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ARCHER-DANIELS-MIDLAND COMPANY, CARGILL, INC.,
12 CORN PRODUCTS INTERNATIONAL, INC., THE CORN REFINERS
ASSOCIATION, INC., PENFORD PRODUCTS CO., ROQUETTE AMERICA,
13 INC., AND TATE & LYLE INGREDIENTS AMERICAS, INC.

14 **UNITED STATES DISTRICT COURT**
15 **CENTRAL DISTRICT OF CALIFORNIA**

16 WESTERN SUGAR COOPERATIVE,
a Colorado cooperative, MICHIGAN
17 SUGAR COMPANY, a Michigan
corporation, C & H SUGAR
18 COMPANY, INC., a Delaware
corporation, UNITED STATES SUGAR
19 CORPORATION, a Florida corporation,
AMERICAN SUGAR REFINING, INC.,
20 a Delaware corporation, THE
AMALGAMATED SUGAR
21 COMPANY LLC, a Delaware limited
liability company, IMPERIAL SUGAR
22 CORPORATION, a Texas corporation,
MINN-DAK FARMERS COOPERA-
23 TIVE, a North Dakota cooperative
association, THE AMERICAN SUGAR
24 CANE LEAGUE OF THE U.S.A., INC.,
a Louisiana non-profit corporation, and
25 THE SUGAR ASSOCIATION, INC., a
Delaware corporation,

26 Plaintiffs,

27 v.

28 ARCHER-DANIELS-MIDLAND

Case No. CV11-3473 CBM (MANx)

**DEFENDANTS' NOTICE OF
MOTION AND MOTION TO
DISMISS PLAINTIFFS' FIRST
AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

FED. R. CIV. P. 12(b)(6) and 9(b)

Hon: Consuelo B. Marshall
Date: September 12, 2011
Time: 11:00 a.m.
Place: Courtroom 2

[Proposed] Order and Request for
Judicial Notice Filed Concurrently
Herewith

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1 COMPANY, a Delaware corporation,
2 CARGILL, INC., a Delaware
3 corporation, CORN PRODUCTS
4 INTERNATIONAL, INC., a Delaware
5 corporation, THE CORN REFINERS
6 ASSOCIATION, INC., a Delaware
7 corporation, PENFORD PRODUCTS
8 CO., a Delaware corporation,
9 ROQUETTE AMERICA, INC., a
10 Delaware corporation, and TATE &
11 LYLE INGREDIENTS AMERICAS,
12 INC., a Delaware corporation,

Defendants.

13 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

14 PLEASE TAKE NOTICE that on September 12, 2011, at 11:00 a.m., or as soon
15 thereafter as this matter can be heard before the Honorable Consuelo B. Marshall of
16 the United States District Court for the Central District of California, in Courtroom 2
17 of the above-entitled Court, located at 312 North Spring Street, Los Angeles,
18 California 90012, Defendants Archer-Daniels-Midland Company, Cargill, Inc., Corn
19 Products International, Inc., The Corn Refiners Association, Inc., Roquette America,
20 Inc., and Tate & Lyle Ingredients Americas, Inc. (“Defendants”) will and hereby do
21 move, pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure,¹
22 for an order dismissing all claims against them in this action with prejudice or,
23 alternatively, to stay or dismiss this action, without prejudice, under the doctrine of
24 primary jurisdiction (“Motion”).

25 This Motion is brought pursuant to Rule 12(b)(6) on the grounds that:

- 26 • Plaintiffs’ first claim against Defendants for violations of Section 43(a)
27 of the Lanham Act fails to state a claim upon which relief can be granted;
- 28 • Plaintiffs’ second claim against Defendants for unfair competition in
violation of Cal. Bus. & Prof. Code §§ 17200 *et seq.* fails to state a claim
upon which relief can be granted; and

¹ All further statutory references are to the Federal Rules of Civil Procedure unless otherwise noted.

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- 1 • Plaintiffs’ action raises complex issues of national concern involving the
- 2 labeling and naming of food ingredients, which should be addressed in
- 3 the first instance by FDA, under the doctrine of primary jurisdiction, and
- 4 which, in fact, are the subject of a pending FDA proceeding.

5 This Motion is also brought pursuant to Rule 9(b) on the grounds that:

- 6 • Plaintiffs’ first claim against Defendants for violations of Section 43(a)
- 7 of the Lanham Act is not pleaded with sufficient particularity; and
- 8 • Plaintiffs’ second claim against Defendants for unfair competition in
- 9 violation of Cal. Bus. & Prof. Code §§ 17200 *et seq.* is not pleaded with
- 10 sufficient particularity.

11 This Motion is based on this Motion and Notice of Motion, the supporting
12 Memorandum of Points and Authorities, and any exhibits attached thereto, the
13 Request for Judicial Notice filed in support of this Motion, and upon such oral
14 argument and submissions that may be presented at or before the hearing on this
15 Motion.

16 This Motion is made following the conference of counsel pursuant to L.R. 7-3
17 which took place on June 24, 2011. Following the conference, Plaintiffs filed a
18 voluntary dismissal, without prejudice, of Defendant Penford Products Co. only.

19 Dated: July 1, 2011

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20
21 By: /s/ Gail J. Standish
Gail J. Standish
Erin R. Ranahan

22
23 Attorneys for Defendants
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25 ASSOCIATION, INC., PENFORD PRODUCTS
26 CO., ROQUETTE AMERICA, INC., AND TATE
& LYLE INGREDIENTS AMERICAS, INC.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 Plaintiffs seek to stifle an ongoing and vigorous public discussion about a
3 critical health issue facing the nation, the obesity crisis, and to prevent Americans
4 from learning the truth about foods they consume. Rushing to court, Plaintiffs have
5 tried to bypass a pending FDA proceeding involving the central issues raised in their
6 lawsuit, a proceeding in which Plaintiffs are also participating. The Court should
7 dismiss this case with prejudice for failure to state a claim, or alternatively defer to
8 FDA’s primary jurisdiction.

9 In their First Amended Complaint, Plaintiffs, who are producers of sugar and
10 two trade associations representing the sugar industry, attempt to allege claims under
11 the Lanham Act and the California Unfair Competition Law against Defendants, who
12 are corn refiners and producers of the food and beverage ingredient high fructose corn
13 syrup (“HFCS”), and the Corn Refiners Association Inc. (“CRA”). Perpetuating the
14 myth that HFCS somehow poses dietary concerns not also present with sugar,
15 Plaintiffs claim that Defendants are making false and misleading statements by
16 equating HFCS with “corn sugar,” stating that HFCS is “natural” and metabolized by
17 the body in the same manner as sugar (i.e., “sugar is sugar”). CRA’s position is that
18 HFCS is a sugar made from corn, and that Americans should moderate their intake of
19 all sugars. The sugar-industry Plaintiffs want to use the courts to stop this speech.

20 Plaintiffs’ claims should be dismissed under Rules 12(b)(6) and 9(b) for
21 multiple reasons:

22 *First*, Plaintiffs fail to state a claim under the Lanham Act against CRA. CRA
23 is engaged in a lawful educational campaign to explain and defend the merits of HFCS
24 in response to public vilification and widespread promulgation of unsubstantiated
25 opinions about the ingredient. CRA does not sell any products, and its alleged
26 conduct does not constitute promotion or marketing of a product that is actionable as
27 false advertising under the Lanham Act.

28 Plaintiffs also fall well short in alleging a Lanham Act claim against CRA with

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1 the sufficiency and plausibility required by the Supreme Court’s decisions in *Twombly*
2 and *Iqbal*. Plaintiffs do not sufficiently allege a plausible way in which CRA’s
3 statements are false or misleading. In some instances, the sources Plaintiffs cite in
4 their Amended Complaint contradict their own allegations. One of Plaintiffs’ cited
5 sources (Bray) acknowledges that HFCS is a form of sugar, and also confirms that the
6 chemical bond that Plaintiffs allege differentiates HFCS from sugar is broken prior to
7 digestion. Another cited source, government data, contradicts Plaintiffs’ assertion of a
8 supposed unique association between increased use of HFCS and a rise in obesity.

9 Moreover, Plaintiffs fail to allege sufficiently and plausibly that any buyers
10 have been or likely will be deceived, or even influenced, in their purchasing decisions
11 because of CRA’s educational campaign to defend HFCS. Plaintiffs do not
12 sufficiently or plausibly claim that sophisticated food and beverage companies, who
13 are the only *direct* buyers of HFCS, have been deceived or influenced in any
14 purchasing decision. As to consumers, Plaintiffs do not, because they cannot, allege
15 that any finished consumer foods containing HFCS are labeled and sold as containing
16 “corn sugar” today. Indeed, Plaintiffs do not cite even a single finished consumer
17 food that has been purchased as a result of anything said by CRA in its educational
18 campaign. The only finished consumer foods Plaintiffs identify are ones that have
19 actually replaced HFCS with sugar and promote the absence of HFCS.

20 Nor do Plaintiffs sufficiently and plausibly allege a likelihood of injury to
21 themselves stemming from any alleged false advertising. In fact, they allege facts
22 suggesting exactly the opposite is occurring: Plaintiffs note the “steady and sustained
23 decline” in sales of HFCS, despite the supposed false advertising, and the “growing
24 number” of food and beverage producers who are replacing HFCS with sugar.
25 Plaintiffs’ allegations are not sufficient and do not state a plausible basis for recovery
26 based on CRA’s public campaign to explain the merits of HFCS.

27 **Second**, Plaintiffs’ Amended Complaint states no false advertising claim
28 against the individual CRA member companies, thus failing under both the *Twombly*

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1 /*Iqbal* standard and Rule 9(b). Plaintiffs do not allege sufficiently a basis for holding
2 the CRA member companies liable for the conduct of a trade association. The only
3 allegation about the members’ own conduct is that some (not all) CRA member
4 companies have referred to HFCS as “corn sugar” in price lists and other unspecified
5 marketing materials provided to their food ingredient company buyers. Plaintiffs
6 allege nothing more, providing no facts or details whatsoever. This is not enough to
7 state a claim under *Twombly* and *Iqbal*, and also fails Rule 9(b)’s heightened pleading
8 requirement, which applies to Plaintiffs’ false advertising claims.

