NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ELLIOT ZEISEL, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

DIAMOND FOODS, INC., a Delaware corporation,

Defendants.
_____/

No. C 10-01192 JSW

ORDER DENYING DEFENDANT DIAMOND FOODS, INC.'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

INTRODUCTION

Now before the Court for consideration is the Motion to Dismiss First Amended Complaint filed by Defendant Diamond Foods, Inc. ("Diamond"). The Court has considered the parties' papers, relevant legal authority, and the record in this case, and finds the matter suitable for disposition without oral argument. *See* N.D. Civ. L.R. 7-1(b). The hearing set for September 10, 2010 is VACATED and the Court HEREBY DENIES Diamond's motion.

BACKGROUND

On March 22, 2010, Plaintiff Elliot Zeisel ("Zeisel") filed this putative class action on behalf of consumers who purchased Diamond of California Shelled Walnuts ("Shelled Walnut products"). On June 18, 2010, in response to a motion to dismiss, Zeisel filed the First Amended Complaint ("FAC"). In his FAC, Zeisel alleges that since 2006 "Diamond used false and misleading packaging to entice consumers to purchase its Shelled Walnut products," and more specifically that Diamond has "used express and implied statements about the positive

effects of omega-3 fatty acid consumption on health to entice consumers to purchase its Shelled Walnut products." (FAC ¶¶ 1-2; *see generally id.* ¶¶ 6, 28-33, 48-49.) For example, Zeisel alleges that "[t]he front and back of the Shelled Walnut product labels included the phrase 'OMEGA 3 2.5 g per serving' with adjacent heart symbols." (*Id.* ¶ 29.) The back of the Shelled Walnut products packaging contains the following statement:

> *The omega-3 in walnuts can help you get the proper balance of fatty acids in your body needs for promoting and maintaining heart health.* In fact, according to the Food and Drug Administration, supportive but not conclusive research shows that eating 1.5 oz. of walnuts per day, as part of a low saturated fat and low cholesterol diet, and not resulting in increased caloric intake, may reduce the risk of coronary disease. Please refer to nutrition information for fat content and other details about the nutritional profile of walnuts.

(*Id.* ¶ 30 (emphasis added).) According to Zeisel, these statements are misleading because the Shelled Walnut products do not provide the health benefits claimed on the package labels. (*See, e.g., id.* ¶ 49.) According to Zeisel, the Food and Drug Administration ("FDA") has not authorized Diamond to use the language emphasized above on its Shelled Walnut product labels. (*See id.* ¶¶ 31, 34-46.)

Zeisel alleges that Diamond's actions violate California Business and Professions Code §§ 17200, *et seq.*[1], California Business and Professions Code §§ 17500, *et seq.*, and the California Consumer Legal Remedies Act, California Civil Code § 1750, *et seq.* Zeisel also brings a claim for restitution based on "quasi-contract/unjust enrichment."

ANALYSIS

A. Applicable Legal Standards to a Motion to Dismiss.

A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the pleadings fail 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).

[1] Zeisel alleges three separate claims for relief under Section 17200 based on the unlawful, unfair and fraudulent prongs of that statute.

Even under the liberal pleading 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 Atlantic Corporation 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 instead 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. __, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 556). If the allegations are insufficient to state a claim, a court should grant 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 & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990).

B. Zeisel's Claims Are Not Preempted.

Diamond moves to dismiss the FAC on the basis that each of Zeisel's claims are preempted by the Federal Food, Drug and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301, *et seq.*, as amended by the Nutrition Labeling and Education Act ("NLEA"), 21 U.S.C. §§ 343, *et seq.* 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) (quoting *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1045 (9th Cir. 2000), *abrogated on other grounds by City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 431-34 (2002)).

1. Zeisel's Claims Are Not Expressly Preempted.

To determine if Zeisel's claims are expressly preempted, the Court begins, as it must, by looking to the plain language of the preemption clause to identify its preemptive scope. *See Pom Wonderful LLC v. Ocean Spray Cranberries, Inc.*, 642 F. Supp. 2d 1112, 1121 (C.D. Cal.

