

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES - GENERAL

Case No.	CV 16-1442 PSG (MRWx)	Date	March 8, 2018
Title	In re Quaker Oats Maple & Brown Sugar Instant Oatmeal Litigation		

Present: The Honorable Philip S. Gutierrez, United States District Judge

Wendy Hernandez

Not Reported

Deputy Clerk

Court Reporter

Attorneys Present for Plaintiff(s):

Attorneys Present for Defendant(s):

Not Present

Not Present

Proceedings (In Chambers): Order GRANTING Defendant’s motion to dismiss Plaintiffs’ first amended consolidated class action complaint

Before the Court is a motion to dismiss Plaintiffs’ first amended consolidated class action complaint, filed by Defendant Quaker Oats Company (“Defendant”). *See* Dkt. # 54 (“*Mot.*”). Plaintiffs Darren Eisenlord, Kevin Phung, Barbara Gates, Mario Aliano, Matthew Perkins, and Sophia Saenz (“Plaintiffs”) oppose the motion, *see* Dkt. # 57 (“*Opp.*”), and Defendant replied, *see* Dkt. # 58 (“*Reply*”). The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. Having considered the moving papers, the Court **GRANTS** Defendant’s motion.

I. Background

A. Factual History

This action “arises out of [Defendant’s] misbranding and false advertising of its line of products sold as Quaker Oats Maple & Brown Sugar Instant Oatmeal.” *See First Amended Consolidated Class Action Complaint*, Dkt. # 51 (“*FAC*”), ¶ 1. Although this line of products (“the Products”)¹ features packaging and labeling that “claim that maple syrup or maple sugar . . . is a sweetening ingredient,” the Products do not contain maple syrup. *Id.* ¶ 2. Plaintiffs therefore contend that “[t]he representations on the Products’ labeling and packaging are false, misleading, and deceptive.” *Id.*

¹ The Products consist of the following products produced by Defendant: Maple & Brown Sugar Instant Oatmeal (Classic Recipe), Maple & Brown Sugar High Fiber Instant Oatmeal, Maple & Brown Sugar Gluten Free Instant Oatmeal, Maple & Brown Sugar Lower Sugar Instant Oatmeal, Maple & Brown Sugar Weight Control Instant Oatmeal, and Maple & Brown Sugar Organic Instant Oatmeal. *FAC* ¶ 1 n. 1.

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Maple syrup, Plaintiffs explain, is derived from the sap of maple trees through a process of drilling and heating, while maple sugar is what remains after the water in maple sap has been boiled off. *Id.* ¶¶ 17–19. Maple syrup is “healthier and more nutritious than cane sugar,” and is allegedly recognized by the federal government as a “nutritive sweetener.” *Id.* ¶¶ 20, 22 (citing 21 C.F.R. §§ 168.140, 168.180). Plaintiffs claim that the Products’ labeling “states in bold type that [they] are ‘Quaker Instant Oatmeal, Maple & Brown Sugar’” and “also prominently includes images of a glass pitcher of maple syrup.” *Id.* ¶ 23. Plaintiffs claim that “[t]hese representations convey to consumers that the Products are sweetened with maple syrup”—which allows the Product to “command a premium in the marketplace”—when in fact they are not. *Id.* ¶¶ 24–25.

As a consequence of this alleged false advertising, Plaintiffs claim that they purchased the Products believing that they contained maple syrup when they actually did not. *Id.* ¶ 3. Specifically, certain of the Products were purchased by Plaintiffs Eisenlord and Phung in California, *id.* ¶¶ 8–9; by Plaintiff Gates in New Jersey, *id.* ¶ 10; by Plaintiffs Aliano and Saenz in Illinois, *id.* ¶¶ 11–12; and by Plaintiff Perkins in Massachusetts, *id.* ¶ 13. Each of these Plaintiffs claims that they “purchased the Product[s] believing [they] contained maple syrup” and “did not receive that which [they were] promised.” *Id.* ¶¶ 8–13. As a result, Plaintiffs conclude that they “were damaged on account of receiving a Product that did not contain maple syrup as represented by [Defendant] and which was fundamentally different and less valuable than labeled and represented.” *Id.* ¶ 30.

