UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HEIDI HITT, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

ARIZONA BEVERAGE CO., LLC; HORNELL BREWING COMPANY, INC.; and FEROLITO VULTAGGIO & SONS, INC.,

Defendants.

CASE NO. 08cv809 WQH (POR)

ORDER

HAYES, Judge:

The matter before the Court is the Motion to Dismiss the Complaint (Doc. # 12) filed by Defendants Arizona Beverage Co., Hornell Brewing Company, Inc. and Ferolito Vultaggio & Sons, Inc.

Background

On May 2, 2008, Plaintiff initiated this action by filing the Complaint (Doc. # 1). Plaintiff's action centers around Defendants' promotion of certain drink products as "100% Natural," "All Natural," or "Natural," and listing fruit(s) in the drink names. *Complaint*, p. 1-2. The Complaint alleges that Defendants' beverages labeled as "All Natural" are deceptively labeled because they contain high fructose corn syrup ("HFCS"), which is not a natural substance (the "All Natural Claims"). *Id.*, ¶¶ 23, 28. The Complaint alleges that Defendants' beverages that have a fruit in the name are deceptively labeled because the beverages "do not

contain any substantial amount of the fruit named on the label" (the "Fruit Name Claims"). *Id.*, ¶¶ 24, 39-40. The Complaint alleges that "Defendants do not mention that the 'All Natural Products' contain one or more non-natural or artificial ingredients, including HFCS, except in inconspicuous and hard-to-read type in the 'Ingredients' statement on the back or sides of these products." *Id.*, ¶ 42. The Complaint alleges that "Plaintiff Hitt naturally and reasonably relied on the labels and advertising created by the Defendants and did not double-check those representations against the ingredient list in small type on the back of the container." *Id.*, ¶ 49.

The Complaint alleges the following causes of action: (1) Misleading and Deceptive Advertising, in violation of section 17500, *et seq.*, of the California Business and Professions Code; (2) Untrue Advertising, in violation of section 17500, *et seq.*, of the California Business and Professions Code; (3) & (4) Unlawful Business Acts and Practices, in violation of 17200, *et seq.*, of the California Business and Professions Code; (5) Fraudulent Business Acts and Practices, in violation of 17200, *et seq.*, of the California Business and Professions Code; and (6) Injunctive and Declaratory Relief under the Consumers Legal Remedies Act, section 1750, *et seq.*, of the California Civil Code.

On July 18, 2008, Defendants filed the Motion to Dismiss. Defendants move to dismiss the Complaint on grounds that Plaintiff's claims are impliedly preempted by regulations promulgated by the Food and Drug Administration ("FDA") pursuant to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. section 301, *et seq.* ("FFDCA"). Defendants also contend that the Complaint fails to state a claim on which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. On August 29, 2008, Plaintiff filed a Response in Opposition to the Motion to Dismiss (Doc. # 14). On September 8, 2008, Defendants filed a Reply (Doc. # 16).

On December 8, 2008, the Court heard oral argument (Doc. # 21).

Analysis

I. Preemption

A. Parties' Contentions

Defendants contend that "Plaintiff's claims are nothing more than an attempt to compel compliance with FDA regulations regarding the labeling of beverages." *Mot. to Dismiss,* p. 8. Defendants contend that "Plaintiff's efforts to do so, however, disregard congressional mandate by directly encroaching in an area that is already heavily and comprehensively regulated by the FDA, namely the labeling, marketing and promoting of beverages." *Id.* Defendants contend that Plaintiff's claims are expressly preempted because "the breadth of the FFDCA and the FDA's regulatory labeling scheme extends to and expressly covers beverages purporting to contain fruit and the characterizing flavors of beverages." *Id.* at 12. Defendants contend that Plaintiff's claims allege that the labeling, marketing and promotion of Defendants' drink products violates various California statutes, and are therefore impliedly preempted because the FDCA and the FDA's implementing regulations have occupied the field of beverage labeling, marketing and promotion. Defendants contend that Plaintiff's claims are also impliedly preempted because they stand as an obstacle to accomplishing federal objectives.

