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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

In re FERRERO LITIGATION	CASE NO.: 11 CV 0205 H (CAB)
	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT FERRERO U.S.A., INC.'S MOTION TO DISMISS CONSOLIDATED COMPLAINT
	Date: June 13, 2011 Time: 10:30 a.m.
	Before: Hon. Marilyn L. Huff

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INTRODUCTION

This is a purported consumer class action against Ferrero U.S.A., Inc. ("Ferrero"), concerning Ferrero's advertising for its Nutella® hazelnut spread ("Nutella®"). Plaintiffs are two California residents who claim to represent a class of every United States consumer who has purchased Nutella® since January 2000. Plaintiffs allege that Ferrero's product label, website and television advertising for Nutella® are deceptive because the statements suggest that Nutella® may be spread on a bread product and consumed with fruit and dairy products as part of a balanced breakfast, including by children, while supposedly not adequately disclosing the sugar and fat content of Nutella® or the health risks associated with over-consumption of sugar and fat. Plaintiffs allege state law claims for unfair competition, false advertising and violation of the Consumer Legal Remedies Act, as well as breach of warranty claims.

Nutella® Product Label. All but one of plaintiffs' claims concerning the Nutella® product label are preempted under federal law. Plaintiffs allege that statements on the label that (i) Nutella® is made with hazelnuts, skim milk and cocoa, and (ii) Nutella® has no artificial colors or preservatives, are deceptive because they fail to alert consumers to the sugar and fat content of Nutella® and that Nutella® contains an artificial flavoring. But the Nutella® label complies with the detailed Food and Drug Administration ("FDA") requirements governing these disclosures. Plaintiffs' claims are therefore preempted because they seek to hold Ferrero liable under state law for failing to include additional disclosures that are inconsistent with federal law.

The only remaining statement on the Nutella® label at issue is "An example of a tasty yet balanced breakfast: a glass of skim milk, orange juice and Nutella® on whole wheat bread" presented in conjunction with an image of the same. According to plaintiffs, this statement is deceptive because it "falsely suggest[s] that Nutella® is the key element that makes the depicted breakfast 'balanced' or nutritious when in fact it is the other food items . . . that provide the

nutrients and healthy qualities." ¶ 77.[1] Plaintiffs' claim fails for at least two reasons. First, the false statement claimed by plaintiffs is a straw man. The label does not suggest that Nutella® is the "key element" in a balanced breakfast, as plaintiffs allege. To the contrary, the label's depiction of Nutella® spread on bread and served with fruit and dairy products makes plain that it can be consumed with a combination of other foods to form part of a balanced breakfast. Second, the statement is not actionable because it is not a quantifiable claim about the product and does not mischaracterize any specific or absolute characteristics of Nutella®. And indeed, this Court has previously held that similar statements concerning a "balanced" diet are mere puffery. *Fraker v. KFC Corp*., No. 06-CV-01284-JM, 2007 WL 1296571, at *3 (S.D. Cal. Apr. 30, 2007) (granting motion to dismiss).

The Website. Since neither plaintiff alleges that she ever viewed or relied upon the website, neither has standing to pursue claims for statements appearing on the website. The website statements are not actionable for the additional reasons that (1) many are preempted, and (2) they are not likely to deceive a reasonable consumer, in any event.

The Television Advertising. The television advertising is not actionable because it is not likely to deceive a reasonable consumer. Even if the television advertising is not formally covered by the preemption doctrine, many of the statements at issue (*e.g*., that Nutella® does not have artificial colors or preservatives, that it contains hazelnuts, skim milk and cocoa) are nearly identical to statements on the label that are governed by, and comply with, federal law. Since the FDA has already determined that these types of statements are not false or misleading when placed on a product label, they can hardly be said to be so when found in television advertising.

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[1] All paragraph citations ("¶ _") are to plaintiffs' Master Consolidated Complaint (Dkt No. 14) ("Complaint") and all exhibit ("Ex.") citations are to the Declaration of Amir Steinhart ("Steinhart Decl.") filed herewith. On a motion to dismiss, a court may consider evidence on which the complaint "necessarily relies" as well as matters of public record without converting the motion into one for summary judgment. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006); *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). Therefore Ferrero respectfully requests the Court consider Steinhart Decl., Exs. A (the Nutella label) and B (pages from the NutellaUSA.com website), which are materials referenced in and quoted by the Complaint, as well as Steinhart Decl., Ex. C, which is a matter of public record.

Warranty Claims. Finally, plaintiffs' claims for breach of express and implied warranty also fail. Plaintiffs do not allege any facts demonstrating that Nutella® is anything other than as advertised or that it is unfit for human consumption.

Ferrero respectfully requests that the Court dismiss the Complaint in its entirety.

FACTUAL ALLEGATIONS

A. Advertising for Nutella®

Nutella® is a "hazelnut spread" made from sugar, palm oil, hazelnuts, cocoa, skim milk and an artificial flavor called Vanillin. ¶ 77; Ex. A. In Europe and around the world, Nutella® has long been used as a breakfast condiment, spread on bread products like toast or waffles. Over the last several years, Nutella® has gained popularity in the United States. ¶ 17.

Given the numerous scientific studies which support the growing recognition of how important eating breakfast is to performance, mood and overall diet (*see, e.g.*, ¶ 82), Ferrero's recent advertising and marketing emphasize that Nutella® can be used to help moms encourage kids to eat a balanced breakfast. ¶¶ 78, 91-93. For instance, the Nutella® label provides as "[a]n example of a tasty yet balanced breakfast" when Nutella® is spread on whole wheat toast and eaten with fruit, a glass of skim milk and a glass of orange juice. ¶ 77. Similarly, the Nutella® website states that parents can "[c]reate a meal of whole wheat toast or a whole-grain toaster waffle with Nutella® hazelnut spread, a small bowl of sliced strawberries and a glass of 1% milk for a good mix of morning nutrients." ¶ 82. Ferrero never suggests that Nutella® alone constitutes a balanced breakfast. It *always* depicts Nutella® spread on a bread product and eaten with fruit or fruit juice and a dairy product. *See, e.g.*, ¶¶ 77-79.

Although Plaintiffs allege that Ferrero claims Nutella® is "the key element that makes the depicted breakfast 'balanced' or nutritious" (¶ 77), Ferrero's actual statements, including those cited in the Complaint, demonstrate that is not a sustainable allegation. Ferrero emphasizes that Nutella® should be eaten in "moderation" (¶ 82 ("When used in moderation with complementary foods, Nutella® can form a part of a balanced meal.")); that the great taste of Nutella® can encourage kids to eat whole grains that they otherwise might not (*id.* ("With the unique taste of Nutella®, kids may think they are eating a treat for breakfast while moms are helping nourish

their children with whole grains.")); and that a balanced breakfast requires a combination of foods (*id.* ("Be sure to include sources of whole grains, protein, fat and nutrient-boosting fruits or vegetables as part of the breakfast plan.")).

