UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Christopher Silva, individually and on behalf of all others similarly situated, Plaintiffs, — against — Hornell Brewing Co., Inc., Arizona Beverages USA LLC, Beverage Marketing USA, Inc., and Arizona Beverage Co. Defendants.	**20-cv-756 (ARR) (PL)** **Not for print or electronic publication** **Opinion & Order**

ROSS, United States District Judge:

Silva brings this putative class action against Hornell Brewing Co., Inc., Arizona Beverages USA LLC, Beverage Marketing USA, Inc., and Arizona Beverage Co. The case concerns Arizona Fruit Snacks, a product manufactured and distributed by the defendants. Silva asserts various statutory and common law claims against defendants, alleging that the Arizona Fruit Snacks packaging falsely represents the product as "all natural," when in fact, the product contains synthetic ingredients and is not "all natural." Defendants move to either stay or dismiss the action. As set forth below, defendant's motion to stay is denied, and defendants' motion to dismiss is granted in part and denied in part.

BACKGROUND

Defendants Hornell Brewing Co., Inc., Arizona Beverages USA LLC, Beverage Marketing USA, Inc., and Arizona Beverage Co. manufacture, sell, and distribute Arizona Fruit Snacks ("the Product"). First Am. Compl. ("FAC") ¶¶ 1–2, ECF No. 16. The Product packaging describes the Product as "All Natural." The front of the packaging is pictured below:

The Product contains gelatin, citric acid, ascorbic acid, dextrose, glucose syrup and modified food starch (corn). *Id.* ¶ 7. Plaintiff alleges that these ingredients are synthetic, which in plaintiff's view means the Product is not, in fact, all natural. *Id.* Thus, plaintiff alleges the "all natural" statement on the packaging is a misrepresentation. *Id.*

Plaintiff Christopher Silva is a resident of Brooklyn, New York. *Id.* ¶ 31. He purchased the Product, with the above-pictured "all natural" labeling, in or about October 2019. *Id.* Silva states

that if the Product were not labeled "All Natural," he would not have been willing to pay the same amount, and consequently, would not have purchased the Product at all. *Id.* ¶ 32. Silva states that defendants charged a premium price for the Product because it was represented as "All Natural" and that the Product cost more than competitive products not bearing an "All Natural" label. *Id.* ¶ 25–26. Silva also alleges that if the Product were actually "All Natural" (not containing synthetic ingredients), he would purchase the Product in the immediate future. *Id.* ¶ 31.

On October 5, 2019, Silva sent a letter and draft complaint to the defendant. On February 11, 2020, Silva filed this action, on behalf of himself, a proposed class consisting of all consumers who purchased the Product anywhere in the United States, and a proposed subclass consisting of all consumers who purchased the project in the State of New York. *Id.* ¶¶ 37–39; Complaint ¶¶ 37–39, ECF No. 1. Defendants moved to stay this action under the primary jurisdiction doctrine, or in the alternative, defendants move to dismiss for failure to state a claim upon which relief can be granted.

DISCUSSION

I. Motion to Stay

Defendant moves to "stay this action under the Primary Jurisdiction doctrine because the FDA is currently evaluating regulations to guide the use of the term 'Natural' on food products." Defs.' Mem. of Law in Supp. of Mot. to Stay or Dismiss ("Def.'s Br.") 1, ECF No. 20-8. Plaintiff opposes, arguing that a stay is not appropriate because there is no indication that such FDA guidance is forthcoming, and that the guidance would not actually affect plaintiffs' claims. Pl.'s Mem. of Law in Opp. to Defs.' Mot. to Stay or Dismiss ("Pl.'s Br.") 1, ECF No. 21. I agree with plaintiff and decline to stay this action.

"The primary jurisdiction doctrine is concerned with 'promoting proper relationships between

the courts and administrative agencies charged with particular regulatory duties.'" *Ellis v. Tribune Television Co.*, 443 F.3d 71, 81 (2d Cir. 2006) (quoting *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63 (1956)). The question of primary jurisdiction arises in "cases involving technical and intricate questions of fact and policy that Congress has assigned to a specific agency." *Nat'l Commc'ns Ass'n, Inc. v. Am. Tel. & Tel. Co.*, 46 F.3d 220, 223 (2d Cir. 1995) (citing *Goya Foods, Inc. v. Tropicana Prod.*, Inc., 846 F.2d 848, 851 (2d Cir. 1988)). If the doctrine applies, the court will forbear ruling on an issue and instead refer it to the appropriate agency. *See id.* at 222–23.

Courts consider the following four factors in deciding whether to apply the primary jurisdiction doctrine:

> (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise;
> (2) whether the question at issue is particularly within the agencys discretion;
> (3) whether there exists a substantial danger of inconsistent rulings; and
> (4) whether a prior application to the agency has been made.

Ellis, 443 F.3d at 82–83 (citing *Nat'l Commc'ns Ass'n, Inc.*, 46 F.3d at 222). "The court must also balance the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings." *Nat'l Commc'ns Ass'n*, 46 F.3d at 223 (citing *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 321 (1973)). In this case, the four *Ellis* factors weigh against application of the primary jurisdiction doctrine.

First, while defining the term "all natural" does involve technical and policy considerations, this case does not require a technical definition of "all natural." Instead, this case requires a determination of whether labeling the Product as "all natural" is misleading to a reasonable consumer. That type of legal question is within the conventional experience of the court and does not require FDA guidance. *See, e.g.*, *Petrosino v. Stearn's Prods., Inc.*, No. 16-CV-7735 (NSR), 2018 WL 1614349, at *10at *30 (S.D.N.Y. Mar. 30, 2018); *Ault v. J.M. Smucker Co.*, No.

13 CIV. 3409 (PAC), 2014 WL 1998235, at *5 (S.D.N.Y. May 15, 2014); *In re Frito-Lay N. Am., Inc. All Nat. Litig.*, No. 12-MD-2413 (RRM) (RLM), 2013 WL 4647512, at *8 (E.D.N.Y. Aug. 29, 2013); *Ackerman v. Coca–Cola Co.*, No. 09–CV–0395 (JG) (RML), 2010 WL 2925955, at *14 (E.D.N.Y. July 21, 2010).

As for the second factor, the parties agree that Congress gave the FDA authority over food labeling, 21 U.S.C. § 341, and that the proper use of the term "natural" on packaging is within the FDA's discretion. *See* Pl.'s Br. 3. But this is only one factor, and it is not decisive.

The third factor is primarily about the danger that the agency may issue guidance that conflicts with the court's ruling. *Elkind v. Revlon Consumer Prod Corp.*, No. 14–CV–2484(JS)(AKT), 2015 WL 2344134, *10 (E.D.N.Y. May 14, 2015); *see also Ellis*, 443 F.3d at 88. That risk is not present here because, as noted above, this case does not involve determining a scientific definition of "natural." Any guidance the FDA ultimately issues about the term "natural" will not be inconsistent with the outcome the court reaches in this case because the FDA is not tasked with applying a reasonable consumer standard.

As for the fourth factor, there has been a prior application to the agency, but I have no confidence that the FDA will be addressing this issue anytime soon. In November 2015, the agency opened a docket "to receive information and comments on the use of the term 'natural' in the labeling of human food products." *See* Wolfson Decl., Defs.' Ex. C, ECF No. 20-4, Use of the Term "Natural" in the Labeling of Human Food Products: Request for Information and Comments, 80 Fed. Reg. 69905-01 (Nov. 12, 2015). It has been nearly five years since that announcement, and the FDA has issued no guidance on use of the term "natural." FDA officials have made three public comments about the topic in those five years, none of which provide any concrete timeline for issuing guidance. *See* Wolfson Decl., Defs.' Ex. D, ECF No. 20-5, Heather Haddon, FDA

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