CASE NO. 17-55901

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CYNTHIA CARDARELLI PAINTER, individually and on behalf of other members of the general public similarly situated

Plaintiff and Appellant,

v.

BLUE DIAMOND GROWERS, *et al.*

Defendants and Appellees.

Appeal From The United States District Court,
for the Northern District of California,
Case No. 2:17-cv-02235-SVW-AJW, Hon. Stephen V. Wilson

APPELLEE'S ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Defendant and Appellee Blue Diamond Growers states that it does not have a parent corporation and that no other publicly held company owns more than 10% of its stock. Accordingly, there are no disclosures required under Fed. R. App. P. 26.1.

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INTRODUCTION

Blue Diamond Growers sells real almondmilk, not imitation dairy milk. Plaintiff Cynthia Cardarelli Painter, however, asks this Court to rule that Blue Diamond must label its Almond Breeze Almondmilk as "imitation milk." Otherwise, according to Painter, Blue Diamond will violate federal regulations governing the labeling of "imitation" foods and will mislead consumers. As the district court ruled, however, her demands are not plausible. No reasonable consumer would fail to recognize that almondmilk is a distinct product with distinct properties. The district court was appropriately incredulous. It recognized, "By using the term '*almond* milk,' even the least sophisticated consumer would know instantly the type of product they are purchasing."

Rightly so. Almondmilk is a distinct product recognized as such by consumers and the U.S. Government. It is not an "imitation" of dairy milk in any meaningful sense of the word. It is not derived from milk and then diminished with cheaper, substitute ingredients, as are traditional examples of imitation food. Nor is there any risk that reasonable consumers will confuse almondmilk for dairy milk. To the contrary, because almondmilk is an established product in its own right, labeling it "imitation milk" would itself would be entirely inaccurate and misleading to consumers.

Painter's contrary view fails because she does not account for the fact that some foods are simply *alternatives* to other foods, offering consumers a *choice* between

different products with different characteristics and nutritional benefits. Taken literally, her approach would mean that dairy milk would have to be labeled as "imitation almondmilk," because it has less calcium than Blue Diamond's almondmilk. Peanut butter and almond butter would have to be labeled as imitations of each other because each product is, using Painter's words, "nutritionally superior" to the other in some respects and they are used in similar ways.

No one would seriously contend that this should be the law. Painter's claims are no more credible. The district court was thus correct when it found Painter failed to plead plausible claims for relief and dismissed her case. This Court should affirm.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d). *See*, *generally*, II ER 96-103. Under the CAFA, federal district courts have original jurisdiction when: (1) the putative class consists of at least 100 members; (2) the citizenship of at least one proposed member of the class is different from that of Defendant; and (3) the aggregated amount in controversy exceeds $5,000,000, exclusive of interests and costs. 28 U.S.C. § 1332(d). Painter's claims satisfy each of these standards. *See* II ER 96-103.

First, Painter purports to represent a class of: "[a]ll individuals in the United States who purchased any Almond Breeze Almondmilk product since four years prior to the filing of this complaint." II ER 125:6-7. While the precise size of the putative

class is unknown, Painter alleges that "hundreds of thousands of reasonable consumers" relied on Blue Diamond's challenged labeling, marketing, and advertising statements during the proposed class period. II ER 117:7, 124:3-4. Plaintiff's allegations thus satisfy CAFA's numerosity requirement, as she alleges significantly more than 100 class members. *See Visendi v. Bank of America, N.A.*, 733 F.3d 863, 869 (9th Cir. 2013) (holding plaintiff's allegation that class included 137 persons satisfied CAFA's numerosity requirement).

Second, during the class period Painter alleges, retail sales of Almond Breeze Almondmilk throughout the country have far exceeded $5 million. II ER 186:13-28; *see also Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1117 (9th Cir.2004) (reviewing cases holding declarations supporting amount in controversy requirement are sufficient to establish removal jurisdiction). In addition, Painter asks for full disgorgement of those sales with interest, exemplary and statutory damages, punitive damages, and attorney fees. *See* II ER 176:14-15, 179:1-180:13, 163:11-15, 166:2-6, 170:11-27, 174:16-18, 175:21-25, 176:16-27, 178:23-180:13. Painter's allegations therefore put more than $5 million "in controversy." *See Korn v. Polo Ralph Lauren Corp.*, 536 F. Supp. 2d 1199, 1205 (E.D. Cal. 2008) ("In measuring the amount in controversy, a court must assume that the allegations of the complaint are true and that a jury will return a verdict for the plaintiff on all claims made in the complaint.").

Finally, Painter and Blue Diamond are both California citizens. II ER 164:18-20, 119:8-10. But, the class she alleges is nationwide. II ER 171:5-11. Her claims,

thus, satisfy CAFA's minimal diversity requirement. *See Harris v. Rand*, 682 F.3d 846, 850-51 (9th Cir. 2012) (holding plaintiff's allegations regarding party citizenship are entitled to presumption of truth).

This Court also has jurisdiction. Painter appeals from an order dismissing her entire case without leave to amend. II ER 8-12, 191. That order constitutes a final, appealable decision. *See San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1124 (9th Cir. 1996). Moreover, Painter timely filed her notice of appeal 30 days after entry of the district court's order. II ER 6, 8; *see also* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A).

STATEMENT REGARDING PRIMARY AUTHORITY

Pursuant to 9th Cir. R. 28-2.7, pertinent statutes are set forth verbatim in an indexed addendum attached hereto. Also included is a copy of an unpublished decision of the U.S. District Court for the Central District of California that Painter cites extensively.

STATEMENT OF THE CASE

A. Plaintiff Cynthia Cardarelli Painter sued Blue Diamond alleging that Almond Breeze Almondmilk products are mislabeled.

Painter filed the operative First Amended Class Action Complaint ("FAC") on February 24, 2017.[1] II ER 158-184. On behalf of a putative, nationwide class of

[1] Although Painter originally filed in the Superior Court for the State of California for the County of Los Angeles, Blue Diamond timely removed the case to the U.S. District Court for the Central District of California. II ER 96-187.

consumers, Painter claimed that through its "marketing practices," Blue Diamond deceived customers into believing that its dairy milk alternative Almond Breeze Almondmilk products were "nutritionally equivalent, and even superior, to dairy milk." II ER 159:7-13.

As originally pleaded, the crux of Painter's claims was that Blue Diamond deceives consumers into thinking that Almond Breeze Almondmilk is nutritionally equivalent or superior to dairy milk by using the term "milk" in the product name: Almond Breeze Almondmilk. *See* II ER 159:7-160:12, 161:16-162:1, 169:8-13. In making this claim, Plaintiff pointed to the difference between Almond Breeze Almondmilk and the Food and Drug Administration's ("FDA") definition of "milk," which is "the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows." II ER 159:22-23 (citing 21 C.F.R. § 131.110).

In addition, she alleged that Almond Breeze Almondmilk products "lack many of the essential nutrients and vitamins provided in dairy milk, which Defendant fails to disclose to and actively conceals from consumers." II ER 159:7-13, 160:13-161:11, 163:1-3, 175:1-9, 177:21-178:5. In support, Painter pointed to the following

statements allegedly quoted from Blue Diamond's website regarding its Almond Breeze Almondmilk products:[2]

- "Made from real California almonds, Almond Breeze Original is a deliciously creamy alternative to dairy and soymilk. Almond Breeze Original is lactose free, soy free, calcium enriched, and contains only 60 calories per glass—that's half the calories of 2% milk."
- "1 cup of 2% fat dairy milk contains 30% DV calcium vs. 1 cup of Almond Breeze Unsweetened Vanilla almondmilk contains 45% DV calcium."
- "There may be no such thing as a perfect food, but almonds come in high on the super-food list. A top plant source for **Protein** and **Vitamin E**, almonds also contain fiber, calcium, iron, and other important nutrients."
- "Almond Breeze is an excellent source of Calcium, Vitamin D, and Vitamin E, and a good source of Vitamin A."

II ER 160:5-15 (emphasis in original). Painter did not allege that any of these statements were false, only that they misled customers into believing that almondmilk is nutritionally superior to dairy milk. *See* I ER 2.

Based on these four website statements and the use of the term "milk" on product labeling, Painter alleged three causes of action for violations of: (1) California Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq.* ("CLRA"); (2) California's False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, *et seq.* ("FAL"); and (3) California's Unfair Competition Law, Cal. Bus. & Prof. Code

[2] Absent from the FAC is any information about which website address was visited and the date that the quotations were allegedly copied from the website. (*See* II ER 159:14-160:12.)

§§ 17500, *et seq.* ("UCL"). II ER 159:2-6, 173:22-178:27; *see also* I ER 2. She claimed that Blue Diamond must label its product "imitation milk," revise its label to compare its ingredients with those found in dairy milk, fortify its product to match or exceed all essential nutrients in dairy milk, or cease using the term "milk" altogether. II ER 164:1-15; *see also* I ER 2.

B. Blue Diamond moved to dismiss on grounds that no reasonable consumer is misled by Almond Breeze labeling, and Painter's theories are inconsistent with and preempted by federal law.

