

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

NOVO NORDISK INC., )  
 ) 8:23-cv-1503-WFJ-TGW  
 PLAINTIFF, ) Tampa  
 ) February 2, 2024  
 v. ) 9:28 a.m.  
 )  
 BROOKSVILLE PHARMACEUTICALS )  
 INC., )  
 )  
 DEFENDANT. )

TRANSCRIPT OF TELEPHONIC MOTION HEARING  
BEFORE THE HONORABLE WILLIAM F. JUNG  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography,  
transcript produced by computer.

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(Proceedings commenced at 9:28 a.m.)

THE COURT: Good morning. This is Judge Jung in 23-cv-1503, Novo Nordisk v. Brooksville Pharmaceuticals. May I have appearances first for Novo?

MR. HALPERIN: Good morning, Your Honor. This is Greg Halperin from Covington & Burling on behalf of Novo.

THE COURT: Counsel.

MR. IMBROSCIO: Good morning, Your Honor. This is Michael Imbroscio from Covington & Burling on behalf of Novo.

THE COURT: All right. Thank you.

MR. COHEN: Good morning. Jordan Cohen with Wicker Smith also on behalf of Novo.

THE COURT: Thank you, Mr. Cohen. How about for Brooksville?

MR. MODAFFERI: Good morning, Your Honor. Matthew Modafferi from Frier Levitt on behalf of Defendant Brooksville.

THE COURT: You broke up a little bit, Matt. Tell me your last name again.

MR. MODAFFERI: I apologize. The last name is Modafferi.

THE COURT: We're here on the motion to dismiss the first amended complaint. And just make a note I've read everything. The memo, the substance at the motion is at

1 Doc 42. There's a response at Doc 51 and a reply at Doc 53.

2 So why don't we -- and I have read everything. I'm  
3 quite familiar with the case. This is the second time  
4 through, but I want y'all to have your say, highlight  
5 anything.

6 So Mr. Halperin, are you going to be speaking for  
7 Novo?

8 MR. HALPERIN: I am, Your Honor.

9 THE COURT: Why don't you tell me what you want me to  
10 highlight. I'll try and hold you guys to 15 minutes a side  
11 since this is round two. So glad to hear from you,  
12 Mr. Halperin.

13 MR. HALPERIN: Sure, Your Honor. I'm happy to  
14 proceed, but it is Brooksville's motion. To the extent you  
15 want to --

16 THE COURT: No, no, no. You're absolutely right. We  
17 have that in reverse. Sorry about that.

18 We'll hear from movant, please. And as I said, the  
19 text of the document is at Doc 42. Sorry about that.

20 What says Brooksville?

21 MR. MODAFFERI: Good morning, Your Honor.

22 As you stated, we are here a second time in this  
23 case. The first time Your Honor had granted defendant's  
24 motion. And essentially defendant's arguments are similar to  
25 the first go-around. Plaintiff claims here that defendant has

1 allegedly misbranded and adulterated products. And that's the  
2 form of the claim that they are bringing. Allegedly it's a  
3 violation of the Florida Drug and Cosmetic Act, but in  
4 substance really plaintiff claims to enforce the Federal Food,  
5 Drug, and Cosmetic Act and the Florida Drug and Cosmetic Act.  
6 And both statutes do not permit a private cause of action.  
7 And the reason why I say it's really in substance to enforce  
8 both statutes is because if you look at both statutes, both  
9 the misbranding and the adulteration provisions in both  
10 statutes, they're identical.

11 THE COURT: Quick question, Counsel. Is there a  
12 direct State of Florida case that says -- I know there are  
13 federally, on a federal statute, but a direct State of Florida  
14 case that says there's no private action, private cause of  
15 action under the Florida statute?

16 The text of the statute doesn't exactly say that. I  
17 think it says the department shall. Is there any just  
18 clear-as-day, you know, smack-me-in-the-face language that  
19 says no private cause of action period in expressed terms in  
20 the Florida Statutes?

21 MR. MODAFFERI: Your Honor, there are several, as you  
22 pointed out. I believe there are actually three or four  
23 federal causes in Florida that say that there's no private  
24 cause of action under the Florida Drug and Cosmetic Act. I do  
25 believe there is some case law in the state courts as well

1 that give rise to that argument or that finding. I'm not  
2 quite sure if there is anything that is a head smacker, or I  
3 may be misquoting Your Honor. We could certainly provide that  
4 to the extent that that's critical to the Court.

