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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE FERRERO LITIGATION	CASE NO. 3:11-CV-00205-H-CAB **PLAINTIFFS' OPPOSITION TO FERRERO'S MOTION TO DISMISS** Judge: The Honorable Marilyn L. Huff Hearing Date: June 13, 2011 Time: 10:30 a.m. Location: Courtroom 13

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FACTS

For more than a decade, on every Nutella label, on the web, in nationally-aired television commercials and in live marketing presentations, Ferrero[1] has leveraged a series of "devices, jingles, and turns of phrase"[2] precision-designed to convey the specific, unequivocal, and common messages that its sugary treat, Nutella, (1) is a "hazelnut spread" nutritionally similar to peanut butter, (2) is a healthful breakfast food for children, and (3) contributes to a "balanced breakfast."

To convince American consumers Nutella is healthy, Ferrero hired Connie Evers, a purported children's nutrition expert, to lend its claims the appearance of credibility, and to conceive an advertising campaign that would make a compelling case for using Nutella at breakfast. To do this, Evers invented a problem Nutella could supposedly solve—the "battle over breakfast." According to Ferrero, "families rush around in the morning," and view breakfast as "yet another distraction." Ferrero contends without support that "having the time to feed our children a wholesome meal in the morning can be a challenge," and that breakfast is "a stressful and challenging experience for moms and children." Master Consol. Compt. ("MCC") at ¶ 82.[3] It repeats these messages in television commercial montages of frenzied mothers, hurried school children, and barking dogs. *Id.* ¶¶ 91-93.

According to Evers, Nutella can help solve this phantom problem because it tastes good and will therefore encourage kids to eat whole grain products. *Id.* ¶ 83.[4] The same could be said of

---

[1] Ferrero is the U.S. arm of the international conglomerate known as the Ferrero Group, which operates with more than 70 affiliated companies, including 38 business units and 15 production plants. Ferrero Group, "Business," *at* http://www.ferrero.com/the-group/business/a-growing-turnover. Ferrero Group is headquartered in Italy and run by its Chief Executive Officers, Pietro and Giovanni Ferrero. In the 1940s, their grandfather turned his pastry shop into a factory and founded Ferrero, whose "values . . . have helped make its *confectionary* well-known and loved by millions of consumers all over the world." Ferrero Group, "Mission" (emphasis added), *at* http://www.ferrero.com/the-group/mission/Ferrero-values. "Ferrero is now the fourth largest *confectionary group* in the world." *Id.* (emphasis added). The Ferrero Group's "best loved products" include Ferrero Rocher chocolate-covered hazelnuts, Mon Cheri cherry liqueur-filled dark chocolates, Kinder brand chocolates, Tic Tacs, and the product at issue in this case—Nutella "hazelnut spread."

[2] *See infra* n.19.

[3] Incorporating Ferrero "Nutella and Nutrition" website, attached hereto as Exhibit A (*Nutella and Nutrition*). The Court may consider documents referenced by the Complaint and accepted by all parties as authentic. *See Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002).

[4] Incorporating Ferrero "Tips for Moms" website, attached hereto as Exhibit B (*Tips for Moms*).

chocolate syrup or rock candy, but that matters little because Ferrero's "battle over breakfast" campaign is really aimed at convining consumers eating Nutella is healthy. Thus, as part of this campaign, Ferrero tells consumers that Nutella is ***wholesome***, made with ***simple, quality ingredients***, that mothers who serve Nutella are ***helping nourish their children***, and that Nutella contributes to a ***balanced breakfast***. *See, e.g.*, *Id.* ¶¶ 79, 82, 92-93.

Contrary to Ferrero's carefully-crafted suggestion, Nutella is not healthy, and is not appropriate to feed children for breakfast, with ***92%*** of its calories coming from fat (50%) and sugar (42%), unsurprising since Nutella is 70% sugar and palm oil by weight. In addition, for the first eight years of the class period, Nutella was made with trans fat, a toxic food additive that, by causing cardiovascular heart disease, type-2 diabetes and cancer, contributes to an estimated 100,000 otherwise preventable American deaths each year.[5] *See generally id.* ¶¶ 44-70.

A. Ferrero Claims Nutella is a "Hazelnut Spread" Similar to Peanut Butter with a Nutritional Profile Comparable to Other Popular Breakfast Condiments

Since before the putative Class Period began on January 1, 2000, Ferrero has been deceptively marketing Nutella as a "hazelnut spread," claiming it is made with "over 50 hazelnuts per jar," and deceptively categorizing Nutella as a nut spread, like peanut butter. *Id.* ¶¶ 2, 24, 75, 77, 81-82, 91-93, 98. But unlike peanut butter, Nutella is made mostly of sugar, not nuts,[6] and so is far more similar to cake icing[7] and candy bars, *e.g.*, *id.* ¶¶ 75, 100. A 2-tablespoon serving of Nutella has less than *half* the protein of the two leading American peanut butters, Jif and Skippy (3g compared to 7g), and ***700% more sugar*** (21g compared to 3g). Moreover, traditional nut spreads like peanut butter are typically

[5] Alberto Ascherio *et al.*, *Trans Fatty Acids & Coronary Heart Disease*, 340 New Eng. J. Med. 94 (1999) (Removing 2% of daily calories from trans fat from the American diet "would prevent approximately 30,000 premature coronary deaths per year, and epidemiologic evidence suggests this number is closer to 100,000 premature deaths annually.")

[6] Nutella is comprised of approximately 55% sugar, 15% palm oil, 13% hazelnuts, less than 7% each cocoa and skim milk, MCC ¶ 81, and less than 2% each soy lecithin (an emulsifier) and vanillin (an artificial flavoring), *id.* ¶¶ 74, 79; *see also* Bish Decl. Ex. A, Dkt. No. 30-3, at 3. *See generally* Travis Saunders, *Nutella – Delicious? Yes! Nutritious? Probably not.*, Obesity Panacea (Apr. 30, 2009), *at* http://www.obesitypanacea.com/2009/04/nutella-delicious-yes-nutritious.html (discussing Nutella composition).

[7] Betty Crocker brand "Rich & Creamy Chocolate Icing," for example, contains 130 calories, 5g of fat, 2g of saturated fat, and 17g of sugar per 2-Tablespoon serving.

comprised of at least 90% nuts, not primarily sugar and oil, like Nutella. Through these messages, Ferrero capitalizes on the perception that peanut and other nut butters like almond butter are healthy, to falsely suggest Nutella is also healthy.[8] Ferrero also claims Nutella's hazelnut content provides "antioxidant compounds that protect your body overall," *id.* ¶ 80, and that because it is made with "simple, quality ingredients," and "contains no artificial flavors or preservatives," it is healthy. *See id.* ¶¶ 79, 91-94.