9 ***Finally***, even if Plaintiffs had managed to state a claim at all, the Court should
10 still dismiss this action without prejudice, or stay this case, under the doctrine of
11 primary jurisdiction. Plaintiffs’ allegations of false advertising, based primarily on
12 CRA’s efforts to explain the merits of HFCS, raise complex issues of national concern
13 that should be addressed in the first instance by the U.S. Food and Drug
14 Administration (“FDA”). In fact, the germane issues in Plaintiffs’ allegations already
15 are the subject of a pending FDA proceeding—a Citizen Petition filed by CRA that
16 asks FDA to approve “corn sugar” as an alternate name for HFCS. CRA filed this
17 Petition to address confusion over HFCS by providing an alternate name that makes
18 clear what the ingredient contains (the sugars glucose and fructose) and its source
19 (corn). The Petition is receiving commentary from numerous sources, for and against,
20 including plaintiff The Sugar Association, which submitted an extensive opposition
21 mirroring virtually all of the allegations in this case. This lawsuit opens a second
22 front of attack for Plaintiffs. Put another way, this lawsuit is an attempted end run
23 around a pre-existing FDA proceeding involving the central issues in this case.

24 For these reasons, Plaintiffs’ Lanham Act claim, and their derivative claim
25 under California law, should be dismissed with prejudice. Alternatively, the Court
26 should apply the doctrine of primary jurisdiction to dismiss this action without
27 prejudice, or stay the case, so that the complex issues raised by Plaintiffs’ claims can
28 be addressed in the first instance by FDA on a uniform, national basis.

STATEMENT OF FACTS AND PLAINTIFFS’ CLAIMS

The following facts are alleged in Plaintiffs’ Amended Complaint or set forth in documents and public records referenced in the Amended Complaint, which the Court may consider under Rule 12(b)(6). *In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 926 (9th Cir. 1999).

A. The Parties

CRA is a trade association whose members are part of the corn refining industry. (Am. Compl. ¶ 22.) Plaintiffs do not, and cannot, allege that CRA sells any products or services to anyone, or that CRA competes with any of the Plaintiffs. The remaining Defendants are CRA member companies who produce, *inter alia*, food ingredients made from corn. (*Id.* at ¶¶ 23-28.)² The CRA members sell these food ingredients directly to food and beverage producers, not consumers. (*Id.* at ¶¶ 31, 48.)

Plaintiffs are eight processors, refiners, or producers of sugar, known chemically as sucrose, produced from sugar beet or cane plants, and two trade associations representing the sugar industry. (*Id.* at ¶¶ 12-21.)

B. Sugar and Sugars

As Plaintiffs’ adopted source states, “[s]ugar is *any* free monosaccharide *or* disaccharide present in a food.” *See* Bray et al., 79 Am. J. Clin. Nutr. 537 (2004) (cited in Am. Compl. ¶ 34 n.6) (emphasis added). *See also* 21 C.F.R. § 101.9(c)(6)(ii); 53 Fed. Reg. 44862 (Nov. 7, 1988). Glucose and fructose are monosaccharide sugars. (Am. Compl. at ¶ 31.) Sucrose, or table sugar, is a disaccharide sugar comprised of these two monosaccharide sugars, glucose and fructose, joined together. (*Id.* at ¶ 30.) The Bray article cited by Plaintiffs explains that when disaccharides such as sucrose enter the human intestine, they are “cleaved,” i.e., the chemical bond is broken and the two monosaccharide molecules are no longer

² The six CRA member Defendants are Archer-Daniels-Midland Company (“ADM”); Cargill, Inc. (“Cargill”); Corn Products International, Inc. (“CPI”); Penford Products Co. (“Penford”); Roquette America, Inc. (“Roquette”); and Tate & Lyle Ingredients Americas, Inc. (“Tate & Lyle”).

1 joined. *See* Bray et al., at 538 (cited in Am. Compl. ¶ 34 n.6).

2 **C. High Fructose Corn Syrup and its Alleged Role in the Obesity Crisis**

3 HFCS is made from corn, but it is a sugar because it is comprised primarily of
4 the same two monosaccharides: glucose and fructose. (*See* Am. Compl. ¶ 31.) *See*
5 *also* 21 C.F.R. § 101.9(c)(6)(ii). HFCS is an ingredient in a wide variety of food and
6 beverages. (Am. Compl. at ¶¶ 29, 31.) Food and beverage companies buy HFCS to
7 use as a sweetener and to provide other functionality, e.g., browning, in many foods.
8 (*Id.* at ¶¶ 29, 31.) Plaintiffs do not, and cannot, allege that HFCS is sold directly to
9 consumers. (*Id.* at ¶¶ 1, 29, 31 (alleging only “commercial” availability of HFCS).)

10 FDA repeatedly has determined HFCS to be generally recognized as safe.³

11 FDA has also determined that HFCS is equivalent to sugar (sucrose) and other
12 nutritive sweeteners in saccharide composition.⁴ FDA staff have confirmed that
13 HFCS produced through the method commonly used in the industry qualifies as
14 “natural” under FDA’s longstanding policy because nothing artificial or synthetic is
15 included or added to the food that would not normally be expected.⁵

16 According to Plaintiffs, since the late 1960s, use and consumption of HFCS has
17 become “nearly ubiquitous.” (*Id.* at ¶¶ 1, 29.) Plaintiffs allege that the rise of HFCS
18 occurred at the “same time” as the rise in obesity in the United States, and that this
19 temporal “association” between the obesity epidemic and the rise in HFCS use
20 became the subject of attention from researchers and consumers. (*Id.* at ¶¶ 34, 35.)
21 Yet Plaintiffs’ own cited data show that use of HFCS has remained flat or decreased

22
23 ³ 48 Fed. Reg. 5716 (1983); 61 Fed. Reg. 43447 (1996).

24 ⁴ 61 Fed. Reg. 43447 (1996) (“the saccharide composition (glucose to fructose ratio) of HFCS is approximately the same as that of honey, invert sugar, and the disaccharide sucrose”).

25 ⁵ 58 Fed. Reg. 2302, 2407 (1993); Letter from Geraldine June, Supervisor, Office of Nutrition,
26 Labeling and Dietary Supplements, Center for Food Safety and Applied Nutrition (“CFSAN”), FDA
27 to Audrae Erickson, President, CRA (July 3, 2008), (cited in FDA Tab E, at 2 and FDA Tab F,
28 Appendix A). *See also* 56 Fed. Reg. 60421, 60466 (“In its informal policy, the agency has considered “natural” to mean that nothing artificial or synthetic (including colors regardless of source) is included in, or has been added to, the product that would not normally be expected to be there”).

1 since 2000, while U.S. obesity levels have continued to rise.⁶

2 Plaintiffs allege that there has been widespread negative publicity, consumer
3 concern, and resulting public discussion and debate about HFCS and its alleged role in
4 the U.S. obesity crisis. (*Id.* at ¶¶ 40-44.) Plaintiffs allege that “HFCS has become the
5 focus of a maelstrom of events”; that HFCS’s role in obesity is the subject of
6 numerous scientific studies and “debate”; and that “[c]onsumer concerns regarding the
7 presence of HFCS in food and drinks is palpable.” (*Id.* at ¶¶ 36, 39, 40, 41.)

8 At the same time, Plaintiffs allege that there has been a “steady and sustained
9 decline” in sales of HFCS. (*Id.* at ¶¶ 1, 44.) Plaintiffs aver that “[c]onsumers
10 increasingly seek to avoid food and drink containing HFCS,” and that a “growing
11 number of food and beverage producers” are replacing HFCS with sugar and
12 promoting their products’ absence of HFCS. (*Id.* at ¶¶ 2, 42.) The only finished
13 consumer foods identified in the Amended Complaint are those that have replaced
14 HFCS with sugar, including products made under the Pepsi, Log Cabin, Jones, and
15 Hunt’s labels. (*Id.* at ¶¶ 42-43.) Plaintiffs do not identify a single finished consumer
16 food in which sugar has been replaced with HFCS, as a result of Defendants’ alleged
17 conduct or otherwise.

18 **D. CRA’s Pending Citizen Petition Before FDA**

19 Plaintiffs do not identify any finished consumer foods on the market today
20 containing HFCS that are labeled as containing “corn sugar.” Rather, as Plaintiffs
21 allege, CRA filed a Citizen Petition with FDA in September 2010 seeking approval of
22 “corn sugar” as an *alternate* common or usual name for HFCS. (*Id.* at ¶¶ 47, 50-53.)
23 CRA’s Petition also requested a conforming amendment to the standard of identity for
24 dextrose monohydrate, another corn-derived product that may be labeled as “corn

25 _____
26 ⁶ See *Overweight and Obesity Statistics*, U.S. Dep’t. Health & Human Servs., Nat’l Insts. Health
27 (Feb. 2010) (<http://win.niddk.nih.gov/publications/PDFs/stat904z.pdf>) (cited in Am. Compl. ¶ 33)
28 (noting that from 1960 to 2006, obesity rates have increased from 13.4% to 35.1%); see also UDSA
Economic Research Service, *Corn Sweetener Supply, Use, and Trade*, Table 30: U.S. High Fructose
Corn Syrup (HFCS) Supply and Use, by Calendar Year (cited in Am. Compl. ¶ 44 n.15) (showing a
decrease in use of HFCS from 2000 to 2010).

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1 sugar” under current FDA regulations. 21 C.F.R. 168.111; 58 Fed. Reg. 2850, 2886
2 (Jan. 6, 1993); (*see* FDA Tab A).⁷ The proposed change would allow, but not require,
3 food and beverage makers to list “corn sugar” on ingredient labels as an alternate
4 name for HFCS. *Id.*

5 The CRA Petition submits that “[t]he name ‘corn sugar’ more accurately
6 reflects the source of the food (corn), identifies the basic nature of the food (a sugar),
7 [] discloses the food’s function (a sweetener) . . . [and] more accurately reflects the
8 reasonable expectation of consumers.” (FDA Tab A, at 7.) The Petition is based on
9 (i) survey data showing widespread consumer confusion about the name “HFCS,”
10 which may suggest, albeit incorrectly, that the ingredient is high in fructose, calories,
11 or sweetness compared to other nutritive sweeteners, including sugar; (ii) scientific
12 literature establishing the equivalence of HFCS to sugar in calories, sweetness,
13 fructose content, and metabolism; and (iii) a study demonstrating that “corn sugar” is
14 rarely used to describe dextrose monohydrate, an ingredient which consumers and
15 industry generally refer to as “dextrose.” (FDA Tab A.)

