NOT FOR PUBLICATION

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STACIE SOMERS, On Behalf of Herself and All Others Similarly Situated, Plaintiff-Appellant, v. BEIERSDORF, INC., a Delaware corporation, Defendant-Appellee.	No. 20-55541 D.C. No. 3:14-cv-02241-LAB-AGS MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Larry A. Burns, District Judge, Presiding

Argued and Submitted March 3, 2021
Pasadena, California

Before: GRABER, MILLER, and LEE, Circuit Judges.

Stacie Somers sued Beiersdorf, Inc., alleging that its Nivea CoQ10 Lotion is a drug that was sold without receiving federal approval under the Food, Drug, and Cosmetic Act ("FDCA"). The district court entered summary judgment in favor of Beiersdorf, ruling that Somers' claim was impliedly preempted. Somers now

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we hold that Somers has failed to state a claim.

1. We review de novo the grant of summary judgment. *Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 759 (9th Cir. 2017). We "may affirm summary judgment on any ground supported by the record." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 956 (9th Cir. 2009) (citation omitted).

2. Somers' theory is as follows: Under California Health & Safety Code § 111550(a), it is unlawful to sell a drug in California unless it has obtained approval from the Food and Drug Administration ("FDA") through the New Drug Application ("NDA") process. Beiersdorf's product, according to Somers, is a "drug" as defined in the federal Food, Drug, and Cosmetic Act, but it never received an approved NDA. Therefore, according to Somers, Beiersdorf is selling its product unlawfully.

But Somers' theory fails to state a claim. Under California Health & Safety Code § 111550, it is unlawful for a manufacturer to sell a drug unless "*either"* of the following two conditions is met. Cal. Health & Safety Code § 111550 (emphasis added). The first condition is that the product has obtained an approved NDA from the FDA. § 111550(a). The second condition is that the product has obtained new drug approval from the state of California. § 111550(b). Because a

manufacturer acts lawfully so long as it meets either condition, it acts unlawfully only when it fails to meet *both* conditions. Yet Somers disclaimed any allegations about Beiersdorf's failure to obtain new drug approval from the state of California as required under section 111550(b). Somers has thus failed to state a claim.

AFFIRMED.