

IN THE FOOD AND DRUG ADMINISTRATION

Petition to the FDA to Assert Its)
Exclusive Jurisdiction with Respect to)
a Warning on Labeling of)
Kava Dietary Supplements)

Docket No. _____

Submitted on Behalf of Jarrow Formulas, Inc.

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Citizen Petition

This is a petition submitted to the Food and Drug Administration (“FDA”) by Jarrow Formulas, Inc. (“Jarrow”) pursuant to 21 C.F.R. § 10.30 and Sec. 402 of the Federal Food, Drug and Cosmetic Act (“FDCA”). This petition requests the Commissioner of Food and Drugs (“the FDA”) to take the administrative action specifically identified in Part A (“Action Requested”) of this petition. The general subject of this petition is kava and, specifically, the FDA’s exercise of its jurisdiction over warnings involved with the labeling of dietary supplements which contain that herb. Throughout this document, the phrase “kava supplements” means kava- containing dietary supplements.

Jarrow is a corporation based in Los Angeles, California which develops, distributes, and sells dietary supplements. Jarrow has a strong interest in the safety and efficacy of dietary supplements. Until March 15, 2002, Jarrow sold dietary supplements, which contained kava, to retailers in the United States.

The use of kava in dietary supplements is now a “hot issue” within the industry and with respect to some members of the general public. This issue first received significant attention in December of 2001 when the American Herbal Products Association (“AHPA”) and other industry representatives met with the FDA to apprise the Agency of reports of safety concerns coming from Europe, and when the FDA issued a Letter to Health Care Professionals (12/18/01).

This petition is timely and significant because: (1) Safety concerns have been expressed about the ingestion of kava supplements in some circumstances and (2) a California state trial court has been asked to issue an Order which would mandate that a special warning be placed on labels and “shelf-talkers for all kava supplements sold in California. Jarrow strongly believes that decisions about such a warning should be made by the FDA, subject to its rule-making and other administrative obligations, and not by a court, even with the input from the FDA, due to

the national interest in a federal, uniform policy for such supplements and due to the Agency's unique responsibility for enforcing federal laws and regulations related to dietary supplements.

A. Action Requested

Petitioners request the FDA to:

(1) Intervene in the case of In re Kava Kava Litigation, Los Angeles Superior Court, Consolidated Case # BC 269717 (“the Lawsuit”)

(2) File a Motion to Dismiss the plaintiffs' claims in the Lawsuit on the basis of (i) the doctrine of implied pre-emption, and (ii) the applicability of the Commerce Clause of the United States Constitution and any other basis upon which it can legally assert and exercise its jurisdiction; and

(3) Immediately, assert exclusive jurisdiction, outside of any litigation context, over safety issues associated with kava supplements by means of a strong public statement which supplements its previous kava related announcements; (4) When the FDA's kava studies are completed, either (a) Issue an official policy, in the nature of a Guidance document, which suggests or recommends a specific caution or warning to be contained on the labels of all kava dietary supplements, provided that policy is supported by available sound science or (b) Issue a Notice of Proposed Rulemaking in order to begin the regulatory process for a caution or warning on the labels of kava supplements, if available sound science supports such rule-making.

The urgency of these circumstances require that the FDA develop, broadcast and take a strong official position with respect to its jurisdiction, as noted in Action (3) above, promptly, in order to protect the public interest and to ensure that all companies and individuals which

manufacture, distribute, and sell kava supplements are subject to uniform requirements. An example of such a policy statement is:

The FDA has the duty of and authority to do its best to ensure the safety of dietary supplements being offered for sale to consumers in the United States. The FDA believes that state court lawsuits and decisions for non-product liability or non-personal injury claims are inappropriate methods for establishing law or policy with respect to the nationally regulated dietary supplement industry. Due to recent reports that dietary supplements which contain kava have the potential to cause adverse effects on or in the liver, the FDA is studying the safety and toxicity of kava dietary supplements. The FDA does not have any information at this time to conclude, pursuant to Sec. 402(f)(1)(A) of the FDCA, that kava dietary supplements present a significant or unreasonable risk of illness or injury to the general public. The evidence which the Agency does have indicates that the incidence of injury associated with kava is extremely rare. In light of these reports, however, persons who have liver disease or liver problems, or persons who are taking drug products that can affect the liver, should consult a physician before using kava supplements. Individuals without sensitivity to kava should not take kava supplements for a period exceeding four weeks, and should abstain from taking them for four weeks before beginning use again. At no time should the recommended serving size or servings per day be exceeded. The recommended daily intake of kava lactones should not exceed 300 mg.

