UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TROY WALKER,
Plaintiff,
v.
CONAGRA FOODS, INC.,
Defendant.

Case No. 15-cv-02424-JSW

ORDER GRANTING MOTION TO DISMISS FIRST AMENDED COMPLAINT

Re: Dkt. Nos. 47, 49[1]

Now before the Court is the motion of Defendant ConAgra Foods, Inc. to dismiss the First Amended Complaint ("FAC") filed by Plaintiff Troy Walker. The Court has considered the parties' papers, relevant legal authority, and the record in this case, and the Court finds that the motion is appropriate for disposition without oral argument. *See* N.D. Cal. Civil L.R. 7-1(b). For the reasons set forth below, the Court GRANTS the motion to dismiss.

I. BACKGROUND

For the purposes of this motion to dismiss, the Court takes the factual allegations in the FAC as true. Plaintiff brings this suit challenging Defendant's marketing and sales of caramel popcorn snacks containing partially hydrogenated oil ("PHO") under the brand name Crunch 'n Munch. (FAC ¶ 4.) PHO is a food additive with artificial trans fat content, which Plaintiff alleges "causes cardiovascular heart disease, diabetes, cancer, Alzheimer's disease, and accelerates cognitive decline in diabetics." (*Id.* ¶¶ 5, 17.)

Plaintiff "repeatedly purchased and consumed" Crunch 'n Munch after January 1, 2008.

[1] In response to the Court's June 2, 2016 order to show cause, Defendants filed an amended memorandum of points and authorities in support of their motion to dismiss. The Court has considered only the amended memorandum of points and authorities (Dkt. No. 49), not the superseded memorandum of points and authorities (Dkt. No. 47).

(*Id.* ¶¶ 9, 12, 63-65, 97.) Plaintiff alleges that he first "learned that Crunch 'n Munch contained artificial trans fat, and caused heart disease, diabetes, cancer, and death" in April 2015. (*Id.* ¶ 66.)

Plaintiff filed this action on June 1, 2015. On March 23, 2016, the Court dismissed Plaintiff's Complaint. (Dkt. No. 43.) The Court held that Plaintiff's claims alleging that Crunch 'n Munch is mislabeled are preempted by the Federal Food, Drug and Cosmetic Act of 1938 ("FDCA"), as amended by the Nutrition Labeling and Education Act ("NLEA"), 21 U.S.C. §§ 301 *et seq*., and dismissed those "mislabeling" claims with prejudice. The Court also held that the Complaint failed to state claims arising out of the use of trans fat in Crunch 'n Munch, but granted leave to amend the "use" claims.

In Plaintiff's FAC, he asserts claims for violation of the "unfair" and "unlawful" prongs of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq*., and for breach of the implied warranty of merchantability. (FAC ¶¶ 107-130.) Plaintiff contends that ConAgra's use of PHO in its Crunch 'n Munch product violates public policy and renders the product "adulterated within the meaning of 21 U.S.C. § 342(a)(2)(C)." (*Id.* ¶¶ 74-75-77.) He further contends that "Crunch 'n Munch is not fit for its ordinary purpose because it is not safe for human consumption." (*Id.* ¶¶ 116.)

II. ANALYSIS

A. Legal Standards Applicable to the Motion to Dismiss.

A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the complaint fails to state a claim upon which relief can be granted. The Court's "inquiry is limited to the allegations in the complaint, which are accepted as true and construed in the light most favorable to the plaintiff." *Lazy Y Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). Even under the liberal pleadings standard of Federal Rule of Civil Procedure 8(a)(2), "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Pursuant to *Twombly*, a plaintiff must not merely allege conduct that is conceivable but must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

As a general rule, "a district court may not consider material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994) (citation omitted), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). However, documents subject to judicial notice, such as matters of public record, may be considered on a motion to dismiss. *See Harris v. County of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012). The Court may also consider "material which is properly submitted as part of the complaint." *Branch*, 14 F.3d at 453 (citation omitted).

B. Conflict Preemption Bars Plaintiff's Claims.

Defendant contends that Plaintiff's claims are preempted by federal law including the FDCA, NLEA, and Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (H.R. 2029) § 754, 129 Stat. 2243, 2284 (2015) ("CAA"), as well as the regulatory goals of the Food and Drug Administration. (Mot. at 2-3.)

"Pursuant to the Supremacy Clause, U.S. Const., Art. VI, cl. 2, federal law can preempt and displace state law through: (1) express preemption; (2) field preemption (sometimes referred to as complete preemption); and (3) conflict preemption." *Ting v. AT&T*, 319 F.3d 1126, 1135 (9th Cir. 2003) (citations omitted). Conflict preemption applies when "compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 1136 (quotations omitted); *see also Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 874-77 (2000) (holding that lawsuit alleging tort liability for failure to install driver's side airbag conflicted with objectives of Federal Motor Vehicle Safety Standard that sought to promote gradual implementation of passive restraint requirement through a variety of systems). "There is a presumption against federal preemption of state laws that operate in traditional state domains," and a party seeking to invalidate a state law based on preemption bears a "considerable burden." *Stengel v. Medtronic Inc.*, 704 F.3d 1224, 1227 (9th Cir. 2013) (quotation omitted).

