City Attorney Dennis Herrera News Release

For Immediate Release:
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Herrera seeks dismissal of Monster Energy's lawsuit to block S.F. City Attorney investigation

S.F. City Attorney blasts Monster's 'frivolous' attempt to 'avoid accountability for recklessly targeting children' in marketing drinks known to pose health risks

SAN FRANCISCO (June 3, 2013)—City Attorney Dennis Herrera today moved to dismiss a lawsuit brought by Monster Beverage Corporation that seeks a federal court order to halt Herrera's investigation into the company's marketing of highly-caffeinated energy drinks to children as young as six years of age. Herrera's Consumer Protection Unit began investigating Monster's business and marketing practices last October in light of mounting scientific consensus that its energy drinks pose potentially serious health risks, particularly to young people. In the midst of what the San Francisco City Attorney's Office believed to be good faith settlement negotiations with Monster to address the City Attorney's concerns, the company abruptly sued the City Attorney in U.S. District Court in Riverside, Calif. on April 29.

In asking Judge Virginia A. Phillips to dismiss Monster's civil action, Herrera described the case as "frivolous" and "a barely disguised attempt to forum shop and to preemptively litigate issues properly considered in the context of the City Attorney's pending state-court action." Herrera sued the Corona, Calif.-based Monster on May 6, 2013 in San Francisco Superior Court for alleged violations of California consumer protection law that include mislabeling its products as dietary supplements, selling adulterated and unsafe products, and using misleading, deceptive, and unfair marketing practices to target children as young as age six.

"Incredibly, Monster Energy is asserting a constitutional right to not only peddle its potentially dangerous products to young children and adolescents, but to be free from investigation for illegal conduct in doing so," said Herrera. "Monster's federal lawsuit is a baseless and cynical ploy to create a legal sideshow, force the City Attorney to litigate in an inconvenient forum in Southern California, and avoid accountability for recklessly targeting children in its marketing of drinks known to pose health and safety risks to young people."

[MORE]

Immediately prior to Monster filing suit, Herrera's office was seeking to negotiate a voluntary agreement with the company to end an array of marketing practices aimed at children and youth, including their promotion of Monster Energy drinks at schools and at school-sponsored sporting events. Evidence of actionable marketing tactics uncovered in Herrera's investigation include a "Monster Army" social networking community with children as young as six years of age, and a "Monster Energy Drink Player of the Game" series, which photographs high school athletes holding twin four-packs—eight 16-ounce cans, containing 128 ounces of highly-caffeinated Monster products. At 10 mg of caffeine per ounce, the photos feature high school athletes, including minors, displaying more than 12-times the generally recommended daily maximum of caffeine for adolescents.

Last month, the U.S. Food and Drug Administration announced its own investigation into the safety of added caffeine in food products—noting "particularly its effects on children and adolescents"—in response to a growing trend in which beverage and food manufacturers like Monster are adding caffeine to their products. Herrera had joined 18 scientists and public health experts in March to urge the FDA to take such action to protect children and adolescents, citing FDA data that consumption of Monster Energy had been implicated in at least five reported deaths. Emergency room visits related to energy drink consumption have spiked dramatically in recent years, according to the U.S. Department of Health and Human Services' Drug Abuse Warning Network statistics cited in the letter, showing a nearly 14-fold increase in medical events for which emergency invention was sought—from 1,494 instances in 2005, to 20,783 in 2011.

The case is: *Monster Beverage Corporation v. Dennis Herrera*, U.S. District Court, Central District of California, Eastern Division, CV-13-00786, filed April 29, 2013. The lawsuit and all supporting documentation in the case are available on the San Francisco City Attorney's website at: http://www.sfcityattorney.org.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

MONSTER BEVERAGE CORPORATION, a Delaware Corporation and MONSTER ENERGY COMPANY, a Delaware Corporation,

Plaintiffs,

vs.

DENNIS HERRERA, in his official capacity as City Attorney of San Francisco,

Defendant.

Case No. ED CV-13-00786 VAP (OPx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CITY ATTORNEY DENNIS HERRERA'S MOTION TO DISMISS

Hearing Date: August 19, 2013
Time: 2:00 p.m.
Judge: Hon. Virginia A. Phillips
Place: Courtroom 2

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INTRODUCTION

Plaintiffs Monster Beverage Corporation and Monster Energy Corporation (collectively, "Monster") ask this Court to enjoin Defendant San Francisco City Attorney Dennis Herrera ("City Attorney") from investigating whether Monster sells an unsafe product and uses misleading and unfair marketing practices in violation of California law. Monster also asks this Court to enjoin the City Attorney from performing his legislatively-intended role in enforcing California's consumer protection laws. The City Attorney now moves to dismiss Monster's case because Monster's claims are frivolous, and represent a barely disguised attempt to forum shop and to preemptively litigate issues properly considered in the context of the City Attorney's pending state-court action.

As an initial matter, this Court has no jurisdiction over this case because Monster has suffered no injury, as Article III requires. Monster's Complaint contains nothing more than dressed-up assertions of annoyance at the City Attorney's investigation and settlement offer. But annoyance is not a legally cognizable injury. The City Attorney's actions have not imposed any legal obligations on Monster or subjected it to any penalties. Indeed, Monster remains free to reject the City Attorney's demands and conduct its business as it sees fit, subject only to the requirements of existing laws that Monster does not challenge here.

Monster's complaint also must be dismissed under the *Younger* abstention doctrine. That doctrine "embodies a strong federal policy against federal-court interference with pending state judicial proceedings, absent extraordinary circumstances." *Beltran v. State of California*, 871 F.2d 777, 781 (9th Cir. 1988) (quoting *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982)). The relief Monster seeks here interferes with a pending state court civil enforcement action in exactly the way *Younger* prohibits.

Even if Monster could overcome these jurisdictional hurdles, the Court should decline to exercise jurisdiction over this declaratory judgment action. This is an

anticipatory suit that Monster brought in bad faith in a race to the courthouse, designed to force the City Attorney to litigate in an inconvenient forum. Declaratory judgment is also not appropriate here because Monster asks the Court to adjudicate matters that are merely duplicative of those at issue before the state court.

Finally, even if the Court did exercise jurisdiction, each of Monster's claims fails as a matter of law. Monster's claims brought under 42 U.S.C. § 1983 are groundless, and in any case they all fail under the *Noerr-Pennington* doctrine because the City Attorney's pre-litigation conduct is protected by the Right to Petition. *Sosa v. DirectTV, Inc.*, 437 F.3d 923, 933-36 (9th Cir. 2006). Monster's preemption claim is also baseless. California law *incorporates* – rather than conflicts with – federal law. Monster's complaint is a brazen attempt to stop a lawful investigation by preemptively initiating litigation in an inconvenient forum. It must be dismissed.

BACKGROUND

California law prohibits "unlawful, unfair or fraudulent business act[s]," and "unfair, deceptive, untrue, or misleading advertising." Cal. Bus. & Prof. Code § 17200. The California Legislature has given the San Francisco City Attorney the authority to investigate and bring civil enforcement actions against any company that has engaged in unlawful, unfair or deceptive business practices. *See id.* § 17204.