In response to Painter's complaint, Blue Diamond moved to dismiss. II ER 62-95. Blue Diamond argued that the use of the term "milk" in the word "almondmilk" would not lead reasonable consumers to believe that Blue Diamond's product was nutritionally equivalent to dairy milk. II ER 76:4-78:19 (citing three district-court decisions which held that the use of the term "milk" in "soymilk" could not plausibly lead consumers to mistake a product for dairy milk). Nor would a reasonable consumer be misled by Blue Diamond's factually accurate statements regarding its product and comparing its product with dairy milk. II ER 78:20-82:2. Similarly, no law compelled Blue Diamond to provide a side-by-side comparison of all nutritional differences between almondmilk and dairy milk. II ER 82:3-83:20. Finally, Blue Diamond argued that Painter's mislabeling claims were preempted by federal law to the extent Painter sought to use state law to require food labeling not mandated by the Federal Food, Drug, and Cosmetics Act, 28 U.S.C. § 301, *et seq.* ("FDCA"). II ER

86:16-90:16 (citing 21 C.F.R. §§ 100.1(c), 101.3(b)(1)-(3), § 131.110). In the alternative, Blue Diamond argued that this dispute fell within the primary jurisdiction of the FDA, and that Painter lacked standing to maintain her claim. II ER 90:17-94:4.

In opposition, Painter argued that Blue Diamond's motion had missed the point of her allegations. First, Painter claimed that the "key" allegation in her FAC was Blue Diamond's failure to label almondmilk "imitation" as she claimed federal regulations required. II ER 45:4-14. As a result, Blue Diamond's labeling was "unlawful," under the UCL, not "unfair" or "fraudulent," and therefore the expectations of reasonable consumers were not relevant to that theory of liability. II ER 43:23-46:3. Second, notwithstanding her extensive allegations on the subject,[3] she disavowed any claim that consumers were misled about the identity of almondmilk by its inclusion of the term "milk." II ER 46:4-47:7. Rather, she characterized her claims as alleging that consumers were misled into believing they were buying a "dairy-substitute that was nutritionally equal or superior to dairy milk." II ER 47:14-18. Thus, again, the problem from Painter's perspective was that almondmilk should be considered "imitation" and should have been labeled as such. II ER 47:21-48:24. Similarly, because her claims rested on Blue Diamond's alleged failure to label an "imitation" product as such, those claims were consistent with and not preempted by federal law. II ER 51:19-54:18. She also disputed application of the FDA's primary

[3] *See* II ER 159:7-160:12, 161:16-162:1, 169:8-13.

jurisdiction at some length and argued in favor of her own standing. II ER 54:19-61:16.

On reply, Blue Diamond showed that the consumer-expectation test applies to all her "unlawful" claims because the federal regulation establishing the "imitation" labeling requirement was designed to prevent consumer deception. II ER 19:15-20:16. Blue Diamond also explained that its product was real almondmilk, not imitation dairy milk. II ER 20:17-25:17. Consistently, because almondmilk is not imitation dairy milk, Blue Diamond reiterated that its almondmilk product was labeled according to its "common or usual name," consistent with federal regulations, and Painter's attempt to require more was accordingly preempted. II ER 26:12-27:18. Finally, Blue Diamond again suggested that the case should be dismissed under the "primary jurisdiction doctrine" and noted Painter's lack of standing. II ER 27:19-30:22.

C. The district court dismissed Painter's claims without leave to amend.

Applying *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), the district court found Painter had failed as a matter of law to plead a claim for relief that was plausible on its face. I ER 3. The court found that Blue Diamond's product was accurately labeled "Almond milk," and any further labeling requirement would be inconsistent with, and therefore preempted by, the FDCA. I ER 3. Further, the court found Painter's false-advertising claims to be governed by the "reasonable consumer" standard. I ER 3-4.

Acknowledging that the factual question of whether a consumer is likely to be deceived is rarely resolved on a motion to dismiss, the court held that "particularly implausible claims may be decided as a matter of law at the pleading stage." I ER 4. Painter's theory that reasonable consumers would be misled into believing that almondmilk is nutritionally equivalent to dairy milk is such a claim, so implausible that it failed as a matter of law. I ER 4 (citing *Gitson v. Trader Joe's Co.*, No. 13-CV-01333-VC, 2015 WL 9121232, at *2 (N.D. Cal. Dec. 1, 2015) and *Ang v. Whitewave Foods Co.*, No. 13-CV-1 953, 2013 WL 6492353, at *3 (N.D. Cal. Dec. 10, 2013)). As a result, and finding any effort to amend futile, the district court dismissed Painter's claims with prejudice. I ER 5.

SUMMARY OF ARGUMENT

The fundamental flaw in Painter's claims is that Blue Diamond's almondmilk is not an imitation food. It is a distinct, alternative food with its own, distinct characteristics and nutritional qualities. It is clearly and, as even Painter conceded, accurately labeled, and no reasonable consumer can plausibly claim to be confused or misled about the nature of the product. The district court correctly dismissed Painter's claims as a matter of law.

Painter's arguments, both in opposition to Blue Diamond's motion to dismiss and in support of this appeal, focus on her argument that Almond Breeze Almondmilk must be labeled "imitation milk" under the FDCA and implementing

regulations. But she has not demonstrated that almondmilk should be considered an "imitation" under federal law, nor can she.

To start, she glosses over the threshold question of what products "substitute for and resemble" another product. The regulatory text, history, and decisional background all suggest two essential standards for a food to qualify as a "substitute" within the meaning of the regulation. First, as reflected in a line of cases expressly approved by the FDA, a product that is derived from a traditional food, such as cheese or ice cream, but altered by the "substitution" of cheaper, less nutritional ingredients will qualify as, *e.g.*, "imitation cheese" or "imitation ice cream." Second, assuming for the sake of argument that true imitation foods may include some products that are not merely cheapened derivatives, there must still be a risk that reasonable consumers will confuse a product for the food being imitated. This will allow producers, consumers, and courts to distinguish between true imitation foods and foods that are simply different products, in a manner consistent with the policies underlying the FDCA.

Painter's claims fail either standard. It goes almost without saying that Almondmilk is not made in any way from milk or milk products, as Painter's own allegations reflect. Nor is there any basis for believing that reasonable consumers will confuse almondmilk for dairy milk, as the district court correctly found, as had the Northern District of California on two prior occasions.

Rather than confront this issue squarely, Painter focuses on almondmilk's purported nutritional inferiority, emphasizing her allegations that almondmilk has a measurably lower quantity of certain nutrients when compared to dairy milk. But her approach, if adopted, would lead to absurd results. As even her allegations reflect, almondmilk has fewer of some nutrients than dairy milk, but more of others. In this way, dairy milk is "nutritionally inferior" to almondmilk as Painter construes the regulatory definition. Taken literally, Painter's approach would mean that consumers could demand that dairy milk be labeled "imitation almondmilk," or that a wide variety of other, recognizably different products be labeled as imitations of one another. Of course, this cannot be the law.

Next, though Painter alleged a wider variety of demands and theories of liability in her complaint, she has now expressly disclaimed any basis other than her mistaken insistence that almondmilk is an imitation food. Moreover, as she herself now concedes, her other claims are preempted by the FDCA; she can only proceed with theories that perfectly track federal law. Because her imitation-labeling claim failed as a matter of law, and her remaining claims are preempted, there is no basis for reversal.

Finally, there is no basis for Painter's request that the Court reverse the decision below and remand the case with instructions for the district court to refer this dispute to the FDA under the primary jurisdiction doctrine. Painter opposed referral in the district court. She is judicially estopped from claiming otherwise now and has waived her present arguments. Moreover, "referral" for primary jurisdiction

is not a literal, jurisdictional transfer; it is either a stay or dismissal of a court case to allow resolution by the FDA. Here, although it did not rule on the basis of primary jurisdiction, the district court's decision to dismiss the case is amongst the options it might have chosen. Thus, there is no basis for reversal at this time.

STANDARD OF REVIEW

The Court reviews an order granting a motion to dismiss *de novo*. *See Decker v. Advantage Fund, Ltd.,* 362 F.3d 593, 595 (9th Cir. 2004) . In reviewing a dismissal, the Court must determine whether the complaint's non-conclusory factual content and reasonably drawn inferences plausibly state a claim "such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While the Court is required to accept all well-plead allegations of material fact in the complaint as true, the Court is not required to accept allegations that are conclusory, unwarranted deductions of fact, or unreasonable inferences. *Clegg v. Cult Awareness Network,* 18 F.3d 752, 754 (9th Cir. 1994).

Denial of leave to amend is also reviewed *de novo*. *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1026 (9th Cir. 2000). However, "[a] district court does not err in denying leave to amend where the amendment would be futile." *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991).

ARGUMENT

I. Blue Diamond sells real almondmilk, not imitation dairy milk, and the district court correctly dismissed Painter's contrary claims.

Painter's appeal rests expressly on her theory that Blue Diamond violates state and federal law by failing to label almondmilk as "imitation" dairy milk. AOB 14-15.[4] The district court correctly rejected this theory; Blue Diamond sells real almondmilk, not imitation dairy milk, and its label is accordingly accurate and consistent with federal law. *See* I ER 4.

Painter has not shown otherwise on appeal. She attempts a mechanical application of 21 C.F.R. § 101.3 ("Section 101.3"), but never articulates, except by conclusory allegations and argument, what it is that she thinks makes almondmilk "a substitute" for dairy milk within the meaning of Section 101.3(e). *See* AOB 19, 22; *Lacano Investments, LLC v. Balash*, 765 F.3d 1068, 1071-72 (9th Cir. 2014) (holding courts do not accept the truth of legal arguments couched as allegations).