B. Procedural History

On May 30, 2017, Plaintiffs’ cases were consolidated, *see* Dkt. # 27, and two weeks later a consolidated class action complaint was filed, *see* Dkt. # 28. Defendant filed a motion to dismiss the original complaint on July 28, *see* Dkt. # 36, which this Court granted on October 10, 2017, *see* Dkt. # 50 (“*MTD Order*”). At that time, Plaintiffs characterized maple syrup as a *flavoring* rather than a *sweetener*. *See id.* at 7–8. The Court concluded that the Products’ flavoring labeling complied with the regulations of the Food and Drug Administration (“FDA”), and that therefore any claims premised on flavoring labeling were expressly preempted. *See id.* at 9–11. As for the remaining causes of action—breach of express warranty and unjust enrichment, *see id.* at 13—the Court determined that Plaintiffs failed to state breach of express warranty claims because their allegations did not include an express assertion by Defendant that the Products contained maple syrup. *See id.* (“Nowhere on the Products’ labels does Defendant assert that maple syrup is an ingredient within.”). Because Plaintiffs failed to state “viable claims under theories of fraud, false advertising, or breach of contract”—which meant that there was “no foundation upon which to base an independent cause of action for unjust enrichment”—the Court dismissed Plaintiffs’ unjust enrichment claim as well. *Id.* at 14.

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The Court also granted Plaintiffs leave to amend. It noted that the previous complaint contained “insufficient pleading with regards to breach of express warranty and standing, which *could* possibly be cured by amendment.” *Id.* at 18 (emphasis in original). As for the preempted claims, the Court only “considered preemption from the standpoint of maple as a *flavoring*, not a *sweetener*—the latter being a different approach that, if successfully pleaded by Plaintiffs, might possibly avoid preemption.” *Id.* (emphases in original).

Plaintiffs filed their amended complaint on November 10, 2017, alleging the following causes of action:

Count I: Violation of California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200 et seq. *FAC* ¶¶ 40–55.

Count II: Violation of California’s Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code §§ 1750 et seq. *FAC* ¶¶ 56–64.

Count III: Violation of California’s False Advertising Act (“FAA”), Cal. Civ. Code §§ 17500 et seq. *FAC* ¶¶ 65–73.

Count IV: Violation of Illinois’s Deceptive Practices and Consumer Fraud Act, 815 Ill. Comp. Stat. 505/1 et seq. *FAC* ¶¶ 74–83.

Count V: Violation of New Jersey’s Consumer Fraud Act, N.J. Stat. Ann. § 56:8-1 et seq. *FAC* ¶¶ 84–88.

Count VI: Untrue and misleading advertising under Massachusetts law, Mass. Gen. Laws ch. 266, § 91. *FAC* ¶¶ 89–93.

Count VII: Unfair and deceptive conduct in violation of Massachusetts law, Mass. Gen. Laws ch. 93A, § 2. *FAC* ¶¶ 94–104.

Count VIII: Unjust enrichment. *Id.* ¶¶ 105–10.

Defendant now moves to dismiss Plaintiffs’ claims once more, arguing that the amended complaint offers only cosmetic changes that do not save the causes of action from preemption. *See generally Mot.*

II. Legal Standard

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To survive a motion to dismiss under Rule 12(b)(6), a complaint must “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In assessing the adequacy of the complaint, the court must accept all pleaded facts as true and construe them in the light most favorable to the plaintiff. *See Turner v. City & Cty. of S.F.*, 788 F.3d 1206, 1210 (9th Cir. 2015); *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). The court then determines whether the complaint “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. However, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* Accordingly, “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) (internal quotation marks omitted).

III. Discussion

Defendant argues that, despite the changes made to Plaintiffs’ complaint, their claims are still preempted by FDA regulations. *See Mot.* 5:10–10:5. The Court agrees.

Claims must be dismissed as expressly preempted by the Food, Drug, and Cosmetic Act (“FDCA”) where they impose food labeling requirements “not identical to” federal requirements. 21 U.S.C. § 343-1(a)(2); *see also Dvora v. General Mills, Inc.*, No. CV 11-1074-GW(PLAx), 2011 WL 1897349, at *3 (C.D. Cal. May 16, 2011) (“Section 343-1(a) expressly preempts state regulation of specific topics related to food labeling and provides that states may not establish any requirement respecting these specified topics ‘that is not identical’ to the requirements in the FDCA in certain categories.”). Courts have held that claims are preempted where, as here, plaintiffs allege that a flavor label promised a product that contained an ingredient described by the flavor label. *See, e.g., Henry v. Gerber Prods. Co.*, No. 3:15-cv-02201-HZ, 2016 WL 1589900, at *7 (D. Or. Apr. 18, 2016); *Dvora*, 2011 WL 1897349, at *5.

Previously, the Court determined that the Products’ labels complied with the FDA’s flavoring labeling requirements. *See MTD Order* at 9–12. As Defendant notes, “[n]either the labels at issue nor the relevant labeling regulations have changed since the Court’s decision.” *Mot.* 5:13–14. Accordingly, to evade preemption at this stage, Plaintiffs would need to either allege that the Products’ labels violate the FDA’s sweetener requirements *or* raise claims that are not addressed by federal law. *See Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1119 (N.D. Cal. 2010). The Court concludes that Plaintiffs’ amended complaint accomplishes neither of these objectives.

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To begin, Plaintiffs suggest that the Court’s previous conclusions regarding the Products’ compliance with FDA flavoring regulations are irrelevant, and that therefore their claims are not preempted, because “[u]nder the FDA regulations, maple syrup is a sweetener and not a flavoring.” *Opp.* 5:4. The Court disagrees with this contention. “[M]aple,” derived from *Acer spicatum Lam* (the mountain maple tree), appears on the FDA’s list of “flavoring substances.” 21 C.F.R. § 172.510. Its appearance on this list is consistent with the FDA’s definition of “flavor” as an ingredient “whose significant function in food is flavoring rather than nutritional,” 21 C.F.R. § 101.22(a)(3), and which is used “to impart or help impart a taste or aroma in food.” 21 C.F.R. § 170.3(o)(12). It is also consistent with the Products’ labeling, which in no way asserts “that maple syrup is an ingredient within,” and instead uses the term in conjunction with flavoring. *MTD Order* at 9–10, 13. In short, despite Plaintiffs’ assertion to the contrary, maple can indisputably be characterized as a flavoring under both the FDA’s regulations and common sense.²

However, even if the Court were to disregard the applicable flavoring regulations and focus only on maple syrup as a sweetener, Plaintiffs’ claims would still fail because they have not demonstrated that the Products’ labels violate federal sweetener regulations. Their amended complaint does not allege any specific regulations that have been violated,³ and this topic is given only cursory attention in their opposition. *See Opp.* 8:14–9:13.

Plaintiffs first argue that Defendant violated the requirement that a food’s ingredient list contain “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(i)(2); *see also* 21 C.F.R. § 101.4. Plaintiffs therefore contend that the Products’ labeling “fails to comply with this regulation” because “[s]weeteners such as maple syrup and

² This conclusion is buttressed by the 2016 FDA document titled *FDA Consumer Update: What’s in a Name? What Every Consumer Should Know About Foods and Flavors*, of which this Court took judicial notice in its prior order. *See MTD Order* at 3; *see also Declaration of Jason Meltzer*, Dkt. # 39, Ex. 1. In that document, as discussed previously, the FDA frequently referred to maple as a flavoring. *See MTD Order* at 9 (“The FDA Consumer Update released in September 2016 and judicially noticed in this proceeding explicitly confirmed that ‘[c]urrent regulations allow use of terms like “maple,” “maple-flavored,” or “artificially maple-flavored” on the food label without having any maple syrup in the product, as long as it contains maple flavoring.””).

³ The amended complaint only references the standard of identity regulations for “maple sirup” and “table sirup.” *See FAC* ¶ 22 (citing 21 C.F.R. §§ 168.140, 168.180). However, the Court previously concluded that Defendant does not market the Products as maple syrup, *see MTD Order* at 7, and so these regulations are inapposite.

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brown sugar must be designated by the common or usual name.” *Opp.* 8:19–22. However, the Court agrees with Defendant that this argument is untenable. Plaintiffs’ lawsuit is premised on, and their complaint explicitly alleges, that the Products *do not contain maple syrup*. Therefore, this regulation is inapplicable; as Defendant correctly notes, it “simply cannot apply to an ingredient *not* contained in the food.” *Reply* 6:3–5 (emphasis in original).