2009) (citing *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002)). The NLEA's preemption clause provides, in pertinent part, that:

> [e]xcept as provided in subsection (b) of this section, no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce –
> ...
>
> any requirement respecting any claim of the type described in section 343(r)(1) of this title, made in the label or labeling of any food *that is not identical* to the requirement of section 343(r) of this title, except a requirement respecting a claim made in the label or labeling of food which is exempt under section 343(r)(5) of this title.

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

The NLEA provides that "[a] food shall be deemed to be misbranded – ... [i]f ... its labeling is false or misleading in any particular." 21 U.S.C. § 343(a)(1). In addition, the NLEA contains detailed provisions setting forth when a label containing nutrition levels and health related claims will be deemed to be misbranded. *Id.* § 343(r). Section 343-1(a) does not reference Section 343(a). Thus, claims premised upon allegations that a label is "false or misleading in any particular" do not fall within the scope of Section 343-1(a). Based on the plain language of Section 343-1(a), the Court concludes that Zeisel's claims, to the extent they allege Diamond's labels are false and misleading, are not expressly preempted by the NLEA. *See Chavez v. Blue Sky Beverage Co.*, __ F.R.D. __, 2010 WL 2528525 at * 3 (N.D. Cal. June 18, 2010) (noting that Section 343-1(a) does not "include the relevant prohibition on 'false or misleading' labeling and concluding that claims arising from false are misleading labels regulated by Section 343(a) are not expressly preempted).

Furthermore, the plain language of Section 343-1(a) demonstrates that Zeisel's claims will be preempted only if they impose obligations that are "not identical" to the requirements set forth in Section 343(r). *Pom Wonderful*, 642 F. Supp. 2d 1121-22; *see also Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 1090 (2008) ("The words of section 343-1 clearly and unmistakably evince Congress's intent to authorize states to establish laws that are 'identical to' federal law."). Pursuant to 21 C.F.R. § 100.1, "not identical" means "the State requirement directly or indirectly imposes obligations or contains provisions concerning the composition or

labeling of food ... that ... [a]re not imposed by or contained in the applicable provision (including any implementing regulation) ... or ... [d]iffer from those specifically imposed by or contained in the applicable provision (including any implementing regulation)." 21 U.S.C. § 100.1(c)(4)(i)-(ii).

Zeisel argues that his Section 17200 claims are not preempted because they are predicated, in part, upon alleged violations of California's Sherman Food, Drug and Cosmetic Law, California Health & Safety Code §§ 109875, *et seq.* (the "Sherman Law"), not the FDCA. Under the Sherman Law, "[a]ny food is misbranded if its labeling does not conform with the requirements for nutrient content or health claims as set forth in ... 21 U.S.C. Sec. 343(r) ... [and] the regulations adopted pursuant thereto." Cal. Health & Saf. Code § 110670. Thus, the Sherman Law's requirements are identical to the requirements of the FDCA. *Farm Raised Salmon Cases*, 42 Cal. 4th at 1090. Accordingly, that claim also is not expressly preempted. *See, e.g., Pom Wonderful*, 642 F. Supp. 2d at 1122 (Section "17200 may be used to enforce violations of California law that are identical to the" FDCA, including California's Sherman Act) (citing *Farm Raised Salmon Cases*, 42 Cal. 4th at 1086-87); *Hansen Bev. Co. v. Innovation Ventures, LLC*, 2009 WL 6597891 at *13 (S.D. Cal. Dec. 23, 2009) (noting that Sherman Law has adopted FDCA requirements for nutrient content and health claims and finding claims alleging violations based on those provisions not expressly preempted).

Diamond's motion to dismiss is denied on this basis.

