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A SWEET (OR NOT SO SWEET) SURPRISE:  
UNPACKING THE FDA RULING AGAINST “CORN  
SUGAR” AS AN ALTERNATIVE NAME FOR HIGH-  
FRUCTOSE CORN SYRUP

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A trip to the grocery store has never been so complicated. In today’s world, “processed foods” permeate the market, laden with high fructose corn syrup (HFCS), trans fat, artificial preservatives, and artificial flavorings.<sup>1</sup> As Barbara Atwell put it, “What we eat has changed more during the past thirty years than in the previous thirty thousand . . . . We’ve become a nation of guinea pigs, the subjects in a vast scientific experiment, waiting to see what happens when human beings eat too much industrialized food.”<sup>2</sup>

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1. See Barbara L. Atwell, *Obesity, Public Health, and the Food Supply*, 4 *IND. HEALTH L. REV.* 3, 9 (2007).

2. *Id.*

Beginning in 2008, the corn industry took the offensive against an onslaught of negative media commentary on the inclusion of HFCS in the majority of foods in the typical American's diet. The Corn Refiners Association (CRA) launched Sweet Surprise, a multi-million dollar advertising campaign to re-vamp the reputation of HFCS as the dietary equivalent to sugar, specifically "corn sugar."<sup>3</sup> This massive campaign consisted of television commercials, print and web advertisements, and a website, complete with press releases, news clips, a blog, dietary and scientific information, and educational materials.<sup>4</sup> In 2010, the CRA filed a Citizen's Petition with the United States Food and Drug Administration (FDA), requesting the term "corn sugar" be approved as an alternative name for HFCS.<sup>5</sup> Specifically, they requested that the Code of Federal Regulations section defining HFCS (21 C.F.R. section 184.1866) be amended to say, "High Fructose Corn Syrup, *also known as corn sugar*, a sweet nutritive saccharide mixture . . . ."<sup>6</sup> Their main argument was that, at the end of the day, "corn sugar" is more representative of what HFCS actually is.<sup>7</sup> Originally, the FDA released a statement of approval for the proposed name substitution, but after receiving significant objection from the Sugar Association, the CRA's rival, the FDA released a second statement indicating that it needed more time to decide the matter.<sup>8</sup> On May 30, 2012, the Department of Health and Human Services denied the CRA's petition for several reasons, which will be discussed in depth later in this Note.<sup>9</sup>

This Note will discuss the impact of the FDA's denial of the CRA's petition. Part I discusses the history of HFCS, looking at how the market has become saturated with products that contain it. Part II discusses the similarities and

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3. Press Release, Corn Refiners Association, New Multi-Media Campaign to "Change the Conversation" About High Fructose Corn Syrup (June 23, 2008), *available at* [http://www.foodconsumer.org/newsite/mobile/Shopping/Food/consumers\\_not\\_aware\\_hfcs\\_is\\_similar\\_to\\_sugar.html](http://www.foodconsumer.org/newsite/mobile/Shopping/Food/consumers_not_aware_hfcs_is_similar_to_sugar.html).

4. Second Amended Complaint at 17, *W. Sugar Coop. v. Archer-Daniels-Midland Co.*, No. CV11-3473 CBM (C.D. Cal. Nov. 21, 2011).

5. Citizen's Petition to U.S. Food and Drug Admin. at 1 (Sept. 14, 2010), *available at* <http://www.regulations.gov#!documentDetail;D=FDA-2010-P-0491-0001>.

6. *Id.* (emphasis added).

7. *Id.* at 2; Press Release, Corn Refiners Assoc., Corn Refiners Petition FDA for use of "Corn Sugar" as Alternate Name for High Fructose Corn Syrup: Eliminating Consumer Confusion is the Goal (Sept. 14, 2010), *available at* <http://sweetsurprise.com/press/cra-petitions-fda-use-corn-sugar>.

8. Melanie Warner, *For Corn Syrup, the Sweet Talk gets Harder*, N.Y. TIMES, May 1, 2010, [http://www.nytimes.com/2010/05/02/business/02syrup.html?ref=corn&pagewanted=all&\\_r=1&](http://www.nytimes.com/2010/05/02/business/02syrup.html?ref=corn&pagewanted=all&_r=1&).

9. See Letter from Michael M. Landa, Dir., Ctr. For Food Safety & Applied Nutrition, to Audrae Erickson, Pres., Corn Refiners Assoc. (May 30, 2012) [hereinafter Letter from Michael M. Landa to Audrae Erickson], *available at* <http://www.fda.gov/aboutFDA/CentersOffices/OfficeofFoods/CFSAN/CFSANFOIAElectronicReadingRoom/ucm305226.htm>.

differences between HFCS and Corn Sugar, as currently defined by the FDA. Part III gives some background on Sweet Surprise, the multi-million dollar advertising campaign championed by the CRA. Part IV examines the FDA's final determination of the Corn Sugar/HFCS question in depth, explaining their ultimate reasoning and how this decision has affected the Sweet Surprise campaign. Finally, Part V attempts to put this decision into context and explore the implications for not only the companies involved but also for the ultimate consumer.

### I. THE HISTORY OF HIGH FRUCTOSE CORN SYRUP (HFCS)

While the advent of HFCS is relatively recent, human beings have sweetened their food with sucrose and other natural sugars throughout history.<sup>10</sup> Interest in the usefulness of "agrocorn" began as a laundry stiffener, though it quickly branched into other areas, such as sweeteners, and eventually into syrups.<sup>11</sup> In 1971, Japanese scientists discovered a method of transforming glucose molecules in corn syrup into fructose.<sup>12</sup> It did not take long for food manufacturers to begin widespread use of HFCS in their products, especially in the late 1970s, when greater tariffs and quotas were imposed on imported sugar.<sup>13</sup> It should be noted that imported sugar tariffs were nothing new, having started as early as the First Congress in 1789.<sup>14</sup> The purpose of these earliest tariffs was simply to raise revenue, but later expanded to encourage domestic refining and raw sugar production by subjecting refined sugar to higher tariffs than raw sugar.<sup>15</sup> These higher tariffs create artificially high prices for sugar in the U.S.,<sup>16</sup> encouraging producers to seek alternative sweeteners that can be manufactured at a lower cost.<sup>17</sup> HFCS has been used in a variety of food staples for the U.S. food

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10. See Eric G. Nielson, *The Fructose Nation*, 18 J. AM. SOC'Y NEPHROLOGY 2619, 2619 (2007).

11. *Id.*

12. Josh Ashley, Note, *A Bittersweet Deal for Consumers: The Unnatural Application of Preemption to High Fructose Corn Syrup Labeling Claims*, 6 J. FOOD L. & POL'Y 235, 236 (2010).

13. *Id.*; JOSE ALVAREZ & LEO POLOPOLUS, UNIV. OF FLA., SC019, THE HISTORY OF U.S. SUGAR PRODUCTION 1 (revised 2012), available at <http://edis.ifas.ufl.edu/pdf/SC/SC019>; David Mercer, *U.S. Corn Syrup Sales Fall*, FOOD MFG., June 2, 2010, <http://www.foodmanufacturing.com/news/2010/06/us-corn-syrup-sales-fall>.

14. ALVAREZ & POLOPOLUS, *supra* note 13, at 1.

15. *Id.*

16. CHRIS EDWARDS, CATO INST., AGRICULTURAL REGULATIONS AND TRADE BARRIERS (2009), available at [http://www.downsizinggovernment.org/sites/downsizinggovernment.org/files/pdf/agriculture-regulations-and-trade-barriers\\_0.pdf](http://www.downsizinggovernment.org/sites/downsizinggovernment.org/files/pdf/agriculture-regulations-and-trade-barriers_0.pdf).

17. See Ashley, *supra* note 12, at 236 (alleging that due to the trade issues that keep sugar prices artificially high, HFCS has become "the sweetener of choice for food manufacturers").

market, such as chips and soft drinks. Nowhere was this more prevalent than in the U.S. beverage industry, which adopted HFCS-55 as its sweetener of choice by the mid-1980s.<sup>18</sup> “Sugar-sweetened beverages are the largest single source of added sweeteners in the American diet,” with the average American consuming approximately forty-six gallons of these beverages each year.<sup>19</sup>

One proffered explanation for HFCS’s success is the granting of corn subsidies by the federal government, particularly through the 2002 Farm Bill.<sup>20</sup> Between 1995 and 2012, these subsidies for corn alone totaled \$84,427,099,356.<sup>21</sup> The government’s willingness to spend such a vast sum on corn production creates a huge incentive for farmers to produce as much corn as possible in order to take advantage of these programs. As a result of this increased corn production, secondary markets were created for products derived from corn. With an increase in demand for these secondary corn products, prices for artificial sweeteners, such as HFCS, are kept relatively low, encouraging companies to use them in their products instead of “regular” sugar. Nonetheless, this explanation for the prevalence of HFCS in the U.S. market has been questioned, with some positing that since the government does not control the price of products created from subsidized corn, the interplay of several other factors decreasing the cost while increasing the utility of HFCS must explain its popularity.<sup>22</sup> While there is no single factor that independently explains the prevalence of

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18. *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 654 (7th Cir. 2002) (“HFCS 55, which constitutes about [sixty] percent of total sales of HFCS, is bought mostly by producers of soft drinks, with Coca-Cola and Pepsi-Cola between them accounting for about half the purchases.”); L.R. LYND ET AL., NAT’L RENEWABLE ENERGY LAB., STRATEGIC BIOREFINERY ANALYSIS: REVIEW OF EXISTING BIOREFINERY EXAMPLES 4 tbl. 3 (2002), available at <http://www.nrel.gov/docs/fy06osti/34895.pdf> (it is interesting to note that this is considered a major event in the history of U.S. corn wet milling, showing the importance of HFCS as a product to the corn industry).