B. The Nutella® Product Label, Website and Television Advertisements

Plaintiffs' Complaint takes issue with (1) the Nutella® product label, (2) the Nutella® website, and (3) three television advertisements for Nutella®.

Nutella® Product Label. Like most food products, the Nutella® product label comprises a back and a front label. The back label contains the FDA-regulated "Nutritional Facts Panel" that lists product-specific information (serving size, calories, and nutrient information) and the product ingredients, which appear in capitalized letters consistent with FDA regulations. Ex. A. Plaintiffs do not allege that the factual information contained in the Nutrition Facts Panel or in the ingredients on the back label is false or deceptive. In addition to factual information about Nutella®, the back label states, "Start your day with Nutella® spread . . . An example of a tasty yet balanced breakfast: a glass of skim milk, orange juice and Nutella® on whole wheat bread," along with an image of whole wheat toast (with Nutella®), three pieces of fruit, a glass of orange juice, and a glass of milk. Ex. A.

The front label contains the FDA-required "Statement of Identity" (*i.e.*, "Hazelnut Spread with Skim Milk & Cocoa") underneath an image of bread with Nutella®, a glass of milk, two hazelnuts and a flower. *Id.* The side of the front label states "The original hazelnut spread," "Made with over 50 Hazelnuts per Jar," "Contains No Artificial Colors" and "Contains No Artificial Preservatives." *Id.* Plaintiffs do not allege that Nutella® contains fewer than 50 hazelnuts or that it contains artificial colors or preservatives.

The Nutella® website. The back label identifies the web address for the Nutella® website, found at www.nutellausa.com. Ex. A. The Nutella® website contains many pages of information about the product, including a list of its ingredients and a copy of the back label Nutritional Facts Panel (Exs. B-2 and B-3, respectively); questions and answers from children's nutrition expert and registered dietician Connie Evers that emphasize the importance of breakfast and discuss how to use Nutella® as part of a balanced breakfast (Ex. B-5); a "breakfast builder"

that allows comparison of the serving size, calories and nutrients of a variety of breakfast options (with or without Nutella®) (Ex. B-6); and links to a variety of health and nutrition resources, including the International Food Information Center, the U.S. Department of Agriculture, and the American Dietetic Associations. Ex. B-7.

Television Advertising. Plaintiffs allege that three television advertisements for Nutella® contain false or deceptive statements about the product, including images of a happy, healthy family; statements like "made with simple quality ingredients, like hazelnuts, skim milk, and a hint of cocoa"; and the identification of Nutella® as "a delicious hazelnut spread." ¶¶ 91-93.

C. Plaintiffs' Allegations

Plaintiffs allege that Ferrero's "multi-faceted marketing campaign focusing on the 'nutritional' value of Nutella® as a breakfast food" is false and misleading "because Nutella contains high levels of saturated fats, sugar, oil, artificial flavoring and other objectionable ingredients." ¶ 99. In particular, they allege that Nutella® contains "dangerous" levels of saturated fat (3.5 grams per serving), sugar (21 grams per serving) and other "objectionable" ingredients. ¶¶ 35-43, 99.

Saturated fat is a naturally occurring nutrient. According to the Recommended Daily Values ("RDV") as published by the FDA, adults and children four years and older should include approximately 20 grams of saturated fats in a typical 2,000 calorie daily diet.[2] A full serving of Nutella® contains 3.5 grams of saturated fat, *i.e.*, 18% of the recommended daily amount. Ex. A. The American Heart Association recommends slightly lower saturated fat intake than the FDA (*i.e.*, 7 percent of one's total daily calories). ¶ 36.

Sugar is another naturally occurring nutrient. No daily reference value has been established. As explained by the FDA, "[T]he public health community has not identified a dietary level above which consumption of sugars has been demonstrated to increase the risk of a

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[2] *See* 21 C.F.R. § 101.9(c)(9); Ex. C (Guidance for Industry: A Food Labeling Guide, Appendix F: Calculate the Percent Daily Value for the Appropriate Nutrients (Oct. 2009), *available at* http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/FoodLabelingGuide/ucm064928.htm.).

disease. Thus, the agency finds there is no sound basis on which to establish the requested [DV] for sugars." Food Labeling: General Requirements for Health Claims for Food, 58 Fed. Reg. 2478, 2491 (Jan. 6, 1993) (to be codified at 21 C.F.R. pts. 20 & 21).

Plaintiffs do not specify what other ingredients in Nutella® are "objectionable" to them, but at points in their complaint they characterize cocoa as "unhealthy" compared to the "more healthy" hazelnut. ¶ 81. Plaintiffs also allege that prior to August 2008 Nutella® contained "partially hydrogenated vegetable oil," which in turn contains artificial trans fat. ¶¶ 69-70. However, neither plaintiff alleges that she purchased Nutella® prior to 2009. *See* ¶¶ 26, 29. Finally, plaintiffs complain that Nutella® contains vanillin, an artificial flavor. ¶ 79.

In a nutshell, plaintiffs allege that Ferrero misleadingly emphasizes certain ingredients (*i.e.*, hazelnuts and skim milk), characteristics ("no artificial colors") and possible uses for Nutella® (*i.e.*, spread on toast at breakfast) while not giving the amounts of saturated fat, sugar and artificial flavoring equal prominence. ¶ 99. Plaintiffs further allege it is false and misleading to describe a "tasty yet balanced breakfast" consisting of skim milk, juice, and whole wheat toast when Nutella® supposedly does not add any nutrients to such a meal. ¶¶ 28, 77, 100, 102, 146. And they allege that it is false and misleading to depict healthy children eating Nutella® when over-consumption of fats and sugar can lead to health problems. ¶¶ 78, 90.

Plaintiffs portray themselves as "reasonably diligent" mothers who were "searching for healthy foods" for their families. ¶¶ 27, 115. Plaintiffs each allege that they inspected and rely on the product labeling of the products they purchase for their families. ¶¶ 26-30. The label for Nutella® clearly discloses the amounts of fat and sugar contained in each serving through the FDA-required Nutritional Facts Panel, and its ingredient list identifies palm oil and sugar as the first two ingredients. Ex. A. Despite their "reasonably diligent" inquiries into the products they were purchasing (including an inspection of the product labels), plaintiffs allege they were deceived into purchasing Nutella® and were unaware that it contained high levels of saturated fat and sugar. ¶¶ 115, 117. Plaintiffs allege that they were unable to appreciate the "grave health consequences of consuming products like Nutella®" and continued to purchase it for several years despite the "global outcry" against the nutrients described in their complaint. ¶ 71.

Plaintiffs do not describe the "reasonably diligent" steps they took to familiarize themselves with the effects of consuming fats and sugars, the amount of those nutrients that they would find acceptable in their daily diets (or at any particular meal), or whether those amounts differ from the recommended daily values set by the FDA.

ARGUMENT

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (alteration in original) (citation omitted). A complaint does not "suffice if it tenders 'naked assertion[s] devoid of further factual enhancement.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (alteration in original) (citation omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co*., 83 F.3d 1136, 1140 (9th Cir. 1996).