B. Factual Background Concerning Kava

Kava (*Piper methysticum*), called kava kava in Polynesia, is from the rootstock of a plant in the pepper family. For hundreds of years, it has been a revered medicinal and ritual herb in Polynesia, used for tranquilizing beverages, ceremonial purposes, symbolic welcomes for notables, as a medicine for relaxation, and also to treat urinary tract infections. See Mark Blumenthal, Kava Safety Questioned Due to Case Reports of Liver Toxicity: Expert analyses of case reports say that there is insufficient evidence to make causal connection, [no date], website of the American Botanical Council, www.herbalgram.org/browse.php/kavaupdate/ (“Blumenthal”). (Copy attached as Exhibit A.) In the U.S., kava has had a strong reputation, as an effective herb to ease mild stress and anxiety, and until recently was one of “the top ten best selling herbs.” See Kava: What Is Happening To This Good Herb? AHPA Report, The Official Publication of the American Herbal Products Association, Vol. 17, No. 1 (Spring/Summer 2002)

(All information is from this source unless otherwise noted; copy attached as Exhibit B.) In February, 1997, AHPA commissioned a safety review of kava by the Herb Research Foundation. In September, 1997, AHPA recommended a label statement for all products containing kava, which included the caution, “*Not recommended for consumption with alcoholic beverages.*” In 1997, the respected herbalist Dr. James Duke published his book The Green Pharmacy, in which he recommended that Americans keep kava as one of twelve major herbs in their herbal medicine chest, and described it as: “This herb is a safe, mild tranquilizer that grows only in tropical forests.” (See page 8 of The Green Pharmacy; copy attached as Exhibit C.)

All was quiet on the safety front until September, 2000 when the Swiss Intercantonal Agency for Control of Medicines notified kava marketers about its concerns regarding kava. One month later, on November 19, 2000, Germany’s Federal Institute for Drugs and Medical Devices (BfArM) announced in a report that it did not intend to conduct a new risk evaluation for licensed kava products. We note that the German Commission E monograph on Kava Kava, published in 1990, has under “Side Effects: none,” although under “Interactions with Other Drugs” the monograph does note that “Potentiation of effectiveness is possible for substances . . . such as alcohol, barbiturates and psychopharmacological agents,” and the recommended duration is three months continuous use. Mark Blumenthal, ed. The Complete German Commission E Monographs (American Botanical Council, published in cooperation with Integrative Medicine Communications, 1998), page 156-157. (Copy attached as Exhibit D.)

Germany’s BfArM reversed its position one year later, and on November 8, 2001, German kava product manufacturers had to respond in four weeks to a letter proposing withdrawal of marketing authorizations for all kava products, except for some homeopathic preparations. The German organization did not report any conclusion of a causal effect between kava and liver damage, but rather based its proposal on a “well-founded suspicion” that kava

could have adverse effects and on “24 spontaneous reports of suspected adverse drug events affecting the liver.” AHPA Report, p. 1, (emphasis added.) During the next months, the health authorities of other countries—Belgium, Canada, New Zealand, Ireland, Australia, and the U.S.—all addressed their concerns regarding kava use. France banned all kava sales for a year, and Britain requested a voluntary and temporary suspension of kava sales.