Plaintiffs’ second argument is that the Products’ labeling violates regulations governing the common or usual name of a food. *See Opp.* 9:1–13. The relevant regulation provides that

[t]he common or usual name of a food shall include a statement of the presence or absence of any characterizing ingredient(s) or component(s) . . . when the presence or absence of such ingredient(s) or component(s) in the food has a material bearing on price or consumer acceptance or when the labeling or the appearance of the food may otherwise create an erroneous impression that such ingredient(s) or component(s) is present when it is not, and consumers may otherwise be misled about the presence or absence of the ingredient(s) or component(s) in the food.

21 C.F.R. § 102.5(c). Plaintiffs contend that “maple syrup is a premium ingredient, which has a material bearing on the price and consumer acceptance of the Products.” *Opp.* 9:10–11. However, § 102.5 is not applicable here. The “common or usual name of a food” refers to that which “accurately identif[ies] or describe[s], in as simple and direct terms as possible, the basic nature of the food or its characterizing properties or ingredients.” 21 C.F.R. § 102.5(a). The “basic nature” of the Products is *not* maple syrup or maple sugar, but is instead instant oatmeal, and since Plaintiffs do not allege that the Products are not actually instant oatmeal, § 102.5 does not support Plaintiffs’ claims. *See Coe v. General Mills, Inc.*, No. 15-cv-05112-THE, 2016 WL 4208287, at *3 (N.D. Cal. Aug. 10, 2016) (determining that § 102.5(c) is not relevant to whether the product name “Cheerios Protein” must indicate the presence of sugar because “the term ‘common or usual name’ is meant to refer to a generic descriptive term rather than a brand name”).

Previously, the Court concluded that the Products’ labeling complied with the FDA’s flavoring regulations, and so any claims premised on alleged false advertising or misrepresentations were preempted. Nothing in Plaintiffs’ amended complaint or opposition provides a sound basis for reconsidering that conclusion. Furthermore, Plaintiffs have not demonstrated that the Products’ labeling violates the FDA’s sweetener regulations, which might have provided an alternative means of avoiding preemption. The Court therefore concludes once again that Plaintiffs’ causes of action that are premised on allegedly unlawful or fraudulent conduct and that seek to enjoin Defendant from continuing its current labeling practices—specifically, Plaintiffs’ first (California UCL), second (California CLRA), third

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(California FAA), fourth (Illinois Consumer Fraud and Deceptive Business Practices Act), fifth (New Jersey Consumer Fraud Act), sixth (Massachusetts untrue and misleading advertising), and seventh (Massachusetts unfair and deceptive conduct) counts—are preempted by federal law.

Accordingly, the Court **GRANTS** Defendant’s motion to dismiss these causes of action. Because Plaintiffs have not stated viable underlying claims, there is no foundation upon which to base the remaining cause of action for unjust enrichment. *See McKinnis v. Kellogg USA*, No. CV 07-2611 ABC (RCx), 2007 WL 4766060, at *6 (C.D. Cal. Sept. 19, 2007) (“Plaintiffs have failed to state any substantive claim against Defendant. In the absence of an underlying substantive claim, Plaintiffs’ ‘claim’ for unjust enrichment fails.”). Consequently, the Court also **GRANTS** Defendant’s motion to dismiss Defendant’s eighth count for unjust enrichment.

IV. Leave to Amend

Plaintiffs request leave to amend. *See Opp.* 19:8–9.

Whether to grant leave to amend rests in the sound discretion of the trial court. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). The Court considers whether leave to amend would cause undue delay or prejudice to the opposing party, and whether granting leave to amend would be futile. *See Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996). Generally, dismissal without leave to amend is improper “unless it is clear that the complaint could not be saved by any amendment.” *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003).

Here, the Court has concluded for the second time that Plaintiffs’ claims are preempted by the applicable regulations. Although the Court previously opined that preemption might be avoided if maple were characterized as a sweetener rather than as a flavoring, Plaintiffs’ attempt at recharacterization does not navigate around the preemptive effects of federal law. Therefore, the Court concludes that amendment would be futile and **DENIES** leave to amend.

V. Conclusion

For the foregoing reasons, the Court **GRANTS** Defendant’s motion to dismiss Plaintiffs’ first amended consolidated class action complaint. This order closes the case.

IT IS SO ORDERED.