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8 **UNITED STATES DISTRICT COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA**  
10

11 TROY BACKUS, on behalf of himself and  
12 all others similarly situated,

13 Plaintiff,

14 v.

15 NESTLE USA INC.,

16 Defendant.  
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Case No: 3:15-cv-1963-MMC

**NOTICE OF APPEAL**

Judge: The Honorable Maxine M. Chesney



# **EXHIBIT A**

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

TROY BACKUS, on behalf of himself and all  
others similarly situated,

No. CV- 15-1963 MMC

Plaintiff,

**JUDGMENT IN A CIVIL CASE**

v.

NESTLE USA, INC.,

Defendant.

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**Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

**Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

**IT IS SO ORDERED AND ADJUDGED**

Defendant Nestle’s motion to dismiss is hereby GRANTED, and the First Amended Complaint is hereby DISMISSED without further leave to amend.

Dated: March 9, 2016

Susan Y. Soong, Clerk



By: Tracy Lucero  
Deputy Clerk

# **EXHIBIT B**

United States District Court  
For the Northern District of California

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

TROY BACKUS, on behalf of himself and all  
others similarly situated,

Plaintiff,

v.

NESTLÉ USA, INC.,

Defendant.

No. C-15-1963 MMC

**ORDER GRANTING DEFENDANT  
NESTLÉ USA'S MOTION TO DISMISS  
FIRST AMENDED COMPLAINT**

Before the Court is defendant Nestlé USA, Inc.'s ("Nestlé") Motion to Dismiss the First Amended Complaint, filed July 17, 2015, pursuant to Rules 8, 9(b), 12(b)(1), and 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff Troy Backus ("Backus") has filed opposition, to which Nestlé has replied. The matter came on regularly for hearing on August 21, 2015, after which, with leave of Court, both parties have filed supplemental briefing. In addition, Nestlé has filed statements of recent authority, the last of which filings was submitted on January 4, 2016, and thereafter, on February 17, 2016, opposed by Backus. Having considered the parties' respective written submissions and the arguments of counsel at the hearing, the Court rules as follows.

**BACKGROUND**

In the operative complaint, the First Amended Complaint ("FAC"), filed June 26, 2015, Backus alleges that Nestlé manufactures, markets, and sells Coffee-mate, a line of

1 coffee-creamer products containing partially hydrogenated oil (“PHO”), an artificial form of  
2 trans fat. (See FAC ¶¶ 4-6, 21). Backus further alleges that PHO is an “illegal, dangerous  
3 additive” (*id.* ¶ 8) for which there is “no safe level” of consumption (*id.* ¶ 26), and he claims  
4 that Nestlé has acted unlawfully by: (1) using PHO in Coffee-mate despite the existence of  
5 safe alternatives to PHO (*see id.* ¶¶ 8-10); and (2) “falsely and misleadingly” marketing  
6 Coffee-mate products as having “0g Trans Fat” (*id.* ¶ 12), in particular by “prominently  
7 display[ing]” the aforementioned statement “on the front of each bottle” (*id.* ¶ 85).

8 In the FAC, Backus asserts nine causes of action, brought both individually and on  
9 behalf of two putative classes: (1) the “PHO Class,” defined as “[a]ll persons who  
10 purchased in the United States, on or after January 1, 2006, Coffee-mate products  
11 containing partially hydrogenated oil”; and (2) the “0g Trans Fat Claim Subclass,” defined  
12 as “[a]ll persons who purchased in the United States, on or after January 1, 2006, Coffee-  
13 mate containing the front labeling claim ‘0g Trans Fat’ and containing partially  
14 hydrogenated oil.” (*id.* ¶ 150.)

15 The first three causes of action pertain to the PHO class and challenge Nestlé’s use  
16 of PHO in Coffee-mate products (“use claims”). The last six causes of action pertain to the  
17 0g Trans Fat Claim Subclass and challenge the “0g Trans Fat” label (“labeling claims”).<sup>1</sup>

18 The nine causes of action are predicated on, respectively: (1) the “Unfair Prong” of  
19 California’s Unfair Competition Law (“UCL”) (*id.* ¶¶ 159-165); (2) the “Unlawful Prong” of  
20 the UCL (*id.* ¶¶ 166-176); (3) breach of the “Implied Warranty of Merchantability” (*id.*  
21 ¶¶ 177-183); (4) the “Unlawful Prong” of the UCL (*id.* ¶¶ 184-196); (5) the “Fraudulent  
22 Prong” of the UCL (*id.* ¶¶ 197-202); (6) the “Unfair Prong” of the UCL (*id.* ¶¶ 203-210); (7)  
23 California’s “False Advertising Law” (*id.* ¶¶ 211-214); (8) California’s “Consumer Legal  
24 Remedies Act” (*id.* ¶¶ 215-218); and (9) breach of “Express Warranty” (*id.* ¶¶ 219-225).

