

\*\*E-Filed 5/24/2010\*\*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

ALL ONE GOD FAITH, INC.,

Plaintiff,

v.

THE HAIN CELESTIAL GROUP, INC. ET AL,

Defendants.

Case Number C 09-03517 JF (HRL)

**ORDER<sup>1</sup> GRANTING YSL'S  
MOTION TO DISMISS AND  
STAYING ACTION AS TO ALL  
REMAINING DEFENDANTS**

Re: Docket Nos. 83, 84, 86, 87, 89, 94,  
114

**I. Background**

**A. Factual and Procedural Background**

On January 13, 2010, Plaintiff All One God Faith, Inc., doing business as Dr. Bronner's Magic Soaps ("Plaintiff"), filed its third amended complaint ("TAC") alleging violations of Section 43(a) of the Lanham Act by Defendants Hain Celestial Group, Inc., Kiss my Face Corporation, and Levlad LLC (collectively, "The Hain Defendants"), Giovanni Cosmetics, Inc., Country Life, LLC, Cosway Company, Inc. ("Cosway"), YSL Beaute ("YSL") (collectively, "the Count I Defendants") and Ecocert France (SAS) and Ecocert, Inc. (collectively, "Ecocert"). Defendants<sup>2</sup> move to dismiss the TAC under the primary jurisdiction doctrine and pursuant to

<sup>1</sup> This disposition is not designated for publication in the official reports.

<sup>2</sup> On April 16, 2010, the parties stipulated to and the Court ordered the withdrawal of Levlad LLC's motion to dismiss *nunc pro tunc* in respect of the February 22, 2010 injunction

1 Fed. R. Civ. P. 12(b)(6). In addition, YSL and Cosway move to dismiss on independent grounds  
2 and Cosway also moves for a more definite statement.

3 On December 14, 2009, the Court granted Defendants' motions to dismiss Plaintiff's  
4 second amended complaint ("SAC") holding that: (1) Plaintiff has failed to exhaust  
5 administrative remedies available through the United States Department of Agriculture  
6 ("USDA"); (2) pursuant to the primary jurisdiction doctrine, it was inappropriate for this Court to  
7 interpret and impose the regulatory framework of the USDA National Organic Program ("NOP"),  
8 especially in light of the fact that the USDA itself has refused to apply the same standards to  
9 Defendants; and (3) Plaintiff has failed to state a claim under the Lanham Act because the  
10 allegations of the SAC required the Court to interpret, apply, and enforce federal regulatory  
11 standards that would negate the legislative prohibition against private actions. Order at 14, 18.  
12 The Court also concluded that Plaintiff had failed to state a Lanham Act claim against YSL  
13 because it did not allege adequately that Plaintiff's products and YSL's products are in  
14 competition. Because it was not entirely clear that the defects in the SAC could not be cured by  
15 amendment, Plaintiff was granted leave to amend.

16 The TAC does not invoke the NOP regulations explicitly. Instead, it alleges that the  
17 Count I Defendants' labeling of their products and Ecocert's certification of products as  
18 "Organic" or some derivation thereof are literally false, misleading or confusing to the  
19 consuming public because the products contain cleansing and moisturizing ingredients derived  
20 from conventional agricultural material, contain petrochemicals, or both. TAC ¶¶ 55-103.  
21 Plaintiff alleges that consumer survey research reflects the beliefs and expectations of consumers  
22 that personal care products labeled as organic will not contain synthetic compounds including  
23 preservatives, *id.* ¶ 34; cleansing or moisturizing agents derived from conventionally-produced  
24 agricultural materials, *id.* ¶ 35; or petrochemicals, *id.* ¶ 37. All of these alleged consumer  
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26 entered by the United States Bankruptcy Court for the District of Delaware in *In re: Natural*  
27 *Products Group, LLC, et al*, Case No. 10-10239 (BLS) (Defendant Levlad LLC's parent  
28 company).

1 expectations were alleged in the SAC, which expressly attributed these expectations to NOP  
2 criteria. MTD at 4 (asserting that “Plaintiff has merely switched the alleged source of consumer  
3 expectations from NOP criteria to consumer research surveys”).

