#38 (9/11 hrg)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 16-9249 PSG-MRW	Date	September 5, 2017
Title	Angerlia Martin, *et al* v. Tradewinds Beverage Co.		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): Order DENYING Defendant's Motion to Dismiss

Before the Court is Defendant Tradewinds Beverage Company's motion to dismiss Plaintiffs' First Amended Consolidated Complaint ("FACC"). Dkt. # 38. The Court considers this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); L.R. 7–15. After considering the arguments in the moving, opposing, and reply papers, the Court DENIES Defendant's motion.

I. Background

This case concerns alleged misleading and deceptive labeling on iced tea beverage containers. Defendant Tradewinds Beverage Company ("Defendant") markets and sells various flavors of sweetened and unsweetened iced teas sold in single containers or multi-bottle packs. *FACC*. At issue in this case are eight varieties of iced tea flavors: (1) Sweet Tea, (2) Extra Sweet Tea, (3) Lemon Tea, (4) Raspberry Tea, (5) Unsweet Tea, (6) Unsweet Tea with Hint of Lemon, (7) Unsweet Tea with Hint of Raspberry, and (8) Unsweet Tea with Hint of Peach (together, "Iced Tea Products"). *Id*. ¶ 9. The packaging of the Iced Tea Products contains the statement "100% Natural" and/or "100% Natural Ingredients." *See id*. ¶ 10.

Plaintiff Angerlia Martin ("Plaintiff") claims that, beginning in 2014 and for the past several years, she purchased three of the eight varieties of the Iced Tea Products, namely, Sweet Tea, Lemon Tea, and Raspberry Tea. *Id*. ¶ 19. Plaintiff claims she was seeking an all-natural product, and based on Defendant's labeling, she believed that the beverages she was purchasing were "all natural." *Id*. ¶ 20. However, the Iced Tea Products contain a caramel color additive, which is an artificial ingredient. *Id*. ¶ 13. Plaintiff alleges that based on the products' packaging, she reasonably believed the Iced Tea Products to be made from all natural ingredients and relied on such representations in purchasing these products. *Id.* ¶ 20. Plaintiff

also asserts that had she known that the products she was purchasing were not "natural," she "would only have been willing to pay less" or be "unwilling to purchase them at all." *Id.* ¶ 26.

On December 14, 2016, Plaintiff filed this lawsuit against Defendant seeking to represent a class of "all persons in California who, on or after December 14, 2012 (the "Class Period"), purchased, for personal or household use and not for resale or distribution, the Tradewinds' Iced Tea Products." Dkt. # 1. Plaintiff asserted the following causes of action: (1) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq.*; (2) violation of California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500, *et seq.*; (3) violation of California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750, et seq.; (4) breach of express warranty; and (5) breach of implied warranty of merchantability. *See FACC.*

On April 27, 2017, the Court granted in part and denied in part Defendant's motion to dismiss the Complaint. *See* Dkt. # 32, *April 27 Order*. The Court granted the motion as to Plaintiff's breach of implied warranty claim and requests for injunctive relief and punitive damages, but denied the motion as to Plainitff's UCL, FAL, CLRA and breach of express warranty claims. *Id*.

In the meantime, on February 3, 2017, Christopher Rhinesmith filed an identical suit alleging purchase of each of the Iced Tea Products, beginning in 2013. The case was consolidated with Plaintiff's case on May 30, 2007. Dkt. # 36. Plaintiff and Rhinesmith (together, "Plaintiffs") filed a first amended consolidated complaint, the operative complaint in this action. Dkt. #37.

Defendant now moves once again to dismiss Plaintiffs' FACC with prejudice in its entirety. Dkt. # 40 ("Mot.")

II. Legal Standard

1. Rule 12(b)(6)

A motion to dismiss under Rule 12(b)(6) tests whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When deciding a Rule 12(b)(6) motion, the court must accept the facts pleaded in the complaint as true, and construe them in the light most favorable to the plaintiff. *Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1019 (9th Cir. 2013); *Cousins v.*

Lockyer, 568 F.3d 1063, 1067-68 (9th Cir. 2009). The court, however, is not required to accept "legal conclusions . . . cast in the form of factual allegations." *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *see Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555.

After accepting all non-conclusory allegations as true and drawing all reasonable inferences in favor of the plaintiff, the court must determine whether the complaint alleges a plausible claim to relief. *See Iqbal*, 556 U.S. at 679-80. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. at 678 (citing *Twombly*, 550
U.S. at 556).

