IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

SHANNAH BURTON,	)	
Individually and on behalf of	)	
All others similarly situated,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 16-cv-1081-MJR-RJD**
	)	
HODGSON MILL, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

REAGAN, Chief Judge:

I. Introduction

This matter is now before the Court on Defendant's Motion to Dismiss the First Amended Complaint (Doc. 4). Plaintiff's ultimate contention is that the Defendant violated the Illinois Consumer Fraud and Deceptive Practices Act ("ICFA"), 815 ILCS § 505, by labeling a pancake mix as 'all natural' despite the fact that it contained synthetic agents such as monocalcium phosphate (a leavening agent) and genetically modified ingredients, such as corn meal (Doc. 1-1 at 139).[1] The matter came before the Court after

[1] Plaintiff also made allegations about buckwheat pancake mix, whole wheat blueberry muffin mix, whole wheat buttermilk pancake mix, Mexican style jalapeno cornbread mix, and insta-bake whole wheat variety baking mix with buttermilk. The named Plaintiff only purchased the buckwheat pancake mix—but her Motion for Leave to Amend (Doc. 26) seeks to include plaintiffs who purchased each of the other products. The Court will only explicitly discuss the buckwheat pancake mix in this order, though the discussion can fairly be interpreted as applicable to any of the mixes. Subsequently, Plaintiff withdrew allegations regarding the Mexican style jalapeno cornbread (Doc. 29).

Defendant removed it from Illinois state court on the basis of the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d) and FED. R. CIV. PRO. RULE 23. In the notice of removal, Defendant noted that the named Plaintiff (Shannah Burton) and Defendant (Hodgson Mills) were both citizens of Illinois, but that the proposed Nationwide class created minimal diversity for removal purposes (Doc. 1 at 1-2). Plaintiff did not challenge the removal. Defendants then filed a Motion to Dismiss (Docs. 3, 4), to which Plaintiff timely responded (Doc. 14). Each side filed supplemental authority (Docs. 17, 18, 20, 22). The Plaintiff has also moved to file a Second Amended Complaint, which the Defendant opposes (Docs. 26, 31). The matter is now before the Court for resolution of the pending motions.

II. Facts

Plaintiff's Complaint was originally filed in St. Clair County, Illinois, in February of 2016 (Doc. 1-1 at 3-12), and was subsequently amended on August 17, 2016 (Doc. 1-1 at p. 136)[2]. The original complaint alleged that Defendant violated the Illinois Consumer Fraud Act ("ICFA"), 815 ILCS § 505 (Doc. 1-1 at 9-11), and alleged accompanying unjust enrichment (Doc. 1-1 at 11-12). The First Amended Complaint added a count for breach of express warranty (Doc. 1-1 at 147-148). On September 23, 2016 the Defendant removed the case to this court on the basis of CAFA (Doc. 1).

[2] The St. Clair County Court granted the request for leave to amend the complaint on August 24, 2016 (Doc. 1-1 at p. 184). At the time that the leave was granted, Defendant had a pending Motion to Dismiss (Doc. 1-1 at 28-46, 162-168). In granting leave to amend, the court did not address the pending motion to dismiss. The record before this Court does not indicate the outcome of the hearing on the Motion to Dismiss before St. Clair County Court that may have been held on September 7, 2016.

Plaintiff did not oppose said removal. Simultaneous to removal, the Defendant filed a Motion to Dismiss before this Court and a supporting memorandum (Docs. 3, 4).

Defendant seeks dismissal on numerous grounds. First, Defendant contends that the Plaintiff lacks standing to make claims for products she did not personally purchase (Doc. 4 at 1-3).

Second, Defendant argues that Plaintiff's claims fail because no reasonable consumer would have been deceived by the product packaging bearing the "all natural" labeling. Specifically, Defendant argues that there is no fixed definition or standard for a product to bear an "all natural" label, so such a label is subjective and cannot form the basis for an affirmative misrepresentation. The lack of a formal definition from the Food and Drug Administration weakens Plaintiff's claim that the presence of any artificial color, flavor, or substance was unfair. Defendant further argues that it would be unreasonable as a matter of law to find that a synthetic leavening agent precluded the use of the label "all natural." (Doc. 4 at 3-9).

