

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**Case No. 08-21894 Civ (Seitz)**

<b>ERIC COVINGTON, individually and on</b>	)
<b>behalf of all others similarly situated,</b>	)
	)
<b>Plaintiff,</b>	)
	)
<b>v.</b>	)
	)
<b>ARIZONA BEVERAGE CO., LLC, HORNELL</b>	)
<b>BREWING COMPANY and FEROLITO</b>	)
<b>VULTAGGIO &amp; SONS,</b>	)
	)
<b>Defendants.</b>	)

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**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION  
TO DEFENDANTS' MOTION TO DISMISS**

**INTRODUCTION**

This case was brought under Florida consumer protection statute and common law, seeking damages and injunctive relief against AriZona Beverage Company and related defendants (hereinafter collectively referred to as "AriZona") for labeling and promoting certain of their beverages as "natural" or "all natural," when they in fact contain one or more non-natural ingredients, such as high fructose corn syrup ("HFCS"). The complaint also alleges claims based on AriZona's misleading use of the names of particular fruits in the names and promotion of beverages that do not contain any significant amount (or any at all) of the named fruit. AriZona has moved to dismiss, arguing that Mr. Covington's claims are expressly preempted by federal law, impliedly preempted because federal law occupies the field of beverage labeling, and impliedly preempted because the claims would interfere with the accomplishment of federal objectives. AriZona also argues that the complaint should be dismissed under the primary

jurisdiction doctrine on the theory that only the FDA has authority to redress Mr. Covington's claims.

Each of these arguments lacks merit. The express preemption theory fails because express preemption requires a statutory preemption provision, and yet Arizona has neglected to explain how any statutory preemption provision is applicable here. Both implied preemption arguments can be quickly rejected because Congress has directed that the federal food labeling laws "shall not be construed to preempt any provision of State law, unless such provision is expressly preempted" by the statute. Pub. L. No. 101-535, § 6(c), 104 Stat. 2535, 2364 (1990). And the primary jurisdiction argument fails because Congress has made clear that it does not intend the FDA to have exclusive authority to protect consumers from false or misleading labeling.

### **FACTUAL AND REGULATORY BACKGROUND**

Arizona's motion primarily argues that Mr. Covington's claims are preempted by federal regulation of beverage labels. Accordingly, section I below offers a brief description of the regulatory scheme and statutory provisions addressing preemption under the food labeling laws, which provide the backdrop for the preemption analysis. Section II provides background about the factual issues in the case, particularly as they relate to federal regulation.

#### **I. THE FDCA AND THE NLEA'S PREEMPTION PROVISION**

Under the Food, Drug, and Cosmetics Act ("FDCA"), the Food and Drug Administration ("FDA") has authority to regulate certain aspects of food safety and labeling. *See* 21 U.S.C. § 371. The FDA can set food definitions and standards of quality, *id.* § 341, establish tolerance levels for poisonous or deleterious substances in food, *id.* § 346, and initiate enforcement proceedings against manufacturers of adulterated or misbranded food. *Id.* §§ 332-334; *see id.* §

342 (defining “adulterated”), § 343 (defining “misbranded”). A food may be deemed misbranded if its labeling is “false or misleading in any particular,” *id.* § 343(a)(1), or if its label does not contain required nutrition information (such as serving size, number of servings per container, or total number of calories). *Id.* § 343(q).

In 1990, Congress enacted the Nutrition Labeling and Education Act, Pub. L. No. 101-535, 104 Stat. 2353, 2364 (1990) (“NLEA”), which is codified as part of the FDCA. The NLEA is the basis for FDA regulation of nutrition labels. Among other things, the NLEA requires that nutrition labeling be placed on most packaged food, prohibits the use of terms that characterize the level of nutrients in a food unless they conform to definitions established by the FDA, and ensures that claims about the relationship between nutrients and health conditions are supported by significant scientific agreement.

In enacting the NLEA, Congress devoted careful attention to the subject of preemption. *See* Laura Sims, *The Politics of Fat: Food and Nutrition Policy in America* 199 (1998) (“The preemption issue remained a key area of dispute throughout consideration of the food labeling bill, with the basic issue being how far the legislation should go in setting uniform food labeling regulations that preempt state laws.”). In the final moments of the floor debate before the NLEA was formally adopted by the House after its passage in both chambers, Representative Waxman explained that a narrow preemption provision had been added to the bill to induce the food industry to support the legislation. 136 Cong. Rec. H12951-02, H12954 (Oct. 26, 1990) (“[I]t was decided that the fairest way to expect the food industry to support a nutrition labeling bill, was to give them some types of preemption of some burdensome State laws that interfered with their ability to do business in all 50 States.”). The leading proponent of stronger federal

preemption, Senator Orrin Hatch, agreed that “the carefully crafted uniformity section of this legislation is limited in scope.” 136 Cong. Rec. S16607-02, S16611 (Oct. 24, 1990).

