UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-61554-CIV-ZLOCH

JOHANNA SAVALLI, on behalf of herself and all others similarly situated,

Plaintiff,

vs.

O R D E R

GERBER PRODUCTS COMPANY,

Defendant.
_____/

THIS MATTER is before the Court upon Defendant Gerber Products Company's Motion To Dismiss Complaint (DE 15). The Court has carefully reviewed said Motion, the entire court file and is otherwise fully advised in the premises.

Traversing the aisles of the modern grocery store can be a harrowing experience. Options abound. Between Brand A or Brand B, artificial or organic, sugar or sucralose, and so on, consumers must weigh their options and conclude which products befit their needs. To aid this process, federal law places certain requirements on the contents of labels affixed to the packaging of those food products. In turn, to understand what they are purchasing, reasonable consumers should——well, read the label.

Plaintiff in this putative class action claims she was hoodwinked by the labeling on Defendant's "cereal snack" product, called "Puffs." Despite the prominent indication that the product

is made with "whole grains," the label's depiction of star-shaped cereal pieces, and the absence of the words "fruit" or "vegetable" on the label, Plaintiff alleges that she was deceived into believing that the product contained significant amounts of real fruit or vegetables. Defendant now moves to dismiss Plaintiff's Complaint (DE 1), arguing that Plaintiff fails to state plausible claims for relief, and that her claims are preempted as a matter of federal law and fail as a matter of state law.[1] The Court harbors serious doubts about the plausibility of Plaintiff's claims (that is, whether a reasonable consumer would likely be confused by the labeling on Defendant's product). However, the Court need not address that point because, after careful consideration of the relevant statutes and regulations, the Court finds that Plaintiff's claims are either preempted by federal law or fail as a matter of state law.

I. Allegations Of The Complaint[2]

Defendant maintains a line of products called Gerber Graduates "Puffs." This product is a whole-grain cereal snack made for infants and young children, which comes in various flavors such as sweet potato, banana, and peach. "Puffs" are available to

[1] Defendant also asserts that Plaintiff lacks Article III standing; however, its argument in this regard is substantially the same as its argument that Plaintiff's Complaint (DE 1) fails to state a plausible claim for relief. The Court does not reach this argument because Plaintiff's claims, even if plausible, are preempted by federal law.

[2] The allegations set forth in this section come from Plaintiff's Complaint (DE 1), with descriptions of the labeling on Defendant's products aided by the information contained within Defendant's Request For Judicial Notice (DE 16).

consumers in a small canister, which prominently displays a picture of a fruit or vegetable on the front panel. Directly above that picture, the descriptive word for the fruit or vegetable appears. For example, if the label depicts a peach, the word "Peach" appears directly above. Directly above and below that descriptive word, consumers will find an indication that "Puffs" is a "cereal snack," which is "naturally flavored with other natural flavors." Further below, a caricature advises consumers that the product is "made with whole grains."

"Puffs" have zero dietary fiber, a key substance found in fruits and vegetables. Indeed, the words "fruit" and "vegetable" appear nowhere on the product's labeling. Instead, the label advises that "Puffs" are comprised of the following ingredients, organized in descending order by predominance of weight: rice flour, whole wheat flour, wheat starch, sugar, whole grain oat flour, dried apple puree, and minute amounts of other ingredients. The back of the labeling panel tells consumers that the product is "specially designed to dissolve quickly." Scattered around the canister's labeling are depictions of the beige, star-shaped cereal pieces consumers will find inside.

Plaintiff purchased Defendant's "Puffs" products two to three times per week over the last year. She relied on representations made at the point of sale, such as the product's labeling, in deciding to purchase the product. Plaintiff alleges that she was

deceived into believing that "Puffs" contains significant amounts of the real fruit or vegetables depicted on the product's labeling. Had she known that the product was a quick-dissolving cereal snack containing no fruit or vegetables, Plaintiff claims she would not have purchased any "Puffs." The Complaint (DE 1) raises one count for violation of the Florida Deceptive and Unfair Trade Practices Act and one count for unjust enrichment arising under Florida common law.

II. Standard

Under Fed. R. Civ. P. 8(a), a pleading "must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The Supreme Court has explained that Rule 8 "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Therefore, in order to defeat a motion to dismiss, a complaint must allege facts which render its legal claims facially plausible. Bell Atlantic v. Twombly, 550 U.S. 544 (2007). Facial plausibility is achieved when the district court can reasonably infer from the facts that the defendant is liable for the alleged wrongdoing. Iqbal, 129 S. Ct. at 1949.