I. PLAINTIFFS' CLAIMS DIRECTED TO THE LABEL AND WEBSITE ARE PREEMPTED BY FEDERAL LAW

The Supremacy Clause establishes federal law as the "supreme Law of the Land," and any state law in conflict with federal law is "without effect." U.S. Const. art. VI, cl. 2; *see Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Additionally, state laws that "interfere with, or are contrary to the laws of Congress" are invalid. *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824). Here, plaintiffs' claims based on the label and website are barred by express preemption.

A. The Food Drug and Cosmetic Act Extensively Regulates Statements Regarding Food Items And State Law Claims Seeking Inconsistent Relief Are Preempted

Ferrero, like all food manufacturers, is subject to extensive regulatory requirements under federal law. The Food, Drug, and Cosmetic Act ("FDCA") established the FDA to ensure that

foods are "safe, wholesome, sanitary, and properly labeled." 21 U.S.C. § 343 *et seq.* In 1990, Congress amended the FDCA by enacting the Nutrition Labeling and Education Act (the "NLEA"), codified as amended at 21 U.S.C. §§ 301, 321, 337, 343, 371 to "clarify and to strengthen the [FDA's] legal authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about the nutrients in foods." H.R. Rep. No. 101-538, at 7 (1990). Pursuant to this statutory scheme, the FDA has issued extensive food labeling regulations that are relevant here. *See* 21 C.F.R. §§ 101.1-101.95.

Among other things, the FDCA and its implementing regulations prohibit food manufacturers from "misbranding" products. A product is considered "misbranded" if "its labeling is false or misleading in any particular" (21 U.S.C. § 343(a)) or does not comply with specific instances identified in the FDCA. *See id.* § 343(b)-(y). The FDCA now includes a broad express preemption provision that prevents any state from directly or indirectly regulating food-labeling claims in a way that is not "identical" to federal requirements to further the congressional goal of establishing national uniformity in labeling. *Id.* § 343-1; *see Mills v. Giant of Md., LLC*, 441 F. Supp. 2d 104, 106-09 (D.D.C. 2006) (noting breadth of preemption clause), *aff'd*, 508 F.3d 11 (D.C. Cir. 2007). Moreover, there is no private right of action under the FDCA. *See, e.g.*, *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 810 (1986).

As amended by the NLEA, the FDCA expressly preempts, among other things, any state law "requirement" for the labeling of food with respect to statements made under 21 U.S.C. §§ 343(r)(1) or 343(k) that is not "identical" to the federal requirements. Section 343(r)(1) governs statements about a food that expressly or by implication characterizes the level of any nutrient in the food. *Id.* § 343(r)(1). To avoid confusion, FDA regulations distinguish between three different kinds of claims described in Section 343(r)(1):

- "Express nutrient content claims" describe the amount of a nutrient in a food, *e.g.*, "No trans-fat," "Low in sodium" or "100 calories." 21 C.F.R. § 101.13(b)(1).
- "Implied nutrient content claims" suggest "that [a] food, because of its nutrient content, may be useful in maintaining healthy dietary practices and is made in association with an explicit claim or statement about a nutrient." *Id.* §§ 101.13(b)(2)(ii), 101.65(d). The FDA and case law recognize that the word "healthy" and its derivatives (*i.e.*, healthful) are properly treated as implied nutrient claims. 21 C.F.R. § 101.65(d).

- "Health claims" characterize "the relationship of any substance to a disease or health-related condition." *Id*. § 101.14(a).

Although different regulations apply to each category of claim, any state law that purports to establish non-identical requirements is expressly preempted under Section 343(r). State laws, common law duties and judge made rules, all fall within the scope of prohibited inconsistent "requirements." *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 323-24 (2008); *Chacanaca v. Quaker Oats Co.*, – F. Supp. 2d –, 2010 WL 4055954, at *5 (N.D. Cal. Oct. 14, 2007).

B. Plaintiffs' Claims Are Expressly Preempted to the Extent They Rely Upon Statements Regarding Certain Contents of Nutella®

Plaintiffs allege that Ferrero touts certain ingredients of Nutella® in its marketing, which suggest that the product is healthy, but that other of its ingredients (namely sugar and palm oil) allegedly render it unhealthy. *See, e.g.*, ¶¶ 24, 28, 40, 42-43, 46, 70, 74, 79. For example, the label for Nutella® contains the following statements: "Hazelnut Spread with Skim Milk & Cocoa," and "Made with over 50 Hazelnuts per Jar." Ex. A. These are nutrient content claims under the federal regulatory scheme. *See* ¶¶ 132(b)-(c).

Although plaintiffs do not dispute the truth of these statements, they contend these nutrient content claims are misleading because Ferrero did not disclose that Nutella® "is comprised primarily of sugar and oil." *See* ¶¶ 97, 99. In other words, plaintiffs seek to impose on Ferrero's labeling a requirement that it disclose what plaintiffs deem to be the unhealthy ingredients in Nutella® together with any statements about other healthy ingredients. But federal law does not require such disclosures.

Congress and the FDA, not plaintiffs, have already defined the circumstances in which a nutrient content claim triggers additional disclosure requirements (and have specified what those disclosures should be) as well as the circumstances in which a food manufacturer must refrain from making "health claims" or calling its product "healthy." When it enacted the NLEA, Congress gave the FDA authority to identify nutrients that – at certain levels – require specific language drawing the consumer's attention to the nutrient at that level in connection with any nutrient content claim, and to prohibit any health claim from being made. *See* 21 U.S.C.

§§ 343(r)(2)(B), 343(r)(3)(A)(ii). To date, the FDA has determined that certain levels of only four nutrients (total fat, saturated fat, cholesterol, and sodium) qualify as such "disqualifying nutrients." 21 C.F.R. §§ 101.13(h)(1), 101.14(a)(4). If the product contains higher levels of these nutrients, then the food manufacturer must refrain from making health claims (*id.* § 101.14) or describing the product as "healthy" (21 C.F.R. § 101.65(d)(2)(i)) and, if the label contains a nutrient content claim (either express or implied), then the label must contain a specific disclosure set forth in the regulation (21 C.F.R. § 101.13(h)(1)). But those requirements do not apply here because Nutella® does not contain the triggering levels of those nutrients.

Total Fat & Saturated Fat. The FDA determined that food with 13 or more grams of fat, or 4 or more grams of saturated fat, per serving meets the threshold levels of "disqualifying nutrients" for purposes of nutrient content and health claims. *See id.*[3] Plaintiffs concede that Nutella® does not contain fat or saturated fat in an amount at or in excess of these disqualifying levels. ¶ 75. Therefore, the presence of saturated fat in Nutella® does not prevent Ferrero from "touting" other ingredients in the product (*i.e.*, making a nutrient content claim) and any claim under state law premised on the "dangerous" levels of saturated fat in Nutella® is expressly preempted by the FDA's decision to set the disqualifying level of saturated fat above the amount contained in Nutella®.

