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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SHERRY WILTZ, on behalf of herself and all others similarly situated,)	CASE NO. CV 15-1352-R
)	
Plaintiff,)	ORDER GRANTING DEFENDANTS’ MOTION TO DISMISS
)	
v.)	
)	
CHATTEM, INC., a Tennessee corporation, and DOES 1-10 Inclusive,)	
)	
Defendants.)	
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)	
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)	

Before the Court is Defendants’ Motion to Dismiss Plaintiff’s Class Action Complaint, which was filed on March 4, 2015. (Dkt. No. 5). Having been thoroughly briefed by both Parties, this Court took the matter under submission on April 28, 2015.

Dismissal under Federal Rule of Civil Procedure 12(b)(6) is proper only when a complaint exhibits either a “(1) lack of a cognizable legal theory or (2) the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.

1 1988). Under the heightened pleading standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544
2 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), a plaintiff must allege “enough facts to state a
3 claim to relief that is plausible on its face,” so that the defendant receives “fair notice of what
4 the...claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 570. The Plaintiff must
5 plead factual content that allows the court to draw the reasonable inference that the defendant is
6 liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678. The court will not accept “threadbare
7 recitals of the elements of a cause of action, supported by mere conclusory statements. . . .” *Id.*

8 Federal law may preempt state law in one of three ways. First Congress may expressly
9 state its intent to preempt state law in the direct language of a statute. *Jones v. Rath Packing Co.*,
10 430 U.S. 519, 525 (1977). Second, Congressional intent to preempt state law can be inferred when
11 Congress “occupies the field” by passing a comprehensive legislative scheme that leaves “no
12 room” for supplemental regulation. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).
13 Third, federal law may preempt state law to the extent that state law directly conflicts with federal
14 law. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141-43 (1963).
15 Congressional intent is the “ultimate touchstone” in every preemption case. *Retail Clerks Int’l*
16 *Ass’n v. Schermerhorn*, 375 U.S. 96, 103 (1963).

17 The Federal Food, Drug, and Cosmetic Act (“FDCA”) sets out a comprehensive statutory
18 framework for regulating the development and marketing of food, drugs, and cosmetics. The
19 FDCA prohibits the misbranding of drugs; “[a drug] shall be deemed to be misbranded [if] its
20 labeling is false or misleading in any particular.” The FDA has exclusive regulatory authority
21 over the enforcement of this provision. Under section 379r of the FDCA, state law claims that
22 depart in any way from FDA regulation—claims that would impose labeling requirements
23 “different from,” “in addition to,” or “otherwise not identical with” federal labeling
24 requirements—are expressly preempted. *See* Title 21 U.S.C. § 379r(a)(2); *see also*, Title 21
25 U.S.C. § 352(a).

26 In the context of OTC drugs, the FDCA expressly preempts state law labeling
27 requirements that are “different from,” “addition[al] to,” or “otherwise not identical with” federal
28 labeling requirements. Title 21 U.S.C. § 379r(a)(2). Under this standard, preemption is certainly

1 appropriate when a state law prohibits labeling that is permitted under federal law. But it is *also*
2 appropriate when a state law prohibits labeling that is *not prohibited* under federal law.

3 Plaintiff's challenge to Defendants' ACT Restoring product's claim that it "Rebuilds Tooth
4 Enamel" is preempted. In light of the FDCA's and the 1995 Monograph's silence as to whether
5 this type of claim is misleading, this type of claim was expressly not prohibited under federal law.
6 Had there been no regulation of dental hygiene, the silence might be interpreted as there being a
7 lack of regulation of dental hygiene products. That is not the case. Here, there is express federal
8 regulation of dental hygiene products that does not encompass a finding that "Rebuilds Tooth
9 Enamel" is misleading. Accordingly, Plaintiff's claim is preempted by the FDCA and her
10 Complaint must be dismissed.

11 **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss is GRANTED. (Dkt.
12 No. 5)

13 Dated: May 8, 2015.



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16 MANUEL L. REAL
17 UNITED STATES DISTRICT JUDGE
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