ROBERT CHACANACA, et al., Plaintiffs, v. THE QUAKER OATS COMPANY, Defendant.

No. C 10-0502 RS

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

752 F. Supp. 2d 1111*; *2010 U.S. Dist. LEXIS 111981

October 14, 2010, Decided
October 14, 2010, Filed

SUBSEQUENT HISTORY: Motion denied by *Chacanaca v. Quaker Oats Co., 2011 U.S. Dist. LEXIS 13729 (N.D. Cal., Feb. 3, 2011)*

CASE SUMMARY:

OVERVIEW: Consumers' claims under *Cal. Bus. & Prof. Code §§ 17200, 17500* against an oatmeal bar manufacturer relating to term "wholesome" and to decal and photograph on front of box were not preempted under *21 U.S.C.S. § 343-1* of Nutrition Labeling and Education Act (NLEA) because they were not regulated by NLEA. However, claims related to statements involving nutrient content were preempted because they sought to impose a requirement in addition to what was mandated by NLEA. Consumers lacked standing to assert a false advertising claim under *15 U.S.C.S. § 1125(a)* because they were not competitors.

OUTCOME: Manufacturer's motion for judgment on the pleadings granted in part and denied in part.

LexisNexis(R) Headnotes

Civil Procedure > Pretrial Judgments > Judgment on the Pleadings

[HN1] *Fed. R. Civ. P. 12(c)* provides that, after the pleadings are closed, a party may move for judgment on the pleadings. A court accepts all factual allegations in the complaint as true and construes them in the light most favorable to the non-moving party. A judgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law.

Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

[HN2] The Federal Food, Drug, and Cosmetic Act (FDCA) was enacted in 1938. It prohibits the misbranding of food. In 1990, Congress amended the FDCA through the passage of the Nutrition Labeling and Education Act (NLEA). The NLEA aimed to clarify and strengthen the Food and Drug Administration's legal authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about nutrients in foods. The many subsections of *21 U.S.C.S. § 343* establish the conditions under which food is considered "misbranded." Generally, food is misbranded under *§ 343(a)(1)* if its labeling is false or misleading in any particular. Two statutory sections--*21 U.S.C.S. § 343(q)* and *(r)*--impose more specific labeling requirements. Respectively, these sections regulate the information that goes into the nutrition box section on all

packaged products and nutrient content claims that appear elsewhere on the label.

Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

[HN3] *21 U.S.C.S. § 343(q)* governs nutrition information and discusses information that must be disclosed about certain nutrients in food products. It is principally in the nutrition box area that a food manufacturer must inform consumers of, for example, the total number of calories per serving or the quantities of various nutrients contained in a food product. An accompanying regulation, *21 C.F.R. § 101.9*, further requires a statement of the number of grams of trans fat in a serving, defined as the sum of all unsaturated fatty acids that contain one or more isolated (i.e., nonconjugated) double bonds in a trans figuration. *21 C.F.R. § 101.9(c)(2)(ii)*.

Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

[HN4] *21 C.F.R. § 101.9* requires a declaration of trans fat content, at least where trans fat is meaningfully present in a food. The regulation states that trans fat content shall be indented and expressed as grams per serving to the nearest 0.5 gram increment below 5 grams and to the nearest gram increment above 5 grams. If the serving contains less than 0.5 gram, the content, when declared shall be expressed as zero. Where a product contains less than 0.5 gram, the manufacturer need not include the zero gram statement at all unless a nutrient content claim is made elsewhere about fat, fatty acid or cholesterol content. In a final rule issued in 1993, the Food and Drug Administration described this rounding down regulation as follows: the nutrition labeling regulation prescribed levels for nutrients that are nutritionally trivial, i.e., those nutrients that are present in a food at insignificant amounts and that consequently are declared as zero on the nutrition label (e.g., less than 5 calories and less than 0.5 g total fat). *58 Fed. Reg. 44020*-01, 44024 (Aug. 18, 1993).

Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

[HN5] *21 U.S.C.S. § 343(r)* discusses "nutrition levels and health-related claims" about a food product made anywhere on a product label. This provision governs all voluntary statements about nutrient content or health information a manufacturer chooses to include on a food label or packaging. Specifically, the section covers claims that expressly or by implication characterize the level of any nutrient or characterize the relationship of any nutrient to a disease or health related condition. *21 U.S.C.S. § 343(r)(1)*. The Food and Drug Administration has promulgated regulations regarding three specific kinds of claims: express nutrient content claims; implied nutrient content claims; and health claims. *21 C.F.R. §§ 101.13*, *101.14*. An express nutrient content claim is a direct statement about the level or range of a nutrient in a food, like "100 calories." A purveyor may include such a claim so long as it does not in any way implicitly characterize the level of the nutrient in the food and it is not false or misleading in any respect (e.g., "100 calories" or "5 grams of fat"), in which case no disclaimer is required. *21 C.F.R. § 101.13(i)(3)*.

Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

[HN6] An implied nutrient content claim describes food or an ingredient in a manner that suggests that a nutrient is absent or present in a certain amount, such as "high in oat bran." An implied content claim might also make a comparative statement, like "contains as much fiber as an apple," or might suggest that the product is consistent with a nutritional or healthy diet. *21 C.F.R. § 101.13(b)(2)(i)-(ii)*. Notably, the section prohibits the use of certain terms--such as "free," "low," or "good source"--that characterize the level or range of any nutrient in a food unless these terms conform to definitions established by the Secretary of the Department of Health and Human Services. *21 C.F.R. § 101.13(b)(1)*. A health claim is one that specifically characterizes the relationship of any substance to a disease or health-related condition. *21 C.F.R. § 101.14*. A food purveyor may include implicit content claims so long as they are consistent with a definition for a claim, as provided in a federal regulation.

Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

[HN7] *21 U.S.C.S. § 343(r)* states that a statement of the type required by *§ 343(q)* that appears as part of the nutrition information required or permitted by such paragraph is not a claim which is subject to *§ 343(r)*. *21 U.S.C.S. § 343(r)(1)*. An accompanying regulation, *21 C.F.R. § 101.13*, further instructs, however, that if such information is declared elsewhere on the label or in

labeling, it is a nutrient content claim and is subject to the requirements for nutrient content claims. *21 C.F.R. § 101.13(c)*.

Constitutional Law > Supremacy Clause > Federal Preemption
Evidence > Inferences & Presumptions > Presumptions > Effects
Governments > Legislation > Interpretation
[HN8] Pursuant to the *Supremacy Clause*, federal law preempts state law when: (1) Congress enacts a statute that explicitly preempts state law; (2) 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; or (3) state law actually conflicts with federal law. The purpose of Congress is the ultimate touchstone in every preemption case. The U.S. Supreme Court has also instructed that a court must start with the assumption that the historic police powers of the States were not to be superseded by a Federal Act unless that was the clear and manifest purpose of Congress. This presumption against preemption is heightened where federal law is said to bar state action in fields of traditional state regulation. In light of the historical primacy of state regulation of matters of health and safety, courts can assume that state and local regulation related to such matters can normally coexist with federal regulations. Where Congress does provide for express preemption, the presumption against preemption requires courts to read the clause narrowly.

Constitutional Law > Supremacy Clause > Federal Preemption
Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act
[HN9] The Nutrition Labeling and Education Act (NLEA) states that it shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under *21 U.S.C.S. § 343-1(a)* of the Federal Food, Drug, and Cosmetic Act. It does contain two express preemption provisions relating to *21 U.S.C.S. § 343(q)* and *(r)*. *Section 343-1(a)(4)* expressly preempts any state or local requirement for nutrition labeling of food that is not identical to the requirement of *§ 343(q)*. *Section 343-1(a)(5)*, in turn, preempts state or local governments from imposing any requirement on nutrient content claims made by a food purveyor in the label or labeling of food that is not identical to the requirement of *§ 343(r)*. The U.S. Supreme Court has clarified that, in the context of express preemption provisions, the term "requirements" reaches beyond positive enactments like statutes and regulations, to embrace common-law duties and judge-made rules. Where a requirement imposed by state law effectively parallels or mirrors the relevant sections of the NLEA, courts have repeatedly refused to find preemption. The Food and Drug Adminsitration itself appears to endorse this approach.

Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act
[HN10] Reference to *21 C.F.R. § 101.13(f)* sheds some light on the Food and Drug Administration's (FDA) approach to content claims in the context of rounding. *Section 101.13(j)* generally governs "reference" claims, or claims that compare the nutrient level of a product to a reference product. The FDA modified *§ 101.13(j)* so that reference claims may employ either the rounded or actual values, so long as the label is internally consistent. *58 Fed. Reg. 44020*-01 at 44024. The FDA also made the following observation on "absolute" claims: Because there is no need to specify the actual amount of the nutrient in the food relative to the claim and, as discussed in the mandatory nutrition labeling final rule, because there is no nutritional difference between rounded and unrounded values of a nutrient in a food, the agency does not see a need to specify which value should be used in determining whether or not a food qualifies to make a nutrient content claim.

Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act
[HN11] The Food and Drug Administration (FDA) has not explicitly required that express content claims employ the rounded figure that appears in the nutrition box, reasoning instead that the difference between actual and rounded values are "nutritionally insignificant." The FDA has urged that the use of either value functionally relays identical information. That said, the FDA has also at least in response to comments expressed a preference for internal consistency between the nutrition box and the rest of the label. In the context of reference claims, the FDA opined that it is more important to prevent consumer confusion by having consistency on the food label than to be prescriptive as to the method by which nutrient values for relative claims are determined and used. Accordingly, if "nutritionally insignificant amounts" of less than 0.5 gram trans fats means the same thing, according to FDA regulations, as "0 grams," then

the use of the latter language in an express nutrient content claim would not be misleading within the meaning of *21 U.S.C.S. § 343(r)* or any of its regulations. The statement would not be misbranded under *§ 343(r)*.

Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

[HN12] *21 C.F.R. § 101.13(o)* instructs that, except as provided in *21 C.F.R. § 101.10*, compliance with the requirements for nutrient content claims in *§ 101.13* and in the regulations in subpart D of this part, will be determined using the analytical methodology prescribed for determining compliance with nutrition labeling in *21 C.F.R. § 101.9*. *Section 101.9* relates to mandatory nutrition information under the ambit of *21 U.S.C.S. § 343(q)*. It also instructs that trans fat content must be expressed as grams per serving to the nearest 0.5 gram increment, and if the serving contains less than 0.5 gram, the content, when declared, shall be expressed as zero. *21 C.F.R. § 101.9(c)(2)(ii)*. The "analytical methodology" phrase refers to the Food and Drug Administration's preferred mechanism for measuring actual nutrient levels in food products. Because this method apparently cannot reliably calculate nutrient levels below 0.5 gram, these low levels are rounded to zero.

Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

[HN13] A simple statement of an ingredient need not necessarily count as a nutrient content claim for purposes of the Nutrition Labeling and Education Act. The Food and Drug Administration has instructed, however, that it may function as such a claim under some circumstances. Also, *21 C.F.R. § 101.13* regulates the manner in which a purveyor may claim the absence of any nutrient. A label may do so only where the food has been specially processed or formulated to remove the nutrient. If it is a food that in its natural state lacks the nutrient, the purveyor must also so indicate. *21 C.F.R. § 101.13(e)(1)-(2)*.

Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

[HN14] Federal regulations categorize as misleading and therefore prohibited even true nutrient content claims if the presence of another "disqualifying" nutrient exceeds an amount established by regulation. The Food and Drug Administration (FDA) has by regulation imposed disqualifying levels for only four nutrients: total fat, saturated fat, cholesterol, and sodium. *21 C.F.R. §§ 101.13(h)(1), 101.14(a)(4)*. A disqualifying level of, for example, saturated fat is four grams per "reference amount customarily consumed." *21 C.F.R. § 101.13(h)(1)*. If this level is exceeded, a food purveyor is prohibited from making an unqualified claim touting the health benefits of another nutrient in the food. This is because the FDA has reasoned that the beneficent claim, standing alone, would be misleading. The FDA has declined to set disqualifying levels for trans fats. It expressed an intent to continue to evaluate the evolving science and, when the science has evolved to a point where the agency believes it can proceed with scientifically-based definitions and levels for these claims, it will proceed to do so through a new rulemaking. *68 Fed. Reg. 41434*-01, 41465 (July 11, 2003). As a matter of federal law, then, the presence of trans fats alone is not a "disqualifying" nutrient which would prevent a food purveyor from emphasizing whatever other health benefits are available from other ingredients.

Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

[HN15] In *21 C.F.R. § 101.54*, the Food and Drug Administration defined "good source" nutrient content claims. A good source claim uses only those terms defined by the Secretary of the Department of Health and Human Services, is made in accordance with the general requirements for all nutrient content claims in *21 C.F.R. § 101.13*, and the food for which the claim is made is labeled in accordance with, among others, *21 C.F.R. § 101.9*. *21 C.F.R. § 101.54(a)(1)-(3)*. Generally, a food purveyor may tout its product as a "good source" of a nutrient where that food contains 10 to 19 percent of the recommended daily intake per reference amount customarily consumed. *21 C.F.R. § 101.54(c)(1)*. Fiber claims contain an additional limitation: unless the food is "low" in fat (defined as "low" in the context of total fat by the relevant regulations), a "good source" fiber claim must also disclose the level of fat per serving. *21 C.F.R. § 101.54(d)(1)*.

Constitutional Law > Supremacy Clause > Federal Preemption

Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

[HN16] The Nutrition Labeling and Education Act does

not regulate "front of the box" symbols or photographs.

Constitutional Law > Supremacy Clause > Federal Preemption
Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act
[HN17] The Food and Drug Administration (FDA) has expressly declined to define "natural." While the FDA has articulated an informal policy construing the term, and has agreed that a formal definition would be beneficial, it invoked resource constraints and refused for the time being to settle on a definition. The informal policy is not entitled to preemptive effect. The FDA has not developed even an informal policy governing or defining the word "wholesome." While the term appears in the Federal Food, Drug and Cosmetic Act itself, the FDA has not otherwise entered the fray.

Administrative Law > Separation of Powers > Primary Jurisdiction
[HN18] Primary jurisdiction is a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decision-making responsibility should be performed by the relevant agency rather than the courts. Dismissal on primary jurisdiction grounds does not speak to the jurisdictional power of the federal courts, but rather structures the proceedings as a matter of judicial discretion, so as to engender an orderly and sensible coordination of the work of agencies and courts. The doctrine applies when a court's jurisdiction over a matter overlaps with the jurisdiction of an administrative agency. To justify application of the primary jurisdiction doctrine, the particular agency deferred to must be one that Congress has vested with the authority to regulate an industry or activity such that it would be inconsistent with the statutory scheme to deny the agency's power to resolve the issues in question. Traditionally, a court weighs four factors when applying the doctrine: (1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation
Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation
Antitrust & Trade Law > Trade Practices & Unfair Competition > State Regulation > Claims
Civil Procedure > Justiciability > Standing > Injury in Fact
[HN19] A plaintiff suffers "injury in fact" for the purposes of standing under *Cal. Bus. & Prof. Code §§ 17200* and *17500* when he or she has: (1) expended money due to the defendant's acts of unfair competition; (2) lost money or property; or (3) been denied money to which he or she has a cognizable claim. As for the California False Advertising Law and California's Consumer Legal Remedies Act, courts in California require that plaintiffs demonstrate the purchase of products as a result of deceptive advertising.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview
[HN20] Puffery involves outrageous generalized statements, not making specific claims, that are so exaggerated as to preclude reliance by consumers. Advertising which merely states in general terms that one product is superior is not actionable. On the other hand, misdescriptions of specific or absolute characteristics of a product are actionable.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court
Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > Fraud Claims
[HN21] *Fed. R. Civ. P. 9(b)* requires that plaintiffs allege circumstances constituting the alleged fraud that are specific enough to give defendants notice of the particular misconduct so that they can defend against the charge and not just deny that they have done anything wrong. In the context of a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, failure to plead with adequate particularity typically affords a plaintiff the ability to amend the complaint.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act
Antitrust & Trade Law > Private Actions > Standing > Requirements
[HN22] Under the Lanham Act, any person who uses a