In October 2012, the City Attorney began investigating whether Monster sells energy drinks that are adulterated and mislabeled in violation of California law, and whether Monster uses misleading and unfair marketing practices to promote its energy drinks, particularly to children and adolescents who cannot safely consume them. Complt. Exs. C, F. The City Attorney invited Monster to provide evidence demonstrating the safety of its energy drinks, and to substantiate its advertising claims. Complt. Ex. C at 42. Monster responded by providing scientific studies that Monster claimed support the safety of its product. Monster declined to substantiate its advertising claims, asserting that most of its statements were mere "puffery." Complt. Ex. D at 59.

After considering the information provided by Monster, the opinions of numerous scientific experts, and additional information, the City Attorney sent Monster a confidential letter on March 29, 2013 to explain his outstanding concerns about Monster's business practices, and to give Monster notice that the City Attorney would file suit if Monster did not respond to his concerns. Compl. Ex. F. The letter explained that because of their high caffeine levels, Monster's energy drinks are not generally recognized as safe ("GRAS"), as required by California law. As numerous scientific experts have concluded "there is no general consensus among qualified experts that the addition of caffeine in the amounts used in energy drinks is safe under its conditions of intended use as required by the GRAS standard, particularly for vulnerable populations such as adolescents. On the contrary, there is evidence in the published scientific literature that the caffeine levels in energy drinks pose serious potential health risks, including increased risk of serious injury or even death." *See* Compl. Ex. D at 65-78. In addition, the letter explained that Monster mislabeled its product as a dietary supplement, and markets its products in a deceptive and unfair manner in violation of California law. Compl. Ex. F. Specifically, Monster markets its products to children and adolescents who cannot safely consume them, and promotes levels of consumption that are unsafe for anyone. *Id.* at 83, 85. Monster also markets its products using alcohol and drug references despite the dangers of consuming energy drinks with alcohol, and makes misleading claims about the benefits of consuming its products. *Id.* at 84-86.

On April 17, 2013, after receiving the City Attorney's letter, Monster asked for an in-person meeting and represented that it was willing to discuss a potential settlement to address the City Attorney's concerns. (Gessner Dec. ¶ 6.) The City Attorney agreed to meet with Monster, but asked that the meeting occur as soon as possible in April. (*Id.* ¶ 7.) At Monster's request, the meeting was scheduled for May 2, 2013 after Monster's counsel represented that they were too busy with other matters to attend earlier. (*Id.*) Also at Monster's request, the City Attorney sent a detailed proposal containing the

terms upon which the City Attorney proposed to resolve the matter without pursuing litigation. (*Id.* ¶¶ 6, 9.) In reliance on Monster's representations that it looked forward to a "genuinely productive meeting," and in a good faith effort to settle the matter without litigation, the City Attorney refrained from filing suit in advance of the May 2 meeting. (*Id.* ¶ 11.) Three days before the scheduled meeting and without advance notice to the City, Monster filed this declaratory relief action. (*Id.* ¶ 12.)

In this action, Monster seeks a declaratory judgment that the City Attorney's investigation and settlement proposal (1) are preempted by federal law, (2) violate the First Amendment, (3) are void for vagueness, and (4) violate the Commerce Clause of the United States Constitution. Monster seeks to enjoin the City Attorney "from enforcing, or directing the enforcement of, the provisions of Cal. Bus. & Prof. Code §§ 17200 and 17500" with respect to Monster's products. Complt. at 27.

On May 6, 2013, the City Attorney, exercising his authority under Section 17204 of the California Business and Professions Code, filed a complaint against Monster on behalf of the People of California in San Francisco Superior Court. *See* Request for Judicial Notice ("RJN") Ex. A. The City Attorney's complaint alleges that Monster mislabeled its products as dietary supplements, sells adulterated, unsafe products, and uses misleading, deceptive, and unfair marketing practices to induce consumers to purchase Monster energy drinks. *Id.* The complaint seeks declaratory and injunctive relief, restitution to the customers Monster's practices harmed, and civil penalties. *Id.* The complaint does not request *any* of the relief Monster alleges that the City Attorney will seek against it. Rather, the complaint leaves the specific terms of injunctive relief for determination by the court after its evaluation of the parties' claims and defenses.

LEGAL STANDARD

The City Attorney brings this motion pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Under Rule 12(b)(1), a complaint must be dismissed where the court lacks subject matter jurisdiction. When considering a motion under Rule 12(b)(1), a court may consider extrinsic evidence and, if the evidence is

disputed, may weigh the evidence and determine the facts concerning the court's jurisdiction. *Augustine v. United States,* 704 F.2d 1074, 1077 (9th Cir. 1983).

Under Rule 12(b)(6), a complaint may survive a motion to dismiss only if, taking all well-pleaded factual allegations as true, it contains "enough facts to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint cannot survive if it appears that recovery is very remote and unlikely. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

DISCUSSION

I. MONSTER'S COMPLAINT FAILS TO SATISFY ARTICLE III.

The Court does not have jurisdiction over this case because Monster lacks standing to bring its claims, and its claims are not ripe. *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). To satisfy federal standing requirements, Monster must demonstrate that it has suffered an "injury-in-fact" to a legally protected interest that is not "conjectural" or "hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Likewise, to demonstrate ripeness, Monster must demonstrate that it has suffered an injury that is concrete and not speculative. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). Thus, under both the standing and ripeness doctrines, Monster's case must be dismissed unless it can show it has suffered an injury that is not speculative, hypothetical or contingent on future events. *Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009). In addition, because Monster seeks only declaratory and injunctive relief, "there is a further requirement that [Monster] show a very significant possibility of future harm." *San Diego County Gun Rights Committee,* 98 F.3d at 1126.

Monster fails to overcome either of these jurisdictional hurdles, because it has not suffered *any* injury. Monster alleges that it "*would*" suffer consequences *if* it were required to modify its business practices to comply with the City Attorney's settlement offer. (*See e.g*., Complt. ¶¶ 6, 55, 77, 81 (emphasis added)). But none of the City

Attorney's actions require Monster to do anything. The City Attorney's investigation and settlement letters do not create legal rights, impose legal obligations, or subject Monster to civil or criminal penalties. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998) (holding no harm created by document that did not change legal relationship between the parties or impose new legal obligations); *Am. Trucking Assoc. v. Interstate Commerce Comm'n*, 747 F.2d 787, 790 (D.C. Cir. 1984) (holding suit not ripe where government's action "neither imposes any obligation upon these petitioners, nor in any other response has any impact upon them felt immediately . . . in conducting their day to day affairs") (internal citations and quotations omitted)). The two letters simply informed Monster of the City Attorney's position as to the legality of Monster's conduct, and proposed voluntary settlement terms on which Monster could address the City Attorney's concerns. Such proposals do not inflict any kind of injury. *National Park Hospitality Ass'n. v. Dep't of the Interior*, 538 U.S. 803, 809 (2003) (holding no harm caused by statement of government's views on the proper application of the law). Monster was free to reject – and indeed has rejected – the City's settlement offers. And Monster remains free to conduct its business as it sees fit, subject only to the requirements of existing laws that Monster does not challenge here.

