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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WESTERN SUGAR COOPERATIVE,
ET AL.,

PLAINTIFFS,

V.

ARCHER-DANIELS-MIDLAND CO.,
ET AL.,

DEFENDANTS.

No. 11-CV-3473 CBM(MANx)

ORDER DENYING IN PART AND
GRANTING IN PART DEFENDANTS'
MOTION TO DISMISS

The matter before the Court is Defendants' Motion to Dismiss and Request for Judicial Notice.¹ [Docs. No. 24, 25.]

FACTUAL AND PROCEDURAL BACKGROUND

This is a dispute between producers of table sugar and those of high fructose corn syrup ("HFCS" or "corn syrup.") Plaintiffs are sugar producers and two trade associations comprised of companies, each of whom is a grower and/or producer and/or refiner of sugar in the United States.² (First Amended Complaint

¹ Plaintiffs filed objections in opposition to Defendants' motion. Plaintiffs' first objection, directed at Defendants' website found at www.sweetsurprise.com, is overruled, as Plaintiffs refer to the website in their complaint and therefore the site is properly incorporated. Plaintiffs' second and third objections, directed at references made to a medical report and to whether table sugar is "natural," are overruled. The Court finds that these references are Defendants' arguments, not evidence before the Court, and will only be considered as arguments.

² Plaintiffs are The Sugar Association, the American Sugar Cane League of the U.S.A., Inc., Minn-Dak Farmers Cooperative, Imperial Sugar Corporation, The Amalgated Sugar Company LLC, C & H Sugar Company, Inc., Michigan Sugar Company, Western Sugar Cooperative, United States Sugar Corporation, and American Sugar Refining, Inc.

1 (“FAC”) at ¶¶ 12-21) [Doc. No. 15.] Defendants are a national trade association,
2 made up of business enterprises in the corn refining industry, and members of the
3 trade organization.³ (*Id.* at ¶¶ 22-28.)

4 The First Amended Complaint (“FAC”) alleges that in 2008, Defendant
5 Corn Refiners Association (“CRA”), a trade association of corn refiners, began a
6 campaign whereby the CRA bought television commercials, print advertisements,
7 and other media to provide the public with information regarding High Fructose
8 Corn Syrup (“HFCS” or “corn syrup”). (*Id.* at ¶¶ 45-48.) The campaign includes
9 a website found at www.sweetsurprise.com. (*Id.*) The campaign employs the use
10 of phrases such as “HFCS is corn sugar,” “HFCS is natural,” and “sugar is sugar.”
11 (*Id.*)

12 Plaintiffs also allege that HFCS is a “man-made product” that does not
13 “naturally occur,” making it different from table sugar, which they allege is
14 extracted from cane and beets. (FAC at ¶¶ 29-31.) Plaintiffs also allege that
15 HFCS is linked to the obesity epidemic and its effect on the human body differs
16 from that of table sugar. (*Id.* at ¶¶ 32-39.) Finally, the FAC alleges that consumers
17 and food and beverage providers are conscious of the difference between sugar
18 and HFCS and are making business decisions based on that difference. (*Id.* at ¶¶
19 42-44.)

20 The First Amended Complaint also alleges that in September 2010,
21 Defendant CRA filed a petition with the FDA seeking to change the name of
22 HFCS to “corn sugar.” Pursuant to FDA regulations, that petition, called a
23 “Citizen Petition,” and all related submissions are filed under the Docket No.
24 FDA-2010-P-049. (*Id.* at ¶¶ 50-51.)

25 Plaintiffs’ suit against CRA and its members alleges that the campaign
26 contains false representations about High Fructose Corn Syrup that constitute false

27
28 ³ Defendants are the Corn Refiners Association, Archer-Daniels-Midland Company, Cargill, Inc., Corn products International, Inc., Penford products Co., Roquette America, Inc., and Tate & Lyle Ingredients Americas, Inc.

1 advertising under the Lanham Act and a violation of the California's Unfair
2 Business Practices Act. 15 U.S.C. § 1125(a); CAL. BUS. & PROF. CODE §§ 17200
3 *et seq.* Plaintiffs allege that Defendants violates these laws by making claims that
4 HFCS is "natural" and should be referred to as "corn sugar" and claims that CRA
5 has made that HFCS is nutritionally and metabolically equivalent to other sugars.
6 (FAC at ¶ 5, 49, 59, 60, 36, 39, 61.)