5 THE COURT: Here's the other concern. I don't know,  
6 Mr. Modafferi, about this, whatever it is, this alleged  
7 contamination, but they are also saying, are they not, if  
8 you're selling a dozen eggs but when we open up the carton --  
9 I have to accept their facts as true right now. You're  
10 selling a dozen eggs. And when we open up the carton of eggs,  
11 it's ten eggs or nine eggs. You're selling something --  
12 another bad metaphor here -- you're telling everybody you're  
13 selling 100-proof whiskey and it's actually watered down.  
14 It's really 60-proof, 70-proof.

15 Putting aside the bar, that alone would be actionable  
16 under FDUTPA, wouldn't it?

17 MR. MODAFFERI: No, Your Honor. And that's a very  
18 good question. I think that goes to the heart of the dispute  
19 here.

20 So using your analogy to the allegations in the  
21 complaint and the liquor, they're saying instead of 100-proof,  
22 it's 81-proof. And really that's based on their own testing.  
23 So if we get down to the core of the case, discovery is  
24 essentially going to be about testing, testing to determine  
25 whether the products that my client sells are misbranded and

1 adulterated. But that testing, that's the FDA's testing that  
2 has to be done. It doesn't matter what their testing says.  
3 We don't know anything about their testing.

4           We submitted a declaration that you can -- there are  
5 all sorts of reasons why certain tests may not come out  
6 exactly on point, but the core of it is, this is testing and  
7 these are provisions and results that fall under the FDA's  
8 purview. It doesn't matter what their testing shows. It  
9 doesn't matter what our testing shows. It matters when the  
10 FDA walks in and they test it, it matters in their testing if  
11 Brooksville's products are consistent and meet the standards  
12 of the FDA.

13           So a litigant could come in and say I bought a  
14 product. It said a hundred proof but it was 90-proof and I  
15 want to bring a cause of action. That's liquor. That's  
16 different. If it's a drug, the case law is pretty clear on  
17 this, that this is the FDA's purview, and there's implied  
18 preemption. And there's good policy reasons for that.

19           There's a federal statutory scheme that the FDA uses  
20 to achieve a delicate balance of objectives. If private  
21 parties come along, that upsets that balance. And as we  
22 discussed the first go-around, there is a shortage of this  
23 medication. The FDA has balanced, has weighed the benefits of  
24 having compounds versus not, whether they are going to  
25 enforce, whether they're not. And this case is really all

1 about plaintiffs stepping into the Food and Drug  
2 Administration shoes or even the Florida Department of  
3 Business and Professional Regulation that has a concurrent  
4 enforcement authority for intrastate violations of the DCA.  
5 That's what this is all about. The plaintiff cannot enforce  
6 those rules against the defendant. The case law is clear.

7 THE COURT: Are you there?

8 MR. MODAFFERI: Yes, I'm here, Your Honor. And just  
9 to go back to my original point, and I'll close on it fairly  
10 quickly because Your Honor has a very good grasp on the  
11 subject matter.

12 Again, what we are dealing with here are claims for  
13 violating FDA rules. And misbranding and adulteration are the  
14 two core provisions that the FDA, you know, seeks to ensure  
15 and seeks to enforce. And that's exactly what this case is.

16 It's not a tort claim under traditional common law.  
17 This is the existence of the FDCA, and the misbranding and  
18 adulteration provisions are critical elements of the case. I  
19 think it's clear. We cited some cases in our papers that kind  
20 of courts are warning other courts basically don't be fooled  
21 by savvy plaintiffs. Don't be fooled by the disguises that  
22 competitors are going to put on to enforce the FDCA claims.  
23 And that's exactly what we have here. It is just another  
24 example of it.

25 And again as mentioned the last time, plaintiff is



1 not without recourse, right? They can petition the FDA for  
2 enforcement. They can petition the Florida Department of  
3 Business and Professional Regulation if there's an intrastate  
4 issue, but the law is clear that a private action is not  
5 permitted to enforce people.

