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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARGOT LOCKWOOD, individually and on behalf of all others similarly situated,

Plaintiff,

v.

CONAGRA FOODS, INC., DOE CORPORATION, and DOES 1 through 50, inclusive,

Defendants.

Case No. CV 08 4151 (CRB)

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

Complaint filed May 2, 2008

Date: January 23, 2009
Time: 10:00 a.m.
Dept.: Courtroom 8, 19th floor
Judge: Hon. Charles R. Breyer

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STATEMENT OF ISSUES (Civ. Local Rule 7-4(a)(3))

1. Whether plaintiff's claims concerning defendant's use of the term "natural" on the labels and advertising of certain foods are expressly preempted by 21 U.S.C. § 343-1(a).

2. Whether plaintiff's claims concerning defendant's use of the term "natural" on the labels and advertising of certain foods are impliedly preempted by the Food and Drug Administration's regulation of food labels, even where Congress has indicated that the scope of preemption extends no further than § 343-1(a) and where the Food and Drug Administration has taken no action to define the term "natural."

3. Whether the Court should refer this case to the Food and Drug Administration under the primary jurisdiction doctrine.

4. Whether plaintiff's class action allegations should be stricken.

SUMMARY OF ARGUMENT (Standing Order)

This case is brought under California consumer protection statutes, based on defendant ConAgra's labeling and advertising pasta sauce that contains high fructose corm syrup as "all natural" or "100% natural." ConAgra has moved to dismiss, on the theories that Ms. Lockwood's clams are expressly preempted by the Nutrition Labeling and Education Act of 1990 ("NLEA") and impliedly preempted because the Food and Drug Administration ("FDA") has occupied the field of food labeling. ConAgra also argues that the Court should decline to hear the case under the primary jurisdiction doctrine and, in the alternative, that the class allegations should be dismissed.

First, Ms. Lockwood's claims are not expressly preempted. The express preemption provision on which ConAgra relies, 21 U.S.C. §343-1(a), preempts only state requirements on the topics specified in its 5 paragraphs. None of those paragraphs applies here. In particular, ConAgra relies on the paragraphs addressing standards of identity for foods and disclosure of artificial coloring, labeling, and preservatives, but neither of those topics are implicated by Ms. Lockwood's claims.

Second, Ms. Lockwood's claims are not barred by field preemption. If Congress intended for FDA to occupy the field of food labeling, there would be no need for an express preemption provision. Thus, ConAgra's field preemption theory renders §343-1(a) superfluous. In addition, § 343-1(a) states that even on the topics as to which state requirements are generally preempted, the state requirements are not preempted if they are identical to federal law. That some state requirements are explicitly allowed to continue in effect contradicts the notion of field preemption in the area of food labeling. Moreover, § 6(c)(1) of the NLEA, *see* 21 U.S.C. § 343-1 note, states that the NLEA "shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under" § 343-1(a). Thus, "[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).

Although ConAgra's implied preemption discussion focuses on field preemption, ConAgra's memorandum also suggests that ConAgra is also arguing that implied conflict preemption applies here. ConAgra asserts, for example, that Ms. Lockwood's claims "would create obstacles to the accomplishment of Congress's objectives in enacting" the FDCA. Again, § 6(c) forecloses this

argument. However, even aside from § 6(c), ConAgra never explains how Ms. Lockwood's claims would pose any obstacle to FDA's ability to achieve its objectives. Surely no FDA objective will be offended if ConAgra does *not* label its pasta sauce as "all natural."

FDA acknowledged as long ago as 1991 that the term "natural" is used in ways that confuse and mislead consumers. At that time and subsequently, FDA acknowledged that a definition would abate that problem, but it also expressly declined to issue a regulation on the term "natural." 58 Fed. Reg. 2302, 2407 (1993) ("Because of resource limitations and other agency priorities, FDA is not undertaking rulemaking to establish a definition for 'natural' at this time."). As the Third Circuit recently explained, there can be no preemption without federal law to do the preempting. *Fellner v. Tri-Union Seafoods, LLC*, 539 F.3d 237, 254 (3d Cir. 2008). *See also Altria v. Good*, 555 U.S. __, 2008 WL 5204477, *11 (2008) (state unfair and deceptive trade practices action not preempted where Federal Trade Commission had not regulated use of "light" on cigarette labeling and advertising).

