NOT TO BE PUBLISHED WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

IRIDA KIMCA, DERRICK SAMPSON, BRITTANY TOMKO, JANCY ORTIZ, DINATRA WYNN, SARAH WARDALE, and JAUNITA CORNETT individually and on behalf of all those similarly situated, Plaintiffs, v. SPROUT FOODS, INC. d/b/a SPROUT ORGANIC FOODS and SPROUT NUTRITION, Defendants.	**SUPERIOR COURT OF NEW JERSEY** LAW DIVISION – BERGEN COUNTY DOCKET NO. **BER-L-2538-22** Civil Action **OPINION**

Argued: **August 5, 2022**
Decided: **August 17, 2022**

HONORABLE ROBERT C. WILSON, J.S.C.

David Freeman, Esq. appearing on behalf of Plaintiffs Irida Kimca, Derrick Sampson, Brittany Tomko, Jancy Ortiz, Dinatra Wynn, Sarah Wardale, and Jaunita Cornett (from Mazie Slater Katz & Freeman, LLC

Michael Zogby, Esq. and Rory Collins, Esq. appearing on behalf of Defendants Sprout Foods, Inc. d/b/a Sprout Organic Foods and Sprout Nutrition (from Faegre Drinker Biddle & Reath LLP)

FACTUAL AND PROCEDURAL BACKGROUND

THIS MATTER is a continuation of a lawsuit filed by Irida Kimca, Derrick Sampson, Brittany Tomko, Jancy Ortiz, Dinatra Wynn, Sarah Wardale, and Jaunita Cornett (collectively "Plaintiffs"). On June 25, 2021, Plaintiffs filed a lawsuit in the U.S. District Court for the District of New Jersey alleging that Defendant Sprout Foods, Inc.'s ("Sprout") baby food products are misleadingly advertised because they allegedly contain elevated and unsafe levels of heavy metals.

On February 4, 2021, the U.S. House of Representatives' Subcommittee on Economic Consumer Policy, Committee on Oversight and Reform ("Subcommittee") published a report ("Report") finding that numerous baby products sold in the United States, including those of

Sprout, contain heavy metals. Sprout cooperated with the investigation into its labeling. On September 29, 2021, the Subcommittee released a second report noting this cooperation.

The FDA issued a response to the Subcommittee's initial report on February 16, 2021, explaining that because the toxic elements are present in the environment and may enter the food supply through natural causes, they cannot be completely avoided in the ingredients that are the basis for baby foods. The FDA routinely monitors toxic levels in foods, and if deemed unsafe the FDA recalls it from the market.

In a March 2021, statement, the FDA explained that the levels they found are not an immediate health risk from exposure to these elements in food. The FDA advised parents not to discard baby food products because eliminating food groups from the diets of children in order to avoid certain elements may result in deficiencies in certain nutrients and potential poor health results. The FDA also cautioned that home-made baby food is unlikely to reduce potential exposure to the same toxic elements and can instead result in even higher concentrations.

On April 8, 2021, the FDA announced its "Closer to Zero" plan to take actions to reduce exposure of toxic elements from foods eaten by babies and young children. The FDA emphasized the complexity of reducing these levels and that it is crucial to ensure that unintended consequences, such as eliminating foods with significant nutritional benefits or raising levels of one toxic element while lowering another, do not occur.

Plaintiffs originally filed their claims against Sprout in U.S. District Court for the District of New Jersey on June 25, 2021. Kimca v. Sprout Foods, Inc., No. 2:21-cv-12977 (D.N.J.). Sprout moved to dismiss, and Plaintiffs responded by filing an amended complaint. Because the amended complaint failed to cure the deficiencies identified in Sprout's initial motion, Sprout again moved to dismiss. On April 25, 2022, U.S. District Judge Stanley R. Chesler dismissed the Kimca Federal FAC because Plaintiffs had failed to allege an injury sufficient to establish Article III standing.