The express preemption provision of the NLEA is codified at 21 U.S.C. § 343-1(a). Under that section, state “requirements” that are “not identical” to federal requirements addressing specified topics are preempted. For example, states may not impose a standard of identity on a food subject to an FDA standard of identity, unless the state standard is identical to the federal standard. *Id.* § 343-1(a)(1). And states may not impose requirements related to nutrition labeling (the statement of serving size, calories, etc., required on food packages) or requirements regarding labeling that characterizes the level of nutrients or makes health claims related to nutrients, unless those state requirements are identical to federal requirements. *Id.* § 343-1(a)(4)-(5).

In an effort to satisfy industry concerns while remaining “sensitive to the regulatory roles played by the States,” the preemption provision was “refined to provide national uniformity where it is most necessary, while otherwise preserving State regulatory authority where it is appropriate.” 136 Cong. Rec. at S16609 (Sen. Mitchell); *see also* 136 Cong. Rec. at S16611 (Sen. Hatch) (“[T]he compromise makes clear that the national uniformity in food labeling that is set forth in the legislation has absolutely no effect on preemption of State or local requirements that relate to such things as warnings about foods or components of food.”). To make clear that, aside from § 343-1(a), the new labeling laws would “otherwise preserv[e] State regulatory authority,” Congress added a statutory provision limiting the preemptive effect of the NLEA to state laws that fall within the NLEA’s express preemption provision:

The Nutrition Labeling and Education Act of 1990 shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under section 403A [21 U.S.C. § 343-1(a)] of the Federal Food, Drug, and Cosmetic Act.

Pub. L. No. 101-535, § 6(c), 104 Stat. 2535, 2364 (21 U.S.C. § 343-1 note).<sup>1</sup>

AriZona's motion to dismiss does not identify any paragraph of § 343-1(a) that expressly preempts Mr. Covington's claims. The only provision that addresses fruit juice is paragraph 2, which provides that states may not impose non-identical requirements of the type required by § 343(i), which in turn provides that beverages purporting to contain fruit juice must prominently disclose the percentage of juice contained in the beverage.

## **II. "ALL NATURAL," HIGH FRUCTOSE CORN SYRUP, AND "FRUIT" BEVERAGES**

AriZona suggests that three related aspects of FDA regulation, or non-regulation, are relevant here: the agency's view regarding terms such as "all natural" in beverage labeling, the agency's view regarding whether HFCS is "natural," and FDA regulations regarding labeling of beverages purporting to contain fruit juice.

A. The FDA does not define or regulate use of the terms "natural" or "all natural." However, the FDA recognizes that "natural" is used to convey that a food is somehow "more wholesome," and that "'natural' claims are confusing and misleading to consumers and frequently breach the public's legitimate expectations about their meaning." 56 Fed. Reg. 60421, 60466 (1991); *see* 58 Fed. Reg. 2302, 2407 (1993). "[B]ecause of resource limitations and other agency priorities," the FDA has not yet defined "natural" or "all natural," although doing so could "abate" "the ambiguity" that "results in misleading claims." 58 Fed. Reg. at 2407. Although the FDA has no definition, it follows a policy of not taking enforcement action charging that a product labeled as "natural" is misbranded, as long as the product has no added color, synthetic substances, or flavors. (Natural and artificial flavors are defined in 21 C.F.R.

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<sup>1</sup>Although section 6(c) was not codified in the United States Code, it is part of the enacted statute. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am.*, 508 U.S. 439 (1993) ("Though the appearance of a provision in the current edition of the United States Code is 'prima facie' evidence that the provision has the force of law, 1 U.S.C. § 204(a), it is the Statutes at Large that provides the 'legal evidence of law'.").

§ 101.22.) 58 Fed. Reg. at 2407. Under the agency's policy, "natural" means that "nothing artificial or synthetic has been included in, or added to, a food that would not normally be expected to be in the food." *Id.*; see also USDA, Food Standards and Labeling Policy Book 116 (Aug. 2005), available at [www.fsis.usda.gov/OPPDE/larc/Policies/Labeling\\_Policy\\_Book\\_082005.pdf](http://www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf) ("natural" denotes that "product and its ingredients are not more than minimally processed"). This policy is binding on the agency in that the agency will not "recommend legal action against a person or product with respect to an action taken in conformity" with it. 21 C.F.R. § 10.85(d). However, the policy does not establish any legal requirements for food or beverage companies. 21 C.F.R. § 10.85(j).