false description or representation that is in connection with any goods is liable to another who believes he is or is likely to be damaged by the use of any such false description or representation. *15 U.S.C.S. § 1125(a)*. The Lanham Act is primarily intended to protect commercial interests from unfair competition. In Jack Russell Terrier Network of Northern California v. American Kennel Club, the Ninth Circuit clarified that different causes of action alleged pursuant to the different subsections of *§ 1125(a)* have different standing requirements. For standing pursuant to the false advertising prong of *§ 1125(a)(1)(B)*, a plaintiff must show: (1) a commercial injury based upon a misrepresentation about a product; and (2) that the injury is competitive, or harmful to the plaintiff's ability to compete with the defendant.

COUNSEL: [**1] For Robert Chacanaca, on behalf of Themselves and All Otehrs Similarly Situated, Victor Guttmann, on behalf of Themselves and All Otehrs Similarly Situated, Plaintiffs: John Joseph Fitzgerald, IV, LEAD ATTORNEY, Santa Clara, CA; Jared Harrison Beck, Beck & Lee Business Trial Lawyers, Miami, FL; Gregory Steven Weston, The Weston Firm, San Diego, CA.

For The Quaker Oats Company, Defendant: Trenton Herbert Norris, LEAD ATTORNEY, Angel A. Garganta, Rachel Lena Chanin, Zachary Bishop Allen, Arnold & Porter LLP, San Francisco, CA.

For Beck & Lee Business Trial Lawyers, Miscellaneous: Jared Harrison Beck, LEAD ATTORNEY, Beck & Lee Business Trial Lawyers, Miami, FL.

JUDGES: RICHARD SEEBORG, UNITED STATES DISTRICT JUDGE.

OPINION BY: RICHARD SEEBORG

OPINION

[*1114] **ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR JUDGMENT ON THE PLEADINGS**

I. INTRODUCTION

Plaintiffs Robert Chacanaca and Victor Guttmann, acting on behalf of a putative class of California consumers, assert that defendant's Chewy Bars product contains "dangerous amounts of trans fat," but are labeled and marketed to suggest that they are in fact wholesome and healthful. Accordingly, their Complaint raises claims for false advertising under the both the Lanham Act and [**2] California law ("FAL"), violations of California's Unfair Competition Law ("UCL"), and violations of California's Consumer Legal Remedies Act ("CLRA"). Plaintiffs do not seek damages. They instead seek an order enjoining the Quaker Oats Company ("Quaker Oats") from including a "0 grams trans fat" statement on the Chewy Bar label, an order compelling "corrective advertising," disgorgement of revenues, and restitution.

At the outset of this action, Quaker Oats requested a temporary stay of discovery and moved immediately for judgment on the pleadings on all of plaintiffs' claims. It argues that the doctrines of express preemption, primary jurisdiction, and Article III standing warrant immediate dismissal of the entire case. In addition, it insists the plaintiffs have not advanced cognizable claims that any statement is misleading as a matter of law.

Quaker Oats' motion for judgment on the pleadings is granted with regard to all claims directed at the "0 grams trans fat" statement, the "good source" of calcium and fiber statements, and the statement indicating that the product contains whole grain oats but lacks high fructose corn syrup. As pleaded, plaintiffs' state law claims seek to [**3] impose a requirement in *addition* to what is mandated by federal statutes and regulations and therefore fail on preemption grounds. Next, plaintiffs have not pleaded that they are in any way in competition with Quaker Oats and they therefore lack standing to bring their Lanham Act claim. As to this claim, Quaker Oats' motion is granted. As to all plaintiffs' remaining claims, Quaker Oats' motion must be denied. In particular, what remains are claims two, three, and four, at least as they pertain to the term "wholesome," the "smart choices made easy" declaration, and depictions of oats, nuts, and children. [1] The discovery stay shall be lifted and the parties shall attend a Case Management Conference as directed at the end of this Order.

1 Claim two is grounded on California's Unfair Competition Law; claim three is grounded on California's False Advertising Law; claim four is grounded on California's Consumer Legal Remedies Act.

[*1115] II. FACTUAL BACKGROUND

This case concerns artificial trans fats, [2] a substance which is chemically manufactured through a process called hydrogenation. Manufacturers add hydrogen atoms to normal vegetable oil by heating the oil to temperatures above 400 degrees Fahrenheit [**4] in the presence of certain ion donor catalyst metals. In its natural state, fat appears in two chemical varieties: (1) fats that lack carbon double bonds, known as saturated fat; and (2) fats that have carbon double bonds, with hydrogen atoms on the same side of the carbon chain, known as cis fats. Trans fats differ from natural fats in that they have double bonds on opposite sides of the carbon chain. The chemical difference is meaningful in several respects. Trans fats boast useful traits characteristic of both types of natural fat: like many vegetable fats occurring in nature, trans fats are legume-based, are relatively inexpensive and, like saturated animal fats, have long shelf-lives in which flavor and texture are maintained. Plaintiffs therefore characterize trans fats as something of a "wonder product" for the packaged food industry. As evidence of their seeming ubiquity, plaintiffs cite to a relatively recent study suggesting that trans fats appear in as many as 40 percent of processed, packaged foods.

> 2 Where this Order discusses "trans fats," it refers to the artificial variety known also as "partially hydrogenated vegetable oil" or "PHVO."

Artificial trans fat does not exist [**5] in nature and plaintiffs contend the human body has not evolved to digest it properly. They argue the very same chemical properties that make trans fat appealing to the food industry also make it "highly toxic" to human health. Plaintiffs rely upon a number of scientific studies (private and governmental) that suggest a link between trans fat consumption and serious, negative health effects such as heart disease, diabetes and cancer. They also point out that certain states and countries have restricted or banned the sale of food products containing trans fats. In any event, they insist in their Complaint that trans fats are not safe for human consumption in any amount.

Defendant's Chewy Bars include hydrogenated vegetable oil in the ingredient list. By contrast, in the nutrition label, defendant states that a single bar contains "0 grams trans fats." The discrepancy arises from federal regulations that govern all statements made in a nutrition box and expressly instruct that any level of trans fat that falls below 0.5 gram per serving must be rounded down to zero. Plaintiffs accept that the "0 grams" carried on the nutrition box complies with FDA regulations. They acknowledge that defendant [**6] would *violate* FDA regulations if it were to attempt to state a decimal amount smaller than 0.5. On a side panel of the Chewy Bars box, defendant repeats the 0 grams trans fats statement. It is this writing--removed as it is from the nutrition facts section but plainly visible to consumers--that plaintiffs insist is false and misleading.

Elsewhere on the box, Quaker Oats also describes Chewy Bars as "wholesome," and "a good source of calcium and fiber." The box reads that the bars are "made with whole grain oats," contain "no high fructose corn syrup," and are among "smart choices made easy." This final statement connotes participation in an industry-sponsored "Smart Choices" program. While plaintiffs acknowledge that these statements are "possibly true," they maintain that the statements imply Chewy Bars are healthful or part of a healthful lifestyle, notwithstanding the hydrogenated oil indisputably contained within them. They suggest images of oats, nuts and children in soccer uniforms that also appear [*1116] on the box contribute further to defendant's inaccurate message.

