

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA DIVISION**

TENTATIVE RULINGS

EVENT DATE: 08/03/2016
JUDICIAL OFFICER: Kevin DeNoce

EVENT TIME: 08:20:00 AM

DEPT.: 43

CASE NUM: 56-2016-00479782-CL-PL-VTA
CASE TITLE: MARTINEZ VS FOSTER FARMS

CASE CATEGORY: Civil - Limited

CASE TYPE: Product Liability

EVENT TYPE: Demurrer (CLM) - to Complaint and notice of deff's demurrer
CAUSAL DOCUMENT/DATE FILED: Demurrer, 06/20/2016

The morning calendar in courtroom 43 will begin at 9 a.m. Cases including *ex parte* matters will not be called prior to 9 a.m.

Please check in with the courtroom clerk by no later than 8:45 a.m. If appearing by CourtCall, please call in between 8:35 and 8:45 a.m.

With respect to the below scheduled tentative ruling, no notice of intent to appear is required. If you wish to submit on the tentative decision, you can send an email to the court at: Courtroom43@ventura.courts.ca.gov or send a telefax to Judge DeNoce's secretary, Christine Schaffels at 805-477-5894, stating that you submit on the tentative. Do not call in lieu of sending a telefax. If you submit on the tentative without appearing and the opposing party appears, the hearing will be conducted in your absence. This case has been assigned to Judge DeNoce for all purposes.

Absent waiver of notice and in the event an order is not signed at the hearing, the prevailing party shall prepare a proposed order and comply with CRC 3.1312 subdivisions (a), (b), (d) and (e). The signed order shall be served on all parties and a proof of service filed with the court. A "notice of ruling" in lieu of this procedure is not authorized.

For general information regarding Judge DeNoce's rules and procedures for law and motion matters, *ex parte* matters, telephonic appearances, trial rules and procedures, etc., please visit: <http://www.ventura.courts.ca.gov/Courtroom/C43>

The court's tentative ruling is as follows:

Grant, pursuant to Evidence Code §452(h), Defendants Foster Farms, LLC's and Foster Poultry Farm's (collectively, "Foster Farms") request for judicial notice of the fact that *Salmonella* bacteria naturally occur in the intestinal tracts of livestock, wildlife, domestic pets, and humans.

Deny Foster Farms' request for judicial notice of the legal proposition that it is legal for poultry producers to sell raw poultry products containing *Salmonella* bacteria. Sustain Foster Farms' general demurrer to the first cause of action for General Negligence and second cause of action for Premises Liability in Plaintiffs Mia Martinez's and Mark Velasquez's Complaint, on the grounds that (a) these claims, as presently pled, are based on allegations that Plaintiffs were made ill by the presence of *Salmonella* bacteria in chicken consumed by Plaintiffs; and (b) such claims appear on their face to be preempted by the express preemption clause set forth in 21 U.S.C. §476e, which prohibits state laws that attempt to impose "ingredient requirements" which are "in addition to, or different than" those imposed by the Poultry Products Inspection Act, which Act does not prohibit the presence of *Salmonella* bacteria in poultry products. (*American Public*

Health Asso. v. Butz (D.C. Cir. 1974) 511 F.2d 331, 334-335.)

The demurrer will be sustained without leave to amend unless Plaintiffs' counsel, at the hearing on this matter, is able to demonstrate how the Complaint might be amended to avoid the preemption problem.

Discussion:

Foster Farms contends that Plaintiffs' cause of action against it for general negligence and products liability both fail to state facts sufficient to constitute a cause of action against Foster Farms because they are preempted by federal law. Specifically, Defendants contend that (i) under the federal Poultry Products Inspection Act ("PPIA"), there is no requirement forbidding the sale of raw poultry merely because it contains *Salmonella*; and (ii) the PPIA contains an express preemption cause prohibiting any state from imposing any requirement "in addition to, or different than" the requirements under the PPIA, and therefore any attempt to impose liability under state tort law on Foster Farms for *Salmonella* bacteria in chicken is preempted.

The scope of federal preemption concerns a pure question of law, and therefore may be resolved on demurrer. (See, e.g., *Farm Raised Salmon Cases* (2008) 42 Cal. 4th 1077, 1089, fn. 10.) Federal preemption can be either express or implied. (*Id.* at pp. 1087-1088.) The party claiming preemption bears the burden of establishing the same. (*Id.* at p. 1088.) There is a general presumption against federal preemption, both as to the existence of preemption and as to the scope of preemption. (*Id.*)

Here, Foster Farms' demurrer is based on an express preemption clause in the PPIA, and therefore the presumption against the **existence** of preemption does not come into play. However, Foster Farms' still must overcome the presumption regarding the scope of the preemption.

The express provision clause in the PPIA relied upon by Foster Farms provides that:

"Requirements within the scope of this Act [21 USCS §§ 451 et seq.] with respect to premises, facilities and operations of any official establishment, which are in addition to, or different than those made under this Act [21 USCS §§ 451 et seq.] may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of paragraph (b) of section 11 of this Act [21 USCS § 460(b)], if consistent therewith, with respect to any such establishment. Marking, labeling, packaging, or ingredient requirements (or storage or handling requirements found by the Secretary to unduly interfere with the free flow of poultry products in commerce) in addition to, or different than, those made under this Act [21 USCS §§ 451 et seq.] may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any official establishment in accordance with the requirements under this Act [21 USCS §§ 451 et seq.], but any State or Territory or the District of Columbia may, consistent with the requirements under this Act [21 USCS §§ 451 et seq.], exercise concurrent jurisdiction with the Secretary over articles required to be inspected under this Act [21 USCS §§ 451 et seq.], for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry into the United States. This Act [21 USCS §§ 451 et seq.] shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this Act [21 USCS §§ 451 et seq.], with respect to any other matters regulated under this Act [21 USCS §§ 451 et seq.]."

(21 U.S.C. §476e.)

Here, the main operative allegations in Plaintiffs' Complaint are as follows:

"...Defendants and each of them failed to properly produce, store, and package chicken for sale which was sold to and consumed by plaintiff. Plaintiffs became ill after eating the chicken and ultimately were diagnosed as suffering from a food borne illness caused by salmonella bacteria. Said bacteria is closely associated with harvested and packaged poultry...."

(Complaint, ¶GN-1.)

As stated, the essence of Plaintiffs' allegations is that they were injured by the presence of *Salmonella* bacteria in the chicken sold by Foster Farms. Plaintiffs dispute this characterization of their Complaint in their Opposition Brief, stating

that:

"The plaintiffs have alleged in their negligence cause of action that the defendants 'failed to properly produce, store, and package chicken.' The allegation is not (as the defendants claim) that because the chicken contained salmonella, defendants are liable."

(Opposition Brief, 2:6-9.)

According to their allegations, Plaintiffs' only alleged injury from Foster Farms' chicken resulted from an illness "caused by salmonella bacteria" in the chicken. Because the *Salmonella* bacteria in the chicken was the alleged cause of Plaintiff's injury, it is fair to characterize Plaintiffs' claims as being based on the presence of *Salmonella* bacteria in the chicken. Because Plaintiffs' claims are fairly characterized (at least as presently pled) as being based on the presence of *Salmonella* bacteria in the chicken, Foster Farms is correct that these claims are preempted by the express preemption clause in the PPIA. Specifically, the scope of the preemption clause in the PPIA includes "ingredient requirements." In particular, the PPIA and related statutes impose certain restrictions on adulterations in poultry products. However, the presence of *Salmonella* bacteria apparently does not constitute an "adulteration" within the meaning of the statutes:

"The Wholesome Meat Act, 21 U.S.C. § 604, providing for inspections, requires that meat 'found to be not adulterated' shall be marked, stamped, tagged, or labeled as 'Inspected and passed' ". The 'U.S. Inspected and passed' legend therefore conforms to the statute; and unless the presence of salmonellae makes meat 'adulterated' the legend is not false or misleading. The term 'adulterated' is defined by the statute, 21 U.S.C. § 601 (m), and we think that the presence of salmonellae in meat does not constitute adulteration within this definition. The definition is directed at poisonous or deleterious additives and filthy, putrid or decomposed substances but not at substances such as salmonellae which may be inherent in the meat. This we think plainly appears from 21 U.S.C. § 601(m) (1) which provides: The term 'adulterated' shall apply to any . . . meat . . . : (1) if it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance, such article shall not be considered adulterated under this clause if the quantity of such substance in or on such article does not ordinarily render it injurious to health; [emphasis supplied.]As the Department said in its letter of August 18, 1971 'the American consumer knows that raw meat and poultry are not sterile and, if handled improperly, perhaps could cause illness.' In other words, American housewives and cooks normally are not ignorant or stupid and their methods of preparing and cooking of food do not ordinarily result in salmonellosis.

"The Wholesome Poultry Products Act also refers to inspections and findings that poultry products are 'not adulterated'. 21 U.S.C. § 457(a). The definition of the term 'adulterated' in the Act, 21 U.S.C. § 453(g), conforms to that found in the Wholesome Meat Act. The term 'official inspection legend' is defined as 'any symbol prescribed by regulations of the Secretary showing that an article was inspected for wholesomeness in accordance with this chapter.' 21 U.S.C. § 453(m). This differs from the definition of the term 'official inspection legend' found in the Wholesome Meat Act, which is 'any symbol prescribed by regulations of the Secretary showing that an article was inspected and passed in accordance with this chapter.' 21 U.S.C. § 601(t). We think however that the term 'inspected for wholesomeness' as used in the Wholesome Poultry Products Act means 'inspected and found not to be adulterated'. The term is so construed and defined by the Secretary in his regulations, 9 C.F.R. § 381.1(24) (1974), and this construction is confirmed by the House Report on the bill which became the Wholesome Poultry Products Act, Pub. L. No. 90-492, 82 Stat. 791. This report evidences the intention of Congress to conform the provisions of the Wholesome Poultry Products Act to those of the Federal Meat Inspection Act, as amended. See H.R. Rep. No. 1333, Apr. 30, 1968, 90th Cong., 2d Sess., in 1968 U.S. CODE CONG. & ADMIN. NEWS 3426, 3427, 3444-45. We conclude that the legend 'inspected for wholesomeness' prescribed by the Secretary, conforms to the statute and is not false or misleading because of the possibility that salmonellae may be present in the poultry products inspected.

"In construing both the Wholesome Meat Act and the Wholesome Poultry Products Act we are mindful that the presence of salmonellae can be detected only by microscopic examination. No one contends that Congress meant that inspections should include such examinations. We think it follows therefore that Congress did not intend the prescribed official legends to import a finding that meat and poultry products were free from salmonellae."

(*American Public Health Asso. v. Butz* (D.C. Cir. 1974) 511 F.2d 331, 334-335.)

Given that the express preemption clause in the PPIA prohibits state laws that attempt to impose "ingredient requirements" which are "in addition to, or different than" those imposed by the PPIA, and given that the PPIA does not

prohibit the presence of *Salmonella* bacteria in poultry products, Plaintiffs' tort claims attempting to impose common law liability on Foster Farms based on the presence of *Salmonella* bacteria in the poultry appears to be preempted by the PPIA. (See, e.g., *Meunrit v. ConAgra Foods, Inc.* (2010) 2010 U.S. Dist. LEXIS 73599, 14-15.) Accordingly, the Court sustains Foster Farms' general demurrer to both causes of action in Plaintiffs' Complaint on preemption grounds.

It is not clear to the court whether Plaintiffs might be able to amend around the above noted preemption issue. As a result, the Court will sustain the demurrer with prejudice **unless** Plaintiffs' counsel, at the hearing on this motion, is able to demonstrate how the Complaint might be amended to avoid federal preemption.