**B.** AriZona beverages contain HFCS, but AriZona labels and promotes the products as "all natural" or "100% natural." Complaint ¶ 2. HFCS is a man-made sweetener that does not occur in nature. *Id.* ¶¶ 30-38. The process used to create HFCS has only been in existence for the last 50 years. *Id.* ¶ 38.

The FDA has no official position on whether HFCS is "natural." Recently, an employee in the FDA's Office of Nutrition, Labeling and Dietary Supplements stated to a reporter that the FDA "would object to the use of the term 'natural' on a product containing HFCS." See *HFCS is not "natural," says FDA*, FoodNavigator-USA.com, Apr. 2, 2008, [www.foodnavigator-usa.com/news/ng.asp?n=84404&m=1FNU402&c=edtytbe](http://www.foodnavigator-usa.com/news/ng.asp?n=84404&m=1FNU402&c=edtytbe). After the Corn Refiners Association met with the FDA and asked the FDA to reconsider that statement, the same FDA employee sent a letter stating that whether the agency would consider HFCS "natural" would depend on the particular process used to manufacture the HFCS. Def. Mem. at Exh. H (FDA letter). Thus, according to the letter, some products containing HFCS could be called "natural" and others could not. *Id.*

This letter suggests that, in the view of that particular FDA employee, whether Arizona beverages containing HFCS may truthfully be called “all natural” is a factual question involving consideration of the process used to manufacture the particular type of HFCS used in Arizona beverages. However, neither the statement to the reporter nor the letter to the Corn Refiners Association establishes any formal FDA position on the question whether HFCS is “natural.” *See* 21 C.F.R. § 10.85(k) (statement by an FDA employee that is not advisory opinion issued under §§ 10.85 or 10.90 “is an informal communication that represents the best judgment of that employee at that time but does not constitute an advisory opinion, does not necessarily represent the formal position of the FDA, and does not bind or otherwise obligate or commit the agency to the views expressed”). The FDA has no official view on the question.

C. The FDA does not regulate use of specific fruit names in the names of beverages. The FDCA provides that, if a beverage purports to contain fruit—including by using the name of a fruit in the product name—the label must prominently disclose the percentage of fruit contained in the product. 21 U.S.C. § 343(i); *see* 21 C.F.R. § 101.30. If the product contains only minor amounts of fruit juice for flavoring and the label uses a descriptive word such as “flavoring,” the label may omit the percentage disclosure. 21 C.F.R. § 101.30(c). The statutory provision and the implementing regulation regarding disclosure of juice content were motivated by concern that beverage labels naming or depicting fruits were misleading to consumers with regard to the overall juice content and the healthiness of the product. *See generally* 58 Fed. Reg. 2897 (1993) (final rule); 56 Fed. Reg. 30452 (proposed rule). FDA regulations do not address labeling and promotion that represents that a product contains a particular fruit that is not in fact contained in that product.

The AriZona beverages at issue are labeled and promoted to suggest that they contain specific fruits that in fact are not contained in or contained only in minimal amounts in those beverages. For example, AriZona's "Blueberry Green Tea with Natural Flavors" does not list blueberries in the ingredients. Complaint ¶ 2. Yet AriZona's website, in advertising this particular beverage, represents that the product contains "sweet blueberries" and touts the purported health benefits of blueberries, thereby reinforcing the false impression created by the product name that the product contains blueberries. See [www.drinkarizona.com](http://www.drinkarizona.com) ("Diet Blueberry Green Tea. Premium brewed green tea? Check. Sweet blueberries full of antioxidants? Check.").

### **ARGUMENT**

On a motion to dismiss, the "complaint's allegations must be taken as true and read in the light most favorable to the plaintiffs." *Linder v. Portocarrero*, 963 F.2d 332, 334 (11th Cir. 1992). A court should only dismiss a complaint if it "appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

#### **I. MR. COVINGTON'S CLAIMS ARE NOT PREEMPTED.**

Taking a kitchen-sink approach, AriZona argues that plaintiff's claim are expressly preempted, are impliedly preempted because the FDA has occupied the field of beverage labeling, and are impliedly preempted because they pose an obstacle to the accomplishment of federal objectives. AriZona is wrong on each point.

##### **A. Fundamental Preemption Principles**

The federal preemption doctrine has its origin in the Supremacy Clause, article VI, clause 2 of the Constitution of the United States, which provides the constitutional authority for the

proposition that conflicts between federal and state law are resolved in favor of federal law. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819); *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992). Preemption can be express or implied. Preemption is “express” if a federal statute explicitly addresses the domain of state law that is or is not preempted, and it is implied if the structure and purpose of federal law, but not its actual words, preempt state law. *See Cipollone*, 505 U.S. at 516. The implied preemption doctrine is itself divided into two types: field preemption and implied preemption. Field preemption applies where a state law seeks to “regulate[] conduct in a field that Congress intended the Federal Government to occupy exclusively.” *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). Conflict preemption is further subdivided into two types, one based on the impossibility of complying with both federal and state law and the other based on the notion that the state law frustrates the purposes of the federal law.