The named plaintiffs allege they repeatedly purchased defendant's Chewy Bars for personal consumption in numerous California [**7] stores. Absent defendant's "material deceptions, misstatements, and omissions," relating to the presence of trans fats in defendant's product, plaintiffs insist they would not have made those purchases.

III. LEGAL STANDARD

[HN1] *Federal Rule of Civil Procedure 12(c)* provides that, "[a]fter the pleadings are closed[,] . . . a party may move for judgment on the pleadings." A court accepts all factual allegations in the complaint as true and construes them in the light most favorable to the non-moving party. *See Turner v. Cook, 362 F.3d 1219, 1225 (9th Cir. 2004)*. "A judgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law." *Heliotrope Gen., Inc. v. Ford Motor Co., 189 F.3d 971, 978 (9th Cir. 1999)*.

IV. DISCUSSION

A. The Statutory Framework.

[HN2] The Federal Food, Drug, and Cosmetic Act ("FDCA") was enacted in 1938. It prohibits the misbranding of food. In 1990, Congress amended the FDCA through the passage of the Nutrition Labeling and Education Act ("NLEA"). The NLEA aimed to "clarify and . . . strengthen the Food and Drug Administration's legal authority to require nutrition labeling on foods, [**8] and to establish the circumstances under which claims may be made about nutrients in foods." H.R. Rep. No. 101-538, at 7 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3336, 3337. The many subsections of *21 U.S.C. § 343* establish the conditions under which food is considered "misbranded." Generally, food is misbranded under *21 U.S.C. § 343(a)(1)* if "its labeling is false or misleading in any particular." Two statutory *sections--343(q)* and *(r)*--impose more specific labeling requirements and are directly in issue here. Respectively, these sections regulate the information that goes into the "nutrition box" section on all packaged products and nutrient content claims that appear elsewhere on the label.

[HN3] *Section 343(q)* governs "nutrition information" and discusses information that *must* be disclosed about certain nutrients in food products. It is principally in the nutrition box area that a food manufacturer must inform consumers of, for example, the total number of calories per serving or the quantities of various nutrients contained in a food product. *See 21 U.S.C. § 343(q)*; *New York State Rest. Ass'n v. New York City Bd. of Health, 556 F.3d 114, 118 (2d Cir. 2009)*. An accompanying regulation, *21 C.F.R. § 101.9*, [**9] further requires "[a] statement of the number of grams of trans fat in a serving, defined as the sum of all unsaturated fatty acids that contain one or more isolated (i.e., nonconjugated) double bonds in a trans figuration . . . ." *21 C.F.R. § 101.9(c)(2)(ii)*. [HN4] More simply, this regulation requires a declaration of trans fat content, at least where trans fat is meaningfully present in a food. The regulation states that "[t]rans fat content shall be indented and expressed as grams per serving to the nearest 0.5 gram increment below 5 grams and to the nearest gram increment above 5 grams. If the serving contains less than 0.5 gram, the content, when declared shall be expressed as zero." *Id.* Where a product contains less than 0.5 gram, the manufacturer need *not* include the zero gram statement at all unless a nutrient content claim is made elsewhere about fat, fatty acid or cholesterol content. *Id.* In a final rule issued in 1993, the FDA described this rounding [*1117] down regulation as follows: "[t]he nutrition labeling regulation prescribed levels for nutrients that are nutritionally trivial, i.e., those nutrients that are present in a food at insignificant amounts and that consequently are [**10] declared as zero on the nutrition label (e.g., less than 5 calories and less than 0.5 g total fat)." *58 Fed. Reg. 44020*-01, 44024 (Aug. 18, 1993). [3]

> 3 Generally speaking, a nutrient content claim (explained in further detail below) indicating that a food is "free" of a particular nutrient (such as the claim that a food is "sodium free") also employs the same rounding down feature. As the Agency has explained, "[b]ecause these values are nutritionally trivial, they are also the defining values for 'free' claims." *58 Fed. Reg. at 44024*.

[HN5] *Section 343(r)* discusses "nutrition levels and health-related claims" about a food product made anywhere on a product label. This provision governs all *voluntary* statements about nutrient content or health information a manufacturer chooses to include on a food label or packaging. Specifically, the section covers claims that "expressly or by implication," "characterize[] the level of any nutrient," or "characterize[] the relationship of any nutrient . . . to a disease or health related condition . . . ." *21 U.S.C. § 343(r)(1)*. The FDA has promulgated regulations regarding three specific kinds of claims: express nutrient content claims; implied nutrient content [**11] claims; and health claims. *See 21 C.F.R. §§ 101.13, 101.14*. An express nutrient content claim is a direct statement about the level or range of a nutrient in a food, like "100 calories." A purveyor may include such a claim so long as it "does not in any way implicitly characterize the level of the nutrient in the food and it is not false or misleading in any respect (e.g., '100 calories' or '5 grams of fat'), in which case no disclaimer is required." *21 C.F.R. § 101.13(i)(3)*.

[HN6] An implied nutrient content claim describes food or an ingredient in a manner that suggests that a nutrient is absent or present in a certain amount, such as "high in oat bran." An implied content claim might also make a comparative statement, like "contains as much fiber as an apple," or might suggest that the product is consistent with a nutritional or healthy diet. *See 21 C.F.R. § 101.13(b)(2)(i)-(ii)*. Notably, the section prohibits the use of certain terms--such as "free," "low," or "good source"--that characterize the level or range of any nutrient in a food unless these terms conform to

definitions established by the Secretary. *21 C.F.R. § 101.13(b)(1)*. Finally, a health claim is one that specifically "characterizes [**12] the relationship of any substance to a disease or health-related condition." *21 C.F.R. § 101.14*. A food purveyor *may* include implicit content claims so long as they are "consistent with a definition for a claim," as provided in a federal regulation.

[HN7] *Section 343(r)* adds that, "[a] statement of the type required by *[Section 343(q)*] that appears as part of the nutrition information required or permitted by such paragraph is not a claim which is subject to this paragraph." *21 U.S.C. § 343(r)(1)*. As it appears in the Chewy Bar nutrition box, therefore, "0 grams trans fat" is a classic example of a statement that is *not* a nutrient content claim. An accompanying regulation, *21 C.F.R. § 101.13*, further instructs, however, that "[i]f such information is declared elsewhere on the label or in labeling, it *is* a nutrient content claim and is subject to the requirements for nutrient content claims." *21 C.F.R. § 101.13(c)* (emphasis added).

B. Federal Preemption.

[HN8] Pursuant to the *Supremacy Clause*, federal law preempts state law when: (1) Congress enacts a statute that [*1118] explicitly preempts state law; (2) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress [**13] left no room for state regulation in that field; or (3) state law actually conflicts with federal law. *Chae v. SLM Corp., 593 F.3d 936, 941 (9th Cir. 2010)*. The first circumstance is principally at issue here. The "purpose of Congress is the ultimate touchstone in every preemption case." *Altria Group, Inc. v. Good, 555 U.S. 70, 129 S. Ct. 538, 543, 172 L. Ed. 2d 398 (2008)* (internal quotation marks omitted). The Supreme Court has also instructed that a court must "start with the assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *United States v. Locke, 529 U.S. 89, 107, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000)* (internal quotation marks omitted). This presumption against preemption is heightened where "federal law is said to bar state action in fields of traditional state regulation." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995)*. In light of the historical "primacy of state regulation of matters of health and safety," *Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)*, courts can assume that "state and local regulation related to [such] matters . . . can normally coexist with federal [**14] regulations." *Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 718, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985)*. Where Congress does provide for express preemption, the presumption against preemption requires courts to read the clause narrowly. *Medtronic, 518 U.S. at 485*.