Plaintiff contends that the Nutrition Labeling and Education Act ("NLEA"), Pub. L. No. 101-535, 104 Stat. 2535 (1990), codified at 21 U.S.C. sections 301, 343, 343-1, expressly preempts certain types of state regulations pertaining to nutrition labeling on food. Plaintiff contends that the claims alleged in the Complaint do not fall within the claims preempted by the NLEA. Plaintiff contends that her claims are not expressly preempted because "there can be no express preemption without a statutory preemption provision," and "absent from [Defendant's] express preemption argument [] is reference to any express preemption provision." *Opposition,* p. 8-9. Plaintiff contends that the NLEA forecloses the possibility that Plaintiff's claims are impliedly preempted through Congress's explicit statement that the NLEA "shall not be construed to preempt any provision of State law, unless such provision is expressly preempted" pursuant to the NLEA. *Id*. at 9. Plaintiff further contends that the FDA

has not defined or regulated the use of the terms "natural" or "all natural," that the FDA has taken no official position on whether HFCS is "natural," and that the FDA has not regulated representations that a product contains a particular fruit that is not in fact contained in that product. *Opposition*, p. 4. Plaintiff contends that the FDA has not occupied the field of food labeling, and that adjudication of Plaintiff's claims would not frustrate any federal objective.

B. Applicable Law

I. Preemption Principles

State statutory and common laws are preempted under the Supremacy Clause of the United States Constitution in three scenarios. First, a federal law expressly preempts a state law when Congress explicitly defines the extent to which its enactments pre-empt state law ("express preemption"). *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) ("when Congress has made its intent known through explicit statutory language, the courts' task is an easy one"). Second, a federal law impliedly preempts a state law "where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively" ("field preemption"). *Id.* Field preemption may be implied from a "'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touches a field in which federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Third, a federal law impliedly preempts a state law "to the extent that it actually conflicts with federal law" ("conflict preemption"). *Id.* Conflict preemption has been found "where it is impossible for a private party to comply with both state and federal requirements," or "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (internal quotations omitted).

The Supreme Court has addressed whether the existence of an express preemption clause forecloses implied preemption, stating that its cases "support[] an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule." *Freightliner Corp., v. Myrick*, 514 U.S. 280, 289 (1995). The Court stated: "[t]he fact that an

express definition of the pre-emptive reach of a statute 'implies' – i.e., supports a reasonable inference – that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption." *Id.* at 288.

Courts addressing whether an agency's explicit policy not to regulate a field can give rise to field preemption have held that "deliberate agency inaction – an agency decision *not* to regulate an issue – will not alone preempt state law." *Fellner v. Tr-Union Seafoods, L.L.C.*, 539 F.3d 237, (3d Cir. 2008) (citing *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002)); *see also Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008) (holding that industry guidances, consent orders and/or agency inaction do not justify preemption of state deceptive practices rules). The *Fellner* court stated that "we find no support for the proposition that an agency's informal explanation for its decision not to regulate can alone imbue such a decision with preemptive force." 539 F.3d at 247.

ii. The Federal Food, Drug and Cosmetic Act and the Nutrition Labeling and Education Act

The FDCA gives the FDA broad authority to regulate certain aspects of food and beverage safety and labeling. 21 U.S.C. § 371. The FDA has promulgated regulations pursuant to its authority granted by the FDCA with respect to beverages that purport to contain fruit or that have fruit flavors. *See* 21 C.F.R. §§ 101.30, 102.33. Section 101.30 regulates the "percentage juice declaration for foods purporting to be beverages that contain fruit or vegetable juice." 21 C.F.R. § 101.30. If the beverage contains fruit juice, the percentage of fruit juice shall be declared, and if the "beverage contains less than 1 percent juice, the total percentage juice shall be declared as 'less than 1 percent juice'." 21 C.F.R. § 101.30(b). If the beverage contains no fruit, but the labeling or flavor of the beverage implies fruit juice may be present, the label shall declare that the beverage does not contain fruit juice. 21 C.F.R. § 101.30(d). If the beverage contains a natural flavor derived from a represented fruit, but contains an amount of the characterizing ingredient insufficient to independently characterize the food or the food contains no such ingredient, "the name of the characterizing flavor may be immediately preceded by the word 'natural' and shall be immediately followed by the word 'flavored.'" 21 C.F.R. § 101.22(i)(1)(i). "If none of the natural flavor used in the food is

derived from the product whose flavor is simulated, the food which the flavor is used shall be labeled either with the flavor of the product from which the flavor is derived or as 'artificially flavored.'" 21 C.F.R. § 101.22(i)(1)(ii).

The FDA has also addressed the use of the term "natural" in depicting food and beverage products, stating that its policy with respect to the use of the term "natural" is unrestrictive. Although the FDA recognizes that the "natural" claims are confusing and misleading to consumers and frequently breach the public's legitimate expectations about their meaning," 56 Fed. Reg. 60421, 60466, the FDA has not defined "natural" or "all natural" because "of resource limitations and other agency priorities," 58 Fed. Reg. 2407. The FDA 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, and flavors." 58 Fed. Reg. 2407. The FDA construes the term "natural" to mean that "nothing artificial or synthetic has been included in, or has been added to, a food that would not normally be expected to be in the food." *Id.*

In 1990, Congress passed the NLEA. The NLEA amended the FDCA by adding two new subsections with respect to nutrition labeling, 21 U.S.C. sections 343(q) and ®), and by adding express preemption provisions, section 343-1(a). Section 343-1 expressly preempts state regulation of specific topics related to food labeling, providing that states may not establish any requirement respecting these specified topics "that is not identical" to the requirements in the FDCA.[1] 21 U.S.C. § 343-1(a). In a note to section 343-1, Congress stated that "[t]he [NLEA] shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under section 403A 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).

[1] Neither party asserts that any of the topics expressly preempted in section 343-1 are implicated in this action.

C. Analysis

i. Express Preemption

Defendants assert that Plaintiff's claims are expressly preempted because "the breadth of the [FDCA] and the FDA's regulatory labeling scheme extends to and expressly covers beverages purporting to contain fruit and the characterizing flavors of beverages." *Mot. to Dismiss*, p. 12. Defendants, however, do not reference any express preemption provision that applies to Plaintiff's claims. The NLEA expressly preempts state "requirements" that are "not identical" to federal requirements on certain specified topics are preempted. 21 U.S.C. § 343-1(a). However, neither party asserts that Plaintiff's claims fall within the NLEA's express preemption provisions. Defendants' reliance on the breadth of the FDCA and FDA's regulatory labeling scheme does not support a finding of express preemption, which requires explicit statutory language preempting Plaintiff's claims. The Court concludes that Plaintiff's claims are not expressly preempted.

ii. Implied Preemption

Defendants assert that Plaintiff's claims are impliedly preempted by the FDCA under the doctrines of field preemption and conflict preemption. The NLEA, which is part of the FDCA, expressly preempts certain claims that are not at issue in this lawsuit. The existence of the NLEA's express preemption provisions "supports a reasonable inference . . . that Congress did not intend to pre-empt other[]" state law claims that are not included in the express preemption provisions. *Freightliner Corp.*, 514 U.S. at 288. Congress has indicated its intent that state law claims that are not expressly preempted by the NLEA shall not be impliedly preempted through its statement that "[t]he [NLEA] shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under section 403A of the Federal Food, Drug, and Cosmetic Act," 21 U.S.C. § 343-1 (note). Based on the foregoing, the Court finds that the statutory structure of the FDCA supports a conclusion that Plaintiff's state law claims are not impliedly preempted.

Defendants assert that the doctrine of field preemption bars Plaintiff's claims because the FDA has occupied the field or beverage labeling, marketing and promotion. As an initial

matter, if the FDA preempted the field of food labeling, there would be no need for the NLEA's express preemption provisions. With respect to Plaintiff's All Natural Claims, the FDA has not defined the term "natural," and has explicitly declined to regulate the term, stating instead that its policy is that the use of the term "natural" shall be unrestrictive. *See* 58 Fed. Reg. 2407. Although Defendants assert that Plaintiff's All Natural Claims are barred by the doctrine of field preemption based on the FDA's "well-established, unrestrictive policy on the use" of the term, *Mot. to Dismiss,* p. 10, "an agency decision *not* to regulate an issue – will not alone preempt state law," *Fellner*, 539 F.3d 237. With respect to Plaintiff's Fruit Name Claims, the FDA has issued regulations in the field through its issuance of rules concerning the labeling of beverages that purportedly contain fruit. However, there is nothing in the statutory provisions of FDCA, its implementing regulations or its legislative history to suggest that Congress intended to exclusively occupy the field of labeling beverages that purport to contain fruit. The Court finds that this scheme of regulation is not "'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,'" or that it "'touches a field in which federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."' *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The Court concludes that Plaintiff's claims are not preempted by the doctrine of field preemption.