19. FOOD POLITICS, SUGAR-SWEETENED BEVERAGE TAX TOOLKIT 4 (2010), available at <http://www.foodpolitics.com/wp-content/uploads/Sugar-Sweetened-Beverages-Toolkit-01.22.10-FINAL.pdf>.

20. See Margaret Sova McCabe, *The Battle of the Bulge: Evaluating Law as a Weapon Against Obesity*, 3 J. FOOD L. & POL’Y 135, 160 (2007) (listing the 2002 Farm Bill as one example of promoting corn growth by appropriating fifteen billion dollars to these products); see also, Natalie Zmuda, *Major Brands No Longer Sweet on High-Fructose Corn Syrup*, ADVER. AGE, Mar. 15, 2010, <http://adage.com/article/news/major-brands-longer-sweet-high-fructose-corn-syrup/142788/> (alleging that sugar farmers do not receive the same subsidy incentives, therefore keeping sugar prices higher than HFCS prices).

21. Envtl Working Grp., *The United States Summary Information: Top Programs in United States, 1995–2012*, FARM.EWG.ORG <http://farm.ewg.org/region.php?fips=00000> (last visited Sept. 8, 2013).

22. See John S. White & John P. Foreyt, *Ten Myths About High-Fructose Corn Syrup*, SWEET SURPRISE, [http://sweetsurprise.com/sites/default/files/pdf/HFCS\\_Press\\_Kit\\_Food\\_TechnologyOct06.pdf](http://sweetsurprise.com/sites/default/files/pdf/HFCS_Press_Kit_Food_TechnologyOct06.pdf) (last visited Sept. 11, 2013).

HFCS in the American diet, it seems likely that government programs encouraging, and even subsidizing, massive corn production had at least a minimal impact on the industry's growth. Given that the U.S. is not the only world market for HFCS, however, indicates that other factors likely played a role in its world-wide popularity as well.

While the U.S. is a major user of HFCS, the product is manufactured and used in many countries throughout the world.<sup>23</sup> This begs the question: What is it about HFCS that makes it so appealing? Its most obvious function is to make products sweeter, but HFCS also gives bread brown crust, enhances the flavors of condiments such as ketchup, and acts as a preservative in things such as jelly and jam.<sup>24</sup> Despite this evidence, some doubt that HFCS is actually sweeter than sucrose, the compound that makes up common table sugar.<sup>25</sup> Nevertheless, HFCS functions for more than just taste, as it is more stable in acidic foods and beverages than sucrose, or ordinary table sugar, and is "immune from the price and availability extremes of sucrose."<sup>26</sup> These factors lend themselves to food producers' preference for HFCS over regular sugar.

Because HFCS permeates a plethora of products in the food market, it is no surprise that between 1970 and 2000, HFCS consumption increased at least one hundred-fold.<sup>27</sup> However, between 2003 and 2008 the use of HFCS dropped eleven percent.<sup>28</sup> Some attribute this decline in usage to allegations that HFCS is a primary cause of the obesity epidemic sweeping the U.S.<sup>29</sup> These allegations transformed HFCS from a "mundane ingredient" to the focus of investigations and research regarding its potential links to obesity, seemingly overnight.<sup>30</sup> This shift in public opinion is understandable in light of the severity this health problem poses to our society:

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23. Press Release, American Sugar Alliance, World Sugar Stocks Remain Tight, Prices Strong (Aug. 1, 2011), available at <http://sugaralliance.org/newsroom/world-sugar-stocks-remain-tight-prices-strong.html> (stating that the U.S. is the fifth largest producer and second largest net importer of sugar).

24. John S. White, *Online Exclusive: HFCS: More Than Just a Sweetener*, FOOD PROD. DESIGN, July 12, 2011, <http://www.foodproductdesign.com/articles/2011/07/hfcs-more-than-just-a-sweetener.aspx>.

25. John S. White, *Straight Talk About High-Fructose Corn Syrup: What It Is and What It Ain't*, 88 AM. J. CLINICAL NUTRITION 1716S, 1718S-19S (2008) (Table 2 compares the sweetness of sucrose and HFCS, which only have a three point difference in absolute sweetness, and a one point difference on relative sweetness).

26. *Id.* at 1716S.

27. George A. Bray et al., *Consumption of High-Fructose Corn Syrup in Beverages May Play a Role in the Epidemic of Obesity*, 79 AM. J. CLINICAL NUTRITION 537, 539 (2004).

28. Mercer, *supra* note 13.

29. *Id.*

30. White, *supra* note 25, at 1716S.

The health risks associated with obesity range from heart disease and diabetes . . . to hypertension, stroke, breast cancer, colon cancer, gallbladder disease, arthritis, sleep disturbances, breathing problems, and physical disability . . . [such as] back problems, knee problems, and other ailments associated with movement and dexterity.<sup>31</sup>

Given this range of problems associated with obesity, it is particularly alarming that rates of obesity amongst children and adolescents have tripled in the last three decades.<sup>32</sup> Additionally, there are approximately 112,000 deaths per year attributed to obesity.<sup>33</sup> But, “[t]he toll that obesity takes on society is measured not only in terms of the deaths it causes, but also in terms of the quality of life for those living with the disease.”<sup>34</sup> It is argued that the link between HFCS consumption and obesity stems from the fact that obese and overweight individuals are more likely to consume sugar-sweetened beverages than normal-weight individuals.<sup>35</sup> Additionally, linking obesity rates with HFCS use and consumption seems only natural, as there appears to be a strong temporal relationship between the increase in HFCS consumption and obesity rates.<sup>36</sup>

In response to consumer concerns over these allegations, many companies began changing their products to better comport with consumer preferences, such as Starbucks removing HFCS from their line of baked goods or Wheat Thins removing all HFCS from their products and replacing it with regular sugar.<sup>37</sup> Companies seem to agree that it is the consumers themselves bringing about this change, as they gravitate towards more “natural” products.<sup>38</sup> At the end of the day, consumption of regular sugar in the U.S. has been rising in response to consumer preferences, largely at the expense of HFCS.<sup>39</sup> I submit that these shifts in consumer preferences led to the attempted, albeit unsuccessful, re-branding of HFCS as the more “natural” ingredient of corn sugar, setting the backdrop for the continuing battle between corn and sugar producers.

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31. Atwell, *supra* note 1, at 7.

32. Food Politics, *supra* note 19, at 5.

33. Ctrs. for Disease Control & Prevention, *Frequently Asked Questions About Calculating Obesity-Related Risk*, [http://www.cdc.gov/PDF/Frequently\\_Asked\\_Questions\\_About\\_Calculating\\_Obesity-Related\\_Risk.pdf](http://www.cdc.gov/PDF/Frequently_Asked_Questions_About_Calculating_Obesity-Related_Risk.pdf) (last visited Sept. 8, 2013).

34. Atwell, *supra* note 1, at 4.

35. Food Politics, *supra* note 19, at 4.

36. Bray, *supra* note 27, at 542.

37. Mercer, *supra* note 13; *see also* Warner, *supra* note 8.

38. Zmuda, *supra* note 20.

39. Press Release, American Sugar Alliance, *supra* note 23.

## II. THE SIMILARITIES AND DIFFERENCES BETWEEN HFCS AND CORN SUGAR

The heart of this battle was really one of terminology: Are HFCS and Corn Sugar interchangeable terms for the same product, or are they indeed two different compounds that should not be synonymous with each other? The FDA, despite the CRA's attempts, maintains separate definitions of the two terms, showing that they are, in fact, distinct.<sup>40</sup> Corn manufacturers, however, continue to argue that the compounds (and subsequently the names used to refer to them) are actually interchangeable, because any differences between them are miniscule.<sup>41</sup> This section will first look at the definitions of HFCS and Corn Sugar as currently defined by the FDA, and then examine the asserted similarities between the two terms for purposes of pending litigation and current controversy.

Before venturing into the contours of statutory language and definition, it is important to have a basic understanding of sugar on a chemical level. Sugars are carbohydrates that consist of one or more ring structures referred to as monosaccharides.<sup>42</sup> During digestion, the sugars are broken down into their individual components and used as energy for the body.<sup>43</sup> The relevant compounds for the purposes of this Note are dextrose (a.k.a. glucose), fructose, and sucrose. Sucrose is commonly known as table sugar, and consists of two rings: one glucose and one fructose.<sup>44</sup> It is typically sweeter than straight dextrose because of the added fructose molecule, which bonds more strongly with sweet taste receptors in the mouth than dextrose.<sup>45</sup> Dextrose, or glucose, on the other hand, is a single ring molecule, and for this reason can bond with other sugar molecules to produce various forms of sugar.<sup>46</sup> As a result, it is one of the most common compounds in the human diet.<sup>47</sup> Lastly, fructose, the compound from which HFCS derives its name, is a simple sugar that consists of one ring and is naturally abundant in a variety of fruits and plant saps.<sup>48</sup> The fundamental difference between dextrose and fructose can be easily confused, but essentially "fructose has the

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40. See 21 C.F.R. § 184.1866 (2013) (defining HFCS); 21 C.F.R. § 184.1857 (2013) (defining corn sugar).