No case appears to have squarely articulated what Section 101.3 means by a product that "is a substitute for and resembles another food." Nonetheless, the

[4] Indeed, notwithstanding the allegations in her complaint, Painter has gone out of her way to disavow any claim that almondmilk violates the "standard of identity" for milk or otherwise disputing Blue Diamond's right to use the term "milk" in its almondmilk labeling. AOB 21-24, 31; *see also* II ER 46:14-15 ("Plaintiff does not allege that consumers are misled to believe that "almondmilk" comes from cows."). Blue Diamond takes Painter at her word and responds to the arguments she has presented on appeal. Still, it is worth noting that the trial court also rejected the standard-of-identity claim Painter originally pled. I ER 3-4.

regulation's terms and history, analogous case law, and a certain amount of common sense[5] suggest governing standards. To qualify, an imitation food must either be a diminished derivative of the food being imitated, or there must be some danger that reasonable consumers will mistake the "imitation" product for the genuine article. Painter's claims do not plausibly satisfy either standard and so fail as a matter of law.

A. Almondmilk is not an "imitation" as courts have traditionally construed that term because Almondmilk is not derived from dairy milk in any way.

First, it is worth considering how courts have traditionally grappled with the word "imitation" in the context of food. *See Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 204 (2011) (holding analysis of a regulation begins with its text). Outside the context of the current iteration of the federal regulatory definition, courts have consistently identified imitation foods as those that begin with the original, traditional product, then "substitute"—that is, literally remove and replace[6]—the product's natural or traditional ingredients with cheaper, less nutritious ingredients designed to increase yield or shelf life.

For example, the Supreme Court approved the labeling of "imitationjam." *See 62 Cases of Jam, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593

[5] *See Iqbal*, 556 U.S. at 679 (holding that determining whether a complaint states a plausible claim depends on "judicial experience and common sense."

[6] *See* American Heritage Collegiate Dictionary (4th ed. 2002) p. 1377 (defining "substitute" as "[o]ne that takes the place of another").

(1951) (applying the FDCA, but predating the enactment of Section 101.3's definition of "imitation"). At issue was a fruit-jam product made, like all jams, from fruit, sugar, and pectin, but the manufacturer drastically reduced the amount of fruit as compared with a traditional jam and substituted the missing fruit with increased pectin. *See id.* at 595.

The Second Circuit's discussion of "imitation cheese" is also illustrative:

> Real cheese is made from milk with its milkfat content intact. Cheese alternatives may be made in two ways. One method begins with either milk from which the milkfat has been removed or casein, natural milk protein extracted from milk. The altered milk or casein is then combined with vegetable oil, which substitutes for milkfat. This type of alternative cheese is lower in calories and cholesterol than real cheese. It sells at prices fifty to sixty percent lower than real cheese. The other type of alternative cheese is chemically similar to real cheese but is made wholly or in part with substitute dairy products. This is presumably even less expensive to manufacture than the former. Vitamins and minerals may be added to raise the nutritional level of alternative cheese.

Grocery Mfrs. of Am., Inc. v. Gerace, 755 F.2d 993, 996 (2d Cir. 1985), *summarily aff'd sub nom. Gerace v. Grocery Mfrs. of Am., Inc.*, 474 U.S. 801 (1985); *see also Blossom Farm Prod. Co. v. Kasson Cheese Co.*, 395 N.W.2d 619, 620 n.1 (Wis. Ct. App. 1986) (describing use of chemical to enhance cheese yield, which rendered the final product "imitation cheese"); *United States v. 651 Cases, More or Less, of Chocolate Chil-Zert*, 114 F. Supp. 430, 432 (N.D.N.Y. 1953) (holding product that started with milk, but replaced certain ingredients with inferior substitutes was "imitation ice cream").

In contrast, courts have recognized that truly distinct, alternative food products are not imitations even if they bear some resemblance to a traditional food. *See Midget*

Prod., Inc. v. Jacobsen, 140 Cal. App. 2d 517, 522 (1956) (holding whip topping that contained no milk or milk fat "is not an imitation milk product, but it is a food product of its own distinctive character."); *accord Coffee-Rich, Inc. v. Kansas State Bd. of Health*, 388 P.2d 582, 587 (Kan. 1964) ("Must a product which contains no milk products and which is a distinctive new product having uses similar to milk products be labeled an imitation milk product? We think not.").

Notably, the FDA expressly approved this standard when adopting the present regulatory definition of "imitation." "The Commissioner concludes that the definition of 'imitation' set forth in this regulation is fully consistent with the court opinions in the Jam and Chil-Zert cases." 38 Fed. Reg. 20702 (Aug. 2, 1973). The FDA also approved the Kansas and California courts' treatment of alternative products as distinct from imitation foods as "the most current and definitive judicial interpretation of the term 'imitation.'" *Id.*

Painter's claims clearly fail this traditional understanding of imitation food, as approved by the FDA. There is no allegation that Blue Diamond's almondmilk contains or is derived from any milk or dairy products. Nor can there be. As Painter's allegations reflect, almondmilk is made from almonds, exactly as its name suggests. II ER 160:5.

B. Aside from products with literally substituted ingredients, distinguishing imitation foods from alternative products must depend on the ability of reasonable consumers to differentiate the products.

1. Section 101.3's text, history, and decisional background confirm that a product is not an imitation, not a "substitute for" another product, unless reasonable consumers are likely to confuse the product for the food being imitated.

While the FDA expressly approved the foregoing, traditional definition of imitation foods, Painter may argue that the express terms of Section 101.3 encompass a broader range of products than the diminished, derivative foods discussed in the cases above. Assuming for the sake of argument that she is right, there must still be some basis for distinguishing imitations from mere alternatives, as did the cases that formed the foundation for the FDA's enactment of Section 101.3. *E.g.*, *Midget Prod., Inc.*, 140 Cal. App. 2d at 522; *Coffee-Rich, Inc.*, 388 P.2d at 587. Many factors may be considered when evaluating whether a food is an imitation, but the regulatory text, history, and case law all suggest that a risk of consumer confusion is the *sine qua non* of an imitation food.

Again, the Court's analysis should start with the regulatory text. *See Chase Bank*, 562 U.S. at 204. In its ordinary use, an "imitation" is not merely similar to the original; it is the approximate equivalent of a "counterfeit," a reproduction passed off as genuine. *See* Bryan A. Garner, Garner's Modern American Usage (3d ed. 2009), 209; *see also* IMITATION, Black's Law Dictionary (10th ed. 2014) (defining "imitation" in the context of trademarks as "[a]n item that so resembles a trademarked

item as to be likely to induce the belief that it is genuine.") Thus, a false appearance of equivalence inheres in the common understanding of "imitation."

Next, the regulation defines an "imitation" product as one that is *both* "a substitute for and resembles" another food. Thus, an imitation must do more than merely bear similarity with another product. "Resemblance alone is not enough to constitute imitation." *United States v. Articles of Drug*, 825 F.2d 1238, 1244 (8th Cir. 1987).

As discussed above, the term "substitute" in this context has traditionally reflected a literal removal of one ingredient in favor of another without notice to consumers. *See Grocery Mfrs.*, 755 F.2d at 1004. The word's common definition is consistent with that understanding. *See* American Heritage Collegiate Dictionary (4th ed. 2002) p. 1377 (defining "substitute" as "[o]ne that takes the place of another"). This suggests the FDA intended to require imitation labeling on food products that were literal replacements for other foods, replacements that would not be identified as such without a label. And, like the cases that preceded the regulation, the use of the word "substitute" suggests no intent to apply the labeling requirement to "alternative" products, which provide consumers with an informed choice amongst options. *See* American Heritage Collegiate Dictionary (4th ed. 2002) p. 42 (defining "alternative" as "[t]he *choice* between two mutually exclusive possibilities" or "[o]ne of a number of things from which one must be *chosen*.").

The regulatory history is also consistent. *See National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 992-94 (2005) (considering regulatory history when construing potentially ambiguous regulation). Section 101.3 was enacted to effectuate the FDCA's prohibition on mislabeling "imitation" foods. Thus, as Painter herself describes it, the imitation-labeling requirement was enacted with the following concerns in mind:

> The consumer, however, must be protected from *unwitting purchase of a product which is different from what he may reasonably expect*.
>
> …
>
> This new regulation… will make certain that no food is labeled *in a false or misleading way* and thus fully implements the mandate given by Congress.

AOB 29-30 (quoting Imitation Foods, 38 Fed. Reg. 2138 (Jan. 19, 1973)) (emphasis added). Consistently, Painter says, "It cannot reasonably be disputed that the FDA, in enacting 21 C.F.R. § 101.3(e), *was concerned about consumer confusion* when a nutritionally superior food product is substituted with a nutritionally inferior one without being fortified." AOB 30 (emphasis added).

Thus, the FDA's express intent when adopting the imitation-labeling requirement confirms what the regulatory text more subtly suggests: a product only qualifies as an "imitation" food if a reasonable consumer is likely to mistake it for the product being imitated.

Indeed, the FDA even cautioned that labeling some products "imitation" would itself be misleading and thus prohibited when those products are known by a common name. 38 Fed. Reg. 20702, 20703 (Aug. 2, 1973). Thus, according to the FDA, mechanical application of Section 101.3's terms must yield to the policy goal of avoiding confusion. That concern over a potential conflict between Section 101.3 and the larger prohibition against misleading labeling is eliminated if the imitation-labeling requirement applies only to those products that may be reasonably mistaken for other, nutritionally superior foods.