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Here, ConAgra has carried that burden. Two recent decisions of the Northern District of California have explained why similar trans fat "use" claims are barred by conflict preemption. *Backus v. ConAgra Foods, Inc.*, No. 16-cv-00454-WHA, 2016 WL 3844331, **2-4 (N.D. Cal. July 15, 2016); *Backus v. Nestle USA, Inc.*, 167 F. Supp. 3d 1068, 1071-74 (N.D. Cal. 2016). This Court concurs with the analysis in those cases, and adopts it here.

In particular, the Court notes that the CAA provides:

> No partially hydrogenated oils as defined in the order published by the Food and Drug Administration in the Federal Register on June 17, 2015 (80 Fed. Reg. 34650 et seq.) shall be deemed unsafe within the meaning of section 409(a) and no food that is introduced or delivered for introduction into interstate commerce that bears or contains a partially hydrogenated oil shall be deemed adulterated under sections 402(a)(1) or 402(a)(2)(C)(i) by virtue of bearing or containing a partially hydrogenated oil until the compliance date as specified in such order (June 18, 2018).

Section 402 of the FDCA, referred to in the CAA, is codified at 21 U.S.C. § 342. It provides in relevant part:

> A food shall be deemed to be adulterated—
>
> (a) . . . (1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health[;] (2) . . . or (C) if it is or if it bears or contains (i) any food additive that is unsafe within the meaning of [21 U.S.C. § 348].

21 U.S.C. § 342(a)(1), (2)(C)(i).

This is the same statutory section upon which Plaintiff relies in alleging that Defendant's use of PHO in Crunch 'n Munch renders the product "adulterated within the meaning of 21 U.S.C. § 342(a)(2)(C)." (FAC ¶¶ 77, 124; *see also id.* at 7.) Yet the CAA clearly states that no food shall be deemed adulterated under that section by virtue of bearing a PHO until June 18, 2018. The Court agrees with Defendant that Plaintiffs' convoluted assertion that this section only limits "the Secretary and the FDA" is not supported by the plain text of this statute.

As in *Backus v. ConAgra* and *Backus v. Nestle*, Plaintiff relies on the FDA's comment that it "believes . . . that state or local laws that prohibit or limit use of PHOs in food are not likely to be in conflict with federal law, or to frustrate federal objectives." 80 Fed. Reg. at 34655. The

Court rejects Plaintiffs' position on this issue for the reasons explained in the *Backus* cases. *See Backus v. ConAgra*, 2016 WL 3844331 at *9; *Backus v. Nestle*, 167 F. Supp. 3d at 1073. In particular, despite the guidance provided by those prior cases, Plaintiffs still have provided no basis for this Court to conclude that "the FDA meant to reference general, broadly applicable state laws, such as those on which [Plaintiff's] use claims are predicated, as opposed to statutory provisions specifically applicable to PHOs." *Backus v. Nestle*, 167 F. Supp. 3d at 1073.

Additionally, Plaintiff's reliance on *Reid v. Johnson & Johnson*, 780 F.3d 952, 962-66 (9th Cir. 2015), is unavailing. *Reid* related to labeling claims, not use claims, and did not address the issue presented here.

Like the courts in *Backus v. ConAgra* and *Backus v. Nestle*, therefore, this Court dismisses Plaintiff's use claims as preempted.

Because all causes of action have been dismissed for the reasons set forth above, the Court does not reach Defendants' remaining arguments for dismissal.

C. The Court Denies Leave to Amend.

Where the Court grants a motion to dismiss, the Court grants leave to amend, unless amendment would be futile. *See, e.g., Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990); *Cook, Perkiss & Lieche, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990). An "amended complaint may only allege 'other facts consistent with the challenged pleading,'" *Reddy*, 912 F.2d at 297 (quoting *Schreiber Distrib. Co. v. Serv Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)). Plaintiff has already been granted one opportunity to amend the claims in his FAC. The Court now finds that further amendment would be futile because Plaintiff could not allege other facts consistent with the FAC that would not be preempted for the same reasons discussed in this order and the Court's March 23, 2016 order. Accordingly, the Court DENIES further leave to amend.

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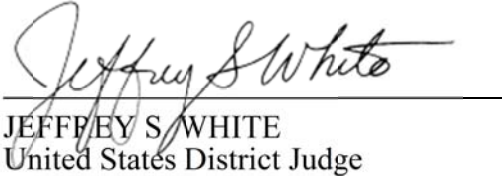
III. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant's motion to dismiss Plaintiff's FAC, without leave to amend and with prejudice.

IT IS SO ORDERED.

Dated: March 31, 2017



JEFFREY S. WHITE
United States District Judge