Sugar. The FDA declined to find sugar to be a potentially "disqualifying nutrient" at all. During its notice and comment period, the FDA received several comments proposing that sugar be included as a "disqualifying nutrient." *See* 58 Fed. Reg. at 2491. After considering those submissions, the FDA declined to list sugar as a disqualifying nutrient for the same reasons FDA did not establish a percent Recommended Daily Value for sugars (*i.e.*, that "the public health community has not identified a dietary level above which consumption of sugars has been

[3] For trans fat, the FDA declined to set disqualifying levels and instead expressed an intent to "continue to evaluate the evolving science and, when the science has evolved to a point where the agency believes it can proceed with scientifically-based definitions and levels for these claims, it will proceed to do so through a new rulemaking." 68 Fed. Reg. 41434, 41465.

demonstrated to increase the risk of a disease"). *Id.*[4] Therefore, the presence of sugar in Nutella® (in any amount) does not prevent Ferrero from "touting" other ingredients in the product and any claim under state law premised on allegedly high levels of sugar is expressly preempted by the FDA's decision to not recognize sugar as a "disqualifying nutrient."

Because Nutella® does not contain a "disqualifying" amount of total fat or saturated fat per serving, and because sugar is not a "disqualifying nutrient," federal law is clear: nutrient content claims on the Nutella® label do not trigger any additional disclosure requirements. Any order concluding otherwise (*i.e.*, requiring Ferrero to make additional disclosures concerning the saturated fat and sugar content of Nutella®) based on state law would impose labeling requirements that are not identical to the federal requirements. As explained by the Northern District of California, "[e]ssentially, plaintiffs' claim asks this Court to *ascribe* disqualifying status to [certain nutrients] where the [FDA] has at least so far declined to do so." *Chacacana*, 2010 WL 4055954, at *8.[5] Accordingly, plaintiffs' state law claims premised on the notion that the saturated fat and sugar content of Nutella® make Ferrero's representations on its label regarding Nutella®'s hazelnut, skim milk and cocoa content misleading are preempted. *See Chacanaca*, 2010 WL 4055954, at *7-8 (finding preempted state law claims alleging that statements that granola bar contained whole grain oats and no high fructose corn syrup were misleading because they suggested bars were healthy despite fact that they also contained hydrogenated vegetable oil, where manufacturer did not violate disqualifying nutrient

[4] The FDA was also not persuaded "that it is necessary to include a 'low calorie' or 'low sugar' criterion in the definition of 'healthy' for the claim to be useful and not misleading to consumers. The information provided in the comments did not show that consumers expect 'healthy' to be a claim about the caloric content of the food." 59 Fed. Reg. 24232, 24244.

[5] In addition to plaintiffs' state statutory claims, their claims for breach of warranty also are subject to preemption. *See Riegel*, 552 U.S. at 320, 330 (finding state law claims seeking to impose requirements different from FDA regulations preempted without distinguishing implied warranty claims from other preempted common-law claims); *Carter v. Novartis Consumer Health, Inc.*, 582 F. Supp. 2d 1271, 1285-86 (C.D. Cal. 2008) (breach of implied and express warranty claims preempted where claims based upon statements permitted by FDA regulations).

regulations).[6] Federal preemption applies equally to nutrient content claims on the Nutella® website. Although Ferrero does not concede that every aspect of its website is subject to FDA regulations, the FDA has taken the position that claims covered by 21 U.S.C. § 343(r) that appear on a product's website fall within the definition of labeling, where the website address appears on the product label, as it does here.[7] Thus, to the extent plaintiffs' state law claims rely upon statements on the Nutella® website, namely, "hazelnut spread that contains quality ingredients such as skim milk and a hint of cocoa," "Hazelnuts have a flavorful combination of oils, vitamins and protein. Like other varieties of nuts, hazelnuts contain antioxidant compounds that protect your body overall," "[s]kim milk is high in protein, vitamins and has less fat than whole milk," and "[o]ver 50 hazelnuts per 13 oz. Jar," they are preempted. ¶¶ 79-81.

C. Plaintiffs' Claims Are Expressly Preempted to the Extent They Rely Upon Alleged Inadequate Disclosure of Artificial Flavoring Ingredient

Plaintiffs' claims also are preempted to the extent they are based upon alleged inadequate disclosure that Nutella® contains vanillin, an artificial flavoring. *See* ¶ 79. The statements "contains no artificial colors" and "contains no artificial preservatives" appear on the product label. Ex. A. The website similarly states: "contains no artificial colors or preservatives." ¶ 79. Plaintiffs claim these statements are deceptive because they are not accompanied by a statement that Nutella® contains the artificial flavoring vanillin.

As with nutrient content claims, the FDCA and its implementing regulations set forth how a food manufacturer must disclose any artificial flavoring. Specifically, 21 U.S.C. § 343(k) deems a food misbranded if "it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling stating that fact." The FDA regulations further

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[6] *Accord Yumul v. Smart Balance, Inc.*, No. CV 10-00927, 2011 WL 1045555, at *8-12 (C.D. Cal. Mar. 14, 2011) (finding preempted state law claims arising from allegations that Smart Balance's statements that Nucoa Real Margarine is "Cholesterol Free" and "healthy" were false and misleading due to trans fat content where manufacturer complied with FDA requirements for nutrient content claims).

[7] *See* FDA Warning Letter to General Mills (May 5, 2009), *available at*: http://www.fda.gov/iceci/enforcementactions/warningletters/ucm162943.htm.

mandate that "[a] statement of artificial flavoring, artificial coloring, or chemical preservative shall be placed on the food or on its container or wrapper, or on any two or all three of these, as may be necessary to render such statement likely to be read by the ordinary person under customary conditions of purchase and use of such food." 21 C.F.R. § 101.22(c). Both the product label and Ferrero's website disclose that Nutella® contains artificial flavoring. Exs. A, B-2. Plaintiffs do not, and cannot, allege that Ferrero's labeling violates these requirements. *See* ¶ 132 (listing several other purported C.F.R. violations); 21 C.F.R. §§ 101.4(g), 101.22(h) ("The label of a food to which flavor is added shall declare the flavor in the statement of ingredients . . . ."); 63 Fed. Reg. 20,486, 20,491 (Apr. 24, 1998) ("likely to be read and understood by the ordinary individual" requirement met by placing disclosure in label information panel).

Because Ferrero *already* complies with the federal requirements for disclosure that Nutella® contains artificial flavoring, plaintiffs' claims are preempted to the extent they seek to hold Ferrero liable under state law for not having additional disclosures wherever Ferrero states (accurately) that Nutella® does not contain any artificial colors or preservatives. Plaintiffs' claims based on the absence of such additional disclosures seek to have this court impose a "non-identical requirement," something Congress has expressly prohibited. *See, e.g.*, *Peviani v. Hostess Brands, Inc.*, – F. Supp. 2d –, 2010 WL 4553510, at *6 (C.D. Cal. Nov. 3, 2010) (finding preempted state law claims based on statement "0 Grams of Trans Fat" despite partially hydrogenated oil content, where defendant's statement complied with FDA regulations); *Chacanaca*, 2010 WL 4055954, at *8 (finding preempted state law claims based on "good source of" statements where defendant's statements complied with FDA requirements).