25 By the instant motion, Nestlé seeks an order dismissing the FAC in its entirety.

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27 <sup>1</sup>Although such differentiation is not clear from the FAC, Backus confirmed at the  
28 August 21, 2015, hearing that the first three causes of action pertain to the use of PHO and  
that the last six pertain to labeling. (See Tr. of Proceedings for Aug. 21, 2015, at 3:4-4:3.)

## LEGAL STANDARD

Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure “can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” See *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). Because Rule 8(a)(2) “requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’” see *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)), “a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations,” see *id.* Nonetheless, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

In ruling on a Rule 12(b)(6) motion, the district court must accept as true all material factual allegations in the complaint and construe them in the light most favorable to the nonmoving party. See *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). With limited exception, however, a district court may not consider any material beyond the complaint. See *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).

## DISCUSSION

At the outset, Nestlé argues that all of Backus’s causes of action are preempted by the federal Food, Drug, and Cosmetic Act (“FDCA”).

Under the Supremacy Clause of the United States Constitution, federal law preempts state law 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).

The party who asserts a state law is preempted bears the burden of demonstrating such preemption, see *Stengel v. Medtronic, Inc.*, 704 F.3d 1224, 1227 (9th Cir. 2013), as well as overcoming a “starting presumption that Congress does not intend to supplant state

1 law” in a field, such as that at issue here, that has been “traditionally occupied by the  
2 States,” see *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997)  
3 (internal quotations and citations omitted); see also *Medtronic, Inc. v. Lohr*, 518 U.S. 470,  
4 485 (1996) (acknowledging states’ historic “regulation of matters of health and safety”).

#### 5 **A. Use Claims: First through Third Causes of Action**

6 Nestlé contends Backus’s use claims, all of which arise under state law, are barred  
7 by the doctrine of conflict preemption.

8 Conflict preemption applies where “compliance with both federal and state  
9 regulations is a physical impossibility” or where state law “stands as an obstacle to the  
10 accomplishment and execution of the full purposes and objectives of Congress,” see *Ting*  
11 *v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003) (internal quotations and citations omitted);  
12 see also *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 873-75 (2000) (holding  
13 conflict preemption applies to lawsuits that “prevent or frustrate the accomplishment of a  
14 federal objective”; finding “common-law ‘no airbag’” claim preempted where, based on  
15 various objectives, Department of Transportation (“DOT”) regulation provided vehicle  
16 manufacturers with range of choices among different passive restraint devices).  
17 Accordingly, the Court next turns to the federal law here at issue.

18 Pursuant to the FDCA, “[t]he introduction or delivery for introduction into interstate  
19 commerce of any food . . . that is adulterated” is “prohibited.” 21 U.S.C. § 331(a). A food is  
20 deemed to be adulterated “if it is or if it bears or contains . . . any food additive that is  
21 unsafe within the meaning of” 21 U.S.C. § 348. *Id.* § 342(a)(2)(C)(i). A food additive, in  
22 turn, is “any substance the intended use of which results . . . in its becoming a component  
23 or otherwise affecting the characteristics of any food . . . if such substance is not generally  
24 recognized, among experts qualified . . . to evaluate its safety, . . . to be safe under the  
25 conditions of its intended use.” *Id.* § 321(s). A food additive is deemed “unsafe” unless, for  
26 purposes relevant here, it complies with “a regulation issued under [§ 348] prescribing the  
27 conditions under which such additive may be safely used.” *Id.* § 348(a)(2). Any person  
28 may file with the Food and Drug Administration (“FDA”) a “petition proposing the issuance

1 of [such] a regulation.” *Id.* § 348(b)(1).