III. Discussion

In its second motion to dismiss, Defendant now argues that: (1) Plaintiffs' claims are expressly preempted by federal law; (2) Plaintiffs' claims are conflict-preempted by federal law; (3) Plaintiffs' claims are field-preempted by federal law; (4) Plaintiffs' claims are impliedly preempted by federal law; (5) the California safe harbor doctrine bars Plaintiffs' claims; (6) Plaintiffs have not plausibly alleged a misleading statement; and (7) the First Amendment protects Defendant's commercial speech. *See Mot. generally*.

As a threshold matter, the Court notes that Plaintiffs' FACC conformed to the Court's Order on Defendant's first motion to dismiss, and added no new facts, legal theories, or causes of action. Dkt. #37. *Compare FAC with FACC*; *Opp* 2. Yet Defendant now raises several new bases on which to dismiss that it could have raised in its first motion, but did not. Federal Rule of Civil Procedure 12(g)(2) "generally precludes a defendant from bringing successive motions to dismiss raising arguments that the defendant failed to raise at the first available opportunity. *Northstar Financial Advisors Inc. v. Schwab Investments*, 135 F. Supp. 3d 1059, 1071 (N.D. Cal. 2015). Defendant offers no explanation for this belated attempt at a second bite of the apple. Even considering the new arguments however, the Court finds none of them meritorious and denies Defendant's motion to dismiss.

The Court addresses each of Defendant's arguments in turn.

A. Preemption

Defendant first argues that Plaintiffs' claims are barred by the doctrines of express preemption, conflict preemption, field preemption, and implied preemption, on the grounds that the FDA,

vested by Congress with the sole authority to regulate the use, manufacture, and labeling of color additives, has the first and last word on the issue of color additives. *Mot.* 1. The Supremacy Clause of the United States Constitution empowers Congress to enact legislation that preempts state law. *See Gibbons v. Ogden*, "Federal preemption occurs when: (1) Congress enacts a statute that explicitly pre-empts state law; (2) state law actually conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that field." *Chae v. SLM Corp.*, 593 F.3d 936, 941 (9th Cir. 2010) (internal quotation marks and citation omitted).

1. Express Preemption

FDCA Section 343-1(a)(3) evinces Congress' "clear and manifest" intent to preempt all state law claims imposing food labeling requirements for caramel color that are additional to or different from and, therefore, "not identical to," FDA requirements. *Gisvold v. Merck and Co., Inc.*, 62 F. Supp. 3d 1198, 1201 (S.D.Cal. Nov. 25, 2014); *see* 58 Fed. Reg. 2470, 2471 (Jan. 6, 1993). *Mot.* 11. Here, Plaintiff is not seeking to hold Defendant to an "additional" or "different" standard than that imposed by the FDA, despite Defendant's assertions to the contrary. Defendant claims that Plaintiffs require disclosure on Defendant's label that its ingredients are "not natural," an affirmative statement that its previous label of "100% natural" has been removed, and that Defendant includes a disclaimer on its products that its ingredients are not natural. *Mot.* 12-13. Indeed, if Plaintiff were actually seeking to require such labeling, these requirements would not be identical to FDA's food labeling requirements with regard to caramel coloring and Defendant's preemption argument would merit consideration. However, Plaintiff is seeking no such requirements.

Plaintiffs' FACC suggests that Defendant's failure to label its products in the manner described above contributed to the Plaintiffs being misled to believe the Iced Tea Products were all natural; nowhere, however, do Plaintiffs seek to impose these or any other labeling requirements on Defendant. *FACC* ¶ 15. Rather, Plaintiff asserts false and misleading advertising in contravention of the UCL, FAL, CLRA, and California Commercial Code stemming from Defendant's labeling of its product as "All Natural" or "100% Natural."

As the Ninth Circuit held in a similar beverage labeling case, "Plaintiffs . . . do not seek to impose any labeling requirements inconsistent with federal law. Instead, they allege violations of consumer-protection laws related to deceptive marketing and advertising. Such cases are not in the sole purview of the FDA; indeed, courts routinely resolve such claims." *Fisher v. Monster Beverage Corp.*, 656 F. App'x 819, 824 (9th Cir. 2016). *See also Gallagher v. Bayer AG*, 2015 WL 1056480, at *4 (N.D.Cal. Mar. 10, 2015) ("[S]tate-law claims are

preempted only 'where application of state laws would impose more or inconsistent burdens on manufacturers than the burdens imposed by the FDCA.'").