Since standing is a prerequisite for subject-matter jurisdiction in federal court, the dismissal was without prejudice. Judge Chesler's opinion articulated the following bases for dismissing Plaintiff's Federal FAC: (1) Plaintiffs had not adequately alleged that the product contained unsafe levels of heavy metals; and (2) Plaintiffs were unable to establish any present or future injury, whether physical or economic.

Plaintiffs did not appeal Judge Chesler's decision or seek to file a second amended complaint with allegations establishing that they suffered an injury. Instead, Plaintiffs simply commenced this New Jersey State Court action, which is substantially the same as the Kimca Federal FAC. The Complaint alleges that the packaging and labels of Sprout baby foods included certain statements about the nutrition of the foods and did not warn that the products may contain heavy metals. Plaintiffs claim that this was misleading because, according to public reports and testing commissioned by their counsel, some Sprout products allegedly contained some measure of heavy metals. Sprout filed this motion to dismiss on June 14, 2022.

For the reasons below, Sprout's Motion to Dismiss is **GRANTED.**

MOTION TO DISMISS STANDARD UNDER RULE 4:6-2(e)

On a motion to dismiss pursuant to R. 4:6-2(e), the Court must treat all factual allegations as true and must carefully examine those allegations "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . ." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). After a thorough examination, should the Court determine that such allegations fail to state a claim upon which relief can be granted, the Court must dismiss the claim. Id. It is simply not enough for a party to file mere conclusory allegations as the basis of its complaint. See Scheidt v. DRS Techs., Inc., 424 N.J. Super. 188, 193 (App. Div. 2012); see also Camden Cty. Energy Recovery Assocs., L.P. v. New Jersey Dept. of Envtl. Prot., 320 N.J. Super 59, 64 (App. Div. 1999), aff'd o.b. 170 N.J. 246 (2001) ("Discovery

is intended to lead to facts supporting or opposing an asserted legal theory; it is not designed to lead to formulation of a legal theory.").

Under the New Jersey Court Rules, a complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. R. 4:6-2(e); see Pressler, Current N.J. Court Rules, Comment 4.1.1. to Rule 4:6-2(e), at 1348 (2010) (citing Printing Mart, 116 N.J. at 746). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. See NCP Litigation Trust v. KPMG, LLP, 187 N.J. 353, 365 (2006); Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66 (2005); Fazilat v. Feldstein, 180 N.J. 74, 78 (2004). The "test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts." Printing Mart, 116 N.J. at 746. However, "a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Sickles v. Carbot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

RULES OF LAW AND DECISION

FDA's Primary Jurisdiction

"Under the doctrine of primary jurisdiction, when enforcement of a claim requires resolution of an issue within the special competence of an administrative agency, a court may defer to a decision of that agency." Campione v. Adamar of New Jersey, Inc., 155 N.J. 245, 263 (1998). Primary jurisdiction "calls for judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." Clark v. Actavis Grp., 567 F. Supp. 2d 711, 715 (D.N.J. 2008). This doctrine is intended to promote uniformity and consistency in regulation, utilize federal agencies' expertise, and allow agencies to exercise discretion in the regulatory policies entrusted to them. IPCO Safety Corp. v. WorldCom, Inc., 944 F. Supp. 352, 356 (D.N.J. 1996).

New Jersey state and federal courts consider four factors to determine whether primary jurisdiction applies: (1) whether the issue is within the conventional experience of judges; (2) whether the issue is particularly within the agency's discretion or requires agency expertise; (3) whether inconsistent rulings might pose a danger of disrupting the statutory scheme; and (4) whether a prior application to the agency has been made. Magic Petroleum Corp. v. Exxon Mobil Corp., 218 N.J. 390, 407 (2014).

These factors lead this Court to apply of the doctrine of primary jurisdiction. First, this case would require the Court to determine what levels of heavy metals in baby foods are safe and acceptable, and whether it is misleading for foods containing certain levels of heavy metals to make true labeling statements about their contents. These questions present "technical matter[s] involving complex chemical considerations" that are uniquely within the FDA's expertise. Coyle v. Hornell Brewing Co., 2010 WL 2539386, at *4 (D.N.J. June 15, 2010).