The preemptive scope of the Supremacy Clause is restricted by other constitutional principles implicit and explicit in the constitutional plan. In particular, the Tenth Amendment reserves to the States the powers not delegated to the federal government by the Constitution, nor prohibited by it to the States. In light of this constitutional imperative of federalism, courts recognize a strong presumption against preemption that may be overcome only by “clear and manifest” congressional intent to the contrary. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994). A party seeking preemption of state law thus bears a heavy burden, for “[p]reemption of state law by federal . . . regulation is not favored ‘in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.’” *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (quoting *Florida Lime*

& *Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)). This approach “provides assurance that the ‘federal-state balance’ will not be disturbed unintentionally by Congress or unnecessarily by the courts.” *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citation omitted). And where, as here, the federal regulatory scheme does not itself provide a damages remedy, the Supreme Court has ascribed preemptive intent to Congress only in the most compelling circumstances. *See English*, 496 U.S. at 87-90; *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

These anti-preemption precepts are deeply embedded in the “federal-state balance” that is fundamental to the constitutional plan. The strong presumption against preemption may be overcome only by “clear and manifest” congressional intent to the contrary. *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707 (1985); *Jones*, 430 U.S. at 525. Thus, the Supreme Court’s Supremacy Clause jurisprudence is “an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.” *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

Accordingly, even if the answer to the question whether the claims alleged here are preempted were ambiguous, that ambiguity would be resolved in Mr. Covington’s favor. In fact, however, there is no ambiguity; the plain language of the statute demonstrates that Mr. Covington’s claims are neither expressly nor impliedly preempted.

#### **B. Mr. Covington’s Claims Are Not Expressly Preempted.**

AriZona first suggests that Mr. Covington’s claims are expressly preempted. Express preemption occurs when a federal statute explicitly states that it supersedes state law. *See, e.g., Bates v. Dow AgroSciences*, 544 U.S. 431, 439 (2005) (quoting express preemption provision); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 58-59 (2002) (quoting express preemption

provision). The question in cases involving express preemption is the scope of the preemption language that Congress has enacted.

AriZona contends that Mr. Covington's claims are expressly preempted "because Congress has expressly granted the FDA sole authority to enforce the FFDCFA and FDA regulations promulgated thereunder," Def. Mem. 12, and it cites *State of Florida v. Eli Lilly & Co.*, 329 F.Supp. 364 (S.D. Fla. 1971), in which the Court held that there is no private right of action to enforce the FDCA. The FDA's enforcement powers and the *Eli Lilly* decision are inapposite, however, because Mr. Covington is not seeking to enforce the FDCA. Rather, his claims arise under Florida's Deceptive and Unfair Practices Act and state common law. Complaint ¶ 4. Absent specific statutory language preempting these state-law claims, they are not expressly preempted.

As discussed above, *see supra* p. 3, the NLEA does have an express preemption provision applicable to certain aspects of food labeling, 21 U.S.C. § 343-1(a). AriZona broadly asserts that, under that provision, "any enforcement of State regulations requires that such regulations be identical to analogous Federal regulations." Def. Mem. 13. In fact, however, § 343-1(a) only preempts state requirements that are not identical to federal requirements on the specific topics identified in § 343-1(a). *See id.* § 343-1(a)(1)-(5). Mr. Covington's claims do not fall within the scope of any paragraph of § 343-1(a), and indeed, AriZona does not argue that that they do.<sup>2</sup>

### **C. The NLEA Forecloses Implied Preemption.**

AriZona also argues that the state-law claims alleged here are impliedly preempted because the FDA has "occupied the field" of beverage labeling and because the claims are

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<sup>2</sup> If AriZona argues in its reply that a particular provision of § 343-1(a) applies here, Mr. Covington will seek to file a surreply to address that new argument.

“obstacles to important federal objectives.” Both of these implied preemption theories must be rejected because “[t]he NLEA explicitly forecloses the possibility that state law would be impliedly preempted.” *N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health*, 509 F. Supp. 2d 351, 355 (S.D.N.Y. 2007).