Third, ConAgra argues that because "questions concerning appropriate food labeling have been placed by Congress under the jurisdiction of the FDA," Ms. Lockwood's claims should be dismissed under the primary jurisdiction doctrine. However, "it is the extent to which Congress, in enacting a regulatory scheme, intends an administrative body to have the first word on issues arising in judicial proceedings that determines the scope of the primary jurisdiction doctrine." *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987). Here, through § 343-1(a) and § 6(c), Congress made clear that it did not intend FDA to have sole authority over food labeling. In addition, because FDA has chosen not to define "natural," protection of the regulatory scheme does not require the Court to defer to FDA. And determining whether labeling and advertising are false or deceptive under consumer protection laws is not an issue outside "the conventional experience of judges." *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956) (citation omitted). In these circumstances, the primary jurisdiction doctrine has no place.

Fourth, ConAgra argues that the class allegations should be stricken because individual issues regarding reliance and loss will predominate over common issues. Contrary to ConAgra's suggestion, it is an unsettled question whether, under California law, each class member must show reliance on alleged misstatements and must establish that he or she suffered injury in fact. Ms. Lockwood

believes that that such individualized showings are not required, and that an inference of reliance on ConAgra's material misrepresentations that its product is "all natural" should be inferred. However, the question is currently pending before the California Supreme Court. *See In re Tobacco II Cases*, 142 Cal. App. 4th 891 (2006), *rev. granted*, 51 Cal. Rptr. 3d 707 (2007). To strike the class allegations at this time would be premature.

INTRODUCTION

This case was brought under California consumer protection statutes, seeking damages and declaratory and injunctive relief against ConAgra Foods and related defendants for labeling and promoting Healthy Choice pasta sauce as "100% natural," "natural" or "all natural," when the product in fact contains high fructose corn syrup ("HFCS"), a chemically-synthesized substance. ConAgra has moved to dismiss, arguing that Ms. Lockwood's claims are both expressly and impliedly preempted by federal law. ConAgra also argues that the claims are barred by the primary jurisdiction doctrine, and that the complaint's class action allegations should be dismissed because individualized issues predominate. As discussed below, each of these arguments lacks merit.

FACTUAL AND REGULATORY BACKGROUND

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. 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.

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 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* 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 discussion before the House passed the final version of the bill, Representative Henry Waxman, the bill's sponsor, explained that a narrow preemption provision

had been added to the bill by the Senate 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."). As explained by the leading Senate proponent of federal preemption, Senator Orrin Hatch, "the carefully crafted uniformity section of this legislation is limited in scope." 136 Cong. Rec. S16607-02, S16611 (Oct. 24, 1990). Under that section, 21 U.S.C. § 343-1(a), 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 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). 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)(1) (21 U.S.C. § 343-1 note).

ConAgra's motion to dismiss is based on paragraphs (2) and (3) of § 343-1(a). Paragraph (2) provides for preemption of any state requirement "for the labeling of food of the type required by section 343(c)" and that is not identical to the requirement of that section. Section 343(c) provides that a food is misbranded if it is an imitation of another food, unless its label bears the word "imitation." And paragraph (3) of § 343-1(a) provides for preemption of any state requirement "for

the labeling of food of the type required by [§ 343(k)] that is not identical to the requirement of" § 343(k). Section 343(k) provides that a food is misbranded if "it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling stating that fact."

II. "ALL NATURAL" AND HIGH FRUCTOSE CORN SYRUP

Two related aspects of FDA regulation, or non-regulation, are relevant here: the agency's view on terms such as "all natural" in food labeling, and the agency's view on whether HFCS is "natural."