7 On August 22, 2011, Defendants filed the instant motion to dismiss, arguing
8 that Plaintiffs' complaint failed to state a claim upon which relief can be granted.
9 Defendants also submitted a request for judicial notice of the Citizen Petition
10 documents submitted to the FDA and a court opinion in a separate litigation. The
11 motion has been fully briefed and oral argument was heard on September 13,
12 2011.

13 *Request for Judicial Notice*

14 **STANDARD OF LAW**

15 Federal Rule of Evidence 201 establishes guidelines for judicially noticing
16 adjudicative facts. FED. R. EVID. 201(a). Under this rule, a court may judicially
17 notice an adjudicative fact if it is "not subject to reasonable dispute in that it is
18 either (1) generally known within the territorial jurisdiction of the trial court or (2)
19 capable of accurate and ready determination by resort to sources whose accuracy
20 cannot reasonably be questioned." FED. R. EVID. 201(b). Furthermore, a court is
21 required to take judicial notice of a fact "if requested by a party and supplied with
22 the necessary information." FED. R. EVID. 201(d).

23 Pursuant to Fed. R. Evid. 201, a district court may take judicial notice of
24 documents filed in any federal or state court. *See Holder v. Holder*, 305 F.3d 854,
25 866 (9th Cir. 2002) (federal appellate court judicially noticed state appellate
26 opinion and briefs and determined that waiver issue had not actually been litigated
27 or necessarily decided). Accordingly, courts routinely hold that judicial notice
28 may be taken of court filings in related litigation involving the same parties. *See*

1 (6) CRA Supplemental Comments to FDA, June 30, 2011

2 (7) A true and correct copy of the opinion in *Robert Stillwell v. Radioshack*
3 *Corp.*, No. 07-cv-00607-JM (CAB) (S.D. Cal. Dec. 18, 2007).

4 Defendants argue that the instant suit places at issue the Citizen Petition
5 filed with the FDA, and therefore the submissions related to that Citizen Petition
6 are relevant to this lawsuit. Plaintiffs oppose Defendants' request except as to
7 Defendants' request to take judicial notice of the opinion in *Stillwell v.*
8 *Radioshack*, and argue that the request seeks judicial notice of disputed facts
9 contained within public records.

10 The Court finds that judicial notice is appropriate of the existence of a
11 Citizen Petition before the FDA, along with the existence of the submissions to the
12 FDA that accompany the citizen petition. The Court also finds it appropriate to
13 take judicial notice of the existence of litigation and an opinion in *Stillwell v.*
14 *Radioshack*. To the extent that the request seeks to judicially notice facts
15 contained within the submissions or the Citizen Petition to the FDA, that request is
16 denied because it seeks judicial notice of disputed facts stated in public records.

17 *Motion to Dismiss*

18 STANDARD OF LAW

19 I. *Rule 12(b)(6)*

20 Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a
21 complaint for "failure to state a claim upon which relief can be granted."
22 Dismissal of a complaint can be based on either a lack of a cognizable legal theory
23 or the absence of sufficient facts alleged under a cognizable legal theory.
24 *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). On a
25 motion to dismiss for failure to state a claim, the court accepts as true all well-
26 pleaded allegations of material fact, and construes them in light most favorable to
27 non-moving party. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025,
28 1031-32 (9th Cir. 2008). To survive a motion to dismiss, the complaint "must

1 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is
2 plausible on its face.’” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting
3 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A formulaic recitation
4 of the elements of a cause of action will not suffice. *Twombly*, 550 U.S. at 555
5 (citations omitted).

6 Although generally the scope of review on a motion to dismiss for failure to
7 state a claim is limited to the complaint, the court may consider evidence on which
8 the “complaint necessarily relies if: (1) the complaint refers to the document, (2)
9 the document is central to the plaintiff’s claim, and (3) no party questions the
10 authenticity of the copy attached to the 12(b)(6) motion.” *Marder v. Lopez*, 450
11 F.3d 445, 448 (9th Cir. 2006) (internal quotation omitted). The court may “treat
12 such a document as ‘part of the complaint, and thus may assume that its contents
13 are true for purposes of a motion to dismiss under Rule 12(b)(6).” *Id.* (quoting
14 *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003)).