41. *What is HFCS?*, SWEETSURPRISE, <http://sweetsurprise.com/what-is-hfcs> (last visited Sept. 8, 2013) (listing similarities between the two compounds, but asserts the only difference between the compounds is the way in which the sugars are bonded at the chemical level).

42. Kirsten Hendrickson, *Dextrose v. Sucrose*, LIVESTRONG (Mar. 28, 2011) <http://www.livestrong.com/article/309335-dextrose-vs-sucrose/>.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Norma DeVault, *What is Fructose?*, LIVESTRONG (May 22, 2010), <http://www.livestrong.com/article/128948-fructose/>.

same chemical formula as glucose[, but] . . . its structure differs in a way that stimulates the taste buds and produces [a] sweet sensation.”<sup>49</sup> During HFCS production, as discussed in more detail below, naturally occurring glucose in corn starch is transformed into fructose using enzymes, creating the “high fructose” result.<sup>50</sup> With the differences of these compounds in mind, we now turn to the definitions of HFCS and Corn Sugar used by the FDA.

According to the FDA, HFCS is a “sweet, nutritive saccharide mixture [made of] approximately [forty-two] or [fifty-five] percent fructose, [and] prepared as a clear aqueous solution.”<sup>51</sup> Sucrose and HFCS are made of the same two simple sugars: glucose and fructose.<sup>52</sup> The procedure for making HFCS begins with:

[H]arvest[ing] [corn], and sen[ding it] to the wet mill. Next, the corn is crushed in a mill and then run through screens in order to separate the corn starch from [the] other parts of the kernel. After being separated, natural enzymes are added to the liquid, which converts some of the sugars . . . from glucose to fructose. The resulting liquid is typically 42 percent fructose and 58 percent glucose. From there, the liquid is passed through activated carbon and filtered. The final product is called HFCS-42 . . . . Some of the HFCS-42 then goes through a liquid filtration process to increase the fructose content, creating a liquid that is 90 percent fructose. This product is called HFCS-90. Finally, the two liquids, HFCS-42 and HFCS-90, are blended to make a mixture that is 55 [percent] fructose. The final blend, called HFCS-55 is widely used as a sweetener in sodas.<sup>53</sup>

Corn sugar, on the other hand, is defined by the FDA as D-glucose, or dextrose.<sup>54</sup> It is produced by mixing “corn starch with safe and suitable acids or enzymes, followed by refinement and crystallization from the resulting hydrolysate.”<sup>55</sup>

The question surrounding the HFCS name substitution was whether these two apparently distinct products were similar enough to be used interchangeably, or whether they were different compounds that should be defined and used separately. Not only are they both made of simple sugars, but research suggests that the caloric intake of sugar (such as corn sugar, as currently defined) and HFCS are the same.<sup>56</sup> Based on this assertion, some have concluded that there would be

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49. *Id.*

50. *Id.*

51. 21 C.F.R. § 184.1866 (2013).

52. *What is HFCS?*, SWEETSURPRISE, *supra* note 41.

53. *How It's Made*, SWEETSCAM, <http://sweetscam.com/how-its-made/> (last visited Sept. 8, 2013).

54. 21 C.F.R. § 184.1857 (2013).

55. *Id.*

56. White, *supra* note 25, at 1719S.

no reduction in obesity rates by replacing HFCS with regular sugar because it simply amounts to a nutritional wash.<sup>57</sup> This flies in the face of other studies that assert the two are not nutritional synonyms.<sup>58</sup> Princeton University conducted one of the more prevalent studies, which found that HFCS causes weight gain in mice despite the equivalent caloric intake of sugar and HFCS.<sup>59</sup> Furthermore, the study contends that the body metabolizes HFCS and sugar differently, affecting weight and energy intake.<sup>60</sup> Of course, the Princeton study is not without critics, who question the study's methods. As we all know, a study on mice is far from conclusive when it comes to the effects of sugar and HFCS on the human body.<sup>61</sup> These examples of contradicting studies illustrate a simple point: there is no definitive proof that using HFCS in food products causes any of the negative effects popular media attributes to it. There are a host of studies to support either side of the argument, regardless of being in the HFCS camp or the corn sugar camp. But there are other sources of evidence from which the similarities and differences of corn sugar and HFCS have been analyzed.

For example, the court in *U.S. v. Archer Daniels Midland Co.* determined that HFCS and sugar are in separate product markets, offering additional evidence that these two products are indeed distinct from one another.<sup>62</sup> The court used three factors to determine whether products were in the same product market: reasonable interchangeability, cross-elasticity of demand, and price correlation.<sup>63</sup> It was really the first of these factors that was dispositive in reversing the lower court's determination that HFCS and sugar were in the same relevant product market.<sup>64</sup> As it relates to the first factor, the interchangeability of the products, the court used three factors to come to a determination: use, quality, and price.<sup>65</sup> The court acknowledged that the two compounds are functionally equivalent to one another, but the price differential between HFCS and sugar

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57. *Id.* at 1720S.

58. *See* Warner, *supra* note 8.

59. *See id.* (referencing Hilary Parker, *A Sweet Problem: Princeton Researchers Find that High-Fructose Corn Syrup Prompts Considerably More Weight Gain*, PRINCETON UNIV. (Mar. 22, 2010), <http://www.princeton.edu/main/news/archive/S26/91/22K07/>).

60. Sharon S. Elliott et al., *Fructose, Weight Gain, and the Insulin Resistance Syndrome*, 76 AM. J. CLINICAL NUTRITION 911, 913 (2002).

61. *See* Warner, *supra* note 8 (statement by Dr. David Ludwig, Children's Hosp. of Bos.).

62. *U.S. v. Archer Daniels Midland Co.*, 866 F.2d 242, 244 (8th Cir. 1988), *aff'd*, *U.S. v. Archer Daniels Midland Co.*, 781 F. Supp 1400 (S.D. Iowa 1991).

63. *Id.*

64. *Id.* at 246–48 (emphasizing the first factor's importance to the court's determination).

65. *Id.* at 246.

prevents them from being reasonably interchangeable.<sup>66</sup> It was the size of the differential between the two products that was most influential in the court's decision, because sugar prices are government supported which raises them to an artificially high level.<sup>67</sup> In light of this uncertainty, efforts to re-brand HFCS as the equivalent to corn sugar seemed a natural next step to distancing itself from the public's disapproving eye.

### III. "SWEET SURPRISE" – THE CORN REFINERS ASSOCIATION'S RE-BRANDING EFFORT

Branding permeates American society, with companies relying on a strong brand in the marketplace in order to be successful. This often consists of a business's name, logo, symbols, or other distinguishing characteristics setting the particular company apart in the consumer's mind from similar products or companies.<sup>68</sup> But what can a business do once their brand has been dragged through the mud? The obvious solution is to re-brand, which is exactly what many companies have tried to do in times of crisis.<sup>69</sup> This is the strategy HFCS producers have decided to take by implementing their secret weapon, "Sweet Surprise."<sup>70</sup>

"'High-fructose corn syrup' is, in retrospect, an unfortunate [name choice], because it conjures up images of a product with very high fructose content. The original intent of the name was simply to distinguish it from ordinary, glucose-containing corn syrup."<sup>71</sup> There were several reasons for the CRA's decision to launch Sweet Surprise, the multi-million dollar campaign to paint HFCS in a more positive, better-informed light. One such reason, as discussed above, was the recent decline in HFCS use, possibly posited to be the result of negative media coverage and research of its harmful effects on the human body, including obesity.<sup>72</sup> Because consumer preferences have shifted towards "natural" products, many companies have responded by eliminating HFCS from their products

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66. *Id.*

67. *Id.*

68. Laurent Muzellec & Mary Lambkin, *Corporate Rebranding: Destroying, Transferring or Creating Brand Equity?*, 40 EUR. J. OF MKTG. 803, 804 (2006).

69. *See id.* at 813–17 (discussing case studies of re-branding within the telecommunications industry).

70. *See* SWEET SURPRISE, <http://sweetsurprise.com> (last visited Sept. 8, 2013); Second Amended Complaint at 17, *W. Sugar Coop. v. Archer-Daniels-Midland Co.*, No. CV11-3473 CBM (C.D. Cal. Nov. 21, 2011) ("The campaign attempts to recast HFCS as a natural product, nutritionally identical and directly comparable to sugar.").