A. FDA does not define or regulate use of the terms "natural" or "all natural." However, 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," FDA has not yet defined "natural" or "all natural," although the agency recognizes that doing so could "abate" "the ambiguity" that "results in misleading claims." 58 Fed. Reg. at 2407. Although FDA has no definition, it follows a policy under which "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.* 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 requirements binding on food companies. *Id.* § 10.85(j). FDA's answer to the "frequently asked question" "What guidance does the FDA have for Natural-Organic?" reiterates that FDA has no law on the subject: "The term 'natural' has not been defined in FDA's law (the [FDCA]) or in FDA's regulations." FDA, Food, Nutrition, and Cosmetics Questions & Answers, *available at* http://www.cfsan.fda.gov/~dms/qa-ind7f.html (viewed Dec. 15, 2008).

B. ConAgra's Healthy Choice pasta sauce contains HFCS, but ConAgra labels and promotes the products as "all natural" or "100% natural." Complaint ¶¶ 2-3 & Exhs. A & B. HFCS does not occur in nature; it is a highly processed substance. *Id.* ¶¶ 22, 24, 25. The chemical process that creates HFCS was created in 1957. *Id.* ¶ 24.

FDA has no official position on whether HFCS is "natural." Recently, an employee in FDA's Office of Nutrition, Labeling and Dietary Supplements stated to a reporter that 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. In response, the Corn Refiners Association requested a meeting to ask that the statement be reconsidered. After the meeting, 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. ConAgra Exh. D, p.19 (FDA letter). Thus, according to the letter, some products containing HFCS could be called "natural" and others could not. *Id*.[1/]

This letter (assuming it is properly considered on a motion to dismiss) suggests that, in the view of that particular FDA employee, whether ConAgra products containing HFCS may truthfully be called "100% natural" or "all natural" is a factual question involving consideration of the process used to manufacture the particular type of HFCS used in those foods. However, neither the statement to the reporter nor the letter to the Corn Refiners Association establish 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 FDA, and does not bind or otherwise obligate or commit the agency to the views expressed").

ARGUMENT

On a motion to dismiss, "[a]ll allegations of material fact in the complaint are taken as true and construed in the light most favorable to the plaintiff." *Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1120 (9th Cir. 2007). 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).

[1/] In its motion to dismiss, ConAgra asks the Court to consider two documents, including this letter, outside the pleadings. Ms. Lockwood believes that the documents are not appropriately considered on a Rule 12(b)(6) motion. However, as discussed herein, if the Court considers the material, it supports Ms. Lockwood's position.

I. MS. LOCKWOOD'S CLAIMS ARE NOT PREEMPTED.

In matters traditionally regulated by the states, the courts apply a strong presumption *against* preemption, which may be overcome only by "clear and manifest" congressional intent to the contrary. *Altria v. Good*, 555 U.S. __, 2008 WL 5204477, *4 (2008); *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985). 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 v. General Elec. Co.*, 496 U.S. 72, 87-90 (1990). Accordingly, even if the answer to the question whether the claims alleged here are preempted were ambiguous, that ambiguity would be resolved in Ms. Lockwood's favor. *Altria*, 2008 WL 5204477, *4. In fact, as shown below, there is no ambiguity; the plain language of the NLEA demonstrates that Ms. Lockwood's claims are neither expressly nor impliedly preempted.

A. Ms. Lockwood's Claims Are Not Expressly Preempted.

1. ConAgra first suggests that Ms. Lockwood'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). The question in cases involving express preemption is the scope of the preemption language that Congress has enacted. As discussed above, *supra* p. 3, the NLEA has an express preemption provision, 21 U.S.C. § 343-1(a), which addresses specified aspects of food labeling. Under § 343-1(a), state "requirements" that are "not identical" to federal requirements on the specified topics are preempted. Here, ConAgra argues that Ms. Lockwood's claims fall within one of two provisions of § 343-1(a), but its arguments require ConAgra to rewrite the claims actually alleged to assert claims that cannot be found in the complaint. The allegations on which Ms. Lockwood's claims are in fact based do not fall within the scope of § 343-1(a).

First, ConAgra looks to paragraph 3 of § 343-1(a), which provides for preemption of state food labeling requirements that are not identical to the federal requirements requiring food labels to disclose the presence of artificial flavorings, artificial colorings, or chemical preservatives. According to ConAgra, this provision preempts Ms. Lockwood's claims because FDA has defined "artificial flavor" and "natural flavor," and those definitions are not identical to the definition of "natural" on which the claims are based. This argument lacks merit for two reasons. First, Ms.