16 CRA’s Petition is currently pending before FDA, and has received over 100
17 public comment submissions from individuals, consumer unions, corn producers, farm
18 bureaus, and trade organizations. (Am. Compl. ¶ 51.) *See also* www.regulations.gov
19 (Docket FDA-2010-P-049). The Sugar Association, a Plaintiff here, submitted
20 comments to FDA concerning CRA’s Petition. (*See* FDA Tab B.) As they do here,
21 The Sugar Association argued to FDA that the term “corn sugar” would mislead
22 consumers; that HFCS is not natural; and that sugar and HFCS are neither chemically
23

24 ⁷ The Amended Complaint refers extensively to CRA’s Petition to FDA, public comments filed in
25 response, and reply comments filed by CRA. (Am. Compl. ¶¶ 50, 51, 53.) These complete
26 materials (in Docket FDA-2010-P-049) are available on the federal rulemaking website,
27 www.regulations.gov. As it has in other cases, this Court may take judicial notice of FDA docket
28 materials on FDA’s website, and Defendants have separately moved that the Court do so here under
Fed. R. Evid. 201. *Peviani v. Hostess Brands, Inc.*, 750 F. Supp. 2d 1111, 1116 (C.D. Cal. 2010);
Daniels-Hall v. Nat’l Educ. Ass’n, 629 F.3d 992, 998-99 (9th Cir. 2010). For the Court’s
convenience, the materials from FDA’s docket and website cited in the Amended Complaint and
herein are attached to Defendants’ Rule 201 motion and will be cited as “FDA Tab ____.”

1 nor metabolically equivalent. (*See* FDA Tab B, at 5-14.) As shown in Comparative
2 Table A, attached hereto, Plaintiffs’ allegations closely track The Sugar Association’s
3 FDA submission. CRA has submitted replies to the public comments, including those
4 made by The Sugar Association and other groups. (*See* FDA Tabs E-F.)

5 **E. CRA’s Educational Campaign**

6 To address the alleged “vilification of HFCS” and the “vague and
7 unsubstantiated opinions” about it, CRA has pursued an educational campaign to
8 explain the facts about HFCS and the relevant science. (Am. Compl. ¶¶ 3, 45-47, 53.)
9 CRA’s campaign utilizes the Internet, television, and publications. (*Id.* at ¶ 46.)

10 CRA does not advertise or promote the sale of HFCS, any consumer products
11 containing HFCS, nor any particular producers of HFCS. Rather, CRA’s campaign
12 provides, among other things, information about HFCS; references and links to
13 scientific papers discussing the merits of HFCS; releases from medical and dietetic
14 associations explaining the equivalence of HFCS to sugar and other caloric
15 sweeteners; and links to the FDA docket containing CRA’s Petition and public
16 comments. *See* www.sweetsurprise.com (cited in Am. Compl. ¶¶ 46, 55). For
17 example, CRA’s campaign cites the American Medical Association’s conclusion that,
18 “[b]ecause the composition of HFCS and sucrose are so similar, particularly on
19 absorption by the body, it appears unlikely that HFCS contributes more to obesity or
20 other conditions than sucrose.” *Id.* (www.sweetsurprise.com/experts, citing AMA
21 Report 3 of Council on Science and Public Health (A-08), June 2008).

22 On its opening page, CRA’s “Sweetsurprise” website cited by Plaintiffs
23 summarizes the goal of CRA’s educational campaign:

24 It is important that consumers recognize added sugars in the diet.

25 Despite its confusing name, high fructose corn syrup is simply corn
26 sugar, or an added sugar in the diet. It is not high in fructose as its name
27 would suggest. High fructose corn syrup is composed of the same two
28 simple sugars (fructose and glucose) as table sugar, honey, and maple

1 syrup.

2 There has been much confusion about this natural sweetener made from
3 corn. We want to clear up this confusion by calling this ingredient what
4 it is: corn sugar. And that is why we are asking the U.S. Food and Drug
5 Administration to allow for an alternate name for this ingredient on food
6 and beverage labels.

7 (*cited in* Am. Compl. ¶ 55 (emphasis added).)

8 **F. Plaintiffs’ Claims**

9 Plaintiffs’ Amended Complaint alleges that use of the name “corn sugar” to
10 describe HFCS is false and misleading. (*Id.* at ¶¶ 3-5, 7, 47-50, 52-56, 59.) Plaintiffs
11 allege that the falsity stems from a “unilateral appropriation of the label ‘corn sugar’
12 ... when that label has long been used for a recognized form of sugar in crystalline
13 form,” i.e., dextrose. (*Id.* at ¶¶ 5, 49, 59.) Plaintiffs claim that “corn sugar” is already
14 the FDA-approved name of the “vastly different” sweetener dextrose, which is “made
15 from corn starch.” (*Id.* at ¶ 5.)

16 In addition, Plaintiffs claim that CRA’s assertion that HFCS is “natural” is false
17 and misleading, notwithstanding FDA staff’s determination and longstanding FDA
18 policy, because HFCS is not “found in nature.” (*Id.* at ¶ 60.) Plaintiffs do not allege
19 that the *processed* sugar they produce and sell, as distinct from the sugar cane or beet
20 plants themselves from which it is derived, is “found in nature.”

21 Plaintiffs also allege that CRA’s statements that HFCS is nutritionally and
22 metabolically equivalent to sucrose or other sugars, i.e., “sugar is sugar,” are false or
23 reckless and misleading because of emerging science and debate over “a likely causal
24 link” between HFCS and obesity or other health problems. (*Id.* at ¶¶ 36, 39, 61.)

25 As to the CRA member companies, Plaintiffs allege only that ADM, Cargill,
26 CPI, and Tate & Lyle have used “corn sugar” as a synonym for HFCS in “marketing
27 materials, including ... price lists” provided to commercial food ingredient customers.
28 (*Id.* at ¶¶ 48, 56.)

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1 Plaintiffs allege that they “have been damaged,” and that their injury includes
2 “price erosion and lost profits stemming from artificially reduced demand caused by
3 Defendants’ false and misleading advertising (whether or not consumer demand has
4 been retained by or driven to HFCS or other competitive sweeteners).” (*Id.* at ¶ 64.)
5 The Amended Complaint contains no allegation that *any* sales of any particular
6 products manufactured by Plaintiffs have been diverted to Defendants, or that the
7 price of any particular product has been or likely will be eroded, as a result of
8 Defendants’ conduct. Rather, Plaintiffs allege a “steady and sustained decline” in
9 HFCS sales (*id.* at ¶¶ 1, 44); that this decline has occurred despite Defendants’ alleged
10 false advertising (*id.* ¶ 47); and that a “growing number of food and beverage
11 producers” are replacing HFCS with sugar (*id.* ¶ 42).

12 Plaintiffs assert claims for false advertising under Section 43(a) of the Lanham
13 Act (Count 1), 15 U.S.C. § 1125(a), and under § 17200 of the California Business &
14 Professions Code (Count 2).

15 ARGUMENT

16 **I. Plaintiffs’ Lanham Act Claim Against CRA Should Be Dismissed**

17 Plaintiffs’ Lanham Act claim against CRA should be dismissed with prejudice
18 because it is based on CRA’s exercise of its right to engage in a public dialogue about
19 the merits of HFCS, in response to the “vilification” of that ingredient and in
20 conjunction with its Petition to FDA. As such, CRA’s activity is not commercial
21 advertising or promotion subject to the Lanham Act. In addition, as to each of the
22 three categories of alleged false statements, Plaintiffs’ Amended Complaint falls far
23 short of what is necessary, under the Supreme Court’s decisions in *Twombly* and
24 *Iqbal*, to sufficiently allege a plausible Lanham Act claim against CRA.

25 **A. CRA is Not Engaged in Commercial Promotion or Marketing of a** 26 **Product to Consumers**

27 To begin, only misrepresentations that are made in the promotion or marketing
28 of a product are actionable under the Lanham Act. *See Rice v. Fox Broad. Co.*, 330

1 F.3d 1170, 1181 (9th Cir. 2003). The Ninth Circuit defines “commercial advertising
2 or promotion” as (a) commercial speech; (b) by the defendant who is in commercial
3 competition with the plaintiff; (c) for the purpose of influencing consumers to buy
4 defendant’s goods or services; and (d) the representations must be disseminated
5 sufficiently to the relevant purchasing public to constitute “advertising” or
6 “promotion” within that industry. *Coastal Abstract Serv., Inc. v. First Am. Title Ins.*
7 *Co.*, 173 F. 3d 725, 735 (9th Cir. 1999). CRA’s challenged conduct is not
8 “commercial advertising or promotion” under this standard.

9 CRA’s activity is not pure commercial speech. The “core notion of commercial
10 speech is speech which does no more than propose a commercial transaction.” *Rice*,
11 330 F.3d at 1181. *See also Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184
12 (9th Cir. 2001). Where commercial speech is “on an issue of public importance, . . . it
13 cannot be said that the sole purpose of the speech is to propose a commercial
14 transaction.” *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1117 (C.D. Cal.
15 2004). In this Circuit, “[i]f speech is not ‘purely commercial’—that is, if it does more
16 than propose a commercial transaction—then it is entitled to the full First Amendment
17 protection.” *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002).
18 *Cf. Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67, 103 S. Ct. 2875, 77 L.
19 Ed. 2d 469 (1983) (in determining whether speech is commercial, courts consider
20 *inter alia* whether speech is admittedly advertising, references a specific product, and
21 if speaker has economic motive).

22 Here, CRA’s educational campaign proposes no commercial transaction
23 whatsoever. Rather, it relates to an issue of central public importance: the alleged role
24 of HFCS in the U.S. obesity crisis. CRA’s educational campaign responds to the
25 alleged public “vilification of HFCS” and addresses “vague and unsubstantiated
26 opinions” about HFCS. (*See Am. Compl.* ¶¶ 32-33, 45.) Moreover, CRA’s campaign
27 is intertwined with, and in furtherance of, its FDA Petition seeking approval of “corn
28

1 sugar” as an alternate name for HFCS. (*See id.* at ¶¶ 3, 47.) The “Sweetsurprise”
2 website, which Plaintiffs cite, describes the goal of CRA’s speech:

3 There has been much confusion about this natural sweetener made from
4 corn. We want to clear up this confusion by calling this ingredient what
5 it is: corn sugar. And that is why we are asking the U.S. Food and Drug
6 Administration to allow for an alternate name for this ingredient on food
7 and beverage labels.

8 (*See Am. Compl.* ¶ 46.) The explicit goal of CRA’s challenged conduct is not to sell
9 goods. It is to explain publicly the merits of HFCS in the face of widespread
10 confusion, criticism and “vilification,” as Plaintiffs allege.