Monster fears that the City Attorney may seek certain remedies in an enforcement action against it, and complains that those remedies could harm Monster's business. (Complt. ¶¶ 14-16.) But before Monster could suffer any such harm, the City Attorney would have to (1) prevail in its litigation against Monster, (2) seek a court order that burdens Monster's rights in the specific ways Monster anticipates, and (3) obtain that order over Monster's objections. Because none of those events are certain to occur, Monster cannot demonstrate that it faces any harm that is not merely "conjectural" or "hypothetical." *Lujan*, 504 U.S. at 560-61.

Monster's assertion that the City Attorney has "threatened an imminent law enforcement action" does not change the matter. (Complt. ¶¶ 14, 16.) Monster does not have a legally protected right to be free from investigations or lawsuits addressing the

legality of its conduct. *Lujan,* 504 U.S. at 560 (injury in fact requires an "invasion of a legally protected interest"). Indeed, it is the City Attorney's rights (and, because the City Attorney acts as a public prosecutor, the public's rights) that Monster seeks to invade with this suit. Monster has not challenged the constitutionality of Section 17200 or sought a declaratory judgment that its conduct complies with that law.[1] Monster asks this Court to enjoin the City Attorney from investigating or *enforcing* California law, and thus seeks to prevent any court from even *considering* the legality of Monster's conduct. (Complt. at 27.) To grant Monster such relief would trample the City Attorney's First Amendment right to seek adjudication of the People's claims, and amount to a "get out of jail free" card for Monster. *Sosa v. DirectTV, Inc.*, 437 F.3d 923, 933-36 (9th Cir. 2006); *see* Section IV, *infra*. Because Monster has suffered no injury that permits it to invoke this Court's jurisdiction, this complaint must be dismissed.

II. THE *YOUNGER* ABSTENTION DOCTRINE REQUIRES DISMISSAL.

Monster's preemptive attack on the City Attorney's civil law enforcement actions presents a textbook case for application of the *Younger* abstention doctrine. Monster

[1] Monster also cannot satisfy the ripeness requirement by framing this case as a pre-enforcement challenge, in which ripeness requirements are relaxed. (Complt. ¶ 17.) Pre-enforcement challenges are ordinarily directed to laws themselves, and may be permitted where the law creates a dilemma – "a choice between complying with a law thought invalid or continuing to act in a manner believed to be lawful but which could result in future adverse consequences if the law in question were later upheld." *Choice Incorporated of Texas v. Greenstein*, 691 F.3d 710, 716 (5th Cir. 2012). Monster does not challenge a law, but rather the City Attorney's enforcement activities. And the action Monster challenges "imposes no new, affirmative obligation" on Monster, but only seeks to enforce existing law. In such circumstances, there is "no such dilemma" permitting an exception to the ripeness requirements. *Id.* (holding pre-enforcement challenge to law that sets forth additional penalties but did not change the requirements of existing law is not ripe). Regardless of the City Attorney's letters, Monster is already obligated to comply with Section 17200, and any actions violating Section 17200 are "already *unlawful*." *Id.* Monster cannot frame its case as a pre-enforcement challenge, and cannot avoid the ripeness requirements Article III imposes.[2] Although *Younger* abstention originally applied only to federal cases that would interfere with state criminal proceedings, the Supreme Court has extended *Younger's* reach to federal court actions that would interfere with civil enforcement proceedings. *New Orleans Public Serv., Inc. v. Council of City of New Orleans,* 491 U.S. 350 (1989) . A Section 17200 action brought in the name of the People is such a proceeding. *People v. Pacific Land Research Co*., 20 Cal.3d 10, 18 (1977).

boldly asks this Court to prevent the City Attorney from investigating and enforcing California's consumer protection laws. But it is well established that, "[o]rdinarily, there should be no interference with [state or local] officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the State and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts." *Younger v. Harris*, 401 U.S. 37, 45 (1971). Monster's attempt to obtain declaratory and injunctive relief in this case is contrary to what the Supreme Court has called "the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." *Id.* at 41.[2]

Younger abstention requires federal courts to refrain from exercising jurisdiction where four requirements are met: "(1) a state-initiated proceeding is ongoing; (2) the proceeding implicates important state interests; (3) the federal plaintiff is not barred from litigating federal constitutional issues in the state proceeding; and (4) the federal court action would enjoin the [state court] proceeding or have the practical effect of doing so, *i.e.*, would interfere with the state proceeding in a way that *Younger* disapproves." *San Jose Silicon Valley Chamber of Commerce Political Action Committee v. City of San Jose*, 546 F.3d 1087, 1092 (9th Cir. 2008). Issuing a "stay" of the federal action is not sufficient; *Younger* abstention *requires* dismissal where the *Younger* factors are satisfied. *Beltran*, 871 F.2d at 781. Because each of these four factors is satisfied here, the Court must dismiss Monster's complaint.[3]

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[2] Although *Younger* abstention originally applied only to federal cases that would interfere with state criminal proceedings, the Supreme Court has extended *Younger's* reach to federal court actions that would interfere with civil enforcement proceedings. *New Orleans Public Serv., Inc. v. Council of City of New Orleans,* 491 U.S. 350 (1989) . A Section 17200 action brought in the name of the People is such a proceeding. *People v. Pacific Land Research Co*., 20 Cal.3d 10, 18 (1977).

[3] The Supreme Court has recognized narrow exceptions to the *Younger* abstention doctrine where there is a "showing of bad faith, harassment, or some other extraordinary circumstances that would make abstention inappropriate," but those exceptions do not apply here. *Middlesex*, 457 U.S. at 435.

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A. The State Proceedings Are On-Going.

There can be no doubt that a state-initiated proceeding is on-going.[4] On May 6, 2013, the City Attorney filed a Complaint against Monster in San Francisco Superior Court seeking to enforce California Business & Professions Code § 17200, and that action is pending. (*See* RJN Ex. A.) It is irrelevant that Monster was able to file its complaint a few days before the City Attorney filed the state court action. For *Younger* abstention, "it is not the filing date of the federal action that matters, but the date when substantive proceedings begin." *M&A Gabaee v. Cmty. Redevelopment Agency,* 419 F.3d 1036, 1039 (9th Cir. 2005); *see also Hicks v. Miranda*, 422 U.S. 332, 349-350 (1975). Because no substantive proceedings have occurred in this action, the first prong of the *Younger* analysis is satisfied.

B. The State Proceedings Implicate Important State Interests.

The City Attorney's lawsuit against Monster implicates important state interests. When assessing the importance of a State's interests, courts "do not look narrowly to its interest in the *outcome* of the particular case." *New Orleans Public Service, Inc. v. Council of the City of New Orleans,* 491 U.S. 350, 365 (1989). Rather, courts consider "the importance of the generic proceedings to the State." *Id.*

Here, the state court suit implicates California's important interests in protecting its residents from unsafe and mislabeled products, and from misleading and unfair marketing practices. Protecting residents' health and safety is a vital state interest. *See Meredith v. Oregon*, 321 F.3d 807, 818 (9th Cir. 2003); *Aiona v. Judiciary of State of Hawaii*, 17 F.3d 1244, 1249 (9th Cir. 1994). Likewise, a state has an important interest in protecting consumers from unfair and deceptive business practices, and providing compensation to consumers harmed by those practices. *See Commuc'ns Telesystems Intern. v. Cal. Public Util. Comm'n*, 196 F.3d 1011, 1017 (9th Cir. 1999).