71. White, *supra* note 25, at 1717S.

72. *See* Atwell, *supra* note 1, at 4, 7.

and spending a lot of money to distinguish their HFCS-free products from those that still contain HFCS.<sup>73</sup>

In order to continue competing in the market, the CRA launched Sweet Surprise in 2008 and, within two years, spent close to thirty million dollars on the campaign.<sup>74</sup> Sweet Surprise takes advantage of a variety of media outlets, including television, print, and web-based platforms.<sup>75</sup> The commercials, which have perhaps received the most widespread acknowledgement because of their comprehensive distribution, were aimed at adults (particularly parents) and encouraged them to visit the website [www.cornsugar.com](http://www.cornsugar.com) for more information on the "truth" about HFCS.<sup>76</sup> The website itself is filled with a wealth of information on HFCS, including myths and facts, expert opinions, links to various scientific studies regarding HFCS, and the history of HFCS production in the U.S.<sup>77</sup> It also has a section with media and press coverage of HFCS and corn sugar, as well as press releases covering the history and continued battle over name substitution.<sup>78</sup> The main goal of the campaign is, allegedly, to re-cast HFCS as the nutritional equivalent to sugar, and as a "natural" product.<sup>79</sup> It does not, according to the CRA, promote the sale of HFCS, but instead seeks to educate the public against the vilification of HFCS as the cause of the obesity epidemic, by giving them the "facts" behind HFCS.<sup>80</sup>

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73. For evidence of this trend, look at a regular Pepsi can versus a Pepsi Throwback can. What may make Pepsi Throwback appealing to consumers is the prominent labeling that it contains *real* sugar. The consumer knows that this is as opposed to their normal sodas, which contain HFCS, making Throwback seem like a more "natural" product; *see also* Zmuda, *supra* note 20.

74. Warner, *supra* note 8.

75. *See* Second Amended Complaint at 17, W. Sugar Coop. v. Archer-Daniels-Midland Co., No. CV11-3473 CBM (C.D. Cal. Nov. 21, 2011).

76. *See, e.g.*, Midgica, *Corn Refiners Association HFCS Commercial – Party*, YOUTUBE (July 17, 2011), <http://www.youtube.com/watch?v=IQ-ByUx552s> (A woman chastises another mother at a party for serving a drink with HFCS in it. After being corrected as to her mistake, they share an awkward moment before a voiceover tells the viewer to "[g]et the facts. You're in for a Sweet Surprise." Previous commercials would send the viewer to [www.cornsugar.com](http://www.cornsugar.com) for more information, but that domain name is no longer in use. The commercials also do not appear on their website [www.sweetsurprise.com](http://www.sweetsurprise.com) nor on the CRA's YouTube channel).

77. SWEET SURPRISE, *supra* note 70.

78. *Newsroom*, SWEETSURPRISE, <http://sweetsurprise.com/news-about-hfcs> (last visited Sept. 8, 2013).

79. Second Amended Complaint at 17, W. Sugar Coop. v. Archer-Daniels-Midland Co., No. CV11-3473 CBM (C.D. Cal. Nov. 21, 2011).

80. Defendants' Notice of Motion and Motion to Dismiss Plaintiffs' First Amended Complaint; Memorandum of Points and Authorities in Support Thereof at 8, W. Sugar Coop. v. Archer-Daniels-Midland Co., No. CV11-3473 CBM (C.D. Cal. Sept. 12, 2011).

Since the FDA's ruling, the CRA has reportedly not ceased their advertising activities with Sweet Surprise.<sup>81</sup> In a statement to the Consumerist, the CRA explained their motivations behind the continued advertising, saying the FDA "did not address or question the overwhelming scientific evidence that [HFCS] is a form of sugar and is nutritionally the same as other sugars."<sup>82</sup> They go on to say that the Sugar Association continually seeks to censor the CRA's educational mission through attempts to block the campaign, implying that the CRA is still waiting to see how the pending litigation between the parties is going to play out.<sup>83</sup>

#### IV. THE FDA RULING: CORN SUGAR AND HFCS ARE NOT INTERCHANGEABLE

The tone leading up to the FDA's decision seemed overwhelmingly against the name change, with organizations and private individuals alike calling for denial of the CRA's petition.<sup>84</sup> In light of this public opinion, and several months after the initial petition, the FDA decided on May 30, 2012 to deny the CRA's petition in a four-page letter to CRA President Audrae Erickson.<sup>85</sup> They listed a number of reasons for their denial of the name change, both technical and policy-driven. The first is the technical distinction between "Sugars" and "Syrups."<sup>86</sup> Sugars have always been defined as crystalline solids, while syrups are defined as "an aqueous solution or liquid food," a legal definition that is consistent with popular dictionary definitions as well.<sup>87</sup> Perhaps the best way to ensure that there is no consumer confusion, which is the ultimate fear supposedly

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81. Chris Morran, *Why is Big Corn Continuing to Run 'Corn Sugar' Ads Even After FDA Denial*, CONSUMERIST (June 8, 2012), <http://consumerist.com/2012/06/08/why-is-big-corn-continuing-to-run-corn-sugar-ads-even-after-fda-denial/>; Linda Bonvie, *The 'Corn Sugar' Scam is Ended, But the Confusion Lingers On*, FOOD IDENTITY THEFT (July 10, 2012), <http://foodidentitytheft.com/the-corn-sugar-scam-is-ended-but-the-confusion-lingers-on/> (reporting that there were still many sightings of the Sweet Surprise ads featuring their slogan "corn sugar or cane sugar, your body can't tell the difference").

82. Press Release, Corn Refiners Assoc., Statement of Audrae Erickson, Pres., Corn Refiners Assoc. on the Food & Drug Admin. Denial of Petition (May 30, 2012), *available at* <http://www.corn.org/press/newsroom/fda-petition-denial-statement/>.

83. Morran, *supra* note 81 (statement of Audrae Erickson, Pres., Corn Refiners Assoc.).

84. Docket Folder Summary, REGULATIONS.GOV, <http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;D=FDA-2010-P-0491> (last visited Sept. 9, 2013) (showing 2,190 public submissions to the FDA's docket for the CRA's petition, both from individuals and interested groups, overwhelmingly against the name change).

85. See Letter from Michael M. Landa to Audrae Erickson, *supra* note 9.

86. *Id.*

87. *Id.*; see also Webster's II New College Dictionary 1102 (2001) (defining "sugar" as "[a]ny of a class of water-soluble crystalline carbohydrates . . ."); Webster's II New College Dictionary 1119 (2001) (defining "syrup" as "[a] thick, sweet, sticky liquid . . .").

prevented by the re-naming, is to ensure that the definitions for these products continue to conform to established social norms.

The second reason for the FDA's denial of the petition is that "Corn sugar" has been commonly used to define Dextrose for thirty years; the FDA officially decided to allow corn sugar as a permissible alternative name for Dextrose in 1993.<sup>88</sup> The CRA's assertion that this alternative name is rarely used on food labels, and that the association between "corn sugar" and dextrose is not common knowledge, is not a strong enough basis for the FDA to overturn such a history.<sup>89</sup> In their independent investigation of these contentions, the FDA found that "corn sugar" was often used on labeling schemes to describe dextrose, raising factual questions as to the CRA's allegations made in the petition.

Lastly, the FDA made a policy argument as to why they were denying the CRA's petition. For those that have hereditary fructose intolerances or fructose malabsorption, "corn sugar" is known as an allowed ingredient, signaling which foods are safe for them to consume.<sup>90</sup> These individuals could be placed at risk by allowing "corn sugar" to refer to HFCS, a product unsafe for their consumption.<sup>91</sup>

The CRA released a statement the day of the denial, asserting that the FDA's treatment of their petition was on very "narrow, technical grounds" and therefore should not be used as evidence that HFCS is, in fact, different than sugar.<sup>92</sup> They further assert that the ruling does nothing to alleviate consumer confusion regarding HFCS, and note that the FDA "continues to consider HFCS as a form of added sugar, and requires that it be identified to consumers in the category of sugars on the Nutrition Fact Panel on foods and beverages."<sup>93</sup> Others, however, hail the decision as a stand against fraud by the corn industry, some even going so far as to call the denial a "victory for American consumers."<sup>94</sup> The Examiner said, "[j]ust when I thought the corn industry owned everything, food processing, food regulations[,] and popular opinions, the FDA . . . popped the

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88. Letter from Michael M. Landa to Audrae Erickson, *supra* note 9.

89. *Id.*

90. *Id.*

91. *Id.*

92. Press Release, Corn Refiners Assoc., *supra* note 82.

93. *Id.*

94. Press Release, Sugar Assoc., FDA Denies Petition to Rename High-Fructose Corn Syrup: Sugar Association Commends FDA Commitment to Consumer Right to Know; Regulators Affirm Changing HFCS Name Would Confuse Public (May 30, 2012), *available at* <http://www.sugar.org/fda-denies-petition-to-rename-high-fructose-corn-syrup/> (quoting Dan Callister, attorney for the Sugar Association).

food industry's corn-syrup bubble."<sup>95</sup> Characterizing the petition as a "clever marketing ploy that would have easily hidden HFCS on labels," opponents of the name change assert that the FDA stood against the CRA by not allowing them to bury facts because the public is now aware of the risks associated with HFCS consumption.<sup>96</sup> While this battle between corn and sugar industries has come to a close, the war appears far from over, with suit still pending between the two industries and continued advocacy on the CRA's part to educate their consumers on the food they eat, specifically HFCS.