4 Plaintiff also amended its allegations with respect to its alleged competition with YSL in  
5 the marketplace. Plaintiff now asserts that its “liquid soaps and moisturizing lotions are available  
6 for sale directly to consumers, on the Internet, through Dr. Bronner’s website,” while YSL’s  
7 products “are available for sale directly to consumers online, on the Internet, through a number of  
8 websites, including Sears and Fragrancenet.com, among others.” *Id.* ¶ 54. Plaintiff and YSL thus  
9 allegedly “compete for the business of consumers searching online for ‘Organic’ liquid body  
10 cleansers and moisturizing lotions/creams.” *Id.*

11 The day after it filed the TAC, Plaintiff also filed an administrative complaint with the  
12 USDA. In its administrative complaint, Plaintiff alleged that Defendants<sup>3</sup> do not comply with the  
13 NOP regulations in the labeling of their personal care products. Request for Judicial Notice  
14 (“RJN”), Ex. A (Plaintiff’s Administrative Complaint).<sup>4</sup> It also contended that USDA has  
15 jurisdiction to impose mandatory regulation of the labeling as “organic” of personal care  
16 products and that Defendants’ personal care products – because they are consumed by humans,  
17 marketed in the United States, and contain agricultural ingredients – are themselves agricultural  
18 products within the meaning of the OFPA and NOP regulations. *Id.* at 3, 6.

## 19 **B. Regulatory Background**

### 20 **1. The Organic Foods Products Act and the NOP’s production and labeling 21 standards for agricultural products**

22 The Organic Food Products Act of 1990, 7 U.S.C. §§ 6501 *et seq.* (“OFPA”) authorized  
23 the USDA to implement the NOP, providing for establishment and enforcement of standards for

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25 <sup>3</sup> The respondent companies named in the administrative complaint include the same  
26 Defendants named in the instant action, as well as several additional companies.

27 <sup>4</sup> Plaintiff does not oppose any of Defendants’ requests for judicial notice. The Court  
28 takes judicial notice of the administrative complaint as it is a matter of public record. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001), citing Fed. R. Evid. 201.

1 labeling agriculture and food products as “organic.” The purpose of the statute is “(1) to  
2 establish national standards governing the marketing of certain agricultural products as  
3 organically produced products; (2) to assure consumers that organically produced products meet  
4 a consistent standard; and (3) to facilitate interstate commerce in fresh and processed food that is  
5 organically produced.” 7 U.S.C. §6501. The NOP was established in 2000. *See* National  
6 Organic Program, 65 Fed. Reg. 80,548 (Dec. 21, 2000) (codified as 7 C.F.R. pt. 205) (“the Final  
7 Rule”). The program includes standards for growing and producing organic agricultural  
8 products, including grains, fruits, vegetables, livestock, etc. *See* 7 C.F.R. Part 205, Subpart C.  
9 Among other things, the regulations govern use of the term “organic” in the labeling and  
10 marketing of such agricultural and food products. *See* 7 C.F.R. Part 205, Subpart D. The statute  
11 requires that agricultural products labeled as “organic” be certified as meeting the requirements  
12 of the regulations by a certifying agent accredited by the USDA, and forbids the labeling as  
13 “organic” products that have not been so certified. 7 U.S.C. §§ 6514(a), 6515, 6519. The NOP  
14 mandates that govern the production, marketing, and labeling of “organic” products are complex,  
15 detailed, and specific.

## 16 **2. Enforcement of organic product standards**

17 In enacting the OFPA, Congress created an exclusive federal mechanism for evaluating  
18 and approving synthetic materials and for challenging decisions made by the USDA pursuant to  
19 that mechanism. It expressly declined to create a private right of action to enforce the statute or  
20 its implementing regulations. In order to create a consistent national standard for organic  
21 products, Congress authorized the USDA to create a National List of approved and prohibited  
22 ingredients that may or may not be permitted in the production, handling, and processing of  
23 organic products. *See* 7 U.S.C. § 6517. Congress created the National Organic Standards Board  
24 (“NOSB”) to advise the Secretary of Agriculture with respect to the ingredients that should be  
25 approved or prohibited on the National List. *See* 7 U.S.C. § 6518. It also mandated that the  
26 NOSB “establish procedures under which persons may petition the [NOSB] for the purpose of  
27 evaluating substances for inclusion on the National List.” 7 U.S.C. § 6518(n).