As with cases involving trace levels of substances in foods, the FDA has "the requisite expertise to evaluate [the] research and determine what levels of [heavy metals] in [baby foods] can be considered safe and whether consumers should be informed of its presence through labeling." Tran v. Sioux Honey Ass'n, Coop., 2017 WL 5587276, at *3 (C.D. Cal. Oct. 11, 2017). Deferring to the FDA on these issues will promote "comity and consistency of decision making." Holk v. Snapple Beverage Corp., 2010 WL 3167533, at *2 (D.N.J. Aug. 10, 2010). It will also enhance "efficiency by allowing the court to take advantage of administrative expertise." Swearingen v. Yucatan Foods, L.P., 59 F. Supp. 3d 961, 964 (N.D. Cal. 2014).

Plaintiffs try to distinguish the FDA's ongoing work on action levels from their claims regarding label statements. But this is a false distinction. Plaintiffs' labeling claims are premised on the idea that any level of heavy metals in the products is unsafe. Just like in Tran, which "although ostensibly about the meaning of the terms 'Pure' or '100% Pure,' [was] really about

what constitutes a safe level of glyphosate in honey." Tran, 2017 WL 5587276, at *2. Accordingly, guidance from the FDA on what constitutes a safe level of heavy metals in baby food is integral to determining whether any of Sprout's label statements were misleading.

Second, what levels of heavy metals in baby foods are safe and acceptable, and whether it is misleading for foods containing certain levels of heavy metals to make true labeling statements about their contents are questions that fall squarely within the FDA's authority to regulate both the safety and labeling of foods. Congress vested the FDA with the authority to set allowable thresholds for unavoidable "deleterious substances" in food, 21 U.S.C. §342, 346, as well as to promulgate labeling requirements for foods, 21 U.S.C. §343; see also Reese v. Odwalla, Inc., 30 F. Supp. 3d 935. 941 (N.D. Cal. 2014). In addition, the FDA has the power to enforce these regulations through product seizures, injunction, and mandatory recalls. 21 U.S.C. §332, 334, 350*l*. Allowable levels of heavy metals in food, and the labeling of the metals, are therefore issues that lie peculiarly within the FDA's discretion and expertise. The FDA should "be given the first chance to exercise that discretion [and] expertise." Sandoz Pharm. Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 231 (3d Cir. 1990).

The FDA has already announced its plan to act on heavy metals in baby foods, and thus has expressed serious "interest in the subject matter of the litigation." Kane v. Chobani, LLC, 645 F. App'x 593, 594 (9th Cir. 2016). This leads to deferring to the FDA's primary jurisdiction because the FDA's "final pronouncement . . . almost certainly would have an effect on the issues in litigation." Reese, 30 F. Supp. 3d at 942.

Third, failing to defer to the FDA on the safe levels of heavy metals in baby foods, and the proper labeling, poses a danger that a court's determination "will be inconsistent with that of other courts or with the FDA itself." Coyle, 2010 WL 2539386, at *4. This is an "important consideration in view of the fact that Congress [did] not want to allow states to impose disclosure

requirements of their own on packaged food products, most of which are sold nationwide," as this would require manufacturers "to print 50 different labels." In re KIND LLC "Healthy & All Natural" Litig., 209 F. Supp. 3d 689, 696 (S.D.N.Y. 2016). Deferring to the FDA will "help ensure uniformity in administration of the comprehensive regulatory regime established by the FDCA." Astina v. Hain Celestial Grp., Inc., 783 F.3d 753, 761 (9th Cir. 2015).