AHPA noted that, in every case, “nations used their regulatory authority to alert consumers to the circumstantial relationship between liver function and kava use. [However,] none of these regulatory authorities other than Germany provided any suggestion that their actions were based on a scientific evaluation of the case reports—and even Germany has now delayed any final regulatory action as it incorporates the information provided by industry experts.” *Id.* (emphasis added). Amid this international confusion, AHPA decided to take a proactive role, and in early December, 2001 commissioned a board certified toxicologist, Donald Waller, Ph.D., “to analyze all known reports of adverse events associated with kava.” (AHPA Report, p. 1) Also in December, AHPA met with the FDA to discuss this issue, and soon afterwards the FDA issued its letter to physicians.

In February, 2002, Dr. Waller concluded from his study that “based on currently available information, . . . kava when taken in appropriate doses for reasonable periods of time has no scientifically established potential for causing liver damage.” Dr. Waller urged greater awareness among both the public and the medical community that some conditions could preclude the consumption of kava in any amount, including “concomitant intake of prescription drugs associated with liver damage, excessive alcohol consumption and preexisting liver disease or hepatitis with compromised liver function.” This report was provided to the FDA on February 19, 2002; on March 25, the Agency issued an advisory to both consumers and to physicians, as discussed below.

On February 26, 2002, Australia issued a similar advisory separately to consumers and physicians, but, as in other countries, this action was not based on any actual cases in that country; its Therapeutic Goods Administration (TGA) stated that there had been no reported Australian cases of liver failure or related problems from kava products. On August 21, 2002, Health Canada issued a “stop-sale order” for all kava-containing products. Health Canada stated that it had made its decision “after a safety assessment concluded there is insufficient evidence to support [kava products] safe use.” Health Canada requested the recall of these products “from all levels of the market.” On the next day, August 22, AHPA issued a report on this recall action and also reported that the Canadian Health Food Association (CHFA), a trade association that represents herbal products in Canada, expressed strong opposition to this total recall in a press release charging that Health Canada made its decision without having discussed its assessment of kava with experts in herbal medicine and without having any new evidence on which to base its decision. In AHPA’s August 22 statement, it reported that the FDA on the same day informed AHPA that its position had not changed in light of the action of Health Canada. (Both announcements are attached as Exhibits E and F.)

C. Statement of Legal Grounds

(1) **Implied Pre-Emption.** Pursuant to DSHEA, the FDA has promulgated a very comprehensive set of regulations which address the labeling of dietary supplements. This exhaustive set of regulations, developed pursuant to explicit provisions in DSHEA, reflects an intention on the part of the Congress as well as the FDA to pre-empt the regulation of integral labeling issues for dietary supplements. See the comprehensive discussion of the doctrine of implied pre-emption in the recent U.S. Supreme Court case of Gade v. National Solid Wastes Management Association, 505 U.S. 88, 98, 99 112 S.Ct. 2374(1992). The Court in the Gade case, identified two different types of implied pre-emption:

“... field pre-emption where the scheme of federal regulation is: so pervasive as to make reasonable but inference that Congress left no room for the States to supplement it”... and conflict pre-emption, where “compliance with both federal and state regulations is a physical impossibility,” or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,”...

Whichever type of implied pre-emption applies, the bottom line is that the FDA does enjoy exclusive jurisdiction over the topic of warning on labels because of the implied pre-emption doctrine.

[2] **Primary Jurisdiction.** The FDA has primary jurisdiction over label statements, cautions, warnings, and failure to warn issues in cases concerning products subject to the FFDCFA. See, e.g., Heller v. The Coca-Cola Co., 230 A.D.2d 768, 646 N.Y.S.2d 524 (N.Y. App. Div. 1996) (“Heller”). In the absence of an official, national policy, in the form of a regulation, with respect to a Warning for kava-containing supplements, more lawsuits and inconsistent rulings from various state courts as to the requirement, if any, and the scope of a caution or warning for labels of kava supplements, will surely occur. Safety issues concerning kava products are subject to FDA’s authority under Sec. 402 of the FDCA. That statute provides that a dietary supplement is adulterated if it “presents a significant or unreasonable risk of illness or injury” under the “conditions of use recommended or suggested in labeling” or “under ordinary conditions of use.”