The state court action also implicates a third, particularly important state interest

[4] Proceedings initiated by municipalities are "state-initiated." *San Jose Silicon Valley Chamber of Commerce Political Action Committee*, 546 F.3d at 1092 (9thCir. 2008) (proceeding initiated by San Jose Ethics Commission).

– namely, California's interest in enforcing its own laws. "[A] state's ability to enforce its laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and Constitution is a basic state function with which federal courts should not interfere." *Potrero Hills Landfill, Inc. v. County of Solano*, 657 F.3d 876, 883 (9th Cir. 2011) (internal citations and quotations omitted). "[W]here the state is in an enforcement posture in the state proceedings, the 'important state interest' requirement is easily satisfied, as the state's vital interest in carrying out its executive functions is presumptively at stake." *Id.* at 883; *Fresh Int'l Corp. v. Agric. Labor Relations Bd.*, 805 F.2d 1353, 1360 n. 8 (9th Cir. 1986). Here, the California Legislature has authorized the City Attorney to bring civil law enforcement actions on behalf of the People of California to enforce Section 17200. *See* Cal. Bus. & Prof. Code § 17204. Pursuant to that authority, the City Attorney has brought a civil enforcement action against Monster to prevent Monster from continuing to engage in unlawful, misleading and unfair business practices. *Id.* § 17200 *et seq*. The relief Monster seeks here would eliminate the City Attorney's enforcement powers and prevent California from enforcing its laws as it has chosen to do. *Potrero Hills Landfill, Inc.*, 657 F.3d at 883.

Monster cannot avoid application of the *Younger* doctrine based on its claim that the City Attorney's investigation and law enforcement action is preempted. Monster may only avoid abstention if preemption is "readily apparent," rendering the state court action "'flagrantly and patently' violative of the constitution." *Commc'ns Telesystems Intern.,* 196 F.3d at 1017 (internal citations omitted); *Fresh Int'l*, 805 F.2d at 1361 n. 12. Monster cannot satisfy this standard. *See* Section V.D, *infra.* To the contrary, courts have repeatedly found that state-law claims similar to those presented here are not preempted. *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1118 (N.D. Cal. 2010); *New York State Rest. Ass'n v. New York City Bd. of Health*, 556 F.3d 114, 123 (2d Cir. 2009); *In re Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 1090-91 (2008).

C. Monster Has An Adequate Opportunity To Raise Federal Questions.

Younger's third requirement is easily satisfied because Monster may raise its federal arguments about the City's enforcement action in the state court action. State court proceedings are *presumed adequate* to adjudicate federal claims "in the absence of unambiguous authority to the contrary." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987). The burden is on Monster "to show that state procedural law barred presentation of [its] claims." *Id.* at 14. Given that state courts are competent to decide issues of federal law, Monster cannot meet that burden. *Id.*

D. Monster Seeks To Interfere With The State Court Proceedings.

Finally, the relief Monster seeks in this action will interfere with on-going state proceedings. If this Court were to grant Monster the relief it seeks and enjoin the City Attorney from "enforcing, or directing the enforcement of, the provisions of" Section 17200 against Monster, the City would be forced to abandon its state court law enforcement action. This is the quintessential type of interference *Younger* prohibits. *See San Jose Silicon Valley Chamber of Commerce*, 546 F.3d at 1095.

Abstention is particularly appropriate here given the nature of Monster's claims. Monster fears that the state court may impose orders that burden Monster's constitutional rights, and thus asks this Court to consider *in advance* defenses that *may* apply in that action if the City Attorney seeks the relief that Monster anticipates. But for this Court to adjudicate Monster's potential and hypothetical defenses to a state court action while that state court action proceeds will result in duplication of judicial efforts, the waste of judicial resources, and the unnecessary resolution of constitutional questions. Indeed, the state court action may narrow or moot many of the abstract claims Monster raises here by not enjoining Monster in the ways that it fears. The potential for "unnecessary conflict" and duplication makes abstention required in this case. *San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1101 (9th Cir. 1998); *see also Pennzoil*, 481 U.S. at 12.

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III. THE COURT SHOULD DECLINE TO EXERCISE JURISDICTION OVER THIS DECLARATORY RELIEF ACTION.

Even if the Court does not dismiss this action under *Younger*, the Court should decline to exercise jurisdiction over this declaratory relief action. The Declaratory Judgment Act "gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so." *Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1223 (9th Cir.1998) (quoting *Public Affairs Assocs. v. Rickover*, 369 U.S. 111, 112 (1962)); 28 U.S.C. § 2201. When determining whether to hear a declaratory relief action, a court must "avoid needless determination of state law issues; it should discourage litigants from filing declaratory actions as a means of forum shopping; and it should avoid duplicative litigation." *Dizol,*133 F.3d at 1225; *see also Brillhart v. Excess. Ins. Co. of Am.*, 316 U.S. 491 (1942). Courts also consider whether the declaratory relief action will "serve a useful purpose in clarifying the legal relations at issue," and "whether the use of a declaratory action will result in entanglement between the federal and state court systems." *Dizol,*133 F.3d at1225 n. 5.

These factors weigh heavily against exercising jurisdiction over Monster's action, which is a classic example of forum shopping and gamesmanship. "Anticipatory suits are found when the plaintiff in the first-filed action filed suit on receipt of specific, concrete indications that a suit by the defendant was imminent, and are viewed with disfavor as examples of forum shopping and gamesmanship." *Xoxide, Inc. v. Ford Motor Co.*, 448 F. Supp. 2d 1188, 1192-94 (C.D. Cal. 2006) (internal quotations omitted). "[W]hen, as here, a declaratory judgment action has been triggered by a [demand letter], equity mitigates in favor of allowing the second-filed action brought by the true plaintiff in the dispute to proceed to judgment rather than the first." *K-Swiss Inc. v. Puma AG Rudolf Dassler Sport*, 2009 WL 2049702 * 3 (C.D.Cal. July 9, 2009).

Monster engaged in bad faith gamesmanship to deprive the City Attorney of his choice of forum. Monster admits it filed its suit only after the City Attorney sent a letter that threatened "imminent law enforcement action." (Complt. 14.) After

receiving the letter, Monster requested that the City Attorney meet with it before filing suit. (Gessner Dec. ¶ 6.) The City Attorney agreed to the meeting, in a good faith attempt to negotiate a settlement before spending the City's limited resources on an enforcement action. But, just days before that scheduled meeting, Monster brought this declaratory judgment action in Southern California, an inconvenient forum for the San Francisco City Attorney who is the "true plaintiff" in this dispute. (*Id.* ¶ 12.) There can be no doubt this action is a disfavored, anticipatory suit that must be dismissed. *See Xoxide, Inc.,* 448 F. Supp. 2d at 1192-94.