Lockwood's complaint does not allege a failure to disclose. Rather, this case is about an affirmative representation that a product that contains a synthesized ingredient is "all natural" or "100% natural." Second, and equally important, this case is not about a "flavoring," artificial or otherwise; it is about a "sweetener." FDA regulations demonstrate that the two are distinct from one another. *See* 21 C.F.R. § 170.3(o)(12) (defining "flavoring agents and adjuvants"), § 170.3(o)(19), (21) (defining "nutritive sweeteners" and "non-nutritive sweeteners"). Because this case is about a "sweetener," not a "flavoring," § 343-1(a)(3) is not relevant here.

Second, ConAgra very briefly suggests that Mr. Lockwood's claims are expressly preempted by § 343-1(a)(2), which provides for preemption of state food labeling requirements that are not identical to the federal requirement that the label of a food that is an imitation of another food must bear the word "imitation." Specifically, ConAgra contends (at 6) that the allegation that HFCS is often cheaper to use than "alternative sweeteners due to the relative abundance of corn and the relative lack of sugar beets," Complaint ¶ 23, is "an artful way of saying that HFCS 'imitates' a sweetener derived from sugar beets." Again, ConAgra is arguing against a claim that Ms. Lockwood has not alleged. Paragraph 23 does not allege ("artfully" or otherwise) that HFCS is "imitation" sugar; it simply posits reasons why a company might choose to sweeten its products with HFCS rather than with the "alternative sweetener," sugar. More importantly, even if this single paragraph could be construed to make a claim about an "imitation" substance (which, again, it cannot fairly be read to do), the Complaint as a whole does not make any claim that ConAgra's product labels should include the word "imitation." Rather, the Complaint alleges violations of California's consumer protection statutes based on the false and misleading use of terms such as "all natural." Section 343-1(a)(2) does not preempt any such claims, and ConAgra does not suggest otherwise.

Because no paragraph of the NLEA's limited preemption provision applies here, Ms. Lockwood's claims are not expressly preempted.

B. The NLEA Forecloses Implied Preemption.

ConAgra also argues (at 7) that the state-law claims alleged here are impliedly preempted because "Congress intended the Federal Government to occupy exclusively" the field of food labeling. This theory fails 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" § 343-1(a). 21 U.S.C. § 343-1 note (Pub. L. No. 101-535, § 6(c)(1)) ("§ 6(c)(1)"). As 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).

1. Federal law can preempt state law under a field preemption theory when a "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. Rather, in several ways, the NLEA makes plain that Congress did not intend to occupy the field of food labeling in general or beverage labeling in particular. To begin with, § 343-1 identifies specifically which statutory provisions preempt state law. "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. *Freightliner Corp. v. Myrick,* 514 U.S. 280, 290 (1995) (quoting *Cipollone v. Liggett Group*, 505 U.S. 504, 517 (1992)). Indeed, an express preemption provision would be "pure surplusage if Congress had intended to occupy the entire field." *Wis. Public Intervenor v. Mortier*, 501 U.S. 597, 613 (1991). In addition, the express *non*-preemption of requirements otherwise preempted under § 343-1(a)—the requirements that are "identical to" federal requirements on the specified topics—contradicts the field preemption theory. Likewise, § 6(c)(1), which states unequivocally that state law outside the scope of § 343-1 is not preempted, is incompatible with field preemption. In accordance with Congress's direction, FDA recognizes 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) (emphasis added). ConAgra's field preemption theory thus fails on the basis of the NLEA's express command.

2. ConAgra mentions § 6(c)(1) only in a footnote. There, it relies on § 6(c)(3), which states, in relevant part, that § 343-1 and § 6(c)(1) "shall not be construed to affect preemption, express or

implied, of any such requirement of a State" that arises under any provision of the FDCA that was not amended by § 343-1. According to ConAgra (at 7 n.5), § 6(c)(1) does not foreclose implied preemption here because its arguments are not based on the NLEA, but on other provisions of the FDCA, "including those governing food labelling [sic] and misbranding, that were not amended by the NLEA." To begin with, this argument would render § 6(c) a nullity. As discussed above, the legislative history of the NLEA demonstrates that Congress intended limited preemption in the area of food labeling. The notion that field preemption can exist with a narrowly drawn preemption provision and an express savings provision, § 6(c)(1), would stand implied preemption jurisprudence on its head. ConAgra can point to no instance in which this Court, the Ninth Circuit, or the U.S. Supreme Court has found field preemption in the face of such powerful evidence of Congress's intent *not* to occupy the field.