2 On June 17, 2015, the FDA published a final determination and declaratory order,  
3 finding “there is no longer a consensus among qualified experts” that PHOs “are generally  
4 recognized as safe (GRAS) for any use in human food,” see Final Determination Regarding  
5 Partially Hydrogenated Oils (hereinafter, “Final Determination”), 80 Fed. Reg. 34650-01,  
6 34650 (June 17, 2015), and, as a result, “are food additives subject to section 409” of the  
7 FDCA (21 U.S.C. § 348), *id.* By said order, the FDA “require[d] discontinuation of the use  
8 of these additives,” *id.* at 34656, “encourage[d] submission of scientific evidence as part of  
9 food additive petitions under section 409” for “one or more specific uses of PHOs,” *id.* at  
10 35653, and set a “compliance date” of June 18, 2018, “to allow time for such petitions and  
11 their review,” *id.*<sup>2</sup>

12 The FDA also identified therein a number of other considerations and found a three-  
13 year compliance period would have “the additional benefit” of: (1) providing small  
14 businesses with time to address “difficulties . . . due to limited research and development  
15 resources and potential challenges to gain timely access to suitable alternatives”; (2)  
16 “minimizing market disruptions by providing industry sufficient time to identify suitable  
17 replacement ingredients for PHOs, to exhaust existing product inventories, and to  
18 reformulate and modify labeling of affected products”; and (3) providing time “for the  
19 growing, harvesting, and processing of new varieties of edible oilseeds to meet the  
20 expected demands for alternative oil products and to address the supply chain issues  
21 associated with transition to new oils.” *Id.* at 34668-69.

22 Thereafter, on December 18, 2015, the President signed into law the Consolidated  
23 Appropriations Act for 2016 (H.R. 2029), which includes the following section pertaining to  
24 PHOs:

25 SEC. 754: No partially hydrogenated oils as defined in the order published by

26 \_\_\_\_\_  
27 <sup>2</sup>The FDA’s order was issued “to remove uncertainty as to the status of PHOs as  
28 food additives” and “has the force and effect of law.” See Final Determination at 34656-57;  
5 U.S.C. § 554(e) (providing agency “may issue a declaratory order to terminate a  
controversy or remove uncertainty”).

1 the Food and Drug Administration in the Federal Register on June 17, 2015  
2 (80 Fed. Reg. 34650 et seq. [Final Determination]) shall be deemed unsafe  
3 within the meaning of section 409(a) [21 U.S.C. § 348(a)] and no food that is  
4 introduced or delivered for introduction into interstate commerce that bears or  
5 contains a partially hydrogenated oil shall be deemed adulterated under  
6 sections 402(a)(1) [21 U.S.C. § 342(a)(1)] or 402(a)(2)(C)(i) [21 U.S.C.  
7 § 342(a)(2)(C)(i)] by virtue of bearing or containing a partially hydrogenated  
8 oil until the compliance date as specified in such order (June 18, 2018).

9 Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 754, 129 Stat. 2242, 2284  
10 (2015) (“CAA § 754”).

11 Nestlé argues that Backus’s suit, which “seeks to make it *immediately unlawful* to  
12 market or sell” in California any food product containing PHOs, conflicts with the FDA’s  
13 regulatory scheme for PHOs, which, as discussed above, allows producers to use PHOs  
14 until June 18, 2018. (Mot. at 6 (emphasis in original).) The Court, as discussed below,  
15 agrees.

16 Where, as here, both the FDA and Congress have spoken, the case for conflict  
17 preemption takes on added strength. Backus’s use claims, which challenge, as a violation  
18 of California statutory and common law, Nestlé’s past and current inclusion of PHOs in  
19 Coffee-mate, would effectively negate the FDA’s order setting a compliance date in 2018  
20 and “stand[ ] as an obstacle to the accomplishment and execution of the full purposes and  
21 objectives” of the FDA in adopting that order. See *Ting*, 319 F.3d at 1136. Backus’s  
22 arguments to the contrary are not persuasive.

23 First, Backus’s characterization of the FDA’s findings is not accurate. The FDA did  
24 not find PHOs “unsafe in any circumstance” or “never safe” (Opp’n at 12, 14); it found  
25 “there is no longer a consensus among qualified experts” as to whether they are safe.  
26 Final Determination at 34650. Indeed, in discussing the comments it received as to  
27 appropriate “threshold” levels of PHOs, the FDA made clear it “need not determine that  
28 there is a consensus that low level uses are unsafe to find that PHOs are not GRAS at low  
levels.” *Id.* at 34653.