[HN9] The NLEA states that it "shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under [*21 U.S.C. § 343-1(a)*] of the [FDCA]." Pub. L. No. 101-535, § 6(c)(1), 104 Stat. 2353, 2364. *See also In re Farm Raised Salmon Cases, 42 Cal. 4th 1077, 1091, 72 Cal. Rptr. 3d 112, 175 P.3d 1170 (2008)* ("Congress made clear that the preemptive scope of *section 343-1* was to sweep no further than the plain language of the statute itself."). It does contain two express preemption provisions relating to *sections 343(q)* and *(r)*. *Section 343-1(a)(4)* expressly preempts any state or local "requirement for nutrition labeling of food that is not identical to the requirement of *section 343(q)*." *Section 343-1(a)(5)*, in turn, preempts state or local governments from imposing any requirement on nutrient content claims made by a food purveyor "in the label or labeling of food that is not identical to the requirement of *section 343(r)*." The Supreme Court [**15] has clarified that, in the context of express preemption provisions, the term "requirements" reaches beyond positive enactments like statutes and regulations, to embrace common-law duties and judge-made rules. *See Bates v. Dow Agrosciences, LLC, 544 U.S. 431, 443, 125 S. Ct. 1788, 161 L. Ed. 2d 687 (2005)*. Where a requirement imposed by state law effectively parallels or mirrors the relevant sections of the NLEA, courts have repeatedly refused to find preemption. *See, e.g., New York State Rest. Ass'n, 556 F.3d at 123*; *Chavez v. Blue Key Natural Beverage Co., 268 F.R.D. 365, 370 (N.D. Cal. 2010)*. The FDA itself appears to endorse this approach. *See Final Rule, 60 Fed. Reg. 57076, 57120 (Nov. 13, 1995)* ("[I]f the State requirement does the same thing that the Federal law does . . . then it is effectively the same requirement as the Federal requirement . . . . [T]he only State requirements that are subject to preemption are those that are affirmatively different from the Federal requirements on matters that are covered by *section 403A(a)* of the act.").

[*1119] This means that plaintiffs' claims need not fail on preemption grounds if the requirements they seek to impose are either identical to those imposed by the FDCA and the NLEA [**16] amendments or do not involve claims or labeling information of the sort described in *sections 343(r)* and *343(q)*. *See Ackerman v. Coca-Cola Co.*, No. 09-0395, 2010 U.S. Dist. LEXIS 73156, 2010 WL 2925955, at *6 (E.D.N.Y. July 21, 2010) (reviewing NLEA's preemptive effect where plaintiffs challenged as misleading content claims made with regard to labeling of Vitamin Water). That is, if the statements at issue are nutrient content claims as contemplated by *subsection (r)*, plaintiffs' deception claims may only go forward if they can show that the statements would also be "misbranded" under the terms of the Act. If the statements are not nutrient claims, then the NLEA's express preemption provision would not in the ordinary circumstance come into play.

1. "0 Grams Trans Fat."

The threshold question is whether the "0 grams trans fat" statement that appears on the side label of the Chewy Bars box (but outside the nutrition box) is a nutrient content claim. The answer is yes, *subsection (r)* (and its regulations) controls, and the express preemption provision of *section 343-1* is implicated. Specifically, the statement is an express nutrient content claim, or a "direct statement about the level (or range) of a nutrient in [**17] [a] food . . . ." *21 C.F.R. § 101.13(b)(1)*. *See also New York State Rest. Ass'n, 556 F.3d at 126* (reading regulation *101.13(c)* as an "unequivocal" instruction that quantitative statements should be understood as express nutrient content claims); *58 Fed. Reg. 2302-01, 2303-04 (1994)* ("FDA stated in the general principles proposal (*56 Fed. Reg. 60421 at 60424)*, that the legislative history of *[section 343(r)(1)*] specifically states that the identical information will be subject to the descriptor requirements if it is included in a statement in another portion of the label . . . ."). As detailed above, a food purveyor can make an "express" content claim so long as it does not "in any way implicitly characterize the level of the nutrient in the food and it is not false or misleading in any respect . . . ." It is beyond dispute that, at least as it appears in the nutrition box, the "0 grams trans fat" statement must be rounded down to zero. The question which then arises is whether an express content claim that repeats the "0 grams" language elsewhere can be "misleading"--and would therefore be misbranded--within the meaning of section (r). If it can, plaintiffs' claims are not expressly [**18] preempted.

Plaintiffs argue that their state law claim asserts only that, removed from the nutrition box, the 0 grams trans fat statement is misleading because it implies that Chewy Bars contain no trans fats *whatsoever* (as opposed to the "0 grams" that appears in the nutrition box, which means instead anywhere from none to "nutritionally insignificant amounts" of trans fat, not exceeding 0.5 gram per serving). As an initial matter, the parties agree that the side-panel statement is voluntary. Nothing in the FDA statutes or regulations *requires* Quaker Oats to declare the trans fat level in this manner. [4] Moreover, plaintiffs' claim asks for an order *prohibiting* the statement; they do not necessarily argue that Quaker Oats must make any affirmative, different statement. To support their argument that the side-panel statement is misleading, plaintiffs point out [*1120] that the nutrition box statement is positioned in close proximity to the Chewy Bars ingredient list, which does include partially hydrogenated vegetable oil. The nutrition box also includes serving size information and consumers can presumably infer that, while each Chewy Bar contains at most trivial amounts of trans fat, consumption [**19] of *several* bars could entail non-trivial amounts (that is, amounts that exceed 0.5 gram). [5]

4 Technically, Quaker Oats was required to declare the "0 grams" trans fat in the nutrition box only *because* it made the content claim elsewhere. *See 21 C.F.R. § 101.9(c)(2)(ii)*.

5 Defendant reads the regulation outlining the manner in which a purveyor may make an express content claim as a statement that an express claim *cannot* be misleading if it simply restates the information in the nutrition box. This is not necessarily so. The regulation states, in relevant part, that, "the label or labeling of a product may contain a statement about the amount or percentage of a nutrient if: (3) The statement does not in any way implicitly characterize the level of the nutrient in the food and it is not false or misleading in any respect (e.g., '100 calories' or '5 grams of fat'), in which case no disclaimer is required . . . ." *21 C.F.R. § 101.13(i)(3)*. The position of "5 grams of fat" or "100 calories" in the sentence, defendant theorizes, operates as an example of a categorically non-misleading, express content claim. The FDA's Final Rule describing this particular section acknowledges,

> however, that even [**20] express claims can be misleading: "The agency believes that statements concerning the amount and percentage of nutrients in food can provide useful information to consumers and flexibility to the food manufacturer in stating the nutritional attributes of a food. However, FDA recognizes that these statements can be misleading." *58 Fed. Reg. 2302-01, 2308-09 (Jan. 6, 1993)*.

Defendant cannot point to any instruction in *section (r)* or any nutrient content regulation that specifically *requires* that express content claims must reference the rounded figures that appear in the nutrition labeling section. An express content claim, rather, must "not in any way implicitly characterize the level of the *nutrient* in the food" and must not be "false or misleading in any respect." *21 C.F.R. § 101.13(i)(3)* (emphasis added). What the regulation does not address is whether or not an express claim must refer to the rounded level that appears in the nutrition box or if it instead should refer to the *actual* nutrient level.