15 II. Rule 9(b)

16 Pleading requirements are normally governed by Rule 8(a), which requires
17 that a complaint must contain “a short and plain statement of the claim showing
18 that the pleader is entitled to relief.” FED. R. CIV. P. 8(a). However, a claim
19 sounding in fraud is subject to a heightened pleading requirement set forth in Rule
20 9(b), which requires a plaintiff to “state with particularity the circumstances
21 constituting fraud.” Fed. R. Civ. P. 9(b). Under this standard, the complaint’s
22 allegations must be “specific enough to give defendants notice of the particular
23 misconduct which is alleged to constitute the fraud charged so that they can
24 defend against the charge and not just deny that they have done anything wrong.”
25 *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985).

26 DISCUSSION

27 I. Claims against CRA

28 In order to state a claim for false advertising under the Lanham Act, 15

1 U.S.C. § 1125(a)(1)(B), a plaintiff must sufficiently allege that:

2 1) in advertisements, defendant made false statements of fact about its own
3 or another's product; 2) those advertisements actually deceived or have the
4 tendency to deceive a substantial segment of their audience; 3) such deception is
5 material, in that it is likely to influence the purchasing decision; 4) defendant
6 caused its falsely advertised goods to enter interstate commerce; and 5) plaintiff
7 has been or is likely to be injured as the result of the foregoing either by direct
8 diversion of sales from itself to defendant, or by lessening of the goodwill which
9 its products enjoy with the buying public.

10 *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1180 (9th Cir. 2003); *Jarrow Formulas,*
11 *Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, n.4 (9th Cir. 2002).

12 Defendant CRA argues Plaintiff has failed to properly plead allegations to
13 establish multiple elements of a false advertising claim.⁴ The Court considers
14 each element in turn.

15 A. Commercial Advertising

16 CRA argues that the statements it made were part of an "education
17 campaign," as opposed to advertising subject to the Lanham Act. A statement
18 constitutes commercial advertising or promotion under the Lanham Act if it is: (1)
19 commercial speech; (2) by a defendant who is in commercial competition with the
20 plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods
21 and services; and (4) the representations must be sufficiently related to the
22 purchasing public to constitute "advertising" or "promotion." *Rice*, 330 F.3d at
23 1181 (citing *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725,
24 735 (9th Cir. 1999)). The statements "need not be made in a classic advertising
25 campaign" and could constitute "more informal types of promotion," but they
26 "must be disseminated sufficiently to the relevant purchasing public to constitute
27 advertising or promotion within that industry." *Id.* (quotation marks omitted).

28 CRA advances several arguments as to why its conduct is not "advertising"
under the Lanham Act. First, CRA argues that its activity is not pure commercial

⁴ The only element not challenged by Defendant CRA is whether it caused the "goods" at issue, the campaign regarding HCFS, to enter interstate commerce.

1 speech because it focuses on the role of corn syrup in health and not on proposing
2 a commercial transaction. Second, CRA argues that it, as a trade organization,
3 does not compete with Plaintiffs and does not promote or sell any products or
4 services.

5 Plaintiffs argue that speech used to promote a product is commercial
6 speech, even when the speech is not targeted specifically at proposing a
7 commercial transaction. Plaintiffs argue that CRA's statements constitute
8 "commercial speech" because the statements are admittedly advertising, refer to a
9 specific product, and an economic motive exists. *See Bolger v. Youngs Drugs*
10 *Product Corp.*, 463 U.S. 60, 66-67 (1983). Plaintiffs point to allegations in the
11 operative complaint related to the commercial nature of CRA's statements. (FAC
12 at ¶¶ 3, 22.)

13 For purposes of this motion, the Court finds that CRA's statements
14 constitute "commercial speech." First, the fact that the statements relate to a
15 public health issue does not insulate them from regulation under the Lanham Act.
16 *See, e.g., PBM Products, LLC v. Mead Johnson & Co.*, 639 F.3d 111 (4th Cir.
17 2011). Second, although CRA's statements do not explicitly say "buy" or
18 "purchase" HFCS, it is clear that the purpose of CRA's statements is to promote
19 HFCS to purchasers. As a trade organization made up of corn refiners, an
20 economic motive exists, and the statements refer specifically to high fructose corn
21 syrup.⁵ The statements themselves also clearly are promoting corn syrup to food
22 and beverage purchasers. *See, e.g., Nat'l Comm'n on Egg Nutrition v. F.T.C.*, 570
23 F.2d 157, 163-64 (7th Cir. 1977) (holding that trade association was engaging in
24 commercial speech although the statements at issue were more than "mere[ly]