B. Ferrero Claims Nutella Contributes to a Balanced Breakfast

Ferrero's Nutella advertising campaign centers around convincing consumers Nutella contributes to a "balanced breakfast," which misleadingly suggests *Nutella* itself is nutritious. *Id.* ¶¶ 4, 27, 31, 77, 79, 82, 86, 104, 146, 162, 167. This term has a concrete meaning to consumers. As Ferrero says, ***"we all know that eating a balanced breakfast is important."*** *Tips for Moms*. On its website, Ferrero, through its nutritionist expert, *defines* "balanced breakfast":

> Q. What is considered a "balanced breakfast?"
>
> Connie [Evers]: 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.

Id. Ferrero then provides an *example* of a balanced breakfast by reference to measurable amounts of foods—1/2 cup of sliced strawberries and 1 cup of 1% milk, in addition (Ferrero says) to a "small whole grain bagel with Nutella." *Id.* Elsewhere on its website, Ferrero further defines a "balanced breakfast" as "consist[ing] of a variety of foods: whole grain products, protein, low fat dairy, and fruit. Such combinations can delay hunger symptoms for hours." It then says that "[a] balanced breakfast can include . . . Nutella® . . . ."[9] Although Ferrero does not provide its source, Evers' reference to exact portions of precisely-identified foods to achieve a "proper balance" of nutrients can only be based on some objective standard, such as United States dietary guidelines.

Notably, while discussing a "mix of nutrients" including fat, and identifying *measurements* of other foods contributing to a balanced breakfast, Ferrero *rarely* states the amount of Nutella it believes

[8] Plaintiffs believe there may be other deceptive Nutella labels or advertising during the putative class period and will seek discovery on that issue.

[9] http://nutellausa.com/balanced-breakfast.htm.

can be eaten as part of a "balanced breakfast," and when it does, it equivocates. In the single example of Ferreo providing an *amount* of Nutella, Evers says that, "*for example*, just 1 tablespoon is a good amount for moms to serve their children . . . ." *Tips for Moms* (emphasis added). This is *half* of Nutella's standard serving size of 2 tablespoons. MCC ¶ 87. It is also far less than the amount of Nutella depicted on the product's label and in television commercials. Thus, by using a standard serving size of Nutella, consumers are *necessarily* violating Ferrero's proposition of a "balanced breakfast," *i.e.*, one that provides a proper mix of nutrients according to objective criteria. Tellingly, Ferrero's identical campaign in Europe was highly criticized, with the United Kingdom's Advertising Standards Authority determining it ***"misleadingly implied [Nutella] made a more significant contribution to a balanced breakfast than was the case."*** *Id.* ¶ 4.

C. Ferrero Claims Nutella is Healthy to Feed Children for Breakfast

Expanding on its balanced breakfast theme, Ferrero then targets *children*, with Evers saying they "need a variety of nutrients," and advising that a balanced breakfast for a child would include, "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." *Nutella and Nutrition*. Ferrero's representations are bolstered with depictions of mothers feeding happy, healthy children Nutella, while representing that the mothers are "helping to nourish" with Nutella, and can "feel good about serving" children Nutella because it is "wholesome," "simple," made with "quality ingredients" and "no artificial colors or preservatives." *See* MCC ¶¶ 3, 27, 31, 77, 78, 90-104, 146, 162, 167.

D. Plaintiffs Purchased Nutella in Reliance on Ferrero's False Claims

Plaintiffs Athena Hohenberg and Laura Rude-Barbato are both mothers of young children. *Id.* ¶¶ 26, 29. Both saw Ferrero's television commercials integrating Ferrero's "battle over breakfast" marketing campaign, along with Ferrero's representations on Nutella's label that it is a "hazelnut spread" and contributes to a "balanced breakfast." On that basis, Plaintiffs believed Nutella was a nutritious food to feed their households, including feeding their children Nutella for breakfast. *Id.* ¶¶ 26-32, 104-14.

1
SUMMARY OF ARGUMENT

2 Ferrero perpetrated a multi-faceted, multi-media, long-term, highly-deceptive advertising
3 campaign falsely suggesting Nutella is healthy, and an appropriate breakfast food for children. While
4 Plaintiffs give dozens of examples of Ferrero's deceptive practices, representations and omissions, the
5 list is not necessarily exhaustive, nor do any of Plaintiffs' state law claims depend upon the Court
6 finding any particular statement or behavior actionable. Nevertheless, unable to respond to Plaintiffs'
7 allegations that its cornucopia of health and wellness representations comprises a long-term, highly-
8 deceptive advertising campaign that caused Plaintiffs and the putative class injury by falsely
9 portraying Nutella as a healthy "hazelnut spread," Ferrero instead attempts to "knock out" certain
10 specific individual phrases.

11 Ferrero asserts, for example, that challenges to statements about Nutella's ingredients are
12 preempted. But Ferrero's statements about hazelnuts, skim milk and cocoa are not implied nutrient
13 content claims permitted under federal law, and no regulation permits Ferrero to tout the absence of
14 artificial colors and preservatives in Nutella. Plaintiffs' claims that the representations are deceptive in
15 context, therefore, are not preempted. Ferrero's attempt to characterize this case as seeking affirmative
16 disclosures of Nutella's health hazards, or additional disclosures of its vanillin, are straw men—
17 Plaintiffs merely want to stop Ferrero from marketing Nutella with the deceptive tactics detailed in the
18 Complaint.

19 Similarly, Ferrero's assertion that some statements Plaintiffs challenge are not likely to
20 deceive a reasonable consumer is unavailing because this is not one of the "rare cases" in which it
21 would be "impossible" for Plaintiffs to show public deception, especially inasmuch as there are
22 several practices and statements here which "contribute to the overall deceptive context as a whole,"
23 and that Plaintiffs allege a long-term, multi-faceted and deceptive overall advertising campaign.
24 Several California district courts have recently held similar claims actionable under the reasonable
25 consumer test.

26 Finally, Plaintiffs state claims for breach of express and implied warranty because Ferrero's
27 representations about Nutella's qualities were specific and unequivocal and Plaintiffs relied on them
28 in purchasing Nutella, but the product was actually not as Ferrero described and warranted.