Consistent therewith, the FDA chose a compliance date that, in its judgment, best  
serves the interests of both the industry and consumers. In that regard, the FDA

1 considered comments recommending compliance dates “ranging from immediate to over  
2 10 years.” *Id.* at 34668. As the FDA explained, it chose a period of three years in order to  
3 allow sufficient time for it to receive and review “scientific evidence,” *id.* at 34653, as to “one  
4 or more specific uses of PHOs for which . . . safe conditions of use may be prescribed,” *id.*  
5 Backus’s use claims would present an insurmountable obstacle to the accomplishment of  
6 such objective.

7 Further, as set forth above, the FDA, in an effort to “minimiz[e] market disruptions,”  
8 *id.* at 34669, weighed a number of additional factors, including the ability of businesses to  
9 “gain timely access to suitable alternatives,” *id.*, and to grow and process new varieties of  
10 edible oilseeds to meet “expected demands,” *id.* A finding of liability on any of Backus’s  
11 use claims would present obstacles to the accomplishment of these additional objectives as  
12 well. See, e.g., *Geier*, 529 U.S. at 874-75 (finding “no airbag” lawsuit preempted where  
13 federal regulation allowed choice of passive restraints; rejecting argument by plaintiff that  
14 DOT set “minimum airbag standard” and, “as far as [the regulation] is concerned, the more  
15 airbags, and the sooner, the better”).

16 Next, Backus’s reliance on the FDA’s statement that it “believes . . . that state or  
17 local laws that prohibit or limit use of PHOs in food are not likely to be in conflict with  
18 federal law, or to frustrate federal objectives,” see Final Determination at 34655, is  
19 unavailing. The statement is not a finding, only a comment, and an ambiguous one at best,  
20 as there is no indication what state laws the FDA had in mind, let alone any reasons for the  
21 FDA’s “belief.” See *Wyeth v. Levine*, 555 U.S. 555, 577 (2009) (holding, even where  
22 agency provides explanation for its view of state law’s impact on federal scheme, weight to  
23 be accorded such explanation “depends on its thoroughness, consistency, and  
24 persuasiveness”). Indeed, in the sentence immediately preceding its “belief,” the FDA  
25 “declin[ed] to take a position regarding the potential for implied preemptive effect of [its]  
26 order on any specific state or local law” and acknowledged “such matters must be analyzed  
27 with respect to the specific relationship between the state or local law and the federal law.”  
28 Final Determination at 34655.

1 Tellingly, nothing in the order suggests the FDA meant to reference general, broadly  
2 applicable state laws, such as those on which Backus's use claims are predicated, as  
3 opposed to statutory provisions specifically applicable to PHOs. Moreover, Backus points  
4 to no state statute, either in effect at the time the FDA issued its declaratory order or  
5 otherwise, by which all use of PHOs is expressly proscribed; rather, the statutes to which  
6 Backus cites proscribe the use of PHOs only in certain limited circumstances. (See FAC at  
7 6 n.15 (citing Cal. Educ. Code § 49431.7, Cal. Health & Safety Code § 114377); see also  
8 Cal. Educ. Code § 49431.7 (proscribing schools' and school districts' sale of foods  
9 containing artificial trans fats to elementary and high school pupils during school hours  
10 "unless the manufacturer's documentation or the label required on the food, pursuant to  
11 applicable federal and state law, lists the trans fat content as less than 0.5 grams"); Cal.  
12 Health & Safety Code § 114377 (providing "no oil, shortening, or margarine containing  
13 artificial trans fat for use in spreads or frying . . . may be . . . served by, or used in the  
14 preparation of any food within, a food facility").)

15 Lastly, Backus's argument that the FDA lacks the authority to issue an order making  
16 legal a usage that, under the above-described statutory scheme, is not allowed, has been  
17 addressed and the question mooted by the enactment of CAA § 754, by which Congress  
18 essentially ratified the FDA's Final Determination. See CAA § 754 (providing PHOs shall  
19 not be "deemed unsafe within the meaning of section 409(a) [21 U.S.C. § 348(a)]"; further  
20 providing foods containing PHOs shall not be "deemed adulterated under sections  
21 402(a)(1) [21 U.S.C. § 342(a)(1)] or 402(a)(2)(C)(i) [21 U.S.C. § 342(a)(2)(C)(i)]" by reason  
22 of any such inclusion prior to June 18, 2018).

23 In sum, the Court finds Backus's use claims, which would impose an immediate  
24 prohibition on the use of PHOs in all foods under all circumstances, would "stand[ ] as an  
25 obstacle" to the fulfillment of the FDA's objectives, as embodied in its regulatory scheme  
26 setting a three-year compliance period, and conflict with Congress's decision not to deem  
27 PHOs unsafe, or the food containing them adulterated, pending the June 18, 2018,  
28 compliance date set by the FDA in its Final Determination of June 17, 2015. See *Ting*, 319

1 F.3d at 1136.

2 Accordingly, the First, Second, and Third Causes of Action will be dismissed as  
3 preempted.<sup>3</sup>

4 **B. Labeling Claims: Fourth through Ninth Causes of Action**

5 Nestlé contends Backus’s labeling claims, all of which arise under state law, are  
6 expressly preempted.

7 Express preemption applies “when a statute explicitly addresses preemption.” *Reid*  
8 *v. Johnson & Johnson*, 780 F.3d 952, 959 (9th Cir. 2015). As relevant to the claims here at  
9 issue, the express preemption analysis “turns on whether the challenged statements are  
10 authorized by the FDA’s regulations or other pronouncements of similar legal effect.” *Id.*  
11 Accordingly, the Court again turns to the relevant federal law.

12 The FDCA, as amended by the Nutrition Labeling and Education Act (“NLEA”),  
13 governs the labeling of food. *See Lilly v. ConAgra Foods, Inc.*, 743 F.3d 662, 664 (9th Cir.  
14 2014). Nestlé argues Backus’s labeling claims are expressly preempted under the NLEA,  
15 which establishes “uniform food labeling requirements.” *Id.* In particular, Nestlé argues,  
16 Backus’s labeling claims are preempted under 21 U.S.C. § 343-1, which, in relevant part,  
17 provides:

18 [N]o State or political subdivision of a State may directly or indirectly establish  
19 under any authority or continue in effect as to any food in interstate  
commerce . . .

20 any requirement for nutrition labeling of food that is *not identical* to the  
21 requirement of section 343(q) of this title . . . or . . .

22 any requirement respecting any claim of the type described in section  
23 343(r)(1) of this title, made in the label or labeling of food that is *not identical*  
to the requirement of section 343(r) of this title . . . .

24 See 21 U.S.C. § 343-1(a)(4)-(5) (emphasis added).

25 Sections 343(q) and 343(r), in turn, set forth the specific labeling requirements that  
26 govern, respectively, claims made in the “Nutrition Facts” box of the product’s packaging

27 \_\_\_\_\_  
28 <sup>3</sup>In light of such ruling, the Court does not address herein Nestlé’s additional  
arguments in support of dismissal of the first three causes of action.

1 (hereinafter, “nutrition box”) and claims made elsewhere on the packaging. Of particular  
2 relevance here are the regulations the FDA has promulgated in implementing those  
3 provisions.

4 As noted, Backus challenges Nestlé’s “0g Trans Fat” claim, made “on the front of  
5 each bottle” of Coffee-mate (see FAC ¶ 85), i.e., outside the nutrition box. Because the  
6 claim appears outside the nutrition box, the claim is classified under the regulations as a  
7 “nutrient content claim,” see 21 C.F.R. § 101.13(c), and, more specifically, an “expressed  
8 nutrient content claim,” see *id.* § 101.13(b)(1). Such a nutrient content claim is not  
9 precluded, provided it is “not false or misleading in any respect.” *Id.* § 101.13(i)(3). Nestlé  
10 argues the nutrient content claim here at issue is not misleading and, indeed, is required by  
11 the applicable federal regulations, given the FDA’s requirements for statements made  
12 inside the nutrition box.

13 For claims made inside the nutrition box, the regulations require a “statement of the  
14 number of grams of trans fat in a serving,” unless the product “contain[s] less than 0.5 gram  
15 of total fat in a serving” and “no claims are made [outside the nutrition box] about fat, fatty  
16 acid or cholesterol content.” See *id.* § 101.9(c)(2)(ii). The regulations further provide that  
17 “[i]f the serving contains less than 0.5 gram [of trans fat], the content, when declared, shall  
18 be expressed as zero.” *Id.*<sup>4</sup> For purposes of the instant motion, it is undisputed that the  
19 Coffee-mate products here at issue contain less than 0.5 gram of trans fat and,  
20 consequently, that Nestlé, in the nutrition box, is required to express the trans fat content  
21 as zero grams. The issue thus presented is whether the same claim made outside the  
22 nutrition box likewise is required, or at least authorized. See *Reid*, 780 F.3d at 959 (holding  
23 express preemption analysis “turns on whether the challenged statements are authorized  
24 by the FDA’s regulations”). If so, Backus’s labeling claims are preempted.