1 The statute requires the USDA to establish an “expedited administrative appeals  
 2 procedure” that allows a person to appeal any action taken under the federal program by the  
 3 USDA or its certifying agents if that action “(1) adversely affects such person; or (2) is  
 4 inconsistent with the organic certification program established under this chapter.” 7 U.S.C. §  
 5 6520(a). There also is a judicial remedy for persons dissatisfied with a “final decision” of the  
 6 USDA. *See* 7 U.S.C. § 6520(b) (authorizing the appeal of a final decision by the Secretary to the  
 7 United States District Court). Apart from this limited private remedy, only the federal  
 8 government is authorized to initiate enforcement of the statute. *See* 7 U.S.C. § 6519(a)  
 9 (establishing that “any person who knowingly sells or labels a product as organic, except in  
 10 accordance with this chapter, shall be subject to a civil penalty of not more than \$10,000).

11 The Final Rule provides that “[t]he NOP is ultimately responsible for the oversight and  
 12 enforcement of the program, including...cases of fraudulent or misleading labeling.” Final Rule  
 13 at 80,557. The USDA has indicated that it accepts all consumer and business complaints  
 14 regarding alleged misuse of the word “organic,” and it has rejected private enforcement actions.  
 15 According to the Final Rule,

16 [a]nyone may file a complaint, with USDA, an [State Organic Program’s] SOP’s  
 17 governing State official, or certifying agent, alleging violation of the Act or these  
 18 regulations. Certifying agents, SOP’s governing State officials, and USDA will  
 19 receive, review, and investigate complaints alleging violations of the Act or these  
 20 regulations. . .Citizens have no authority under the NOP to investigate complaints  
 21 alleging violation of the Act or these regulations...Only USDA may bring an  
 22 action under 7 U.S.C. § 6519.

23 *Id.* at 80,627; *see also id.* at 80,556 (noting, in a discussion of common law nuisance claims for  
 24 pesticide drift onto organic farms, that the OFPA “itself does not provide for the right to bring  
 25 suit as a Federal cause of action, and [the USDA] could not grant it through this regulation”).

### 26 **3. Application of the OFPA to personal care products**

27 The OFPA defines the term “agricultural product” as “any agricultural commodity or  
 28 product, whether raw or processed, including any commodity or product derived from livestock  
 that is marketed in the United States for human or livestock consumption.” 7 U.S.C. § 6502(1).

The statute provides further that “no person may affix a label to, or provide other market

1 information concerning, an agricultural product if such label or information implies, directly or  
2 indirectly, that such product is produced and handled using organic methods, except in  
3 accordance with this chapter.” *Id.* at § 6505(a)(1)(B).

4 At the end of 2000, during deliberations on the regulations, commenters “asked that the  
5 NOP include in the final rule certification standards for cosmetics, body care products, and  
6 dietary supplements.” Final Rule, 80,557. The USDA concluded, however, that “[t]he ultimate  
7 labeling of cosmetics, body care products, and dietary supplements...is outside the scope of these  
8 regulations.” *Id.*

9 In May 2002, the USDA issued a “Policy Statement on National Organic Program Scope”  
10 indicating that because cosmetics and body care products may “contain agricultural products the  
11 producers and handlers of such products, classes of products and production systems are eligible  
12 to seek certification under the NOP.” *See* Hain Defendants’ Request for Judicial Notice in  
13 Support of Motion to Dismiss the SAC (“Def. RJN SAC”), Ex. H.<sup>5</sup> At the same time, it clarified  
14 that NOP labeling standards were not mandatory for personal care and cosmetic products, but  
15 that manufacturers of such products voluntarily could seek USDA certification and only then  
16 would be subject to the NOP standards for organic labeling.

17 In April 2004, the USDA changed its position, declaring that producers of personal care  
18 and cosmetic products could not seek even voluntary participation in the NOP. In a Guidance  
19 Statement, the USDA stated that the “OFPA does not extend” to products over which “USDA  
20 has no regulatory authority,” including such products as “personal care products.” Def. RJN  
21 SAC, Ex. I at 2-3. A few months later, the USDA again changed its position and suspended the  
22 Guidance Statement, thereby once again permitting qualified personal care product handlers  
23 voluntarily to certify and participate in the NOP.

24 The USDA issued its most recent guidance on the application of NOP standards to  
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26 <sup>5</sup> The Court took judicial notice of Defendants’ Exhibits A-M in its order dismissing  
27 Plaintiff’s SAC. These documents remain a part of the record on this motion.

1 personal care products in April 2008. USDA Guidance Statement, “Cosmetics, Body Care  
2 Products and Personal Care Products.” Def. RJN SAC, Ex. B. It confirmed again that producers  
3 and handlers of personal care products may seek USDA certification:

4 If a cosmetic body care product or personal care product contains or is made up of  
5 agricultural ingredients, and can meet the USDA/NOP organic production,  
6 handling, processing and labeling standards, it may be eligible to be certified  
7 under the NOP regulations...Any cosmetic, body care product or personal care  
8 product that does not meet the production, handling, processing, labeling, and  
9 certification standards described above, may not state, imply or convey in any way  
10 that the product is USDA-certified organic or meets the USDA organic standards.

11 *Id.* At the same time, the USDA again made clear that the NOP regulatory regime does not  
12 govern the labeling of personal care products unless the labeling itself implies certification under  
13 the specific NOP standards:

14 USDA has no authority over the production and labeling of cosmetics, body care  
15 products and personal care products that are not made up of agricultural  
16 ingredients or do not make any claims to meeting USDA organic standards.  
17 Cosmetics, body care products, and personal care products may be certified to  
18 other, private standards and be marketed to those private standards in the United  
19 States. These standards might include foreign organic standards, eco-labels, earth  
20 friendly, etc. USDA’s NOP does not regulate these labels at this time. *Id.*

21 Plaintiff contends that because a product that meets the NOP standards may be eligible to carry  
22 the USDA label, products that do not meet the standards may not carry the USDA label and “may  
23 not state, imply or convey in any way that the product is USDA-certified organic or meets the  
24 USDA organic standards.” *Id.*

25 Finally, in March 2009, the NOSB adopted a discussion draft recommendation urging  
26 USDA to amend its existing regulations to (1) “assur[e] consumers that the federal government is  
27 policing [organic personal care product] claims”; and (2) “allow[] for the development of a  
28 complete federal organic cosmetic program.” *See* Def. RJN SAC, Ex. K (March 23, 2009,  
NOSB Discussion Document). On December 10, 2009, after the Court issued its order  
dismissing the SAC, the NOSB formally recommended that the existing rules be amended to  
provide that NOP standards for labeling a product as “organic” or “made with organic

1 [ingredient]" apply to personal care products. D. RJN TAC, Ex. B<sup>6</sup> (NOSB Formal  
2 Recommendation to the NOP). On April 23, 2010, Miles McEvoy, Deputy Administrator of the  
3 NOP, issued an official memorandum stating that the NOP will: (1) communicate with the Food  
4 and Drug Administration (FDA) and the Federal Trade Commission (FTC) regarding the use of  
5 the term "organic" in personal care products in order to achieve a "comprehensive approach"  
6 across agencies; (2) obtain information regarding organic labeling of personal care products in  
7 the marketplace; and (3) "consider the recommendations of the NOSB on rulemaking and take  
8 them under advisement for future incorporation." Request for Judicial Notice (Dkt. 117), Ex. A.

## 9 II. Legal Standard

### 10 A. Motion to Dismiss pursuant to Rule 12(b)(6)

11 Dismissal under Fed. R. Civ. P. 12(b)(6) "is appropriate only where the complaint lacks a  
12 cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendonado v.*  
13 *Centinela Hosp. Medical Center*, 521 F.3d 1097, 1104 (9th Cir. 2008). For purposes of a motion  
14 to dismiss, the plaintiff's allegations are taken as true, and the court must construe the complaint  
15 in the light most favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). At  
16 the same time, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need  
17 detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to  
18 relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a  
19 cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal  
20 citations omitted). Thus, a court need not accept as true conclusory allegations, unreasonable  
21 inferences, legal characterizations, or unwarranted deductions of fact contained in the complaint.  
22 *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-755 (9th Cir. 1994). "[W]here the well-  
23 pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the  
24 complaint has alleged-but it has not 'show[n]'- 'that the pleader is entitled to relief.'" *Ashcroft v.*

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26 <sup>6</sup> Plaintiff does not object to Defendants' requests for judicial notice in support of their  
27 instant motion to dismiss. The Court will take judicial notice of the NOSB's formal  
28 recommendation as it is a public record. Fed. R. Evid. 201(b).



1 *Iqbal*, 129 S.Ct. 1949, 1590 (2009) (quoting Fed. R. Civ. P. 8(a)(2)).

2 Leave to amend must be granted unless it is clear that the complaint's deficiencies cannot  
3 be cured by amendment. *Lucas v. Department of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995).  
4 When amendment would be futile, however, dismissal may be ordered with prejudice. *Dumas v.*  
5 *Kipp*, 90 F.3d 386, 393 (9th Cir. 1996).

### 6 **III. Discussion**

#### 7 **A. Primary Jurisdiction Doctrine**

8 The primary jurisdiction doctrine does not implicate subject-matter jurisdiction as such,  
9 but it is a “prudential doctrine under which courts may, under appropriate circumstances,  
10 determine that the initial decisionmaking responsibility should be performed by the relevant  
11 agency rather than the courts.” *Syntek Semiconductor Co., Ltd v. Microchip Technology, Inc.*,  
12 307 F.3d 775, 780 (9th Cir. 2002). The primary jurisdiction doctrine applies when both the court  
13 and an administrative agency have jurisdiction over the same matter. *United States v. Western*  
14 *Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956). Four factors traditionally are considered by the court  
15 in applying the doctrine: “(1) the need to resolve an issue that (2) has been placed by Congress  
16 within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a  
17 statute that subjects an industry or activity to a comprehensive regulatory authority that (4)  
18 requires expertise or uniformity in administration.” *Syntek Semiconductor Co., Ltd*, 307 F.3d at  
19 781.

20 In its previous order, the Court determined that the USDA has jurisdiction over personal  
21 care products and that the primary jurisdiction doctrine is applicable. Order at 11-12 (holding  
22 that while to date the USDA has declined to exercise its authority with respect to the labeling of  
23 organic personal care products, it has asserted jurisdiction over such products in other ways, such  
24 as allowing producers and handlers of such products, including Plaintiff, to seek USDA  
25 certification under the NOP). Plaintiff, in an about face from its position on Defendants’  
26 previous motion to dismiss, but consistent with the Court’s order, now contends in its  
27 administrative complaint that the USDA has jurisdiction over the labeling of organic personal  
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1 care products. RJN, Ex. A at 3, 6. Plaintiff's "extensive campaign to try to convince the [agency]  
2 to act on [defendant's] supposed misstatements and violations demonstrates that [plaintiff]  
3 understood that this subject fell within the [agency's] domain." *PhotoMedex, Inc. v. Irwin*, 601  
4 F.3d 919, 930 (9th Cir. 2010). Moreover, the NOSB's formal recommendation to the NOP – that  
5 the existing rules be amended to make clear that the NOP standards for labeling a product as  
6 "organic" apply to personal care products – presupposes that the USDA has jurisdiction over the  
7 products involved. RJN TAC, Ex. B

8 Plaintiff currently has an active administrative action pending before the USDA. While  
9 the TAC does not invoke the NOP regulations explicitly, it asserts essentially the same  
10 allegations found in Plaintiff's administrative complaint with respect to Defendants' labeling of  
11 personal care products. It also requests that the same product standards identified in the SAC be  
12 imposed on Defendants by this Court. Defendants contend that if the Court does not dismiss or  
13 stay the current action, it will be forced to evaluate how the "alleged consumer understandings  
14 line up with the existing regulations" and potentially "impose product standards that conflict  
15 with those selected by Congress" pursuant to the OFPA. MTD at 6-7, *comparing* TAC ¶¶ 33-44  
16 (alleging that reasonable consumer expect that organic products have *no* synthetic ingredients or  
17 petrochemical compounds) (emphasis added), *with* 7 U.S.C. § 6510 and 7 C.F.R. § 205.301(b)  
18 (authorizing the use of some synthetic ingredients in "organic" products); *compare* RJN TAC,  
19 Ex. D (Q&A regarding petrochemicals) (noting that the National List, which contains materials  
20 eligible as a class for use in organic products, may include petrochemical-based  
21 ingredients); *with* TAC ¶ 35 (stating that survey research shows that consumers believe that a  
22 product labeled "organic," "organics," "100% Organic Active Ingredients," "Pure Organic  
23 Technology," or "Made with Organic Ingredients" does not contain cleansing or moisturizing  
24 agents derived from conventionally-produced agricultural materials ); 7 U.S.C. § 6510(a)(4)  
25 (allowing up to 5% non-organic content in an "organic" product) and 7 C.F.R. § 205.301(c)  
26 (permitting products labeled "made with organic ingredients" to contain up to 30% non-organic  
27 agricultural content).