Specifically, the NLEA states that it “shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under section 403A [21 U.S.C. § 343-1(a)] of the Federal Food, Drug, and Cosmetic Act.” 21 U.S.C. § 343-1 note (Pub. L. No. 101-535, § 6(c), 104 Stat. 2535, 2364 (1990)). As the FDA has explained, this statutory language “clearly manifests Congress’s intention” that the NLEA not preempt state law beyond the NLEA’s express terms: “If there is no applicable Federal requirement that has been given preemptive status by Congress, there is no competing claim of jurisdiction, and, therefore, no basis under the 1990 amendments for Federal preemption.” 56 Fed. Reg. 60528, 60530 (1991).

Thus, Congress has directed and the FDA has recognized that “the only State requirements that are subject to preemption are those that are affirmatively different on matters that are covered by section [343-1] of the act.” 58 Fed. Reg. 2462 (1993). In this respect, the NLEA’s preemption provisions are “somewhat unusual,” in that “[t]he NLEA can be analyzed only in terms of express preemption, because its express provisions prohibit any implied preemption under the statute.” Burk, *The Milk-Free Zone: Federal and Local Interests*, 22 Colum. J. Env’tl L. 227, 259 (1997); accord *In re Farm Raised Salmon*, 175 P.2d 1170, 1179 (Cal. 2008), petition for cert. filed (U.S. Apr. 18, 2008) (No. 07-1327). Thus, AriZona’s implied preemption arguments fail on the basis of the NLEA’s express command.<sup>3</sup>

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<sup>3</sup> In arguing for implied preemption, AriZona relies on the district court’s decision in *Holk v. Snapple*, 2008 WL 2446844 (D.N.J. June 13, 2008), *appeal docketed*, No. 08-3060 (3d Cir. July 18, 2008). It does not appear that the court in that case was apprised of § 6(c). In any event, *Holk* was wrongly decided, and is currently on appeal to the

### **1. As The Statute States, FDA Does Not Occupy The Field Of Food Labeling.**

The statutory provision discussed above, § 6(c), is dispositive of the implied preemption issue, and the Court need look no further to reject both of AriZona's implied preemption arguments. Moreover, even if a field preemption analysis needed to be undertaken, AriZona's field preemption argument would fail.

Federal law can preempt state law under a field preemption theory only when the "scheme of federal regulation" is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *English*, 496 U.S. at 79 (citation omitted). No such federal scheme exists here.<sup>4</sup> Rather, the NLEA itself makes plain that Congress did not intend to occupy the field of food labeling in general or beverage labeling in particular. Section 343-1(a) identifies specifically which statutory provisions preempt state law, and § 6(c) states unequivocally that state law outside the scope of § 343-1(a) is not preempted. "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted" under field preemption principles. *Cipollone*, 505 U.S. at 517; *see also Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 613 (1991) (express preemption provision would be "pure surplusage if Congress had intended to occupy the entire field"). The NLEA's limited express preemption provision and its anti-preemption provision indisputably manifest that Congress did not intend to displace all state law with regard to food labeling. And, as discussed above, *see supra* p. 3, the legislative history of the NLEA confirms that Congress intended preemption under the Act to be "limited in scope." 136 Cong. Rec.

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Third Circuit, whose recent decision *Fellner v. Tri-Union Seafoods, LLC*, \_\_ F.3d \_\_, 2008 WL 3842925 (3d Cir. Aug. 19, 2008) calls into question *Holk's* preemption determination.

<sup>4</sup> *Cf. Sprietsma*, 537 U.S. at 69 (no field preemption where Coast Guard authorized to regulate boat safety but statute "does not require the Coast Guard to promulgate comprehensive regulations covering every aspect of recreational boat safety and design") (emphasis in original).

S16607-02, S16611 (Oct. 24, 1990) (statement of Sen. Hatch). Field preemption simply does not apply here.

## **2. Mr. Covington's Claims Do Not Frustrate Any Federal Objective.**

Notwithstanding Congress's express statement that § 343-1 defines the complete scope of preemption under the federal food labeling laws, AriZona argues that the claims alleged here are impliedly preempted because they pose an obstacle to accomplishing federal objectives. Again, § 6(c) firmly disposes of this argument. *N.Y. State Rest. Ass'n*, 509 F. Supp. 2d at 355; *In re Farm Raised Salmon*, 175 P.2d at 1179. Even without § 6(c), however, AriZona would be mistaken.

Federal law preempts state law when the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Sprietsma*, 537 U.S. at 64 (citation omitted). Arguing that this theory of preemption applies here, AriZona relies primarily on *Geier v. American Honda Motor Corp.*, 529 U.S. 861 (2000). There, the Supreme Court considered the preemptive effect of a federal regulation, issued after notice-and-comment rulemaking, that addressed in detail the types of passive restraints required and permitted in automobiles. Concluding that the agency “deliberately provided the manufacturer with a range of choices among different passive restraint devices” to “bring about a mix of different devices introduced gradually over time,” in an attempt to “lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance—all of which would promote [the regulation's] safety objectives,” *id.* at 875, the Supreme Court held that the plaintiff's claim seeking to hold Honda liable for failing to install one particular passive restraint would frustrate the federal purpose.