This conclusion is further bolstered by case law discussing the purpose of these laws. Several of the traditional, imitation-food cases reflected a concern over consumer confusion. *See Grocery Mfrs.*, 755 F.2d at 1003 (noting that, without a labeling requirement, consumers had been "wholly uninformed as to the composition of any cheese-like substance served to them"); *Midget Prod., Inc.*, 140 Cal. App. 2d at 520-21 (noting the importance of ensuring that product labeling is not misleading and does not result in consumer confusion); *Coffee-Rich, Inc.*, 388 P.2d at 586 (finding that the purposes of the Kansas law prohibiting misbranding of imitation food was "to prevent fraud and deception and to make it possible that the consumer should know that an article purchased was what it purported to be").

Likewise, cases discussing Section 101.3's definition of imitation foods have focused on similar concerns. For example, the Eighth Circuit upheld the imitation-labeling requirement on the grounds that it "successfully reconciled the [FDCA]'s

objective of *alerting the public* to inferior products with the Act's proscription against *false or misleading labels*." *Nat'l Milk Producers Fed'n v. Harris*, 653 F.2d 339, 343 (8th Cir. 1981) (emphasis added). The D.C. Circuit similarly noted the regulation's purpose "of better informing consumers so that they may exercise a knowledgeable choice of differing foods." *Fed'n of Homemakers v. Schmidt*, 539 F.2d 740, 744 (D.C. Cir. 1976); *accord Comm. for Accurate Labeling & Mktg. v. Brownback*, 665 F. Supp. 880, 884-85 (D. Kan. 1987) (holding the adoption by the FDA of the "imitation" labeling requirement advanced the purposes of the FDCA "to inform the consumer of the actual characteristics and properties of food products"). In fact, the Southern District of Ohio even found that an obligation to label a food "imitation" could only be upheld against a First Amendment challenge if justified by a desire to protect citizens from false or misleading information. *See Lever Bros. Co. v. Maurer*, 712 F. Supp. 645, 651–52 (S.D. Ohio 1989).

In short, the imitation-labeling requirement turns on the need to inform consumers of information that is not otherwise obvious, reflecting the FDA's express policy to avoid consumer confusion.

2. Painter has not pled and cannot plead a plausible claim that reasonable consumers are misled by the fact that Blue Diamond's real almondmilk is not labeled "imitation" milk.

After reviewing the parties arguments below and applying *Iqbal* and *Twombly*'s plausibility standard, the district court concluded, "No reasonable consumer could be

misled by Defendant's unambiguous labeling or factually accurate nutritional statements." I ER 4. "By using the term "*almond* milk", even the least sophisticated consumer would know instantly what type of product they are purchasing." *Id.*

Rightly so. As Painter alleges, Blue Diamond "markets its Almond Beverages as a non-dairy *alternative* for consumers to purchase in lieu of dairy milk." AOB 18 (citing II ER 89:9-10; II ER 159:7-161:11.) (emphasis added); *see also* II ER 160:5-6 (alleging Blue Diamond's labels identify almondmilk as an "alternative to dairy and soymilk"). That is correct. Almondmilk *is* an alternative to dairy milk and soymilk, offering consumers a choice between products with distinct characteristics and nutritional benefits.[7] *See* American Heritage Collegiate Dictionary (4th ed. 2002) p. 42 (defining "alternative" in terms of choice); *compare also* II ER 160-61, 168-69 (alleging that almondmilk has less protein and less of certain vitamins than dairy milk), *with* II ER 160:8 (admitting that Almond Breeze has roughly 50% more calcium than dairy milk).[8] It is also consistent with Section 101.3, which does not require imitation

[7] Painter also claims in her Opening Brief that she alleged Blue Diamond markets almondmilk as a "substitute," but her cited allegations continue to use the word "alternative." *See* AOB 18-19 (citing II ER 159:7-13.) That word choice is no accident; it reflects Blue Diamond's public statements, as alleged by Painter. II ER 159:9-10. And her use of the word "substitute" is an entirely rhetorical and conclusory argument and may be disregarded on a motion to dismiss. *See Lacano Investments*, 765 F.3d at 1071-72.

[8] While this allegation reflects Blue Diamond's labeling, rather than Painter's own statements, Painter has conceded that those representations are factually accurate, though misleading in some way. *See*, *e.g.*, AOB 32; I ER 2.

labeling on alternative products. *See Midget Prod., Inc.*, 140 Cal. App. 2d at 522; *Coffee-Rich, Inc.*, 388 P.2d at 587.

The district court's ruling was also consistent with the persuasive analysis of the Northern District of California dismissing similar false labeling claims as implausible as a matter of law. *See* I ER 4 (citing *Ang v. Whitewave Foods Co.*, No. 13-CV-1953, 2013 WL 6492353 (N.D. Cal Dec. 10, 2013); *Gitson v. TraderJoe's Co.*, No. 13-CV-01333-WHO, 2013 WL 5513711 (N.D. Cal. Oct. 4, 2013) ("*Gitson I*"); *Gitson v. Trader Joe's Co.*, No. 13-CV-01333-VC, 2015 WL 9121232 (N.D. Cal. Dec. 1, 2015) ("*Gitson II*")). As the district court stated, those prior cases found that no reasonable consumer would believe that a product labeled "Organic Soy Milk," including the explicit statement that the product is "LACTOSE & DAIRY FREE", has the same qualities as cow's milk. *See* I ER 4 (*Gitson I*, 2013 WL 5513711, at *7). "Under Plaintiffs' logic, a reasonable consumer might also believe that veggie bacon contains pork, that flourless chocolate cake contains flour, or that e-books are made out of paper." *Id.* (citing *Ang*, 2013 WL 6492353, at *4).

Painter attempts to distinguish these cases on the grounds that, at least as argued, her case presents imitation-labeling claims, not standard-of-identity claims. AOB 8-10 (citing *Kelley v. WWF Operating Co.*, No. 1:17-CV-117-LJO-BAM, 2017 WL 2445836 (E.D. Cal. June 6, 2017) (referring imitation-labeling claim to the FDA pursuant to the primary jurisdiction doctrine without addressing the plausibility of that claim); *Melissa Cuevas v. Topco Associates, LLC*, No. EDCV 17-0462-DOC (SPx),

Dkt. No. 34 (C.D. Cal. July 18, 2017) (same)).[9] But, as the district court held, that is a distinction without a difference on this record. I ER 4. Under either theory, the plausibility of the claim turns on whether there is some risk that consumers will be misled. As it relates to almondmilk, there is no such risk, and Painter's claims are not plausible as a matter of law. *See Ang*, 2013 WL 6492353, at *4; *Gitson I*, 2013 WL 5513711, at *7.

In fact, concluding otherwise would run afoul of the FDA's concern about the confusion that could arise if alternative products with common, established names of their own are mislabeled "imitation." 38 Fed. Reg. 20702, 20703 (Aug. 2, 1973). Here, as noted repeatedly, Blue Diamond sells real almondmilk and labels its product accordingly.[10] Calling it "imitation milk" would be false and misleading and would suggest that it contains milk ingredients or is otherwise related to dairy products in a way that is entirely inaccurate.

[9] The *Cuevas* decision is not apparently available through any public database, like Westlaw. Because Painter failed to do so, Blue Diamond provides a copy of the decision in its attached addendum. *See* Fed. R. App. P. 32.1(b).

[10] Indeed, Almondmilk is a product recognized distinctly by the U.S. Department of Agriculture (https://ndb.nal.usda.gov/ndb/foods/show/4188?manu=&fgcd=&ds=) and the U.S. Patent and Trademark Office (https://tmng.uspto.gov/tmngidm/public-view-record.html?referrer=public&recordId=60209).

a. Because Section 101.3 includes a reasonable-consumer standard, Painter cannot maintain her claims without allegations showing a risk of consumer confusion, even under the UCL's "unlawful prong."

As she did in the district court, ER 43:21-46:3, Painter primarily argues that reasonable consumer expectations are irrelevant to her claim that almondmilk must be labeled as imitation milk; rather, she can proceed under the UCL's prohibition against "unlawful" business practices. *See* AOB 24-28. In support, she cites a long string of cases holding that, upon showing an unlawful business practice, there is no need to prove that the practice is also unfair or deceptive. *See id.* In turn, as she argues, a risk of deception is only required under the UCL's "unlawful prong" if it is required by the underlying, predicate legal violation. AOB 26-27 (citing, *e.g.*, *Bruton v. Gerber Prod. Co.*, 703 F. App'x 468, 471 (9th Cir. 2017)). Neither of these legal principles, however, is disputed.

Rather, the point here is that consumer expectations *are* part of the predicate legal standard. The self-described "key allegation" of Painter's complaint is that Blue Diamond failed to comply with Section 101.3's requirement that imitation foods be labeled as such. AOB 27. And that predicate legal standard *does* require showing some risk of consumer confusion. *See* Sections I.B.1, *supra*. As a result, even under her own interpretation of the law, her UCL claim "borrows" a consumer-confusion standard, and her claim fails for want of a plausible basis for finding that reasonable

consumers will be misled into thinking that almondmilk is dairy milk. Her attempt to use the UCL's unlawful prong to avoid consumer expectations fails accordingly.

b. None of Painter's allegations plausibly suggest a risk of consumer deception or confusion.

Alternatively, Painter argues that she alleged plausible deception. AOB 28-30. Her argument, however, is ultimately circular. She claims that failing to label a nutritionally inferior "substitute" as an imitation food is inherently misleading. AOB 29-30, 32-33. But, as discussed above, a product is only a "substitute" if there is some risk that a reasonable consumer will mistake it for the genuine article, which Painter has not demonstrated.

Attempting to show otherwise, Painter points to what she describes as the "specific examples" of "misleading and deceptive advertising and labeling. . . ." AOB 29 (citing II ER 164:17-165:6). But she concedes that every statement cited is factually accurate. AOB 32; I ER 2. And, she has not identified any plausible basis for finding that a reasonable consumer would have been misled by those accurate statements. There is none, as the district court concluded. I ER 3-4. At worst, the statements Painter highlights are non-actionable puffery—generalized statements of superiority without any "misdescription of specific or absolute characteristics"—and may be dismissed as a matter of law. *In re Ferrero Litigation*, 794 F. Supp. 2d 1107, 1115 (S.D. Cal. June 30, 2011) (citing *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d

1134, 1145 (9th Cir.1997); *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 245 (9th Cir.1990)).

Painter's argument that factually accurate labeling *can* be misleading is therefore unavailing. *See* AOB 31-32 (citing *Williams v. Gerber Products Co.*, 552 F.3d 934, 939 (2008) (overturning dismissal of UCL claim after finding that package's repeated reference to "fruit juice" and depiction of fruits "could likely deceive a reasonable consumer" to believe that the product was made from the depicted fruit juices); *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1129 (C.D. Cal. 2010) (discussing *Williams* and finding allegations of potential deception sufficient to withstand motion to dismiss); *Mullins v. Premier Nutrition Corp.*, 178 F. Supp. 3d 867, 892 (N.D. Cal. 2016) (holding disclaimers do not cure affirmative misrepresentations). Unlike those cases, Painter did not allege facts suggesting that consumers are plausibly misled or that Blue Diamond made any affirmative misrepresentations. Indeed, aside from merely noting that factually accurate statements can be actionable, AOB 28, 31-33, Painter made no effort in the trial court or on appeal to show that reasonable consumers were likely to be misled. *See* AOB 28-29; II ER 46:4-49:9.

In fact, the only specific representation she discusses in any meaningful way is Blue Diamond's accurate representation that Almond Breeze has half the calories and

50% more calcium than dairy milk. *See* AOB 28; II ER 160:5-9.[11] Contrary to her arguments, however, it is simply not plausible that these accurate comparisons of two, nutritional metrics lead reasonable consumers to believe that almondmilk has an equal or greater quantum of *all essential nutrients* when compared to dairy milk. No case appears to uphold such a conclusion or hold that, contrary to federal regulations, once a manufacturer advises consumers of any comparison with another product, it must provide a complete, side-by-side comparison of all product metrics. Merely to articulate the claim is to refute it.

In a similarly conclusory and unsupported way, Painter also argues that Blue Diamond leads its customers to believe they are buying a "dairy milk alternative that is nutritionally equivalent, and even superior, to dairy milk." AOB 4 (citing II ER 159:9-10). But "nutritionally equivalent" and "nutritionally superior" are merely rhetorical devices she uses to advance her litigation position. Such an allegation need not be credited by the Court. *See Clegg*, 18 F.3d at 754.

Moreover, as Blue Diamond noted in the district court, there is no objective standard of nutritional equivalence or superiority. ER 80:20-28. Section 101.3 provides a specific, objective measure of nutritional *inferiority* exclusively for purposes of defining imitation foods. 21 C.F.R. § 101.3(e)(4). But equivalence and superiority

[11] The other specific representations Painter alleges do not draw any comparison with dairy milk or any other product. II ER 160:9-12.

are not defined by regulation and, the concept of nutritional superiority is highly subjective. For example, for lactose intolerant consumers, Almond Breeze Almondmilk could be considered "nutritionally superior" to dairy milk; however, for a consumers with a nut allergy, dairy milk would likely be considered to be "nutritionally superior." With nothing more than conclusory allegations and subjective expectations, Painter cannot be said to have pled a plausible claim that Blue Diamond's factually accurate labels mislead reasonable consumers.

Similarly unavailing is Painter's argument that compliance with one labeling requirement does not establish compliance with all requirements. AOB 33-34. Neither Blue Diamond nor the district court suggested otherwise. The district court did note that truly curious consumers may determine the nutritional content of almondmilk by reference to the factually accurate nutrition label. I ER 4. But it did so only after concluding that "no reasonable consumer could be misled by Defendant's unambiguous labeling or factually accurate nutritional statements." I ER 4. Her argument thus fails to show error.

Likewise, there is no claim or argument that an imitation food can avoid Section 101.3's requirements by providing an accurate nutritional label. AOB 34. Again, the point here is that almondmilk is not imitation dairy milk.

Finally, Painter argues that courts are hesitant to resolve the plausibility of a UCL claim on a motion to dismiss. AOB 28 (citing *Williams*, 552 F.3d at 938). While true, it remains universally acknowledged that dismissal is appropriate when, as here, a

plaintiff's claims are completely implausible. *See Williams*, 552 F.3d at 939 (acknowledging that, while rare, motions to dismiss have been upheld); *Freeman v. Time, Inc.*, 68 F.3d 285, 289-90 (9th Cir. 1995) (upholding dismissal of claim that consumers would be misled by promotion announcing in large letters that recipient had won sweepstakes, then advising of conditions for actual award in smaller print). Here, where Painter's claims are so patently implausible and inconsistent with the law, dismissal at the pleading stage is warranted.

C. Painter's contrary, mechanical construction of Section 101.3 would lead to absurd results.

As noted, Painter largely glosses over the question of whether almondmilk may reasonably be called a "substitute for" dairy milk. Instead, she focuses on the second element of imitation foods: nutritional inferiority. Assuming for the sake of discussion that Painter has alleged facts sufficient to demonstrate almondmilk's nutritional inferiority as defined by Section 101.3, II ER 160:14-161:11, a more thoughtful consideration of her point reveals the absurdity of applying Section 101.3 to almondmilk at all.

As Painter argues, in the context of imitation foods, "nutritional inferiority" is defined as a reduction in certain key nutrients as compared with product being imitated. AOB 15 (citing 21 CFR 101.3(e)(4)(i)). But the facts she alleges reflect not only that almondmilk is nutritionally inferior to dairy milk with respect to some essential nutrients, but that dairy milk is also nutritionally inferior to almondmilk with

respect to others. *Compare* II ER 160-61, 168-69 (alleging that almondmilk has less protein and less of certain vitamins than dairy milk), *with* II ER 160:8 (admitting that Almond Breeze has roughly 50% more calcium than dairy milk).

Thus, without considering the reasonable expectations of consumers, one could argue that dairy milk is "imitation" almondmilk; they "resemble" each other, and dairy milk is conceded to be "nutritionally inferior" to almondmilk when it comes to calcium. The same could be argued with respect to peanut butter and almond butter. Both products are brown and viscous, spread on bread, and each is nutritionally inferior to the other in some ways.[12] Under Painter's theory, each must be labeled as an "imitation" of the other. Veggie burgers, turkey burgers, and beef burgers could all be rendered imitations of each other under the same theory.

"That way madness lies." King Lear Act 3, scene 4, 25. Thus, as Blue Diamond argued in the district court, alternative products should not be treated as "imitation." Almondmilk and dairy milk are separate products, just as are peanut butter and almond butter or veggie burgers and turkey burgers. Considering one "nutritionally inferior" to the other is meaningless. *See* II ER 80:20-28. Each product

[12] Publicly available information reveals that, for example, almond butter has significantly more calcium, iron, and vitamin E, while peanut butter has more thiamin, niacin, and vitamin B-6. Compare https://ndb.nal.usda.gov/ndb/foods/show/4836?manu=&fgcd=&ds= (peanut butter), with https://ndb.nal.usda.gov/ndb/foods/show/3739?manu=&fgcd=&ds= (almond butter).

has its own nutritional advantages and disadvantages, depending on the consumer.[13] But, under Painter's theory, consumers could sue dairies for failing to label their milk imitation almondmilk (or imitation soymilk, or ricemilk, etc.) That absurd result can be avoided by recognizing that some products bearing superficial resemblance are alternatives to one another, rather than "imitations," so long as reasonable consumers are not likely to be misled into buying one, thinking that it is the other.

II. As Painter concedes, federal law preempts all her claims other than her misplaced theory that almondmilk must be labeled as "imitation" milk.

The district court found that any labeling mandate imposed by dint of litigation—rather than by FDCA or implementing regulation—would be preempted. I ER 3 (citing 21 U.S.C. § 343-l(a)(3)). It did not err.

Through the FDCA, the Nutritional Labeling Education Act of 1990 ("NLEA"), and the regulations promulgated thereunder, 21 C.F.R. §§ 1.1, *et seq.*, Congress and the FDA have created a comprehensive and uniform system for food labeling. With few exceptions not relevant here, only the federal government has the authority to enforce these laws. *See* 21 U.S.C. § 337. Consistently, where state law requires—or is purported to require—anything different from or in addition to the

[13] Contrast that with, for example, imitation cheese, which is entirely inferior to real cheese from a nutritional standpoint. *See Grocery Mfrs.*, 755 F.2d at 996; *Blossom Farm Prods.*, 395 N.W.2d at 388-90.

FDA's labeling requirements, that state law is preempted by the FDCA. *See* 21 U.S.C. § 343-l(a)(3); 21 C.F.R. § 100.1(c).

Here, Painter attempted to use state laws to force Blue Diamond to (1) label its almondmilk "imitation milk," (2) revise its product label to compare its ingredients with those found in dairy milk, (3) fortify its almondmilk to match or exceed all essential nutrients in dairy milk, or (4) cease using the term "milk" altogether. II ER 164:1-15. Only the first and third even arguably align with the requirements of the FDCA and Section 101.3. *If* almondmilk were imitation milk—which it is not, as discussed above—an order requiring Blue Diamond to label Almond Breeze accordingly or align its nutritional content with dairy milk would be arguably consistent with federal law.

By contrast, no federal law or regulation requires Blue Diamond to compare the essential nutrients in almondmilk with those found in dairy milk on the Almond Breeze label or to stop from using the term "milk" in the product name "almondmilk." Painter has cited no such legal requirement, either here or in the district court. Those claims accordingly exceed the requirements of the FDCA and its implementing regulations and are preempted. *See* 21 U.S.C. § 343-l(a)(3).

Notably, Painter does not argue otherwise on appeal. Instead, she argues that her UCL, FAL, and CLRA claims are not preempted because they track Section 101.3's imitation-labeling requirement exactly. AOB 19; *see also* AOB 22 ("Whether Painter's imitation food claims are pre-empted therefore depends on whether the state

'imitation' statutes specifically track the relevant federal law."); *see also* AOB 16-18 (citing a long list of decisions for the proposition that the Sherman Act incorporates federal labeling regulations).

Painter also tacitly concedes that her other claims—attempting to impose the addition of nutritional information or the elimination of the word "milk" from almondmilk—are preempted. Thus, it appears the parties and the district court agree: Painter's demands are not preempted to the extent they track exactly with the requirements of Section 101.3, but are preempted to the extent they differ in any respect from federal law.

Nonetheless, Painter argues that the district court erred by refusing to grant her leave to amend. According to her, the court should have allowed her to eliminate those claims in order to avoid preemption. AOB 19-21. This argument does not support reversal for several reasons.

First, for the reasons discussed above, her non-preempted, imitation-labeling claims fail are not plausible and fail as a matter of law. As a result, the district court correctly refused to allow a futile amendment. *See* I ER 5; AOB 21; *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009) (cited by Painter at AOB 21) (holding that district court has discretion to deny leave to amend for various reasons, including upon finding amendment would be futile).

Second, Painter forfeited this argument by failing to raise it in the district court. *Baccei v. United States*, 632 F3d 1140, 1149 (9th Cir. 2011) (affirming summary

judgment and declining to consider plaintiff/appellant's argument that district court failed to consider dispositive facts when he failed to raise the issue in the district court). Painter claims she raised this argument in the district court, but the cited discussion only requests blanket leave to amend, not a specific proposal to eliminate the portions of her claim that even she now acknowledges are preempted. *Compare* AOB 21, *with* II ER 43:17-21.

In short, Painter's preemption arguments fail to reflect any basis for reversal.

III. There is no basis to remand this case for referral to the Food and Drug Administration.

In the alternative, Painter now asks this Court to order the district court to stay this action and refer the matter to the Food and Drug Administration (FDA) on a theory of "primary jurisdiction." (AOB 35-35.) The Court should decline the invitation.

Under the doctrine of primary jurisdiction, the judicial process is suspended pending "referral" of the issues to the administrative body for its views. *United States v. W. Pac. R.R.*, 352 U.S. 59, 64 (1956) (superseded by regulation on other grounds as stated in *Frydman v. Portfolio Recovery Associates, LLC,* No. 11 CV 524, 2011 WL 2560221 (N.D. Ill. June 28, 2011).

> "Referral" is the term of art employed in primary jurisdiction cases. In practice, it means that a court either stays proceedings, or dismisses the case without prejudice, so that the parties may pursue their administrative remedies. There is no formal transfer mechanism between the courts and the agency; rather, upon invocation of the primary jurisdiction doctrine,

> the parties are responsible for initiating the appropriate proceedings before the agency.

Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc., 307 F.3d 775, 782 n.3 (9th Cir. 2002) (citing *Reiter v. Cooper*, 507 U.S. 258, 268 n.3 (1993)).

Painter's request for referral to the FDA should be rejected for several reasons.

First, it is an impermissible about-face. In the district court, Painter affirmatively argued against primary jurisdiction. ER 55:8-56:18. The district court, in reaching Painter's claims on the merits, implicitly accepted Painter's argument that referral would be inappropriate. I ER 1-5. Having convinced the district court to consider the merits of her claims, she is judicially estopped from now claiming it should have referred the matter to the FDA. *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (when party first successfully persuades a court to accept a position, it is judicially estopped from "later seeking an advantage by taking a clearly inconsistent position"). In addition, by virtue of having resisted primary jurisdiction, Painter waived her right to pursue it on appeal. *See GCB Commc'ns, Inc. v. U.S. S. Commc'ns, Inc.*, 650 F.3d 1257, 1263-64 (9th Cir. 2011) (holding primary jurisdiction is waived if not timely raised); *United States v. Campbell*, 42 F.3d 1199, 1202 (9th Cir. 1994) (same); *CSX Transp. Co. v. Novolog Bucks Cty.*, 502 F.3d 247, 253 (3d Cir. 2007) (same); *Balt. & Ohio Chi. Terminal R.R. v. Wisc. Cent. Ltd.*, 154 F.3d 404, 411 (7th Cir. 1998) (same).

In *CSX*, a rail common carrier sued a private port seeking the payment of tariffs. 502 F.3d at 251-52. The district court entered judgment as a matter of law in favor of the defendant, holding that the plaintiff could not impose the requested tariffs on the defendant. *Id.* at 252. The plaintiff filed a motion for reconsideration and an alternative motion for referral, arguing that the reasonableness of tariffs is a determination statutorily reserved to the Surface Transportation Board. *Id.* at 252-53. The district court denied the motion, and this Court affirmed, holding that the plaintiff raised the argument too late in the proceedings, and that no marginal benefit "would be achieved by requiring a District Court, *after* it has rendered a judgment, to vacate that judgment upon motion and refer a question it has already decided to an agency." *Id.* at 253. The plaintiff's strategic decision to "wait until judgment had been entered, and then request[ ] a second bite at the apple" was unsupportable. *Id.*

The same considerations apply here. Not only did Painter wait until after an adverse judgment was entered, raising the issue for the first time on appeal, but, as discussed above, she affirmatively argued against the application of the primary jurisdiction doctrine in the trial court. ER 55:8-56:18. Thus, even if Painter were not estopped by her prior argument, she nevertheless waived any argument regarding primary jurisdiction. *See GCB Commc'ns*, 650 F.3d at 1263-64; *Campbell*, 42 F.3d at 1202; *CSX*, 502 F.3d at 253; *Balt. & Ohio Chi. Terminal*, 154 F.3d at 411; *Nw. Airlines, Inc. v. Cty. of Kent, Michigan*, 510 U.S. 355, 366 n.10.

In any event, as noted, district courts may stay or dismiss a case under primary jurisdiction. Here, the district court opted to dismiss the case. I ER 5. While primary jurisdiction was not the basis for the court's decision, it stands as an alternative basis for the ultimate result. *See Logan v. U.S. Bank Nat'l Ass'n*, 722 F.3d 1163, 1169 (9th Cir. 2013) (holding that Court of Appeals may affirm on any ground even if based on reasons different from those articulated by the district court). While it is true that the district court *could* have stayed the case under primary jurisdiction, rather than dismissing it, there is no basis for ordering it to reinstate the case and then opt for a stay over dismissal. *See GCB Commc'ns*, 650 F.3d at 1262 (holding that decision whether to refer case under primary jurisdiction doctrine is reviewed for abuse of discretion).

Thus, while Blue Diamond initially requested that the trial court stay the matter under the doctrine of primary jurisdiction—in the alternative to its request that the court dismiss the complaint with prejudice on the merits—Blue Diamond respectfully submits that referral is no longer appropriate; the district court has ruled definitively on the question presented. *See CSX Transp.*, 502 F.3d at 253 ("No[thing] . . . would be achieved by requiring a District Court, after it has rendered a judgment, to vacate that judgment upon motion and refer a question it has already decided to an agency.").

CONCLUSION

Blue Diamond makes real almondmilk, not imitation dairy milk, no reasonable consumer is or would be confused on this point, and Painter has conceded the factual accuracy of Blue Diamond's labeling and public statements. Thus, the imitation-labeling requirement simply does not apply to Blue Diamond's product. In turn, any theory of liability under state law that exceeds the imitation-label requirements is both baseless and preempted. For these reasons, the district court correctly concluded that Painter had failed to plead any plausible claim, and primary jurisdiction provides no basis for this Court to reverse that decision. The judgment should be affirmed.

DATED: March 2, 2018

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STATEMENT OF RELATED CASES

Appellee is not aware of any related cases pending before the Court.

DATED: March 2, 2018

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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief complies with the type-volume limitation. It is proportionally spaced, has a typeface of 14 points (Garamond), and contains 9,738 words.

DATED: March 2, 2018

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ADDENDUM OF PRIMARY AUTHORITIES
9TH CIR. RULE 28-2.7

Code of Federal Regulations

Title 21

Section 101.3

(a) The principal display panel of a food in package form shall bear as one of its principal features a statement of the identity of the commodity.

(b) Such statement of identity shall be in terms of:

(1) The name now or hereafter specified in or required by any applicable Federal law or regulation; or, in the absence thereof,

(2) The common or usual name of the food; or, in the absence thereof,

(3) An appropriately descriptive term, or when the nature of the food is obvious, a fanciful name commonly used by the public for such food.

(c) Where a food is marketed in various optional forms (whole, slices, diced, etc.), the particular form shall be considered to be a necessary part of the statement of identity and shall be declared in letters of a type size bearing a reasonable relation to the size of the letters forming the other components of the statement of identity; except that if the optional form is visible through the container or is depicted by an appropriate vignette, the particular form need not be included in the statement. This specification does not affect the required declarations of identity under definitions and standards for foods promulgated pursuant to section 401 of the act.