Defendants assert that Plaintiff's claims are impliedly preempted because they stand as an obstacle to accomplishing federal objectives. The purpose of the FDCA is to "protect the public health by ensuring that [] foods are safe, wholesome, sanitary, and properly labeled." 21 U.S.C. § 393. With respect to Plaintiff's All Natural Claims, the FDA has deferred taking regulatory action. Plaintiff's All Natural Claims do not stand as an obstacle to accomplishing Congress's objectives of uniformity and consistency in regulating beverage labeling because there are no federal requirements regarding the term "natural" to be given preemptive effect. With respect to Plaintiff's Fruit Name Claims, the Complaint alleges that Defendants have engaged in false or deceptive advertising or promotion by giving beverages that do not contain blueberries names such as "Blueberry Green Tea" or giving beverages that do not contain

cranberries names such as "White Cranberry and Apple Tea." Although the FDA has issued regulations concerning the labeling of beverages containing fruit in the name, the purpose of the FDA's regulations is to ensure that beverages that purport to contain juice do not mislead consumers by creating a false impression about juice content. S*ee* Fed. Reg. 2897. Plaintiff's Fruit Name Claims, which assert that Defendants' beverages with fruit in the name that do not contain such fruits are deceptive, pose no obstacle to the accomplishment of the FDA's federal objective of ensuring that beverage labels do not create a false impression about juice content. The Court concludes that Plaintiff's claims are not impliedly preempted by the doctrine of conflict preemption.

II. Failure to State a Claim

Defendants assert that "no reasonable consumer, concerned about his/her health, after examining a company's website (which depicts the products and their ingredients) would be able to convince a fact finder that they were deceived in this case." *Mot. to Dismiss*, p. 21. Defendants move to dismiss the Complaint for failure to state a claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on grounds that "[u]nder no set of facts, no matter how favorable they are read, can Plaintiff demonstrate that the labels at issue are inherently misleading such that they are likely to deceive consumers." *Id.*

Plaintiff contends that Plaintiff "should have the opportunity to present evidence, such as a consumer survey, showing that [Defendant's] labeling and promotion is likely to deceive reasonable consumers." *Opposition,* p. 16. Plaintiff opposes dismissal of the Complaint on grounds that the issue of whether a reasonable consumer will likely be deceived "should not be decided on a motion to dismiss." *Id.*

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the pleadings. *See De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978). A complaint may be dismissed for failure to state a claim under Rule 12(b)(6) where the factual allegations do not raise the right to relief above the speculative level. *See Bell Atlantic v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Conversely, a complaint may not be dismissed for failure to state a claim where the allegations plausibly show that the pleader is

entitled to relief. *See id.* (citing Fed R. Civ. P. 8(a)(2)). In ruling on a motion pursuant to Rule 12(b)(6), a court must construe the pleadings in the light most favorable to the plaintiff, and must accept as true all material allegations in the complaint, as well as any reasonable inferences to be drawn therefrom. *See Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003); *see also Chang v. Chen*, 80 F.3d 1293 (9th Cir. 1996).

"[F]alse or misleading advertising and unfair business practices claim[s] must be evaluated from the vantage of a reasonable consumer." *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995). Under the reasonable consumer standard, a plaintiff "must show that members of the public are likely to be deceived." *Id.* (internal quotations omitted). "California courts . . . have recognized that whether a business practice is deceptive will usually be a question of fact not appropriate for decision on demurrer." *Williams v. Gerber*, 523 F.3d 934, 939 (9th Cir. 2008). The factual allegations in *Gerber* are similar to the present case: the *Gerber* plaintiffs alleged that packaging used by Gerber to sell its "Fruit Juice Snacks" used the words "fruit juice" and contained images of fruits; that the packaging was deceptive because the product contained no fruit juice from any of the fruits pictured on the packaging; and that the plaintiffs did not read the nutrition label. *Id.* at 936. The Ninth Circuit noted that motions to dismiss deceptive business practice claims are granted under "rare" situations, and held that the plaintiffs stated a deceptive business practice claim under California law, and could "plausibly prove that a reasonable consumer would be deceived by the Snacks packaging." *Gerber*, 523 F.3d at 940.

The facts of this case are similar to the facts in *Gerber* in that there are a number of features of Defendants' beverage packaging to be considered in this case, including representations that the beverages are natural, the use of fruit in the names of the beverages, and depictions of fruit on the labels of the beverages, which makes dismissal of the action inappropriate at this stage of the proceedings. *Gerber*, 523 F. 3d at 939. Viewing the allegations in the light most favorable to Plaintiff, the Court concludes that the facts of this case "do not amount to the rare situation in which granting a motion to dismiss is appropriate," and that the parties should be able to submit evidence to demonstrate whether a reasonable

consumer would find the labeling on the subject beverages to be deceptive. *Id.* The Motion to Dismiss for failure to state a claim is denied.

Conclusion

IT IS HEREBY ORDERED that the Motion to Dismiss (Doc. # 12) is **DENIED.**

DATED: February 4, 2009

WILLIAM Q. HAYES
United States District Judge