III. Analysis

This Court is not the first to consider a claim of whether Defendant's "Puffs" products' labeling is misleading. The United States District Court for the District of Oregon considered a similar claim under the Oregon Unfair Trade Practices Act and held that such claim was preempted by the Food, Drug, and Cosmetic Act, 21 U.S.C. § 301, et seq. ("FDCA"). See Henry v. Gerber Products Co., Case No. 15-CV-02201, 2016 WL 1589900 (D. Or. Apr. 18, 2016). For many of the same reasons set forth in Henry, the Court finds that Plaintiff's claims are either preempted by the FDCA or fail as a matter of law pursuant to the safe harbor provision of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.212(1).

The Supremacy Clause of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI cl. 2. The Supremacy Clause thus empowers Congress to preempt state laws. Arizona v. United States, 132 S.Ct. 2492, 2500 (2012). Among others, one way in which Congress may preempt state laws is through express preemption. See Shuford v. Fidelity Nat. Property & Cas. Ins. Co., 508 F.3d 1337, 1344 (11th Cir. 2007). Express preemption occurs "when Congress has manifested its intent to preempt state law explicitly in the language of the statute." Id.

The FDCA generally prohibits the "adulteration or misbranding of any food . . . in interstate commerce." 21 U.S.C. § 331(b). The FDCA considers a food product misbranded if its labeling is "false or misleading in any particular manner." 21 U.S.C. § 343(a). Congress amended the FDCA in 1990 to "create uniform national standards regarding the labeling of food." Bruton v. Gerber Products Co., 961 F. Supp. 2d 1062, 1079 (N.D. Cal. 2013). As part of those amendments, Congress explicitly preempted any state labeling requirements that are not identical to federal labeling requirements. Henry, 2016 WL 1589900 at *6; 21 U.S.C. § 341-1(a) ("no State or political subdivision of a State may directly or indirectly establish . . . any requirement for the labeling of food of the type required in [the enumerated sections of the FDCA, including § 343(i)(2)] that is not identical to the requirement of such section"). Interpreting this preemption clause, courts have consistently found that the FDCA preempts state statute- and common-law-based claims to the extent that they would impose liability for conduct expressly permitted by the FDCA. E.g., Henry, 2016 WL 1589900 at *7 (state-law unfair trade practices claim preempted); Turk v. Gen. Mills, Inc., 662 F.3d 423, 426-27 (7th Cir. 2011) (same); Red v. Kroger Co., Case No. 10-01025, 2010 WL 4262037, *7 (C.D. Cal. Sept. 2, 2010) (state law claims for unfair competition, false advertising, and consumer remedies preempted); see also Bates v. Dow Agroscience, LLC, 544

U.S. 431, 443 (2008) (finding, in the context of preemption clauses, the term "requirements" extends "beyond positive enactments, such as statutes and regulations, to embrace common-law duties.").

The Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") prohibits, "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . ." Fla. Stat. § 501.204(1). However, any "act or practice required or specifically permitted by federal or state law" is excluded from the FDUTPA's prohibition. Fla. Stat. § 501.212(1); see Prohias v. AstraZeneca Pharmaceuticals, L.P., 958 So.2d 1054, 1056 (Fla. Dist. Ct. App. 2007) (finding plaintiff's failure to state a claim for violation of the FDUTPA and for unjust enrichment where the defendant's drug labeling complied with FDA requirements). The FDCA's preemption provision and the FDUTPA's safe harbor provision thus fold neatly into one another such that: to the extent that conduct is specifically permitted by the FDCA, it is not actionable under the FDUTPA; or to the extent that the FDUPTA would extend liability to conduct expressly permitted by the FDCA, the FDCA preempts the FDUTPA. The operative inquiry in either case is whether the labeling at issue is specifically permitted by the FDCA.

Turning to that inquiry, the FDCA requires that labels bear

"the common or usual name of each [] ingredient . . . except that spices, flavorings, and colors . . . may be designated as spices, flavorings, and colorings without naming each." 21 U.S.C. § 343(k). Foods that use artificial flavoring must "bear[] labeling stating that fact." 21 U.S.C. § 343(k). The Food And Drug Administration ("FDA") promulgated regulations implementing these subsections to "expressly permit a manufacturer to indicate the 'characterizing flavor' of a food product, and set forth exactly how the product's 'characterizing flavor' is to be described on the product's 'label, labeling, and advertising." Henry, 2016 WL 1589900 at *6 (quoting Dvora v. Gen. Mills, Inc., Case No. 11-CV-1074, 2011 WL 1897349 (C.D. Cal. May 16, 2011) & 21 C.F.R. § 101.22(i)). Manufacturers may use words or a depiction of a particular fruit to indicate a "primarily recognizable flavor," or "characterizing flavor"; if the food does not actually contain that fruit, "the name of the characterizing flavor may be immediately preceded by the word 'natural' and shall be immediately followed by the word 'flavored'"; and if the "food contains both a characterizing flavor from the product whose flavor is simulated and other natural flavor which simulates, resembles, or reinforces the characterizing flavor . . . the name of the food shall be immediately followed by the words 'other natural flavor. . . .'" 21 C.F.R. § 101.22(i).

As in Henry, Plaintiff claims that the marketing and labeling

of Defendant's "Puffs" product leads consumers to believe that the product actually contains significant amounts of the fruit depicted on the product's labeling. The Henry Court recognized, and this Court agrees, that "the FDA regulations set out above plainly allow a manufacturer to use the name and image of a fruit on a product's packaging to describe the product's 'characterizing flavor,' even if the product does not actually contain any of the depicted fruit, or indeed any fruit at all." Henry, 2016 WL 1589900 at *6. The overwhelming weight of authority accords. See Larsen v. Trader Joe's Co., 917 F. Supp. 2d 1019, 1024 (N.D. Cal. 2013); Hairston v. South Beach Beverage Co., Inc., Case No. 12-CV-1429, 2012 WL 1893818, *3 (C.D. Cal. May 18, 2012); Dvora, 2011 WL 1897349 at * 3-6; McKinnis v. Gen. Mills, Inc., Case No. 07-CV-2521, 2007 WL 4761172, *4 (C.D. Cal. Sept. 18, 2007). Defendant's "Puffs" products' labeling plainly meets the regulations' requirements, and is thus expressly permitted by the FDCA. Indeed, Plaintiff concedes as much.

Plaintiff attempts to skirt dismissal of her Complaint (DE 1) by suggesting that her claims merely parallel the FDCA's general prohibition against false or misleading food labeling, and are therefore not preempted. Put differently, Plaintiff contends that labeling expressly permitted by the FDCA and FDA regulation may nonetheless be misleading. The argument is self-defeating. Conduct cannot be simultaneously permitted by the FDCA and

prohibited by it. See Henry, 2016 WL 1589900 at *7 ("labels that are required or permitted by the FDCA or FDA regulations are 'by definition, [] not considered false or misleading under federal law.') (quoting Red v. Kroger Co., Case No. 10-CV-01025, 2010 WL 4262037 (C.D. Cal. Sept. 2, 2010); see also Boroski v. Dyncorp. Int'l, 700 F.3d 446, 452 (11th Cir. 2012) (noting the "black letter rule of statutory construction that a court must interpret a statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole") (internal marks omitted); RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S.Ct. 2065, 2071 (2012) ("It is a commonplace of statutory construction that the specific governs the general"). Plaintiff's claim for violation of the FDUTPA fails as a matter of law, and consequently, "[h]er claim for unjust enrichment thus necessarily fails as well." Prohias, 958 So. 2d at 1056.

The allegations of the Complaint (DE 1) establish that Defendant has identified the characterizing flavor of its "Puffs" product in a manner expressly permitted federal law. Plaintiff's claims are either preempted by federal law or fail as a matter of state law.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Defendant Gerber Products Company's Request For Judicial Notice (DE 16), being unopposed, be and the same is hereby **GRANTED**;

2. Defendant Gerber Products Company's Motion To Dismiss Complaint (DE 15) be and the same is hereby **GRANTED;**

3. Plaintiff's Complaint (DE 1) be and the same is hereby **DISMISSED** without prejudice; and

4. Plaintiff may attempt to cure the defects in the now-dismissed Complaint (DE 1) by filing an amended Complaint on or before noon on Wednesday, October 12, 2016.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 20th day of September, 2016.

WILLIAM J. ZLOCH
United States District Judge

Copies furnished:
All Counsel of Record