1 Defendants argue persuasively that the TAC necessarily would require the Court to  
2 interpret and apply the NOP regulatory framework when determining questions such as what  
3 “organically produced,” “nonagricultural,” or “synthetic” mean. 7 C.F.R. § 205.2 (defining these  
4 and other terms utilized in NOP regulatory language). Each of these terms, as defined by the  
5 USDA, is utilized by Plaintiff in the TAC to describe consumer expectations, the science of  
6 manufacturing personal care products, and the prayer for relief’s requested injunction. Because  
7 the USDA’s enforcement of NOP standards governing personal care products has been  
8 recommended formally by the NOSB and currently is under the NOP’s review, and because  
9 Plaintiff has an active administrative action pending before the USDA, it would be inappropriate  
10 for this Court to adjudicate Plaintiff’s Lanham Act claim and impose a potentially conflicting set  
11 of standards. *See Shipley v. United States*, 608 F.2d 770, 775 (9th Cir. 1979) (holding that  
12 “where a pending administrative proceeding might render the relief sought in district court  
13 unnecessary, it is proper for the district court to stay the case before it pending the outcome of the  
14 administrative proceeding”); *see also Schering-Plough Healthcare Prods., Inc. v. Schwarz*  
15 *Pharma, Inc.*, 586 F.3d 500, 508-09 (7th Cir. 2009) (citations omitted) (holding that “[t]he FDA  
16 should be given a chance to opine on the proper labeling before a Lanham Act suit is filed...since  
17 it has more experience with consumers’ understanding of drug labels than judges do”).

18 “Whether to stay or dismiss without prejudice a case within an administrative agency's  
19 primary jurisdiction is a decision within the discretion of the district court.” *Davel Commc’n,*  
20 *Inc. v. Qwest Corp.*, 460 F.3d 1075, 1091 (9<sup>th</sup> Cir. 2006), citing *Reiter v. Cooper*, 507 U.S. 258,  
21 268-69, 113 S.Ct. 1213, 122 L.Ed.2d 604 (1993). “[W]here the court suspends proceedings to  
22 give preliminary deference to an administrative agency but further judicial proceedings are  
23 contemplated, then jurisdiction should ordinarily be retained via a stay of proceedings, not  
24 relinquished via a dismissal.” *Id.*, citing *N. Cal. Dist. Council of Hod Carriers, Bldg. & Constr.*  
25 *Laborers, AFL-CIO v. Opinski*, 673 F.2d 1074, 1076 (9th Cir.1982). Defendants argue that  
26 dismissal is more appropriate than a stay because any questions remaining following the  
27 disposition of the administrative complaint should proceed under the review standards of the  
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1 Administrative Procedure Act, not before this Court under the Lanham Act. However, without  
 2 knowing how the USDA will proceed regarding the NOSB's recommendation and Plaintiff's  
 3 administrative complaint, the Court cannot presume that there will be nothing left for it to decide.  
 4 Accordingly, the Court will exercise its discretion to stay the case pending further action by the  
 5 USDA.<sup>7</sup>