## V. THE ROAD AHEAD

While some might think that the FDA's denial is the end of the road for the Sweet Surprise campaign, it is really just the beginning. Much rests on the outcome of the still-pending litigation between HFCS/corn producers and the sugar refiners, who challenged the Sweet Surprise campaign on the basis of false advertising.<sup>97</sup>

### A. False Advertising: An Overview

False advertising and other unfair competition claims are governed the Lanham Trademark Act.<sup>98</sup> The simple purpose of this Act is to provide protection for trademarks, regulate commerce by controlling deceptive and misleading use of these marks in commerce, and to protect persons engaged in commerce from unfair competition.<sup>99</sup> False advertising claims in particular are covered in 15 U.S.C. section 1125.<sup>100</sup> The plaintiff bears the burden of establishing the following elements required for a successful false advertising claim:

- (1) that defendant made material false or misleading representations of fact in connection with the commercial advertising or promotion of its product; (2) in commerce; (3) that are either likely to cause confusion or mistake as to (a) the origin, as-

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95. Kimberly Lord Stewart, *FDA Says High Fructose Corn Syrup is Not Corn Sugar*, THE EXAMINER (May 31, 2012), <http://www.examiner.com/review/fda-says-high-fructose-corn-syrup-is-not-corn-sugar>.

96. Joseph Mercola, *Why Is Big Corn Continuing to Run 'Corn Sugar' Ads Even After FDA Denial?*, MERCOLA (June 25, 2012), <http://articles.mercola.com/sites/articles/archive/2012/06/25/fructose-on-corn-sugar.aspx>.

97. Second Amended Complaint at 23, *W. Sugar Coop v. Archer-Daniels-Midland Co.*, No. CV11-3473 CBM (C.D. Cal. Nov. 21, 2011).

98. 15 U.S.C. §§ 1051-1072 (2006).

99. 15 U.S.C. § 1127 (2006); *see also*, Elizabeth Williams, *Standing to Bring False Advertising Claim or Unfair Competition Claim under § 43(a)(1) of Lanham Act*, 124 A.L.R. FED. 189, § 2(a) (1995).

100. 15 U.S.C. § 1125 (2006).

sociation[,] or approval of the product with or by another, or (b) the characteristics of the goods or services; and (4) injure the plaintiff.<sup>101</sup>

Standing to bring a false advertising claim in most jurisdictions rests on showing that there is likelihood of damages that result from the advertising.<sup>102</sup> Therefore, the question becomes how the false advertising adversely impacted the plaintiff in a quantifiable way.

False advertising claims seek to protect consumers from harm or, for the purposes of this Note, to prevent them from being swindled into paying more for a food product they think is healthier for them based on misleading or simply false information.<sup>103</sup> Food labeling is an important issue in this area because consumers are concerned, now more than ever, with what they eat.<sup>104</sup> This has prompted consumers to prefer labels that indicate the food is natural, likely part of the CRA's decision-making process when they began marketing HFCS as a more natural product and the equivalent of regular sugars.<sup>105</sup> The FDA has said, albeit not very clearly, that a product can be considered "natural" under certain circumstances, despite the fact that it contains HFCS.<sup>106</sup> The implications of this decision, however, cannot be under-stated. "American consumers view food and beverage labels as the best way to establish a healthy connection between the goods they purchase and their lifestyle—the most important or easiest step to improving overall health and wellness."<sup>107</sup> Because of consumer interest in the

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101. Sally Beauty Co. v. Beautyco, Inc., 304 F.3d 964, 980 (10th Cir. 2002) (citing *Cottrell, Ltd. v. Biotrol Int'l, Inc.*, 191 F.3d 1248, 1252 (10th Cir. 1999) (citations omitted)).

102. Williams, *supra* note 99.

103. A. Bryan Endres et al., *United States Food Law Update: Health Care Reform, Preemption, Labeling Claims and Unpaid Interns: The Latest Battles in Food Law*, 6 J. FOOD L. & POL'Y 311, 332 (2010).

104. Ricardo Carvajal & Riette Van Laack, *Seeing Red Over "Green:" The Fight Over "Organic," "Natural," and "Sustainable,"* 18 BUS. LAW TODAY 33, 33 (2009) (asserting that consumer preferences for organic or natural foods provide greater rewards for food companies, and therefore increase their incentives to use these buzz words in labeling).

105. *Id.* at 34.

106. Compare Lorraine Heller, *HFCS is Not 'Natural,' Says FDA*, FOOD NAVIGATOR-USA (Apr. 2, 2008), <http://www.foodnavigator-usa.com/Suppliers2/HFCS-is-not-natural-says-FDA> (because HFCS is produced using synthetic fixing agents, the FDA objected to the use of the term "natural" on labels containing the product); with Laura Crowley, *HFCS is Natural, Says FDA In a Letter*, FOOD NAVIGATOR-USA (July 8, 2008), <http://www.foodnavigator-usa.com/Suppliers2/HFCS-is-natural-says-FDA-in-a-letter> (clarifying that as long as the synthetic agents do not touch the final product, they are not considered "added in" or "included in" the final product and therefore can be considered natural).

107. Adam C. Schlosser, *A Healthy Diet of Preemption: The Power of the FDA and the Battle Over Restricting High Fructose Corn Syrup from Food and Beverages Labeled 'Natural,'* 5 J. FOOD L. & POL'Y 145, 146 (2009); see also Ashley, *supra* note 12, at 236 (stating that the most

claims being made on their food labels, studies indicate that emphasizing health claims of a product on the label can increase product sales.<sup>108</sup> This makes it important for companies, like the CRA, to maintain a certain image of their product that is going to attract consumers, and in this case has prompted their attempt to distance HFCS from the negative connotations surrounding it. Given the lack of clarity from the FDA regarding what kinds of labels products containing HFCS can bear, numerous suits have been filed regarding HFCS and “natural” claims on labels, though none have brought closure to the subject.<sup>109</sup>

The danger of misleading marketing was addressed in *Smajlaj v. Campbell Soup Co.*, dealing with health claims made on soup labels.<sup>110</sup> The harm in *Smajlaj* centered around the fact that consumers paid more for soups they thought were healthier for them because they were advertised as having less sodium than regular soups by the same brand.<sup>111</sup> The problem was that the sodium content was almost identical, meaning that consumers were not getting the added benefit they were paying extra for.<sup>112</sup> Specifically, the court warned against basing claims for misleading labels on marketing materials without specifically alleging which parts of the materials are misleading, and precisely how they may mislead the consumer.<sup>113</sup> The court stated that actually seeing the label for the “regular” product against which the health claim is made is not required, meaning that the consumer does not have to know that the statement on the “healthy” label is false in order to suffer harm for which they can seek relief.<sup>114</sup> This is what the sugar industry was concerned about: consumers purchasing “natural” products, or products containing the term “corn sugar,” and thinking that they are healthier, when they really contain allegedly harmful artificial ingredients, such as HFCS.<sup>115</sup> As it relates to the name change, the sugar industry was concerned that consumers would purchase products that list “corn sugar” in the ingredients for a higher price, under the delusion that the product is just as healthy or healthier for them than other products containing “real” sugar.

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preferred labels of customers were those that claimed the product was natural, such as “100% Natural” or “All Natural Ingredients”).

108. Ashley, *supra* note 12, at 236.

109. *Id.* at 236–37.

110. *Smajlaj v. Campbell Soup Co.*, 782 F. Supp.2d 84, 104 (D. N.J. 2011).

111. *Id.*

112. *Id.* at 90.

113. *Id.* at 105.

114. *Id.* at 104.

115. Second Amended Complaint at 22, *W. Sugar Coop. v. Archer-Daniels-Midland Co.*, No. CV11-3473 CBM (C.D. Cal. Nov. 21, 2011) (alleging that the statements made through the CRA’s marketing are knowingly misleading, and therefore damaging the consuming public, by obscuring health concerns, and the sugar industry, by diverting sales).

B. *Western Sugar Coop. v. Archer-Daniels Midland Co., et al.*i. *Misleading Statements*

The sugar industry alleges three specific categories of statements that mislead consumers and violate the Lanham Act.<sup>116</sup> The first category was the CRA's use of the term "corn sugar" throughout advertisements as a substitute name for HFCS, despite the fact that the FDA had not ruled on the petition at the time of the re-branding.<sup>117</sup> According to the complaint, Sweet Surprise used the term over two billion times since September 2010, which misled the public into thinking that the FDA had already approved "corn sugar" for that use.<sup>118</sup> The second category of misleading statements is the continuous claim that HFCS (or "corn sugar" as they refer to it in the commercials) is natural, suggesting that it occurs as a product of nature.<sup>119</sup> Lastly, the third category of statements under contention is Sweet Surprise's repeated use of the phrase "whether it's corn sugar or cane sugar, your body can't tell the difference," and similar statements.<sup>120</sup> They allege that such statements are a unilateral appropriation of the term "corn sugar" and not supported by scientific evidence, therefore misleading the public as to the "truth" regarding HFCS.<sup>121</sup> According to the complaint, this gave consumers the impression that HFCS is similar to corn sugar as it is currently defined, when they are really separate products under current understanding of the terms.<sup>122</sup>

The plaintiff alleges that, aside from consumer harm, the sugar industry has also suffered harm as consumers purchase products with HFCS in them over products that contain sugar, resulting in price erosion and lost profits.<sup>123</sup> They also allege that, in response to the misleading campaign on the CRA's part, they will have to engage in corrective advertising to educate the public of the "truth"—that HFCS and corn sugar are not interchangeable, and that there are real differences between the two products.<sup>124</sup> Furthermore, they allege the CRA's use of "corn sugar" as a substitute name for HFCS caused irreparable injury to their business and goodwill with the public, for which they are entitled to relief.<sup>125</sup>

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116. *Id.* at 24.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 25.