[HN10] Reference to another subsection of regulation *101.13* sheds some light on the agency's approach to content claims in the context of rounding. *Section 101.13(j)* generally governs "reference" [**21] claims, or claims that compare the nutrient level of a product to a reference product. Take for example a food purveyor who has reduced the level of fat in its own product by 25 percent. Imagine the purveyor wishes to highlight the reduction by adopting a "reference" claim. As originally codified, *section 101.13(j)(1)(ii)(B)* required that the purveyor reference "the value declared in the nutrition labeling of the [prior version of the] product, i.e., the rounded value." The regulation did not specify, however, whether the values used to determine compliance with the 25 percent claim were to be the rounded or actual values. In a subsequent notice and comment period, the Agency received comments voicing concern over the possibility of consumer confusion where, for example, the claimed change reflected actual values but did not match the rounded values identified in the label. In response, the Agency modified *subsection (j)* so that reference claims may employ either the rounded or actual values, so long as the label is internally consistent. *58 Fed. Reg. 44020*-01 at 44024. The Agency also made the following observation on "absolute" claims that helps resolve the dilemma here:

> [B]ecause [**22] there is no need to specify the actual amount of the nutrient in the food relative to the claim and, as discussed in the mandatory nutrition labeling final rule, because there is no nutritional difference between rounded and unrounded values of a nutrient in a food, the agency does not [*1121] see a need to specify which value should be used in determining whether or not a food qualifies to make a nutrient content claim. *Id.*

Thus, [HN11] the Agency has not explicitly required that express content claims employ the rounded figure that appears in the nutrition box, reasoning instead that the difference between actual and rounded values are "nutritionally insignificant." The Agency has urged that the use of *either* value functionally relays identical information. That said, the Agency has also at least in response to comments expressed a preference for internal consistency between the nutrition box and the rest of the label. In the context of reference claims, the Agency opined, "it is more important to prevent consumer confusion by having consistency on the food label than to be prescriptive as to the method by which nutrient values for relative claims are determined and used." *Id.* [6] Accordingly, if "nutritionally [**23] insignificant amounts" of less than 0.5 gram trans fats means the same thing, according to Agency regulations, as "0 grams," then the use of the latter language in an express nutrient content claim would *not* be misleading within the meaning of *section (r)* or any of its regulations. The statement would not be misbranded under *subsection (r)* and the plaintiffs' state law claims therefore seek to impose a non-identical burden. It is for this reason that plaintiffs' claims relying on the use of this particular statement are preempted.

> 6 *Subsection (o)* of the nutrient content regulation also appears to provide some support for defendant's preemption claim. [HN12] It instructs that, "[e]xcept as provided in *§ 101.10*, compliance with the requirements for nutrient content claims in this section and in the regulations in subpart D of this part, will be determined using the analytical methodology prescribed for determining compliance with nutrition labeling in *§ 101.9*." *Section 101.9* relates to mandatory nutrition information under *section 343(q)*'s ambit. It also instructs that trans fat content must be "expressed as grams per serving to the nearest 0.5 gram increment," and

> "[i]f the serving contains [**24] less than 0.5 gram, the content, when declared, shall be expressed as zero." *21 C.F.R. § 101.9(c)(2)(ii)*. The "analytical methodology" phrase refers to the Agency's preferred mechanism for measuring actual nutrient levels in food products. Because this method apparently cannot reliably calculate nutrient levels below 0.5 gram, these low levels are rounded to zero. In short, *section 101.13(o)* at least tangentially supports defendant's argument that express content claims should employ rounded values.

2. Made With Whole Grain Oats but *Not* With High Fructose Corn Syrup.

Plaintiffs also attack the inclusion in the label of an ingredient (contains whole grain oats) and a statement proclaiming the absence of another (no high fructose corn syrup). As to oats, [HN13] a simple statement of an ingredient need not necessarily count as a nutrient content claim. The FDA has instructed, however, that it may function as such a claim under some circumstances. The court in *Ackerman v. Coca-Cola* in fact relied on the statement "high in oat bran" as an example of an implied nutrient content claim because it also suggested a high dietary fiber content. 2010 WL 2010 U.S. Dist. LEXIS 73156, 2925955, at *3. Plaintiffs, for their part, insist [**25] that the oat claim *is* an implied content claim intended to convey that Chewy Bars are part of a healthful diet, notwithstanding the fact that they contain hydrogenated vegetable oil. The high fructose corn syrup claim is also a content claim. *Section 101.13* regulates the manner in which a purveyor may claim the absence of any nutrient. A label may do so only where the food has been "specially processed" or "formulated" to remove the nutrient. If it is a food that in its natural state lacks the nutrient, the [*1122] purveyor must also so indicate. *See C.F.R. § 101.13(e)(1)-(2)*.

Plaintiffs do not contend that either statement is directly false; they acknowledge that Chewy Bars contain whole grain oats and lack high fructose corn syrup. Instead, they suggest that the presence of hydrogenated vegetable oil makes these claims, to the extent they suggest Chewy Bars are nutritionally healthful, misleading. The federal regulatory statute provides for this precise scenario: [HN14] that is, it categorizes as misleading and therefore prohibited even true nutrient content claims if the presence of another "disqualifying" nutrient exceeds an amount established by regulation. [7] The Agency has by regulation imposed [**26] "disqualifying" levels for only four nutrients: total fat, saturated fat, cholesterol, and sodium. *21 C.F.R. §§ 101.13(h)(1), 101.14(a)(4)*.

> 7 The statutory framework generally requires that a "disclaimer" accompany the content claim, rather than prohibit the content claim entirely.

It is important to note how disqualifying claims work. A disqualifying level of, say, saturated fat is four grams per "reference amount customarily consumed." *21 C.F.R. § 101.13(h)(1)*. If this level is exceeded, a food purveyor is *prohibited* from making an unqualified claim touting the health benefits of another nutrient in the food. This is because the Agency has reasoned that the beneficent claim, standing alone, would be misleading. Notably, the FDA in a recent final rule declined to set disqualifying levels for trans fats. It expressed an intent to "continue to evaluate the evolving science and, when the science has evolved to a point where the agency believes it can proceed with scientifically-based definitions and levels for these claims, it will proceed to do so through a new rulemaking." *68 Fed. Reg. 41434*-01, 41465 (July 11, 2003).

As a matter of federal law, then, the presence of trans fats alone is [**27] not a "disqualifying" nutrient which would prevent Quaker Oats from emphasizing whatever other health benefits are available from the Bars' other ingredients or because it lacks certain ingredients. Because the Agency has expressly decided *not* to recognize trans fats as a disqualifying nutrient, plaintiffs' state law claim is inconsistent with *subsection (r)* and its regulations to the extent it depends on the presence of trans fats to render the content claims misleading. *See Ackerman v. Coca-Cola Co.*, 2010 U.S. Dist. LEXIS 73156, 2010 WL 2925955, at *8 (finding plaintiff's claim that high sugar content in beverage made health claims misleading preempted where FDA failed to establish sugar as a disqualifying nutrient). Essentially, plaintiffs' claim asks this Court to *ascribe* disqualifying status to trans fats where the Agency has at least so far declined to do so.

3. Good Source Claims.

Next, Quaker Oats contends its claims that Chewy Bars are a "good source" of calcium and fiber are implied nutrient content claims regulated by *section 343(r)*. It

suggests any argument that these claims are misleading in light of some amount of trans fats in the product similarly is also expressly preempted. [HN15] In *21 C.F.R. § 101.54*, [**28] the Agency defined "good source" nutrient content claims. A good source claim uses only those terms defined by the Secretary, is made in accordance with the general requirements for all nutrient content claims in *section 101.13*, and the food for which the claim is made is labeled in accordance with, among others, *section 101.9*. *21 C.F.R. § 101.54(a)(1)-(3)*. Generally, a food purveyor may tout its product as a "good source" of a nutrient where that food contains 10 to 19 percent of the recommended daily [*1123] intake "per reference amount customarily consumed." *21 C.F.R. § 101.54(c)(1)*. Fiber claims contain an additional limitation: unless the food is "low" in fat (defined as "low" in the context of total fat by the relevant regulations), a "good source" fiber claim must also disclose the level of fat per serving. *21 C.F.R. § 101.54(d)(1)*.