Monster's suit also needlessly asks this Court to decide issues that will be raised in the state court action. All of Monster's purported "causes of action" are nothing more than defenses to the City Attorney's "threatened enforcement" of Section 17200. Complt. at p. 16. Those defenses can be fully litigated in the state-court action. Adjudicating those defenses separately here would duplicate the state court litigation, waste judicial time and effort, and create confusion. Monster acknowledges as much, characterizing this and the state court actions as "opposite sides of the same coin." *See* Not. of Related Case, Dkt. 11 at p. 3. Monster's suit would also cause unnecessary entanglement with the state court action. Indeed, it is hard to imagine more substantial "entanglement" than that created by a putative defendant in a state-court enforcement action asking a federal court to shut down the investigation into its misconduct.

IV. THE REMEDIES MONSTER SEEKS, IF GRANTED, WOULD VIOLATE THE CITY ATTORNEY'S FIRST AMENDMENT RIGHT TO PETITION.

Monster gets the law exactly backwards when it claims that the City Attorney's pre-litigation activities violated Monster's constitutional rights. It is the relief Monster seeks – an order enjoining the City Attorney from continuing his investigation and litigation efforts – that would violate the First Amendment.

The City Attorney, like all other citizens, has the right to "petition the Government for a redress of grievances" under the First Amendment. U.S. Const. amend. I. The Supreme Court has described the Right to Petition as "among the most

precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967). The Right to Petition includes the "right of access to the courts." *Sosa*, 437 F.3d at 929. In the litigation context, the Right to Petition protects the right to file complaints and other documents. *Id*. at 935. And, to allow sufficient "breathing room" for speech, the Right to Petition also protects the right to engage in "conduct incidental to the prosecution of the suit," including investigating and sending settlement offers and demand letters. *Id*. at 935, 942 (internal quotations omitted); *see also Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983) (Right to Petition protects demand letters: "[t]he litigator should not be protected only when he strikes without warning.").

The *Noerr-Pennington* doctrine protects the Right to Petition by ensuring that those who petition the government for redress "are generally immune from statutory liability for their petitioning conduct." *Sosa*, 437 F.3d at 929; *Tarpley v. Keistler*, 188 F.3d 788, 794 (7th Cir. 1999) (under *Noerr-Pennington*, "parties may petition the government . . . without fear of suit"). The doctrine establishes a rule of statutory construction whereby courts must "construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise." *Id.* at 931. Courts will not "lightly impute to Congress an intent to invade . . . freedoms" protected by the Right to Petition. *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc*., 365 U.S. 127, 138 (1961). Thus, if the conduct at issue "could fairly fall within the scope of the Petition Clause and a plausible construction of the applicable statute is available that avoids the burden, [a court] must give the statute the reading that does not impinge on the right of petition." *Sosa*, 437 F.3d at 932.

Noerr-Pennington requires this Court to interpret 42 U.S.C. § 1983 in a way that does not burden the City Attorney's Right to Petition. *Sosa*, 437 F.3d at 932 n.6 (*Noerr-Pennington* guides interpretation of statutes such as § 1983). The City Attorney's investigation of Monster's unlawful activities and settlement demand letter

are pre-litigation conduct that "fairly fall within the scope of the Petition Clause," and are entitled to *Noerr-Pennington* immunity. *Sosa*, 437 F.3d at 939 ("[T]he First Amendment requires the extension of Noerr-Pennington immunity to the making of reasonably based prelitigation settlement demands."). Section 1983 has consistently been interpreted to not apply to conduct protected by the Right to Petition. *Evers v. County of Cluster*, 745 F.2d 1196, 1204 (9th Cir. 1984); *Tarpley*, 188 F.3d at 794-96.

Noerr-Pennington requires this Court to reject Monster's claim that the City Attorney violated Section 1983 by engaging in pre-litigation conduct, as well as its request for an injunction that would prevent the City Attorney from enforcing California's consumer protection laws against Monster. *Sosa*, 437 F.3d at 929, 935, 939. This is true even though Monster claims the City Attorney's petitioning conduct violated *Monster's* First Amendment Rights. Even if Monster's claims had some merit (which, as discussed below, they do not), a plaintiff may not be accorded a remedy that violates a defendant's right to petition. *Tarpley,* 188 F.3d at 796. "[T]he machinery of the courts may not be invoked to protect one First Amendment right at the expense of" another person's Right to Petition. *Id.* at 795, 796 n. 7.

V. EACH OF MONSTER'S CLAIMS FAILS AS A MATTER OF LAW.

Even if Monster could overcome the multiple jurisdictional bars to its complaint and the application of *Noerr-Pennington*, its claims are baseless and must be dismissed.

A. Void for Vagueness

Monster's claim that the City Attorney's demand letter is "void for vagueness" is puzzling. An ordinance, statute or regulation is unconstitutionally vague if it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, . . . [or] if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). But a letter that merely *proposes* a settlement offer cannot be "void" because it does not "prohibit" any conduct or provide anything that can be "enforced." *Id.* No case or other authority supports Monster's assertion that a settlement offer – a mere invitation to begin

negotiations – is tantamount to a law that imposes civil or criminal penalties. Monster's void for vagueness claim lacks merit, and must be dismissed.

B. First Amendment

Monster's First Amendment claims fare equally poorly. Monster claims the City Attorney's demand letter violates its right to be free from "compelled speech" by suggesting that Monster include adequate warning labels on its products, and improperly "restricts" Monster's ability to market its products.

Monster's claims fail at the outset because the demand letter does not "compel" Monster to say anything, or "restrict" Monster's ability to speak in any way. Complt. Ex. F. The demand letter initiated settlement discussions between the parties, and proposed ways in which Monster could bring its activities into compliance with California's civil consumer protection laws. But, again, the letter has no legal force. Monster was free to – and indeed did – refuse even to negotiate, much less to change its marketing practices or labeling. The mere existence of an investigation and proposals for settlement cannot violate the First Amendment. *Laird v. Tatum*, 408 U.S. 1, 10-11 (1972) (governmental investigation that allegedly was "broader in scope" than necessary did not violate First Amendment because it was not "regulatory, proscriptive, or compulsory in nature").

To the extent that Monster claims the relief the City Attorney is seeking "*would* compel" Monster to change its speech or labeling, that *would* only happen *if* the state court orders Monster to reform its business practices to comply with the law.[5] (Complt.

[5] Monster does not – and cannot – allege that the City's demand letter caused any chilling effect. Courts have consistently rejected the argument that the enforcement of consumer protection laws chills commercial speech. Because "advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely." *Va. Pharmacy Bd. v. Va. Consumer Council,* 425 U.S. 748, 772 n. 24 (1976). To the extent California's consumer protection laws (and the City Attorney's enforcement) caused Monster to be "more cautious" and "make greater efforts to verify the truth of its statements," that would simply mean that the consumer protection laws are serving "the purposes of commercial speech protection by insuring that the stream of commercial information flow[s] cleanly as well as freely." *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 963-64 (2002).