Moreover, the phrase "any such requirement" in paragraph (3) of § 6(c) must refer to the "requirement" discussed in paragraph (2) because paragraph (2) has the only prior use of the term "requirement" in § 6(c). In paragraph (2), Congress provided that section 343-1 does not apply "to any requirement respecting a statement in the labeling of food that provides for a warning concerning the safety of the food . . . ." "Thus read in context, it is clear that the phrase 'any such requirement' in NLEA section 6(c)(3) refers to the food safety labeling requirement discussed in the immediately preceding provision, NLEA section 6(c)(2)." *In re Farm Raised Salmon*, 175 P.3d 1170, 1093 (Cal. 2008). Safety warnings, and thus paragraph (3), are inapposite here.

ConAgra further tries to sidestep § 6(c)(1) by suggesting that its claims are brought under provisions of the FDCA that are not part of the NLEA and that, therefore, § 6(c)(1) (which only addresses the effect of the NLEA on preemption) does not apply. In so arguing, ConAgra focuses on FDCA provisions addressing misbranding and FDA regulations addressing various aspects of food labeling. As to the misbranding provisions, the notion that they support implied preemption here is frivolous because the same theory would support preemption of any claim brought in connection with any product regulated by FDA (drugs, medical devices, foods)—all of which must comply with FDCA and FDA prohibitions on misbranding. *See* 21 U.S.C. § 331(a); *see also Fellner v. Tri-Union Seafoods, LLC*, 539 F.3d 237, 254-55 (3d Cir. 2008) (rejecting argument that failure-to-warn claim

regarding mercury in tuna conflict with FDCA food misbranding provision). Moreover, the misbranding provisions of the FDCA pre-date enactment of the NLEA in 1990, yet ConAgra cannot seriously suggest that FDA comprehensively regulated food labels before that date. As for the particular regulations on which ConAgra relies (at 7 n.5 (citing ConAgra Memo at 2:25-3:20)), the majority of the regulations cited by ConAgra were promulgated as part of FDA's implementation of the NLEA. *See*, *e.g*., 58 Fed. Reg. 2302 (1993) ("in response to the Nutrition Labeling and Education Act of 1990," issuing regulations 21 C.F.R. §§ 101.9, 101.13, 101.54, 101.56, 101.60-62, 101.65, 101.69, 101.95); 58 Fed. Reg. 2478 (1993) (issuing 21 C.F.R. §§ 101.14, 101.70, 101.71 "in response to provisions of the Nutrition Labeling and Education Act of 1990").

With regard to the specific matter at issue in this case—the meaning of "natural"—the contention that FDA has comprehensively regulated use of the term is belied by FDA's repeated statements that it sees the value in adopting a definition and that it has not yet adopted one. Even comprehensive regulations do not necessarily preempt state law. *English*, 496 U.S. at 87. To find field preemption in a situation where Congress has emphasized the continuing role of the states and where the agency has plainly stated that it has not addressed the pertinent matter would be unprecedented.

3. ConAgra's field preemption argument is based largely on two district-court cases. Neither case helps ConAgra to overcome the statute's plain language, which makes clear that the NLEA does not occupy the field of food labeling. First, ConAgra relies on the district court decision in *Holk v. Snapple*, 574 F. Supp. 2d 447 (D.N.J. 2008), in which it does not appear that the court was apprised of § 6(c). Like this case, *Holk* was brought under a state unfair and deceptive trade practices act and alleged that use of the term "all natural" on the labels of products containing HFCS was false and misleading. The district court, in a decision currently on appeal to the Third Circuit, concluded that FDA regulations and the decision to defer defining "natural" "thoroughly occupy the field of the beverage labeling at issue." *Id*. at 455. However, listing FDA's labeling regulations shows what the agency has done in the area of food and beverage labeling, but ignores what the agency has not done—notably, its decision not to regulate use of "natural." In any event, whether or not the regulations listed are "comprehensive," "[t]o infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides

to step into a field, its regulation will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence." *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." *Id*.