25 To date, the Ninth Circuit, albeit in an unpublished decision, as well as three district  
26

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27 <sup>4</sup> “[i]f a statement of the trans fat content is not required, . . . the statement ‘Not a  
28 significant source of trans fat’ shall be placed at the bottom of the table of nutrient values.”  
*Id.*

1 courts in this district, have found labeling claims that are essentially indistinguishable from  
 2 the labeling claims here at issue were preempted by the NLEA. See *Carrea v. Dreyer's*  
 3 *Grand Ice Cream, Inc.*, 475 Fed. App'x 113, 115 (9th Cir. 2012); *Walker v. B&G Foods,*  
 4 *Inc.*, 2016 WL 463253, at \*3-4 (N.D. Cal. Feb. 8, 2016); *Guttmann v. Nissin Foods (U.S.A.)*  
 5 *Co., Inc.*, 2015 WL 4309427, at \*3 (N.D. Cal. July 15, 2015); *Chacanaca v. Quaker Oats*  
 6 *Co.*, 752 F. Supp. 2d 1111, 1121 (N.D. Cal. Oct. 14, 2010).<sup>5</sup>

7 Although the analyses provided by those four courts differ somewhat, each found  
 8 significant the FDA's expressed "preference for internal consistency between the nutrition  
 9 box and the rest of the label." See *Chacanaca*, 752 F. Supp. 2d at 1121 (citing 58 Fed.  
 10 Reg. 44020-01, 44024 (Aug. 18, 1993));<sup>6</sup> 58 Fed. Reg. at 44024 (finding "because there is  
 11 no nutritional difference between rounded and unrounded values of a nutrient in a food, the  
 12 agency does not see a need to specify which value should be used in determining whether  
 13 or not a food qualifies to make a nutrient content claim"; further finding, with respect to  
 14 relative claims,<sup>7</sup> "it is more important to prevent consumer confusion by having consistency  
 15 on the food label than to be prescriptive as to the method by which nutrient values . . . are  
 16 determined and used"); see also, e.g., *Carrea*, 475 Fed. App'x at 115 (holding "0g Trans  
 17 Fat" statement on front of packaging is express nutrient content claim that FDA "instructs  
 18 should mirror the Nutrition Facts panel").

19 Further, as noted by a district court in the Central District, additional support for  
 20 preemption can be found in 21 U.S.C. § 343(r)(2)(A)(i), which provides that, with limited

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21  
 22 <sup>5</sup> A number of other district courts likewise have found such claims preempted. See  
 23 *Henderson v. Gruma Corp.*, 2011 WL 1362188, at \*13 (C.D. Cal. Apr. 11, 2011) (finding  
 24 state law claims based on "0 g transfat" preempted); *Peviani v. Hostess Brands, Inc.*, 750  
 F. Supp. 2d 1111, 1119-20 (C.D. Cal. 2010) (finding state law claims based on "0 Grams of  
 Trans Fat" preempted); *Red v. Kroger Co.*, 2010 WL 4262037, at \*1, 5-6 (C.D. Cal. Sept. 2,  
 2010) (finding state law claims based on "0g Trans Fat per serving" preempted).

25 <sup>6</sup> To the extent Nestlé contends, however, that an express nutrient content claim can  
 26 never be misleading if it simply restates the information in the nutrition box, this Court, as  
 27 did the district court in *Chacanaca*, disagrees. See *Chacanaca*, 752 F. Supp. 2d at 1120  
 n.5.

28 <sup>7</sup> A "relative" claim is one in which the nutrient level of the labeled product is  
 compared with that of another product. See 21 C.F.R. § 101.13(j).

1 exceptions not applicable here, a claim outside the nutrition box that characterizes the level  
2 of any covered nutrient may only be made “if the characterization of the level . . . uses  
3 terms which are defined in regulations of the Secretary.” See 21 U.S.C. § 343(r)(2)(A)(i);  
4 *Henderson*, 2011 WL 1362188, at \*13 (noting, for trans fats, regulations provide that “[i]f  
5 the serving contains less than 0.5 gram, the content, when declared, shall be expressed as  
6 zero”).