6 **B. YSL's independent motion to dismiss pursuant to Rule 12(b)(6)**

7 Notwithstanding the principles of primary jurisdiction, YSL contends that the TAC  
 8 should be dismissed as to YSL on the separate basis that the facts as alleged are insufficient to  
 9 support a Lanham Act claim. To state a claim for false advertising under the Lanham Act, a  
 10 plaintiff must allege that "(1) the defendant made a false statement either about the plaintiff's or  
 11 its own product; (2) the statement was made in commercial advertisement or promotion; (3) the  
 12 statement actually deceived or had the tendency to deceive a substantial segment of its audience;  
 13 (4) the deception is material; (5) the defendant caused its false statement to enter interstate  
 14 commerce; and (6) the plaintiff has been or is likely to be injured as a result of the false  
 15 statement, either by direct diversion of sales from itself to the defendant, or by a lessening of  
 16 goodwill associated with plaintiff's product." *Newcal Industries, Inc., v. Ikon Office Solution*,  
 17 513 F.3d 1038, 1052 (9th Cir. 2008), quoting *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304  
 18 F.3d 829, 835 n. 4 (9th Cir. 2002). "For the purposes of the Lanham Act, 'competitors' are  
 19 'persons endeavoring to do the same thing and each offering to perform the act, furnish the  
 20 merchandise, or render the services better or cheaper than his rival.'" *New.Net v. Lavasoft*, 356  
 21 F.Supp.2d 1090, 1116 (C.D. Cal. 2004), citing *Kournikova v. General Media Communications*,  
 22 *Inc.*, 278 F.Supp.2d 1111, 1117 (C.D. Cal. May 2, 2003). "They are parties vying for the same  
 23 dollars from the same consumer group." *Id.*

24 As it did in its previous motion to dismiss, YSL claims that Plaintiff fails to allege that its  
 25 products compete directly with YSL's. In its previous pleading, Plaintiff did not allege that its

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 27 <sup>7</sup> The Court does not address the merits of Cosway's motions to dismiss and for a more  
 28 definite statement. Instead, the motions will be terminated without prejudice in light of the stay.

1 products could be found in the same store or even the same state as YSL's. The Court declined  
2 to infer that merely because Plaintiff and YSL sell cosmetic products, both of which are labeled  
3 as organic, they compete directly with each other. The Court also noted that Plaintiff did allege  
4 that the products of other Defendants were "typically sold in the same sections, and often on the  
5 same shelves, of the same retail outlets, including grocery stores, natural food stores, drug stores,  
6 and other outlets," SAC ¶ 83, and on the same websites. *Id.* ¶ 84.

7 Plaintiff now alleges that its products and YSL's both are sold on the Internet and that in  
8 turn they "compete for the business of consumers searching online for 'Organic' liquid body  
9 cleansers and moisturizing lotions/creams." TAC ¶ 54. These newly alleged facts improve little  
10 upon Plaintiff's previous allegations. The fact that Plaintiff and YSL both sell their personal care  
11 products on the Internet does not mean that they are in direct competition. Plaintiff claims in its  
12 opposition papers that "when consumers search the internet for organic products those search  
13 results will very likely display web sites that contain both Dr. Bronner's and YSL Beaute's  
14 products," Opposition to YSL at 5, but the TAC itself contains no such allegation. Even in its  
15 opposition papers, Plaintiff only goes so far as to claim that it is *very likely* that such a search  
16 would yield both Plaintiff and YSL products. *See contra Kournikova*, 278 F.Supp.2d at 1117  
17 (holding that the parties were competitors where they both sold merchandise specifically  
18 featuring Anna Kournikova over the internet, as well as in magazines and stores). "[W]here the  
19 well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct  
20 the complaint has alleged-but it has not 'show[n]'- 'that the pleader is entitled to relief.'" *Iqbal*,  
21 129 S.Ct. at 1950, quoting Fed. R. Civ. P. 8(a)(2).

22 The Court's previous order offered explicit detailed comments with respect to the  
23 deficiencies in Plaintiff's Lanham Act claim against YSL. It appears that Plaintiff cannot cure  
24 these deficiencies consistent with the requirements of Fed. R. Civ. P. 11. Accordingly, the Court  
25 will grant YSL's motion to dismiss without leave to amend.

#### 26 IV. ORDER

27 Good cause therefore appearing, the instant action will be STAYED as to Defendants The  
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1 Hain Celestial Group, Inc, Kiss My Face Corporation, Levlad, LLC, Giovanni Cosmetics, Inc.,  
2 Cosway, Ecocert, and Country Life, Inc. YSL's motion to dismiss will be GRANTED, without  
3 leave to amend. A case management conference to determine the progress of the administrative  
4 proceedings before the USDA is hereby scheduled for September 10, 2010.

5 **IT IS SO ORDERED.**

6 DATED: 5/24/2010

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9 JEREMY FOCHEL  
10 United States District Judge\_\_

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