In addition, as the Supreme Court has explained, an agency's decision not to regulate a matter within its purview, or—as here—a decision not *yet* to regulate that matter, does not suggest that the agency determined that a regime free of regulation was an aspect of its overall regulatory plan, absent an "'authoritative' message of a federal policy against [regulation]." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 67 (2002), *quoted in Fellner*, 539 F.3d at 246. Here, FDA's statements unambiguously show that it has no policy against regulating use of the term "natural;" it just does not have enough resources to promulgate a regulation. *See* 58 Fed. Reg. at 2407. Under these circumstances, even if § 341-1(a), § 6(c), and the legislative history reviewed above (at 2-3) did not unequivocally manifest Congress's rejection of field preemption, ConAgra's theory would be meritless.

Second, ConAgra focuses on *Fraker v. KFC Corp*., 2007 WL 1296571 (S.D. Cal. Apr. 30, 2007). There, the plaintiff alleged that KFC's food was misbranded in violation of the FDCA and California's Sherman Act because the food it advertised as healthy was high in trans fat. The court held that the claims were preempted because "they conflict with the exclusive enforcement mechanism provided by Congress." *Id*. at *3. To begin with, the court's opinion does not mention § 6(c). In addition, in *Fraker*, the defendant argued, and the court agreed, that the plaintiff's claims, which were based on alleged violations of federal regulations, conflicted with the "exclusive enforcement mechanism provided by Congress." *Id*. The court held that only FDA can bring suit to enforce compliance with federal regulation, *id.* at *3 (citing 21 U.S.C. § 337(a)), and that the plaintiff's claims would thus interfere with FDA's "uniform enforcement." *Id*. In contrast, the complaint in this case does not seek to enforce *federal* requirements (it does not even cite federal requirements), but only *state* requirements. *See* Complaint pp. 11-19 (stating causes of action); *see also In re Farm Raised Salmon*, 175 P.3d at 1183 (distinguishing *Fraker* on this basis).

4. Finally, although ConAgra's implied preemption discussion generally seems to argue field

preemption, at a few points ConAgra suggests that perhaps it intends to argue conflict preemption as well. For instance, ConAgra asserts (at 9-10) that Ms. Lockwood's claims "would create obstacles to the accomplishment of Congress's objectives in enacting" the FDCA. 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, ConAgra would be mistaken.

Under implied conflict preemption principles, 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). "State law is not preempted whenever an agency has merely 'studied' or 'considered' an issue; state law is preempted when federal *law* conflicts with state law." *Fellner*, 539 F3d at 254 (emphasis in original). Here, because FDA does not define or regulate use of the terms "natural" or "all natural," (much less have a formal position on whether HFCS is "natural"), preemption of Ms. Lockwood's "all natural" claims is not warranted under this theory either. Indeed, ConAgra would be hard-pressed to explain how promoting its products as "all natural" advances any federal objective.

To the extent that ConAgra makes a conflict preemption argument, that argument is based on *Holk*, which was decided before and is inconsistent with the decision in *Fellner*, in which the Third Circuit recently considered whether failure-to-warn claims brought by a woman who suffered mercury poisoning after eating tuna were preempted by FDA activities. FDA had taken several steps addressing health risks posed by mercury in tuna: It had issued a consumer advisory, a "backgrounder," and a compliance policy guiding FDA's exercise of enforcement action, and the Commissioner of FDA had sent a letter concerning a lawsuit brought under California's Proposition 65 stating the view that FDA's actions preempted that suit. 539 F.3d at 241. Nonetheless, FDA had taken no formal step to address mercury warnings or disclosures on tuna labels. Holding that the plaintiff's claims were not preempted, the Third Circuit "decline[d] to afford preemptive effect to less formal measures lacking the 'fairness and deliberation' which would suggest that Congress intended the agency's action to be a binding and exclusive application of federal law." *Id*. at 245 (quoting *United States v. Mead Corp*, 533 U.S. 218, 230 (2001)). Reviewing Supreme Court case law, the Third Circuit explained that "mere deliberate agency inaction—an agency decision not to regulate

an issue—will not alone preempt state law." *Id*. at 247.