This case could not be further from *Geier*. Not only has AriZona failed to identify any statute or regulation that defines “natural” or “all natural,” but it concedes that none exists. *See* Def. Mem. 10. In contrast to the extensive notice-and-comment rulemaking and lengthy Federal Register notice explaining the agency’s goals in formulating the particular safety regulation at issue in *Geier*, here the FDA has deferred taking regulatory action. It has acknowledged that the term “natural” is sometimes used in misleading ways, and that a regulatory definition of the term might be useful, 58 Fed. Reg. at 2407, but, so far, has declined to define the term. *See* Def. Mem. at Exh. G (“Because of resource limitations and other agency priorities, FDA is not undertaking rulemaking to establish a definition for ‘natural’ at this time.”). Mr. Covington’s claims thus would not impede any federal objective with regard to “natural labeling” because the FDA has not expressed a view on this topic in any legally meaningful way. On the other hand, Mr. Covington’s “natural” claims are fully consistent with the FDA’s observation that use of such terms on food labels “may be misleading.” 58 Fed. Reg. at 2903 (FDA “has discouraged use” of term “natural” because it is “ambiguous and may be misleading”).

As the Third Circuit’s recent decision in *Fellner v. Tri-Union Seafoods* explains, for state law to be preempted under the theory that it is an obstacle to federal purposes, those purposes must be established through federal law. *Fellner v. Tri-Union Seafoods*, 2008 WL 3842925, \*12. In *Fellner*, the Court held that the plaintiff’s claims alleging mercury poisoning from eating canned tuna were not preempted by the FDA’s issuance of an advisory and backgrounder warning certain consumers from eating too much seafood; its establishment of non-binding guidelines to its enforcement division about when to take action for seafood being misbranded; or its sending of an informal letter expressing its opinion that a state law mercury warning requirement was preempted. As the Court explained, state laws only “give way when they

actually conflict with federal law,” and none of these FDA actions constituted “federal law with which the alleged state duty to warn conflicts.” *Id.* at \*14.

Here, although the FDA has a “policy” that guides its own exercise of enforcement discretion, *see supra* p. 5, that policy does not impose any labeling requirement on any food company. 21 C.F.R. § 10.85(d), (j); *see Fellner*, 2008 WL 3842925, \*10 (FDA guideline stating policy for taking enforcement action does not preempt state law). And the non-binding statements of an individual FDA employee as to whether HFCS is “natural,” as that term is used in the FDA’s informal policy, do not constitute the formal position of the FDA or commit the FDA to any position, much less evidence a federal objective capable of preempting state law. *See supra* p. 6 (FDA employee first stated to a reporter that HFCS is not “natural” and later stated in a letter that whether HFCS is “natural” depends on production process); *see also Fellner*, 2008 WL 3842925, \*5 (“[W]e have found no case in which a letter that was not the product of some form of agency proceeding and did not purport to impose new legal obligations on anyone was held to create federal law capable of preemption.”). In short, here, as in *Fellner*, the FDA has “not acted to regulate . . . in a manner that could preempt [Mr. Covington’s] claims.” *Id.* at \*12.

Thus, the facts of this case are not analogous to *Geier*, but to *Sprietsma v. Mercury Marine*, 537 U.S. 51. In *Sprietsma*, the Supreme Court considered whether the Coast Guard’s decision not to require propeller guards on motor boats impliedly preempted a state-law damages action alleging that the manufacturer’s motor boat was unreasonably dangerous because the motor was not protected by a propeller guard. Rejecting the manufacturer’s preemption argument, the Court explained that it was “quite wrong” to view the decision not to issue a federal regulation as the “functional equivalent” of a prohibition against state regulation of the

subject matter. *Id.* at 65. Rather, that decision was “fully consistent with an intent to preserve state regulatory authority.” *Id.*; *see also Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995) (where agency had no standard either requiring or prohibiting antilock brakes, state common-law claim regarding antilock brakes not preempted); *Fellner*, 2008 WL 3842925, \*12 (“[T]he cases leave no doubt that a mere decision not to regulate . . . alone will not preempt state law.”). *Fellner*, 2008 WL 3842925, \*12. Likewise here, the agency’s decision not to undertake rulemaking to define “natural” or “all natural” has no preemptive effect. “If there is no Federal requirement to be given preemptive effect, preemption does not occur.” 60 Fed Reg. 57076, 57120 (1995) (FDA statement).