6 And with that, Your Honor, I will save some of my  
7 time to --

8 THE COURT: Hold on. So suppose I get your stuff,  
9 okay. I'm probably five pounds overweight, so I wouldn't  
10 qualify. But let's say that I'm obese or whatever. I buy  
11 your stuff. This is just a hypothetical. And you guys are  
12 selling, I assume it is like an injection or something. It is  
13 just distilled water, not Brooksville but the other company  
14 down the street. It sells this stuff, advertises. It's just  
15 distilled water. They're ripping me off, taking advantage of  
16 this hot, new thing and stealing from me.

17 I don't have a cause of action against them?

18 MR. MODAFFERI: So another great question, Your  
19 Honor. You as the consumer could bring a tort claim against  
20 them, absolutely.

21 THE COURT: I could sue them for fraud. And that's  
22 not in the same way that these device cases where the hip  
23 implant blows up in a lady's hip. That would be my cause of  
24 action.

25 MR. MODAFFERI: Correct. So you would be bringing

1 tort claims under traditional common law consistent with the  
2 Eleventh Circuit decisions of *Mink*, *Godelia*, and *Jacob*,  
3 because someone who sells a product and puts it out there for  
4 consumers, they have a duty to consumers. There is no duty to  
5 a competitor. The competitor down the street, it would be  
6 their option if the store two doors down is selling a product  
7 that's basically water would be to again petition the FDA for  
8 enforcement, petition the Florida Department of Business and  
9 Professional Regulation. So everyone has their options and  
10 everyone has their recourse.

11 Consumers, yes, common law torts, traditional tort  
12 claims are available. Competitors, no, you cannot enforce the  
13 FDCA rules or DCA rules against a competitor. That's not the  
14 process of the Unfair Trade Practices Act.

15 And again, Your Honor, I think -- I'm not sure if I  
16 went over my 15 minutes or not.

17 THE COURT: I'll come back. I'll give you five  
18 minutes on the back side here.

19 MR. MODAFFERI: I appreciate it. Thank you.

20 THE COURT: Mr. Halperin, just a couple questions. I  
21 know it's in the record, but one wonders why there's a  
22 shortage of this. And to me there's two responses. Either  
23 you can't make enough of it, you know, your factory is  
24 overwhelmed, or the second one is it's contrived shortage for  
25 economic rent purposes.

1           The first reason seems -- and I know it's not  
2 relevant, but I just have to tell you what's in the judge's  
3 mind here. The first reason that you can't make enough of it,  
4 your factory is overwhelmed. It seems like everybody else is,  
5 so I'm not sure what that issue is.

6           What I hope and at the end of the day I'm sure Novo  
7 Nordisk being a big company is going to do what they want to  
8 do, but we are just not going around here trying to knock off  
9 the competition. So this testing, if we get there, it is  
10 going to be important that your people aren't just going  
11 around finding salt in the wrong spot and trying to stop all  
12 this, but apparently the FDA contemplates that other people  
13 are going to make this stuff because it's on that list.

14           Anyway, what do you say in rebuttal, Mr. Halperin?

15           MR. HALPERIN: Sure, Your Honor.

16           Novo's amended complaint is directly responsive to  
17 the Court's prior ruling and readily passes the test that Your  
18 Honor spelled out in that ruling, that to escape implied  
19 preemption, the alleged conduct must give rise to liability  
20 under state law even if the federal FDCA did not exist.  
21 That's what Your Honor articulated at Docket 33.

22           Novo's amended complaint is not the same complaint in  
23 disguise as Mr. Modafferi says. It differs both on the law  
24 and on the facts. The original complaint involved a provision  
25 of Florida law that expressly mentioned the FDCA; whereas, the

1 amended complaint relies on a provision that makes no such  
2 reference.

3           The original complaint alleged that Brooksville's  
4 drug was unapproved. The operative complaint alleges that  
5 Brooksville's drug had the wrong amount of active ingredients.  
6 It has nine eggs instead of twelve eggs, to use Your Honor's  
7 terms. It has dangerous impurities. It's not distilled  
8 water. It is actually harmful ingredients.

9           To apply the test that Your Honor articulated in its  
10 prior ruling, we can assume that tomorrow the federal  
11 government repeals the Federal Food, Drug and Cosmetic Act.  
12 Brooksville's ongoing manufacturer compounded semaglutide that  
13 contains impurities that risk patient safety. And  
14 significantly less active ingredients being represented on the  
15 label would still give rise to liability.