ARGUMENT

I. LEGAL STANDARD

Federal pleading requirements are "extremely liberal," and require only "a short and plain statement of the claim," so as to "minimize disputes over pleading technicalities." *Doyle v. Ill. Cent. R.R. Co.*, 2009 U.S. Dist. LEXIS 8852, at *9-10 (E.D. Cal. Jan. 29, 2009). Courts evaluate motions to dismiss with "a powerful presumption against rejecting pleadings for failure to state a claim," *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248-49 (9th Cir. 1997) (internal quotation omitted). "When there are well-pleaded allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009). In deciding a motion to dismiss, courts should draw "all reasonable inferences from the complaint in [Plaintiff's] favor," *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 949 (9th Cir. 2009), and "accept the plaintiffs' allegations as true and construe them in the light most favorable to the plaintiffs." *Siracusano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167, 1177 (9th Cir. 2009).

II. PLAINTIFFS' CLAIMS ARE NOT PREEMPTED

Ferrero asserts that Plaintiffs' claims over five statements identified in the Complaint as examples of its misleading advertising campaign are preempted: (1) "Hazelnut Spread with Skim Milk & Cocoa," (2) "Made with over 50 Hazelnuts per Jar," (3) "contains no artificial colors," (4) "contains no artificial preservatives," and (5) "contains no artificial colors or preservatives." (Mot. at 9, 12.) Ferrero is wrong, but even if those few statements were preempted, because the Complaint alleges dozens of additional misleading statements and practices, that finding would not subject any of Plaintiffs' claims to dismissal. *See Henderson v. J.M. Smucker Co.*, 2011 U.S. Dist. LEXIS 27953, at *13-14 n.5 (C.D. Cal. Mar. 17, 2011).

A. Statutory Framework

1. There is a Strong Presumption Against Federal Preemption

Pursuant to the Supremacy Clause, federal law preempts state law when Congress enacts a statute that explicitly preempts state law. *See Chae v. SLM Corp.*, 593 F.3d 936, 941 (9th Cir. 2010) (citation omitted). There are two "cornerstones" of preemption jurisprudence. "First, the purpose of Congress is the ultimate touchstone in every pre-emption case. . . . Second, in all pre-emption cases . .

. we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 129 S. Ct. 1187, 1194-95 (2009) (internal quotations, citations and alterations omitted) (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). In short, "Congress does not cavalierly pre-empt state-law causes of action." *Medtronic*, 518 U.S. at 485.

This presumption demands courts give preemption statutes "narrow reading[s]." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992). Thus, where there are "plausible alternative reading[s]" of an express preemption provision, courts "have a *duty* to accept the reading that disfavors pre-emption." *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 449 (2005) (emphasis added). The strong presumption against preemption "applies with particular force when Congress has legislated in a field traditionally occupied by the States." *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008). "[C]onsumer protection laws such as the UCL, false advertising law, and CLRA, are within the states' historic police powers and are therefore subject to the presumption against preemption. Laws regulating the proper marketing of food, including the prevention of deceptive sales practices, are likewise within states' historic police powers." *In re Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 1088 (2008) (internal quotations, citations and alterations omitted); *see also Law v. General Motors Corp.*, 114 F.3d 908, 909 (9th Cir. 1997) ("Given the importance of federalism . . . we entertain a strong presumption that federal statutes do not preempt state laws; particularly those laws directed at subjects—like health and safety—'traditionally governed' by the states." (citations omitted)).

2. The FDCA and NLEA

The Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.*, empowers the FDA (a) to protect public health by ensuring that "foods are safe, wholesome, sanitary, and properly labeled," 21 U.S.C. § 392(b)(2)(A); (b) to promulgate regulations to implement the statute; and (c) to enforce its regulations through administrative proceedings. *See* 21 C.F.R. §§ 7 *et seq.* The Act prohibits the distribution and sale of misbranded foods. *See* 21 U.S.C. §§ 331(a)-(c), (g), (k). Foods are deemed misbranded when they meet one of the definitions for being misbranded pursuant to 21 U.S.C. § 343.

Congress enacted the Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, §

6(a), 104 Stat. 2353 (1990), to "clarify and to strengthen [the FDA's] authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about the nutrients in foods." *Nat'l Council for Improved Health v. Shalala*, 122 F.3d 878, 880 (10th Cir. 1997) (quoting H.R. Rep. No. 101-538, at 7 (1990), reprinted in 1990 U.S.C.C.A.N. 3336, 3337).

In passing the Act, Congress sought to "create uniform national standards regarding the labeling of food and to prevent states from adopting inconsistent requirements with respect to the labeling of nutrients." *Farm Raised Salmon Cases*, 42 Cal. 4th at 1086 (citing Remarks of Rep. Waxman, 136 Cong. Rec. 5840 (daily ed. July 30, 1990), debate on H.R. No. 3562, 101st Cong., 2d Sess.). Thus Maryland cannot require lactose intolerance warnings on milk labels. *Mills v. Giant of Md., LLC*, 441 F. Supp. 2d 104 (D.D.C. 2006). Nor may Puerto Rico require the name and address of both a canner and importer on food labels. *Goya de P.R., Inc. v. Santiago*, 59 F. Supp. 2d 274 (D.P.R. 1999). Such requirements impede Congress's goal of consistent nationwide food labeling. By contrast, "[s]tate-law prohibitions on false statements of material fact do not create diverse, nonuniform, and confusing standards." *Cipollone*, 505 U.S. at 529. To meet the goal of consistent nationwide labeling, the NLEA introduced the now-familiar Nutrition Facts panel and amended the FDCA to preempt state labeling requirements not identical to those promulgated under some portions of § 343, *see* 21 U.S.C. § 343-1.

"The NLEA's rule of construction concerning the scope of preemption excludes implied preemption, providing in relevant part that, '[t]he [NLEA] shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under section 403A of the [FDCA].'" *Red v. Kraft Foods, Inc.*, 754 F. Supp. 2d 1137, 2010 U.S. Dist. LEXIS 122849, at *3-4 (C.D. Cal. 2010) (citing Pub. L. No. 101-535, § 6(c)(1), 104 Stat. 2353, 2364; *In re Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 1091 (2008) ("Congress made clear that the preemptive scope of section 343-1 was to sweep no further than the plain language of the statute itself.")).