Heller is factually analogous to the Lawsuit in all material aspects. In Heller, several plaintiffs filed a proposed class action lawsuit against nine manufacturers of soft drinks, alleging that the plaintiffs and similarly-situated consumers purchased and consumed soft drinks that contained Aspartame after those soft drinks had become spoiled or tasteless due to the limited

shelf life of Aspartame. Plaintiffs sought damages for fraud and deceit and sought to compel defendants to disclose expiration dates on the labels of all of their diet soft drink products. The trial court granted defendants' motion to dismiss plaintiffs' claims on the grounds that the doctrine of primary jurisdiction applied, thereby requiring the trial court to defer to the FDA on the issue of the labeling of soft drinks which contain Aspartame. The appellate court affirmed the trial court's order of dismissal, holding that deferring on this issue to the FDA, which had spent 10 years reviewing the stability of Aspartame and had issued a regulation (21 C.F.R. § 172.804) which does not require expiration dates, would help to ensure national uniformity in the labeling of soft drinks which contain Aspartame, and would properly utilize the special expertise of the FDA.

The Heller court provided two reasons for the doctrine of primary jurisdiction: "a need for the expertise and specialized knowledge of an administrative agency and a need for consistency and uniformity in an industry which is nationally regulated." Finally, these same two reasons are repeated by the court in deciding that the FDA has primary jurisdiction over labeling issues as to Aspartame: "This will ensure that there will be national uniformity in the labeling of Aspartame and will utilize the special expertise of the FDA in evaluating the relevant factors for approving food additives." Heller at 526.

[3] **The Commerce Clause Also Dictates A National, Uniform Policy.** A prudent application of the Commerce Clause of the United States Constitution should result in the FDA exercising exclusive jurisdiction over these kava issues and a dismissal of the Lawsuit by the California state court. Clearly, the history of the inclusion of that clause in the United States Constitution was the "vesting in Congress the power to regulate commerce with foreign nations and among the several States . . . to insure uniformity of regulation against conflicting and discriminating state legislation." Robert H. Bork & Daniel E. Troy, Locating the Boundaries:

The Scope of Congress's Power to Regulate Commerce, 25 Harv. J. Law & Public Policy 849 and 852 (2002).

The actual and potential exercise of one state's perceived protectionist attitude is hostile to other states and the national interest. A crisis in labeling is not near; it is here. See Robert H. Bork, Federalism and Federal Regulation: The Case of Product Labeling, Working Paper Series No. 46, at 4 (Wash. Legal Found. July 1991) ("Labeling") The Constitution created a strong federal government, in large part, to establish and protect a national market free of state barriers to interstate commerce. The FDA possesses ample authority to preempt state laws, and state judicial proceedings in order to protect interstate commerce as well as the federal system of product safety regulation. Professor Bork noted:

When several states begin to formulate warning laws, the problems for the maintenance of an efficient national market become great; if many states do so, the problems will be enormous. States certainly will enact different labeling laws for a variety of reasons. Different experts, for instance, may produce different assessments of the scientific evidence concerning the hundreds or thousands of chemicals examined. Different legislatures, similarly, will have different judgments as to the balance to be struck between the degree of risk that requires a warning and the cost to consumers and businesses of providing it. Different states, finally, will have different balances of political forces and, consequently, the compromises struck will differ from state to state.

Varying state laws, if they are allowed to remain in place, will interfere with interstate trade. Manufacturers and processors whose goods must carry different labels will have to use shorter production runs than they would under a system of uniform regulations. Shorter production runs mean higher costs. Firms marketing items in more than one state will have to maintain separate packing and distribution systems to insure that their products satisfy each of the various standards in force, thus greatly adding to the cost of doing business. The increased costs, of course, will ultimately be borne by consumers. Still worse, the regulations will destroy the flexibility in distribution essential to a free market. A manufacturer or distributor may ship goods to one state or region and discover that unanticipated variations in demand require changing the goods' destination to another state or region. Under a system of uniform federal labeling requirements, redirection of goods could occur swiftly and efficiently. Under a system of varying state requirements, however, redirection would be difficult or impossible. Goods appropriately labeled for Oregon or Nevada could not be sent on to California without complete relabeling. Californians would pay higher prices

because of this inconvenience. If the cost of relabeling became very high, the goods would sit in Oregon or Nevada while California bid up the price for the inadequate supplies available to them.