Mr. Covington’s claims based on beverage names that specify particular fruits that are not in the product are subject to the same analysis. Fruit-containing beverages are addressed in 21 U.S.C. § 343(i) and 21 C.F.R. § 101.30, which require a disclosure of the percentage of fruit in any beverage purporting to contain fruit. Neither the statute nor the regulation, however, requires AriZona, for example, to give beverages that do not contain blueberries names such as “Blueberry Green Tea.” The federal regulations simply do not evince a federal objective of encouraging beverage companies to use fruits in product names. *See Hillsborough County*, 471 U.S. at 717 (“[M]erely because the federal provisions were sufficiently comprehensive to meet the need identified by Congress did not mean that States and localities were barred from identifying additional needs or imposing further requirements in the field.”). Rather, the purpose of the percentage-juice requirements on which AriZona relies is to ensure that beverages that purport (through names, descriptions, or pictures on labeling or advertising) to contain juice do not mislead consumers by creating a false impression about juice content. *See generally* 58 Fed. Reg. 2897 (discussing reasoning behind rule requiring percentage disclosure). Mr. Covington’s

state-law claims, based on common law and a Florida statute that prohibit false or deceptive advertising or promotion, are fully consistent with and pose no obstacle to the accomplishment of this federal purpose.

*Cohen v. McDonald's Corp.*, 808 N.E.2d 1 (Ill. App. Ct. 2004), on which AriZona relies, is not to the contrary. In *Cohen*, a consumer brought a deceptive business practices act claim, arguing that the nutritional information provided by McDonald's misrepresented the nutritional value of foods such as hamburgers for children under age four, although such foods were intended for those children. The state appellate court held that the claims were preempted, without noting the existence of the anti-preemption provision, § 6(c). In addition, the court's holding turned on its understanding that the lawsuit "would have this court place labeling requirements on restaurants that provide foods intended for children under the age of three," and that it lacked the "authority" "to interpret a federal statute"—concerns inapplicable here (because the NLEA's restaurant labeling requirements are not at issue and this Court has authority to interpret statutes). *Id.* at 9-10. On the other hand, the court in *Cohen* agreed that a state deceptive practices action that adopted the federal statute or regulations as the standard of conduct would *not* be preempted. *Id.* at 9. Thus, the court recognized that federal law did not preempt the field of food labeling, and that state law does not always pose an obstacle to the accomplishment of federal objectives regarding food labeling.<sup>5</sup>

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<sup>5</sup> AriZona discusses *Animal Legal Defense Fund v. Provini Veal Corp.*, 626 F. Supp. 278 (D. Mass. 1986). That decision addresses preemption under the drug provisions of the FDCA and the Federal Meat Inspection Act ("FMIA"). The decision holds that Congress intended to occupy the field of antibiotic use in animals and that an express preemption provision of the FMIA applies. *Id.* at 285. The decision is inapposite here. AriZona also cites *People v. Tri-Union Seafoods*, 2006 WL 1544284 (Cal. Sup. Ct. May 11, 2006). That decision held that the FDA's actions relating to methylmercury in seafood preempted a state-law methylmercury warning requirement. As the recent Third Circuit decision in *Fellner*, 2008 WL 3842925, makes clear, that state trial court decision was wrong. In any event, the court in *People v. Tri-Union* relied on the FDA Commissioner's assertion that the state requirement would interfere with the FDA's interest in informing people of the benefits of seafood, along with the risks. *Id.* at \*54. Here, in contrast, the FDA has no interest in whether AriZona advertises its products as "all natural" or includes a particular fruit in the name of a product that does not contain that fruit.

### **3. AriZona's Acts Are Not "Required or Specifically Permitted" by Law.**

Within its preemption argument, AriZona contends that Mr. Covington's claim under Florida's Deceptive and Unfair Trade Practices Act (FDUTPA) should be dismissed because FDUTPA does not apply to acts that are "required or specifically permitted by federal or state law." *State v. Tenet*, 420 F. Supp. 2d 1288, 1310 (S.D. Fla. 2005). This argument—which essentially reiterates AriZona's field preemption theory—fails, however, because AriZona's labeling of products containing HFCS as all-natural, and labeling and promoting products as containing particular fruits that are not actually contained in the products, are *not* required or specifically permitted by federal or state law. As AriZona concedes, "the FDA . . . has yet to determine . . . how the terms 'natural' or 'all natural' should be defined and whether either may be used on the label of a beverage containing HCFS." Def. Mem. 19 (citing *Holk*, 2008 WL 2446844, at \*7). The notion that AriZona is "required" to label its teas as "all natural" or to promote them as containing "sweet blueberries" or "crisp white cranberry" is silly, and AriZona does not suggest otherwise. And the contention that such labeling and promotion is "specifically permitted" is belied by AriZona's failure to identify any federal statute or regulation that addresses these specific topics. In short, as AriZona's memorandum implicitly concedes, no federal law directly addresses either aspect of AriZona's beverage labeling and promotion challenged here.