Plaintiffs "escape [the NLEA's] preemptive force" here because "the requirements [they] seek to impose are not with respect to the claims of the sort described in" sections of the FDCA preempted by the NLEA. *Ackerman v. The Coca-Cola Co.*, 2010 U.S. Dist. LEXIS 73156, at *21 (E.D.N.Y. July 21, 2010); *see also Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1119 (N.D. Cal. 2010)

("plaintiffs' claims need not fail on preemption grounds if the requirements they seek to impose . . . do not involve claims or labeling information of the sort described in" the FDCA); *Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387 PJH, slip op. at 9-15 (N.D. Cal. May 26, 2011), attached hereto as Exhibit C.

B. Because "Hazelnut Spread with Skim Milk & Cocoa" and "Made with over 50 Hazelnuts per Jar" are not Implied Nutrient Content Claims, Plaintiffs' Challenges to those Advertisements are not Preempted

Ferrero asserts the phrases "Hazelnut Spread with Skim Milk & Cocoa," and "Made with over 50 Hazelnuts per Jar," are preempted because they are "nutrient content claims under the federal regulatory scheme." Mot. at 9. Not so. Nutrient content claims "characterize[] the level of any nutrient *which is of the type required by paragraph (q)(1) or (q)(2) to be in the label or labeling of the food*," 21 U.S.C. § 343(r)(1)(A) (emphasis added). *Accord* 21 C.F.R. § 101.13(b) (a nutrient content claim "expressly or implicitly characterizes the level of a nutrient *of the type required to be in nutrition labeling under 101.9*" (emphasis added)). Section 343(q) deems any packaged food misbranded unless it contains a Nutrition Facts panel disclosing the amounts of nine specific nutrients in a food: (1) total fat, (2) saturated fat, (3) cholesterol, (4) sodium, (5) total carbohydrates, (6) complex carbohydrates, (7) sugars, (8) dietary fiber, and (9) total protein, 21 U.S.C. § 343(q)(1), or any other nutrient the FDA determines should be disclosed, *see id.* § 343(q)(2). *See also* 21 C.F.R. § 101.9(c) (implementing regulations). Hazelnuts, Skim Milk, and Cocoa are not "required to be in nutrition labeling under [21 C.F.R. §] 101.9." They are *ingredients*, not *nutrients*.

Nevertheless, while "a simple statement of an ingredient need not necessarily count as a nutrient content claim. . . . [t]he FDA has instructed . . . that it may function as such a claim under some circumstances." *Chacanaca*, 752 F. Supp. 2d at 1121. There are, however, only two "circumstances" in which a description of the ingredients in a food acts as an implied nutrient content claim: (1) where the manner of describing the ingredient "suggests that a *nutrient* is absent or present in a certain amount (e.g., 'high in oat bran')," or (2) where the claim "[s]uggests that the 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* (e.g., 'healthy, contains 3 grams (g) of fat')." 21 C.F.R. § 101.13(b)(2)(i)-(ii) (emphases added).

Despite this limitation on when an ingredient description is an implied nutrient content claim, the court in *Chacanaca* held preempted a challenge to the statement, "contains whole gain oats," because plaintiffs there alleged the statement was "intended to convey that Chewy Bars are part of a healthful diet, notwithstanding that they contain [trans fat]." 752 F. Supp. 2d at 1121. Because it exceeded the limitations of 21 C.F.R. § 101.13(b)(2), this conclusion was clearly erroneous. *See Red v. Kraft*, 754 F. Supp. 2d 1137, 2010 U.S. Dist. LEXIS 122849, at *13 (distinguishing Chacanaca and holding that phrases like "Made with Real Vegetables" and "Made with Real Ginger and Molasses" "do not meet the definition of implied nutrient content claims because they do not suggest 'that a nutrient is absent or present in a certain amount' or make an explicit claim like that in the 'healthy, contains 3 grams (g) of fat' example given in § 101.13(b)(2)(ii)."). Based on this conclusion, the *Chacanaca* court held that because the food labeled "contains whole grain oats" satisfied the FDA's disqualifying criteria for total fat, saturated fat, cholesterol and sodium, plaintiffs' challenges to that statement were preempted, 752 F. Supp. 2d at 1122, the same argument Ferrero makes. Mot. at 9-12.

Because Ferrero's representations that Nutella is a "hazelnut spread with skim milk & cocoa," and is "made with over 50 hazelnuts per jar," are not "made in association with an explicit claim or statement about a nutrient," they are not implied nutrient content claims under 21 C.F.R. § 101.13(b)(2)(ii). Thus, the statements are *only* implied nutrient content claims if both (1) the ingredients in the statements are associated with a nutrient identified in 21 U.S.C. § 343(q)(1)(D) or 21 C.F.R. § 101.9(c), and (2) the statement "suggests [the] nutrient is absent or present in a certain amount," 21 C.F.R. § 101.13(b)(2)(i). Unlike the phrase "'high in oat bran,' [which] suggest[s] a high dietary fiber content,"[10] *Ackerman*, 2010 U.S. Dist. LEXIS 73156, at *10, Ferrero has not demonstrated hazelnuts, skim milk,[11] or cocoa are associated with any nutrient, so neither statement is an implied nutrient content claim. Moreover, the statement that Nutella is a "hazelnut spread with

[10] 21 U.S.C. § 343(q)(1)(D) requires the disclosure of the nutrient, dietary fiber.

[11] Even if the reference to skim milk implied the presence of calcium, that is a "vitamin and mineral," *see* 21 C.F.R. § 101.9(c)(8), not a nutrient like those identified in 21 U.S.C. § 343(q)(1)(D). Moreover, despite that 21 C.F.R. § 101.13(b) references § 101.9, and § 101.9 prescribes the disclosure of calcium, other non-nutrients are also discussed in § 101.9, like calories, *id.* § 101.9(c)(1), which is not a "nutrient," *see* 21 U.S.C. § 343(q)(1)(C).

skim milk & cocoa" does not suggest any nutrient is "absent or present in a certain amount," and is not an implied nutrient content claim for that additional reason.[12] As such, because "they are not subject to the 'disqualifying nutrient' levels discussed in *Chacanaca*[,] . . . there [is] no obvious argument for express preemption." *Red v. Kraft*, 754 F. Supp. 2d 1137, 2010 U.S. Dist. LEXIS 122849, at *13.