Labeling at 16-18 (emphasis added; citations omitted).

The existence of the Lawsuit and the possibility of similar kava warning lawsuits or regulations in the 49 other states, with various possible results, constitute barriers to interstate commerce. Those barriers inevitably lead to decisions by manufacturers and distributors to stop selling the goods which are the subject of those lawsuits or regulations. Those withdrawals deprive consumers of a choice of products and price competition from which they previously benefited. Professor Bork states:

In other cases, an even more ironic outcome seems likely. California has a huge consumer market, one larger than those of many of the world's nations. No national or regional seller can afford to abandon the California market. Where labeling costs are significant, sellers often will prefer to leave smaller markets. States with much smaller populations than California's, as a result, may have to accept California's labeling requirements even if they do not want them. Indeed, national and regional marketers will join consumer and environmental lobbies in pressing smaller states to adopt California's regulations verbatim and later to copy every change that California's regulators make to its laws. This pressure may produce a degree of uniformity among states (though there will in other states still be differences) but it will not preserve the federalism contemplated by President Reagan's Executive Order. A degree of uniformity among the states will be imposed not by the national government but by a single state government. The result would be as though the Constitution had provided that the most populous state in the Union had the power to regulate commerce among the states.

[4] **The Lawsuit.** In March and April of 2002, three lawsuits were filed in the Superior Court for the County of Los Angeles, California which alleged that manufacturers, distributors, and retailers of kava supplements deceptively labeled and advertised those products by, among other things, failing to provide warnings concerning the potential for adverse effects on the liver from consumption of kava supplements. See Althoff, et al. v. Albertson's, Inc., et al., Case No. BC269717 ("Althoff"); Ross, et al. v. Natural Organics, Inc., et al., Case No.

BC26944; Feldman v. Albertson's, Inc., et al., Case No. BC271902. The kava actions have been consolidated under the caption "In re Kava Kava Litigation", Case No. BC 269717.

The consolidated Amended Complaint does not allege that any of the plaintiffs suffered any personal or bodily injuries as a result of the purchase or ingestion of a kava supplement; in fact, not one plaintiff alleges that any Jarrow kava product was purchased by any named plaintiff. The relief sought in the lawsuit includes (1) injunctive relief, such as requiring that: (a) all kava supplements sold by the defendants provide clear and reasonable warnings; and that (b) the named defendants conduct a "corrective" advertising and information campaign advising consumers that "kava can cause hepatitis, cirrhosis, and liver toxicity," (2) restitution, (3) disgorgement of revenue, and (4) attorneys fees.

On August 9, 2002, the trial court issued a decision ("Cal. Dec."), which *inter alia*, stayed the proceeding pending FDA action on the kava issue, pursuant to the doctrine of primary jurisdiction:

The question of whether to stay this action under the doctrine of primary jurisdiction is a matter fully within the discretion of this Court. See, Farmers Ins. Exchange v. Superior Court (1992) 2 Cal. 4th 377. The Court finds, on balance, in light of the FDA's ongoing, active involvement and issuance of a Consumer Advisory, that a stay will enhance judicial efficiency by permitting the Court to take advantage of FDA administrative experience and have the benefit of the FDA's views of the issues. The United States Supreme Court has acknowledged the usefulness of similar stays when the FDA is confronted with issues, as here presented, which are within the FDA's particular expertise and competence. See, Weinberger v. Bentex Pharmaceuticals, Inc. (1973) 412 U.S. 645, 653-54 ("in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.") A stay will help assure the uniform application of laws, minimize the risk that the Court's rulings might hinder or conflict with FDA actions or policies, and conserve the resources of the judiciary and the parties which might otherwise be consumed in litigating issues to be effectively resolved by the FDA. Wise v. Pacific Gas & Electric Co. (1999) 77 Cal. App. 4th 287, 296.

The ongoing FDA investigation and its attendant Consumer Advisory . . . weigh heavily in the Court's consideration of the question of a stay at this juncture, and they tip the balance in favor of granting a stay.