16           And I want to emphasize the patient safety  
17 consequences here because it's not as Your Honor said, picking  
18 off competition. We are bringing these suits motivated by  
19 patient safety concerns from what we seem to be a cottage  
20 industry that sprung up to take advantage of the popularity of  
21 these drugs and the demand for these drugs outpacing Novo's  
22 supply, which it is actively seeking to increase, none of  
23 which, as Your Honor noted is in the record, but I just want  
24 to note the context here. We are bringing these suits for  
25 patient safety. And the best evidence of that is we're not

1 seeking monetary damages. We're seeking to put an end to  
2 conduct that we believe is harming and potentially harming  
3 patients.

4           The test, Your Honor, articulates, gives rise to  
5 liability under state law even if the federal FDCA did not  
6 exist, is met here for two reasons. First, we brought a  
7 traditional FDUTPA claim, a claim that doesn't rely on any  
8 predicate state statute. And I will come to Your Honor's  
9 question in a moment about whether the Florida DCA has a  
10 private cause of action, but Your Honor doesn't even need to  
11 look at the Florida DCA because we've alleged a traditional  
12 FDUTPA claim, that it is unfair and deceptive, within the  
13 ordinary meaning of those terms, to sell a product that you  
14 say has one amount of ingredient and actually has another or  
15 to sell a product that actually has dangerous ingredients in  
16 it. That claim would survive even if the federal FDCA were to  
17 be repealed tomorrow.

18           Second, we have alleged a violation of the Florida  
19 DCA, and counsel for Brooksville keeps saying we're trying to  
20 enforce the federal DCA. We're actually not. We are  
21 expressly seeking only to bring a claim based on a violation  
22 of the Florida DCA, which stands on its own and doesn't  
23 require any reference to the federal FDCA's stated claim.

24           So let's start with the first reason, the traditional  
25 FDUTPA claim based on the ordinary meaning of unfair and

1 deceptive under FDUTPA's liberal construction.

2           Brooksville's motion to dismiss doesn't even address  
3 this theory at all. And its reply brief doesn't substantively  
4 engage with it, so we think that alone is enough to deny the  
5 motion to dismiss. But selling a product that says it has 2.1  
6 milligrams per milliliter of semaglutide and actually has 1.6  
7 milligrams per milliliter, which is the claim we brought, the  
8 pleadings that Your Honor has to accept as true at this stage,  
9 is deceptive no different than selling Coffee Mate that says  
10 it has 500 servings in it but actually has 25 percent less.  
11 That's exactly the claim that the Southern District evaluated  
12 in *Yonan*, 591 F. Supp 3d at 1301 from 2022 and said that state  
13 of deceptive trade practices claimed under FDUTPA is the exact  
14 claim that we're bringing here as to semaglutide, including  
15 almost to the exact amount the amount less of semaglutide as  
16 was alleged there with respect to Coffee Mate. And similarly,  
17 selling a product that contains impurities --

18           THE COURT: Yeah, but Coffee Mate is not regulated by  
19 the FDA, right?

20           MR. HALPERIN: It is, Your Honor. It's a food  
21 regulated by the same Food, Drug and --

22           THE COURT: It doesn't seem like the level of --  
23 anyway, it's not quite a prescription drug. It's probably  
24 just ground up egg shells which, by the way, I consume every  
25 morning. Sorry.

1 MR. HALPERIN: It actually is regulated under the  
2 same Food, Drug and Cosmetic Act that's at issue here.  
3 Selling a drug that contains impurities that can cause  
4 anaphylaxis and other life-threatening injuries is an unfair  
5 practice under the ordinary meaning of that term because it  
6 offends established public policy and it's immoral, unethical,  
7 oppressive or unscrupulous. That argument goes entirely  
8 unrebutted by Brooksville in their papers. And we think that  
9 alone states a claim even if Your Honor were to decide there  
10 is no private cause of action under the Florida DCA and that  
11 we can't sue under FDUTPA based on a violation of the Florida  
12 DCA, but that's what I want to turn to next.

13 The second reason is the violation of the predicate  
14 statute, the Florida DCA that makes no reference to the  
15 federal DCA. The violation of the Florida DCA is not what we  
16 are suing on directly. Rather, our claim is that it is a  
17 per se violation of FDUTPA under Section 501.203(3) to violate  
18 the Florida DCA. The Florida DCA is a statute that prescribes  
19 unfair methods of competition or unfair, deceptive or  
20 unconscionable acts or practices. Nothing in FDUTPA says that  
21 the predicate statute has to create a private cause of action  
22 in order for that predicate statute to serve as a violation of  
23 FDUTPA.

24 Your Honor asked for case law. I would direct Your  
25 Honor to *Reilly v. Amy's Kitchen*, which was not in our brief,

1 2013 Westlaw 9638985 in the Southern District in 2013. There  
2 plaintiffs brought -- a class of plaintiffs brought a FDUTPA  
3 claim against a juice manufacturer saying, among other things,  
4 that the juice manufacturer violated the Florida DCA's  
5 misbranding provision, the same provision we bring a claim --  
6 that we rely on for our predicate cause of action here.

7           The Court acknowledged that the Florida DCA doesn't  
8 have itself a private cause of action but said, quote, it is  
9 not apparent that a plaintiff must be able to maintain a  
10 private cause of action to establish a per se violation under  
11 FDUTPA. And the Court allowed that claim to proceed past a  
12 motion to dismiss.

13           That's consistent with the District of Connecticut  
14 case we cite in our brief, *Patane*, because it is common for  
15 consumer protection in unfair trade practices statutes to  
16 serve as a vehicle for a cause of action based on conduct that  
17 violates an independent state law standard that is not itself  
18 otherwise actionable. That's at 369 F. Supp. 3d at 394  
19 against the District of Connecticut. So we think it's  
20 irrelevant that the underlying predicate statute itself  
21 doesn't create a cause of action if our cause of action is  
22 under FDUTPA, not the Florida DCA.

23           Going back to whether that claim is a preemptive  
24 claim or not, the Florida DCA makes it unlawful to sell a drug  
25 that's adulterated or misbranded. It defines what it means to



1 be adulterated, what it means to be misbranded without  
2 reference to any federal law. And so because of that, the  
3 Florida DCA is not a statute. The provision of the Florida  
4 DCA that we would rely on is not a provision that says, in sum  
5 and substance, comply with the Federal Food, Drug and Cosmetic  
6 Act. Instead it's a statute that says, in sum and substance,  
7 don't sell adulterated and misbranded drugs.

8           So if Florida -- if the Federal Food, Drug and  
9 Cosmetic Act were to be repealed tomorrow, the Florida DCA  
10 would continue to make Brooksville's conduct unlawful no  
11 different than it does today. It makes no difference that the  
12 conduct alleged may also violate the Federal Food, Drug and  
13 Cosmetic Act. Section 337a of the federal act bars  
14 enforcement of violations, quote, of this chapter. But Novo  
15 is not suing under this chapter. It's suing under the Florida  
16 DCA which makes no reference to this chapter.

17           As the Court stated in its prior order, a state law  
18 claim can survive implied preemption -- this is a direct  
19 quote. A state law claim can survive implied preemption even  
20 if based on conduct that violates the FDCA. That's Docket 33  
21 at page 5. That's consistent with *Jacob*. It's consistent  
22 with *Godelia*, and it's consistent with *Mink* where plaintiffs  
23 explicitly pointed to breaches of federal regulations as  
24 evidence of the state law violations that were brought in  
25 those cases. Where a case involves violations of both state

1 and federal law, litigation of the federal violation is left  
2 to the FDA alone. That's undisputed. But the litigation of  
3 the Florida DCA violation is not preempted simply because it  
4 may also violate federal law.

5           And the FDA actually takes that exact same position.  
6 In an amicus brief before the U.S. Supreme Court in  
7 *Albertson's*, which we cited in our brief, plaintiffs brought a  
8 claim under a California law that said a food is misbranded if  
9 it has an artificial coloring in it but doesn't disclose the  
10 presence of the artificial coloring. That California law was  
11 substantively identical to a provision in the Federal Food,  
12 Drug and Cosmetic Act, and so defendant there said that the  
13 claim brought under California law was preempted.

14           The United States submitted an amicus brief before  
15 the Supreme Court saying, no, that claim is not preempted and  
16 wrote, quote, actions to enforce state laws that impose  
17 requirements identical to those under the FDCA are not actions  
18 to enforce the FDCA itself.