C. **<u>Because FDA Regulations do not Expressly Permit Ferrero to Represent that Nutella "Contains no Artificial Colors or Preservatives," Plaintiffs' Challenges to those Advertisements are Not Preempted</u>**

Ferrero's argument that these statements are preempted by the FDCA relies upon a straw man—that Plaintiffs "claim these statements are deceptive because they are not accompanied by a statement that Nutella® contains the artificial flavoring vanillin." Mot. at 12.[13] But Plaintiffs do not challenge the adequacy of Ferrero's vanillin disclosure; rather, Plaintiffs merely allege Ferrero deceptively "implies Nutella is healthful because it 'contains no artificial colors or preservatives.'" MCC ¶ 79; *see id.* ¶ 97 (Ferrero "widely advertis[es] that Nutella® is healthy because it does not have 'artificial colors or preservatives'").

"While requiring disclosures of [artificial flavoring in addition to those already prescribed by FDA regulations] would certainly conflict with federal regulations, Plaintiffs are not, with this lawsuit, necessarily trying to force such disclosures, but, rather, are simply trying to prevent [Ferrero] from making certain other claims." *Red v. Kraft Foods, Inc.*, No. CV 10-1028-GW(AGRx), Dkt. No. 59, slip op. at 2 (C.D. Cal. Sept. 16, 2010)[14]; *id.*, Dkt. No. 40, slip op. at 2[15] (

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[12] If hazelnuts were associated with a nutrient, the statement that Nutella is "made with over 50 hazelnuts per jar" (but *only* that statement regarding hazelnuts) might arguably be an implied nutrient content claim pursuant to 21 C.F.R. § 101.13(b)(2)(i), but Ferrero would have to show reasonable consumers would take "50 hazelnuts" to imply something about the absence or presence of a *nutrient*—not the hazelnuts themselves. For its part, Ferrero associates hazelnuts with antioxidants, MCC ¶ 80, which are not one of the ascribed nutrients.

[13] Ferrero weaves a similar straw man throughout its memorandum, that Plaintiffs supposedly seek to impose affirmative disclosures about the amount or unhealthy nature of the sugar and oil in Nutella. *See* Mot. at 1:8-9, 15-16, 19; 6:12-13; 9:17-20; 11:7-10; 19:23-25, 20:8-9. Not so. Plaintiffs merely seek to prevent Ferrero from using misleading advertisements to market Nutella.

[14] Integrated into *Red v. Kraft*, 754 F. Supp. 2d 1137, 2010 U.S. Dist. LEXIS 122849, at *3; *see id.* at *19-20 ("Once again, the Court will resist Defendants' attempt to characterize Plaintiffs' claims as being based on a failure to disclose [information FDA regulations do not require].").

> Defendants commit a logical fallacy. They write: [“A]s a logical matter, Kraft Foods could not have ‘deceptively omitted the fact that the product contains artificial trans fat’ because federal law prevents it from declaring the very statement Plaintiffs seek.” This is not a preemption argument. Plaintiffs are not, with these claims, seeking to impose any requirement that is “not identical” to federal labeling standards.)

Accord Henderson v. J.M. Smucker Co., 2011 U.S. Dist. LEXIS 27953, at *12 (“This reasoning suggests a false choice which the FAC’s prayer for relief does not require. Plaintiff seeks to enjoin Defendant from using the particular statements at issue; the FAC does not pray for an injunction requiring Defendant to disclose [additional information FDA regulations do not require] on its product labels.”). *Compare* MCC at 38-39 (Prayer for Relief).

In the cases Ferrero relies on, courts held challenges to statements like “0g trans fat” and “no cholesterol” preempted because, those courts determined, FDA regulations specifically permitted manufactures to make those claims. *See Astiana, supra*, slip op. at 13-14. Here, there are *no* FDA regulations permitting Ferrero’s advertisements, “contains no artificial colors,” “contains no artificial preservatives,” or “contains no artificial colors or preservatives.” Thus, even Ferrero concedes Plaintiffs claims are only “preempted to the extent they seek to hold Ferrero liable under state law for not having additional disclosures,” or if they are “based on the absence of additional disclosures,” Mot. at 13, which they are not.

III. PLAINTIFFS’ CLAIMS SATISFY THE REASONABLE CONSUMER TEST

Claims under the UCL, FAL and CLRA are governed by the “reasonable consumer” test, *see Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). This requires that a plaintiff “show that ‘members of the public are likely to be deceived.’” *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) (quoting *Bank of West v. Superior Court*, 2 Cal. 4th 1254, 1267 (1992)). *See also Lavie v. Proctor & Gamble Co.*, 105 Cal. App. 4th 496, 510 (2003) (A “reasonable consumer” is defined as an ordinary member of the consuming public who acts reasonably under all the circumstances). At the pleading stage, the focus is on whether a plaintiff alleging deceptive advertising could possibly show likelihood of deception. *See Williams*, 552 F.3d at 939 (a deceptive advertising claim should only be dismissed where it is “impossible” for plaintiff to prevail if allowed to offer evidence under the

[15] Integrated by reference into *Red v. Kraft Foods, Inc.*, 2011 U.S. Dist. LEXIS 26893, at *13 (C.D. Cal. Jan. 13, 2011).

reasonable consumer standard). "Although reasonableness can, in appropriate circumstances, be decided as a question of law, 'California courts . . . have recognized that whether a business practice is deceptive will usually be a question of fact not appropriate for decision on [a motion to dismiss].'" *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1125 (C.D. Cal. 2010) (quoting *Williams*, 552 F.3d at 938); *see also Brockey v. Moore*, 107 Cal. App. 4th 86, 100 (2003) (same); *Sugawara v. Pepsico, Inc.*, 2009 U.S. Dist. LEXIS 43127 (E.D. Cal. May 21, 2009) (same); *accord Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1399 (E.D. Cal. 1994) (allegations should only be dismissed where an "alleged misrepresentation, in context, is such that no reasonable consumer could be misled.")

By contrast, "[w]here a defendant's representations generate reasonable expectations that a product will have qualities or capabilities it does not have, courts have found that those representations may be likely to deceive." *Kowalsky v. Hewlett-Packard Co.*, 2010 U.S. Dist. LEXIS 131711, at *30 (N.D. Cal. Dec. 13, 2010), *vacated in part*, 2011 U.S. Dist. LEXIS 41337 (N.D. Cal. Apr. 15, 2011).

A. Objectively True Statements are Actionable if Deceptive

The purported truth of a claim is not determinative of whether it is actionable under the UCL, FAL and CLRA. *See Morgan v. AT&T Wireless Services, Inc.*, 177 Cal. App. 4th 1235, 1255 (2009) ("A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under the UCL."); *Franklin Fueling Sys. v. Veeder-Root Co.*, 2009 U.S. Dist. LEXIS 72953, at *21-22 (E.D. Cal. Aug. 11, 2009) (the FAL prohibits "not only advertising which is false, but also advertising which although true, is either actually misleading or which has a capacity, likelihood, or tendency to deceive or confuse the public").

