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CHOBANI, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

KATIE KANE, *et al.*, individuals, on behalf of themselves and all others similarly situated,

Plaintiff,

v.

CHOBANI, INC.

Defendant.

Case No. CV 12-02425-LHK

DEFENDANT CHOBANI, INC.'S MOTION FOR LEAVE TO SEEK RECONSIDERATION OF THE COURT'S JULY 12, 2013 ORDER [DKT. #125] GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

[Fed. R. Civ. P. 12(b)(6); N.D. Cal. R. 7-9]

[No Hearing Required; Proposed Order Attached]

Date: TBD
Time: TBD
Ctrm.: TBD
Judge: Hon. Lucy H. Koh

Complaint Filed: May 14, 2012

Pursuant to Civil Local Rule 7-9, defendant Chobani, Inc. ("Chobani") hereby respectfully moves for leave to seek reconsideration of the Court's July 12, 2013 Order [Dkt. #125], which granted in part and denied in part Chobani's motion to dismiss the second amended complaint.[1] In particular, Chobani requests leave to seek reconsideration of two specific portions of the July 12, 2013 Order:

1. <u>The new evaporated cane juice theory</u>. The Court's decision denying in part Chobani's motion to dismiss is based on a theory of liability that was not alleged by plaintiffs or briefed by the parties. In paragraphs 93-95 of their Second Amended Complaint ("SAC"), each plaintiff alleges his or her specific evaporated cane juice ("ECJ") theory in the exact same manner: "Plaintiff believed Defendant's Misbranded Food Products contained only natural sugars from milk and fruit and ***did not contain*** added sugars or syrups." (Emphasis added.) That allegation is synonymous with alleging that they did not know ECJ was a sweetener or a form of sugar. In its Order, the Court expressly (and correctly) rejected plaintiffs' "added sugar" theory as "simply not plausible." Order at 11.

Though dismissing the ECJ *theory* plaintiffs alleged, the Court did not dismiss plaintiffs' ECJ *claim*. Instead, the Court concluded that the claim could survive based on a different theory, namely that consumers may have believed that ECJ is a healthier form of sugar than white sugar or dried cane syrup. Order at 11-12. Plaintiffs, however, have never alleged that *they* believed ECJ is a *healthier* form of sugar (SAC at ¶¶ 93-95),[2] and they did not defend the SAC based on

[1] This Court recognizes the appropriateness of granting motions for reconsideration in circumstances similar to those found here. *See*, *e.g.*, *Kowalsky v. Hewlett-Packard Co.*, 771 F. Supp. 2d 1156 (N.D. Cal. 2011) (motion for reconsideration granted where preexisting and new authority not previously brought to the court's attention, including as applied to new theory of liability appearing for first time in motion to dismiss order).

[2] The Court in its Order relies on the SAC's general allegations about ECJ (Order at 11 (citing SAC at ¶¶ 10, 12, 62-64)) and, to be sure, those allegations do generally reference health attributes of sucrose products. But the general allegations do ***not*** reference ***these*** plaintiffs, whose beliefs are alleged in paragraphs 93-95 only. The Court also relies on plaintiffs' allegation that they would not have purchased Chobani's products had they known that the products "contained added dried cane syrup." Order at 11 (quoting SAC at ¶¶ 93-95). This allegation relates to plaintiffs' ECJ theory that they did not know that ECJ is a form of sugar at all; it is not an allegation that plaintiffs believed ECJ to be a healthier ***form*** of sugar.

that theory in their opposition to Chobani's motion to dismiss.[3]

Accordingly, Chobani had no reason to address such a theory in its briefing or argument, and seeks reconsideration on this basis. Civil Local Rule 7-9(b)(1); *see also Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983) (it is inappropriate to assume that plaintiff "can prove facts which it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged").

Reconsideration is particularly important here, because the new ECJ theory fails for at least three previously unaddressed reasons:

Standing. As this Court ruled in its Order, these plaintiffs must allege reliance, deception, and injury to have standing to assert their claims. *See* Order at 8-10 (requiring plausible allegations of *plaintiffs'* reliance, deception, and injury). Here, plaintiffs' entire case was built upon the theory that they did not know that ECJ is a form of sugar. SAC at ¶¶ 93-95; *see also* Declarations of Plaintiffs In Support of Plaintiffs' Motion for Preliminary Injunction [Dkt. #109-1, #109-2, #112] ("I believed that Chobani Greek Yogurt contained only natural sugars from milk and fruit and did not contain added sugars or syrups"). Plaintiffs ***never*** alleged that they believed ECJ is a healthier form of sugar, let alone that they were injured because of it.[4] SAC at ¶¶ 93-95. The complete absence of any allegations that *plaintiffs* believed ECJ to be a healthier form of sugar necessarily means that plaintiffs lack standing to proceed on that

[3] It's not just that plaintiffs do not press the "healthier sugar" theory of liability in the SAC, they have affirmatively ***disclaimed*** it before this Court. *See, e.g.*, Lustig Supp. Decl. (Dkt. #107-1), ¶ 15 ("The issue here is ***added sugar*** . . ."), ¶ 17 ("***added sugar*** . . . is the problem"), ¶ 19 ("This case is ***not*** about sugar's toxicity or ***detrimental health effects***"), ¶ 20 ("Kane v. Chobani is . . . ***not*** a 'yogurt is bad for you case'") (emphasis added in each).

[4] Nor have plaintiffs' counsel even *argued* that their clients believed ECJ to be a healthier form of sugar and were damaged thereby. *See* Transcript of July 11, 2013 Hearing on Plaintiffs' Motion for Preliminary Injunction (Dkt. #127 at 17:12 (plaintiffs' counsel responding "I don't know" when asked what plaintiffs believed ECJ to be)). Thus, more than one year and three iterations of the complaint after initiating this action, plaintiffs still do not know what they thought ECJ referred to. One thing is clear from such an admission: plaintiffs did not believe that ECJ is a healthier form of sugar.

theory.[5] Hence, reconsideration is warranted. Civil Local Rule 7-9(b)(2).

Significantly, this defect cannot be cured by amendment. It is well established that an amended complaint "may only allege other facts ***consistent*** with the [original] pleading." *See, e.g.*, *Reddy v. Litton Indus.*, 912 F.2d 291, 296-97 (9th Cir. 1990); *Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128, 1145 (N.D. Cal. 2010) ("the Court will not accept [as true] Schlesinger's allegation that he did not receive a refund given Plaintiffs' past contradictory pleadings"); *Agron, Inc. v. Chien-Lu Lin*, 2004 WL 555377, *10 n.77 (C.D. Cal. Mar. 16, 2004) ("amended complaints must allege facts consistent with prior complaints").

Here, not only have plaintiffs failed to allege that they were deceived in the manner identified in the Court's Order, but the allegations that they do make are incompatible with the Court's theory. In particular, having alleged and argued they did not know that ECJ is a form of sugar at all, plaintiffs are precluded from now alleging or proceeding under the ***inconsistent*** theory that they believed that ECJ ***is*** sugar, in a healthier form. *See Reddy*, 912 F.2d at 296-97.

Express Preemption. The premise of the Court's Order is that the word "juice" alone implies a claim of healthfulness. The FDA, however, regulates health-related claims under 21 C.F.R. § 101.65(d), and provides specific requirements that must be met before any such claims are made. There is nothing in § 101.65(d) that applies its requirements to all labels with the word "juice," and in fact there is no suggestion that the FDA has ever taken the position that the

[5] It is also notable that this Court confirmed in its motion to dismiss Order that all of plaintiffs' claims, including "unlawful" prong claims under the UCL, sound in fraud and are subject to the particularity requirement of Fed. R. Civ. P. 9(b). Order at 29-30. Given that plaintiffs made no allegations that they were deceived and injured by the "ECJ is a healthier form of sugar" theory, that liability theory clearly fails the Court's particularity ruling. And it's not only the Court's 9(b) ruling that is trampled by the post-complaint and post-motion recognition of the "healthy sugar" theory. Chobani never had an opportunity to develop and present possible legal defenses to the "healthy sugar" theory. For example, if plaintiffs had alleged that Chobani was marketing ECJ as "better" than sugar, Chobani may have been able to establish that such a claim would be *non-actionable puffery* as a matter of law. *See, e.g., Elias v. Hewlett-Packard Co.*, -- F. Supp. 2d --, 2013 WL 3187319, *10 (N.D. Cal. June 21, 2013) ("generalized advertisements . . . say nothing about the specific characteristics" and may be dismissed as puffery). Likewise, if plaintiffs had alleged that Chobani failed to disclose that ECJ is not as healthy as natural cane sugar and that such omission caused them injury, Chobani could have argued that it had *no legal duty to disclose* such facts. *Id.*, *10-11; SAC ¶ 64 ("this material information is omitted from" the label). Finally, if plaintiffs had challenged the label as making an unlawful "healthy" claim, Chobani could have argued a different *express preemption* defense along the lines of what is detailed in the text of the next section.

word "juice" alone implies healthfulness or has required compliance with § 101.65(d) just because the word "juice" is used. Indeed, numerous juice products exist that would not comply with § 101.65(d), and the FDA has not claimed that all such products imply healthfulness and thus violate FDA regulations. Although Chobani understands that the Court is not seeking to apply § 101.65's requirements here, in ruling that "juice" implies that ECJ is healthful or more healthful than other sugar products, the Court's Order makes a finding that conflicts with FDA regulations, including § 101.65(d). Accordingly, the "healthy sugar" via "juice" theory is expressly preempted under 21 U.S.C. § 343-1(a)(5) (preempting claims arising under 21 U.S.C. § 343(r)).[6]

Reasonable Consumer Test. Nothing from Chobani's labeling or any other Chobani advertising addresses whether ECJ is a healthier form of sugar, and plaintiffs do not allege or argue otherwise. *See, e.g.*, SAC pp. 4-5; *see also* Dkt. #86, p. 2. Accordingly, Chobani's motion had no reason to apply the reasonable consumer test to the theory that consumers could be deceived into purchasing Chobani products based on a belief that ECJ is a "healthy and nutritious" form of sugar. Order at 11. Performing the reasonable consumer analysis is important because it would show that no consumer, let alone a "significant portion of the general consuming public,"[7] would purchase Chobani based on such a belief. To find for plaintiffs on this point would require the Court to conclude that a significant portion of the public (i) actually believes that there is a "healthy and nutritious" form of sugar, (ii) turns the product around and reviews the back label before purchasing it, (iii) not only reviews the Nutrition Facts Panel to determine the amount of sugars but also looks to the list of ingredient to identify the name and type of any sweeteners, (iv) reads ECJ and concludes that it is "healthy and nutritious" based

[6] Plaintiffs' counsel are well aware of the regulations governing "healthy" implied nutrient content claims and they have alleged such claims against other defendants. *See, e.g., Ogden v. Bumble Bee Foods, LLC,* No. 5:12cv1828 (Dkt. #14), ¶ 78; *Brazil v. Dole Food Co.,* No. 5:12cv1831 (Dkt. #25), ¶ 161; *Gustavson v. Wrigley Sales Co.,* No. 5:12cv1861 (Dkt. #21), ¶ 160. For this reason – and because Chobani does *not* make a "healthy" claim – it is no accident that plaintiffs failed to allege any "healthy" claim here.

[7] *See Williamson v. Reinalt-Thomas Corp.*, 2012 WL 1438812, *10 (N.D. Cal. April 25, 2012) ("The key phrases under the reasonable consumer test are 'reasonable consumer' and 'significant portion of the general consuming public'").

solely on the word "juice" (thereby assuming that a significant portion of the public thinks that juice is healthful),[8] and (v) purchases Chobani based on the healthfulness of ECJ (rather than the taste, texture, protein level, low fat content, etc.). Consumers purchasing a yogurt product with approximately 20 grams of disclosed sugars do not think or act that way.[9]

2. The Court's decision denying in part Chobani's motion to dismiss based on the primary-jurisdiction doctrine should be reconsidered in light of *Hood v. Wholesoy* and other recent court decisions. The Court's Order denies Chobani's primary-jurisdiction argument as to the ECJ claims. Order at 30. On July 12, 2013 – the same day as this Court's Order – Judge Rogers in this District issued a decision in *Hood v. Wholesoy & Co.*, ruling the exact opposite way on an identical issue. *Hood v. Wholesoy & Co.*, 2013 WL 3553979 (N.D. Cal. July 12, 2013) (deferring "to the authority and expertise of the FDA to say what the appropriate rules should be with respect to 'soy yogurt' and 'evaporated cane juice.' Rendering a decision based on what this Court believes the FDA might eventually decide on either of these issues 'would usurp the FDA's interpretive authority'"); *see also Van Atta v. General Mills, Inc.*, No. 1:12cv2815 (Dkt. #51) (D. Co. July 18, 2013) (magistrate recommendation) (claims regarding whether genetically modified ingredients may be used in food marketed as "natural" stayed in favor of the primary jurisdiction of the FDA); *Cox v. Gruma*, No. 4:12cv6502 (Dkt. #68) (N.D. Cal. July 11, 2013) (same). Chobani respectfully seeks reconsideration based on this

[8] Even the FDA in its draft, non-binding guidance did not reference any implied health claim from the "evaporated cane juice" ingredient.

[9] Finally, plaintiffs' counsel, Don Barrett, made very clear during the preliminary injunction hearing that

> [t]his is ***not*** a false advertising case . . . This is a case about a violation of a state [labeling] law . . . .

Transcript of July 11, 2013 Hearing on Plaintiffs' Motion for Preliminary Injunction (Dkt. #127 at 40:20-21 (emphasis added). Such an admission certainly calls into question the Court's conclusion in the Order that plaintiffs are suing on a "healthy sugar" false advertising theory. Moreover, it calls into question the Court's ruling regarding implied preemption, as Mr. Barrett is unambiguously admitting that his case (or at least a good deal of it) is simply an attempt to enforce labeling laws ***without*** any actual consumer deception or reliance on the alleged misbranding. Relatedly, we have never heard how, under a theory where there is no deception and no reliance (on the nonexistent deception), plaintiffs satisfy the requirement under the UCL that they have suffered "injury" and have "lost money or property" "***as a result of***" the alleged unfair competition. That is an additional basis to reconsider the Order.

new authority and the reasoning supporting it. Civil Local Rule 7-9(b)(1)-(2).

In its Order, this Court identifies the four factors relating to primary jurisdiction under *Syntek Semiconductor Co. v. Microchip Tech., Inc.*, 307 F.3d 775, 781 (9th Cir. 2002). Order at 29. In *Hood*, Judge Rogers applies those factors to the ECJ claim and concludes that the claim should be dismissed under the primary-jurisdiction doctrine. Chobani respectfully submits that a similar analysis of the *Syntek* factors should be conducted here and would yield the same result.

This Court's Order also provides that primary jurisdiction is proper "when a claim is cognizable in federal court but requires resolution of an issue of first impression, ***or*** of a particularly complicated issue that Congress has committed to a regulatory agency." Order at 30 (quoting *Syntek*, 307 F.3d at 780) (emphasis added). Although the Court concluded that this was not an issue of first impression (Order at 30), the Order does not consider whether the ECJ issue is sufficiently complicated such that it should be left to the FDA. *See* Local Rule 7-9(b)(3).

This is significant, given the Court's acknowledgement during the preliminary injunction hearing that, compared to the FDA, it does not possess expertise in the matters at issue:

> I'm . . . wondering why this type of relief isn't being sought from the FDA, which has expertise in this . . . . The FDA would know better than . . . some district court out in California that doesn't regularly handle anything regarding labeling laws and . . . regulation of food.

Transcript of July 11, 2013 Hearing on Plaintiffs' Motion for Preliminary Injunction (Dkt. #127) at 3:23-4:4.

The Court's comments are correct, as the FDA constantly reviews food ingredients and applies its regulations. This Court should not be the forum for deciding technical matters regarding the composition of different forms of sugar,[10] resolving differences in expert opinions over FDA regulations and guidance, or applying regulations that the FDA addresses on a regular basis – especially where, as here, the FDA has already received comments from industry relating

[10] There are numerous FDA regulations governing the labeling, description, and composition of various forms of sugar. *See, e.g.*, 21 C.F.R. §§ 101.4(b)(2), 101.9(c)(6)(ii), 184.1854.

to ECJ under the process firmly established in 21 C.F.R. § 10.115.

Chobani thus respectfully submits that the Court should reconsider its prior ruling and allow Chobani to file a motion for reconsideration. In the event the Court is not inclined to reconsider the Order, Chobani currently intends to file a request under 28 U.S.C. § 1292(b) to certify the primary jurisdiction and preemption rulings for interlocutory appeal based on, among other things, the conflict within this District. Chobani has already drafted that motion and is prepared to file it immediately, rather than waiting for disposition of this reconsideration motion, if either the Court or plaintiffs believe that the motions should be considered at the same time.

Respectfully submitted,

DATED: July 22, 2012

MAYER BROWN LLP
Dale J. Giali
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By: /s/ *Dale J. Giali*
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CHOBANI, INC.

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2013, I caused the foregoing **DEFENDANT CHOBANI, INC.'S REQUEST FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION AND PROPOSE ORDER THEREON** to be electronically filed with the clerk of the court. I understand that the court will provide electronic notification of and access to such filing to the counsel of record in this matter who are registered on the CM/ECF**.**

MAYER BROWN LLP
Dale J. Giali
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Dated: July 22, 2013

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