2. Zeisel's Claims Are Not Impliedly Preempted.

Diamond also argues that the FDA occupies the field of health claim labeling and, thus, Zeisel's claims are impliedly preempted. "The touchstone of preemption is congressional intent." *Martin v. Midwest Express Holdings, Inc.*, 555 F.3d 806, 808 (9th Cir. 2009) (citing *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)). Field preemption will be found when "the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *In re Tippett*, 542 F.3d 684, 689 (9th Cir. 2008). However, "[i]n all pre-emption cases, and particularly in those in which Congress has legislated ... in a field which the States have traditionally occupied,' ... we start with the

assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, __ U.S. __, 129 S.Ct. 1187, 1194 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (2006) (in turn quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (internal quotation marks omitted).

"[A]n express definition of the pre-emptive reach of a statute 'implies' - *i.e.*, supports a reasonable inference - that Congress did not intend to pre-empt other matters...." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995). At the same time, such an inference "does not mean that the express clause entirely forecloses any possibility of implied pre-emption." *Id.* This Court need not resort to inferences, because Congress has stated that the NLEA "shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under Section 403A of the" FDCA. Pub. L. No. 1010535, § 6(c)(1); *see also Pom Wonderful*, 642 F. Supp. 2d at 1123; *Lockwood v. Conagra Foods, Inc.*, 597 F. Supp. 2d 1028, 1032 (N.D. Cal. 2009); *Farm Raised Salmon Cases*, 42 Cal. 4th at 1091. This statement of congressional intent negates Diamond's argument that Congress intended federal law to occupy the field of food and beverage labeling to the exclusion of the states.

Diamond also relies on *Fraker v. KFC Corp.*, 2007 WL 1296571 (S.D. Cal. Apr. 30, 2007) in support of this argument. The Court finds Defendant's reliance on *Fraker* unpersuasive. First, the *Fraker* court did not analyze or interpret Section 343-1(a). Rather, the court's focus is on Section 337(a), which provides that "[e]xcept as provided in subsection (b) of this section, all such proceedings for the enforcement, or to restrain violations, of this chapter shall be by and in the name of the United States."[2]

Second, the plaintiff in *Fraker* expressly predicated her state claims on violations of the FDCA. Because of this fact, the *Fraker* court agreed with the defendant's argument that the plaintiff's claims would "conflict with the exclusive enforcement mechanism provided by Congress." On that basis, the court concluded that plaintiff's claims were impliedly preempted.

[2] Diamond also moves to dismiss on this basis. The Court agrees with Zeisel that Diamond misapprehends the nature of his claims. Accordingly, to the extent Diamond's motion is premised on this argument, it is denied.

Fraker, 2007 WL 1296571 at *3-*4. That is not the situation here. Although Zeisel includes numerous references to the FDCA in his complaint, it is evident from the FAC that he predicates his claims solely on alleged violations of the Sherman Law, which as discussed above, expressly adopts the requirements of 21 U.S.C. § 343(r).

Diamond must show that Congress clearly and manifestly intended to occupy the entire field of food labeling so as to preclude Zeisel's state law claims. It has not met this burden. Therefore, the Court finds that Zeisel's claims are not impliedly preempted, and Diamond's motion is denied on this basis as well.

C. The Court Cannot Conclude that Zeisel's Claims for Injunctive Relief Are Moot.

Diamond also argues that Zeisel's claims for injunctive relief are moot because it has agreed to comply with the FDA's request to change the labels on its Shelled Walnut products. Although Zeisel does in fact allege that Diamond made statements that it would change its labels, Zeisel does not allege that Diamond has in fact changed its labels. At this stage of the proceedings, the Court cannot conclude that any claims for injunctive relief would be moot. Accordingly, Diamond's motion is denied, in part, on this basis as well.

CONCLUSION

For the foregoing reasons, Diamond's motion to dismiss is DENIED. The parties shall appear for the initial case management conference as scheduled on October 1, 2010 at 1:30 p.m., and their joint case management conference statement shall be due on September 24, 2010.

IT IS SO ORDERED.

Dated: September 3, 2010

JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE