UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JEFF SPANO, DEBBIE SPANO, individuals and as next friends of C.S., a minor child,	§	NO. 1:21-CV-748-DAE
Plaintiffs,	§	
vs.	§	
WHOLE FOODS, INC., DOES 1-50,	§	
Defendants.	§	

ORDER GRANTING MOTION TO DISMISS

The matter before the Court is Defendant Whole Foods Market Group, Inc.'s[1] ("Whole Foods") Motion to Dismiss for Failure to State a Claim. (Dkt. # 12.) The Court finds this matter suitable for disposition without a hearing. After careful consideration of the memoranda in support of and in opposition to the motion, the Court, for the following reasons, **GRANTS** the motion.

[1] Plaintiffs apparently incorrectly named "Whole Foods, Inc." as the defendant. Whole Foods states that because Plaintiffs' allegations arise out of a claimed purchase at a store in Port Chester, NY, the correct corporate entity is Whole Foods Market Group, Inc., who owns and operates stores in New York. (Dkt. # 12 at 1 n.1.)

BACKGROUND

On August 26, 2021, Plaintiffs Jeff Spano and Debbie Spano, as individuals and next friends of C.S., a minor child, filed suit in this Court against Defendants Whole Foods and Does 1-50.[2] (Dkt. # 1.) Plaintiffs' amended complaint alleges that on September 7, 2018, Whole Foods manufactured, packaged, and sold cupcakes at its Port Chester, NY store that were improperly labeled as vegan. (Dkt. # 11 at 3.) According to Plaintiffs, the cupcakes were placed in the vegan section of the bakery and neither the cupcake labels nor the signage in the vegan section of the bakery disclosed the inclusion of nuts in the cupcakes. (Id.)

Plaintiffs' minor son C.S. is severely allergic to nuts. (Dkt. # 11 at 3.) After purchasing the cupcakes, on September 8, 2018, Plaintiff Debbie Spano gave a cupcake to C.S. at a friend's birthday party; C.S. experienced the onset of anaphylaxis in front of his friends after consuming the cupcake. (Id.) Debbie Spano thereafter administered epinephrine to C.S. while awaiting the arrival of first responders to transport C.S. to the local emergency department. (Id.) C.S. was thereafter treated by emergency personnel and was released later that evening. (Id.)

[2] Defendants Does 1–50 were not served in accordance with Rule 4 of the Federal Rules of Civil Procedure.

According to Plaintiffs' complaint, subsequent investigation revealed that the cupcakes were not vegan, but were the non-vegan version of vanilla cupcakes manufactured by Whole Foods. (Dkt. # 11 at 4.) Plaintiffs allege that the Whole Foods bakery manager later admitted that "unknowledgeable staff had mislabeled the non-vegan vanilla cupcakes as vegan." (Id.)

After he recovered, Plaintiffs contend that C.S. developed a severe eating disorder in which he would only eat food prepared in front of him from trusted sources. (Dkt. # 11 at 5.) They state that C.S. was afraid to eat in public for fear of going into anaphylactic shock in front of others who would not know how to help him. (Id.) Plaintiffs allege that his eating disorder negatively affected C.S.'s ability to socialize with peers and caused him to fall behind in school. (Id.) Because of the challenges resulting from this incident, Plaintiffs state that Debbie Spano was forced to resign from her job in order to provide C.S. with the care he needed. (Id.)

Plaintiffs' suit alleges the following causes of action against Defendants: (1) negligence; (2) strict products liability manufacturing defect; (3) strict products liability marketing defect (failure to warn); (4) breach of express warranty under the Texas Business and Commerce Code; (5) breach of implied warranty under the Texas Business and Commerce Code; (6) lost earning capacity;

(7) vicarious liability; (8) as well as violations of Texas's Deceptive Trade Practices Act, Tex. Bus. and Comm. Code § 17.50. (Dkt. # 11.)

On February 15, 2022, Whole Foods filed a motion to dismiss on the basis that Plaintiff failed to state a plausible claim for relief. (Dkt. # 12.) On March 1, 2022, Plaintiffs filed a response in opposition. (Dkt. # 14.) On March 8, 2022, Whole Foods filed its reply. (Dkt. # 15.)

APPLICABLE LAW

Federal Rules of Civil Procedure 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." When analyzing a motion to dismiss for failure to state a claim, the court "accept[s] 'all well pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" United States ex rel. Vavra v. Kellogg Brown & Root, Inc., 727 F.3d 343, 346 (5th Cir. 2013) (quoting In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007)). The court "must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a Court may take judicial notice." Funk v. Stryker Corp., 631 F.3d 777, 783 (5th Cir. 2011) (quoting Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007)).

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). However a court reviewing a complaint "[is] not bound to accept as true a legal conclusion couched as a factual allegation." Id. "A Rule 12(b)(6) motion to dismiss for failure to state a claim is an appropriate method for raising a statute of limitations defense." Mann v. Adams Realty Co., 556 F.2d 288, 293 (5th Cir. 1977).

ANALYSIS

Whole Foods moves to dismiss Plaintiffs' claims on the basis that: (1) Plaintiffs' claims are derived from and based on the Federal Food, Drug, and Cosmetic Act ("FDCA"), and are therefore preempted because there is no private cause of action under the FDCA; (2) to the extent any claims survive preemption, they are governed by Texas law and are barred by the applicable two-year statute of limitations for such claims; (3) the Texas Products Liability Act applies to Plaintiffs' claims; (4) Plaintiffs' claims for "lost earning capacity" and "vicarious liability" are not independent causes of action; and (5) Plaintiffs cannot recover for

Debbie Spano's lost income or earning capacity based on C.S.'s injuries. (Dkt. # 12.)

A. Preemption

Whole Foods first argues that Plaintiffs' claims must be dismissed because private parties cannot enforce the FDCA. (Dkt. # 12 at 4.) Whole Foods further contends that not only are Plaintiffs precluded from directly enforcing the FDCA, Plaintiffs are also prevented from directly enforcing the FDCA by way of state law claims that are wholly dependent on alleged FDCA violations. (Id.) As a result, Whole Foods argues that Plaintiffs' claims are impliedly preempted by the FDCA. (Id. at 4–5.) Whole Foods maintains that because Plaintiffs base all of their causes of action on an alleged breach of the FDCA, they must be dismissed. (Id. at 5.)

In response, Plaintiffs contend that each of their claims are wholly independent state-based causes of action, and therefore are not made in an attempt to privately enforce the FDCA. (Dkt. # 14 at 5.) They argue that their complaint references the FDCA only once to highlight Whole Foods's many violations already reported to the United States Food and Drug Administration ("FDA"). (Id.)

1. FDCA and Implied Preemption

In 1938, Congress enacted the FDCA, codified at 21 U.S.C. § 301 et seq. The FDCA empowers the FDA to (a) protect the public health by ensuring that "foods are safe, wholesome, sanitary, and properly labeled," 21 U.S.C. § 393(b)(2)(A); (b) promulgate regulations pursuant to this authority; and (c) enforce its regulations through administrative proceedings. See 21 C.F.R. § 7.1 et seq.

Under 21 U.S.C. § 337(a) of the FDCA, all proceedings to enforce FDA regulations "shall be by and in the name of the United States." See also Buckman Co. v. Plaintiffs' Legal Comm'n, 531 U.S. 341, 349 n.4 (2001) ("The FDCA leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance" with its provisions). While § 337(a) does not expressly preempt state law, courts have noted that it has an implied preemptive effect.

In Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001), plaintiffs raised a state law claim of fraud based on allegations that a defendant had misled the FDA in connection with the approval of a medical device. The Supreme Court recognized that the FDCA "leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance with" FDCA requirements. Id. at 349 n.5 (citing 21 U.S.C.

§ 337(a)). Because the FDCA reserves to the federal government the exclusive authority to decide if and how the FDCA will be enforced, the Supreme Court in Buckman understood this to impliedly preempt a state law claim based on conduct that was wrongful solely because it violated the FDCA.