Plaintiffs argue that, even if it is true that Chewy Bars qualify as a "good source" of these two nutrients, inclusion of the claims "falsely" implies that the product is healthy. As explained above, the FDA has at least so far declined to include trans fat as a disqualifying ingredient and food purveyors need not disclose trans fat levels whenever they tout [**29] the existence of other nutrients. As plaintiffs have presented no other evidence to support their claim that these two good source claims violate the NLEA amendments or attendant regulations, their state law deception claims are preempted.

4. Wholesome, Smart Choices Made Easy, Photographs of Healthy Children, Oats, and Nuts.

Finally, plaintiffs attack photographic depictions of oats, nuts, and children in soccer uniforms, the inclusion of a "smart choices made easy" decal, and the general descriptor "wholesome" as all being deceptive. These words, decals, and figures, plaintiffs argue, generally depict Chewy Bars as a "smart" diet choice or as a product that would contribute to a healthy and wholesome lifestyle. Neither the decal nor the children are appropriately categorized as nutrient content claims, and defendant's contention that the NLEA preempts the charge that they are misleading is without support. [HN16] The NLEA does not regulate "front of the box" symbols such as the smart choices decal or the photographs. Defendant has submitted a copy of a Notice from the Agency, dated April of 2010, expressing an interest in determining whether regulation in this arena would be helpful to consumers. [**30] *See 75 Fed. Reg. 22602*-01 (Apr. 29, 2010). Until the Agency brings "front of the box" symbols and photographs into its regulatory ambit, however, it appears a state law claim that seeks only to prohibit false or misleading statements would not contravene federal law.

The word "wholesome" could, of course, be interpreted implicitly to characterize the bars' nutrients. It is, however, a word with broader meaning than typical claims implying healthfulness and does not describe any particular nutrient. While neither party presents any case law interpreting the word "wholesome" against a NLEA preemption argument, courts often address the word "natural." The analysis typically employed in that context is instructive here. In a case involving a label for the beverage Snapple, it was touted as being "all natural," despite the fact that high fructose corn syrup appeared in the ingredient list. *Holk v. Snapple Beverage Corp., 575 F.3d 329 (3d Cir. 2009)*. High fructose corn syrup is not a "naturally" occurring substance and the plaintiffs insisted that descriptor was therefore misleading. In rejecting the beverage maker's preemption argument, the Third Circuit observed that [HN17] the FDA had expressly [**31] declined to define "natural." *Id. at 341*. While the Agency had articulated an "informal policy" construing the term, and had agreed that a formal definition would be beneficial, it invoked resource constraints and refused for the time being to settle on a definition. The Third Circuit reasoned that the informal policy was not entitled to preemptive effect and allowed plaintiffs' state law deception claims to proceed. *Id.* Here, the Agency has not developed even an informal policy governing or defining the word "wholesome." While the term appears in the FDCA statute itself (the FDCA gives [*1124] the FDA the responsibility to promulgate regulations to ensure that "foods are safe, wholesome, sanitary, and properly labeled," *21 U.S.C. § 393(b)(2)(A)*), the Agency has not otherwise entered the fray. Based on this record and in light of the presumption against preemption, plaintiffs' state claims arguing that "wholesome" is misleading as used here is not preempted.

C. Primary Jurisdiction.

[HN18] "Primary jurisdiction" is a "prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decision-making

responsibility should be performed by the relevant agency rather [**32] than the courts." *Syntek Semiconductor Co., Ltd. v. Microchip Technology, Inc., 307 F.3d 775, 780 (9th Cir. 2002)*. Dismissal on primary jurisdiction grounds "does not speak to the jurisdictional power of the federal courts," but rather "structures the proceedings as a matter of judicial discretion, so as to engender an orderly and sensible coordination of the work of agencies and courts." *United States v. Bessemer & L. E. R.R., 717 F.2d 593, 599, 230 U.S. App. D.C. 316 (D.C. Cir. 1983)*. The doctrine applies when a court's jurisdiction over a matter overlaps with the jurisdiction of an administrative agency. *United States v. Western Pac. R.R. Co., 352 U.S. 59, 63-64, 77 S. Ct. 161, 1 L. Ed. 2d 126, 135 Ct. Cl. 997 (1956)*. To justify application of the primary jurisdiction doctrine, "[t]he particular agency deferred to must be one that Congress has vested with the authority to regulate an industry or activity such that it would be inconsistent with the statutory scheme to deny the agency's power to resolve the issues in question." *United States v. Gen. Dynamics Corp., 828 F.2d 1356, 1363 (9th Cir. 1987)*. Traditionally, a court weighs four factors when applying the doctrine: "(1) the need to resolve an issue that (2) has been placed by Congress within the [**33] jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." *Syntek, 307 F.3d at 781*.

Without question, the FDA has extensively regulated food labeling in the context of a labyrinthine regulatory scheme. Nonetheless, plaintiffs advance a relatively straightforward claim: they assert that defendant has violated FDA regulations and marketed a product that could mislead a reasonable consumer. As courts faced with state-law challenges in the food labeling arena have reasoned, this is a question "courts are well-equipped to handle." *See, e.g., Lockwood v. Conagra Foods, Inc., 597 F. Supp. 2d 1028 (N.D. Cal. 2009)*. Moreover, the issues that survive defendant's preemption arguments--whether or not the "smart choices made easy" decal, the photographs of oats, nuts, and children in soccer uniforms, or the term "wholesome" are misleading--do not entail technical questions or require agency expertise. Accordingly, it would be neither necessary nor appropriate to invoke the primary jurisdiction doctrine here, especially in that [**34] it is unclear what form of relief plaintiffs might hope to obtain from referral to the Agency. Defendant's motion to for judgment on the pleadings on the basis of primary jurisdiction must therefore be denied, along with their corresponding "abstention" defense.

D. Standing under the UCL, state FAL laws, and the CLRA.

Quaker Oats argues that plaintiffs have not established an injury in fact and therefore lack Article III standing to bring their UCL, FAL, or CLRA claims. Specifically, defendant argues plaintiffs have categorically failed to plead any health-related ailment or impact from consumption [*1125] of the trans fat-laden snacks. Plaintiffs correctly point out that the particular harm for which they seek redress is not health related. Rather, their claims sound in deception, unfairness and false advertising. As for their UCL claims, [HN19] a plaintiff suffers "injury in fact" for the purposes of standing under *Sections 17200* and *17500* when he or she has: (1) expended money due to the defendant's acts of unfair competition; (2) lost money or property; or (3) been denied money to which he or she has a cognizable claim. *Hansen Beverage Co. v. Innovation Ventures, No. 08-1166, 2009 U.S. Dist. LEXIS 127605, 2009 WL 6597891, at *15 (Dec. 23, 2010)* [**35] (*citing Hall v. Time Inc., 158 Cal. App. 4th 847, 70 Cal. Rptr. 3d 466 (2008)*). As for the FAL and CLRA, courts in California require that plaintiffs demonstrate the purchase of products as a result of deceptive advertising. *See, e.g., Laster v. T-Mobile United States, Inc., 407 F. Supp. 2d 1181, 1194 (S.D. Cal. 2005)*. The injury alleged here is the *purchase* of food products that contain an ingredient the plaintiffs find objectionable. Had they known about the trans fat content, they insist, they would not have purchased the product. Defendant's health-based harm argument misses the mark, as plaintiffs have adequately alleged an injury directly related to the redress they seek.