Lastly, the FDA is actively considering these issues as part of its "Closer to Zero" plan. The FDA held its first public meeting on Closer to Zero, issued draft action levels for lead in juice in April 2022, and said it will propose the first action level for baby food later this year. Therefore, it is "appropriate to allow the FDA an opportunity to provide guidance" on these issues. In Re Gen. Mills, Inc. Kix Cereal Litig., 2013 WL 5943972, at *1 (D.N.J. Nov.1, 2013).

Plaintiff Does Not Adequately Allege the Elements of Injury

The Kimca District Court, analyzing substantially identical allegations, concluded that Plaintiffs did not adequately allege injury for purposes of Article III standing because they failed to allege that any levels of heavy metals in the products were high enough to render the products unsafe and that there was any economic injury. The same analysis applies to injury as a substantive element of Plaintiffs', which is a more stringent requirement than Article II standing. See Ross v. Bank of Am., N.A. (USA), 524 F.3d 217, 222 (2d Cir. 2008).

Plaintiffs generally allege that baby food products, including Sprout's, contain dangerous or unsafe levels of heavy metals, but they never specify at what level heavy metals become unsafe and, thus, they cannot and do not allege that any Sprout products exceeded this level. This renders Plaintiffs' claims of injury implausible and speculative. See Hoffman v. Nutraceutical Corp., 2013 WL 2650611, at *2 (D.N.J. June 10, 2013) (dismissing claims pursuant to Rule 12(b)(6) where "[p]laintiff failed to show that the alleged lead in [the] [d]efendant's product caused the product to be worth less than was promised").

The District Court recognized this and dismissed the same claims against Sprout, finding that there was no injury. As the District Court explained, Plaintiffs alleged that the foods contain heavy metals and that they can be unsafe. However, Plaintiffs did not connect the two allegations, and without the connection it is pure speculation. Plaintiffs have not alleged any new or different facts that would change Judge Chesler's analysis, and thus are unable to establish the element of injury. This case is similar to Koronthaly v. L'Oreal USA, Inc., where the plaintiff failed to demonstrate that lead-containing lipsticks were dangerous and "asserted only a subjective allegation that the trace amount of lead in the lipsticks are unacceptable to her." 374 F. App'x 257, 259 (3d Cir. 2010).

The Complaint also fails to plead economic injury, Plaintiffs fail to plausibly allege that they suffered a loss of the benefit of the bargain or that they paid a higher price than they would have, had they known the products contained a trace amount of heavy metals. Plaintiffs' allegations are analogous to In re Johnson & Johnson Talcum Power Prods. Mktg., Sales Practice & Liability Litigation, 903 F.3d 278 (3d Cir. 2018). In In re Johnson & Johnson, the Third Circuit held that the plaintiff's purchase of baby power that allegedly increased the risk of cancer did not constitute economic harm for standing purposes because she did not allege that the product caused her physical injury, did not allege a fear of future injury, did not allege that the product failed to perform its purposes of "absorb[ing] excess moisture," and did not allege that she was unable to consume the entire product. In re Johnson & Johnson, 903 F.3d at 281-282, 288. Rather, plaintiff alleged only that, had she known the powder "could lead to an increased risk of developing ovarian cancer, she would not have purchased the powder." Id. at 282. The court held that this did not constitute economic injury. Id.

Although the issue in In re Johnson & Johnson arose in the context of Article III standing, the same rule applies to pleading the element of injury. Courts routinely dismiss claims where the

plaintiffs alleged economic injury amounts to nothing more than buyer's remorse. See Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 115 (App. Div. 2009).

Here, Plaintiff alleges that had they known Sprout's products contained some level of heavy metals they would not have purchased, or would have paid less, for the baby foods. However, Plaintiffs have not adequately alleged that their children are at risk due to the products. Nor have they alleged that the products failed to provide food or nutrition, that their children were unable to consume the product, or that the products failed to comply with any applicable regulatory standards. Thus, they are unable to establish an economic injury. Therefore, Plaintiffs' Complaint is hereby DISMISSED.

CONCLUSION

For the aforementioned reasons, Sprout's Motion to Dismiss the Complaint is hereby **GRANTED.**