11 As such, CRA’s challenged conduct is not pure commercial speech subject to
12 the Lanham Act. *See Mattel*, 296 F.3d at 907 (“Barbie” reference in song used to sell
13 song and comment on cultural values was noncommercial speech); *Hoffman*, 255 F.3d
14 at 1185 (protected expression inextricably entwined with commercial purpose, not
15 purely commercial speech); *TYR Sport, Inc. v. Warnaco Swimwear, Inc.*, 709 F. Supp.
16 2d 802, 818 (C.D. Cal. 2010) (statement to reporter about a swimsuit touched on
17 public debate about performance of suit, and thus did not violate Lanham Act because
18 it was inextricably intertwined with coverage of topic); *New.Net*, 356 F. Supp. 2d at
19 1117 (where statements “constitute[] speech on an issue of public importance, . . . it
20 cannot be said that the sole purpose of the speech is to propose a commercial
21 transaction”).

22 Further, CRA does not compete with Plaintiffs and does not promote or sell any
23 products or services. Indeed, Plaintiffs do not allege that CRA’s educational
24 campaign even references any distinct items that can be purchased by consumers. *See*
25 *Bolger*, 463 U.S. at 66-67 (speech is commercial where the speech references a
26 specific product and the speaker has an economic motive for engaging in the speech);
27 *New.Net*, 356 F. Supp. 2d at 1118 (dismissing Lanham Act claim with prejudice
28 because defendant did not compete with plaintiff).

1 In sum, Plaintiffs seek to chill CRA’s lawful efforts to educate the public
2 about the merits of HFCS, in conjunction with its Petition before FDA. Because
3 CRA’s alleged conduct is not commercial advertising or promotion, Plaintiffs’
4 Lanham Act claim against CRA should be dismissed with prejudice. If the Lanham
5 Act were interpreted to support a claim like Plaintiffs’ attack on CRA’s educational
6 campaign, that interpretation would render the statute vulnerable to challenge as an
7 abridgement of the fundamental First Amendment right of free speech.

8 **B. Plaintiffs Fail to Allege a Plausible Lanham Act Claim Under**
9 ***Twombly* and *Iqbal***

10 “[O]nly a complaint that states a plausible claim for relief survives a motion
11 to dismiss.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009).
12 “[W]here the well-pleaded facts do not permit the court to infer more than the mere
13 possibility of misconduct, the complaint has alleged—but it has not ‘shown’—that the
14 pleader is entitled to relief.” *Id.* Moreover, “a plaintiff’s obligation to provide the
15 ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions,
16 and a formulaic recitation of a cause of action’s elements will not do. Factual
17 allegations must be enough to raise a right to relief above the speculative level on the
18 assumption that all of the complaint’s allegations are true.” *Bell Atl. Corp. v.*
19 *Twombly*, 550 U.S. 544, 545, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). “Asking for
20 plausible grounds does not impose a probability requirement at the pleading stage; it
21 simply calls for enough facts to raise a reasonable expectation that discovery will
22 reveal evidence [to support plaintiff’s claims].” *Id.*

23 Thus, before *Twombly* and *Iqbal*, a complaint could not be dismissed unless it
24 appeared “beyond doubt” that a plaintiff could prove “no set of facts in support of his
25 claim which would entitle him to relief.” *Wright v. Gen. Mills Inc.*, 2009 WL
26 3247148, at *5 (S.D. Cal. Sept. 30, 2009). That standard no longer applies. Now,
27 “the non-conclusory factual content, and reasonable inferences from that content, must
28 be plausibly suggestive of a claim entitling the plaintiff to relief.” *Peviani v. Hostess*

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1 *Brands, Inc.*, 750 F. Supp. 2d 1111, 1115 (C.D. Cal. 2010) (citing *Moss v. United*
2 *States Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009)).

3 To state a false advertising claim under the Lanham Act, a plaintiff must
4 sufficiently allege: (1) the defendant made a false statement either about the
5 plaintiff's or its own product; (2) the statement was made in commercial advertising
6 or promotion; (3) the statement actually deceived or had the tendency to deceive a
7 substantial segment of its audience; (4) the deception is material; (5) the defendant
8 caused its false statement to enter interstate commerce; and (6) the plaintiff has been
9 or is likely to be injured as a result of the false statement. *Jarrow Formulas, Inc. v.*
10 *Nutrition Now, Inc.*, 304 F. 3d 829, 835 n.4 (9th Cir. 2002). A failure to allege
11 plausibly the factual support for any of these elements is fatal. *Robert Stillwell v.*
12 *Radioshack Corp.*, No. 07-cv-00607-JM (CAB) at 9-10 (S.D. Cal. Dec. 18, 2007) (a
13 "failure to allege all elements of a Lanham Act . . . claim in an amended complaint
14 may result in the dismissal of this claim with prejudice").

15 As set forth below, Plaintiffs' Lanham Act claim against CRA falls far short of
16 what is needed to state a claim under *Twombly* and *Iqbal*, and it does so in regard to
17 each of the three alleged categories of false statements that Plaintiffs identify:

18 **1. HFCS is Corn Sugar**

19 Plaintiffs' "corn sugar" allegations, the centerpiece of their lawsuit, fail on
20 virtually every element of a Lanham Act claim. *First*, Plaintiffs claim that CRA's use
21 of "corn sugar" to describe HFCS is false because that term already is an FDA-
22 approved name of the "distinct" sweetener dextrose, which is "made from corn
23 starch." (*Id.* at ¶ 5.) But Plaintiffs themselves admit that HFCS is made from *corn*
24 (Am. Compl. ¶ 29), and the sources Plaintiffs adopt in their Amended Complaint
25 actually state that HFCS is a *sugar*—hence, "corn sugar." In fact, the "landmark
26 scientific report" Plaintiffs cite states that "[s]ugar is *any* free monosaccharide *or*
27 disaccharide present in a food." See Bray et al., 79 Am. J. Clin. Nutr. 537 (2004)
28 (cited in Am. Compl. ¶ 34 n.6) (emphasis added). HFCS consists primarily of the

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1 monosaccharides glucose and fructose. (Am. Compl. ¶ 31.) Plaintiffs’ same source
2 explains that “*Added sugar* is a sugar added to a food and includes sweeteners *such as*
3 *sucrose, HFCS, honey, molasses, and other syrups,*” identifying both sucrose and
4 HFCS as “sugar.” Bray, et al., at 537 (emphasis added). Thus, Plaintiffs’ own
5 allegations and adopted sources demonstrate that use of the term “corn sugar” to
6 describe HFCS is not literally false.

7 **Second**, as noted above, CRA’s statements were not made in commercial
8 advertising or promotion, but rather as part of an educational campaign that is not
9 actionable under the Lanham Act.

10 **Third**, Plaintiffs allege that “corn sugar” is misleading by “falsely suggesting to
11 consumers that HFCS is or is similar to the actual corn sugar product, [dextrose,]
12 when in fact the two products are wholly different.” (Am. Compl. ¶ 59.) However,
13 Plaintiffs do not sufficiently allege or plausibly show that any consumers or
14 commercial buyers are likely deceived into thinking the phrase “corn sugar” in CRA’s
15 statements means anything *other* than HFCS. Plaintiffs do not allege that consumers
16 are even aware that “corn sugar” can mean “dextrose in crystalline form, derived from
17 corn starch.” Equally important, in CRA’s educational campaign, the term “corn
18 sugar” is openly and obviously equated with HFCS. As Plaintiffs acknowledge, the
19 very purpose of CRA’s activities is to “equate HFCS and corn sugar.” (Am. Compl. ¶
20 53.) Because “corn sugar” does not appear in isolation, without a contextual reference
21 to HFCS, no reasonable consumer, and certainly no commercial buyer, could
22 plausibly believe that the phrase “corn sugar” means something other than HFCS.
23 There can be no deception that “corn sugar” means “dextrose in crystalline form,
24 derived from corn starch,” when CRA openly equates “corn sugar” with HFCS.

25 **Fourth**, Plaintiffs fail to allege materiality. A misrepresentation is “material”
26 when it is likely to influence purchasing decisions. *Cook, Perkiss and Liehe, Inc., v.*
27 *N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 244 (9th Cir. 1990). As this Court has
28 observed, “*Cook, Perkiss and Liehe* requires that the ‘deception is material,’ not that

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1 the advertisement as a whole is material.” *In re Century 21-Re/Max Real Estate*
2 *Adver. Claims Litig.*, 882 F. Supp. 915, 924 (C.D. Cal. 1994). Materiality has nothing
3 to do with the truth or falsity of the statement, or the defendant’s intent. *See*
4 *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 312 n.10 (1st
5 Cir. 2002). Rather, materiality focuses on whether the false or misleading statement is
6 likely to make a difference to purchasers. *Id.*

7 Plaintiffs here fail to make even a conclusory allegation that CRA’s use of the
8 term “corn sugar” is material in any way. Nor do they allege facts from which
9 materiality can be inferred. It is not even clear whether Plaintiffs’ claims relate to
10 direct commercial buyers of HFCS, i.e., food and beverage companies, or to
11 purchasers of finished consumer foods containing HFCS. The ingredient HFCS is
12 purchased directly only by sophisticated food and beverage manufacturers, who have
13 countless reasons to purchase one sweetener over another. It is not plausible that
14 these sophisticated entities, which are intimately familiar with the properties of cane
15 sugar, beet sugar, and HFCS, would be influenced in their buying decisions by CRA’s
16 description of HFCS as “corn sugar.” *See Au-Tomotive Gold, Inc. v. Volkswagen of*
17 *Am., Inc.*, 457 F.3d 1062, 1076 (9th Cir. 2006) (likelihood of consumer confusion
18 decreases where buyer is sophisticated and exercises high degree of care). Plaintiffs
19 do not even try to allege that they are.

20 As to consumers, Plaintiffs make sweeping allegations about the “nearly
21 ubiquitous” presence of HFCS in food and drink and CRA’s educational campaign.
22 (*See Am. Compl.* ¶ 1.) Yet Plaintiffs never plausibly link any statement by CRA to
23 the purchase of any identifiable finished consumer foods. Indeed, Plaintiffs do not
24 identify any foods on the market that list HFCS as “corn sugar” on their labels. And
25 the only finished consumer goods Plaintiffs identify are ones that have replaced HFCS
26 with sugar and promote the absence of HFCS. (*Am. Compl.* ¶ 43.) Plaintiffs do not
27 allege sufficient facts suggesting that any consumer is more likely to make a decision
28 to purchase any particular foods containing HFCS, believing it was dextrose, as a

1 result of CRA’s educational campaign. Plaintiffs’ allegations do not sufficiently or
2 plausibly show that equating HFCS with “corn sugar” has affected, or is affecting, any
3 consumer purchasing decisions today.