7 Backus argues that *Reid*, a published opinion decided after *Carrea*, requires a  
8 different result than that reached in the above-cited cases. See *Reid*, 780 F.3d at 959-63.  
9 The Court disagrees. Although *Reid*, as here, concerned a labeling claim made on the  
10 outside packaging of a product containing less than 0.5 gram of trans fat per serving, the  
11 statement there at issue was “No Trans Fat.” In finding challenges based thereon were not  
12 preempted, the Ninth Circuit gave deference to a warning letter in which the FDA “indicated  
13 that ‘No Trans Fat’ is ‘an unauthorized nutrient content claim.’” See *id.* at 956, 962; see  
14 also *id.* at 962-63 (noting FDA, in promulgating 21 C.F.R. § 101.62(b)-(c), approved “No  
15 Fat” and “No Saturated Fat” for use as nutrient content claims but decided not to allow “No  
16 Trans Fat” claim).

17 The nutrient content claim at issue in *Reid* is distinguishable. In the context of the  
18 FDA’s regulations, the word “No” has no meaning beyond its ordinary, dictionary definition,  
19 i.e., “not any,” and “No” cannot be used to list trans fat content in the nutrition box. In  
20 contrast, “0g Trans Fat” is explicitly defined as any quantity less than 0.5 gram, and, as  
21 discussed above, is a rounded value whose use in the nutrition box is mandated by the  
22 FDA. Tellingly, with respect to “0g Trans Fat” nutrient content claims, Backus points to no  
23 FDA warning similar to that on which *Reid* relied, and the absence thereof further supports  
24 the analysis set forth in the above-cited decisions in which the courts have found state law  
25 causes of action based thereon preempted.

26 In sum, the Court finds the nutrient content claim challenged here by Backus is  
27 authorized by the above-discussed regulations and, as such, is neither false nor misleading  
28 under federal law. Consequently, the relief Backus seeks by his labeling claims would

1 impose a requirement that is not identical to the requirements imposed by those  
2 regulations, and thus each of his labeling claims is preempted.<sup>8</sup>

3 Accordingly, the Fourth through Ninth Causes of Action will be dismissed as  
4 preempted.<sup>9</sup>

5 **C. Leave to Amend**

6 In his opposition, Backus requests leave to amend in the event that the Court  
7 dismisses any of his claims. Although, as Backus points out, leave to amend should be  
8 granted with liberality, such leave is not required where amendment would be futile. See,  
9 *e.g.*, *Carrico v. City and County of San Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011).  
10 Here, given the grounds on which the Court has determined Backus’s claims are subject to  
11 dismissal, the Court finds the requested leave would be unavailing as a matter of law.

12 **CONCLUSION**

13 For the reasons set forth above, Nestlé’s motion to dismiss is hereby GRANTED,  
14 and the FAC is hereby DISMISSED without further leave to amend.

15 **IT IS SO ORDERED.**

16  
17 Dated: March 8, 2016

  
MAXINE M. CHESNEY  
United States District Judge

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19  
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22  
23 <sup>8</sup> The Court finds unpersuasive Backus’s argument that his labeling claims  
24 nonetheless survive under 21 U.S.C. § 343(a), a general provision that precludes labeling  
25 that is “false or misleading in any particular” and is not referenced in the express  
26 preemption provisions of § 343-1. See, *e.g.*, *Gorenstein v. Ocean Spray Cranberries, Inc.*,  
27 2010 WL 10838229, at \*1 (C.D. Cal. Jan. 29, 2010) (finding § 343(a) “is but a part of a  
larger statutory scheme that must be construed, to the extent possible, to give effect to all  
of its provisions”; noting “the Supreme Court has warned against . . . literalism where it  
effectively defeats the statutory objective by negating other statutory provisions”).

28 <sup>9</sup> In light of such ruling, the Court does not address herein Nestlé’s additional  
arguments in support of dismissal of the Fourth through Ninth Causes of Action.

# **EXHIBIT C**

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8  
9 **UNITED STATES DISTRICT COURT**  
10 **NORTHERN DISTRICT OF CALIFORNIA**  
11

12 TROY BACKUS, on behalf of himself and  
all others similarly situated,

13  
14 Plaintiff,

15 v.

16 NESTLE USA INC.,

17 Defendant.

Case No: 3:15-cv-1963-MMC

**SERVICE LIST FOR APPEAL**

Judge: The Honorable Maxine M. Chesney

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