Because plaintiffs are challenging a number of statements that are regulated by the FDA, and subject to express preemption under federal law, their state law claims based on those statements should be dismissed as a matter of law.

II. THE COMPLAINT FAILS TO STATE A CLAIM UNDER THE UCL, FAL OR CLRA BECAUSE THE CHALLENGED STATEMENTS ARE NOT LIKELY TO DECEIVE A REASONABLE CONSUMER

To state a false advertising claim under the UCL, FAL, or CLRA, plaintiffs must identify a statement that is likely to deceive the public. *Williams v. Gerber Prods. Co.*, 552 F.3d 934,

938 (9th Cir. 2008); *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 507 (2003); *Freeman v. Time, Inc.*, 68 F.3d 285, 289-90 (9th Cir. 1995) (affirming dismissal where plaintiff failed to show that public was likely to be deceived). Courts apply a "reasonable person" standard to determine whether a statement, viewed in context, is "likely to . . . deceive[ ]" the public. *Freeman*, 68 F.3d at 289; *Lavie*, 105 Cal. App. 4th at 504-05. "A claim may be dismissed pursuant to Rule 12(b)(6) if no reasonable consumer would be deceived or misled." *Ford v. Hotwire, Inc.*, No. 07-CV-1312, 2008 WL 5874305, at *3 (S.D. Cal. Feb 25, 2008); *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1398-99 (E.D. Cal. 1994) ("[I]f the alleged misrepresentation, in context, is such that no reasonable consumer could be misled, then the allegation may also be dismissed as a matter of law.").

A. The Affirmative Statements Challenged in the Complaint Are Not Likely to Deceive a Reasonable Consumer

None of the statements challenged by plaintiffs are capable of misleading "an appreciable number of reasonably prudent purchasers exercising ordinary care." *Brockey v. Moore*, 107 Cal. App. 4th 86, 99 (2003). In fact, some of the statements represent general, subjective claims which are non-actionable statements under the law. *Newcal Indus., Inc. v. IKON Office Solution*, 513 F.3d 1038, 1053 (9th Cir. 2008) ("[A] statement that is quantifiable, that makes a claim as to the 'specific or absolute characteristics of a product,' may be an actionable statement of fact while a general, subjective claim about a product is non-actionable puffery.") (citation omitted), *cert. denied, Ikon Office Solutions, Inc. v. New-cal Indus.*, 129 S. Ct. 2788 (2009).

1. The Nutella® Product Label Is Not Deceptive

As discussed above, most of the statements on the label (concerning the fact that Nutella® is made with hazelnuts, skim milk and cocoa) are subject to preemption because they are nutrient content claims that are governed by, and comply with, federal law.

Plaintiffs' only remaining claim that the label is deceptive is because of the statement on the back label "[a]n example of a tasty yet balanced breakfast: a glass of skim milk, orange juice and Nutella® on whole wheat bread," in conjunction with the depiction of "fruit, a glass of orange juice, a glass of milk, a slice of bread covered in Nutella®, and jar of Nutella®." ¶¶ 24,

77. Plaintiffs claim this statement and the accompanying image are deceptive because they "suggest Nutella® is the key element that makes the depicted breakfast 'balanced' or nutritious when in fact it is the other food items such as milk, juice, fruit, and bread that provide the nutrients and healthy qualities that Nutella® is touting." ¶ 77. The claim fails for at least two reasons.

First, this Court can review the label on a motion to dismiss and determine that it does not suggest to a reasonable consumer that Nutella® is the "key element" of a balanced breakfast. The label expressly shows in words and pictures that Nutella® should be consumed with a variety of other foods. Any reasonable consumer – and certainly one exercising ordinary care – would appreciate the nutritional benefits associated with whole wheat bread, fruit, skim milk and orange juice. Conversely, it would defy common sense for any consumer to conclude the "hazelnut spread" is the "key element" of the breakfast given the depiction and description of the proposed elements. That is particularly so when the challenged statement and image are literally surrounded by the Nutrition Facts Panel (which states the serving size, calorie, fat and protein content, among other things) and the list of ingredients in Nutella®.

Second, this Court has held that phrases like "tasty yet balanced breakfast" do not "describe (or misdescribe) any specific or absolute characteristic" of the product and are therefore non-actionable. *Fraker*, 2007 WL 1296571, at *1 (sustaining motion to dismiss involving statements such as "[KFC] can fit into a **balanced eating plan**," and "[y]ou can enjoy 'fast food' as part of a sensible **balanced diet**") (emphasis added) (internal quotation marks and citation omitted); *Newcal*, 513 F.3d at 1053; *see also Williams*, 552 F.3d at 939 & n.3 (acknowledging the word "'nutritious,' were it standing on its own, could arguably constitute puffery, since nutritiousness can be difficult to measure concretely.") (citation omitted).

Rather than making specific, factual assertions about Nutella®, the "tasty but balanced breakfast" statement stands for Ferrero's unremarkable view that consumers can spread Nutella® on whole wheat bread to improve its taste while ensuring they receive a mix of nutrients at breakfast when taken with other nutritional elements such as fruit and skim milk. If plaintiffs mean to suggest that no meal can possibly be considered "balanced" if it contains 3.5 grams of

saturated fat (*i.e.*, 18% of the FDA's daily recommended allowance) or 21 grams of sugar, they are wrong and, at most, that point of view would constitute these individuals' own opinions. But California's consumer protection laws do not exist to enforce idiosyncrasies or divergent opinions about the optimal amount of saturated fat and sugar that should be consumed at breakfast. Because "tasty yet balanced" does not describe any "specific or absolute characteristic" about Nutella®, it is a non-actionable statement properly dismissed on a Rule 12(b)(6) motion. *Newcal*, 513 F.3d at 1053; *Haskell*, 857 F. Supp. at 1399-1400.

2. The Website Statements Challenged in the Complaint Are Not Actionable

Plaintiffs next challenge various statements made on the Nutella® website, including (1) "contains quality ingredients such as skim milk and a hint of cocoa," (Ex. B-1) (2) statements about the hazelnuts, cocoa and milk that are in the product, (*id.*) (3) the views and "Tips for Moms" from nutritionist, Connie Evers, (Exs. B-4 and B-5) (4) and statements regarding the glycemic index of Nutella®. *See* ¶¶ 79-89. Neither plaintiff alleges that she visited the Nutella® website or saw any of these statements before deciding to purchase Nutella®.[8] Therefore, neither plaintiff has standing under the UCL nor CLRA to pursue claims based on statements that appear on the Nutella® website. *In re Tobacco II Cases*, 207 P.3d 20, 40-41 (Cal. 2009) (a UCL plaintiff "must plead and prove actual reliance to satisfy the standing requirement of [California Business & Professions Code] section 17204."). Thus, to the extent plaintiffs' claims are based on statements that appear on the Nutella® website, they must be dismissed on this ground alone. *See, e.g.*, *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 947 (S.D. Cal. 2007) (dismissing CLRA claim where complaint "[did] not allege that false statements or claims had anything to do with her decision to purchase"); *Johns v. Bayer Corp.*, No. 09CV1935, 2010 WL 476688, at *4 (S.D. Cal. Feb. 9, 2010) (where plaintiff alleged reliance on product label only, he lacked standing to pursue claims based on radio, television, or internet advertisements").