Cal. Dec. at 6-7 (emphasis added). A copy of that decision is attached as Exhibit G.

IMPACT OF THE LAWSUIT

Jarrow strongly believes that the Lawsuit cuts to the heart of DSHEA and undermines the role of the FDA and its relationship to the dietary supplement industry. In effect, the Lawsuit seeks to substitute lawyers and judges or the judicial branch for the FDA or the executive branch as the nation's regulator of supplements. Who, really, is running the regulatory "show"?

Also, as a result of the Lawsuit, this defendant has, in effect, been barred from communicating meaningfully with the FDA on this important regulatory matter because it is very wary of making statements which could possibly be construed, in the Lawsuit, as admissions against its interest. Whether or not a warning should be required by the FDA for kava supplements and the content of such a warning, are matters of great importance for distributors, such as Jarrow, as well as for consumers. Members of the dietary supplement industry want to participate, in a meaningful way, in the resolution of these issues by the Agency; that participation can include the filing of Comments about a Proposed Rule or participation in FDA-sponsored forums about a Proposed Rule. Federal or state court litigation, on the other hand, acts a powerful deterrent to such participation because of the overwhelming fear that plaintiffs' lawyers will aggressively scour the administrative proceedings to identify any statement which could be used to their advantage in such litigation. Ironically, it is the companies who are the defendants in the Lawsuit who have the most at stake, from a business standpoint, and the most to contribute to the Agency during the development of its label policy with respect to warnings. In fact, this Petitioner suggests that even this petition carries certain litigation risks for it.

[5] **Diverse Industry Recommendations.** The American Herbal Products Association ("AHPA"), the American Botanical Council ("ABC"), and, most recently, Citizens

for Responsible Nutrition (“CRN”) have all recommended different cautions to be contained on kava supplement labels. The ABC suggested that the public adhere to the following cautions:

Kava should not be used by anyone who has any liver problems, or by anyone who is taking any drug products with known adverse effects on the liver, or anyone who is a regular consumer of alcohol.

Since the reports so far are associated with chronic use, kava should not be taken on a daily basis for more than four weeks (without the advice of a qualified professional).

- In addition, consumers should discontinue use if symptoms of jaundice (e.g., dark urine, yellowing of the eyes) occur.
- Consumers should consult their primary healthcare provider if they have a history of liver problems or suspect possible liver problems before using kava or continuing its use.

AHPA currently recommends the following labeling policy for food and dietary supplement products containing kava:

- Products containing kava should be formulated and labeled to limit consumption of total kavalactones to 300 mg per day.
- Labels of food and dietary supplement products containing kava should bear the following or significantly similar statement:

Caution: Ask a healthcare professional before use if you have or have had liver problems, frequently use alcoholic beverages, or are taking any medication. Stop use and see a doctor if you develop symptoms that may signal liver problems (e.g., unexplained fatigue, abdominal pain, loss of appetite, fever, vomiting, dark urine, pale stools, yellow eyes or skin). Not for use by persons under 18 years of age, or by pregnant or breastfeeding women. Not for use with alcoholic beverages. Excessive use, or use with products that cause drowsiness, may impair your ability to operate a vehicle or heavy equipment.

The CRN currently recommends the following cautionary label statement: “The US FDA advises that a potential risk of rare, but severe, liver injury may be associated with kava dietary supplements.”

[6] **The FDA Has Already Issued At Least Four Official Announcements on**

Kava

The FDA has already asserted its jurisdiction through several official, public announcements concerning kava supplements, all posted on its website.

1. In the May-June 2002 issue of the FDA Consumer magazine, in an article in the Updates section entitled “Kava and Severe Liver Injury,” there is presented a summary of the Consumer Advisory issued on March 25. This article notes that “liver damage appears to be rare,” but that kava products have been “associated with” liver-related injuries. The article also “urges” consumers and health-care professionals to report any adverse events to the FDA’s MedWatch program. It concludes:

The FDA will continue to investigate the relationship, if any, between the use of dietary supplements containing kava and liver injury. The agency will alert consumers, and if warranted, take additional action as more information becomes available. (Emphases added.)