25
26 ⁵ Defendant CRA also argues that it does not compete with Plaintiffs because it is a trade association and does not
27 promote or sell any products or services because HFCS is not a "product" under the Lanham Act. However,
28 Plaintiffs' allegations, that the CRA represents the interests of corn refiners and seeks to promote HFCS, are
sufficient to establish at this stage that Defendant CRA competes with Plaintiffs and promotes HFCS. The Court
finds that Defendant CRA was engaging in commercial speech because it was advertising a specific product
(HFCS) for an economic purpose – that is, the economic gain of the members of the CRA.

1 propos[ing] a particular commercial transaction”).

2 The cases cited by CRA do not hold otherwise. In those cases, either the
3 purpose of the speech was not commercial, or the statements were not made in
4 advertisements. *See Rice*, 330 F.3d at 1181 (holding that statements made in and
5 during a television show, not separately, were not a promotion or marketing of the
6 show); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1185 (9th Cir. 2001)
7 (holding that picture of celebrities included in a feature article also aimed at
8 “humor” and “editorial comment” on actors and not in a traditional advertisement
9 was not commercial speech); *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090
10 (C.D. Cal. 2004) (statements made by a defendant who “function[ed] like [a]
11 consumer protection group[.]” were not commercial speech); *Mattel, Inc. v. MCA*
12 *Records, Inc.*, 296 F.3d 894, 907 (9th Cir. 2002) (use of trademark in a song that
13 “lampoons the . . . image and comments humorously on . . . cultural values” was
14 exempted from regulation under the non-commercial exemption). Although CRA
15 disputes that the goal of the campaign is to sell goods, the Court must assume the
16 allegations in the complaint to be true at the motion to dismiss stage. This factual
17 dispute therefore cannot be resolved at this stage.

18 B. Falsity

19 Plaintiffs’ suit challenges three general claims that CRA is making in its
20 advertising campaign about HCFS. They are: (1) that HFCS is “natural”; (2) that
21 “sugar is sugar” (referring to HCFS as sugar); and (3) that HFCS is “corn sugar.”
22 CRA argues that Plaintiffs have failed to sufficiently plead that any of these
23 statements are false.

24 The Court finds that Plaintiffs have adequately pled that the statements used
25 by CRA in its campaign are false. Plaintiffs allege that the statement by CRA that
26 HFCS is natural is false because it is not “found in nature” and cannot simply be
27 extracted from an ear or stalk of corn (FAC at ¶¶ 6, 29, 31, 60.) Defendants argue
28 that this definition is not applied by the FDA, but cite no authority for the

1 proposition that the FDA can conclusively determine whether a particular product
2 or substance is natural.

3 As to the statements equating HFCS with sugar (“sugar is sugar,” “HFCS is
4 nutritionally the same as table sugar,” “your body can’t tell the difference,” and
5 “HFCS is corn sugar”), Defendants argue that the statements are not literally false
6 even though they admit that the chemical make up of HFCS is different than table
7 sugar. Defendants argue that this difference is not qualitatively significant. The
8 Court finds that resolution of that question is inappropriate at the motion to
9 dismiss stage. Plaintiffs identify various allegations in the FAC relating to the
10 difference between table sugar and HFCS.⁶ (FAC at ¶¶ 29-31, 61, 36, 7, 39.) The
11 Court finds these allegations sufficient to state a claim that the statements equating
12 HFCS with sugar are false.

13 Finally, as to the statement that HFCS is “corn sugar,” Plaintiffs allege that
14 the statement is false because, along with the claims that HFCS is natural and
15 equivalent to table sugar, Defendants use the statement to equate HFCS with table
16 sugar. (*Id.* at ¶ 4-5, 29-31, 54, 59.) For the same reasons that the Court finds the
17 allegations sufficient at this stage to state a claim that equating HFCS with sugar is
18 false, the Court finds that Plaintiffs have stated a claim that the statement, HFCS is
19 “corn sugar,” is false.