[8] Plaintiff Hohenberg alleges reliance on the Nutella label (¶ 27) while Plaintiff Rude-Barbato alleges reliance on television advertisements (¶ 29) and the product label (¶ 31).

Additionally, the statements made on the Nutella® website are not actionable because they are not likely to deceive any reasonable consumer. First, Nutella® is made from ingredients such as cocoa and skim milk, and there is nothing deceptive about telling consumers what is in the product. To the extent plaintiffs take issue with the words "quality" or "simple," these are examples of non-actionable statements indicating subjective assertions of superiority. *Fraker*, 2007 WL 1296571, at *3; *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1140 (C.D. Cal. 2005) (holding that "quality" and 'high quality,' are statements consisting of non-actionable puffery); *Corley v. Rosewood Care Ctr., Inc.*, 388 F.3d 990, 1008 (7th Cir. 2004) ("[t]he phrase "high quality" is highly subjective); *Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1330 (7th Cir. 1994) (labels like "poor quality" are inherently subjective expressions).

Plaintiffs next challenge the "advice from Connie Evers, M.S., R.D" and her "Tips for Moms," including her opinion that "[w]hen used in moderation with complementary foods, Nutella can form part of a balanced meal." ¶¶ 82-83. When taken in context – as they must under California law (*Haskell v. Time, Inc.*, 857 F. Supp. at 1398) – Ms. Evers is emphasizing the "tasty" characteristics of the product (¶ 84 ("[t]he best breakfast is the one that will be eaten!" and "help moms win the daily 'battle at breakfast'")) while recommending that mothers nourish their children with whole grains, fresh fruit, a cup of yogurt, 1% milk, and/or juice. ¶¶ 84-85; Exs. B-4 and B-5. Ms. Evers plainly describes her definition of a "balanced breakfast," *i.e.*, "[a] balanced breakfast should provide the proper balance of protein, carbohydrates from whole grains, fat and the nutrients provided by either a serving of fruit or vegetables" and offers several suggestions of food combinations that would meet her criteria. ¶ 86; Ex. B-5. There is nothing false or deceptive about Ms. Evers' views or advice.

Finally, plaintiffs allege that the website's description of the glycemic index for Nutella® is false. On its website, Ferrero explains that "Nutella has a glycemic index of 33 which means it is a low GI food" and that "[t]wo slices of high fiber white bread with 20 grams of Nutella also has a low GI (GI = 47), and it provides around 14% of a person's daily energy (kilojoule) and sugar needs." ¶ 89. Plaintiffs do not contend that either of these metrics is false. Rather, plaintiffs take issue with the use of the word "low." By providing the consumer with actual data,

however, Ferrero ensures that consumers can decide for themselves whether the GI of Nutella® is "high," "low" or something else – depending on their own viewpoint and preferences.

Of course, neither plaintiff alleges that she relied on Ms. Evers' views, the information about the GI Index of Nutella®, or anything else on the website in deciding to purchase Nutella® and therefore lack standing to challenge those statements. Accordingly, any claims based on the website should be dismissed.

3. The Television Advertisements Challenged In the Complaint Are Not Deceptive

Plaintiffs challenge three television ads that emphasize the "tasty" aspects of Nutella®. *See* ¶ 91 ("That's why I love Nutella®, a delicious hazelnut spread that's perfect on multigrain toast and even whole wheat waffles."); ¶ 92 ("Like Nutella®, a delicious hazelnut spread that's perfect on multigrain toast, even whole grain waffles, for a breakfast that my kids love, and I feel good about serving."); ¶ 93 ("Nutella®, a delicious hazelnut spread that I use to get my kids to eat healthy foods.").

Plaintiffs allege these ads are deceptive because they portray mothers feeding Nutella® to happy, healthy children (¶ 90); state (truthfully) that Nutella® does not have any artificial colors or preservatives (¶ 94); and tout the "simple" and "wholesome" ingredients in Nutella®. ¶¶ 93, 95 ("Every jar has wholesome, quality ingredients, like hazelnuts, skim milk, and a hint of delicious cocoa."). None of these statements is likely to deceive a reasonable consumer. First, there is nothing "deceptive" about using "happy, healthy children" in television advertisements. Second, plaintiffs do not and cannot allege that Nutella® contains artificial colors or preservatives. Third, there is nothing deceptive about characterizing hazelnuts and skim milk as "wholesome, quality" ingredients. Indeed, plaintiffs themselves allege that hazelnuts are "healthy" (¶ 81) and there is no allegation that skim milk is otherwise.

Because plaintiffs have not alleged any affirmative statement that is likely to deceive a reasonable consumer, the Ninth's Circuit decision in *Williams v. Gerber Products Co*. is distinguishable. In *Gerber*, the product was called "fruit juice snack," and its label described the snack as being made with "fruit juice and other all natural ingredients" – a claim that the court

stated "appears to be false" – along with pictures of real fruit. 552 F.3d at 939. Here, there is no "apparently false" statement – such as "sugar free" or "no saturated fat" – and the images on the label accurately represent the product's content: Nutella® is made from real hazelnuts, skim milk and cocoa (the front label image) and the picture of fruits, juice, and whole wheat bread on the back label is expressly provided as a suggested breakfast – not the implied ingredients. Plaintiffs do not allege otherwise. Therefore, plaintiffs have failed to state a claim that a reasonable consumer would be deceived by any of the affirmative statements or images challenged in the complaint.

B. The Alleged "Omissions" Are Not Contrary to an Affirmative Representation or an Omission of Material Fact that Ferrero Was Obligated to Disclose

Plaintiffs' theory of falsity by omission fails as well. Plaintiffs allege that Ferrero fails to inform consumers that "Nutella® contains high levels of saturated fats, sugar, oil, artificial flavoring and other objectionable ingredients . . . , which harm the heart by raising blood cholesterol and blood sugar levels." ¶ 99.

But that theory cannot survive, even at the pleading stage, because the ingredients in Nutella® are plainly listed on the product for all consumers to see: SUGAR, PALM OIL, HAZELNUTS, COCOA, SKIM MILK, REDUCED MINERALS WHEY (MILK), LECITHIN AS EMULSIFER (SOY), VANILLIN: AN ARTIFICIAL FLAVOR.[9] Ex. A. Moreover, the product label provides consumers with the nutrients of the product, including Saturated Fats (3.5g), Sugar (21g), Calories (200), in the FDA-required Nutrition Facts Panel for each 2 tablespoon serving. Plaintiffs do not allege that the list of ingredients is wrong, that an ingredient is missing, or that the "Nutrition Facts" of the product are actually higher than listed.