Because Defendant's preemption argument is grounded in the "additional or different" labeling requirements and the Court finds no such requirements have been sought, Defendant's motion to dismiss on the grounds that Plaintiffs' claims are expressly preempted is denied.

2. Conflict Preemption

Conflict preemption exists where "compliance with both the federal and state regulations is a physical impossibility," or when the state law stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Cal. Fed. Sav. and Loan Ass'n v. Guerra* , 479 U.S. 272, 281, 107 S. Ct. 683, 93 L. Ed. 2d 613 (1987). Here, Plaintiffs' state law claims parallel the FDCA's own guidelines regarding false and/or misleading labeling. *See* 21 U.S.C. § 343. Subsection 343(a)(1) provides that food is misbranded if the "labeling is false or misleading in any particular." *See Sandoval v. PharmaCare US, Inc.*, 145 F. Supp. 3d 986, 993 (S.D. Cal. 2015) ("[S]tate false-advertising laws are consistent with the FDCA's prohibition on false and misleading labeling and they are unrelated to the labeling requirements of § 343(r)(6)."). "The NLEA is clear ... that if state law seeks to impose liability consistent with the FDCA, the law is not preempted." *Salazar v. Honest Tea, Inc.*, 74 F.Supp.3d 1304, 1311 (E.D.Cal.2014). Plaintiffs' claims are thus not conflict preempted, and Defendant's motion to dismiss on this basis is denied.

3. Implied Preemption

District courts have routinely rejected arguments that state-law UCL, FAL, and CLRA food-labeling claims and related claims under the Sherman Law are impliedly preempted. *See Hesano v. Iovate Health Sciences, Inc.*, 2014 WL 197719, at *7 (S.D.Cal. Jan. 15, 2014) ("The FDCA . . . does not preclude states from adopting their own parallel laws and adopting a different mechanism for enforcing those laws."); *Trazo v. Nestle USA, Inc.*, 2013 WL 4083218, at *7 (N.D.Cal. Aug. 9, 2013) ("While state law tort actions cannot be used to improperly intrude on the FDA's exclusive jurisdiction, Plaintiffs here sue under state law—namely, the Sherman Law, UCL, FAL, and CLRA—and so their claims are not impliedly preempted."). *Sandoval v. PharmaCare US, Inc.*, 145 F. Supp. 3d 986, 995 (S.D. Cal. 2015). Defendant's motion to dismiss on the basis of implied preemption is denied.

4. Field Preemption

"Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards." *Arizona v. United States*, 567 U.S. 387, 401 (2012). Defendant's argument that Plaintiffs' claim is field-preempted is grounded in "the framework of [federal] regulation of color additives." *Mot.* 15. Again, Defendant's mischaracterizes Plaintiffs' claim. The regulation of color additives, even if it is a field entirely occupied by the federal government, is not the issue. Whether Defendant's "All Natural" label was false and/or misleading is. There can be no field preemption here, so Defendant's motion to dismiss on this ground is denied.

B. California Safe Harbor Doctrine

Defendant also raises the California safe harbor doctrine in support of its position that compliance with the FDA's labeling requirements for caramel coloring provides it a safe harbor against Plaintiff's claims. *Mot.* at 17. The safe harbor doctrine states that "if the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination." *Cal-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 182 (1999). Defendant relies on its compliance with FDA rules regarding disclosure of color additives in the ingredients list as a shield against Plaintiffs' claims. Plaintiffs' claims, however, do not implicate Defendant's compliance with FDA rules regarding disclosure of caramel coloring on its ingredients list. It is Defendant's on-label claim that its product is "All Natural" or contains "100% Natural Ingredients," when in fact it contains an ingredient the FDA has deemed artificial, that is central to Plaintiffs' complaint.

This Court has already rejected Defendant's argument that FDA-compliant disclosure of caramel coloring in the ingredients list protects Defendant against a false and misleading advertising claim, and the Court does so again now. *See April 27 Order* 13. The Defendant's motion to dismiss on the grounds that the California Safe Harbor doctrine bars Plaintiffs' claims is denied.