124. *Id.*

125. *Id.* at 26.

In response to these claims, the CRA asserts that there have been no finished food products put on the market with corn sugar on the label instead of HFCS, and therefore neither the sugar companies nor the consumers have yet suffered any actual harm from the “Sweet Surprise” campaign.<sup>126</sup> To support this claim, they mention the continuing decline in HFCS sales, as well as the number of companies that are dropping HFCS from their products completely, as evidence that any “misleading” information from their campaign has actually helped the sugar industry, rather than injure them.<sup>127</sup> Additionally, they assert a number of affirmative defenses, including the doctrine of unclean hands, stating that any misperceptions the public may have about HFCS is caused or perpetuated in whole or in part by the Sugar Association’s own conduct.<sup>128</sup> Specifically, they allege: “Plaintiffs have undertaken a comprehensive and systematic campaign to confuse consumers about HFCS and to vilify or perpetuate the vilification of HFCS, employing false statements, innuendo, and misdirection . . . .”<sup>129</sup> Why engage in this kind of behavior? Defendants allege that the plaintiffs have a vested interest in stifling the fact that there is scientific evidence showing that sugar from corn is not nutritionally different from sugar made from beets or cane.<sup>130</sup> Finally, Defendants allege that the Sugar Association’s statements are also false as pertains to HFCS, and therefore, are not entitled to relief.

There is little indication how this section of claims will be treated, given the FDA’s subsequent denial of the petition.<sup>131</sup> Whether the denial should have any impact on the merits of this claim will need to be decided by the jury in the case. While it is true that the administrative ruling by the FDA has no direct bearing on the merits of the pending case, it still provides strong evidence for the jury to consider when the case goes to trial.<sup>132</sup> This separation comes from the fact that the FDA’s jurisdiction resides over food labels, while the Federal Trade

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126. Defendants’ Notice of Motion and Motion to Dismiss Plaintiffs’ First Amended Complaint; Memorandum of Points and Authorities in Support Thereof at 2, *W. Sugar Coop. v. Archer-Daniels-Midland Co.*, No. CV11-3473 CBM (C.D. Cal. Sept. 12, 2011).

127. *Id.*

128. Archer-Daniels-Midland Company’s First Amended Answer to Plaintiffs’ Second Amended Complaint & Counterclaim; Demand for Jury Trial at 16–17, *W. Sugar Coop. v. Archer-Daniels-Midland Co.*, No. CV11-3473 CBM (C.D. Cal. Sept. 7, 2012).

129. *Id.* at 17.

130. *Id.*

131. Note that the Western Sugar Cooperative has not amended their complaint since the FDA’s denial of the petition. *See generally* Docket Proceedings, *W. Sugar Coop. v. Archer-Daniels-Midland Co.*, No. CV11-3473 CBM (C.D. Cal. Apr. 22, 2011).

132. Elaine Watson, *Sugar Attorney: Jury in Corn Sugar Lawsuit Will Draw Same Conclusion as FDA on HFCS*, FOOD NAVIGATOR-USA (June 4, 2012), <http://www.foodnavigator-usa.com/Regulation/Sugar-attorney-Jury-in-corn-sugar-lawsuit-will-draw-same-conclusion-as-FDA-on-HFCS>.

Commission (FTC) has jurisdiction over advertising.<sup>133</sup> Audrae Erickson, president of the CRA, seems confident that the FDA's ruling does not hurt their chances in the courtroom, stating, "[t]he standards the FDA applies to determine the wording of ingredient labels are entirely different from the standards a judge or jury will use to determine whether one commercial interest can silence another."<sup>134</sup>

Unfortunately, however, case law is scarce with examples of how juries treat evidence of a term's use before FDA approval, as these suits tend to settle out of court. In 2008, the makers of Airborne, a popular cold remedy, settled a class action lawsuit for false advertising for roughly twenty-three million dollars.<sup>135</sup> Kellogg came to a similar settlement in 2011, where consumers won out over Kellogg for claims that their Rice Krispies cereal was good for children in small amounts.<sup>136</sup> The fact that these cases, dealing with remarkably similar facts as the case at hand, have settled before going to trial provides little guidance as to how an administrative ruling after a suit has been filed affects litigation for false advertising. It stretches the imagination, however, to think that this evidence of the federal government's stance on the issue would have *no* bearing on the jury's decision-making. When determining whether the statements that were made were false and confusing to consumers, the FDA's decision supports the idea that consumers need to be protected from this kind of activity.

## ii. *Status of the Case*

On October 21, 2011, the court granted a motion to dismiss the state law portions of the sugar industry's claim, as well as all manufacturers of HFCS as parties of the suit, citing California's Anti Strategic Lawsuit Against Public Par-

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133. 15 U.S.C. § 45 (2006) (granting the FTC power to regulate fraud and misrepresentation in commerce, extending to television advertising); *see* Watson, *supra* note 132.

134. Watson, *supra* note 132 (referencing the statement of Audrae Erickson, Pres., Corn Refiners Assoc.).

135. *See, e.g.*, Order (1) Granting Motion for Final Approval of Settlement, (2) Granting in Part Motion for Attorneys' Fees and Litigation Expenses, and (3) Granting in Part Motion for Incentive Award to Plaintiff, *Wilson v. Airborne, Inc.*, No. EDCV 07-770-VAP, 2008 WL 3854963 (C.D. Cal. Aug. 13, 2008); *see also* Kate Barrett, *Airborne to Refund Consumers*, ABC NEWS (Mar. 3, 2008), <http://abcnews.go.com/Health/ColdFlu/story?id=4380374&page=1#.UWnY-6vEo5A> (Class action suit was over Airborne's claim that it was a cure for the common cold. Since the settlement, the company has "toned down its claims," despite repeated claims that the company did nothing wrong.).

136. Order Approving Final Settlement Approval, *Weeks v. Kellogg Co.*, No. CV 09-08102, 2011 U.S. Dist. Lexis 155472, at \*148 (Nov. 23, 2011).

ticipation statute (Anti-SLAPP).<sup>137</sup> Several of the defendants, however, were subsequently brought back into the suit in July 2012.<sup>138</sup> After the FDA's denial of the CRA's petition, Defendants filed counterclaims in September 2012, alleging that the Sugar Association also engaged in false advertising and commercial disparagement under the Lanham Act.<sup>139</sup> The basis of their claim lies in the lack of conclusive scientific research on the health effects of HFCS, which they claim should bar Plaintiffs from making representations that HFCS causes obesity or is any different than processed sugar, and that falsely lead consumers to believe that eating foods containing processed sugar is healthier than eating foods that contain HFCS.<sup>140</sup> Pointing to a number of specific publications where such statements have been made, HFCS producers seek an injunction against the Sugar Association making statements of this nature, as well as expanded monetary damages for the harm suffered by these statements and compensation for corrective advertising given the exceptional nature of the case.<sup>141</sup> Additionally, they allege that over-consumption of *all* sugars is the real problem, and that using HFCS as a scapegoat will not accomplish the overall health objectives supposedly at the forefront of the sugar industry's attack against HFCS.<sup>142</sup>

In response to these counterclaims, the Sugar Association filed a Motion to Dismiss, asserting that, unlike Defendants, their communications do not amount to commercial speech, and therefore are entitled to First Amendment

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137. Order Denying in Part and Granting in Part Defendants' Motion to Dismiss at 14, *W. Sugar Coop. v. Archer-Daniels-Midland Co.*, No. CV11-3473 CBM (C.D. Cal. Oct. 21, 2011); Press Release, Corn Refiners Assoc., Court Rejects Key Portions of Lawsuit Against Corn Refining Industry: Under California Free Speech Statute, Judge Immediately Dismisses Claim Due to Lack of Evidence; Also Dismisses All Manufacturers (October 23, 2011), available at <http://www.corn.org/press/newsroom/court-rejects-portions-lawsuit/>.

138. Order Granting in Part and Denying in Part Certain Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint at 14, *W. Sugar Coop. v. Archer-Daniels-Midland Co.*, No. CV11-3473 CBM (C.D. Cal. July 31, 2012); see also Jeff Gelski, *C.R.A. Member Companies Back in HFCS Lawsuit*, FOOD BUS. NEWS (Aug. 1, 2012), [http://www.foodbusinessnews.net/articles/news\\_home/Regulatory\\_News/2012/08/CRA\\_member\\_companies\\_back\\_in\\_H.aspx?ID=%7B37481F2F-6F3D-4BED-9FE6-F278499B72F3%7D&cck=1](http://www.foodbusinessnews.net/articles/news_home/Regulatory_News/2012/08/CRA_member_companies_back_in_H.aspx?ID=%7B37481F2F-6F3D-4BED-9FE6-F278499B72F3%7D&cck=1).