4 **Fifth**, Plaintiffs do not sufficiently allege that they have or likely will be injured
5 by CRA’s use of “corn sugar.” *See Southland Sod Farms v. Stover Seed Co.*, 108 F.3d
6 1134, 1139 (9th Cir. 1997); *see also All One God Faith, Inc. v. Hain Celestial Group,*
7 *Inc.*, 2009 WL 4907433, at *10 (N.D. Cal. Dec. 14, 2009). Plaintiffs make a
8 conclusory allegation that they have suffered “actual damages in the form of price
9 erosion and lost profits stemming from artificially reduced demand caused by
10 Defendants’ false and misleading advertising (whether or not consumer demand has
11 been retained by or driven to HFCS or other competitive sweeteners).” (Am. Compl.
12 ¶ 64.) But Plaintiffs allege **no** facts supporting a likely “reduced demand” for sugar,
13 either by consumers or by the food and beverage industry, as a result of CRA’s
14 speech.

15 In fact, the Amended Complaint suggests that just the opposite is occurring.
16 Plaintiffs allege a “steady and sustained decline” in HFCS sales (Am. Compl. ¶¶ 1,
17 44); that this decline in HFCS has occurred despite Defendants’ alleged false
18 advertising (*id.* ¶ 47); and that a “growing number of food and beverage producers”
19 are replacing HFCS with sugar (*id.* ¶ 42).

20 Nor do Plaintiffs allege sufficiently or plausibly a link between CRA’s alleged
21 false use of “corn sugar” and any loss to *Plaintiffs*. Plaintiffs allege that “corn sugar”
22 is false and misleading as to HFCS because it appropriates the FDA-approved name
23 for dextrose, a “vastly different” corn-based sweetener. (Am. Compl. ¶¶ 5, 29, 59.)
24 Injury flowing from this alleged false use of the name “corn sugar”—i.e., because it is
25 an approved name for dextrose—might theoretically harm makers of dextrose, but not
26 makers of cane or beet sugar. Certainly Plaintiffs allege no facts showing how this
27 would occur, nor why supposedly deceived buyers of dextrose would otherwise have
28 purchased sugar or sugar-sweetened foods. *All One God Faith, Inc.*, 2009 WL

1 4907433, at *10 (dismissing Lanham Act claim which failed to allege facts supporting
2 injury or its likelihood as a result of alleged false advertising). Moreover, even if
3 Plaintiffs could show an actual or likely loss of sales to themselves, which they have
4 not, Plaintiffs do not allege sufficiently or plausibly that such loss is due to CRA’s
5 educational campaign as opposed to unrelated factors such as price, availability,
6 functionality, brand preference, or myriad other factors that drive buying behavior.
7 Plaintiffs fail to set forth any facts to account for these potential causes of lost sales or
8 price erosion of sugar, if any actually occurred. *See id.*

9 Finally, Plaintiffs allege in conclusory fashion that Defendants seek to
10 “appropriate the goodwill of natural sugar” (although they make no allegation that
11 their own processed products are “found in nature”). (Am. Compl. ¶ 50.) Plaintiffs
12 do not allege that their goodwill has been or will likely be harmed by CRA’s alleged
13 conduct, and certainly allege no facts supporting such an allegation. If the “goodwill”
14 of sugar has been created or maintained through the alleged “vilification” and “vague
15 and unsubstantiated opinions” concerning HFCS identified in the Amended Complaint
16 (*id.* at ¶ 45), Plaintiffs have no legal right to maintain that “goodwill.”

17 In sum, after *Twombly*, Plaintiffs’ conclusory and speculative allegations of
18 causation and injury fail to state a claim. *See Wright*, 2009 WL 3247148, at *5.

19 2. HFCS is “Natural”

20 Plaintiffs’ claims regarding the term “natural” fail for many of the same reasons
21 set forth above. As in the case of “corn sugar,” Plaintiffs fail to allege commercial
22 advertising covered by the Lanham Act, materiality (i.e., influence on a buying
23 decision), or a plausible likelihood of injury to them stemming from CRA’s
24 educational campaign. These same arguments, detailed above, apply equally to
25 Plaintiffs’ assertion that CRA has falsely described HFCS as “natural.”

26 In addition, Plaintiffs’ “natural” allegations fail to state a claim because they do
27 not identify an applicable definition of “natural” in existence when CRA made its
28 alleged statements that HFCS failed to meet. Plaintiffs skirt FDA’s longstanding

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1 policy concerning “natural,” which was in place when CRA’s challenged speech
2 occurred, and FDA staff’s confirmation that HFCS produced through the common
3 industry method qualifies as “natural.” *See supra* at 5, n.5. *See Hill’s Pet Nutrition,*
4 *Inc. v. Nutro Product, Inc.*, 2007 WL 4105571, at *2 (C.D. Cal. Apr. 28, 2007) (if a
5 claim is literally true or ambiguous, it cannot be literally false); *Coors Brewing Co. v.*
6 *Anheuser-Busch Cos. Inc.*, 802 F. Supp. 965, 969-70 (S.D.N.Y. 1992) (a claim cannot
7 be literally false when it meets at least one definition of the word).⁸ Plaintiffs identify
8 no other definition of “natural” applicable to conventional foods regulated by FDA in
9 existence when the challenged statements by CRA were made.

10 Plaintiffs apparently are asking the Court to adopt a new standard that a
11 “natural” food ingredient must be “found in nature” without processing by man (Am.
12 Compl. ¶¶ 29, 31, 60), and then have the Court apply this definition retroactively to
13 CRA’s statements. Plaintiffs do not identify any authority defining a food ingredient
14 as “natural” only if “found in nature” untouched by human processes, nor do they
15 allege that consumers believe this is the definition of a “natural” food ingredient. *See*
16 *Wright*, 2009 WL 3247148, at *5 (allegation that “members of the public were likely
17 to have been deceived and likely made their purchases on the basis that ‘100%
18 Natural’ would not include a highly processed ingredient such as HFCS” was
19 inadequate under *Iqbal* and *Twombly*). Table sugar itself does not meet this proposed
20 definition. While sugar cane and sugar beet plants are found in nature, table sugar is
21 *produced* from sugar cane and sugar beet plants using several processing stages. (*See*
22 Am. Compl. ¶ 30.)⁹ The Court should decline Plaintiffs’ invitation to establish a new

23
24 ⁸ Plaintiffs’ proposed definition of “natural” has no basis in FDA regulation or policy. 58 Fed. Reg.
25 2407 (“[FDA] will maintain its current policy . . . not to restrict the use of the term ‘natural’ except
26 for added color, synthetic substances, and flavors”); 56 Fed. Reg. 60421, 60466 (“In its informal
policy, the agency has considered ‘natural’ to mean that nothing artificial or synthetic (including
colors regardless of source) is included in, or has been added to, the product that would not normally
be expected to be there”).

27 ⁹ “Sucrose is obtained by crystallization from sugar cane or sugar beet juice that has been extracted
28 by pressing or diffusion, then clarified and evaporated.” 21 C.F.R. 184.1854; 73 Fed. Reg. 8606,
8608 (Feb. 14, 2008) (cited in Am. Compl. ¶ 30 n.2).

1 standard for “natural,” which departs from FDA’s long-established policy and requires
2 scientific agency expertise and uniformity in administration. Additionally, any
3 changes in an applicable definition of “natural” can only apply prospectively, not
4 retrospectively in a manner that might unfairly make statements false *after the fact*.

5 **3. “Sugar is Sugar”**

6 Finally, Plaintiffs’ allegations challenging CRA’s statements that HFCS is
7 nutritionally and metabolically equivalent to sugar (i.e., “sugar is sugar”) fail to state a
8 claim, for the same reasons noted above. Plaintiffs do not allege commercial
9 advertising under the Lanham Act, materiality, or sufficiently allege injury to
10 themselves resulting from this alleged false statement.

11 In addition, while failing to allege literal falsity, Plaintiffs actually show the
12 literal truth of the statement “sugar is sugar” by adopting a source that expressly
13 equates sugar derived from multiple sources, including HFCS and sucrose. Plaintiffs’
14 “landmark” source states that “[s]ugar is *any* free monosaccharide *or* disaccharide
15 present in a food.” *See* Bray et al., 79 Am. J. Clin. Nutr. 537 (2004) (cited in Am.
16 Compl. ¶ 34 n.6) (emphasis added). It states: “*Added sugar* is a sugar added to a food
17 and includes sweeteners *such as sucrose, HFCS*, honey, molasses, and other syrups,”
18 identifying both sucrose and HFCS as “sugar.” *Id.* Plaintiffs’ source also explains
19 that when disaccharides such as sucrose enter the human intestine, they are “cleaved,”
20 i.e., the monosaccharides are no longer joined. *See id.* at 538. Thus, the chemical
21 bond which initially exists in sucrose, and that Plaintiffs cite (Am. Compl. ¶¶ 30-31),
22 is not a point of differentiation between sucrose and HFCS.

23 Plaintiffs do not meet their pleading burden of sufficiently alleging CRA’s
24 “sugar is sugar” statements are false or misleading for additional reasons. Plaintiffs
25 allege only a “*likely* causal link between HFCS consumption and obesity . . . that is
26 not equally present by the consumption of sucrose” and that “some researchers began
27 to publish *hypotheses* based on testing of a *potential* causal relationship between the
28 dramatic, concurrent rise in HFCS consumption and obesity.” (*Id.* ¶¶ 1, 61 (emphasis

1 added.) But the government data cited by Plaintiffs show that U.S. obesity rates
2 have continued to skyrocket while HFCS use has remained flat or declined since 2000.
3 *See supra* n.6; (Am. Compl. ¶¶ 33, 44 n.15.) Empirically, this does not show that
4 HFCS is uniquely linked to obesity in a way that sucrose is not.

5 Moreover, Plaintiffs admit that the science they rely on does not actually
6 demonstrate that the body processes HFCS differently than sugar, but rather only
7 “strongly suggests” it. (Am. Compl. ¶ 54.)¹⁰ Although Plaintiffs allege that science
8 supporting their position is “emerging” and that “the precise role of HFCS in the
9 obesity epidemic . . . is still the subject of scientific debate,” they do not cite any.
10 They allege that “the comparative analysis of HFCS and sucrose (at a minimum)
11 remains the subject of debate and further analysis.” (*Id.* ¶¶ 2, 8, 36, 39, 54.) Plaintiffs
12 claim only that there is “uncertainty” as to the truth of CRA’s statements. (*Id.* ¶ 8.)