Additionally, the Food Allergen Labeling and Consumer Protection Act, 21 U.S.C. § 343 ("FALCPA"), provides that "no State or political subdivision of a state may directly or indirectly establish . . . or continue in effect as to any food in interstate commerce—(2) any requirement for the labeling of food of the type required by [specified sections] of this title that is not identical to the requirement of such section." 21 U.S.C. § 343–1(a)(2). The FDCA deems a food as "misbranded" if its labeling "is false or misleading in any particular." 21 U.S.C.A. § 343(a).

Courts have found that "[i]n order to survive preemption, a state law claim must rely on an independent state law duty that parallels or mirrors [an FDCA] requirement [], but must not solely and exclusively rely on violations of the FDCA's own requirements." Patane v. Nestle Waters N. Am., Inc., 314 F. Supp. 3d 375, 386 (D. Conn. May 17, 2018). If a private litigant files a state law claim that also violates the FDCA, it must fit through a "narrow gap" in order to escape implied preemption. Perez v. Nidek Co., 711 F.3d 1109, 1120 (9th Cir. 2013). "The Eighth Circuit has aptly described the 'narrow gap' through which a

state-law claim must fit to escape preemption by the FDCA: 'The plaintiff must be suing for conduct that *violates* the FDCA (or else his claim is expressly preempted by § 360k(a)), but the plaintiff must not be suing *because* the conduct violates the FDCA (such a claim would be impliedly preempted under Buckman).'" Id. (quoting In re Medtronic, 623 F.3d 1200, 1204 (8th Cir. 2010) (emphasis in original)). Thus, "under principles of implied preemption . . . private litigants may not bring a state-law claim against a defendant when the state-law claim is in substance (even if not in form) a claim for violating the FDCA." Loreto v. Procter & Gamble Co., 515 F. App'x 576, 579 (6th Cir. 2013) (internal quotation marks omitted). In other words, a plaintiff must state a claim based on a violation of some other law—such as state tort law—that also happens to violate the FDCA. The claim cannot be primarily premised on a violation of the FDCA.

2. Analysis

The Court must determine whether Plaintiffs' state-law claims are, in substance, claims seeking to enforce the FDCA. As stated above, the Court will consider whether Plaintiffs' claims would exist in the absence of the FDCA. See Buckman, 531 U.S. at 353. If they would not exist, then they are impliedly preempted. See id.

Plaintiffs have alleged general state common law claims for negligence, strict product liability, manufacturing defect, and marketing defect. (Dkt. # 11.) Plaintiffs have also alleged violations of section 2-313 of the Texas Business and Commerce Code for breach of express warranty and breach of implied warranty, as well as a claim for violations of Texas's deceptive trade practices act, Tex. Bus. and Comm. Code sec. 17.50. (Id.) In seeking to dismiss Plaintiffs' claims, Whole Foods argues that Plaintiffs have based all of their causes of action on an alleged breach of the FDCA. (Dkt. # 12 at 5.)

Plaintiffs' negligence claim alleges that Whole Foods: (1) "owed a duty to Plaintiffs to provide lawfully and accurately labeled food"; (2) breached their duty by "failing to identify ingredients lawfully and accurately in food goods [in direct violation of] *21 U.S.C. § 321(qq)*"[3]; (3) breached their duty of care "by staffing the bakery department with untrained, unsupervised and unqualified employees who were unfamiliar with the importance of lawfully and accurately labeling foods containing allergens as set forth in *21 U.S.C. § 321(qq)*"; and (4) had knowledge of at least 36 other complaints and incidents involving Whole Foods *violating § 343(w) of the FDCA*, and thereafter failed to act by researching a safe alternative solution. (Id. at 7–9 (emphasis added).)

[3] Section 321(qq) defines "major food allergen" to include "[m]ilk, egg, fish (e.g., bass, flounder, or cod), Crustacean shellfish (e.g., crab, lobster, or shrimp), tree nuts (e.g., almonds, pecans, or walnuts), wheat, peanuts, soybeans, and sesame."