139. Archer-Daniels-Midland Company's First Amended Answer to Plaintiffs' Second Amended Complaint & Counterclaim; Demand for Jury Trial at 22, *W. Sugar Coop. v. Archer-Daniels-Midland Co.*, No. CV11-3473 CBM (C.D. Cal. Sept. 7, 2012) (other defendants Cargill, Corn Products International, and Tate & Lyle also filed answers and counterclaims against plaintiffs).

140. *Id.* at 39 (specifically alleging that the "Sugar Association has stepped up its efforts to spread false and misleading statements regarding processed sugar and HFCS").

141. *Id.* at 51.

142. *Id.* at 22-23.

protections.<sup>143</sup> Ultimately, they allege that the corn industry is only making these counterclaims because they subscribe to an "I'm-doing-it-because-you're-doing-it" attitude.<sup>144</sup> This, according to the motion, is not enough to plead a viable false advertising claim.<sup>145</sup> Finally, they claim that Defendants' affirmative defense of "unclean hands" should be stricken for the same reasons as the counterclaims.<sup>146</sup> The court has not issued an order regarding the motion as of September 17, 2013, though the CRA filed their opposition to the motion in December 2012 and the plaintiffs filed a brief in further support of their motion in January 2013.<sup>147</sup>

### C. "Sweet Surprise" Since the FDA Denial

Since the FDA's denial of the CRA's petition, the Sweet Surprise campaign has continued. Acknowledging the denial, the CRA went on to assert that the campaign to educate the public about the truth behind HFCS must continue, because consumer confusion continues.<sup>148</sup> The CRA believes that "[c]onsumers have the right to know what is in their foods and beverages in simple, clear language that enables them to make well-informed dietary decisions."<sup>149</sup> For this reason, the CRA has not discontinued the Sweet Surprise campaign, likely because of the unresolved question surrounding the pending case against them.

The biggest reason why the campaign continues likely rests in the distribution of regulation amongst administrative agencies.<sup>150</sup> Since the ads are not for a specific food product, meaning that the ads are not encouraging consumers to run to their nearest store and purchase a bottle of pure HFCS, the FDA does not control them.<sup>151</sup> It falls to the FTC to decide which advertisements are deceptive,

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143. Plaintiffs' Notice of Motion, Motion and Memorandum in Support of Motion to Dismiss and to Strike Allegations From the Counterclaim, and to Strike Affirmative Defense of "Unclean Hands" at 6-7, *W. Sugar Coop. v. Archer-Daniels-Midland Co.*, No. CV11-3473 CBM (C.D. Cal. Oct. 29, 2012).

144. *Id.* at 21.

145. *Id.*

146. *Id.* at 24.

147. CRA Member Company Defendants' Opposition to Plaintiffs' Motion to Dismiss and to Strike Allegations From the Counterclaim, and to Strike Affirmative Defense of "Unclean Hands," *W. Sugar Coop. v. Archer-Daniels-Midland Co.*, No. CV11-3473 CBM (C.D. Cal. Dec. 10, 2012); Reply in Further Support of Plaintiffs' Motion to Dismiss and to Strike Allegations From the Counterclaim, and to Strike Affirmative Defense of "Unclean Hands," *W. Sugar Coop. v. Archer-Daniels-Midland Co.*, No. CV11-3473 CBM (C.D. Cal. Jan. 14, 2013).

148. Press Release, Corn Refiners Assoc., *supra* note 82.

149. *Id.*

150. Mercola, *supra* note 96.

151. 15 U.S.C. § 45 (2010) (granting the FTC power to regulate fraud and misrepresentation in commerce, extending to television advertising); Morran, *supra* note 81.

and which are not.<sup>152</sup> Therefore, the CRA has much at stake in the still-pending suit with the sugar industry, considering the amount of money they have already invested in the campaign. If the court rules that the campaign was, in fact, false advertising, their campaign is over, and the money they have already spent forfeited, on top of the damages and court costs awarded to the other side. Despite their continued assertions that they have done nothing wrong, the CRA has taken some interesting steps relating to the Sweet Surprise campaign. Their website, [www.cornsugar.com](http://www.cornsugar.com), is now simply a shell site, providing a blank page when visitors attempt to access it.<sup>153</sup> Additionally, the commercials at issue are no longer available at [www.sweetsurprise.com](http://www.sweetsurprise.com),<sup>154</sup> nor on the CRA's YouTube channel.<sup>155</sup> The question becomes whether this can be taken as evidence of their "guilt," or if it is simply the company's good faith attempts to comply with the FDA's order.

Being that the case is in federal court, it is likely that Federal Rule of Evidence 407, dealing with subsequent remedial measures would be applicable, and prevent the evidence of advertising changes from being admitted.<sup>156</sup> The rule states that "[w]hen measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: negligence, culpable conduct, a defect in a product or its design[,] or a need for a warning or instruction."<sup>157</sup> In this case, it is unlikely the evidence that the CRA removed references to "corn sugar" from their campaign, and even took the ads off their website and YouTube channel, could be brought into the suit as evidence to show their culpability in the false advertising suit. This is bolstered by public policy, which seeks to encourage compliance with the laws and regulations of the United States.<sup>158</sup> If the CRA's compliance with the FDA regulation subjected them to inferences of guilt in their pending suit, then they would not be encouraged to comply with the FDA's regulation, and in fact would seem to be encouraged to remain in violation of the new regulation until the suit is resolved. Additionally, neither bad faith nor intent is an element of a false advertising

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152. 15 U.S.C. § 45 (2010).

153. CORN SUGAR, <http://www.cornsugar.com> (last visited Sept. 10, 2013).

154. *Videos*, SWEET SURPRISE, <http://sweetsurprise.com/hfcs-videos> (last visited Sept. 10, 2013) (videos on the site are testimonials by doctors and other professionals proclaiming the "truth" about HFCS).

155. *Corn Refiners Assoc.*, YOUTUBE, <http://www.youtube.com/user/CornRefinersAssoc/videos?view=0> (last visited Sept. 10, 2013) (video library is substantially the same as their website, [sweetsurprise.com](http://sweetsurprise.com), showing testimonials by various professionals regarding HFCS and the industry).

156. FED. R. EVID. 407.

157. *Id.*

158. *See id.* (advisory committee note).

claim, so it seems questionable that this evidence would add any real value to Plaintiffs' claims.<sup>159</sup>

#### D. *Is the FDA's Denial Enough?*

No matter the outcome of the pending case, there are some that want to take the denial a step further, arguing that not only was it right for the petition to be denied, but that HFCS have its Generally Regarded as Safe (GRAS) status revoked, declaring sugar in all its forms to be a "toxic" substance.<sup>160</sup> Sections 182.1, 184.1, and 186.1 of the Code of Federal Regulations house the current GRAS listings, totaling hundreds of substances.<sup>161</sup>

Under sections 201(s) and 409 of the Federal Food, Drug, and Cosmetic Act . . . any substance that is intentionally added to food is a food additive, that is subject to premarket review and approval by FDA, unless the substance is generally recognized, among qualified experts, as having been adequately shown to be safe under the conditions of its intended use, or unless the use of the substance is otherwise excluded from the definition of a food additive.<sup>162</sup>

This can be determined using two kinds of evidence: "use of a food substance may be GRAS either through scientific procedures or . . . through experience based on common use in food."<sup>163</sup> The FDA established a range of five conclusions that can be reached when determining GRAS affirmation for substances.<sup>164</sup> In 1997, the FDA sought to consolidate their resources by eliminating the GRAS affirmation petition process and replacing it with a notification procedure.<sup>165</sup> No final rule regarding the notification procedure has been passed.<sup>166</sup>

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159. *Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964, 980 (10th Cir. 2002) (citing *Cottrell, Ltd. v. Biotrol Int'l, Inc.*, 191 F.3d 1248, 1252 (10th Cir. 1999) (Citations omitted)).

160. Gary Taubes, *Is Sugar Toxic?*, N.Y. TIMES, April 13, 2011, [http://www.nytimes.com/2011/04/17/magazine/mag-17Sugar-t.html?\\_r=1&pagewanted=all&](http://www.nytimes.com/2011/04/17/magazine/mag-17Sugar-t.html?_r=1&pagewanted=all&) (referencing Robert H. Lustig, *Sugar: The Bitter Truth*, YOUTUBE (July 30, 2009), <http://www.youtube.com/watch?v=dBnniua6-oM>) (asserting that sugar in all forms, including HFCS, is a toxic substance, and therefore not safe for general consumption as the products have been deemed by the FDA)).

161. Substances that are Generally Regarded as Safe, 21 C.F.R. § 182.1 (2012); Substances Added Directly to Human Food Affirmed as Generally Recognized as Safe (GRAS), 21 C.F.R. § 184.1 (2012); Substances Added Indirectly to Human Food Affirmed as Generally Recognized as Safe (GRAS), 21 C.F.R. 186.1 (2012).