Nevertheless, Ferrero argues some of its statements cannot be deceptive, and therefore are not actionable, because they are supposedly "true." For example, Ferrero asserts "there is nothing deceptive about telling consumers what is in the product" or "using 'happy, healthy children' in television advertisements." Mot. at 17-18. Other courts have found similar arguments unpersuasive.[16]

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[16] In a heading (only), Ferrero asserts that the omissions discussed in the Complaint "are not contrary to an affirmative representation or omission of material fact that Ferrero was obligated to

See, e.g., *Red v. Kraft*, 754 F. Supp. 2d 1137, 2010 U.S. Dist. LEXIS 122849, at *19-20; *Henderson v. Gruma*, 2011 U.S. Dist. LEXIS 41077, at *30-31 (C.D. Cal. Apr. 11, 2011); *Henderson v. Smucker*, 2011 U.S. Dist. LEXIS 27953, at *10-12; *Chacanaca*, 752 F. Supp. 2d at 1126 ("photographic depictions of . . . children in soccer uniforms" which suggested "that active, healthy children are fueled with Chewy Bars" were actionable).

In addition, Ferrero's assertion that its "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," Mot. at 15 (emphasis added), ignores that *Ferrero hired a children's nutritionist to convey this message to the public*, which is anything but "unremarkable." But while Ferrero's "view" of what "balanced breakfast" means admits reference to objective criteria (a "mix of nutrients . . . such as fruit and skim milk"), it's view is ultimately irrelevant, since Plaintiffs only need show the public was likely to be deceived.

B. Ferrero's Deceptive Advertising Campaign is not Mere Puffery

Unlike the statements at issue here, puffery involves "outrageous generalized statements . . . that are so exaggerated as to preclude reliance by consumers." *Franklin Fueling*, 2009 U.S. Dist. LEXIS 72953, at *14 (quoting *Cook, Perkiss, & Liehe, Inc., v. N. Cal. Collection Serv.,* 911 F.2d 242, 246 (9th Cir. 1990)). "Conversely, 'misdescriptions of specific or absolute characteristics of a product are actionable.'" *Id.* A statement is mere puffery where it is "*extremely unlikely* to induce consumer reliance." *Newcal Indus. v. Ikon Office Solution*, 513 F.3d 1038, 1053 (9th Cir. 2008) (emphasis added). This is untrue of the challenged Ferrero statements, that Nutella is nutritionally similar to peanut butter and contributes to a balanced breakfast, and that Nutella is healthful to feed children for breakfast.

Ferrero relies heavily on *Fraker v. KFC Corp.*, 2007 U.S. Dist. LEXIS 32041 (S.D. Cal. Apr.

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disclose." Mot. at 19. But Ferrero's implicit argument, that certain of its "'objectively true' statements cannot be challenged as misleading unless there was additional relevant information that [Ferrero] was obligated to mention" is contrary to "[t]he binding standard for stating a claim for false statements on packaged foods under the UCL and CLRA . . . in *Williams v. Gerber Prods*. . . . [in which t]he Ninth Circuit did not suggest Plaintiffs must also plead that 'other relevant information has been omitted.'" *Red v. Kraft*, 2011 U.S. Dist. LEXIS 26893, at *4.

30, 2007), but takes liberties with alteration, Mot. at 15:19, to change its meaning. *Fraker* did not hold, as Ferrero suggests, that the statement that *KFC's* food "can fit into a balanced eating plan" was puffery, but rather the statement that "*all foods* can fit into a balanced diet plan" was puffery, and similarly that "[y]ou can enjoy *fast food* as part of a sensible balanced diet" was puffery. *Fraker v. KFC Corp.*, 2006 U.S. Dist. LEXIS 79049, at *10 (S.D. Cal. Oct. 19, 2006) (emphases added). Emphasizing that "context is important," the *Fraker* court reasoned that when "viewed in context, ... [n]o reasonable consumer would rely upon the statements as specific representations as to health, quality or safety." *Id.* at *11.

But *Fraker* is distinguishable in "context" because it involved restaurant food, not packaged food, so there was no label implicated. Instead, the Fraker's claims depended entirely on statements made on a website owned by KFC's parent, which discussed health and wellness generally, without any particular connection to KFC's food. *See Fraker* Second Amended Complaint ¶ 23 & Ex. A, No. 3:06-cv-01284-JM-WMC (S.D. Cal.), Dkt. No. 18. Paradoxically, Fraker alleged "[m]any consumers do not have ready access to the Internet or know how to access defendants' nutritional data on the Internet." *Id.* ¶ 22. Unlike general health and wellness statements seen by few consumers and not connected with the food at issue in *Fraker*, the statement here that Nutella is part of a "balanced breakfast," is specific to Nutella, was seen by every consumer who purchased it, and was reinforced through a consistent and disciplined advertising campaign. Thus, unlike in *Fraker*, Ferrero's representations "constitute a campaign by [Ferrero] in which it represented itself as prioritizing (even 'obsessing over')" providing a healthy breakfast. *See In re Toyota Motor Corp. Unintended Acceleration Mktng., Sales Practices, and Prods. Liab. Litig.*, 2010 U.S. Dist. LEXIS 131330, at *153 (C.D. Cal. Nov. 30, 2010) (distinguishing *Fraker*).

Moreover, while the *Fraker* court decided five years ago that representations like "sensible balanced diet" were puffery in the context of that case, several recent decisions hold that because consumers may take words like "sensible," "smart," "wholesome," "nutritious," and "natural" to mean healthy, the use of such claims on the labels of products containing allegedly objectionable ingredients is *not* puffery. *Williams*, 552 F.3d at 939 ("nutritious"); *Chacanaca*, 752 F. Supp. 2d at 1125-26 ("wholesome" and "smart choices"); *Red v. Kraft Foods, Inc.*, No. CV 10-1028-GW(AGRx), Dkt. No.

40[17] ("sensible solutions" and "sensible snacking"); *Henderson v. Gruma*, 2011 U.S. Dist. LEXIS 41077, at *30-31 ("all natural"); *Von Koenig v. Snapple Bev. Corp.*, 713 F. Supp. 2d 1066, 1080 (E.D. Cal. 2010) (same); *Hitt v. Ariz. Bev. Co.*, LLC, 2009 U.S. Dist. LEXIS 16871 (S.D. Cal. Feb. 4, 2009) (same).