77, 81.) But any court order that the City may obtain in its state court lawsuit against Monster, will not – and cannot – burden Monster's speech rights. The City Attorney's investigation concerns only Monster's commercial speech, that is, speech "related solely to the economic interests of the speaker and its audience." *Central Hudson Gas v. Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980).[6] Commercial speech is only entitled to First Amendment protection if it is "neither misleading nor related to unlawful activity." *Id.* at 564, 566; *In re R.M.J.*, 455 U.S. 191, 203 (1982) ("Misleading advertising may be prohibited entirely.") In its state court action, the City Attorney alleged that Monster has used misleading and deceptive marketing practices to sell a product that fails to satisfy safety standards. If a state court were to agree and order Monster to reform its unlawful and misleading business practices, the court's order would *establish* that Monster's conduct is unprotected by the First Amendment – so the court's order could not burden Monster's constitutional rights. *Id.* And if a court does not agree, and rules in Monster's favor, then Monster will not face any restrictions on its business practices. Monster's right to engage in protected commercial speech will remain intact regardless of the outcome of the City Attorney's investigation.

Nor could any hypothetical court order resulting from the City Attorney's investigation burden Monster's right to be free from compelled speech. Legislatures and courts may require a commercial message to "appear in such a form, or include

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[6] Monster alleges in its third cause of action that the City Attorney's demand letter concerns non-commercial speech. That claim is implausible and must be dismissed. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face."). The only speech Monster identifies relates solely to Monster's economic interests or to the economic interests of its customers. *Central Hudson,*447 U.S. at 561. And the City Attorney's demand letter makes clear that the City's concerns relate to the deceptive and misleading ways in which Monster markets its product. (*See* Complt. Ex. F.) To the extent Monster claims that its speech has been transformed into non-commercial speech because the safety of energy drinks is currently a topic of public interest, that argument fails. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67-68 (1983); *Nat'l Comm'n on Egg Nutrition v. Fed.Trade Comm'n*, 570 F.2d 157, 159, 163 (7th Cir. 1977); *see also Kasky*, 27 Cal.4th at 964-65.

1 such additional information, warnings, and disclaimers, as are necessary to prevent its
2 being deceptive." *Va. Pharmacy Bd. v. Va. Consumer Council,* 425 U.S. at 772; *see*
3 *also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (advertiser
4 lacks a constitutionally protected interest in avoiding providing factual product warning
5 labels); *In re R.M.J.*, 455 U.S. at 201 (same). Thus, if Monster's current product
6 labeling and marketing practices are deceptive, Monster has no First Amendment right
7 to avoid providing factual warning labels on its products. *Id.* Monster no doubt will
8 claim that its current practices are not deceptive, and no additional warning label is
9 necessary. But then Monster will face no liability under California law. In either
10 scenario, Monster's First Amendment rights will remain uncompromised.

11 **C. Commerce Clause**

12 Monster also claims that the City Attorney violated the Commerce Clause (or,
13 more accurately, the dormant Commerce Clause) by sending a demand letter. This
14 argument is absurd. The dormant Commerce Clause prohibits state legislation or other
15 "regulatory measures designed to benefit in-state economic interests by burdening out-
16 of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-274
17 (1988); *Pac. Merchant Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1177 (9th Cir.
18 2011). As Monster admits, "*state law[s]"* are invalid if they violate the dormant
19 Commerce Clause. (Complt. ¶ 67 [emphasis added].) Settlement offers that lack the
20 force of law cannot violate the Commerce Clause.

21 Monster's Commerce Clause claim also fails because it is premised on the false
22 notion that the City Attorney seeks to require Monster to develop "special practices for
23 California, or even just San Francisco." Complt. ¶ 68. The City Attorney has asked
24 Monster to stop selling unsafe, mislabeled products and to stop using misleading and
25 deceptive marketing practices. Complt. Ex. F. California's food safety and labeling
26 requirements are identical to and do not conflict with federal food safety regulations.
27 *See* Section V.D, *infra*. Because Monster already cannot sell adulterated or mislabeled
28 products *anywhere* within the United States, Monster's claim that it could be required to

"create special practices" for California is implausible. *Iqbal*, 556 U.S. at 678.

Similarly, all fifty states prohibit false and misleading advertising. *See* Survey of State False Advertising Laws, http://www.dnapolicy.org/resources/Prince_ StateFalseAdvertisingLaws.pdf. Thus, there is no possibility that Monster could be required to design or market its product differently for sale in California than elsewhere. And even if such a result were possible, that result would have to be dictated by a court order; again, Monster would be perfectly free to raise these purportedly constitutional concerns about the effects of that order to the issuing court.

D. Preemption and Primary Jurisdiction

Finally, Monster's claims that the City Attorney's investigation and enforcement activities are "preempted" and subject to the primary jurisdiction of the federal Food and Drug Administration ("FDA") also fail as a matter of law. Again, as an initial matter, the City Attorney's investigation and enforcement activities do not compel Monster to do *anything*, let alone to take steps that might conflict with federal law or to make changes to its product that should be effected under the FDA's oversight. Put another way, there is no "requirement" or "determination[]" the City Attorney has imposed, so there can be no conflict between that requirement or determination and federal law. Complt. ¶¶ 25-26; *see* Section I, *infra.*

Further, to the extent the City Attorney's investigation concerns Monster's product labeling, the City Attorney has the authority to enforce state-law requirements that parallel the requirements set forth in the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301 *et. seq. Medtronic v. Lohr*, 518 U.S. 470, 495 (1996). And to the extent the City Attorney targets Monster's marketing and safety practices, the City Attorney properly exercises historic police powers of the state that are not displaced by federal regulation of Monster's products.

1. The FDCA's Express Preemption Provision Does Not Apply.

As the City Attorney's March 29, 2013 letter makes clear (Complt. Ex. F), the City Attorney's investigation of Monster's products gave rise to concerns that Monster

has mislabeled its products and sold products with unsafe caffeine levels. Monster claims the City Attorney's investigation targets Monster's product labeling and is therefore preempted because the FDCA contains an express preemption provision, adopted in the Nutrition Labeling and Education Act ("NLEA"), that prohibits states from imposing "any requirement for nutrition labeling of food that is not identical" to the requirements imposed by federal law. 21 U.S.C. § 343-1(a)(2) & (a)(4).

The NLEA's preemption provision does not affect the City Attorney's investigation and enforcement authority under California laws, because those laws do not impose any requirements that differ from those imposed by federal law. Where a "requirement" imposed by state law effectively mirrors or parallels one imposed by federal law, the requirement may be enforced under state law. *Medtronic v. Lohr*, 518 U.S. 470, 495 (1996). Consequently, courts have repeatedly found that the NLEA's preemption provision does *not* foreclose state-law claims based on requirements that parallel FDCA requirements. *Jones v. ConAgra Foods, Inc.*, --- F. Supp. 2d ---, 2012 WL 6569393, *4 (N.D. Cal. Dec. 12, 2012); *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1118 (N.D. Cal. 2010); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 370 (N.D. Cal. 2010); *see also New York State Rest. Ass'n v. New York City Bd. of Health*, 556 F.3d 114, 123 (2d Cir. 2009); *In re Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 1090-91 (2008). The FDA has taken the same position. *See* Final Rule, 60 Fed. Reg. 57076, 57120 (Nov. 13, 1995) ("[T]he only State requirements that are subject to preemption are those that are affirmatively different from the Federal requirements . . . . "[I]f the State requirement does the same thing that Federal law does … then it is effectively the same requirement as the Federal requirement.").