Plaintiffs claim for strict product liability alleges that Whole Foods "unlawfully placed misbranded and mislabeled cupcakes in the stream of commerce with the knowledge that consumers would not, and could not, inspect the product for harmful defects." (Dkt. # 11 at 10.) The manufacturing defect claim alleges that Whole Foods's cupcakes were defective as their composition and labeling deviated from planned specifications" and that Whole Foods "unlawfully and inaccurately labeled the cupcakes as 'vegan' even though the cupcakes were not vegan." (Id. at 10.) Plaintiffs further allege that the cupcakes "contained allergen ingredients which were *required by Federal law to be disclosed* on the label but were not disclosed on the label." (Id. (emphasis added).)

Similarly, Plaintiffs' marketing defect claim alleges that Whole Foods failed to warn of the harmful ingredients in the cupcakes, and that the cupcakes were "unlawfully and inaccurately labeled . . . as 'vegan' even though the cupcakes were not vegan." (Dkt. # 11 at 11.) The claim also states that the cupcakes "contained allergen ingredients which were *required by Federal law to be disclosed* on the label but were not disclosed on the label." (Id. (emphasis added).)

Plaintiffs have also alleged state law claims pursuant to section 2-313 of the Texas Business and Commerce Code. Plaintiffs' breach of express warranty claim alleges that Whole Foods expressly warranted that its "vegan" vanilla cupcake consumed by C.S. was free from dairy, tree nuts, and fish. (Dkt. # 11 at

11.) Plaintiffs further allege that pursuant to section 2-313, Whole Foods's cupcake label constituted a material statement amounting to a warranty to the purchaser of the cupcakes' ingredients. (Id. at 12.) As the purchaser of the cupcakes, Plaintiffs contend they relied on the material statement and were ultimately harmed by the breach of express warranty. (Id. at 13.)

Plaintiffs also assert a breach of implied warranty claim which alleges that Whole Foods, in selling multiple cupcakes in a single package, knew or had reason to know that persons other than the purchaser would be the end consumers of the cupcakes. (Dkt. # 11 at 13.) Plaintiffs contend that Whole Foods expressly warranted that the "vegan" cupcakes were free from dairy, tree nuts, and fish, which impliedly warranted that the cupcakes were fit for their intended purpose and foreseeable use. (Id.) Plaintiffs allege they relied on these implied warranties of fitness and were thereby harmed by the breach. (Id. at 14–15.)

Additionally, Plaintiffs allege a deceptive trade practices act claim pursuant to section 15.50 of the Texas Business and Commerce Code. (Dkt. # 11 at 17.) Plaintiffs allege that Whole Foods falsely labeled foods as vegan and failed to include the allergens on the label constituting a deceptive trade practice. (Id.) Plaintiffs assert that they were injured by the false and deceptive advertising and that they suffered damages as a result. (Id.)

Upon review, the Court finds that all of Plaintiffs' causes of action are entirely dependent upon an FDCA violation. In other words, the only reason Whole Foods's cupcakes were allegedly "unlawful" or deceptive were because they failed to comply with FDCA labeling requirements for food allergens. This theory of liability is impliedly preempted by federal law. Plaintiffs' claims could not exist based solely on traditional state tort law—"the existence of [the] federal enactment[] is a critical element in their case." See Buckman, 531 U.S. at 353. That is, the standard for allergen labeling under the FDCA is critical to each of Plaintiffs' claims, although Plaintiffs do not outright allege this. Nor have Plaintiffs alleged any state law claims that are identical to the FDCA's requirements which would survive preemption. See Patane v. Nestle Waters N. Am., Inc., 314 F. Supp. 3d 375, 386 (D. Conn. May 17, 2018) ("In order to survive preemption, a state law claim must rely on an independent state law duty that parallels or mirrors [an FDCA] requirement [], but must not solely and exclusively rely on violations of the FDCA's own requirements.").

Furthermore, Plaintiffs' state law claim citing consumer protection statutes rests on the allegation that Whole Foods failed to comply with the FDA's requirements for labeling. (Id. at 11–15 ("Plaintiffs were persons injured by the deceptive and false advertising and labelling practices of the Defendant.").) For example, in Verzani v. Costco Wholesale Corp., 2010 WL 3911499 (S.D.N.Y.