20 C. Consumer Deception

21 Defendant CRA argues that Plaintiffs failed to state a claim because they
22 failed to allege that consumers would be deceived. Plaintiffs counter that
23 advertising is presumed deceptive if the falsity is deliberate. *Harper House v.*
24 *Thomas Nelson, Inc.*, 889 F.2d 197, 209 (9th Cir. 1989); *U-Haul Int’l Inc. v.*
25 *Jartran, Inc.*, 793 F.2d 1034, 1040-41 (9th Cir. 1986). In order to allege
26 deception, a plaintiff can allege that the defendant has expended “substantial funds

27 _____
28 ⁶ Finally, the statement that HFCS is “corn sugar” is, as Plaintiffs indicate, best understood in the context of a broad advertising campaign.

1 in an effort to deceive consumers and influence their purchasing decisions.” *U-*
2 *Haul*, 793 F.2d at 1041. Plaintiffs argue that the presumption is raised by the FAC
3 with allegations that Defendants have spent about \$50 million on their advertising
4 campaign. (FAC at ¶¶ 3, 22-28, 45-48.) The Court finds these allegations
5 sufficient at this stage to establish deception.

6 D. Materiality

7 Defendants argue that Plaintiffs failed to allege that any deception was
8 material. Specifically, Defendants argue that food and beverage buyers are too
9 sophisticated to be confused by any potential deception in advertising. Plaintiffs
10 identify various allegations that they argue include materiality. (FAC at ¶¶ 40-
11 45.) The allegations relate to consumer concerns regarding the presence of HFCS
12 in food products and food and beverage producers switching from HFCS to sugar
13 with consumer preferences in mind. The Court finds these allegations sufficient to
14 establish materiality.

15 E. Injury

16 Defendants finally argue that Plaintiffs have failed to allege any injury or
17 likelihood of injury resulting from the advertising campaign. Plaintiffs allege that
18 Defendants’ \$50 million campaign is aimed to “turn consumer sentiment around”
19 on HFCS and that the result of the campaign injures Plaintiffs in the form of price
20 erosion and lost profits. (FAC at ¶¶ 42, 45-54, 64-66.) The Court finds these
21 allegations sufficient at this stage to establish an injury.⁷

22 II. *Claims against CRA members*

23 The remaining Defendants, made up of corn refiners who are board
24 members of the CRA (collectively, “Member Defendants”), argue that Plaintiffs
25 have failed to state a claim against them. First, the Member Defendants argue that
26 Plaintiffs have not met Rule 9’s requirements to state a claim of fraud or

27 _____
28 ⁷ Having found that Plaintiffs have adequately pled their false advertising claim under the Lanham Act against
CRA, the Court also finds that Plaintiffs have adequately pled their state law claim against CRA.

1 misrepresentation with particularity. Second, they argue that the FAC lacks any
2 allegations that they engaged in commercial advertising. Finally, Defendants
3 argue that there are no allegations that any statements by the Defendants were
4 material, as required by the Lanham Act. Defendant Roquette separately argues
5 that it should be dismissed from the suit because there are no allegations stated
6 against it at all.

7 Plaintiffs argue that they have sufficiently pled that CRA is an agent of the
8 other defendants such that CRA's conduct should be imputed to the remaining
9 Defendants. Plaintiffs allege that the CRA is a trade organization representing the
10 interest of the corn refining industry, including the promotion of HFCS, that
11 Defendants (other than the CRA) are CRA members, that the campaign led by
12 CRA is financed by the members, and that HCFS use CRA as their agents to affect
13 consumer sentiment on HFCS. (FAC at ¶¶ 3, 22-28; 45-48; 50, 52.)

14 An agency relationships exists when "both the principal and the agent []
15 assent to the principal's right to control the agent." *United States v. Bonds*, 608
16 F.3d 495, 506 (9th Cir. 2010). Actual control is not necessary, as long as there is
17 an agreement that the principal has the right to control the agent, an agency
18 relationship exists. *Id.*, 608 F.3d at 506.

19 Plaintiffs' allegations as to the relationship between CRA and its members
20 are conclusory and do not establish the authority to control that is required to show
21 an agency relationship. Hence, the Court cannot impute CRA's actions to the
22 remaining defendants. Furthermore, Plaintiffs' allegations do not establish a false
23 advertising claim against the individual member companies, as the First Amended
24 Complaint lacks any allegations of the Member Defendants engaging in any
25 advertising.⁸ The allegations against the Member Defendants are not sufficient to
26 establish an agency relationship and hold the Member Defendants responsible for

27 _____
28 ⁸ Because the false advertising claim under the Lanham Act fails as to the Member Defendants, the state law claim that incorporates the same elements likewise fails.

