the Oils
13 include the label "All Natural" next to the Oil's name on the
14 packaging. See id. ¶¶ 11-14. Plaintiff claims that the Oils are
15 not "natural" at all, because they are made with genetically
16 modified ("GM" or "bioengineered") crops, and are also "so heavily
17 processed that they bear no chemical resemblance to the ingredients
18 from which they were derived." Id. ¶ 1. As Plaintiff alleges,
19 consumers like her are drawn to "All Natural" products because
20 those products are perceived to be "better, healthier, and more
21 wholesome." Id. ¶ 2. Labels like Defendant's therefore trick
22 consumers into buying products they otherwise would have avoided,
23 whether due to health concerns or mere preference. See id. ¶¶ 2,
24 8.

25 Plaintiff's first basis for her suit, that food derived from
26 GM crops cannot be natural, is based on an array of definitions
27 from industry, government, and health organizations. Id. ¶¶ 16-20.
28 These definitions all characterize bioengineered crops as having

1 been scientifically altered to combine one plant's genetic material
2 with another's in ways that do not occur naturally. See id. ¶¶ 16-
3 20. She also asserts that "[o]ver 70% of U.S. corn, over 90% of
4 U.S. soy, and over 80% of U.S. canola crops are GM," and that
5 Defendant sources its ingredients from U.S. commodity suppliers who
6 supply GM crops. Id. ¶ 21. Plaintiff's claims include only one
7 factual statement from Defendant itself about GM crops, taken from
8 its "Statement Regarding Genetic Modification": "Due to expanding
9 use of biotechnology by farmers and commingling of ingredients in
10 storage and shipment, it is possible that some of our products may
11 contain ingredients derived from biotechnology." Id. ¶ 22.
12 Plaintiff links these facts together to conclude that Defendant
13 must be using non-natural GM crops in its Oils, and therefore that
14 the "All Natural" statement that appears on Defendant's Oils is
15 actionably false, misleading, or unfair. Id. ¶ 23.

16 Plaintiff's second, separate factual ground for this suit --
17 that the Oils are not natural because they are highly processed and
18 no longer retain their source-plants' original chemical properties
19 -- is based on distinctions among oil-manufacturing processes. Id.
20 ¶ 24. Plaintiff first describes extraction methods like cold-
21 pressing, which she says "allow the oils to retain the chemical
22 composition occurring in nature." Id. ¶ 25. She then contrasts
23 this process with the less mechanical, more chemical methods she
24 says Defendant uses to make its Oils. See id. ¶ 26. According to
25 Plaintiff, Defendant begins its manufacturing process by physically
26 extracting oil from vegetables, but after that, the raw oil becomes
27 unrecognizably modified. See id. ¶¶ 27-30. There are several
28 steps to this process: alkali-neutralization, meant to separate

1 free fatty acids from the neutralized oil; bleaching and
2 deodorizing, meant to lighten the oil's color and minimize its
3 odor; and conditioning. Id. ¶¶ 28-30. Plaintiff alleges that in
4 all of these steps, Defendant treats the Oils with harsh,
5 potentially harmful chemicals that render the Oils less like
6 natural oils extracted mechanically and more like unnatural
7 chemical composites. See id.

8 Based on the above facts, Plaintiff asserts three causes of
9 action against Defendant: (i) violation of California's Consumer
10 Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, et seq.; (ii)
11 violations of California's Unfair Competition Law ("UCL"), Cal.
12 Bus. & Prof. Code § 17200, et seq.; and (iii) breach of express
13 warranty. FAC ¶¶ 39-62. Defendant now moves to dismiss, arguing
14 that (i) Plaintiff's FAC fails to meet federal pleading standards;
15 (ii) federal law preempts Plaintiff's claims; (iii) the Court
16 should dismiss the FAC under the primary jurisdiction doctrine;
17 (iv) and Plaintiff fails to state claims under each cause of action
18 she pleads. See MTD at 2-4.

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20 **III. LEGAL STANDARD**

21 A motion to dismiss under Federal Rule of Civil Procedure
22 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
23 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
24 on the lack of a cognizable legal theory or the absence of
25 sufficient facts alleged under a cognizable legal theory."
26 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
27 1988). "When there are well-pleaded factual allegations, a court
28 should assume their veracity and then determine whether they

1 plausibly give rise to an entitlement to relief." Ashcroft v.
2 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court
3 must accept as true all of the allegations contained in a complaint
4 is inapplicable to legal conclusions. Threadbare recitals of the
5 elements of a cause of action, supported by mere conclusory
6 statements, do not suffice." Id. at 678 (citing Bell Atl. Corp. v.
7 Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a
8 complaint must be both "sufficiently detailed to give fair notice
9 to the opposing party of the nature of the claim so that the party
10 may effectively defend against it" and "sufficiently plausible"
11 such that "it is not unfair to require the opposing party to be
12 subjected to the expense of discovery." Starr v. Baca, 652 F.3d
13 1202, 1216 (9th Cir. 2011).

14 Additionally, allegations of fraud must meet the heightened
15 pleading standard of Federal Rule of Civil Procedure 9(b), which
16 requires that plaintiffs alleging fraud "must state with
17 particularity the circumstances constituting fraud." Kearns v.
18 Ford Motor Co., 567 F.3d 1120, 1125-27 (9th Cir. 2009). "To
19 satisfy Rule 9(b), a pleading must identify the who, what, when,
20 where, and how of the misconduct charged, as well as what is false
21 or misleading about the purportedly fraudulent statement, and why
22 it is false." United States ex rel Cafasso v. Gen. Dynamics c\$
23 Sys., 637 F.3d 1047, 1055 (9th Cir. 2011) (internal quotation marks
24 and citations omitted).

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1 **IV. DISCUSSION**

2 **A. Pleading Issues**

3 Defendant argues that Plaintiff's FAC fails to plead with
4 particularity or plausibility either that the Oils contain GM
5 ingredients or that Defendant's processing makes the Oils otherwise
6 non-natural. MTD at 9-12.

7 As to the first theory, Defendant argues that Plaintiff fails
8 to allege that the Oils actually contain non-natural ingredients --
9 only that it is highly likely that they are, given the percentage
10 of GM crops in the U.S. and the fact that Defendant admits the
11 possibility of using such crops. See id. at 9-10. Defendant is
12 correct that Plaintiff must provide "more than a sheer possibility"
13 that the Oils contain GM ingredients, see Iqbal, 556 U.S. at 678,
14 but the Court finds Plaintiff's pleadings sufficiently plausible on
15 this point.

16 As to Plaintiff's second theory, Defendant claims that
17 Plaintiff does not allege with sufficient specificity that the Oils
18 contain trace chemicals, and that Plaintiff does not explain how
19 the process she describes render the Oils "chemically altered."
20 MTD at 11-12. Defendant adds that Plaintiff's claims contravene
21 FDA regulations and policy -- discussed further below -- such that
22 her allegations are implausible under Twombly and Iqbal. Id. The
23 Court finds that Plaintiff pleads this theory with sufficient
24 specificity to satisfy Rule 9(b). Plaintiff does not need to set
25 out scientifically precise descriptions of how the Oils' chemical
26 makeup changes. She only needs to describe the who, what, when,
27 where, and how of the allegedly misleading conduct, which she has
28 done: Plaintiff's FAC describes Defendant's chemical processing of

1 the Oils, states that this renders them non-natural, and concludes
2 that if the Oils are non-natural then the "All Natural" tag is
3 false or misleading. See Cafasso, 637 F.3d at 1055. The truth of
4 this theory remains to be litigated, but it cannot be dismissed on
5 the pleadings.

6 **B. Standing**

7 Since Plaintiff pleads that she only purchased Crisco Pure
8 Vegetable Oil, not any of the other three Oils, Defendant concludes
9 that Plaintiff lacks standing to sue based on the other three Oils.
10 MTD at 24. Plaintiff responds that she has standing not just based
11 on the purchases, but on Defendant's business practices, and that
12 since the Oils are substantially similar, Plaintiff has standing to
13 represent purchasers of all four Oils. Opp'n at 22-23. Plaintiff
14 is correct. It is true that "there is authority going both ways"
15 on standing issues like this one. See Astiana v. Dreyer's Grand
16 Ice Cream, Inc., No. C-11-2910 EMC, 2012 WL 2990766, at *11 (N.D.
17 Cal. July 20, 2012). But "the critical inquiry seems to be whether
18 there is sufficient similarity between the products purchased and
19 not purchased," such as whether the products are of the same kind,
20 whether they are comprised of largely the same ingredients, and
21 whether each of the challenged products bears the same alleged
22 mislabeling. Id. at *13; see also Colucci v. ZonePerfect Nutrition
23 Co., No. 12-2907 SC, 2012 WL 6737800, at *4 (N.D. Cal. Dec. 28,
24 2012).

25 The Court finds that there is sufficient similarity between
26 Crisco Pure Vegetable Oil and the other three Oils identified in
27 Plaintiff's FAC. They are all the same kind of product. They all
28 have highly similar labels. Plaintiff alleges the same actionable

1 conduct as to each of them. This is enough for the Court to
2 conclude that Plaintiff has standing to sue for alleged mislabeling
3 of all four Oils.

4 **C. Preemption**

5 Defendant argues that Plaintiff's claims are preempted because
6 they conflict with both FDA policies on bioengineered foods and
7 federal food labeling regulations. MTD at 12-17.

8 First, Defendant claims that FDA policies make clear that the
9 FDA has, for years, rejected the argument that bioengineered foods
10 must be labeled differently, since the FDA has determined that
11 there is no material difference (for labeling purposes) between
12 bioengineered foods and non-bioengineered foods. Id. at 12-13.

13 For example, in 1992, the FDA declared that it would regulate
14 bioengineered foods under its existing regulatory framework,
15 "utilizing an approach identical in principle to that applied to
16 foods developed by traditional plant breeding." Statement of
17 Policy: Foods Derived from New Plant Varieties, 57 F.R. 22984-01
18 (May 29, 1992) (the "1992 Policy").¹ The FDA concluded that
19 bioengineered foods need not be labeled differently from non-
20 bioengineered foods unless they differ so much that the "common or
21 usual name" no longer applies to the bioengineered food." Id. at
22 22991. In 1993, the FDA issued a public request for more data and
23 information about the labeling of bioengineered foods, but
24 afterward stated again that the use of bioengineered food was not

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26 ¹ This and other FDA documents cited in this Order appear as
27 exhibits to Defendant's Request for Judicial Notice, ECF No. 21
28 ("Def.'s RJN"), which the Court GRANTS under Federal Rule of
Evidence 201 because they are public, government documents. The
Court cites to the Federal Register for documents that appear
there, and to Defendant's RJN for those that do not.

1 "material" and did not need to be specially disclosed. Food
2 Labeling: Foods Derived from New Plant Varieties, 58 F.R. 25837-03,
3 25839 (Apr. 28, 1993).

4 The FDA has reiterated as recently as 2001 and 2005 that it
5 finds no basis for requiring special labeling of bioengineered
6 foods. See MTD at 5-6; Def.'s RJN Exs. 4 (FDA guidance on
7 voluntary bioengineering labeling), 5 (FDA statement before the
8 Senate on bioengineering labeling). This Court has also confirmed
9 that at no point has the FDA stated any intention to alter its
10 longstanding position not to adopt any regulations governing the
11 term "natural," regardless of consumers being misled. See, e.g.,
12 Lockwood v. Conagra Foods, Inc., 597 F. Supp. 2d 1028, 1033-34
13 (N.D. Cal. 2009).

14 Based on these numerous instances of FDA refusal to adopt
15 regulations requiring the disclosure of bioengineered ingredients
16 or further defining the term "natural," Defendant concludes that
17 Plaintiff's lawsuit "seeks to impose new and different labeling
18 standards for products that may have bioengineered ingredients."
19 MTD at 13. Plaintiff responds that this is not really what her
20 case concerns. She alleges that the "All Natural" statement is
21 false or misleading since the Oils are not, in fact, 100 percent
22 natural. See Opp'n at 13-15.

23 Defendant replies by arguing that whatever the basis of
24 Plaintiff's claim, her goal is ultimately to require that
25 bioengineered foods be labeled differently from non-bioengineered
26 foods in a way preempted by federal law. Reply at 11-12. This is
27 not an accurate statement of Plaintiff's argument. Under
28 Plaintiff's theory, Defendant could have simply left "All Natural"

1 off the labels. But because they included the phrase, Plaintiff
2 claims that the labels are misleading. This is not a preempted
3 theory. Defendant may not affirmatively be required to disclose
4 its use of bioengineered ingredients (if any exist at all), but
5 Plaintiff is only alleging that the "All Natural" claim might be
6 untrue and misleading if Defendant in fact does use bioengineered
7 ingredients or processing techniques that render a natural
8 ingredient non-natural. Plaintiff's claim is therefore not
9 preempted on these grounds.

10 Defendant also argues that FDA regulations governing the
11 identification of common ingredients preempts Plaintiff's state law
12 claims. The Food, Drug, and Cosmetics Act ("FDCA"), as amended by
13 the Nutrition Labeling and Education Act ("NLEA"), is the operative
14 statute in this case, establishes a regulatory scheme for food
15 labeling. 21 U.S.C. § 341 et seq. Congress has given the Food and
16 Drug Administration (the "FDA") regulatory authority over food
17 labeling due to the need for expertise and uniformity in that
18 field, and has also stated that federal law preempts state law on
19 food labeling: "[N]o State . . . may directly or indirectly
20 establish . . . any requirement for the labeling of food that is
21 not identical to the [FDCA]." Id. § 343-1(a).

22 On this point, Defendant essentially argues that because the
23 FDA requires food producers to label ingredients according to their
24 common or usual names, and the FDA does not require bioengineered
25 ingredients to be so labeled, Defendant would violate FDA
26 regulations if it referred to the Oils' ingredients as, for
27 example, "bioengineered soy." MTD at 14-17 (citing 21 C.F.R. §
28 102.5(a) (setting out this regulation)). According to Defendant,

1 Plaintiff's theory would require food labeling that is not
2 identical to the FDCA and is therefore preempted. Id.

3 Defendant's argument fails. Again, Plaintiff is not demanding
4 that Defendant label its products differently, even though she
5 alleges that she would not have bought any of the Oils had they
6 been labeled as including bioengineered ingredients, for example.
7 And this is not a case in which a plaintiff sued a food producer
8 for not disclosing its use of bioengineered ingredients. Rather,
9 Plaintiff sued Defendant for allegedly making a false or misleading
10 statement on its products. It is not even implied in Plaintiff's
11 theory that Defendant should have labeled the product differently,
12 just that it should not have included a certain label that is
13 allegedly false or misleading. This theory is not preempted.

14 Accordingly, the Court finds that Plaintiff's claims are not
15 preempted by FDA regulations or federal food labeling laws.
16 Defendant's motion is DENIED on this point.

17 **D. Plaintiff's State Law Claims**

18 **i. UCL, CLRA, and FAL claims**

19 Defendant moves to dismiss Plaintiff's state law causes of
20 action for failure to state a claim. Plaintiff's first two causes
21 of action are for violations of the CLRA and UCL, respectively,
22 though the latter claim is predicated on alleged violations of the
23 CLRA and California's False Advertising Law ("FAL"), Cal. Bus. &
24 Prof. Code § 17500, et seq.

25 The CLRA prohibits "unfair methods of competition and unfair
26 or deceptive acts or practices." Cal. Civ. Code § 1770. Plaintiff
27 relies on sections of the CLRA that prohibit the following:
28 misrepresenting the source of a product, id. § 1770(a)(2);

1 misrepresenting the characteristics, ingredients, or benefits of a
2 product, id. § 1770(a)(5); misrepresenting the standard, quality,
3 or grade of a product, id. § 1770(a)(7); advertising a product
4 without intent to sell it as advertised, id. § 1770(a)(9); and
5 misrepresenting that a product has been supplied in accordance with
6 previous representations, id. § 1770(a)(16). Plaintiff claims that
7 because Defendant represented that the Oils were "all natural" when
8 they were not, it violated the CLRA.

9 The UCL prohibits all unlawful, unfair, or fraudulent conduct.
10 See Cal. Bus. & Prof. Code § 17200. Each prong can be a separate
11 cause of action. Berryman v. Merit Prop. Mgmt., Inc., 152 Cal.
12 App. 4th 1544, 1554 (Cal. Ct. App. 2007). A plaintiff can state a
13 claim under the unlawfulness prong by pleading that a business
14 practice violates a predicate law. See Cel-Tech Commc'ns, Inc. v.
15 L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180 (Cal. 1999).
16 Unfairness claims can be based on business practices that violate
17 established public policy or are immoral, unethical, oppressive, or
18 unscrupulous, which cause injury to consumers outweighing the
19 practice's benefits. McKell v. Wash. Mutual, Inc., 142 Cal. App.
20 4th 1457, 1473 (Cal. Ct. App. 2006). Plaintiffs can state claims
21 under the fraudulent prong by pleading that a defendant's business
22 practices are likely to deceive members of the public. Morgan v.
23 AT&T Wireless Servs., Inc., 177 Cal. App. 4th 1235, 1254 (Cal. Ct.
24 App. 2009). Plaintiff alleges (1) that Defendant violated the
25 unlawful prong by violating the CLRA and FAL, since the "All
26 Natural" label is allegedly false; (2) that Defendant's conduct is
27 unfair because it undermines the UCL and CLRA, and is offensive or
28 injurious to the public without countervailing beneficial effects;

1 and (3) that Defendant's practices are fraudulent because they are
2 likely to deceive reasonable consumers.

3 Defendant's only argument as to these claims is that, as a
4 matter of law, Plaintiff fails to allege that Defendant's "All
5 Natural" statements would be likely to deceive a reasonable
6 consumer. MTD at 21 (citing Freeman v. Time, Inc., 68 F.3d 285,
7 289 (9th Cir. 1995); see also Williams v. Gerber Prods. Co., 552
8 F.3d 934, 938 (9th Cir. 2008) ("reasonable consumer" standard
9 applies to UCL, CLRA, and FAL claims).

10 Under the reasonable consumer standard, Appellants must "show
11 that 'members of the public are likely to be deceived.'" Freeman,
12 68 F.3d at 289 (quoting Bank of West v. Super. Ct., 2 Cal. 4th
13 1254, 1267 (Cal. Ct. App. 1992)). "Likely to be deceived" implies
14 more than a mere possibility of misunderstanding -- "likelihood"
15 here is measured in terms of whether a significant portion of the
16 general consuming public might be misled. Lavie v. Procter &
17 Gamble Co., 105 Cal. App. 4th 496, 508 (Cal. Ct. App. 2003). The
18 California Supreme Court has recognized "that these laws prohibit
19 'not only advertising which is false, but also advertising which[,]
20 although true, is either actually misleading or which has a
21 capacity, likelihood or tendency to deceive or confuse the
22 public.'" Kasky v. Nike, Inc., 27 Cal. 4th 939, 951 (Cal. 2002).

23 According to Defendant, the Court should dismiss Plaintiff's
24 state law claims as a matter of law because Plaintiff has not
25 articulated, in plausible terms, why any alleged presence of
26 bioengineered ingredients in the Oils would render the "All
27 Natural" statement misleading in light of FDA policy on
28 bioengineered ingredients and the term "natural." See MTD at 22-

1 24.

2 The Court cannot make such a finding at this time. While
3 Defendant is right that this Court and others have dismissed claims
4 like these at the pleading stage for not being plausibly misleading
5 to a reasonable consumer, Defendant's argument is too attenuated
6 and relies on mischaracterizations of Plaintiff's claims, as noted
7 above. See supra, Section IV.C. Moreover, the Court cannot as a
8 matter of law conclude, as Defendant urges, that reasonable
9 consumers would all understand that packaged, non-organic foods may
10 contain bioengineered ingredients and that the only way to avoid
11 such ingredients completely is to buy only certified organic
12 products. MTD at 23. Plaintiff's argument is much simpler than
13 that, and it does not depend on a conflation of "natural" with
14 "organic." Rather, Plaintiff has alleged that a reasonable
15 consumer would read the "All Natural" label, assume that such a
16 product contains no bioengineered or chemically altered
17 ingredients, and would then be misled if the product did in fact
18 contain such things.

19 Since the reasonable consumer issue cannot be resolved as a
20 matter of law at this point, the Court finds that Plaintiff has
21 sufficiently stated claims under the UCL and CLRA. See also
22 Williams, 552 F.3d at 938-39 (whether practices are deceptive,
23 fraudulent, or unfair is generally a question of fact not
24 resolvable at the pleading stage). Defendant's motion on this
25 point is DENIED.

26 **ii. Express Warranty**

27 Plaintiff alleges that Defendant's product labels constitute
28 express warranties that became part of the basis of Plaintiff's

1 bargain with Defendant, such that Defendant's failure to deliver an
2 "All Natural" product constituted a breach of warranty. FAC ¶¶ 57-
3 62. Defendant argues that Plaintiff's express warranty claim must
4 be dismissed because the "All Natural" label is mere puffery, not
5 an affirmation of fact; and that Plaintiff lacks privity with
6 Defendant. MTD at 25. Plaintiff responds that advertising
7 statements can constitute express warranties, that Defendant's
8 label is not non-actionable puffery, and that California warranty
9 law includes an exception to the general rule requiring privity in
10 warranty actions, permitting breach of express warranty claims
11 arising from affirmations of fact made by manufacturers in labels
12 or advertisements. Opp'n at 24-25.

13 The Court finds that Plaintiff has alleged sufficient facts to
14 make out a claim for breach of express warranty. "All Natural" is
15 an affirmative claim about a product's qualities, and it does not
16 amount to mere puffery because it is not outrageous and
17 generalized. See Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection
18 Servs., Inc., 911 F.2d 242, 246 (9th Cir. 199) (puffery is
19 "outrageous generalized statements"); Keith v. Buchanan, 173 Cal.
20 App. 3d 13, 22 (Cal. Ct. App. 1985) (advertising statements can be
21 construed as warranties). Moreover, Plaintiff is correct that
22 California law provides an exception in express warranty claims
23 arising from affirmative representations made in labels. Burr v.
24 Sherwin Williams Co., 42 Cal. 2d 682, 696 (Cal. 1954) (affirming
25 exception). Moreover, this case is not based on the California
26 Magnuson-Moss Act governing express warranties, which concerns
27 defects -- therefore the line of cases addressing warranty claims
28 under that statute does not apply here. See, e.g., Dreyer's Grand,

1 2012 WL 2990766, at *3. Defendant's motion on this point is
2 therefore DENIED.

3 **E. Primary Jurisdiction**

4 "The primary jurisdiction doctrine allows courts to stay
5 proceedings or to dismiss a complaint without prejudice pending the
6 resolution of an issue within the special competence of an
7 administrative agency." Clark v. Time Warner Cable, 523 F.3d 1110,
8 1114 (9th Cir. 2008). "[T]he doctrine is a 'prudential' one, under
9 which a court determines that an otherwise cognizable claim
10 implicates technical and policy questions that should be addressed
11 in the first instance by the agency with regulatory authority over
12 the relevant industry rather than by the judicial branch." Id.

13 The Court does not find that primary jurisdiction is
14 appropriate here. As noted above and in other cases, various
15 parties have repeatedly asked the FDA to rule on "natural"
16 labeling, and the FDA has declined to do so because of its limited
17 resources and preference to focus on other priorities. See, e.g.,
18 Janney v. General Mills, No. C 12-3919 PJH, 2013 WL 1962360, at *6
19 (N.D. Cal. May 10, 2013) (noting that the FDA generally refers
20 parties to its policy statements on "natural," as described above,
21 and that the FDA appears to have little interest in addressing the
22 issue anew); Lockwood, 597 F. Supp. 2d at 1035 (same). Even if the
23 Court found that the primary jurisdiction doctrine applied to this
24 case, referring the matter to the FDA would do little more than
25 protract matters. Defendant's motion is DENIED on this point.

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V. CONCLUSION

As explained above, Defendant J.M. Smucker Co.'s motion to dismiss Plaintiff Diana Parker's amended class action complaint is DENIED.

IT IS SO ORDERED.

Dated: August 23, 2013



UNITED STATES DISTRICT JUDGE