13 Plaintiffs thus do not sufficiently allege that CRA’s statements regarding the
14 nutritional and metabolic equivalence of HFCS and sugar *are* false or misleading, or
15 that anyone *has been or likely will be* deceived by them. They assert only that the
16 alleged statements possibly could be misleading based on the unknown outcome of
17 potential future “emerging” science. This is not enough. Plaintiffs have not met their
18 pleading burden under *Twombly* and *Iqbal* of *plausibly showing* that they are entitled
19 to relief, given the paucity of their allegations and the facially uncertain, “emerging”
20 science they cite. *See Iqbal*, 129 S. Ct. at 1950 (“where the well-pleaded facts do not
21 permit the court to infer more than the *mere possibility* of misconduct, the complaint
22 has alleged—but it has not ‘shown’—that the pleader is entitled to relief”) (emphasis

23 ¹⁰ In fact, the other “studies” Plaintiffs cite (in addition to Bray, which was a review of literature, not
24 an independent study) do not support their claims. The Neilson piece was an editorial, not a
25 scientific study. E. Neilson, *The Fructose Nation*, 18 J. Am. Soc. Nephrology 2619 (2007) (cited in
26 Am. Compl. ¶ 31 n.3). It does not state that HFCS is metabolically different from sucrose. On its
27 face, the Princeton University rat study contains inconsistent and improperly controlled findings that
28 do not support its purported conclusions. M. Bocarsly, et al., *High-Fructose Corn Syrup Causes
Characteristics Of Obesity In Rats: Increased Body Weight, Body Fat And Triglyceride Levels*,
Pharmacol. Biochem. Behav. (2010) (cited in Am. Compl. ¶ 37 n.10). For example, rats fed large
amounts of HFCS for 24 hours gained *less* weight than rats fed HFCS for 12 hours. *Id.* at 2. The
Ventura study (cited in Am. Compl. ¶ 38 n.11) actually describes HFCS as a kind of “sugar,” and
does not analyze the metabolism of sucrose versus HFCS.

1 added); *All One God Faith, Inc. v. Hain Celestial Group, Inc.*, 2010 WL 2133209, at
2 *8-9 (N.D. Cal. May 24, 2010) (claim that Internet search will “very likely” yield both
3 plaintiff and defendant products was insufficient under Lanham Act because it showed
4 only a possibility that parties were competitors).

5 **II. Plaintiffs Fail to State a Lanham Act Claim Against the CRA Member**
6 **Companies**

7 Setting aside CRA’s educational campaign, for which the CRA member
8 companies cannot be liable under agency principles, Plaintiffs allege very little else
9 about the CRA member companies. Plaintiffs devote a solitary allegation to allegedly
10 false statements made by certain individual member companies: “ADM, Cargill, Corn
11 Products and Tate & Lyle also began using ‘corn sugar’ as a synonym for HFCS in
12 their marketing materials, including their price lists.” (Am. Compl. ¶ 56.) This single
13 bare assertion falls well short of stating a claim.

14 **A. CRA is Not an Agent of the Other Defendants**

15 To begin, the CRA member companies cannot be liable for statements made by
16 CRA because CRA is not their agent. Plaintiffs allege in conclusory fashion:
17 “Evidently alarmed by the growing vilification of HFCS and resulting drop in sales,
18 HFCS producers—led by CRA, acting as the other Defendants’ agent—attempted to
19 turn consumer sentiment around beginning in June 2008.” (Am. Compl. ¶ 45.)
20 However, a trade association is not the agent of its member companies for making
21 statements, even though its purpose is to promote their interests. *See Gallagher v.*
22 *Gallagher*, 130 F. Supp. 2d 359 (N.D.N.Y. 2001) (trade association cannot be an
23 agent of its member employers, even though its purpose is to promote their interests
24 and those of the industry generally); *York v. Tennessee Crushed Stone Ass’n*, 684 F.2d
25 360 (6th Cir. 1982) (trade association was not “agent” of any of the 29 companies
26 engaged in the crushed stone business who were its members, even though its purpose
27 was to promote the interests of the industry generally).

1 Plaintiffs' bare assertion of agency also fails under *Twombly* because it does not
2 identify any facts plausibly supporting an agency relationship. Plaintiffs assert simply
3 that CRA "represents the interests of the corn refining industry." (Am. Compl. ¶ 22.)
4 This, alone, is not enough. *See Seneca v. First Franklin Fin. Corp.*, 2011 WL
5 1326224, at *3 (S.D. Cal. Apr. 5, 2011) (dismissing complaint because "[a]lthough
6 plaintiff alleges an agency relationship existed between FFFC and the brokers, he has
7 not sufficiently alleged facts indicating that FFFC gave the brokers authority to
8 represent or bind the FFFC or that FFFC took some action . . . to give plaintiff the
9 impression that an agency relationship existed"); *Arias v. Capital One, N.A.*, 2011 WL
10 835610, at *4 (N.D. Cal. Mar. 4, 2011) (dismissing complaint where plaintiffs did not
11 allege broker-defendant granted actual authority to lender-defendant or even that the
12 lender acted in such a way as to give plaintiffs the impression that there existed an
13 agency relationship between lender and broker).

14 **B. The Alleged False Statements of ADM, Cargill, CPI, and Tate & Lyle**
15 **Relating to "Corn Sugar" Do Not Satisfy *Twombly* or Rule 9(b)**

16 In addition to meeting the *Twombly* standard, a Section 43(a) false advertising
17 claim premised on misrepresentation or fraud, as here, must meet the heightened
18 pleading standard of Fed. R. Civ. P. 9(b). *Ecodisc Tech. AG v. DVD Format/Logo*
19 *Licensing Corp.*, 711 F. Supp. 2d 1074, 1085 (C.D. Cal. 2010). Rule 9(b) provides,
20 "In alleging fraud or mistake, a party must state with particularity the circumstances
21 constituting fraud or mistake." Fed. R. Civ. P. 9(b). To satisfy Rule 9(b), a plaintiff
22 must state the "time, place, and specific content of the false representations as well as
23 the identities of the parties to the misrepresentation." *Schreiber Distrib. Co. v. Serv-*
24 *Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). A plaintiff must also set
25 forth what is false or misleading about a statement, and why. *Vess v. Ciba-Geigy*
26 *Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).

27 Plaintiffs have failed to meet the heightened pleading standard of Rule 9(b)
28 with respect to their charge that certain CRA member companies referred to HFCS as

1 “corn sugar” in pricing sheets and unspecified marketing materials provided to their
2 food ingredient customers. (Am. Compl. ¶¶ 48, 56.) Plaintiffs do not attach or quote
3 the materials. Plaintiffs do not allege any specifics whatsoever, such as the time,
4 place, recipient, or content of any such “marketing materials, including price lists.”
5 For this reason alone, these claims should be dismissed. *See Wright*, 2009 WL
6 3247148, at *6; *Von Koenig v. Snapple Beverage Corp.*, 2011 WL 43577, at *3 (E.D.
7 Cal. Jan. 6, 2011); *Ries v. Hornell Brewing Co., Inc.*, 2011 WL 1299286 (N.D. Cal.
8 Apr. 4, 2011) (dismissing complaint lacking details of dates of purchase, prices paid,
9 which products were purchased, and where products were purchased).

10 Additionally, Plaintiffs do not allege that these “marketing materials, including
11 price lists” constitute “commercial advertising” under the Lanham Act. There is no
12 allegation of sufficient dissemination, *see New.Net, Inc.*, 356 F. Supp. 2d at 1118, nor
13 any basis to show that price lists constitute commercial advertising or promotion. *See*
14 *Mut. Pharm. Co. v. Watson Pharms., Inc.*, 2009 WL 3401117, at *5 (C.D. Cal. Oct.
15 19, 2009) (denying motion for preliminary injunction where court “was not
16 convinced” defendants’ inclusion of products on third-party price lists “even
17 constitutes a ‘false statement’ in ‘commercial advertising or promotion’”).

18 Nor do Plaintiffs allege that the price lists and marketing materials containing
19 the term “corn sugar” deceived or influenced any commercial food ingredient buyers
20 to purchase HFCS believing it was dextrose. It is implausible that sophisticated
21 commercial buyers would purchase HFCS described as “corn sugar” believing it was
22 the “vastly different” product dextrose, or that they would be influenced at all in their
23 buying decision by the phrase “corn sugar” on a price list. Plaintiffs thus fail to allege
24 deception or materiality. *Stillwell*, No. 07-cv-00607-JM (CAB) at 9-10.

25 Finally, Plaintiffs make no allegations that the CRA member companies have
26 made statements describing HFCS as “natural” or equating HFCS and sugar (i.e.,
27 “sugar is sugar”). Therefore, Plaintiffs’ claims against the individual CRA member
28 companies should be dismissed.

1 **C. Plaintiffs Make No Allegations About Penford and Roquette**

2 Finally, Plaintiffs fail to identify any false statements made by Defendants
3 Penford and Roquette. For this reason alone, any remaining claims against Roquette
4 should be dismissed.¹¹

5 **III. Plaintiffs’ Unfair Competition Claim Should Be Dismissed**

6 Plaintiffs’ claim under section 17200 of the California Business and Professions
7 Code (“UCL”) also should be dismissed for several reasons.

8 First, because Plaintiffs’ claim under the Lanham Act is deficient, their
9 derivative UCL claim also should be dismissed. *Felix the Cat Prods. v. New Line*
10 *Cinema*, 2000 U.S. Dist. LEXIS 21763, at *5 (C.D. Cal. Apr. 28, 2000) (“state law
11 claims for unfair competition are ‘substantially congruent’ to Lanham Act claims and
12 so rise or fall with plaintiff’s federal claims”); *Mut. Pharm. Co.*, 2009 WL 3401117, at
13 *6. Plaintiffs themselves allege that their UCL claim is “substantially congruent” to
14 their claim under the Lanham Act. (Am. Compl. ¶ 69.) As such, Plaintiffs’ UCL
15 claim fails for all of the reasons set forth above.

16 Second, Rule 9(b) applies to UCL claims, which are premised on
17 misrepresentation of fraud. *Kearns v. Ford Motor Co.*, 567 F. 3d 1120, 1124-25 (9th
18 Cir. 2009); *Vess*, 317 F.3d at 1103-05.¹² As set forth above, Plaintiffs fail to establish
19 the “who, what, when and where” with respect to the CRA member Defendants. (*See*
20 *supra* at 23-24.)