1 actions carried out by CRA.⁹

2 *III. Primary Jurisdiction*

3 The primary jurisdiction doctrine allows a court to stay or dismiss an action
4 without prejudice pending resolution by a government agency of an issue within
5 its special competence. *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th
6 Cir. 2008). Courts traditionally look at the following four factors, although the
7 ultimate decision is within the court's discretion: (1) the need to resolve an issue
8 that (2) has been placed by Congress within the jurisdiction of an administrative
9 body having regulatory authority (3) pursuant to a statute that subjects an industry
10 or activity to a comprehensive regulatory authority that (4) requires expertise or
11 uniformity in administration." *Syntek Semiconductor Co., Ltd. v. Microchip*
12 *Tech., Inc.*, 307 F.3d 775, 781 (9th Cir. 2002).

13 Defendants argue that, if the Court finds that Plaintiffs' claim has been
14 sufficiently stated, the Court should dismiss the case under the primary
15 jurisdiction doctrine because of the pending Citizen Petition that CRA filed with
16 the FDA in September 2010.¹⁰ That petition seeks approval of "corn sugar" as a
17 name for corn syrup on food labels. (FAC at ¶¶ 47, 50-53.) The petition also
18 requested an amendment relating to the standard of identity for a product already
19 labeled as "corn sugar," dextrose monohydrate. (*Id.*) Defendants argue that the
20 Court should stay or dismiss this case to allow the FDA to first consider the issue
21 of whether HFCS should be labeled as "corn sugar."

22 Plaintiffs argue that the supposed misappropriation of the term "corn sugar"
23 is not the "centerpiece" of Plaintiffs' claims. Rather, Plaintiffs argue, their claim

24 ⁹ Defendants also argue that Plaintiffs have failed to comply with Rule 9(b), which requires that certain claims be
25 pled with specificity. The Court notes that courts are divided on this issue. *Compare John P. Villano, Inc. v. CBS,*
26 *Inc.*, 176 F.R.D. 130, 131 (S.D.N.Y. 1997) ("a claim of false advertising . . . falls outside the ambit of rule 9(b)")
27 *with EcoDisc Tech. AG v. DVD Format/Logo Licensing Corp.*, 711 F. Supp. 2d 1074, 1085 (C.D. Cal. 2010)
(applying Rule 9(b) to a false advertising claim that the court found was "grounded in fraud"). In this case,
28 assuming that Rule 9(b) applies to false advertising claims, the Court finds that Plaintiffs have met their burden as
to Defendant CRA.

¹⁰ The Citizen Petition and associated documents can be found at www.regulations.gov under the docket number
FDA-2010-P-049.

1 is based on the totality of Defendants’ advertising, which is not within the purview
2 of the FDA’s authority. Plaintiffs also argue that some of the pertinent allegations
3 in the FAC, including the statement that HFCS is “natural” or “equivalent to real
4 sugar” is not even at issue in the Defendants’ Citizen Petition before the FDA.
5 Lastly, Plaintiffs argue that if any administrative agency were to have primary
6 jurisdiction over the issues raised in this case, it would be the Federal Trade
7 Commission (“FTC”), which regulates advertising and has no pending proceeding
8 involving the claims presented in this case.


9 The Court finds that the primary jurisdiction doctrine is inapplicable in a
10 case such as this one, where a plaintiff challenges an advertising campaign.
11 Defendants have not pointed to a single case where a case challenging an
12 advertising campaign has been stayed under the doctrine. Even more importantly,
13 resolution of the Citizen Petition before the FDA would not resolve the issues
14 raised by Plaintiffs’ suit. The issue of whether HFCS is just like table sugar has
15 not been placed by Congress within the jurisdiction of the FDA. Furthermore, the
16 issues presented here, revolving around allegations of falsity in advertising, do not
17 call into question the FDA’s expertise.

18 **CONCLUSION**

19 For the reasons provided above, Defendants’ Motion to Dismiss is DENIED
20 as to Defendant CRA and GRANTED as to the Member Defendants, with leave to
21 amend. If an amended complaint is to be filed, it must be filed no later than
22 November 18, 2011.

23
24 **IT IS SO ORDERED.**

25 DATED: October 21, 2011


By _____
CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE