LEXSEE 2010 U.S. DIST. LEXIS 43797

SAN JOSE DIVISION Amnon Rosen, Plaintiff, v. Unilever United States, Inc., Defendant.

NO. C 09-02563 JW

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2010 U.S. Dist. LEXIS 43797

May 3, 2010, Decided
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For Unilever United States, Inc., Defendant: William Lewis Stern, LEAD ATTORNEY, Janelle Jad Sahouria, Morrison & Foerster LLP, San Francisco, CA.

JUDGES: JAMES WARE, United States District Judge.

OPINION BY: JAMES WARE

OPINION

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITH PREJUDICE

I. INTRODUCTION

Amnon Rosen ("Plaintiff") brings this putative class action against Unilever United States, Inc. ("Defendant"), alleging violations of California Consumers Legal Remedies Act ("CLRA"), [1] Unfair Competition Law ("UCL"), [2] and False Advertising Law ("FAL"). [3] Plaintiff alleges that Defendant has misrepresented the ingredients of its butter-substitute product through its advertising **[*2]** and product labeling. The Court has subject matter jurisdiction pursuant to the Class Action Fairness Act of 2005, *28 U.S.C. § 1332(d)*.

1 *Cal. Civ. Code §§ 1750, et seq.*
2 *Cal. Bus. & Prof. Code §§ 17200, et seq.*
3 *Cal. Bus. & Prof. Code §§ 17500, et seq.*

Presently before the Court is Defendant's Motion to Dismiss. (hereafter, "Motion," Docket Item No. 20.) The Court conducted a hearing on March 1, 2010. Based on the papers submitted to date and oral argument, the Court GRANTS Defendant's Motion to Dismiss.

II. BACKGROUND

In a Complaint filed on June 9, 2009, Plaintiff alleges as follows:

> Plaintiff is a California citizen living in Santa Clara County. [4] Defendant is an international consumer products company based in Englewood Cliff, New Jersey. (Id. P 9.)
>
> Defendant produces the product "I Can't Believe It's Not Butter" ("ICBINB"). (Complaint P 12.) ICBINB is a "soft spread" that is often used as a substitute for butter in cooking. (Id.) Between June 2004 and present day, Defendant used marketing, advertising, and labeling

> to misrepresent that ICBINB is nutritious, healthy to consume, and better than butter and similar products. (Id. PP 2, 3, 14, 15, 19.) The front and side of the ICBINB packaging **[*3]** states "Made With A Blend of Nutritious Oils." (Id. P 14.) However, ICBINB contains partially hydrogenated oil. (Id. P 4.) Partially hydrogenated oil is an artificial, man-made substance that has no nutritional value and is known to cause a number of health problems. (Id. PP 4, 5, 8, 10, 15, 20.)

On the basis of the allegations outlined above, Plaintiff alleges three causes of action: (1) Violation of the UCL, *Cal. Bus. & Prof. Code §§ 17200, et seq.;* (2) Violation of the FAL, *Cal. Bus. & Prof. Code §§ 17500, et seq.;* and (3) Violation of the CLRA, *Cal. Civ. Code §§ 1750, et seq.*

> 4 (Class Action Complaint P 8, hereafter, "Complaint," Docket Item No. 1.)

Presently before the Court is Defendant's Motion to Dismiss.

III. STANDARDS

Pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, a complaint may be dismissed against a defendant for failure to state a claim upon which relief may be granted against that defendant. Dismissal may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*; *Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir. 1984).* **[*4]** For purposes of evaluating a motion to dismiss, the court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987).* Any existing ambiguities must be resolved in favor of the pleading. *Walling v. Beverly Enters., 476 F.2d 393, 396 (9th Cir. 1973).*

However, mere conclusions couched in factual allegations are not sufficient to state a cause of action. *Papasan v. Allain, 478 U.S. 265, 286 (1986)*; see also *McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th Cir. 1988).* Courts may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by amendment. *Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000).*

IV. DISCUSSION

Defendant moves to dismiss Plaintiff's Complaint on multiple grounds. (Motion at 2.) Since the preemption ground could be dispositive of the claims, the Court will address that ground first.