2010), aff'd 432 F. App'x 29, 30 (2d Cir. 2011), the district court concluded that a food mislabeling claim brought under New York's generic deceptive trade practices law (N.Y. Gen. Bus. Law § 349) was preempted by the FDCA. Citing Buckman, the court noted that "[t]he FDCA lacks a private right of action and therefore Verzani cannot rely on it for purposes of asserting a state-law consumer claim under G.B.L. § 349." Id. at *3. Plaintiff Verzani's "persistent allegations that Costco's labeling of the Shrimp Tray violates the FDCA and the Food and Drug Administration's regulations on the labeling of 'shrimp cocktails' indicates that his true purpose is to privately enforce alleged violations of the FDCA, rather than to bring a claim for unfair and deceptive business practices under G.B.L. § 349." Id.

Given the allegations, the Court finds that Plaintiffs have "attempt[ed] to pass off FDCA claims, otherwise enforceable only by the FDA, as privately enforceable state law claims." In re Trader Joe's Tuna Litig., No. 2:16-cv-01371-ODW(AJWx), 2017 WL 2408117, at *3 (C.D. Ca. June 2, 2017); see Loreto, 515 F. App'x at 579 ("The statute's public enforcement mechanism is thwarted if savvy plaintiffs can label as arising under a state law for which there exists a private enforcement mechanism a claim that in substance seeks to enforce the FDCA."). Plaintiffs' claims would not exist without the FDCA and, therefore, Plaintiffs are prohibited from bringing them because they are impliedly preempted by the

FDCA. See also Estes v. Lanx, Inc., 660 F. App'x 260, 262 (5th Cir. 2016) (determining plaintiff's misrepresentation "claim is based on the allegation that the system lacked, to use his words, 'the requisite FDA approval.' As such, the claim 'exist[s] solely by virtue of the FDCA disclosure requirements'" and is impliedly preempted); cf. Jones v. WFM-Wo, Inc., 265 F. Supp. 3d 775, 779–80 (M.D. Tenn. 2017) (considering express preemption in context of whether food was exempt from labeling requirements and whether certain statutory exemptions applied, finding the issue was premature for court's consideration).

Accordingly, because Plaintiffs' claims are preempted by federal law, the Court does not reach the merits of Whole Foods's other proffered grounds for dismissal, including that they are barred by the statute of limitations, and that the Texas Products Liability Act applies to Plaintiffs' claims. (See Dkt. # 12.) Additionally, given the Court's ruling, any claim for damages for lost earning capacity and lost income, or a claim for vicarious liability are without merit and will likewise be dismissed.

B. Leave to Amend

Ordinarily, a plaintiff should be granted leave to amend their complaint prior to dismissal. Here, however, Plaintiffs did not respond initially to Whole Foods's first motion to dismiss filed on November 2, 2021 (Dkt. # 8). On January 5, 2022, the Court ordered Plaintiffs to file a response to that motion,

warning them that the failure to file a response to the motion could result in the Court granting Whole Foods's motion to dismiss and dismissing the case without prejudice. (Dkt. # 9.) Thereafter, rather than responding to the motion to dismiss, Plaintiffs filed an amended complaint. (Dkt. # 11.) However, because the basis of Whole Foods's original motion to dismiss was largely premised on the same preemption argument it brings in the instant motion to dismiss, the Court finds that Plaintiffs already had an opportunity to amend their complaint and replead their claims. Therefore, the Court will not afford Plaintiffs another opportunity to amend; however, their claims will be dismissed without prejudice.

CONCLUSION

In light of the foregoing, the Court **GRANTS** Whole Foods's Motion to Dismiss for Failure to State a Claim. (Dkt. # 12.) Plaintiffs' claims are **DISMISSED WITHOUT PREJUDICE**. The Clerk's Office is **INSTRUCTED TO ENTER JUDGMENT** and **CLOSE THE CASE**.

IT IS SO ORDERED.

DATED: Austin, Texas, June 9, 2022.

David Alan Ezra
Senior United States District Judge