Third, Defendant argues that the presence of a complete ingredients list on the packaging defeats any claim of labeling misrepresentation (Doc. 4 at 9-12). Fourth, Defendant argues that the product guarantee—offering a refund if a customer is not satisfied—defeats Plaintiff's claim (Doc. 4 at 12-13). Fifth, Defendant argues that its conduct was not unfair under the ICFA because it did not violate public policy, or otherwise place consumers under duress with no viable alternative (Doc. 4 at 13-14).

Sixth, Defendant argues that Plaintiff's unjust enrichment claim must be dismissed because it does not constitute a freestanding cause of action absent the other fraud allegations (Doc. 4 at 14). Seventh, Defendant contends that the breach of express warranty claim fails because Defendant did not provide the requisite pre-suit notice and Defendant was not on notice of the alleged defect (Doc. 4 at 14-15). Eighth, Defendant argues that Plaintiff lacks standing to bring any claim related to goods purchased outside of Illinois (Doc 4 at 15-16). Ninth, Defendant argues that Plaintiff's claims face a number of statute of limitations problems (Doc. 4 at 16-17). Tenth, Defendant argues that Plaintiff has no standing to seek injunctive relief since she is unlikely to suffer future harm (Doc. 4 at 17). Eleventh, Defendant contends that Plaintiff's claims must be dismissed for failing to provide sufficient particularity as required by FED. R. CIV. P. RULE 9(b) (Doc. 4 at 17-19). And, finally, twelfth, Defendant argues that this Court should stay the case under the doctrine of primary jurisdiction to await word from the FDA about a more specific definition of the term "all natural" (Doc. 4 at 19-20).

Plaintiff responded to each ground for dismissal in turn (Doc. 14). First, Plaintiff alleges that ICFA does not require reliance, so there is no standing issue as to products she did not purchase (Doc. 14 at 1-3). Additionally, she argues that the products she did not purchase contain the identical packaging 'misrepresentation' that is the subject of her claim against the pancake mix (*Id.*).

Second, she argues that she defined 'natural' in making her claim, that she interpreted the term as reasonable consumers would, and that reasonable consumers would not expect to find synthetic materials in a product labeled 'natural' (Doc. 14 at 3-4). Or, alternatively, the interpretation of the term natural and consumer perception of that term is inappropriate for resolution at the motion to dismiss stage (Doc. 14 at 4-7).

Third and fourth, Plaintiff argues that presence of an ingredient list or a guarantee on the packaging does not exonerate Defendant for making a false representation via the 'natural' labeling because consumers should not be required to look to the list, they might miss the presence of non-natural substances on the list, and the guarantee does nothing to alter or fix the falsity of the 'natural' label on the front of the box (Doc. 14 at 7-11).

Fifth, Plaintiff argues that her claim does satisfy ICFA under the alternative interpretation that the practice injured the consumer, rather than the requirement that the consumer had no reasonable alternative (Doc. 14 at -12).

Sixth, because her other claims should survive, her unjust enrichment claim may also survive (Doc., 14 at 12).

Seventh, no pre-suit notice was required for her warranty claim because the Defendant was aware of the falsity of the label based on prior warnings from consumers (Doc. 14 at 12-13).

Eighth, as to the nationwide claims, Plaintiff argues that it is too early to determine the propriety of this issue (Doc. 14 at 13). Likewise, ninth, Plaintiff argues it is too early to determine the statute of limitations issues (Doc. 14 at 14).

Tenth, Plaintiff argues that she has standing to seek injunctive relief because if she were unable to do so, consumers would have no method to seek recourse for harms contemplated by ICFA (Doc. 14 at 14-16).

Eleventh, Plaintiff contends that she does meet Rule 9(b) by alleging that Hodgson Mills misrepresented the "all natural" character of its products on labels in the last five years. This allegation contains the who, what, where, when, and how required by 9(b).

Finally, twelfth, Plaintiff argues that there is no primary jurisdiction basis for staying the case because the FDA likely will not issue a definitive statement, or even if it does, that would not impact this case (Doc. 14 at 17-20).

Subsequent to Defendant's Motion to Dismiss (Doc. 4) and Plaintiff's Response (Doc. 14), both sides have moved to supplement the record with developments in consumer class action case law (Docs. 17, 18, 20, 22). The Court has allowed the supplements (Docs. 19, 21).

Plaintiff also moved to amend her complaint on February 3, 2017, seeking to include named plaintiffs who purchased the products she did not purchase (Doc. 26). The Defendant opposed this request on the grounds that it was prejudicial by dragging

out the length of the case and that even with the amendment, the case will still suffer standing problems (Doc. 31).

The Magistrate Judge presiding over this case, Judge Reona Daly, stayed discovery pending a ruling on the Motion to Dismiss and the Motion to Amend (Dkt. entry 30). The motions are now before the Court for resolution.

III. Applicable law

This Court accepts all factual allegations as true when reviewing a 12(b)(6) motion to dismiss. ***Erickson v. Pardus*, 551 U.S. 89, 94 (2007).** To avoid dismissal for failure to state a claim, a complaint must contain a short and plain statement of the claim sufficient to show entitlement to relief and to notify the defendant of the allegations made against him. **FED. R. CIV. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007).** In order to meet this standard, a complaint must describe the claims in sufficient factual detail to suggest a right to relief beyond a speculative level. ***Id.*; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *EEOC v. Concentra Health Servs.*, 496 F.3d 773, 776 (7th Cir. 2007)**. A complaint need not contain detailed factual allegations, ***Scott v. Chuhak & Tescon, P.C.*, 725 F.3d 772, 782 (7th Cir. 2013)**, but it must go beyond "mere labels and conclusions" and contain "enough to raise the right to relief above the speculative level," ***G&S Holdings, LLC v. Cont'l Cas. Co.*, 697 F.3d 534, 537-38 (7th Cir. 2012).**

The Seventh Circuit has outlined the boundaries of 12(b)(6) with two major principles. First, facts in the pleadings are accepted as true and construed in the plaintiff's favor, but allegations in the form of legal conclusions are insufficient to survive a motion to dismiss. ***McReynolds v. Merrill Lynch & Co., Inc.*, 694 F.3d 873, 885 (7th Cir. 2012).** And, second, "the plausibility standard calls for 'context-specific' inquiry that requires the court 'to draw on its judicial experience and common sense.'" ***Id.*** Threadbare recitals of elements and conclusory statements are not sufficient to state a claim. ***Id.*** Put another way, to survive a motion to dismiss "the plaintiff must give enough details about the subject-matter of the case to present a story that holds together [. . .] the court will ask itself could these things have happened, not did they happen." ***Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010).**

Furthermore, FEDERAL RULE OF CIVIL PROCEDURE 9(b) requires that allegations of fraud be pled with particularity—a heightened standard of pleading. ***Windy City Metal Fabricators & Supply, Inc. v. CIT Technology Financing Serv., Inc.*, 536 F.3d 663, 668 (7th Cir. 2008).** Particularity requires alleging the circumstances of fraud or mistake, including: "the identity of the person who made the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." ***Id. (internal citation omitted).*** The complete lack of information about the timing, place, or manner of communicating alleged misrepresentations may render a claim insufficiently pled, particularly where

the plaintiffs are the alleged audience for the misrepresentations. ***See Gandhi v. Sitara Capital Mgmt., LLC*, 721 F.3d 865, 870 (7th Cir. 2013).**

In the context of a motion to dismiss, facts are construed in favor of the plaintiff, but in the context of class certification, the Court must make inquiry into the existence of facts sufficient to support certification. Thus, the class certification inquiry is more exacting than the motion to dismiss inquiry, and yet the inquiry should not be so exacting that it takes place of a merits analysis by the jury. ***See Messner v. Northshore University Health System*, 669 F.3d 802, 823-24 (7th Cir. 2012) (discussing the standards for class certification).** A court should determine class certification matters at the earliest possible juncture. ***See id. citing* FED. R. CIV. P. RULE 23(c)(1)(A) ("At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.").** By contrast, the Seventh Circuit has cautioned against declining class certification too early in a case based on a merits—esque determination, because discovery is not yet complete and the Court runs the risk of substituting its own speculation for the wisdom and deliberation of jurors. ***See Messner*, 669 F.3d at 823-34.**

Class certification is governed in part by FED. R. CIV. P. RULE 23, which requires a multi-part showing. First, a proposed class must meet the Rule 23(a) requirements of numerosity, typicality, commonality, and adequacy of representation. Second, the class must meet one of three alternatives in Rule 23(b). Rule 23(b)(3) permits class

certification if the questions of law or fact common to class members 'predominate' over questions that are individual to class members. Predominance may exist when "'common questions represent a significant aspect of a case and…can be resolved for all members of a class in a single adjudication,' [or] if a 'common nucleus of operative facts and issues' underlies the claims brought by the proposed class." ***Messner*, 669 F.3d at 815 (internal citations omitted).**

Although Rule 23 directs that class certification shall be addressed at the earliest practical time, the Court finds that in this instance it is not yet appropriate to dispose of issues in this case on the basis of class certification. The case was removed from state court, and the Plaintiff has yet to formally move for certification before this Court. As was discussed above, the standards for class certification are more exacting than those for a run-of-the-mill motion to dismiss. Though standing should not be obtained via the back door of class certification, this Court finds that it would be premature to rule on standing/class certification issues that are clearly intertwined prior to the Plaintiff formally moving for certification.[3] ***See generally Muir v. NBTY*, 2016 WL 5234596 (N.D. Ill. 2016) (collecting cases on standing and class certification in the consumer fraud context, and noting that a plaintiff would lack standing to challenge a product he did not purchase, but deferring a ruling on which product(s) that plaintiff was pursuing**

[3] The Court also notes that the Seventh Circuit's findings in ***Suchanek v. Sturm Foods, Inc.*** weigh in favor of waiting to address standing at the appropriate time (when a motion for certification is pending and has been fully briefed) and giving deference consumers proceeding on a theory of label-misrepresentation who argued that common claims predominated, **764 F.3d 750 (7th Cir. 2014).**

in that suit); ***compare with Mednick v. Precor, Inc.,*** **2014 WL 6474915 (7th Cir. 2014) (finding that a plaintiff may have standing to sue for products not purchased if the misrepresentations are identical or substantially similar).**

The Court will consider the twelve arguments presented in the motion to dismiss by applying the 'lighter' motion to dismiss standard (taking the evidence in favor of the Plaintiff), with the understanding that the Court will address other arguments later at the time when class certification is squarely before the Court.

IV. Legal analysis

First, the Defendant argues that Plaintiff lacks standing to sue for products she did not purchase. Initially, Plaintiff opposed this contention by relying on case law, however, she subsequently offered an amended complaint wherein she identifies plaintiffs who purchased each individual product. The Court has not yet ruled on Plaintiff's request for leave to file the amendment, or Defendant's opposition of the same. Because the Court is not dismissing the case at this juncture, the Court will allow the amended complaint to be filed. The amendment presumably resolves the issues about standing.

Second, the Court is not persuaded by Defendant's argument that this case cannot proceed under the ICFA because the Food and Drug Administration (FDA) has not announced a uniform definition of the term "all natural." To establish a claim under ICFA, a Plaintiff must allege "(1) a deceptive or unfair act or promise by the

defendant; (2) the defendant's intent that the plaintiff rely on the deceptive or unfair practice; and (3) that the unfair or deceptive practice occurred during a course of conduct involving trade or commerce." ***See Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 739 (7th Cir. 2014)** ***quoting Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 574 (7th Cir. 2012).** A private plaintiff must show that he or she suffered actual pecuniary loss, though at the motion to dismiss stage, courts have found that the mere allegation a consumer paid a premium for a product based on a misrepresentation is sufficient. ***See Camastra*, 761 F.3d at 739; *Biffar v. Pinnacle Foods Grp., LLC,* No. 16-0873-DRH, 2016 WL 7429130, * at 4 (S.D. Ill. Dec. 22, 2016) (plaintiff's allegation that price of muffin mix was "more than the value of the muffin mix as sold and that she would not have purchased it or would have paid less for it had she known it contained synthetic ingredients" sufficient to plead a plausible theory of actual damages); *McDonnell v. Nature's Way Products, LLC*, (CM/ECF, N.D. Ill., Case No. 16-c-5011-SLE, Doc. 38) (finding that plaintiff's allegation that she would not have purchased an energy supplement or would have paid less had she known it was not entirely made in the United States was sufficient to state a plausible claim of actual damages).**

Here, Plaintiff alleges that she paid a premium for the pancake mix because it was labelled as "all natural". She alleges that the "all natural" label constituted a misrepresentation because the product actually contained synthetic ingredients. She argues that no reasonable consumer would expect to find synthetic ingredients in a

product labeled as natural. Defendant tries to defeat Plaintiff's claim, arguing that there is no commonly accepted definition of "all natural," that the 'synthetic' ingredients are so ubiquitous that no reasonable consumer could miss them or be aggrieved by them, and that 'organic' products (labelled under higher standards) also contain the 'synthetic' ingredients, among other things. The Court finds that these arguments are better left to a jury, because the determination of whether or not a reasonable consumer could be misled is an intricate question of fact that is best informed by a pool of members of the community.