A. Federal Preemption

Defendant contends that Plaintiff's state law claims are expressly preempted by the Nutrition Labeling and Education Act ("NLEA"), *21 U.S.C. §§ 341, et seq.*, and that the claims are preempted by the dormant **[*5]** *commerce clause*. (Motion at 3-7.) Defendant contends that Plaintiff's claims impermissibly seek to regulate ICBINB's label, which states that it has "0g Trans Fat" in compliance with FDA regulations. (Id. at 5.) Plaintiff contends that the gravamen of its claims is not an attack on the quantity of trans fat listed on the label, but Defendant's allegedly false and misleading claims that ICBINB is nutritious and healthy. [5]

> 5 (Plaintiff's Opposition to Defendant's Motion to Dismiss at 5-11, hereafter, "Opposition," Docket Item No. 32.) Although the Complaint speaks only in terms of "partially hydrogenated oil," not trans fats, Plaintiff appears to base his claim that partially hydrogenated oil is unhealthy on the fact that it contains trans fatty acids, since Plaintiff relies on a university study stating that trans fats are what make partially hydrogenated oils unhealthy for human consumption. (See Complaint P 10 (citing http://www.hsph.harvard.edu/nutritionsource/nutrition-news/transfats/).)

Preemption analysis begins with "the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." **[*6]** Id. (citing *Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).* "[C]onsumer protection laws such as the UCL, false advertising law, and CLRA, are within the states' historic police powers and therefore are subject to the presumption against preemption. Laws regulating the proper marketing of food, including the prevention of deceptive sales practices, are likewise within states' historic police powers." Farm Raised Salmon Cases, 42 Cal. 4th at 1088.

The *Supremacy Clause of United States Constitution* provides that federal laws and treaties "shall be the supreme law of the land." *U.S. Const. art. VI, cl. 2*. The Supreme Court has recognized three types of federal preemption of state law under the *Supremacy Clause*: (1) express preemption, where Congress states explicitly the preemptive effect of its legislation on state law; (2) field preemption, where Congress intends for federal law to occupy exclusively an entire field of regulation; and (3)

conflicts preemption, where it is impossible for a private party to comply with both state and federal requirements. *English v. General Electric Co., 496 U.S. 72, 78-79 (1990)*.

The Federal Food, Drug, and Cosmetic Act ("FFDCA") establishes **[*7]** a comprehensive federal scheme of food regulation to ensure that food is safe and labeled in a manner that does not mislead consumers. See *21 U.S.C. §§ 301, et seq.* "The purpose of the NLEA was to create uniform national standards regarding the labeling of food and to prevent states from adopting inconsistent requirements with respect to the labeling of nutrients." *Farm Raised Salmon Cases, 42 Cal. 4th 1077, 1086 (Cal. 2008)*. The NLEA amendments to the FFDCA include an express preemption provision that governs product labeling by providing that no state may directly or indirectly establish any requirement for the labeling of food that is not identical to the requirements of *Section 343(q)*. See *21 U.S.C. § 343-1(a)*; see also *Farm Raised Salmon Cases, 42 Cal. 4th at 1086*. "If a federal law contains an express preemption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains." *Altria Group, Inc. v. Good, 129 S. Ct. 538, 543 (2008)*.

Here, Plaintiff alleges as follows:

> Defendant [is] misleading consumers about the nutritional and health qualities of its product. During the period from June 2004 to **[*8]** the present . . . Defendant made misleading statements that its Product was nutritious, healthy to consume, and, consequently, better than similar products such as butter.
>
> Defendant conveyed this message through a multi-million dollar advertising campaign . . . [and] stated prominently in bold-face type directly on the front and side of its Product containers that the Product was "Made with a Blend of Nutritious Oils." This message . . . is misleading and deceptive because Defendant's Product contains a highly unhealthy, non-nutritious oil known as partially hydrogenated oil.
>
> In combination with the misleading claims made on its packaging, Defendant has conducted multi-million dollar, widespread marketing campaigns to deceptively convey the message that its Product is nutritious and healthy. For instance, during the Class Period Defendant ran a marketing campaign entitled "Big Fat Truth" in which Defendant deceptively portrayed its Product as nutritious and healthy. As part of the "Big Fat Truth" marketing campaign, Defendant states on its website that "our soft spreads are a better nutrition option than butter because they are made with a blend of nutritious oils, including canola and **[*9]** soybean . . . ." Defendant also proclaims on its website that the Product is "made with nutritious plant oils like soybean and canola." These statements are deceptive and misleading given that ICBINB contains dangerous, non-nutritious, unhealthy partially hydrogenated oil.

(Complaint PP 1-4, 15.) Based on these allegations, the Court finds that Plaintiff's claims are not preempted by the NLEA. The NLEA requires that a product label have a statement of the number of grams of trans fat per serving, and that if the amount per serving is less than 0.5 grams, the amount stated shall be "zero." [6] ICBINB contains less than 0.5 grams of trans fat per serving, and is required by the NLEA to state "0g Trans Fat" per serving on its label. (See Opposition at 6 n.3.) Plaintiff's allegations avoid preemption because they are not directed at the "0g Trans Fat" statement or at any other statement on the label that is regulated by the NLEA.