Thus, for example, 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 a 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. 537 U.S. at 65. Rather, that decision was "fully consistent with an intent to preserve state regulatory authority." *Id.*

Likewise, in *Altria*—the Supreme Court's most recent case addressing implied preemption—the plaintiff alleged that tobacco company Philip Morris violated Maine's unfair and deceptive trade practices act by marketing cigarettes as "light" and "lowered tar and nicotine" to falsely convey to consumers that those cigarettes deliver less tar and nicotine and, therefore, are less harmful than regular cigarettes. 2008 WL 5204477, *2. Philip Morris argued that the plaintiff's claims were both expressly preempted by the Federal Cigarette Labeling and Advertising Act and impliedly preempted by Federal Trade Commission ("FTC") policy allowing use of descriptors such as "light." *Id*. at *3-*4. The Supreme Court rejected both arguments. With respect to implied preemption, the defendant's argument was based on FTC compliance documents addressing tar and nicotine disclosure, FTC consent orders, and FTC's inaction in allowing "light" descriptors. The Supreme Court stated that the agency's failure to require defendants to correct their allegedly misleading use of "light" descriptors was *not* evidence of a policy authorizing such representations because "agency nonenforcement of a federal statute is not the same as approval." *Id*. at *10. Much like FDA had done in 1991 with respect to "natural," the FTC had in 1997 stated in a Federal Register notice that "'[t]here are no official definitions for' the terms 'light' and 'low tar,'" and had sought comment on whether the agency should provide "official guidance with respect to the terms." *Id*. at *11 (quoting 62 Fed. Reg. 48163 (1997)). Again, much like FDA here, the FTC did not then take action on the matter. Nonetheless, the Court held the FTC's actions and inactions did not "even arguably justif[y]

the pre-emption of state deceptive practices rules." *Id*. at *11.[2/]

In sum, "nothing short of federal law can have [preemptive] effect." *Fellner*, 539 F.3d at 243. Because no federal law regulates use of the term "natural" on food labels, there is no preemption here.

II. THE PRIMARY JURISDICTION DOCTRINE IS INAPPLICABLE HERE.

In an argument largely mirroring its field preemption discussion, ConAgra argues (at 11) that because "questions concerning appropriate food labeling have been placed by Congress under the jurisdiction of the FDA," Ms. Lockwood's claims should be dismissed under the primary jurisdiction doctrine. This argument too lacks merit. First, "it is the extent to which Congress, in enacting a regulatory scheme, intends an administrative body to have the first word on issues arising in judicial proceedings that determines the scope of the primary jurisdiction doctrine." *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987); *see also United States v. Culliton*, 328 F.3d 1074, 1082 (9th Cir. 2003) (noting that uniformly present in primary jurisdiction cases is "Congressional intent to imbue an administrative agency with total responsibility to resolve or address the particular issue"). Here, § 343-1(a) and § 6(c) show that Congress did not intend FDA to have sole authority over food labeling. The primary jurisdiction doctrine should not be used to override Congress' intent that state authority would coexist with FDA authority in areas not covered by § 343-1(a).

Second, as discussed above, FDA has declined to define "natural." *See* 58 Fed. Reg. at 2407 ("Because of resource limitations and other agency priorities, FDA is not undertaking rulemaking to establish a definition for 'natural' at this time."). ConAgra notes that, in February 2006, the Sugar Association filed a petition asking FDA to define the term, but that petition has been pending for nearly three years without response. In the meantime, as recently as July 2008, the FDA letter on which ConAgra relies reiterated the agency's "natural" policy, without in any way suggesting that the agency is planning to undertake a rulemaking. *See* ConAgra Exh. D. Where FDA has consciously

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[2/]Similarly, the non-binding statements of an individual FDA employee as to whether HFCS is "natural," as that term is used in FDA's informal policy, do not constitute the formal position of FDA or commit FDA to any position, much less evidence a federal objective capable of preempting state law. *See supra* pp. 3-4 (FDA employee stated to a reporter that HFCS is not "natural" and later stated in a letter that whether HFCS is "natural" depends on production process). As the Third Circuit recently observed, "[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." *Fellner*, 539 F.3d at 245.

decided to defer regulation indefinitely, "protection of the integrity of a regulatory scheme" does not call for "preliminary resort" to FDA. *Gen. Dynamics Corp*., 828 F.2d at 1363 (citation omitted).