Ferrero's own words show "balanced breakfast" is a concrete, specific factual assertion that can be evaluated by reference to objective, measurable facts and standards, and can be proven or disproven through discovery. *See Annunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1140-41 (C.D. Cal. 2005). Thus, while Ferrero's contention that a jury may consider a meal "'balanced' if it contains 3.5 grams of saturated fat . . . or 21 grams of sugar" (Mot. at 15-16) is well beyond the scope of a pleadings motion, it demonstrates that a jury could refer to Nutella's nutrients and composition, and compare it to measurable criteria, to determine if Ferrero's representations that it is part of a "balanced breakfast" are misleading. And, as discussed above, Ferrero believes consumers know a "balanced breakfast" is important, and that it is definable and concrete. In context, Ferrero's representations touting Nutella as part of a "balanced breakfast" are not the type of "outrageous generalized statements . . . so exaggerated as to preclude reliance by consumers," *Franklin Fueling*, 2009 U.S. Dist. LEXIS 72953, at *14, that constitute puffery.

But even if, standing alone, the "balanced breakfast" representations were not actionable, where a series of statements "contribute[s] to the deceptive context of the packaging as a whole," the court should not dismiss the statements as "mere puffery." *See Williams*, 552 F.3d at 939 n.3; *see also Peviani v. Natural Balance, Inc.*, 2011 U.S. Dist. LEXIS 18110, at *12 (S.D. Cal. Feb. 24, 2011) (Huff, J.) ("[W]hile the other statements relied on by Plaintiff standing on their own may constitute puffery, those statements contribute 'to the deceptive context of the packaging as a whole.' Given their context, the Court declines to dismiss these statements as well." (citation omitted); *Henderson*, 2011 U.S. Dist. LEXIS 27953, at *12-13 ("[E]ven if certain statements would be non-actionable on their own, where there are multiple statements at issue, we must consider the packaging as a whole. . . . Therefore, at this time, we decline to strike individual statements as mere puffery.").

[17] Integrated by reference into *Red v. Kraft*, 2011 U.S. Dist. LEXIS 26893, at *13.

Plaintiffs here allege dozens of statements, including several on the Nutella's label, which, as part of Nutella's long-term, multi-media advertising campaign, contributed to the deceptive health message conveyed by Nutella's packaging as a whole. Thus, Plaintiffs' claims should not be dismissed as challenging representations that are merely puffery.

C. <u>Plaintiffs May Challenge Advertising Conveying Ferrero's Deceptive Message</u>

Ferrero contends Plaintiffs cannot challenge statements made on Nutella's website because neither alleges she visited the website (Mot. at 16), despite that a website is "labeling for [a] . . . product" if "the website address appears on the product label," FDA Warning Letter to General Mills (May 5, 2009),[18] and despite that the commercials incorporate the "battle of breakfast" campaign defined and discussed on the website. In support of its argument, however, Ferrero relies on two distinguishable cases. Mot. at 16.

Cattie involved the question of whether bed sheets were falsely advertised as having a higher than actual thread count. *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 941-42 (S.D. Cal. 2007). The plaintiff there "bought one set of sheets eleven days before filing suit, and . . . there was no evidence Plaintiff was dissatisfied with the sheets . . . , or used them, or even opened them. . . . The possibility that Plaintiff did not rely on the allegedly false advertising when making her purchase is thus more than purely theoretical." *Id.*, at 946-947. But the real problem in *Cattie* was that while "Plaintiff does allege that the advertising *resulted* in the sale of goods, [she] does not allege that false statements or claims had anything to do with her decision not purchase the linens." *Id.* at 947 (emphasis added). Cattie's general statements about damage to the class, the court held, "are conclusory and do not adequately allege reliance." By contrast, Plaintiffs allege their reliance on Ferrero's deceptive advertising campaign in detail. MCC ¶¶ 26-27, 30-31, 103-114. Such allegations have repeatedly been upheld at the pleading stage, including by this Court. *See Peviani*, 2011 U.S. Dist. LEXIS 18110, at *8-9; *Red v. Kraft*, 2010 U.S. Dist. LEXIS 122849, at *21 (citing *Chavez v. Blue Sky Natural Bev. Co.*, 340 Fed. Appx. 359, 361 (9th Cir. 2009); *Von Koenig v. Snapple Bev. Corp.*, 713 F. Supp. 2d 1066 (E.D. Cal. 2010); *Chacanaca*, 2010 U.S. Dist. LEXIS 11981, at *34-35).

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[18] *Available at* http://www.fda.gov/iceci/enforcementactions/warningletters/ucm162943.htm. *See* Mot. at 12 n.7, citing letter.

Johns is also distinguishable. In that case, the plaintiff purchased a vitamin he alleged was promoted with deceptive claims about an ingredient, selenium. *Johns v. Bayer Corp.*, 2010 U.S. Dist. LEXIS 10926, at *1-4 (S.D. Cal. Feb. 9, 2010). On that basis he sought to represent a class of consumers who purchased a *different* product that he never "even considered purchasing," *id.* at *12.

Because "the plaintiff in *Johns* did not allege that he saw *any* advertisements for the product, that he read the packaging on the product, that he even considered purchasing the product, or that he relied upon any radio, television, or internet advertisement in connection with his purchase of the product," the case is distinguishable where, as here, the "Plaintiff expressly alleges that he was exposed to and saw [defendant's] claims by reading the [product] label, purchased [the product] in this District in reliance on these claims, and suffered injury in fact." *Rikos v. P&G*, 2011 U.S. Dist. LEXIS 49076, at *28 (W.D. Ohio May 4, 2011) (allegation that all advertising statements carried the same message sufficient to state a claim under UCL without plaintiff identifying the specific advertising statements on which he relied). *See also Morey v. NextFoods, Inc.*, 2010 U.S. Dist. LEXIS 67990, at *5 (S.D. Cal. June 7, 2010) (

> NextFoods argues that Plaintiff cannot challenge advertisements that she was not exposed to and therefore could not have relied upon in purchasing GoodBelly products. At the pleading stage, however, a plaintiff is 'not required to plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements.' Therefore, Plaintiff's allegations that she purchased GoodBelly products in reliance on NextFoods's advertising is sufficient to create standing under both federal and California law.)