21 Third, courts may consider on a motion to dismiss whether challenged
22 statements, “when read reasonably and in context,” would have misled a reasonable
23

24 ¹¹ On June 29, 2011, Plaintiffs filed a voluntary dismissal of Defendant Penford.

25 ¹² Courts have dismissed similarly vague claims involving HFCS. *See Von Koenig v. Snapple*, 2011
26 WL 43577 (E.D. Cal. Jan. 6, 2011) (dismissing under Rule 9(b) claims involving unspecified
27 “commercial advertisements” and “other promotional materials” because plaintiffs failed to identify
28 specific promotional materials, allege when they were exposed to them, or describe how the
materials were false or misleading); *Ries v. Hornell*, 2011 WL 1299286 (N.D. Cal. Apr. 4, 2011)
(dismissing claims that defendants falsely advertised beverage containing HFCS as “natural,” where
plaintiffs did not allege which of defendants’ many products were at issue).

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1 consumer. *Freeman v. Time, Inc.*, 68 F.3d 285, 289-90 (9th Cir. 1995) (holding that
2 “reasonable consumer” standard applies to UCL claims and affirming dismissal
3 because statements were not deceptive or misleading). Courts may grant motions to
4 dismiss UCL claims where it is evident that the representations are unlikely to deceive
5 a reasonable consumer. *See, e.g., Sugawara v. Pepsico, Inc.*, 2009 WL 1439115, at
6 *2-4 (E.D. Cal. May 21, 2009) (dismissing UCL claim based that “Crunchberries”
7 misled consumers into thinking that the cereal contained real berries because the
8 “packaging makes no claim to be particularly nutritious or to be designed specifically
9 to meet the nutritional needs . . . , nor does it contain any images of actual fruit that
10 would convince this Court the instant packaging was even potentially deceptive”);
11 *McKinnis v. Kellogg USA*, 2007 WL 4766060, at *5 (C.D. Cal. Sept. 19, 2007)
12 (dismissing UCL claim that the packaging of “Froot Loops” misled consumers into
13 thinking that the cereal contained real fruit, because “[n]o reasonable consumer would
14 view the trademark ‘FROOT LOOPS’ name as describing the ingredients of the
15 cereal,” and no reasonable consumer would view the “brightly colored rings, . . . as
16 depicting any fruit”). For the reasons set forth above, Plaintiffs cannot demonstrate
17 that any of the statements would deceive a reasonable consumer. *See supra* at 15-16,
18 19, 21-22, 24. Accordingly, Plaintiffs’ UCL claim should be dismissed.

19 **IV. The Court Should Dismiss or Stay This Case Under the Doctrine of**
20 **Primary Jurisdiction**

21 Even if Plaintiffs had been able to state a claim, this action should still be
22 dismissed without prejudice, or stayed, under the doctrine of primary jurisdiction.
23 Plaintiffs’ claims about “corn sugar,” along with their other allegations, raise complex
24 issues of first impression that warrant expert consideration by FDA. The central
25 issues presented by Plaintiffs’ claims are the subject of a Citizen Petition filed by
26 CRA and opposed by Plaintiffs that is pending before FDA. The Court should dismiss
27 or stay this action to allow FDA to provide uniform, expert guidance on the issues
28 raised by Plaintiffs’ claims. As one court put it: “The FDA should be given a chance

1 to opine on the proper labeling before a Lanham Act suit is filed.” *See Schering-*
2 *Plough v. Schwarz Pharma, Inc.*, 586 F.3d 500, 508 (7th Cir. 2009).

3 **A. Legal Standards Governing the Primary Jurisdiction Doctrine**

4 Primary jurisdiction “is a prudential doctrine under which courts may, under
5 appropriate circumstances, determine that the initial decisionmaking responsibility
6 should be performed by the relevant agency rather than the courts.” *Syntek*
7 *Semiconductor Co., Ltd. v. Microchip Tech., Inc.*, 307 F.3d 775, 780 (9th Cir. 2002).
8 The doctrine “is properly invoked when a claim is cognizable in federal court but
9 requires resolution of an issue of first impression, or of a particularly complicated
10 issue that Congress has committed to a regulatory agency.” *Id.* (citation omitted); *see*
11 *also Weinberger v. Bentex Pharms. Inc.*, 412 U.S. 645, 654, 93 S. Ct. 2488, 37 L. Ed.
12 2d 235 (1973) (“[t]hreshold questions within the peculiar expertise of an
13 administrative agency are appropriately routed to the agency, while the court stays its
14 hand”).

15 Primary jurisdiction is committed to the Court’s discretion, but courts in the
16 Ninth Circuit have applied factors such as: “(1) the need to resolve an issue that (2)
17 has been placed by Congress within the jurisdiction of an administrative body having
18 regulatory authority (3) pursuant to a statute that subjects an industry or activity to a
19 comprehensive regulatory authority that (4) requires expertise or uniformity in
20 administration.” *Syntek*, 307 F.3d at 781. If a court determines that primary
21 jurisdiction applies, then it “refers” the issue to the relevant agency.¹³

22 In *Syntek*, plaintiff Syntek and defendant Microchip sold competing
23 microcontrollers, which are controlled by a program called a microcode. Syntek filed
24 a declaratory judgment action challenging the copyright registration of Microchip’s
25 microcode. 307 F.3d at 778. Syntek alleged that the Copyright Office should not
26 have registered Microchip’s microcode because it included a “decompiled” source

27 _____
28 ¹³ In primary jurisdiction cases, “referral” means the court either stays or dismisses the case without
prejudice, so that the parties may pursue administrative remedies. *Syntek*, 307 F.2d at 782 n.3.

1 code and not an “original” source code. *Id.* at 780. The district court entered
2 summary judgment for Microchip. *Id.* The Ninth Circuit reversed and stayed
3 Syntek’s action under primary jurisdiction so that the issues raised by its claim could
4 be considered in the first instance by the Register of Copyrights. *Id.* at 780. The court
5 held that: (1) Congress intended uniformity in copyright laws; (2) whether
6 “decompiled” source code qualified for copyright registration was a complex issue of
7 first impression committed to the Register of Copyrights; (3) Syntek’s claim raised the
8 question of whether the agency acted in conformance with its own regulations; and (4)
9 the declaration of registration invalidity sought by Syntek was indistinguishable from
10 the administrative remedy of copyright registration cancellation. *Id.* at 781. The court
11 concluded that “this case requires the resolution of an issue within the jurisdiction of
12 an administrative body exercising statutory and comprehensive regulatory authority
13 over a national activity that requires expertise and uniformity in administration.” *Id.*
14 at 782.¹⁴

15 Courts have applied the doctrine of primary jurisdiction under the same
16 circumstances at issue here—where an alleged violation of Section 43(a) of the
17 Lanham Act raises threshold issues that are the subject of an ongoing FDA
18 proceeding. *See Schering*, 586 F.3d at 508-10. There, Schering and the defendants
19 manufactured an oral laxative called polyethylene glycol. *Id.* at 502-03. FDA had
20 approved an over-the-counter version of Schering’s product, but all of the defendants’
21 products required a prescription. *Id.* at 503. Schering claimed under Section 43(a)
22 that the statement found on the labels of the defendants’ products—polyethylene
23 glycol was “sold only by prescription”—was false because, in fact, Schering’s
24 polyethylene glycol product did *not* require a prescription. *Id.* That issue was the

25 ¹⁴ *See also Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1074-75 (9th Cir. 2010) (claim
26 dismissed because issue of access to property via easement designated as Indian Reservation Road
27 was pending before Bureau of Indian Affairs); *Clark v. Time Warner Cable*, 523 F.3d 1110, 1115-16
28 (9th Cir. 2008) (claims dismissed because question of whether defendant was subject to the
“slamming” statute was pending before the Federal Communications Commission); *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1377 (9th Cir. 1983) (claims dismissed because issues raised by FDA regulatory letters were subject of pending proceedings).

1 subject of an ongoing FDA proceeding to determine whether the defendants’ drugs
2 were “misbranded” (i.e., if their labeling was false or misleading). *Id.* at 505. The
3 district court dismissed Schering’s suit without prejudice, holding that Schering could
4 refile its action if and when the FDA proceeding concluded. *Id.* The Seventh Circuit
5 affirmed under primary jurisdiction, finding that Schering had “jumped the gun by
6 suing before the FDA addressed the misbranding issue.” *Id.* at 510; *see also id.* at
7 508-09 (“The FDA should be given a chance to opine on the proper labeling before a
8 Lanham Act suit is filed . . . since it has more experience with consumers’
9 understanding of drug labels than judges do.”).

10 **B. The Court Should Dismiss or Stay This Action**

11 The centerpiece of Plaintiffs’ case is CRA’s effort to equate HFCS with “corn
12 sugar.” (Am. Compl. ¶¶ 3-5, 7, 47-50, 52-56, 59.) Plaintiffs’ claims rest on FDA’s
13 definition of “corn sugar,” i.e., that the name “corn sugar” is defined and limited by
14 FDA regulations to the product dextrose. (Am. Compl. ¶¶ 5, 49, 59.) These claims
15 raise threshold issues concerning the definition and proper use of “corn sugar” that
16 should be determined by FDA in the first instance under the *Syntek* factors. **First**,
17 Plaintiffs’ claims and allegations raise the need to resolve an issue—i.e., whether
18 “corn sugar” is a proper alternate name for HFCS. **Second**, that issue has been placed
19 by Congress within the jurisdiction and regulatory authority of FDA under the FDCA
20 and related statutes. *See* 21 U.S.C. § 341 (vesting FDA with jurisdiction to
21 promulgate regulations fixing and establishing reasonable definitions and standards of
22 identity for food). **Third**, Congress has vested FDA with jurisdiction over this
23 specific issue pursuant to statutes that give FDA comprehensive regulatory authority
24 to regulate issues concerning food safety and labeling. *See* 21 U.S.C. §§ 337, 371;
25 *Brandenfels v. Heckler*, 716 F.2d 553, 555 (9th Cir. 1983). **Fourth**, determining the
26 proper definition of “corn sugar” is a complex issue with national implications that
27 requires expertise and uniformity in administration. *See* 21 U.S.C. § 343 (vesting
28 FDA with jurisdiction over issues concerning labeling and misbranding of food

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1 ingredients).

2 The doctrine of primary jurisdiction applies with especial vigor here because
3 the issues raised by Plaintiffs about “corn sugar” not only fall generally within FDA’s
4 jurisdiction and expertise, but are the subject of a pending and actively contested FDA
5 proceeding. *See Pub. Citizen Health Research Group v. FDA*, 740 F.2d 21, 29 (D.C.
6 Cir. 1984) (“judicial resolution of the issue [pending before FDA] would encourage
7 disregard for the procedures Congress has established to resolve such questions and
8 would undermine the autonomy of the administrative decisional process”). Plaintiffs
9 allege that CRA’s Petition has received nationwide scrutiny and commentary—over
10 100 public comments have been submitted in connection with the Petition, from
11 individuals and entities, including consumer unions, corn producers, farm bureaus,
12 and others. (Am. Compl. ¶ 51.)

13 Plaintiffs’ subsidiary claims also fall within the primary jurisdiction of FDA.
14 Plaintiffs’ claim that HFCS is not nutritionally or metabolically equivalent to sucrose
15 (*id.* ¶ 61) is bound up in the pending FDA proceeding, as it is addressed in CRA’s
16 Petition itself and in multiple public comments, including those submitted by The
17 Sugar Association, a Plaintiff here.¹⁵ Of course, the question of whether HFCS is
18 nutritionally and metabolically equivalent to sucrose is inseparable from CRA’s
19 Petition, because if FDA agrees that HFCS can be called “corn sugar,” it follows that
20 FDA will have determined that “sugar is sugar,” whether produced from beets, cane,
21 or corn. In addition, the issue of describing HFCS as “natural” (*id.* ¶ 60) also falls
22 within the primary jurisdiction of FDA. *See* 21 C.F.R. § 101.22; 74 Fed. Reg. 10483,
23 10483 (Mar. 11, 2009). Indeed, that issue already has been addressed by action of the
24 FDA staff with responsibility for this issue. An FDA staff letter from July 2008
25 confirms that HFCS produced through a common industry method qualifies as

26
27 ¹⁵ *See* FDA Tab A, at 2-5 (CRA Petition); FDA Tab B, at 10-12 (The Sugar Association comments);
28 FDA Tab C, at 1-2 (Shape Up America! Comments); FDA Tab D, at 2 (National Consumers League
comments); *see also* FDA Tab E, at 4-9 (CRA 4/4/2011 reply comments discussing scientific
studies).

1 “natural” under FDA’s longstanding policy.¹⁶

2 Even if the issue pending before FDA were artificially limited to the definition
3 of “corn sugar,” the doctrine of primary jurisdiction (and judicial economy) still
4 would warrant dismissing or staying this action, rather than proceeding to litigate
5 piecemeal those issues that are not directly the subject of the FDA proceeding on
6 CRA’s Petition. *Allnet Commc’n Serv., Inc. v. Nat’l Exch. Carrier Ass’n*, 965 F.2d
7 1118, 1122 (D.C. Cir. 1992) (“it would make little sense to refrain from applying
8 primary jurisdiction merely because of an ancillary claim that we would reach only
9 after examination of ones clearly within the agency’s purview.”).¹⁷

10 Plaintiffs will not be prejudiced by a stay or dismissal of this action, without
11 prejudice, because their interests are being pursued in the FDA proceeding. In
12 February 2011, The Sugar Association,¹⁸ a plaintiff here, submitted comments
13 opposing CRA’s Petition that comprised 279 pages, including 27 articles, studies,
14 regulations and opinions and 40 footnotes to additional articles and data. (*See* FDA
15 Tab B.) As Comparative Table A attached hereto demonstrates, Plaintiffs’ Amended
16 Complaint closely mirrors the arguments The Sugar Association presented to FDA in
17 opposing CRA’s Petition. Plaintiffs’ central claim here—that CRA wrongly
18 appropriated the name “corn sugar” from dextrose—repeats almost verbatim The
19 Sugar Association’s central argument to FDA: “CRA now seeks to appropriate
20 another name, ‘corn sugar,’ which is the established name for another product that is
21 even more different from HFCS.” (*See* FDA Tab B, at 5.)

22
23 ¹⁶ *See* July 3, 2008 Geraldine June Letter, *supra*, FDA Tab F.

24 ¹⁷ Moreover, FDA may fashion any outcome it deems appropriate in response to the Petition and is
25 not bound to grant the specific relief requested by CRA. 21 U.S.C. § 348(c)(1). Thus, FDA could
26 decide questions concerning the term “corn sugar” and various other issues raised by Plaintiffs’
claims and allegations. *See Schering*, 586 F.3d at 505 (“But we do not know [what FDA will do],
and see no need to guess while the misbranding proceeding is wending its way through the FDA.”).

27 ¹⁸ The Sugar Association and seven of its members, including the Amalgamated Sugar Company,
American Sugar Cane League, American Sugar Refining, Inc., C & H Sugar Company, Imperial
28 Sugar Company, Michigan Sugar Company, and Minn-Dak Farmers Cooperative, are Plaintiffs in
this lawsuit. (*See* <http://www.sugar.org/about-us/sustaining-members.html>.)

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1 **C. Plaintiffs Cannot Artfully Plead Around the FDA Proceeding**

2 Plaintiffs attempt to plead around FDA’s primary jurisdiction with a footnote
3 conclusion that their claims are *not* based on CRA’s Petition to FDA, but rather
4 exclusively on Defendants’ advertising, documents and statements. (Am. Compl.
5 n.19.) Plaintiffs’ own allegations disprove this assertion. They refer repeatedly to
6 CRA’s Petition, and there is clear overlap between the issues raised by CRA’s Petition
7 and Plaintiffs’ claims. (*Id.* ¶¶ 3, 47, 50, 51, 53.) The activity challenged by Plaintiffs
8 is inextricably intertwined with, and in furtherance of, CRA’s Petition to FDA—as
9 Plaintiffs themselves acknowledge both here and in their submission to FDA. (*See*
10 Am. Compl. ¶¶ 3, 47; *see also* FDA Tab B, at 6 n.10 (“Coinciding with the filing of
11 this Petition, CRA began promoting HFCS as ‘corn sugar’ in television commercials
12 and on CRA-sponsored websites.”).)

13 **D. Plaintiffs In Effect Are Attempting to Enforce FDA Regulations, for**
14 **Which There is No Private Right of Action**

15 Finally, while Plaintiffs disavow reliance on the CRA Petition before FDA, in
16 fact Plaintiffs are seeking to use the Lanham Act as a back-door method of pursuing a
17 violation of the FDCA—a statute that does not provide for a private right of action.
18 21 U.S.C. § 337(a) (“all such proceedings for the enforcement, or to restrain
19 violations, of [the FDCA] shall be by and in the name of the United States”); *see also*
20 *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 810-11, 106 S. Ct. 3229, 92 L.
21 Ed. 2d 650 (1986) (“there is no federal cause of action for FDCA violations”); *Dial A*
22 *Car, Inc. v. Transp., Inc.*, 82 F.3d 484, 490 (D.C. Cir. 1996) (Lanham Act cannot be
23 used as a “back-door method” of enforcing administrative regulations).

24 The heart of Plaintiffs’ case, i.e., that Defendants are misappropriating the term
25 “corn sugar,” simply alleges a violation of the FDCA, as Plaintiffs’ allegations make
26 clear. Plaintiffs define “corn sugar” by reference to the FDA GRAS affirmation
27 regulation. (Am. Compl. ¶ 29.) Plaintiffs then allege that “[c]orn sugar and HFCS are
28 not the same [because] [t]he *FDA* ... [has] long recognized corn sugar as dextrose in

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1 crystalline form, derived from corn starch.” (*Id.* ¶ 49 (emphasis added).) Plaintiffs
2 further allege that Defendants have violated the Lanham Act by calling HFCS “corn
3 sugar” in defiance of *FDA regulations*: They allege Defendants have acted “*in*
4 *defiance of the FDA’s regulatory scheme* for labeling for sweeteners and syrups.”
5 (Am. Compl. ¶ 59 (emphasis added).)

6 Plaintiffs cannot rely on FDA regulations, or even Defendants’ alleged violation
7 of them, to state a Lanham Act claim. *PhotoMedex, Inc. v. Irwin*, 601 F.3d 919, 924
8 (9th Cir. 2010) (“Because the FDCA forbids private rights of action under that statute,
9 a private action brought under the Lanham Act may not be pursued when . . . the claim
10 would require litigation of the alleged underlying FDCA violation in a circumstance
11 where the FDA has not itself concluded that there was such a violation.”). Rather, to
12 state a claim under the Lanham Act, a plaintiff must “provide other evidence [outside
13 the FDCA] establishing the proper market definition of” a disputed term. *Grove*
14 *Fresh Distribs., Inc. v. Everfresh Juice Co.*, 1989 WL 152670, at *3 (N.D. Ill. Nov.
15 29, 1989). Plaintiffs make *no* sufficient allegations outside current FDA regulations
16 to support their claim concerning Defendants’ use of the term “corn sugar.” Rather,
17 Plaintiffs allege that Defendants are calling HFCS “corn sugar” “*in defiance of the*
18 *FDA’s regulatory scheme* for labeling for sweeteners and syrups.” (Am. Compl. ¶ 59
19 (emphasis added).) These allegations necessarily require “litigation of the alleged
20 underlying FDCA violation in a circumstance where the FDA has not itself concluded
21 that there was such a violation.” *PhotoMedex*, 601 F.3d at 924. The Ninth Circuit has
22 made clear that a Lanham Act claim cannot proceed under these circumstances
23 because it “would intrude on the exclusive government enforcement authority
24 established under the FDCA.” *Id.* at 925.

25 * * *

26 There is no warrant for this Court to dive into the debate over the proper name
27 and description of HFCS while these questions are being addressed by FDA—the
28 agency with the relevant expertise that Congress has authorized and empowered to

1 address these matters. Respectfully, the more prudent course is for the Court to
2 exercise its discretion and “stay its hand” while these questions are “wending their
3 way” through the FDA process. *Weinberger*, 412 U.S. at 654; *Schering*, 586 F.3d at
4 505. Disputes over the description of food ingredients, matters raising issues that go
5 well beyond the scope of HFCS, should not be resolved by *ad hoc* individual lawsuits
6 between private parties, but rather through agency development of rules of general
7 applicability.

8 **CONCLUSION**

9 For the foregoing reasons, Plaintiffs’ Amended Complaint should be dismissed
10 with prejudice for failure to state a claim. Alternatively, this action should be
11 dismissed without prejudice or stayed under the doctrine of primary jurisdiction.

12 Respectfully submitted,

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