The City Attorney's claims related to Monster's product labeling seek to enforce California's Sherman Law, through California Business and Profession Codes Section 17200. Through the Sherman Law, California has expressly adopted the federal labeling requirements as its own by providing that "[a]ll food labeling regulations and any amendments to those regulations adopted pursuant to the federal act … shall be the

food regulations of this state." Cal. Health & Safety Code § 110100. California has also enacted a number of laws and regulations that adopt and incorporate specific enumerated federal food laws and regulations. *See, e.g.*, *id.*§ 110660 ("Any food is misbranded if its labeling is false or misleading in any particular."); *id.* § 110665 ("Any food is misbranded if its labeling does not conform with the requirements for nutrition labeling as set forth in … 21 U.S.C. § 343(q).").

By seeking to enforce the Sherman Law against Monster, the City Attorney seeks to enforce the *same* requirements that federal law imposes – not different ones. Any misbranding or labeling violations the City Attorney seeks to redress are based on *the same* requirements federal law imposes on Monster, which are incorporated by the Sherman Law into California law. *See* Complt. Ex. F (citing FDA, Draft Guidance for Industry: Factors that Distinguish Liquid Dietary Supplements from Beverages, Considerations Regarding Novel Ingredients, and Labeling for Beverages and Other Conventional Foods, December 2009 (demonstrating Monster's products are mislabeled as dietary supplements); *see also* 21 U.S.C. § 343(a) (providing that food "shall be deemed to be misbranded" under the FDCA if "its labeling is false or misleading in any particular"). Because any requirements a court might impose on Monster under Section 17200 would parallel those required by the FDA, the NLEA's express preemption provision is inapplicable. *Lohr*, 518 U.S. at 496.[7]

2. The City Attorney's Investigation Is Not Impliedly Preempted By The FDCA.

Monster's argument that the FDCA impliedly preempts the City Attorney's investigative and enforcement powers is likewise misplaced. Monster makes the bald assertion that because the FDCA establishes a "comprehensive scheme" for the regulation of food and beverage products, "any state or local efforts to regulate such

[7] In any case, the express preemption provision Monster identifies applies only to "requirements" regarding a product's label. 21 U.S.C. § 343-1(a)(2) & (a)(4). The City Attorney's claims regarding Monster's marketing practices and product safety are unaffected by this provision. *See Chacanaca*, 752 F. Supp. 2d at 1123.

ingredients are preempted." Complt. ¶ 26. Monster's conclusion is based on an incorrect premise, namely, that where federal law has regulated a matter comprehensively, that matter is presumptively withdrawn from the purview of the states. To the contrary, there is a strong presumption that Congress does *not* intend to supplant state laws, *Stengel v. Medtronic Inc.*, 704 F.3d 1224, 1227-28 (9th Cir. 2013), particularly those state laws "that operate in traditional state domains." *Id.* at 1227. Matters implicating public health and safety, as well as the general regulation of the sale and marketing of food and beverage products, are presumptively matters of state, rather than federal, concern. *DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997); *Stengel*, 704 F.3d at 1228; *see also Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 144 (1963) ("States have always possessed a legitimate interest in the protection of [their] people against fraud and deception in the sale of food products within their borders." (internal citations and quotation marks omitted)). Monster cannot point to anything in the FDCA indicating an intent to withdraw these matters from State consideration.

Indeed, not only does the FDCA lack any indication of Congressional intent to displace States from their historic oversight, but the FDCA *contemplates* that state and local officials, like the City Attorney, will enforce state consumer protection laws. In enacting the NLEA, Congress made clear that the FDCA does not intend, or accomplish, "a sweeping preemption of private actions predicated on requirements contained in state laws." *Farm Raised Salmon*, 42 Cal. 4th at 1090. Rather, the FDCA maintains the historical role of the States in protecting their citizens from unsafe or deceptively marketed food products "by allowing the States to adopt standards that are identical to the Federal standard, *which may be enforced in State court* …." *Id.* at 1090 (quoting Remarks of Rep. Waxman, 136 Cong. Rec. 1539 (daily ed. July 30, 1990) (emphasis added)). Moreover, that the FDCA contains various, but limited, express preemption provisions demonstrates that Congress did not intend the FDCA to broadly preempt state regulatory authority or the enforcement power of local officials. "[A]n

express definition of the pre-emptive reach of a statute 'implies' – *i.e.*, supports a reasonable inference – that Congress did not intend to pre-empt other matters." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995). Congress enacted NLEA's preemption provision regarding product labeling, but declined to limit state power more broadly. The inference to be drawn from Congress' use of specific, limited preemption provisions is that Congress "did *not* intend to limit states' options in a broad fashion." *Farm Raised Salmon*, 42 Cal. 4th at 1092 (emphasis added). Thus, courts have consistently permitted States to do what the City Attorney seeks to do: enforce state laws that incorporate federal food safety and marketing requirements. *See id*. at 1096 ("No court . . . has ever held that states may not provide a private remedy for the violation of state laws imposing requirements identical to those imposed by federal law."); *Reid v. Johnson & Johnson*, 2012 WL 4108114, *6 (S.D. Cal. Sept. 14, 2012) ("Congress has specifically indicated that it does not intend to occupy the field of food and beverage labeling, and states are permitted to regulate matters … provided that such state laws do not fall within the FDCA's express preemption provisions."). Monster's claim that the FDCA debilitates all state consumer protection laws regarding food safety should be rejected.

3. The City Attorney's Investigation Is Not Barred By The Doctrine Of Primary Jurisdiction.

The same is true of Monster's argument that the City Attorney's investigation and enforcement actions are foreclosed by the doctrine of primary jurisdiction. As an initial matter, Monster's invocation of primary jurisdiction as a claim against the City Attorney for attempting to "usurp FDA's regulatory authority" is misplaced. Primary jurisdiction is not a far-reaching prohibition on all enforcement activity that touches on matters falling within a federal agency's purview; rather, it is a prudential judicial doctrine that allows a *court* to use its discretion "to stay proceedings or to dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency." *Clark v. Time Warner Cable*, 523 F.3d 1110,

1114 (9th Cir. 2008). A court invoking the doctrine is "require[d] … to enable a 'referral' to the agency" of the matter at hand. *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1173 (9th Cir. 2002). The doctrine has no application to an investigation, as there is nothing for this Court to dismiss or stay, and no concrete issue for this Court to refer to the FDA.

