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

ASHLEY FRANZ,

Plaintiff,

vs.

BEIERSDORF, INC.,

Defendant.

CASE NO. 14cv2241-LAB (AGS)

**ORDER GRANTING LEAVE TO FILE
SECOND AMENDED COMPLAINT**

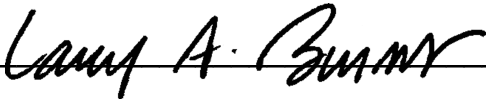
Through this putative class action, Ashley Franz asserts that Beiersdorf, Inc. makes misleading representations on bottles of its Nivea CoQ10 Lotion. The Court determined that Ashley Franz's UCL claim falls within the primary jurisdiction of the FDA, and stayed the case while she pursued it through the administrative process. (Docket no. 34.) Franz submitted a citizen petition with the FDA. Without discussing the merits of Franz's claim, the FDA "den[ied her] petition" and informed her that it "d[id] not intend to take action at this time regarding Nivea CoQ10." (Docket no. 37.)

Franz now moves file a second amended complaint. (Docket no. 41.) Beiersdorf opposes the motion. (Docket no. 42.) "When the agency declines to provide guidance or to commence a proceeding that might obviate the need for judicial action, the court can then proceed according to its own light." *Owner-Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, 192 F.3d 778, 785–86 (8th Cir. 1999) (brackets omitted). The parties' dispute centers

1 on whether the FDA rejected the premise of Franz's claim, or simply declined to exercise its
2 primary jurisdiction. (Docket nos. 41 and 42.) The Court concludes that it's the latter. The
3 FDA provided no insight regarding whether Nivea CoQ10 lotion is a drug or whether its
4 labeling is misleading. It simply declined to get involved at this time. Thus, consistent with
5 *New Prime*, Franz's motion to file a second amended complaint is **GRANTED**. She shall file
6 her second amended complaint no later than October 7, 2016.

7 **IT IS SO ORDERED.**

8 DATED: September 30, 2016

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10 **HONORABLE LARRY ALAN BURNS**
11 United States District Judge
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