475 Fed.Appx. 113, 2012 WL 1131526 (C.A.9 (Cal.))
(Not Selected for publication in the Federal Reporter)
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This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)

United States Court of Appeals,
Ninth Circuit.
Mirko CARREA, on behalf of himself and those similarly situated, Plaintiff—Appellant,
v.
DREYER'S GRAND ICE CREAM, INC., Defendant—Appellee.

No. 11–15263.
Argued and Submitted Jan. 18, 2012.
Filed April 5, 2012.

Background: Putative class action was initiated, alleging that ice cream manufacturer's labeling violated California's consumer protection laws. The United States District Court for the Northern District of California, Jeffrey S. White, J., 2011 WL 159380, dismissed complaint for failure to state claim. Plaintiff appealed.

Holdings: The Court of Appeals held that:
(1) claims regarding "0g Trans Fat" statement were preempted, and
(2) claims regarding statements "Original Sundae Cone," "Original Vanilla," and "Classic" did not violate consumer protection laws.

Affirmed.

West Headnotes

[1] Antitrust and Trade Regulation 29T 132

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(A) In General
29Tk132 k. Preemption. Most Cited Cases

States 360 18.84

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.83 Trade Regulation; Monopolies
360k18.84 k. In general. Most Cited Cases

Claims that ice cream manufacturer violated California consumer protection laws by stating on front of its packaging that its product contained "0g Trans Fat" were expressly preempted by Federal Food, Drug and Cosmetic Act (FDCA), as amended by Nutrition Labeling and Education Act (NLEA); statement was express nutrient content claim that Federal Food and Drug Administration (FDA) not only permitted, but further instructed should mirror Nutrition Facts panel, and because product contained less than 0.5 grams of trans fat per serving, panel had to express this amount as zero. Federal Food, Drug, and Cosmetic Act, § 403A(a)(5), 21 U.S.C.A. § 343–1(a)(5); 21 C.F.R. §§ 101.9(c)(2)(ii), 101.13(i)(3); West's Ann.Cal.Bus. & Prof.Code §§ 17200 et seq., 17500 et seq.; West's Ann.Cal.Civ.Code § 1750 et seq.

[2] Antitrust and Trade Regulation 29T 164

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(B) Particular Practices
29Tk164 k. Labeling and packaging. Most Cited Cases

Packaging for ice cream product, describing it as "Original Sundae Cone," "Original Vanilla," or "Classic," did imply that product was more wholesome or nutritious than competing products, in violation of California consumer protection laws. West's Ann.Cal.Bus. & Prof.Code §§ 17200 et seq.,

17500 et seq.; West's Ann.Cal.Civ.Code § 1750 et seq.

***114** Michael Reese, Kim Eleazer Richman, Esquire, Reese Richman LLP, New York, NY, for Plaintiff–Appellant.

Carmine R. Zarlenga, Mayer Brown LLP, Washington, DC, Dale Joseph Giali, Andrea M. Weiss, Esquire, Mayer Brown LLP, Los Angeles, CA, for Defendant–Appellee.

Appeal from the United States District Court for the Northern District of California, Jeffrey S. White, District Judge, Presiding. D.C. No. 3:10–cv–01044–JSW.

Before: KOZINSKI, Chief Judge, WARDLAW and PAEZ, Circuit Judges.

MEMORANDUM [FN*]

FN* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

****1** Mirko Carrea ("Carrea") appeals the district court's dismissal of his Second Amended Class Action Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The complaint alleges that Dreyer's Grand Ice Cream, Inc. ("Dreyer's") violated four state consumer protection laws: (1) Unfair Competition Law, Cal. Bus. and Prof.Code § 17200 *et seq.;* (2) False Advertising Law, Cal. Bus. and Prof.Code § 17500 *et seq.;* (3) California Consumers Legal Remedies Act, Cal. Civ.Code § 1750, *et seq.;* and (4) New York General Business Law § 349. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under Rule 12(b)(6) , and we affirm.

***115** [1] Carrea's claims regarding the "0g Trans Fat" statement, located on the front of Drumstick's packaging, are expressly preempted by the Federal Food, Drug and Cosmetic Act ("FDCA"), as amended by the Nutrition Labeling and Education Act ("NLEA"). 21 U.S.C. § 343–1(a)(5). The statement is an express nutrient content claim that the Federal Food and Drug Administration ("FDA") not only permits, 21 C.F.R. § 101.13(i)(3), but further instructs should mirror the Nutrition Facts panel, *see* 58 Fed.Reg. 44020, 44024–25 (Aug. 18, 1993) (stating that any discrepancy between a nutrient content claim and the Nutrition Facts panel would be "confusing to consumers, and this consequence is unintended"). Here, because Drumstick contains less than 0.5 grams of trans fat per serving, the Nutrition Facts panel must express this amount as zero. 21 C.F.R. § 101.9(c)(2)(ii). Accordingly, the same rule applies to the statement on the front of Drumstick's packaging. In essence, Carrea seeks to enjoin and declare unlawful the very statement that federal law permits and defines. Such relief would impose a burden through state law that is not identical to the requirements under section 343(r). These claims are therefore expressly preempted. *See Degelmann v. Advanced Med. Optics, Inc.,* 659 F.3d 835, 840–42 (9th Cir.2011).

[2] Carrea's claims regarding the other statements on the front of Drumstick's packaging fare no better. It is implausible that a reasonable consumer would interpret "Original Sundae Cone," "Original Vanilla," and "Classic," to imply that Drumstick is more wholesome or nutritious than competing products. Notably, none of these phrases modify "recipe," "ingredients," "1928," or any other term that might suggest that the modern Drumstick is identical in composition to its prototype. Even were it so, the presence of "original" or "classic" ingredients alone does not plausibly imply that a product is more nutritious than other desserts. In addition, no reasonable consumer is likely to think that "Original Vanilla" refers to a natural ingredient when that term is adjacent to the phrase, "Artificially Flavored." Finally, it strains credulity to claim that a reasonable consumer would be misled to think that an ice cream dessert, with "chocolate coating topped with nuts," is healthier than its competitors simply by virtue of these

"Original" and "Classic" descriptors. In sum, we conclude that Carrea's state law claims fail to satisfy the "reasonable consumer" standard in *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir.2008). Dismissal of these claims with prejudice was therefore proper.

****2** The judgment of the district court is **AFFIRMED.**

C.A.9 (Cal.),2012.
Carrea v. Dreyer's Grand Ice Cream, Inc.
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