

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

Case No. CV 09-6130 DSF (RZx)

Date 2/1/10

Title Diana Zupnik, et al. v. Tropicana Products, Inc.

Present: The
Honorable

DALE S. FISCHER, United States District Judge

Debra Plato

Not Present

Deputy Clerk

Court Reporter

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (In Chambers) Order DENYING Motion to Dismiss (Docket No. 19)

I. BACKGROUND

Plaintiff is a consumer who purchased Defendant’s “Tropicana Pure 100% Juice Pomegranate Blueberry Flavored Blend of 5 Juices from Concentrate with other Natural Flavors.”¹ While the juice’s full name is on the front of the label, the label contains a prominent picture of pomegranates and blueberries and the words “Pomegranate” and “Blueberry” are substantially larger than the other parts of the juice’s official name. (See Compl. at 6.) There is no allegation that Defendant failed to disclose the ingredients of the juice in the label’s ingredient list as required by law.

On behalf of herself and other similarly situated consumers, Plaintiff claims that Defendant’s label and website advertising are false or misleading in violation of California Business and Professions Code §§ 17200 and 17500. Plaintiff’s § 17200 claims are predicated, in part, on an alleged violation of the California Sherman Food, Drug, and Cosmetic Law (“Sherman Law”), California Health and Safety Code § 110660.

Defendant moves to dismiss the complaint, claiming that Plaintiff does not have

¹ There may be a dispute as to the name of the juice. For the purposes of this motion, the Court will accept Defendant’s representation that this is the full, official name of the product.

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standing to bring her claims, that the claims are expressly preempted by federal law, and that the claims are not pleaded with particularity. For the reasons given below, the motion is denied.

II. ANALYSIS

A. Plaintiff Has Standing to Bring Her Claims

Claims may be brought under §§ 17200 and 17500 by “a person who has suffered injury in fact and has lost money or property as a result of the unfair competition.” Cal. Bus. & Prof. Code §§ 17204, 17535. Defendant claims that Plaintiff did not suffer an injury-in-fact because she “got what she paid for.” (Def.’s Mem. at 9.) This is unpersuasive. The premise of Plaintiff’s complaint is that she was misled into purchasing what she believed to be a juice primarily consisting of pomegranate and blueberry juice that was, in fact, mostly pear juice. If these allegations are taken to be true – as they must be on a motion to dismiss – then Plaintiff did not get what she paid for. This is a sufficient allegation of injury-in-fact.

B. Plaintiff’s Claims are Not Expressly Preempted

Plaintiff’s § 17200 and § 17500 claims are predicated, in part, on violations of California’s Sherman Law, specifically California Health and Safety Code § 110660.² Section 110660 is substantially identical to 21 U.S.C. § 343(a) and reads: “Any food is misbranded if its labeling is false or misleading in any particular.”³

The Federal Food, Drug and Cosmetic Act⁴ contains an express preemption provision, 21 U.S.C. § 343-1. Section 343-1 provides that states cannot establish food labeling requirements “not identical to” federal requirements set out in numerous

² Defendant’s motion conflates two issues: Plaintiff’s claims related to the juice’s label and Plaintiff’s claims related to Defendant’s website. Defendant makes no argument that the website claims are preempted by federal labeling laws.

³ Section 343 reads, in relevant part:
A food shall be deemed to be misbranded –
(a) False or misleading label
If (1) its labeling is false or misleading in any particular

⁴ As amended by the Nutrition Labeling and Education Act of 1990.

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subsections of 21 U.S.C. § 343. See generally 21 U.S.C. § 343-1. However, § 343(a) is not listed as preempted by § 343-1. “[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).⁵ Even if § 343-1 did list § 343(a), only state laws that were “not identical to” the federal requirements would be preempted.

Food and Drug Administration (“FDA”) regulations state:

“Not identical to” does not refer to the specific words in the requirement but instead means that the State requirement directly or indirectly imposes obligations or contains provisions concerning the composition or labeling of food, or concerning a food container, that:

- (i) Are not imposed by or contained in the applicable provision (including any implementing regulation) of section 401 or 403 of the act; or
- (ii) Differ from those specifically imposed by or contained in the applicable provision (including any implementing regulation) of section 401 or 403 of the act.

21 C.F.R. § 100.1(c)(4).

There is no dispute that the provision Plaintiff sues under – California Health and Safety Code § 110660 – is identical to 21 U.S.C. § 343(a). However, Defendant implies that if a food producer has otherwise complied with the provisions of § 343 and its implementing regulations, no ad hoc claim for a “false or misleading” label can be brought. Defendant argues that the claim would, in effect, impose requirements that “are not imposed” or “differ from those” explicitly laid out in the federal statutes and regulations and, therefore, would be preempted.

This logical argument is undercut by the lack of any indication that the FDA could not sue under § 343(a) for a “false or misleading” label where the label does not violate another, more specific food labeling statute or regulation. In fact, the authority that exists strongly suggests the opposite. See United States v. 45/194 Kg. Drums of Pure Vegetable Oil, 961 F.2d 808, 811 (9th Cir. 1992) (“The statute condemns every statement, design, and device which may mislead or deceive.”) (quoting United States v. 95 Barrels (More or Less) Alleged Apple Cider Vinegar, 265 U.S. 438, 442-43 (1924)).

⁵ Defendant does not argue that Plaintiff’s claims are implicitly preempted.

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Congress presumably chose to include § 343(a) in the statutory scheme in order to allow the FDA to target specific false or misleading labels without having promulgated regulations that address the specific false or misleading aspect of the particular label. Because Congress has also allowed states, at the very least, to pass statutes identical to § 343(a), a private party equipped with a private right of action under state law is able to sue to enforce a state statute identical to § 343(a), just as the FDA would be able to sue to enforce § 343(a) itself. See also Farm Raised Salmon Cases, 42 Cal. 4th 1077, 1090-95 (2008) (private rights of action under Sherman Law not preempted by federal law).

C. Plaintiff's Claims are Pleaded With Particularity

Assuming that Plaintiff's claims sound in fraud, they are pleaded with sufficient particularity to satisfy Federal Rule of Civil Procedure 9(b). The complaint details what representations were made, how they were made, and why they are false. (See generally Compl. ¶¶ 13-32; see also Pl.'s Opp'n at 17.) The complaint also includes pictures of the allegedly false or misleading labels and advertisements. (See Compl. at 6, 9-10.) This is sufficient for the purposes of Rule 9(b).

III. CONCLUSION

The motion to dismiss is DENIED.

IT IS SO ORDERED.