2. On March 25, 2002, the FDA, Center for Food Safety and Applied Nutrition (“CFSAN”), issued a Consumer Advisory entitled “Kava Dietary Supplements May Be Associated With Severe Liver Injury.” This Advisory does not contain warning, or cautionary language to be placed on kava product labels. Instead, the tone is characterized by such statements as : “Although liver damage appears to be rare, FDA believes consumers should be informed of this potential risk.” (Emphasis added.) Jarrow believes that because the FDA’s statement clearly implies, through the language “FDA believes consumers should be informed,” then the Agency needs to take the next logical step and develop language in the form of a warning for inclusion in a Notice of Proposed Rule-Making.

3. Also on March 25, 2002, the FDA published a Letter to Health Care Professionals, on its website, entitled “FDA Issues Consumer Advisory That Kava Products May be Associated with Severe Liver Injury.” Again, the tone of this Letter is not of urgency, but rather, calmly advising of a “potential risk” and urging health care professionals as well as consumers to report any cases of liver or other injuries to the Agency’s MedWatch program.

The FDA adds: “In the event that you are contacted, we want you to be aware of our advice to consumers. To further assist you, we plan in the near future to provide additional information on the nature of the adverse events we have received.”

4. On December 18, 2001 in an undated Letter addressed to “Dear Health Care Professional Colleague,” the FDA reported that kava supplements in Switzerland and Germany “have been implicated in cases of serious liver toxicity,” and that one case of liver failure in a previously healthy young female had been reported in the U.S. The letter concluded that “Due to the potentially serious nature of these concerns,” the FDA was urging the recipients to report “any cases of hepatic toxicity that you think may be related to the use of kava dietary supplements” to the MedWatch program.

Most recently, the FDA’s Dr. Christine Taylor wrote in a letter response to the Council for Responsible Nutrition: “The agency pointed out in the [consumer] advisory that although liver damage appears to be rare, FDA believes consumers should be informed of this potential risk.” (Emphasis added.)

[7] **Recent FDA Precedent.** In another recent safety situation, the FDA took the initiative in issuing a statement on a safety and labeling issue, specifically, about a new risk of taking Prempro. “FDA Statement on the Results of the Women’s Health Initiative,” August 13, 2002, posted on the CDER section of FDA’s website. See also Marc Kaufman, Hormone Replacement Gets New Scrutiny: Finding of Increased Risks Prompts Federal Effort, Wash. Post, August 14, 2002, at A1. (Both documents attached as Exhibits H and I.) On July 9, 2002, it was announced that a clinical trial, performed as a part of the Women’s Health Initiative (WHI), was stopped because the overall health risks of Prempro, particularly for invasive breast cancer and coronary heart disease (CHD), exceeded the benefits of the drug, including a lower rate of bone fractures. A little more than one month later, the FDA issued its announcement,

categorically stating that “The WHI [trial] now establishes that Prempro should not be prescribed to postmenopausal women for cardiovascular protection.” The announcement further states what conditions Prempro has and has not been approved for and announces that HHS will host public sessions on this issue in the fall, concluding, “More information on this will follow.” Our point with this example is that on safety and labeling issues concerning FDA-regulated products, the FDA has a history of promptly asserting its jurisdiction.

[8] To the best of our knowledge, no state legislature has enacted any statute which mandates a warning for kava supplements.

D. Environmental Impact

This petition qualifies for categorical exclusion under 21 C.F.R. §§ 25.15, and 25.30 - 25.32, and, therefore, does not require the preparation of an environmental assessment or an environmental impact statement. In any event, the action requested in this petition will not have any significant effect on the quality of the human environment. In accordance with the requirements of 21 C.F.R. § 25.15, we assert we are not aware of any extraordinary circumstances.

Certification

The undersigned certifies that, to the best knowledge and belief of the undersigned, this petition includes all information and views on which the petition relies, and that it includes representative data and information known to the petitioners which are unfavorable to the petition.



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