Likewise, the Court declines Defendant's third and fourth arguments that no claim should stand because the ingredient label or the product guarantee somehow clarify the "all natural" label. Arguments like these have been rejected by other courts, and this Court finds that they are matters best left for jurors. ***See Biffar*, at 7; *Murphy v. Stonewall Kitchen, LLC*, 503 S.W.3d 308, 312-13 (Mo. Ct. App. 2016) (finding that ingredient label defense did not defeat plaintiff's Missouri misrepresentation claim about cake mix that was labelled 'all natural' but contained a synthetic ingredient); *Thorton v. Pinnacle Foods Group LLC*, 2016 WL 4073713 (E.D. Mo. 2016) (finding that the ingredient list defense did not defeat plaintiff's allegation regarding muffin mix labeled as 'nothing artificial'); *but c.f. Kelly v. Cape Cod Potato Chip Co.*, 81 F.Supp.3d 754, 762 (W.D. Mo. 2015) (finding that ingredient list revealing synthetics defeated misrepresentation claim about label with 'all natural' moniker); *Kane v.***

***Chobani*, 2013 WL 5289253 at *10 (finding that because the label clearly disclosed allegedly unnatural ingredients, plaintiff's misrepresentation claim failed).** This Court finds that the crux of this issue is a reasonable person's interpretation of the various labels and representations on a given product—thus, this question is best left for the jury.

Fifth, as to Defendant's argument that the pancake packaging does not violate ICFA because it is not unfair or oppressive, this argument is not persuasive because it leaves out the alternative way to establish unfairness—via a showing that the consumer was substantially injured. ***See Siegel v. Shell Oil Co.*, 612 F.3d 932, 934-35 (7th Cir. 2010).** To determine unfairness, a defendant's conduct must: "(1) violate public policy; (2) be so oppressive that the consumer has little choice but to submit; and (3) cause consumers substantial injury"—though not all three criteria must exist for a finding of unfairness. ***Id.* at 935.** The parties gave short shrift to this argument in their briefs, but based upon the above-findings and the low standard of review for a motion to dismiss, the Court finds at this juncture that unfairness has been sufficiently established for the case to proceed.

Likewise, as to the sixth argument that unjust enrichment did not occur, the Court will allow this claim to proceed because it is intertwined with the others and may be established if Plaintiff prevails on the other ICFA claims. To establish unjust enrichment in Illinois "a plaintiff must allege that the defendant has unjustly retained a

benefit to the plaintiff's detriment and that defendant's retention of the benefit violates the fundamental principles of justice, equity and good conscience." ***HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 545 N.E.2d 672, 679 (Ill. 1989).** Here, Plaintiff plausibly alleges that defendant overcharged her for a product that was not as advertised, and that Defendant still possess those funds.

Seventh, Defendant argues that Plaintiff cannot maintain her claim under a theory of breach of an express warranty because she did not provide pre-suit notice regarding the alleged product defect. To state a claim for breach of express warranty, a plaintiff must allege that (1) the seller made an affirmation of fact or promise; (2) relating to the goods; (3) which was part of the basis for the bargain; and (4) seller guaranteed that the goods would conform to the affirmation or promise. Typically, a breach of express warranty claim requires pre-suit notice to the seller, however, this is not required when: (1) the seller has actual knowledge of the defect of the particular product; or (2) a consumer plaintiff suffers a personal injury, in which case the notice requirement could be satisfied by filing a lawsuit against the seller. ***See Connick v. Suzuki Motor Co., Ltd.*, 675 N.E.2d 584, 589 (1996).** Here, Plaintiff does not allege that she sustained personal injury, but she claims that the seller had actual knowledge of the breach of the warranty. Her theory is essentially that the Defendant had knowledge of the falsity of the "all natural" label in light of the ingredients in the product. A

reasonable jury could reach this conclusion, so this claim will proceed beyond the motion to dismiss.

Eighth, Defendant argues that Plaintiff has no standing to bring claims for a nationwide class, including consumers whose transactions took place entirely outside of Illinois. The Court finds that resolution of this issue is premature, and will be better addressed at the class certification phase.

Ninth, Defendant argues that various statutes of limitations may bar Plaintiff's claims, particularly if the class includes individuals from multiple states (that may have differing statutes of limitations). As with the previous claim, the Court finds that this issue is best addressed once the case proceeds to class certification and the parameters of this issue are more well-defined.

Tenth, Defendant argues that Plaintiff lacks standing to seek injunctive relief because now that she is aware of the synthetic ingredients in Defendant's products, she will not be harmed again by buying the products. In order to secure injunctive relief, a plaintiff must show a "'real and immediate' threat of future violations of their rights[.]" ***Scherr v. Marriott Intern., Inc.*, 703 F.3d 1069, 1074 (7th Cir. 2013)** ***quoting City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (finding that a plaintiff had standing to seek injunctive relief against a hotel for potential Americans with Disabilities Act violations based on her upcoming trips to the hotel to visit nearby family).*** Plaintiff cites two cases from other districts in this circuit where courts have allowed injunctive

claims to proceed in the consumer fraud context, but this Court does not find those cases persuasive. ***See Muir v. NBTY, Inc.*, 2016 WL 5234596 at *10 (N.D. Ill. 2016) (holding that a plaintiff suing a dietary supplement manufacturer for false advertising could show future harm in light of the fact that manufacturer's false practices were allegedly ongoing); *Le v. Kohls Dep't Stores, Inc.*, 160 F.Supp.3d 1096, 1109 (E.D. Wis. 2016) (allowing consumer fraud claim against Kohls for deceptive pricing to proceed).** The named Plaintiff is unlikely to purchase a Hodgson Mills product again if she is truly harmed and deterred by their advertising conduct, so she does not have standing as contemplated by *Scherr* and *Lyons*. Additionally, even after class certification, it is unlikely any class member runs the risk of future harm, because the class will not include those who *could* in the future unknowingly buy a product, just those who have already purchased the products.[4] Accordingly, the motion to dismiss is granted as to the request for injunctive relief.

In a catch-all attempt to defeat Plaintiff's complaint, the Defendant's eleventh argument is that the case should be dismissed for failing to meet the Rule 9(b) particularity requirements for pleading fraud. Rule 9(b) requires a plaintiff to outline the basic who, what, when, where, how components of the claim. Here, Plaintiff has met these basics by alleging that the Defendant acted in a deceptive manner by

[4] It is worth noting that the ICFA clearly provides the Attorney General with a cause of action for injunctive relief, perhaps because it would be impossible for individual plaintiffs to establish standing. *See* 815 ILCS § 505/7.

advertising pancake mix (and other mixes) as "all natural" despite the presence of synthetic ingredients, and that she, and other individuals, were misled and relied on this representation in buying the products in the past five or so years. These assertions are sufficient under Rule 9(b).

Finally, twelfth, the Defendant argues that this Court should stay this case under the doctrine of primary jurisdiction because the FDA may be in the process of formulating a more concrete definition of the term 'all natural.' The Court is not persuaded by this argument for numerous reasons, including because the FDA last issued a call for proposals on the topic in the fall of 2016 and has not yet issued any further timeframe or next steps. But, more importantly, the FDA's eventual formal definition has no bearing on a reasonable consumer's perception at the time this product was advertised and purchased. Awaiting FDA action would unnecessarily protract this litigation. Accordingly, the Court denies this ground for dismissal.

V. Pending motions

Plaintiff's pending Motion for Leave to File a Second Amended Complaint (Doc. 26) is hereby **GRANTED**. The Court does not find that granting leave is unduly prejudicial because the arguments already considered at the motion to dismiss phase as to the one named Plaintiff would apply with equal force and the same results to the new plaintiffs. Nothing about the above analysis changes based upon the inclusion of additional parties.

VI. Conclusion

For the foregoing reasons, the Court **DENIES** the Motion to Dismiss (Doc. 4) in all respects, other than the request to dismiss Plaintiff's claim for injunctive relief—which is hereby **GRANTED**.

IT IS SO ORDERED.

DATED: April 6, 2017

s/ Michael J. Reagan
Michael J. Reagan
United States District Judge