6 See *21 C.F.R. § 101.9(c)(2)(ii)*.

A product label can contain advertisement or other material that is regulated by State consumer protection laws. Although the "oils" referred to in the advertisement on the label are the same oils that are subject to the NLEA labeling **[*10]** requirement, the Court finds that there is no inherent conflict in allowing relief under state law with respect to what is said in the advertisement on a label about characteristics of those oils that are not regulated by the NLEA. Moreover, in part, Plaintiff's claims are based on advertisements that are independent of the product label. Thus, there is no basis for Defendant's claim that those representations are preempted.

Accordingly, the Court DENIES Defendant's Motion to Dismiss all causes of action on the ground that Plaintiff's claims are expressly preempted by the NLEA. [7]

7 On March 17, 2010, over two weeks after the hearing, Plaintiff filed a Notice of Recent FDA Action, attaching two FDA warning letters to food companies that the FDA considered to have mislabeled their food products by failing to disclose certain information about the fat content of

the products. (hereafter, "Notice," Docket Item No. 48.) In light of the disposition here, the Court DENIES Defendant's Motion to Strike Plaintiff's Notice as moot.

B. Failure to State Facts Constituting a Plausible Legal Claim

In the alternative, Defendant moves to dismiss Plaintiff's Complaint for failure to state a claim.

A complaint **[*11]** must plead "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)*. A claim is plausible on its face "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, 129 S. Ct. 1937, 1949 (2009)*. Thus, "for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009)*.

In Iqbal, the Supreme Court set forth a two-pronged approach by which courts are to review the sufficiency of allegations in a complaint. First, a court reviews the complaint and discounts any allegations that amount to little more than "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal, 129 S. Ct. at 1949*. Second, the court examines the remaining allegations to determine whether they "state a plausible claim for relief." *Id. at 1950*. A claim is plausible, as opposed to merely possible, **[*12]** if its factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id. at 1949*. In contrast, a complaint alleging facts that are "merely consistent with a defendant's liability, stops short of the line between possibility and plausibility of entitlement to relief." Id.

Here, Plaintiff's Complaint rests on the allegation that Defendant's use of the word "nutritious" with respect to the product is false and misleading. Plaintiff alleges that the statement "Made with a Blend of Nutritious Oils" is printed on the product label and is made in advertisements. In addition, Plaintiff alleges that Defendant advertises that the product is "a better nutrition option than butter." (See Complaint PP 14, 15, 19.) The gravamen of Plaintiff's allegations is that these statements are misleading because they imply that the product contains only nutritious oils. Plaintiff alleges that the product contains partially hydrogenated oil and that type of oil is "not nutritious or healthy." (See id. P 8.) Therefore, Plaintiff alleges that the "nutrition" representations are false or misleading. In substance, Plaintiff alleges that the content of **[*13]** the blend of ingredients in the product remove it from being in the category of nutritious products. The implausibility of Plaintiff's allegations can more readily be seen if the allegation are expressed as a categorical syllogism: [8]

> *For the representation "blend of nutritious oils" to be true, all constituent oils must be nutritious. One of the constituent oils in the product [partially hydrogenated oil] is not nutritious. Therefore, the product representation is false.*

8 A "categorical syllogism" is one in which the conclusion follows from the relationship between the concepts in the premises and their membership in certain categories. See e.g., *Aylett v. Secretary of HUD, 54 F.3d 1560, 1567-68 (10th Cir. 1995)*.

Applying the first prong of Iqbal to Plaintiff's claim, the Court finds that Plaintiff's major premise (that all constituent oils must be nutritious in order for the blend to be nutritious) is merely a conclusion. If essential elements of a claim are supported by a conclusion, the complaint is plausible only if the conclusion is supported by allegations of fact elsewhere in the complaint. Here, Plaintiff does not allege any facts with respect to what a "blend" must contain in **[*14]** order to be "nutritious." Furthermore, since Plaintiff concedes that some of the oils in the blend are nutritious, Plaintiff fails to allege any facts to support the conclusion that the nutritious nature of the "blend of nutritious oils" is negated because a partially hydrogenated oil is blended with them.