Finally, determining whether labeling and advertising are false or deceptive under consumer protection laws is not an issue outside "the conventional experience of judges." *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956) (citation omitted). And although the primary jurisdiction doctrine is concerned, in part, with uniformity, this case does not implicate that interest. *Cf. Ryan v. Chemlawn Corp.*, 935 F.2d 129, 132 (7th Cir. 1991) (primary jurisdiction would not promote uniformity where plaintiff alleged state-law causes of action that were not dependent on agency provisions). If Congress believes that state consumer-protection statutes threaten an interest in uniformity, it can enact a provision to preempt those state laws. Congress has not done so here.

III. THE COURT SHOULD NOT STRIKE THE CLASS ALLEGATIONS.

ConAgra asks that the class allegations be stricken because, it argues, individual issues regarding reliance and loss will predominate over common issues. However, contrary to ConAgra's suggestion (at 13, 15), it is far from settled whether, under California's Unfair Competition Law and False Advertising Law (collectively, "UCL"), "[e]ach class member must show reliance on the alleged misstatements" and "establish he or she personally 'suffered injury in fact.'" Indeed, the question is currently pending before the California Supreme Court. *See In re Tobacco II Cases*, 142 Cal. App. 4th 891 (2006), *rev. granted*, 51 Cal. Rptr. 3d 707 (2007). Therefore, it would be premature to dismiss the class allegations now. *See Stern v. AT&T Mobility Corp.*, 2008 WL 4382796, at *12 (C.D. Cal. 2008) ("Because it is not clear that absent class members must prove either causation or reliance, the Court finds that certification of plaintiff's UCL class is appropriate at this time.").

Moreover, the better reading of the UCL is that each class member need not demonstrate reliance and injury in fact. The courts have long recognized that the UCL does not require "allegations of actual deception, reasonable reliance, and damage." *Committee on Children's Television v. General Foods Corp.*, 35 Cal. 3d 197, 211 (1983). ConAgra's contrary argument is based on the 2004 amendment to the UCL, which limited *standing* to bring suit, to "prohibit[] private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact." *Californians For Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223, 228 (2006) (citation omitted).

However, that "measure left entirely unchanged the substantive rules governing business and competitive conduct." *Id.* at 232.

In any event, even where reliance is necessary, "an inference of reliance arises if a material false representation was made to persons whose acts thereafter were consistent with reliance upon the representation." *Occidental Land, Inc. v. Superior Court*, 18 Cal. 3d 355, 363 (1976); *see also Mass. Mut. Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282, 1292 (Cal. App. 2002). "[If] material misrepresentations were made to the class members, at least an inference of reliance would arise as to the entire class." *Vasquez v. Superior Court*, 4 Cal. 3d 800, 804 (1971). Here, given the importance that many people place on eating natural foods, an "all natural" misrepresentation is a material misrepresentation of fact. The Court should not dismiss the class action allegations on the pleadings, before Ms. Lockwood has the chance to demonstrate that reliance can be inferred.

Similarly, it is not "a bar to certification that individual class members may ultimately need to itemize their damages." *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 334 (2004). The California Supreme Court has "recognized that the need for individualized proof of damages is not per se an obstacle to class treatment." *Id*. at 334-35; *see also, e.g., Vasquez*, 4 Cal. 3d at 815. And here, the calculation of damages would not be complex and could likely be calculated through a standard formula that includes, as ConAgra suggests (at 15), a calculation of the difference between the pasta sauce's value to consumers had it been as advertised versus its actual value. Common issues will predominate in this case, and this Court should not strike the class action allegations.

CONCLUSION

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

Dated: January 2, 2009

Respectfully submitted,

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