19           Mr. Modafferi talks about how allowing private  
20 parties to bring these circuit claims would upset the balance  
21 of the federal FDCA. Well, the FDA actually takes and has  
22 taken in three things before the U.S. Supreme Court the very  
23 opposite position.

24           I want to close with highlighting just how radical  
25 the position that Brooksville takes here would be. It would

1 be a radical departure from preemption jurisprudence including  
2 from *Mink*, from *Godelia*, from *Jacob* and from the test that  
3 Your Honor articulated previously because it would make the  
4 Florida DCA unenforceable by anyone. It would mean that the  
5 Attorney General of Florida couldn't sue to bring a violation  
6 of the types that Your Honor raised in the hypothetical, that  
7 the Attorney General could not enforce under FDUTPA a pharmacy  
8 that was selling distilled water and packaging it as a drug to  
9 help with weight loose. It would mean that consumers who  
10 purchased that compound couldn't sue under FDUTPA.

11 Now, Mr. Modafferi says, well, they might have a  
12 common law fraud claim, but that common law fraud claim would  
13 bring the exact same preemption problems under Mr. Modafferi's  
14 preemption test as the claim we brought here, because it would  
15 require, in Mr. Modafferi's terms, adjudicating the FDA  
16 testing that we don't believe, first of all, that the FDA is  
17 the one responsible for doing the testing. That's  
18 Brooksville's responsibility, not the FDA's. But even  
19 accepting that proposition, it would mean, because the FDA is  
20 the one responsible for the testing, the consumer couldn't  
21 bring that common law fraud claim no different than  
22 Mr. Modafferi's position that Novo doesn't have a claim here  
23 because the FDA's testing is implicated. That's a radical  
24 proposition meaning that no one could bring a Florida DCA  
25 claim, not the Attorney General, not consumers, and that

1 couldn't be what the Florida legislature had in mind when it  
2 passed the Florida DCA, and it's not required by preemption  
3 law.

4           So with that, Your Honor, unless Your Honor has  
5 further questions, I'll rest there.

6           THE COURT: All right. Well, thank you,  
7 Mr. Halperin.

8           Mr. Modafferi, why don't you button up anything you  
9 wish to share in rebuttal.

10           Mr. Modafferi is on mute. Hello.

11           MR. MODAFFERI: I apologize. Thank you, Your Honor.

12           Just buttoning up here, Mr. Halperin mentioned, you  
13 know, certain things that I had stated, one of them being the  
14 policy reasons and the federal statutory scheme that would be  
15 upset, and that's not from me. I was actually quoting the  
16 Supreme Court in *Buckman*. Presumably the test that counsel  
17 referred to as Mr. Modafferi's test, again, that's not my  
18 test. That's the Supreme Court test. So it's binding on this  
19 Court what I had mentioned before with respect to, you know,  
20 preemption and the test for preemption, but I just want to  
21 make two other quick points.

22           First of all, the Florida DCA is a law that says in  
23 substance comply with the FDCA. In the opening of the statute  
24 it's stated perfect. The legislature's stated purpose is  
25 conformity with the provisions and regulations issued under

1 the authority of the federal DCA. And Your Honor actually  
2 found that in the prior order that the Florida DCA is the law  
3 that says in substance comply with the federal DCA.

4 One other thing that I just want to finish on is  
5 counsel's comment about there would be no enforcement if the  
6 preemption law with respect to enforcing the FDCA through  
7 competition laws or the DCA were not available, but that's  
8 misguided. The DCA can be enforced. Violations of the DCA  
9 can be enforced by the state. That is clear. There is no  
10 private enforcement. And similarly consumers -- every case  
11 cited by my adversary, *Reilly*, *Patane*, those are all cases  
12 brought by consumers, not competitors and in filed tort  
13 claims. Yes, was there in *Patane* a consumer protection claim  
14 as well? There was, but that came to rely on California  
15 cases, a line of California cases that have since been  
16 basically rejected by the Ninth Circuit in the *Nexus*  
17 *Pharmaceuticals* case and the *Hope* case that followed.

18 So with that, I don't want to beat this drum. Your  
19 Honor has a very good handle on the issues here. We're  
20 dealing with a drug, not a food which, as Your Honor said, is  
21 a little more relaxed. And we submit that plaintiff's claim  
22 shall be or should be under *Buckman* and other binding case law  
23 preempted as a matter of law.

24 Thank you.

25 THE COURT: Well, I sure appreciate both arguments at

1 this high level.

2 Well, Mr. Modafferi, I'm going to deny your motion to  
3 dismiss. I'm not at all sure that -- I guess we'll find out  
4 whether the altruistic motive behind this lawsuit is as  
5 Mr. Halperin said. I hope it is. I certainly know he  
6 believes it is.

7 I don't intend to write a big order here because this  
8 is sui generis. I don't need to create a bunch of precedence  
9 for what I think is a very unique factual pattern related  
10 strictly to Brooksville. So the motion to dismiss is denied.  
11 I'm going to need an answer from Brooksville, say, in 14 days.

12 Now, let's do this on the case management report,  
13 Counsel. I saw where y'all just said we'll hold off until you  
14 get a ruling on this. And I saw where you requested a  
15 preliminary pretrial conference. I'm not sure you need that.  
16 You guys are A team on both sides. See if you can agree on a  
17 case management report. And if you can't, then file competing  
18 reports within 14 days, and I'll lay those out on my desk and  
19 see what looks good.

20 All right. Anything else from the movant,  
21 Mr. Modafferi, today?

22 MR. MODAFFERI: Yes, Your Honor. Two quick points,  
23 the first of which is this case is marked for mediation. So  
24 I'm not quite sure -- I would assume that we were kind of just  
25 waiting for the briefing to be resolved before the mediator

1 stepped in. I'm not too familiar with the mediation process  
2 in the Middle District of Florida, but I feel like that would  
3 have a direct impact on our case management plan.

4           Should we reach out to the mediator that's been  
5 selected and work with that individual?

6           THE COURT: Sure. Now, let me look here.  
7 McClelland, bright guy. That's right. So why don't you all  
8 communicate on that.

9           Now, I'm not going to require instanter mediation or  
10 early mediation. If the parties agree, that's fine. If not,  
11 put your deadline in your proposed case management report.

12           What was the other point, Mr. Modafferi?

13           MR. MODAFFERI: The other thing I was just going to  
14 say, Your Honor, for purposes of the record and, you know,  
15 circling back to my client for purposes of, you know,  
16 explaining the decisions and whether there will be any appeal,  
17 I understand that a lengthy order would not be required, but  
18 to the extent Your Honor is amenable, even a text order might  
19 work.

20           THE COURT: I'm certainly going to deny the motion on  
21 the record, but I'm sure your client understands that you will  
22 inform them that this is a nonfinal order. I'm not aware of  
23 any grounds for appeal in a normal course, but I'm pretty sure  
24 there's not any appeal from a denial of a motion to dismiss,  
25 but you may counsel them in any way you want. So there will

1 be a marginal order come out denying the motion. It is just  
2 based on the facts in the complaint, and I have to accept them  
3 as true. They may or may not be true. They are saying that  
4 you are selling a dozen eggs, to continue the multiple bad  
5 metaphors, and people are getting nine, and we will see how  
6 the case shakes out. I think the argument put up by Novo is  
7 well taken and carried the day today.

8 Anything else, Mr. Modafferi?

9 MR. MODAFFERI: No. Thank you, Your Honor. That  
10 would be all.

11 THE COURT: Answer within 14 days. Case management  
12 either together within 14 days or competing versions within 14  
13 days.

14 Mr. Halperin, anything from you?

15 MR. HALPERIN: No, Your Honor. Thank you very much.

16 THE COURT: Thank you, Counsel. I appreciate it.  
17 Good day.

18 (Proceedings concluded at 10:05 a.m.)  
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1 UNITED STATES DISTRICT COURT )  
2 MIDDLE DISTRICT OF FLORIDA )

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4 **REPORTER TRANSCRIPT CERTIFICATE**

5 I, Tracey Aurelio, Official Court Reporter for the United  
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11 the transcript page format is in conformance with the  
12 regulations of the Judicial Conference of the United States of  
13 America.

14 /s *Tracey Aurelio*

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Tracey Aurelio, RMR, RDR, CRR  
Official Court Reporter  
United States District Court  
Middle District of Florida  
Tampa Division  
Date: February 7, 2024