Similarly, Plaintiff's minor premise (that partially hydrogenated oil is not nutritious) is a mere conclusion that lacks factual support. Plaintiff's allegation that partially hydrogenated oil is not nutritious [9] is devoid of any allegations of facts to support that allegation. Moreover, this unsupported conclusion is contrary to FFDCA regulations that define trans fat as a "nutrient" whose quantity is required to appear on food labels. See *21 C.F.R. § 101.9(c)(2)(ii)*. It thus appears that Plaintiff is not able to allege truthfully that partially hydrogenated oil is not a nutrient.

9 (Id. PP 4, 5, 8, 10, 15, 20.)

Applying the second prong of Iqbal, even if the Court assumes the truth of Plaintiff's premise that partially hydrogenated oil is not a nutrient, and examines the relationship between that premise and the allegedly false representations, the Court finds an implausible legal **[*15]** theory. Plaintiff's reasoning is that the inclusion of partially hydrogenated oil in the blend makes the "nutri-

tious" representations false and misleading. Plaintiff commits three logical fallacies: *petitio principii* (begging the question), "fallacy of composition" and the "fallacy of division."

The fallacy of *petitio principii* or begging the question, is committed when one attempts to establish a basis for a conclusion by constructing a premise that assumes that the conclusion has already been established. [10] Plaintiff incorporates this fallacy in his major premise: *For the representation "blend of nutritious oils" to be true, all constituent oils must be nutritious.* The premise that every constituent oil must be nutritious in order to truthfully represent that the blend of oils is nutritious is alleged by Plaintiff without ever establishing its truth. Then, in the conclusion (*Therefore, the product representation is false*) this unsupported premise is used to support the very conclusion that is assumed in the premise.

10 See *Jasmine Networks, Inc v. Superior Court (Marvell), 180 Cal. App. 4th 980, 1005 (Cal. App. Ct. 2009).*

The "fallacy of composition" is committed when one reasons from **[*16]** the properties of a "part" to the properties of the "whole." The fallacy is sometimes referred to as "the whole is nothing more than the sum of its parts." The reasoning is fallacious because things joined together may have different properties as a whole than they do separately. [11] Here, Plaintiff's allegations are based on the premise that the use of a non-nutritious oil, irrespective of amount, in a blend of otherwise nutritious oils makes the "blend" non-nutritious. Besides the lack of any facts to support this transformation, it does not logically follow from the fact that one oil in a blend does not have the nutritional properties of other nutritious oils, that the blend is rendered devoid of being nutritious.

11 See *Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290, 322 (2d Cir. 2008).*

The "fallacy of division" is the reverse of the fallacy of composition. It is committed when one argues that what is true of a whole must also be true of its parts. To reason that since a blend of oils is represented as being nutritious, if partially hydrogenated oil is part of the blend, it must also be nutritious commits the fallacy of division. Inherent in Plaintiff's allegations **[*17]** is the fallacious reasoning that in order to be a part of what is represented to be a "blend of nutritious oils," partially hydrogenated oil must have the same characteristics of the other oils in the blend.

Thus, even presuming the truthfulness of Plaintiff's allegations about the nature of partially hydrogenated oil, the Court concludes that the illogical relationships Plaintiff draws between the nature of partially hydrogenated oil and the representations Defendant makes about the blend of oils renders Plaintiff's complaint implausible on its face. See *Iqbal, 129 S. Ct. at 1949* (citing *Twombly, 550 U.S. at 570*).

Accordingly, the Court GRANTS Defendant's Motion to Dismiss on the ground that Plaintiff fails to state facts constituting a plausible legal claim. Since the Court finds that there is no cure for the lack of logical tie discussed above, any amendment would be futile. [12]

12 In addition, since the Court has found that this basis is sufficient to dismiss Plaintiff's Complaint with prejudice, the Court does not reach Defendant's remaining grounds. Additionally, the Court DENIES as moot Defendant's Request for Judicial Notice and Supplemental Request for Judicial Notice because the **[*18]** Court did not rely on any of the subject documents in its analysis. (See Defendant's Request for Judicial Notice in Support of its Motion to Dismiss Plaintiff's Complaint, Docket Item No. 22; Defendant's Supplemental Request for Judicial Notice in Support of its Motion to Dismiss Plaintiff's Complaint, Docket Item No. 38.)

V. CONCLUSION

The Court GRANTS Defendant's Motion to Dismiss all causes of action on the ground that Plaintiff's claims do not and cannot satisfy the pleading standards of Twombly and Iqbal. The Complaint is DISMISSED with prejudice. Judgment will be entered accordingly.

Dated: May 3, 2010

/s/ James Ware

JAMES WARE

United States District Judge