To the extent plaintiffs are suggesting that Ferrero had an obligation to go even further and describe the possible health effects of any ingredient, *i.e.*, alleged "harm [to] the heart by raising blood cholesterol and blood sugar levels" (¶ 99), they are wrong. In establishing national

[9] Plaintiffs erroneously contend that "Ferrero further deceptively omits that Nutella contains artificial flavoring." ¶ 97. In fact, the product label and list of ingredients on the website both expressly list "Vanillin: An Artificial Flavor" as required by FDA regulations. Exs. A and B-2.

uniform labeling standards, Congress and the FDA determined that food labels must objectively list ingredients and specific nutritional levels. 21 U.S.C. § 343(g); 21 C.F.R. § 101 *et seq.*); *Hitt v. Ariz. Beverage Co.*, No. 08cv809, 2009 WL 449190, at *5 (S.D. Cal. Feb. 4, 2009) (discussing the FDCA in the context of "Congress's objectives of uniformity and consistency in regulating beverage labeling."). As explained previously, the FDA requires specific disclosures in some circumstances, but only where the product contains certain levels of "disqualifying nutrients" – levels that are not present here (*see supra* at pp. 10-11) and nothing in those regulations suggests that food manufacturers must go even further and describe the possible health effects of those ingredients – and for good reason. Many health effects are speculative and vary considerably based on the individual consumer's diet, activity levels and other aspects of their life.

III. THE COMPLAINT FAILS TO STATE A CLAIM FOR "UNFAIR" OR "UNLAWFUL" CONDUCT UNDER THE UCL

The UCL has three "prongs"; it can be violated by conduct that is "fraudulent," "unfair," or "unlawful." *See generally Cruz v. PacifiCare Health Sys., Inc*., 30 Cal. 4th 303, 315 (2003); *Blakemore v. Superior Court*, 129 Cal. App. 4th 36, 43 (2005). Plaintiffs' claims for violations of the "fraudulent" prong (¶ 146) are discussed above, since the test for a violation under this prong is whether members of the public are likely to be deceived. *See supra* Section II-A; *see also Bank of the West v. Superior Court*, 833 P.2d 545, 553-54 (Cal. 1992). The following demonstrates that plaintiffs have also failed to plead violations of the "unfair" and "unlawful" prongs, and therefore their Section 17200 claims should be dismissed completely.

A. The Complaint Does Not State a Claim Under the "Unlawful" Prong of the UCL

Plaintiffs allege that Ferrero's conduct is unlawful because it runs afoul of the FDCA and its implementing regulations (¶ 132), California's Food, Drug, and Cosmetic Law ("Sherman Act") (¶ 133), the CLRA and FAL (¶ 135). Plaintiffs have not stated a claim under any of these laws and, therefore, have failed to state a claim under the "unlawful prong" of the UCL.

The FDCA and Sherman Act both prohibit the sale of "misbranded" food, *i.e*., product labels that are "false or misleading in any particular" (21 U.S.C. § 343(a); Cal. Health & Safety Code § 110660) or making non-compliant nutrient or health claims (21 U.S.C. § 343(r); Cal.

Health & Safety Code § 110670). Plaintiffs do not allege (because they cannot) that the Nutrition Facts Panel or Ingredients are incorrect and, as discussed in Section I-B, the complaint does not identify any other statement on the label that is "false or misleading." For example, the front label states "Made with over 50 Hazelnuts per Jar." Plaintiffs do not allege that Nutella® contains fewer than 50 hazelnuts. The front label further states "Contains No Artificial Colors" and "Contains No Artificial Preservatives." Plaintiffs do not allege that Nutella® does, in fact, contain artificial colors or preservatives. Finally, the front label states "Hazelnut Spread with Skim Milk & Cocoa." Plaintiffs do not allege that Nutella® is not a hazelnut spread or that it does not contain skim milk and cocoa. In sum, the Nutella® label complies with all FDCA and Sherman Act requirements, and plaintiffs have pleaded no facts to the contrary.

Nor have plaintiffs stated a violation of the CLRA or FAL. As discussed above, the complaint fails to state a viable claim under those statutes because no reasonable consumer is likely to be deceived and, therefore, the complaint fails to state a claim for unlawful conduct. *Ford v. Hotwire, Inc.*, No. 07-CV-1312, 2007 WL 6235779, at *4 (S.D. Cal. Nov. 19, 2007).

B. The Complaint Does Not State a Claim Under the "Unfair" Prong of the UCL

Plaintiff alleges that Ferrero's conduct constitutes an "unfair" business practice under the UCL. *See* ¶ 142. California courts are split as to the appropriate test for determining whether a practice is "unfair" in the context of a consumer action. *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 735-36 (9th Cir. 2007) (acknowledging state of flux in the law); *Ford v. Hotwire, Inc.*, 2008 WL 5874305, at *4-5. One line of appellate decisions defines "unfair" as any conduct that is immoral, unethical, unscrupulous, or substantially injurious to consumers, and requires the court to weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim. *Smith v. State Farm Mut. Auto. Ins. Co.*, 93 Cal. App. 4th 700, 718-19 (2001). The other line holds that the public policy which is a predicate to a consumer unfair competition action under the "unfair" prong of the UCL must be tethered to specific constitutional, statutory, or regulatory provisions. *Scripps Clinic v. Superior Court*, 108 Cal. App. 4th 917, 939 (2003).

Here, plaintiffs rely on the first line of cases, alleging that it is "immoral, unscrupulous and offends public policy" for Ferrero to "place[ ] Nutella® into the stream of commerce with

knowledge that, through the intended use of such products, individuals, including young children, will be exposed to high and dangerous levels of saturated fat, trans fat, highly-refined sugars, and other objectionable ingredients." ¶¶ 142-43. Under their expansive interpretation of "unfair," plaintiffs are asking the Court to effectively prohibit the sale of any food that contains 3.5 grams of saturated fat, 21 grams of sugar, or any other ingredient that these plaintiffs find "objectionable." But Congress and the FDA have, after significant deliberation and study, concluded that companies are allowed to put products "into the stream of commerce" that contain 3.5 grams of saturated fat and 21 grams of sugar. *See supra* Section I. Thus, plaintiffs' proposed test is untenable on its face, expressly preempted (for the reasons discussed above), and prohibited by, among other things, the dormant commerce clause[10] and the safe harbor provisions of *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 182 (1999) (courts should not make illegal that which the Legislature or a regulatory agency has expressly allowed).