C. Plaintiffs have not plausibly alleged a misleading statement

In its initial Rule 12(b)(6) motion, Defendant argued that no reasonable consumer could be misled by its label, which states that its iced tea is "100% Natural." Defendant reasons that "a truthful claim is not likely to deceive a reasonable consumer." *Mot*. 21. A truthful claim can deceive a reasonable consumer, as the Ninth Circuit found in *Fisher*. *See Fisher*, 656 F. App'x

819, 823 ("Although the statements upon which Townsend and Cross relied were not strictly false, it is plausible that they were misleading, which is all that California law requires."). Defendant correctly notes that the FDA's policy on color additives provides that a product is considered natural when "nothing artificial or synthetic (including colors regardless of source) . . . has been added to the product *that would not normally be expected to be there*." 80 Fed. Reg. at 69906 (emphasis added). Defendant argues that Plaintiffs fail to include the last phrase of the policy in an effort to mischaracterize the standard, because without the phrase, there would be no question that the addition of food coloring would render the product "not natural."

D e fendant's contention misses the mark. A reading of the full the policy does not change the thrust of Plaintiffs' position. It remains plausible that a reasonable consumer would not normally expect an artificial color additive in a product labeled "All Natural." Defendant's inclusion of the caramel coloring on the ingredient list would protect it against any allegation that it failed to disclose such an ingredient. But that is not Plaintiffs' claim. Rather, the label "All Natural" is allegedly misleading because the product in fact contains an artificial coloring agent—one Plaintiffs did not expect to be in the product precisely because of the "All Natural" label.

Defendant notes that the FDA's policy requiring disclosure of color additives on the ingredient list is "not to require that a food color additive ingredient that is naturally sourced, like caramel color, must be labeled as non-natural or artificial . . . [c]onsequently, this policy does not and cannot plausibly show that Tradewinds' iced tea ingredient claims could have misled a reasonable consumer." *Mot*. 22. This circular argument is unavailing; Plaintiffs are not seeking to require Defendant to label its product as non-natural or artificial, and a reasonable consumer may not normally expect an artificial color additive to be in a product labeled "All Natural" or "100% Natural."

In its initial motion, Defendant argued that Plaintiffs failed to allege any misleading statements with particularity. Dkt.# 23 1. This Court rejected that argument, noting that "the statement that Iced Tea Products were '100% Natural' or made with '100% Natural Ingredients' could easily be interpreted by consumers as a claim that all the ingredients in the product were natural, which appears to be false due to the presence of an artificial color additive." *April 27 Order* 12. Defendant's claim that Plaintiff failed to plausibly allege a misleading statement is nothing more than a retread of its earlier argument. The Court has already found that Plaintiffs have plausibly alleged a misleading statement, and therefore Defendant's motion to dismiss on that ground is denied.

D. The First Amendment and Commercial Speech

The protections afforded commercial speech by the First Amendment are not unlimited. False or misleading commercial speech is not protected speech; only commercial speech that concerns "lawful activity" and is "not misleading" is protected by the First Amendment. *Central Hudson Gas & Elec. v. Public Serv.Comm'n*, 447 U.S. 557, 566 (1980); *see also E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1297 (9th 19 Cir. 1992) ("[M]isleading commercial speech can be restricted.").

Plaintiffs allege that caramel coloring is an artificial ingredient and therefore Defendant's "100% Natural" and "All Natural" labels are false and/or misleading. Defendant argues that because caramel coloring is derived naturally, its iced tea product is "all natural," and its labels are therefore neither false nor misleading—making any regulation of them subject to intermediate scrutiny (the regulation must advance a substantial governmental interest and be no more restrictive than necessary to advance it. *Id*.). Defendant argues that Plaintiffs cannot meet this burden because the requirements they seek are not a reasonable means to advance the government's interest, because the government itself has already established those means. *Mot*. 24.

The flaw in this argument is two-fold. First, Defendant's conclusory statement that its labels cannot be construed as false and/or misleading has already been addressed by this Court, which found that the labels could "easily" be misleading to a reasonable consumer. *April 27 Order* 12. Second, Defendant again mischaracterizes Plaintiffs' Complaint as imposing an affirmative requirement on Defendant, one that would unreasonably burden its speech. The sole issue underlying Plaintiffs' claims is that Defendant's product labels were false and/or misleading, and that Plaintiffs were in fact misled. They seek no affirmative requirement or regulation of Defendant's speech; rather, they seek damages from having been misled by Defendant's label. Taking the facts pleaded in the Complaint as true and construing them in the light most favorable to the Plaintiffs, the Court denies Defendant's motion to dismiss on the basis that the First Amendment protects its commercial speech.

IV. Conclusion

In light of the foregoing, Defendant's motion to dismiss Plaintiffs' FACC is

DENIED.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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