162. *Generally Recognized as Safe (GRAS)*, FDA, <http://www.fda.gov/Food/IngredientsPackagingLabeling/GRAS/ucm2006850.htm> (last visited Sept. 10, 2013).

163. *Id.*

164. *GRAS Substances (SCOGS) Database*, FDA, <http://www.fda.gov/Food/IngredientsPackagingLabeling/GRAS/SCOGS/default.htm> (last visited Sept. 10, 2013).

165. Substances Generally Recognized as Safe, 62 Fed. Reg. 18938 (1997); *History of the GRAS List and SCOGS Review*, FDA,

In 1976, the FDA released a review from the Select Committee on GRAS Substances (SCOGS) for Corn Sugar, stating that there was little evidence to show it was harmful to the body, and therefore designated it as GRAS.<sup>167</sup> Later, they also issued a section on Corn Syrup, which received the same conclusion rating as corn sugar: a two.<sup>168</sup> According to the FDA, this conclusion means:

[t]here is no evidence in the available information on [substance] that demonstrates a hazard to the public when it is used at levels that are now current and in the manner now practiced. However, it is not possible to determine, without additional data, whether a significant increase in consumption would constitute a dietary hazard.<sup>169</sup>

This seems to be the very assertion many make when it comes to HFCS, given the fact that consumption of the product has increased so drastically.<sup>170</sup> Due to the recent slew of research into the science of sugar (in all its forms, including HFCS) and its effects on the human body, proponents of this response think it is time for the FDA to reconsider this status. Vocal proponents of labeling sugar and related products as “toxic” acknowledge that HFCS and other forms of regular sugar are indeed equivalents of one another.<sup>171</sup> In the words of Sweet Surprise, “whether it’s corn sugar or cane sugar, your body can’t tell the difference.”<sup>172</sup> Opponents of HFCS agree, but use this as evidence that one is as poisonous as the other.<sup>173</sup>

Despite the FDA’s denial, it seems unlikely the FDA would go so far as to revoke GRAS status from HFCS or corn sugar under their modern regulatory definitions. The evidence is simply inconclusive as to the health effects of these products, not to mention that the combined political power of companies that produce or use HFCS in their products is staggering. This power can be seen in

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<http://www.fda.gov/Food/IngredientsPackagingLabeling/GRAS/SCOGS/ucm084142.htm> (last visited Sept. 10, 2013).

166. *History of the GRAS List and SCOGS Review*, *supra* note 165.

167. *Corn Sugar (Dextrose)*, DATABASE OF SELECT COMMITTEE ON GRAS SUBSTANCES (SCOGS) REVIEW (1976), <http://www.accessdata.fda.gov/scripts/fcn/fcnDetailNavigation.cfm?rpt=scogsListing&id=94> (last visited Sept. 10, 2013).

168. *Corn Syrup*, DATABASE OF SELECT COMMITTEE ON GRAS SUBSTANCES (SCOGS) REVIEW (1976), <http://www.accessdata.fda.gov/scripts/fcn/fcnDetailNavigation.cfm?rpt=scogsListing&id=95> (last visited Sept. 10, 2013).

169. *GRAS Substances (SCOGS) Database*, *supra* note 164 (brackets in original).

170. Bray, *supra* note 27, at 542.

171. See Taubes, *supra* note 160.

172. Associated Press, *Corn Syrup’s ‘Sugar is Sugar’ Campaign Disputed by Sugar Industry*, NOLA (Sept. 14, 2011), [http://www.nola.com/health/index.ssf/2011/09/corn\\_syrups\\_sugar\\_is\\_sugar\\_cam.html](http://www.nola.com/health/index.ssf/2011/09/corn_syrups_sugar_is_sugar_cam.html) (describing popular commercial where the industry stated that no matter whether it is corn sugar or cane sugar, “[y]our body can’t tell the difference” and “[s]ugar is sugar.”).

173. Taubes, *supra* note 160.

these companies' successful thwarting of the proposed soda tax in 2010. States that managed to pass such a tax were quick to repeal it, in the face of heavy industry lobbying.<sup>174</sup>

"Two years ago, the Maine Legislature passed a soda tax of [forty-two] cents per gallon of soda. The revenues were marked to go toward a state health care program. Last November, the soft-drink industry thwarted the effort by pumping [four] million [dollars] into 'Fed up with Taxes,' a ballot initiative that successfully encouraged voters to reject the tax."<sup>175</sup>

The amounts spent on these campaigns in the various states can be staggering, showing just how far the beverage industry, in particular, was willing to go in order to protect their profits from these taxation measures proposed by the states.<sup>176</sup> One can only imagine the kind of combined funds and political power that would be thrown into preventing the effective, overall ban of HFCS given the number of products which still include it as an ingredient.

## VI. CONCLUSION

Both sugar producers and corn syrup producers have a vested interest in "winning" the public perceptions for their product, causing the CRA to launch Sweet Surprise, an attempt to educate the public about HFCS. However, its petition to allow "corn sugar," a name used pervasively throughout the campaign, as an alternative name for HFCS was denied.<sup>177</sup> While the public may labor under the perception that this settles the matter, the truth is that the battle of these sweet giants is just beginning.

Since the denial, the CRA has continued its mission to educate the public as to the truth about HFCS, though it appears they have removed many, if not all, references to "corn sugar" from their campaign.<sup>178</sup> Much rides on the still-pending suit between the sugar industry and the corn industry, each claiming that the other is guilty of false advertising.<sup>179</sup> The impact that the FDA denial will

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174. Joey Peters, *Soda Taxes Fizzle in Wake of Industry Lobbying*, WASH. POST, July 13, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/13/AR2010071303494.html>; *Washington State Candy and Soda Tax Repealed*, FOOD NAVIGATOR-USA (Dec. 7, 2010) <http://www.foodnavigator-usa.com/Regulation/Washington-State-candy-and-soda-tax-repealed>.

175. Peters, *supra* note 174.

176. *Id.*

177. Letter from Michael M. Landa to Audrae Erickson, *supra* note 9.

178. *See generally* SWEET SURPRISE, [www.sweetsurprise.com](http://www.sweetsurprise.com) (last visited August 2, 2013) (noting that the materials provided in both print and video do not refer to "corn sugar" but instead refer to their product as High Fructose Corn Syrup).

179. *See generally* Second Amended Complaint, *W. Sugar Coop. v. Archer-Daniels-Midland Co.*, No. CV11-3473 CBM (C.D. Cal. Nov. 21, 2011); *Archer-Daniels-Midland Compa-*

have on the judge and jury of the case remains to be seen. The administrative process is separate from litigation, and the types of evidence relied on in each can be very different. Additionally, there is a lack of precedent in this area, as cases where false advertising claims were affected by subsequent administrative rulings have settled out of court.<sup>180</sup> It seems likely, however, that the petition denial is exactly the kind of evidence that a jury in particular would give great weight to in their deliberations, which could make the CRA's job a little harder.

For now, it seems that the battle between corn and sugar continues, with American consumers caught in the middle. While the jury is still out on the health effects of HFCS as compared to other forms of added sugar, the CRA hit the nail on the head when it said, "Americans should be consuming less of *all* added sugars, whether the source be processed sugar, HFCS, or any other kind of added sugar. Vilifying one kind of added sugar will not reduce Americans' waistlines. Reducing all added sugars, and reducing caloric intake in general, will."<sup>181</sup> Regulation and litigation in this area will only do so much; ultimately, the consumer must take responsibility for their shopping cart and educate themselves on the foods they eat. This does not mean companies should be able to make whatever claims they like about their products, but this does highlight the need for regulation of what can and cannot be said in marketing directly to consumers. By the same token, an all-out attack on sugar by any name as a "toxic" substance takes society to the other, undesirable extreme. No one can fault HFCS companies for wanting to revamp their image in the wake of negative and attacking media perceptions, but without these standards it is difficult to know what claims are false, and what claims are merely trying to rebut the equally untrue allegations by the sugar industry and other public interest groups. With any luck, the pending litigation between the two heavy-hitters in this fight will provide much-needed guidance where confusion exists.

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ny's First Amended Answer to Plaintiffs' Second Amended Complaint & Counterclaim; Demand for Jury Trial, *W. Sugar Coop. v. Archer-Daniels-Midland Co.*, No. CV11-3473 CBM (C.D. Cal. Sept. 7, 2011).

180. *See e.g.*, Order (1) Granting Motion for Final Approval of Settlement, (2) Granting in Part Motion for Attorneys' Fees and Litigation Expenses, and (3) Granting in Part Motion for Incentive Award to Plaintiff, *Wilson v. Airborne, Inc.*, No. EDVC 07-770-VAP, 2008 WL 3854963, at \*1 (C.D. Cal. Aug. 13, 2008).

181. *Archer-Daniel-Midland Company's First Amended Answer to Plaintiff's Second Amended Complaint & Counterclaim; Demand for Jury Trial* at 22-23, *W. Sugar Coop. v. Archer-Daniels-Midland Co.*, No. CV11-3473 CBM (C.D. Cal. Sept. 7, 2011).