With respect to the second line of California cases interpreting the "unfair prong," the complaint does not allege facts demonstrating a violation of any specific constitutional, statutory, or regulatory provisions. *Scripps Clinic*, 108 Cal. App. 4th 917. On the contrary, Ferrero complies with the expansive regulatory regime that governs food manufacturers and, again, the "unfair" prong of the UCL cannot be used to make illegal conduct that is expressly permitted under that regulatory framework. *Cel-Tech*, 20 Cal. 4th at 182. Because plaintiffs have failed to state a claim under either standard of "unfair," plaintiffs' claims under the "unfair" prong of the UCL should be dismissed. *See Hotwire*, 2007 WL 6235779, at *5.

[10] Plaintiffs' proposed test would Balkanize the distribution of food products in this country—one set of rules in California that is prescribed by plaintiffs (prohibiting products that plaintiffs believe contain "dangerous levels" of saturated fat and sugar) and another set of rules for the rest of the United States (as prescribed by the FDA). That result is precisely what Congress and the FDA sought to avoid by establishing national standards and a result that would disrupt interstate commerce in a way that is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

IV. THE COMPLAINT DOES NOT STATE A CLAIM UNDER THE CLRA

Plaintiff's fourth cause of action alleges violations of California's Consumers Legal Remedies Act (Cal. Civ. Code § 1750 *et seq*.). ¶¶ 154-60. It should be dismissed for the reasons set forth above, namely, no reasonable consumer is likely to be deceived by the challenged statements. *Hotwire*, 2008 WL 5874305, at *5 ("The Court agrees for substantially the same reasons discussed with the UCL and FAL. Plaintiff fails to state a claim as to the first three subsections, namely California Civil Code § 1770(5), (9), and (14).").

It should also be dismissed because the CLRA does not give consumers license to sue for any practice that the consumer considers to be unfair. Unless a practice falls within one of the 23 practices set forth in Civil Code § 1770, it does not violate the CLRA. *See Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1557 (2007). Plaintiffs allege that Ferrero's conduct violates subsections (5), (7), (9), and (16) of the CLRA (¶ 156), but they do not adequately plead any such violations.[11] Because plaintiffs' CLRA claims merely provide "labels and conclusions" along with a bare statement of an entitlement to relief, they are properly dismissed. *Twombly*, 550 U.S. at 545, 555 n.3; *Kramer v. Intuit Inc*., 121 Cal. App. 4th 574, 581 (2004) (sustaining demurrer where alleged misconduct did not violate one of the enumerated prongs).

V. THE COMPLAINT DOES NOT STATE A CLAIM FOR BREACH OF WARRANTY, EITHER EXPRESS OR IMPLIED

Plaintiffs allege that Ferrero's representations regarding Nutella® are express warranties, which Ferrero breached because Nutella® was "not an 'example of a tasty yet balanced breakfast,' or healthy." ¶ 164. But Ferrero never expressly represented as fact that Nutella® is *itself* a "balanced breakfast" or "healthy." *See generally* Exs. A, B. The statements allegedly made to plaintiffs in connection with their purchases of the product were that a breakfast of fresh

[11] Section 1770(a)(5) prohibits "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have." Cal. Civ. Code § 1770(a)(5). Section 1770(a)(7) prohibits representing that goods are of a particular standard, quality, or grade if they are of another; Section 1770(a)(9) prohibits "[a]dvertising goods or services with intent not to sell them as advertised"; and Section 1770(a)(16) prohibits "[r]epresenting the subject of a transaction has been supplied in accordance with a previous representation when it has not." Cal. Civ. Code §§ 1770(a)(7), (a)(9), (16). Plaintiffs do not allege conduct that would violate any of these subsections.

fruits, whole wheat bread with Nutella®, a glass of milk and orange juice *together* make up a balanced breakfast. Additionally, the statements Ferrero made about the contents of Nutella® (such as that it contains hazelnuts and skim milk) are true, and plaintiffs do not contend to the contrary.

Any inference plaintiffs drew regarding the healthfulness of Nutella® cannot support an express warranty claim, which requires affirmative statements of verifiable fact, not idiosyncratic understandings inferred by a consumer. *See, e.g., Werberl ex rel. v. Pepsico, Inc.*, No. C 09-04456, 2010 WL 2673860, at *5 (N.D. Cal. July 2, 2010) (inference that product derived nutritional value from fruit could not support express warranty claim where claim was made nowhere on product or in marketing materials). Similarly, to the extent plaintiffs intend to assert an express warranty claim upon the representation that Nutella®, when eaten together with fresh fruits, whole wheat bread, milk and orange juice is an example of a balanced breakfast, the claim is barred because such statement is not an explicit guaranty that Nutella® itself is healthy. *See McKinniss v. Sunny Delight Beverages Co.*, No. CV 07-02034, 2007 WL 4766525, at *6 (C.D. Cal. Sept. 4, 2007) (depictions of fruit on label not explicit warranty as to extent of fruit content); *McKinniss v. Gen. Mills, Inc.*, No. CV 07-2521, 2007 WL 4762172, at *5 (C.D. Cal. Sept. 18, 2007) (plaintiffs inference that product contained real fruit or fruit juice could not support express warranty claim). Because plaintiffs have identified no false affirmation or fact or promise that formed the basis of their bargain, their breach of warranty claim fails as a matter of law. Cal. Com. Code § 2313(1); *see, e.g.*, *McKinnis v. Kellogg USA*, No. CV 07-2611, 2007 WL 4766060, at *5 (C.D. Cal. Sept. 19, 2007); *McKinniss*, 2007 WL 4762172, at *5.

Plaintiffs similarly fail to state a claim under California law for breach of the implied warranty of merchantability. This warranty "does not 'impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.'" *Am. Suzuki Motor Corp. v. Superior Court*, 37 Cal. App. 4th 1291, 1296 (1995) (citations omitted). In the context of food products, courts determining whether such product is "merchantable" consider whether the food is fit for human consumption – "the ordinary purpose[ ] for which such goods are used," and "[c]onform to the promises or affirmations of fact made on

the container or label if any." *See* Cal. Com. Code § 2314(2); 18 Williston on Contracts § 52:76 (4th ed. 2009) (equating "merchantable" quality with "fitness for human use or consumption"). As explained in the discussion of express warranty, Nutella® conforms to all affirmations of fact on its label. *See Sugawara v. Pepsico, Inc.*, No. 2:08-cv-01335, 2009 WL 1439115, at *5 (E.D. Cal. May 21, 2009) (no claim for breach of implied warranty of merchantability where plaintiffs received what was described on product box). Although plaintiffs allege that fat and sugar have been associated in certain health literature with increased risks of health conditions, they do not assert that Nutella® is unfit for human consumption. They have therefore failed to state a claim for breach of the implied warranty of merchantability. *See Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 (9th Cir. 2009) (fact that product had potential to cause harm did not render it unmerchantable; affirming dismissal of claim).

CONCLUSION

Plaintiffs have not stated a claim upon which relief can be granted and, therefore, Ferrero respectfully requests that the Master Consolidated Complaint be dismissed pursuant to Federal Rule of Civil Procedure Rule 12(b)(6).

Dated: April 18, 2011

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