E. A Cognizable Claim For Relief or Non-Actionable Puffery?[8]

> 8 Defendant also relies on *Cel-Tech Communications, Inc. v. Los Angeles Cellular, 20 Cal. 4th 163, 182, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*, to argue that plaintiffs' California UCL, FAL and CLRA claims must be dismissed. In *Cel-Tech*, the California Supreme Court instructed that, "Courts may not simply impose their own notions of the day as to what is fair or unfair." *Id.* "If the Legislature has permitted certain conduct or considered a situation and

> concluded no action should lie, courts may not override [**36] that determination. When legislation provides a 'safe harbor,' plaintiffs may not use the general unfair competition law to assault that harbor." *Id.* Quaker Oats' safe harbor defense argues merely that the "0 grams trans fat" statement is permitted by *section 343(r)* (and required by *section 343(q)*, at least as it appears in the nutrition box). As noted above, all claims addressing the "0 grams trans fat" statement are expressly preempted. Accordingly, defendant's safe harbor argument is moot.

As to those statements noted above that are not subject to preemption, defendant makes the additional argument that, because they are entirely truthful or, at best, represent non-actionable puffery, plaintiffs cannot as a matter of law establish that any of them are misleading. [HN20] Puffery involves "outrageous generalized statements, not making specific claims, that are so exaggerated as to preclude reliance by consumers." *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246 (9th Cir. 1990)*. "[A]dvertising which merely states in general terms that one product is superior is not actionable." *Id.* (*quoting Smith-Victor Corp. v. Sylvania Elec. Prods., Inc., 242 F. Supp. 302, 308 (N.D. Ill. 1965)*. [**37] On the other hand, "misdescriptions of specific or absolute characteristics of a product are actionable." *Cook, 911 F.2d at 246*.

As to "wholesome," Quaker Oats insists that the term is so vague and general that a reasonable consumer would not be misled. For support, Quaker Oats relies upon a district court decision finding that the phrase, "[the] most wholesome nutritious safe foods you can buy anywhere in the world," constituted non-actionable puffery. *Tylka v. Gerber Products Company, No. 96-1647, 1999 U.S. Dist. LEXIS 10718, 1999 WL 495126, at *2 (N.D. Ill. July 1, 1999)*. The use of the word "wholesome," however, was only part of the phrase deemed puffery in *Tylka*. It was surely the idea that there were no more nutritious, safe, or wholesome products available *anywhere* else around the globe that rose to the level of unbelievable exaggeration. The insistence that a product [*1126] with (allegedly) dangerous additives is nonetheless "wholesome," by contrast, arguably *could* mislead a reasonable consumer. Accordingly, at this juncture, the term "wholesome" cannot be deemed to constitute non-actionable puffery.

Similarly, Quaker Oats insists the "smart choices made easy" decal is either true or constitutes puffery. Either [**38] way, Quaker Oats contends a reasonable consumer could not find the symbol or any of its possible implications to be misleading. According to plaintiffs, the smart choices program itself is "deceitful," and is a product of an "industry-funded initiative created by a coalition of market giants." (Pls.' Opp'n at 23:2-4.) Plaintiffs argue the decal is "nutritionally suspect" and is designed to make "highly processed foods appear as healthful as unprocessed foods." (*Id.* at 10-11.) As with "wholesome," a determination of whether or not the decal is non-actionable owing to its status as either true or harmless puffery cannot be determined on this motion.

Finally, Quaker Oats asks the Court to reject plaintiffs' argument that photographic depictions of oats, nuts, and children in soccer uniforms are misleading. Taking plaintiffs' allegation that trans fats are not safe in any amount as true, and crediting the inference plaintiffs draw from the box (that is, that active, healthy children are fueled with Chewy Bars), the Court cannot resolve at this juncture the issue of whether or not a reasonable consumer might be duped by these depictions.

F. Pleading with Particularity: *Federal Rule of Civil Procedure 9(b)*.

Defendant [**39] argues that plaintiffs' claims sound in fraud and therefore must satisfy the particularity requirement of *Rule 9(b)*. *See Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103-04 (9th Cir. 2003)*. [HN21] *Rule 9(b)* requires that plaintiffs allege circumstances constituting the alleged fraud that are "specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Id. at 1106* (*quoting Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001)*).

In the context of a 12(b)(6) motion to dismiss, failure to plead with adequate particularity typically affords a plaintiff the ability to amend the complaint. Defendant wishes to avoid that result here and instead terminate this action. Even assuming defendant's *Rule 9(b)* arguments are relevant to the consideration of a motion for judgment on the pleadings, plaintiffs have identified the particular statements they allege are misleading, the basis for that contention, where those statements appear on the product packaging, and the relevant time period in which the statements were used. As such, they have satisfied the requisite "who, what, when, where, [**40] and how" of

the misconduct charged. *See Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009)*.

G. Standing to bring the Lanham Act / False Advertising Claim.

Defendant seek judgment as a matter of law on plaintiffs' Lanham Act claims and again raises a standing argument, this time pointing out that the Lanham Act governs unfair competition only between competitive entities. Because plaintiffs are private individuals (indeed, consumers), defendant insists they lack standing to sue for false advertising under the Act. [HN22] Under the Lanham Act, any person who uses a "false description or representation" that is "in connection with any goods" is liable to another "who believes he is or is likely to be damaged by the use of any such false description or representation." *15 U.S.C. § 1125(a)*. *See generally Jarrow Formulas, Inc. v. Nutrition* [*1127] *Now, Inc., 304 F.3d 829, 835 (9th Cir. 2002)* (*citing Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997))*. The Lanham Act is primarily intended to protect commercial interests from unfair competition. *See Mut. Pharm. Co. v. Ivax Pharms., Inc., 459 F. Supp. 2d 925, 934-34 (C.D. Cal. 2006)* (*citing Sandoz Pharm. Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 230 (3rd Cir. 1990))*.

In [**41] *Jack Russell Terrier Network of Northern California v. American Kennel Club, 407 F.3d 1027, 1037 (9th Cir. 2005)*, the Court clarified that "different causes of action alleged pursuant to the different subsections of *15 U.S.C. § 1125(a)* have different standing requirements." "[F]or standing pursuant to the 'false advertising' prong of § 43(a) of the Lanham Act, *15 U.S.C. § 1125(a)(1)(B)*, a plaintiff must show: (1) a commercial injury based upon a misrepresentation about a product; and (2) that the injury is "competitive," or harmful to the plaintiff's ability to compete with the defendant." *Id.* (citations omitted). Plaintiffs here do not argue that they mean to compete in any way with Quaker Oats and therefore cannot satisfy the second prong of the standing requirement. Instead, they counter by pointing out that they seek only injunctive relief under the Act, pursuant to *section 1116*, where the standing requirements are more relaxed. *Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, (9th Cir. 1997)* ("First of all, a competitor need not prove injury when suing to enjoin conduct that violates *section 43(a)*.") (internal quotation marks and citation omitted). *Southland Sod Farms*, however, [**42] does not stand for the proposition that a non-competitor otherwise without standing may bring a false advertising claim if only injunctive relief is requested. In short, plaintiffs have not shown that they have standing to sue under the Lanham Act and judgment must therefore be entered against them on this claim.

V. CONCLUSION

For the reasons stated above, plaintiffs' state law claims targeting the "0 grams trans fat," "good source," "made with whole grain oats," and "no high fructose corn syrup" declarations must fail on preemption grounds. As plaintiffs lack standing under the Lanham Act, judgment is entered for defendants on this claim also. Insofar as Quaker Oats seeks a favorable judgment at this juncture on all state claims that focus on the term "wholesome," on images of children, nuts, or oats, or the "smart choices made easy" language or decal, its motion is denied. A Further Case Management Conference shall be held on **December 16, 2010 at 10:00 a.m.** in Courtroom 3, on the 17th Floor of the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California. The parties shall submit a Joint Case Management Statement at least one week prior to the Conference.

IT IS SO [**43] ORDERED.

Dated: 10/14/10

/s/ Richard Seeborg

RICHARD SEEBORG

UNITED STATES DISTRICT JUDGE