(d) This statement of identity shall be presented in bold type on the principal display panel, shall be in a size reasonably related to the most prominent printed matter on such panel, and shall be in lines generally parallel to the base on which the package rests as it is designed to be displayed.

(e) Under the provisions of section 403(c) of the Federal Food, Drug, and Cosmetic Act, a food shall be deemed to be misbranded if it is an imitation of another food unless its label bears, in type of uniform size and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated.

(1) A food shall be deemed to be an imitation and thus subject to the requirements of section 403(c) of the act if it is a substitute for and resembles another food but is nutritionally inferior to that food.

(2) A food that is a substitute for and resembles another food shall not be deemed to be an imitation provided it meets each of the following requirements:

(i) It is not nutritionally inferior to the food for which it substitutes and which it resembles.

(ii) Its label bears a common or usual name that complies with the provisions of § 102.5 of this chapter and that is not false or misleading, or in the absence of an existing common or usual name, an appropriately descriptive term that is not false or misleading. The label may, in addition, bear a fanciful name which is not false or misleading.

(3) A food for which a common or usual name is established by regulation (e.g., in a standard of identity pursuant to section 401 of the act, in a common or usual name regulation pursuant to part 102 of this chapter, or in a regulation establishing a nutritional quality guideline pursuant to part 104 of this chapter), and which complies with all of the applicable requirements of such regulation(s), shall not be deemed to be an imitation.

(4) Nutritional inferiority includes:

(i) Any reduction in the content of an essential nutrient that is present in a measurable amount, but does not include a reduction in the caloric or fat content provided the food is labeled pursuant to the provisions of § 101.9, and provided the labeling with respect to any reduction in caloric content complies with the provisions applicable to caloric content in part 105 of this chapter.

(ii) For the purpose of this section, a measurable amount of an essential nutrient in a food shall be considered to be 2 percent or more of the Daily Reference Value (DRV) of protein listed under § 101.9(c)(7)(iii) and of potassium listed under § 101.9(c)(9) per reference amount customarily consumed and 2 percent or more of the Reference Daily Intake (RDI) of any vitamin or mineral listed under § 101.9(c)(8)(iv) per reference amount customarily consumed, except that selenium, molybdenum, chromium, and chloride need not be considered.

(iii) If the Commissioner concludes that a food is a substitute for and resembles another food but is inferior to the food imitated for reasons other than those set forth in this paragraph, he may propose appropriate

revisions to this regulation or he may propose a separate regulation governing the particular food.

(f) A label may be required to bear the percentage(s) of a characterizing ingredient(s) or information concerning the presence or absence of an ingredient(s) or the need to add an ingredient(s) as part of the common or usual name of the food pursuant to subpart B of part 102 of this chapter.

(g) Dietary supplements shall be identified by the term "dietary supplement" as a part of the statement of identity, except that the word "dietary" may be deleted and replaced by the name of the dietary ingredients in the product (e.g., calcium supplement) or an appropriately descriptive term indicating the type of dietary ingredients that are in the product (e.g., herbal supplement with vitamins).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. EDCV 17-0462-DOC (SPx) Date: July 18, 2017

Title: MELISSA CUEVAS V. TOPCO ASSOCIATES, LLC

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Dwayne Roberts	Not Present
Courtroom Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFF: None Present	ATTORNEYS PRESENT FOR DEFENDANT: None Present

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING DEFENDANT'S MOTION TO STAY [29]

Before the Court is Defendant Topco Associates, LLC's ("Topco" or "Defendant") Motion to Dismiss Amended Class Action Complaint or, in the Alternative, Stay the Case ("Motion") (Dkt. 29). The Court finds this matter suitable for decision without oral argument. Fed. R. Civ. P. 78, Local Rule 7-15. Having considered the parties' arguments, the Court STAYS proceedings pending the FDA's determination of question presented by *Kelley v. WWF Operating Company*, No. 1:17-CV-117-LJO-BAM, 2017 WL 2445836 (E.D. Cal. June 6, 2017) of whether plant-based products are "imitation" of dairy milk under 21 C.F.R § 101.3(e).

I. Background

The Court adopts the facts as set out in the operative complaint, Plaintiff's First Amended Complaint ("FAC") (Dkt. 23).

Plaintiff Melissa Cuevas ("Plaintiff") brings this class action on behalf of herself and other people who purchased Full Circle Almondmilk beverages from Defendant Topco. FAC ¶ 1.

Topco is a Delaware corporation. *Id.* ¶ 22. Topco markets, distributes, and sells Full Circle Almondmilk products in San Bernardino County and throughout the United States. *Id.* ¶ 23. Plaintiff contends that Topco engages in "false, misleading, and deceptive marketing practices" by leading customers to believe that Topco's Almondmilk beverages are "dairy milk alternative[s] that [are] nutritionally equivalent to dairy milk." *Id.* ¶ 2.

Plaintiff alleges that Topco advertises its Almondmilk beverages as containing levels of calcium equivalent to dairy milk on its website, stating "quality, calcium-rich milk does not come from cows alone." *Id.* ¶ 3. However, Full Circle Original Unsweetened Almondmilk contains 67% less calcium, "90% less protein, 85% less potassium, and 57% less magnesium than non-fat dairy milk." *Id.* ¶ 4. Further, according to the U.S. Department of Agriculture ("USDA") National Nutrient Database, Almondmilk beverages contain less vitamins and nutrients than dairy milk. *Id.* ¶ 4.

Plaintiff also alleges that Defendant fails to accurately label Almondmilk beverages as "imitation milk" as required by the Food and Drug Administration ("FDA"). *Id.* ¶ 5. The FDA requires substitute products to be labeled as "imitation" if there is any reduction of essential nutrients in a measurable amount from the product it is a substitute for. *Id.* Plaintiff contends that Almondmilk should be labeled as "imitation milk" because of the reduction of essential nutrients found in measurable amount in dairy milk. *Id.*

Plaintiff claims that consumers rely on Defendant's marketing, product advertisement, packaging, and labeling in deciding whether to purchase Almondmilk beverages. *Id.* ¶ 7. In purchasing Almondmilk, Plaintiff relied on the belief that Almondmilk beverages were "nutritionally superior to dairy milk and contained comparable amounts of the essential vitamins and nutrients contained in dairy milk." *Id.* ¶ 20.

Plaintiff alleges that had she known that Almondmilk beverages were nutritionally deficient compared to dairy milk, she "would have paid less for [the Almondmilk products] or purchased other milk substitutes that are nutritionally equivalent to milk." *Id.* ¶ 21.

II. Procedural History

On March 13, 2017, Plaintiff brought this action against Topco. In the FAC, Plaintiff alleges that Defendant violated (1) California's Consumers Legal Remedies Act ("CLRA"), California Civil Code § 1750, *et seq.*; (2) California's Unfair Competition Law ("UCL"), California Business & Professions Code § 17200, *et seq.*; and (3)

California's False Advertising Law ("FAL"), California Business & Professions Code § 17500, *et seq*. FAC ¶¶ 63, 76–77, 86–88.

On June 7, 2017, Defendant filed the instant Motion (Dkt. 29). Plaintiff opposed on June 19, 2017 (Dkt. 31). Defendant replied on June 26, 2017 (Dkt. 32).

III. Legal Standard

A. Motion to Dismiss

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail to set forth a set of facts which, if true, would entitle the complainant to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (holding that a claim must be facially plausible in order to survive a motion to dismiss). The pleadings must raise the right to relief beyond the speculative level; a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 268 (1986)). On a motion to dismiss, a court accepts as true a plaintiff's well-pleaded factual allegations and construes all factual inferences in the light most favorable to the plaintiff. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). A court is not required to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678.

In evaluating a Rule 12(b)(6) motion, review is ordinarily limited to the contents of the complaint and material properly submitted with the complaint. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); *Hal Roach Studios Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989). Under the incorporation by reference doctrine, the court may also consider documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119, 1121 (9th Cir. 2002). A court may treat such a document as "part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

Dismissal with leave to amend should be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). This policy is applied with "extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (holding that dismissal with leave to amend should be granted even if no request to amend was made).

For claims sounding in fraud, a complaint must be dismissed when a plaintiff fails to meet the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009); *see* Fed. R. Civ. P. 9(b). Rule 9(b) requires a plaintiff alleging such claims to "state with particularity the circumstances constituting fraud." *Id.* The "circumstances" required by Rule 9(b) are the "who, what, when, where, and how" of the fraudulent activity. *United States ex rel Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011). Further, if the plaintiff claims that a statement is false or misleading, "[t]he plaintiff must set forth what is false or misleading about a statement, and why it is false." *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting *In re Glenfed, Inc. Secs. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994)).

In other words, the plaintiff "must set forth an explanation as to why the statement or omission complained of was false or misleading." *Cooper v. Pickett*, 137 F.3d 616, 625 (9th Cir. 1997). This heightened pleading standard ensures that "allegations of fraud are specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). However, "intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b); *see Neubronner*, 6 F.3d 666, 672 (9th Cir. 1993).

B. Motion to Stay

"A district court has inherent power to control the disposition of the causes on its docket in a manner which will promote economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936). The decision of granting or denying a stay is within the discretion of the district court. *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007).

When considering whether to stay a case, courts weigh a series of competing interests, including (1) "the possible damage that may result from the granting of a stay," (2) "the hardship or inequity which a party may suffer in being required to go forward," and (3) "the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (citation omitted). "[T]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Landis*, 299 U.S. at 255.

IV. Discussion

Defendant argues that the Court should dismiss the case because (1) the term "Almondmilk" complies with the federal standard of including "the common or usual name of the food" pursuant to 21 U.S.C. § 343(i); (2) Almondmilk is not imitation cow's milk; and (3) a reasonable consumer would not have been misled by Full Circle's label and website. Mot. at 6–13.

A. The Term "Almondmilk" and § 341(i)

Defendant first argues that using the term "milk" on product labels of plant-based alternatives to dairy milk is proper. *Id.* at 7. Defendant cites *Ang v. Whitewave Foods Company*, No. 13–cv–1953, 2013 WL 6492353 (N.D. Cal. Dec. 10, 2013), for the proposition that the name "Almondmilk" accurately describes the product and "clearly convey[s] the basic nature and content of the beverage[], while clearly distinguishing [the product] from milk derived from dairy cows." *Id.* at *4

Defendant also cites *Gitson v. Trader Joe's Co.*, No. 13–cv–01333, 2015 WL 9121232 (N.D. Cal. December 1, 2015), to support the argument that Defendant's use of the term "Almondmilk" does not mean that the product purports to be cow milk. Mot. at 8. In *Gitson*, the court held that the defendant had not, "by calling its products 'soymilk,' attempted to pass off those products" as dairy milk. *Gitson*, 2015 WL 9121232, at 2.

However, Plaintiff is not seeking to preclude Defendant from using the term milk in "Almondmilk." Instead, Plaintiff alleges that "Defendant's labels are false, misleading, and unlawful because [Almondmilk products] are . . . imitation of another food—milk—and nutritionally inferior to milk, and should therefore either bear the word 'imitation' or be fortified to in order to be nutritionally equivalent to milk." *See* Opp'n at 7.

Ultimately, Defendant's reliance on *Ang* and *Gitson* is misplaced because neither *Gitson* nor *Ang* addressed the issue of whether plant-based products are imitations of cow milk under 21 C.F.R. § 101.3(e). *Id.* Indeed, there is no controlling case on this issue and the FDA has not made any determination on this matter.

B. Whether Almondmilk is Imitation Milk

Defendant next argues that Almondmilk is not imitating milk and that a reasonable consumer would not have been misled by the Almondmilk product label and its website. Mot. at 8–13. Citing *Ang* and *Gitson*, Defendant contends that Almond milk is a "separate and distinct product" like soy milk and coconut milk. *Id.* at 9. As stated above,

these cases only address the standard identity of "milk" but did not resolve the issue of whether plant-based products are imitations of milk, and thus are not directly on point.

Instead, the case at hand is analogous to *Kelley*, where the court stayed the suit and referred the issue of whether Silk Almondmilk beverages should be labeled "imitation" under 21 C.F.R. § 101.3(e) to the FDA. In *Kelley*, the plaintiff brought a class action on behalf of herself and others who bought Silk Almondmilk products from the defendant. *Kelley,* 2017 WL 2445836, at *1. Similarly to Plaintiff's claims in this case, the *Kelley* plaintiff's claims are based on allegations that Silk Almondmilk products are "(1) mislabeled, in violation of § 101.3(e), because they should be identified as 'imitation' dairy milk; and (2) the use of the term 'almondmilk' is misleading." *Id.* at *2.

The *Kelley* court concluded that the courts were an inappropriate forum to determine "*in the first instance* whether almond milk 'substitutes for,' is 'nutritionally inferior' to, and 'resembles' dairy milk" such that it must be labeled "imitation" milk under § 101.3(e). *Id.* at *5. Rather, the court determined the issue is more properly resolved by the FDA, as the FDA has the requisite knowledge and expertise on food labeling and can "ensure uniformity in administration of the regulations." *Id.*

Plaintiff argues that this case is the same as many other "unlawful and deceptive food labeling decisions issued by district courts." Opp'n at 9. Plaintiff cited *Reid v. Johnson & Johnson*, 780 F.3d 952 (9th Cir. 2015), and several district court cases for the proposition that district courts are competent to rule on false and misleading food labels. Opp'n at 9–10.

However, as Plaintiff concedes in her opposition, Plaintiff's CLRA, FAL and UCL claims are predicated on 21 C.F.R. § 101.3(e). Opp'n at 9. As noted above, there are no Ninth Circuit cases deciding whether plant-based milk is a substitute to dairy milk and should therefore be labeled as "imitation" milk under § 101.3(e). The Court agrees with the *Kelley* court that the court "is not an appropriate forum to decide *in the first instance* whether Almondmilk" is a substitute to dairy milk. *Kelley,* 2017 WL 2445836, at *5.

The FDA's determination on the issue raised by *Kelley* will have a substantial impact on this case, where the central issue is also whether Almondmilk is a milk substitute. Defendants seek a stay pending the outcome of *Kelley*. "The existence of another proceeding that may have a substantial impact on a pending case is a particularly compelling reason to grant a stay." *Stanley v. Novartis Pharms. Corp.*, No. CV 11-03191, 2012 U.S. Dist. LEXIS 61713, at *7 (C.D. Cal. April 13, 2012) (citing *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863–64 (9th Cir. 1979)).

Courts weigh the following competing interests on whether to grant or deny a stay pending the FDA's findings in *Kelley*: (1) the possible damage which may result from granting of a stay; (2) the hardship or inequity a party may suffer in being required to go forward; and (3) the orderly course of justice measure in terms of simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

C. Prejudice to Plaintiff if a Stay is Granted

Although Plaintiff contends that Defendant's Motion to Dismiss Plaintiff's UCL, FAL, and CLRA claims should be denied, Plaintiff does not argue that she will suffer prejudice if a stay is granted. The Ninth Circuit has held that "a stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time in relation to the urgency of the claims." *Levya*, 593 F.2d at 864. Plaintiff has not identified any ongoing injury that suggest that the resolution of her claims is urgent.

The Court cannot foresee how long it will take for the FDA to make a ruling in *Kelley*. But as the court in *Kelley* points out, on December 23, 2016, some members of Congress have called for the FDA to address the issue of whether Almondmilk products are imitations of dairy milk. *Kelley*, 2017 WL 2445836, at *5. Thus, the FDA is aware of the issue and there is no indication that the FDA has shown no interest in addressing the Almondmilk issue. *See id.* at *6. The court in *Kelley* also mentioned that "the FDA is currently considering whether to opine on a dispositive issue in th[e] case," suggesting that the FDA will issue a ruling, or decline to rule, in a reasonable time frame. *See id.*

Accordingly, in spite of the delay a stay would cause, the Court finds no evidence that granting a stay would prejudice Plaintiff.

Accordingly, the first factor weighs in favor of granting a stay.

D. Prejudice to Defendant if a Stay is Denied

The Court should also consider the prejudice the Defendant may suffer in being required to move forward. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (citing *Landis*, 299 U.S. at 254–55). Although Defendant requested a stay because the case at hand is similar to *Kelley*, Defendant does not assert that it will be prejudiced if the stay is denied. The only prejudice to Defendant appears to be the litigation cost and the hardship of defending this suit. The Ninth Circuit has ruled that "being required to defend a suit, without more, does not constitute a clear case of hardship or inequity." *Lockyer*, 398 F.3d

at 1098 (internal quotations marks omitted). As such, the second factor does not weigh in favor of granting a stay.

E. The Orderly Course of Justice

The "district court possesses the inherent power to control its docket and promote efficient use of judicial resources." *Dependable Highway*, 498 F.3d at 1066 (citing *Landis*, 299 U.S. at 254). However, case management, on its own, "is not necessarily a sufficient ground to stay proceedings." *Id.* The orderly course of justice is measured in terms of "simplifying or complication of issues, proof, and questions of law which could be expected to result from a stay." *Id.* (citing *Landis*, 299 U.S. at 248, 254–55).

As the court in *Kelley* concluded, the issue of whether Almondmilk should be deemed "imitation" milk under § 101.3(e) "involved technical questions of fact uniquely within the expertise and experience of agency." *Kelley*, 2017 WL 2445836, at *5 (citing *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304 (1976)). Because the FDA has not officially considered this issue and the Court's ruling can impair the uniformity of the FDA's regulation of food labels, the Court finds it would serve the interest of justice to stay this case pending the FDA's resolution of the *Kelley* referral.

Accordingly, the third factor weighs in favor of granting a stay, and because two of the three factors weigh in favour of a stay, the Court will STAY this case.

V. Disposition

The Court GRANTS Defendant's alternative Motion to Stay and STAYS this case pending the FDA's resolution of the *Kelley* referral. All dates in this case are VACATED.

The parties are ORDERED to provide the Court with a status reports **every ninety (90) days** outlining any developments in the FDA's evaluation of the *Kelley* referral and any progress the FDA makes toward resolving whether Almondmilk is imitation milk. The parties are further ORDERED to provide the Court with a status report **within fourteen (14)** days of the FDA's resolution of the *Kelley* referral.

The Clerk shall serve this minute order on the parties.

MINUTES FORM 11
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Initials of Deputy Clerk

PROOF OF SERVICE

Cynthia Painter v. Blue Diamond Growers. et al.
U.S. Court of Appeals for the Ninth Circuit, Docket No. 17-55901

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 425 Market Street, 26th Floor, San Francisco, CA 94105.

On March 2, 2018, I served true copies of the following document(s) described as**:**

APPELLEE'S ANSWERING BRIEF

on the interested parties in this action as follows:

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BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 2, 2018, at San Francisco, California.

Grace M. Mohr