In any case, even if primary jurisdiction were at issue, Monster fails to state a claim for its application. Primary jurisdiction may be warranted "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." *Brown*, 277 F.3d at 1172. It applies to claims that "implicate[] technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry, rather than by the judicial branch." *Clark*, 523 F.3d at 1114. Because the doctrine often results in "added expense and delay," it "should be invoked sparingly." *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 477 (8th Cir. 1988) (internal citations and quotations omitted). Consequently – and contrary to Monster's assertions, *see* Complt. ¶¶ 27-43 – primary jurisdiction "is not implicated simply because a case presents a question[] over which the [FDA] *could* have jurisdiction." *Brown*, 277 F.3d at 1172 (emphasis added). It does not "require that all claims within an agency's purview be decided by the agency." *Id.* And it is not "intended to secure expert advice" from the FDA. *Id.* Rather, it applies only where a court is faced with "the need to resolve an issue" that "has been placed by Congress within the jurisdiction of an administrative body" and which "requires expertise or uniformity in administration." *Syntek Semiconductor Co., Ltd. v. Microchip Tech., Inc.*, 307 F.3d 775, 781 (9th Cir. 2002).

The City Attorney's investigation and enforcement of California's consumer protection laws against Monster do not fall within this narrow category of matters properly left to the FDA's expertise, as numerous courts have recently found. State-law consumer protection and misleading marketing claims – the precise claims at issue in

Herrera's investigation – are "relatively straightforward" matters that courts are "well-equipped to handle" without agency involvement or expertise, even when those claims incorporate FDA regulations. *Chacanaca*, 752 F. Supp. 2d at 1124; *see also Jones*, 2012 WL 6569393, at *7; *Lockwood v. Conagra Foods, Inc.*, 597 F. Supp. 2d 1028, 1034-35 (N.D. Cal. 2009); *Reid*, 2012 WL 4108114, at *11. And these claims are of the precise type that the FDCA envisions will be enforced under state law *as well as* through federal regulatory authority. *See* Section V.D.1, *infra*. That the FDCA envisions that local officials like the City Attorney will enforce state laws identical to the FDA's regulations forecloses Monster's primary jurisdiction claim. *See Washington Toxics Coalition v. Environmental Protection Agency*, 413 F.3d 1025, 1034 (9th Cir. 2005) (primary jurisdiction "inapplicable" where administrative scheme permits enforcement of regulations by both agency and individual citizen suits).

Monster's assertion that the FDA has announced it "intends to form a third-party review panel to help determine whether energy drinks pose particular risks to teenagers or people with underlying health problems" does not change the matter. Complt. ¶ 43. Although an impending agency rulemaking addressing the precise question posed in a case might substantiate a decision to dismiss or stay where the criteria for invoking primary jurisdiction are otherwise satisfied, *Clark*, 523 F.3d at 1114-15, the FDA's representation that it intends to convene an advisory body that may addresses issues implicated by one facet of Herrera's investigation is not tantamount to a rulemaking. There is no assurance that the advisory body will convene or act in the near future, that FDA will adopt any recommendations the body may or may not make, or that FDA will promulgate regulations controlling Monster's marketing and labeling activities. FDA's current proposal provides no basis for Monster to ask this Court to enervate Herrera's broader investigation and enforcement activities.

CONCLUSION

For the reasons explained above, Monster's complaint must be dismissed.

Dated: June 3, 2013

DENNIS J. HERRERA
City Attorney

[TO BE FILED ON JUNE 3, 2013]

By:________________________
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

MONSTER BEVERAGE CORPORATION, a Delaware Corporation and MONSTER ENERGY COMPANY, a Delaware Corporation,

Plaintiffs,

vs.

DENNIS HERRERA, in his official capacity as City Attorney of San Francisco,

Defendant.

Case No. ED CV-13-00786 VAP (OPx)

DECLARATION OF FRANCESCA GESSNER IN SUPPORT OF CITY ATTORNEY DENNIS HERRERA'S MOTION TO DISMISS

Hearing Date: August 19, 2013
Time: 2:00 p.m.
Judge: Hon. Virginia A. Phillips
Place: Courtroom 2

I, Francesca Gessner, declare as follows:

1. I am a Deputy City Attorney for the City and County of San Francisco ("the City"). I am a member in good standing of the California bar. I have personal knowledge of the matters stated, and if called to testify, I can and will testify competently as to all matters set forth herein.

2. In October 2012, San Francisco City Attorney Dennis Herrera ("City Attorney") began an investigation into whether Monster Beverage Corporation and Monster Energy Company (collectively, "Monster") sell energy drinks that are adulterated and mislabeled in violation of California law, and whether Monster uses misleading and unfair marketing practices to promote its energy drinks, particularly to children and adolescents who cannot safely consume them.

3. On October 31, 2012, the City Attorney sent a letter to Rodney Sacks, the Chief Executive Officer of Monster Beverage Corporation. In that letter, the City Attorney invited Monster to provide evidence demonstrating the safety of its energy drinks, and to substantiate its advertising claims. A copy of the October 31, 2012 letter is attached as Exhibit C to Monster's Complaint for Declaratory and Injunctive Relief ("Complaint").

4. After considering the information Monster provided in response to the City Attorney's letter, the opinions of numerous scientific experts and additional information, the City Attorney sent Monster a confidential letter on March 29, 2013 to explain his outstanding concerns about Monster's business practices, and to give Monster notice that the City Attorney would file suit if Monster did not respond to his concerns. A copy of the City Attorney's March 29, 2013 is attached as Exhibit F to the Complaint.

5. After receiving that letter, Monster represented to our office that it wanted to "keep the dialogue open" and asked that we schedule a call to discuss the City Attorney's concerns.

6. On April 17, 2013, I, deputy city attorney Aileen McGrath, and deputy city attorney Jennifer Choi spoke with Monster's counsel Miriam Guggenheim of Covington & Burling LLP and Dan Marmalesfsky of Morrison & Foerster LLP by phone. During that call, Monster's counsel represented that Monster was willing to discuss a potential settlement to address the City Attorney's concerns. To facilitate that discussion, Monster's counsel requested an in-person meeting with the City Attorney's staff. Monster's counsel also requested that the City Attorney provide more specificity as to the terms that he would seek in a settlement agreement with Monster.

7. In light of Monster's representations, the City Attorney agreed to have a meeting with Monster, but asked that the meeting occur as soon as possible in April. At Monster's request, the meeting was scheduled for May 2, 2013 after Monster's counsel represented that they were too busy with other matters to attend earlier.

8. On April 19, 2013, I received an email from Miriam Guggenheim in which she confirmed the meeting on May 2, and represented that Monster personnel with settlement authority would be available either in person or by phone to discuss the business practices of concern to the City Attorney. She closed the email by noting that Monster looked "forward to a genuinely productive meeting." A copy of the April 19, 2013 email is attached hereto as **Exhibit A**.

9. On April 24, 2013, in response to Monster's request, the City Attorney sent a detailed proposal containing the terms upon which the City Attorney proposed to resolve his investigation of Monster's business practices without pursuing litigation.

10. On the same date, Miriam Guggenheim sent an email thanking my colleague Tara Steeley and me for sending the proposal and stating that she was confirming whether 10 am would work as a start time for the meeting on May 2.

11. In reliance on Monster's representations that it looked forward to a "genuinely productive meeting," and in a good faith effort to settle the matter without litigation, the City Attorney refrained from filing suit in advance of the May 2 meeting.

12. On April 29, 2013, three days before the scheduled settlement meeting, Monster filed the Complaint in this action without any advance notice to the City Attorney.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed June 3, 2013 in San Francisco, California

s/*Francesca Gessner*
FRANCESCA GESSNER