### **II. The Primary Jurisdiction Doctrine Does Not Apply.**

According to AriZona, the relief Mr. Covington seeks is "within the primary jurisdiction of the FDA" because Congress "designated the FDA as the federal agency responsible for protecting the public health by ensuring that 'foods are safe, wholesome, sanitary, and properly labeled.'" Def. Mem. 19 (quoting 21 U.S.C. § 393(b)(2)(A)). This argument too lacks merit.

By explicitly stating in § 6(c) of the NLEA that the federal food labeling laws shall not be construed to preempt any provision of state law not preempted by the express preemption provision in § 343-1(a), Congress made clear that it intended some state law addressing food labeling to remain in effect. The primary jurisdiction doctrine should not be used to override Congress' clear intention that FDA regulation and enforcement actions co-exist with state-law actions in areas not covered by the express preemption provisions.

In any event, the purposes behind the primary jurisdiction doctrine would not be served by dismissing Mr. Covington's claims. *See United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956) (explaining that application of the doctrine depends on "whether the purposes it serves will be aided by its application in the particular litigation"). As AriZona notes, the "main justifications for the rule of primary jurisdiction are the expertise of the agency deferred to and the need for a uniform interpretation of a statute or regulation." *Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260, 1265 (11th Cir. 2000). Whether AriZona's advertising, marketing, and labeling of its products is deceptive and misleading under Florida law, however, is not an issue outside "the conventional experience of judges," *Far East Conference v. United States*, 342 U.S. 570, 574 (1952), nor is it a question that implicates uniformity concerns, as it does not require interpretation of any federal law. Courts regularly hear questions of misleading advertising under deceptive practices acts and common law. *See, e.g., Gibson Guitar Corp. v. Piano Expo, Inc.*, 2005 WL 1676811 (M.D. Fla. July 18, 2005); *Izadi v. Machado Ford, Inc.*, 550 So.2d 1135, 1141 (Fla. 3d DCA 1989). This case, too, should proceed to be heard on its merits.

### CONCLUSION

For all the foregoing reasons, the motion to dismiss should be denied.

Respectfully submitted, this the 29<sup>th</sup> day of August, 2008.

s/Jon Herskowitz

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Jon M. Herskowitz, Esq.  
(Florida Bar No. 814032)  
E-Mail: [Jon@bhfloridalaw.com](mailto:Jon@bhfloridalaw.com)  
BARON & HERSKOWITZ  
One Datan Center  
Penthouse One, Suite 1704  
9100 South Dadeland Boulevard  
Miami, Florida 33156  
Telephone Number: (305) 670-0101  
Facsimile Number: (305) 670-2393

**ADDITIONAL PLAINTIFF'S COUNSEL:**

Joseph L. "Josh" Tucker, Esq.  
([josh@jacksonandtucker.com](mailto:josh@jacksonandtucker.com))

**PRO HAC VICE MOTION PENDING**

Edward E. Angwin, Esq.  
([ed@jacksonandtucker.com](mailto:ed@jacksonandtucker.com))

**PRO HAC VICE MOTION PENDING**

JACKSON, TUCKER & ANGWIN, P.C.  
2229 1<sup>st</sup> Ave North  
Birmingham, AL 35203  
Phone: 205-252-3535  
Fax: 205-252-3536

G. Richard Baker, Esq.  
BAKER LAW, PC  
700 29<sup>th</sup> Street South  
Birmingham, Alabama 35233  
Telephone: 205-714-7166

Anna Dean Farmer, Esq.  
LAW OFFICES OF ANNA DEAN FARMER, P.C.  
440 Louisiana, Suite 900  
Houston, Texas 77002  
Telephone: 713-965-0095

Christopher K. Gilbert, Esq.  
THE GILBERT LAW FIRM  
2223 Cheshire Lane  
Houston, Texas 77018  
Telephone: 832-541-3747

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 29<sup>th</sup> day of August, 2008, I electronically filed the foregoing document with the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record and pro se parties identified in the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner or those who are not authorized to receive electronically Notices of Electronic Filing:

Robert P. Donovan, Esq.  
MCELROY, DEUTSCH, MULVANEY, *ET AL.*  
Three Gateway Center  
100 Mulberry Street  
Newark, NJ 07102

Stephen Bernard Gillman, Esq.  
SHUTTS & BOWEN  
201 South Biscayne Boulevard  
Suite 1500 Miami Center  
Miami, FL 33131

s/Jon Herskowitz  
JON M. HERSKOWITZ, ESQ.