Accord Fitzpatrick v. General Mills, Inc., 263 F.R.D. 687, 693 (S.D. Fla. 2010) ("[A] plaintiff seeking to prove that [a defendant's] health message is 'deceptive' may rely on any evidence concerning that message, including advertisements to which he or she was not personally exposed.").[19]

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[19] The court in *Fitzpatrick* was concerned that if it were to adopt the defendant's "restrictive approach [that] would mean the putative class is disharmonious because each plaintiff was likely exposed to a unique array of advertising statements, and would therefore be forced to rely on a slightly divergent pool of evidence to establish that [defendant] engaged in the same deceptive act." 263 F.R.D. at 693. This would be troubling because "there are many ways to skin a cat" and the defendant

> employed a number of devices, jingles, and turns of phrase to convey the common message that eating [defendant's product] aids in the promotion of digestive health . . . . It is this precise claim—communicated in one way or another to every purchaser of [defendant's product]—that Plaintiff alleges is deceptive. Just as "a brick is not a wall," whether a defendant's representation, omission, or practice—which inevitably includes, for example,

Finally, the court in *Johns* based its ruling in part on the plaintiff's failure to allege exposure to a long-term advertising campaign, since his claims were based upon a single, specific misrepresentation. 2010 U.S. Dist. LEXIS 10926, at *12-13. By contrast, because Plaintiffs here allege such a long-term, multi-faceted advertising campaign, they are "not required to plead with an unrealistic degree of specificity that the[y] relied on particular advertisements or statements." *Id.*, at *13, quoting *In re Tobacco II Cases*, 46 Cal. 4th 298, 328 (2009).

Moreover, while Plaintiffs may not have personally visited the Nutella website, they were nevertheless exposed to the representations there, because they underlie Ferrero's "balanced breakfast" message. Ferrero relies on a nutritionist to "substantiate" this claim. Since Plaintiffs would not have seen the "balanced breakfast" representation but for Evers' "signing off" on it, her opinions, which are embodied on the Nutella website, contributed to Plaintiffs' and the putative class's injuries. Indeed, the website—whose URL is prominently featured on Nutella's label—is both labeling for Nutella and evidence of its deceptive practice of employing a purported children's nutrition expert to render phony and inapplicable "scientific" advice about feeding Nutella to children as part of a "balanced breakfast."

D. Plaintiffs State Claims Under the UCL and CLRA

1. CLRA

Ferrero casts its "reasonable consumer" argument as addressing only Plaintiffs' UCL "fraudulent" prong claim (Mot. at 20), but because the CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale of goods or services to any consumer," Cal. Civ. Code § 1770(a), "[g]enerally, the standard for deceptive practices under the fraudulent prong of the UCL applies equally to claims for misrepresentation under the CLRA." *Kowalsky*, 2011 U.S. Dist. LEXIS 41337, at *16 (citing *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1360 (Cal. Ct. App. 2003)). "For this reason, courts often analyze the two statutes together. This suggests

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> other related representations, omissions, or practices of the defendant—is often relevant to determine whether the specific act is likely to mislead an objective reasonable consumer. Accordingly, . . . each plaintiff would [only] need to prove he or she was exposed to [defendant's] allegedly deceptive *message* that eating [its product] promotes digestive health.

Id. at 693-94 (emphasis added, internal citations and alterations omitted).

that the court's above analysis of the fraudulent prong of the UCL applies equally to claims brought under the CLRA . . . ." *Id.* (citations omitted). In sum, if the Court determines Plaintiffs' claim under the UCL's fraudulent prong should not be dismissed under Rule 12, then neither should Plaintiffs' CLRA claim.

Citing the CLRA *count* in the Complaint, Mot. at 23 (citing MCC ¶ 156), Ferrero nevertheless asserts Plaintiffs' CLRA claim "merely provide[s] 'labels and conclusions' along with a bare statement of entitlement to relief" and therefore is "properly dismissed." *Id.* (citation omitted). Contrary to Ferrero's assertion that "Plaintiffs do not allege any conduct that would violate" the CLRA, Mot. at 23 n.11, the Complaint details Ferrero's behavior with respect to each CLRA section it violated.

Plaintiffs allege Ferrero's conduct violates Cal. Civ. Code §§ 1770(a)(5), (7), (9), and (16). MCC ¶ 156. These sections prohibit Ferrero from advertising Nutella with the "intent not to sell [it] as advertised" (§ 1770(a)(9)), and from representing that Nutella "ha[s] sponsorship, approval, characteristics, ingredients, uses, [or] benefits" that it does not have (§ 1770(a)(5)), that Nutella is "of a particular standard, quality, or grade . . . if [it is] of another" (§ 1770(a)(7), or that Nutella "has been supplied in accordance with a previous representation when it has not" (§ 1770(a)(16)).

Contrary to Ferrero's suggesting that identifying these sections in their CLRA count is tantamount to the type of conclusory allegations insufficient under *Twombly*, the MCC details Ferrero's violations of these sections. For example, by employing a nutritionist to "spread the word" about Nutella, Ferrero's advertisements and business practices suggest Nutella has the sponsorship or approval of nutrition science, which it does not. Ferrero also represents that Nutella is primarily comprised of hazelnuts, rather than sugar and oil, by calling it a "hazelnut spread" and implying that because it has "over 50 hazelnuts per jar" that is the primary ingredient. Ferrero's advertising campaign also represents that Nutella is an appropriate breakfast food for children, which it is not, and that Ferrero is characteristically similar to peanut butter, jelly, and syrup, which it is not. This and other behavior detailed in the Complaint and discussed above is conduct that, if proven, would render Ferrero liable under these statutes.

2. UCL's "Unlawful" Prong

Ferrero's argument that Plaintiffs do not state a claim under the UCL's "unlawful" prong depends on the Court holding Plaintiffs entirely fail to state claims under the FAL and CLRA. For the reasons discussed, the Court should, respectfully, uphold Plaintiffs' FAL and CLRA claims, and therefore decline to dismiss their UCL "unlawful" claim prong on those grounds. In addition, Ferrero's conduct violates the FDCA, which prohibits labeling that is "false or misleading in any particular," 21 U.S.C. § 343(a), and the Sherman Law, which incorporates all the requirements of the FDCA and its implementing regulations. Complaint ¶¶ 132-33. *See Farm Raised Salmon Cases*, 42 Cal. 4th at 1086-90; *Pom Wonderful LLC v. Ocean Spray Cranberries, Inc.*, 642 F. Supp. 2d 1112, 1121-22 (C.D. Cal. 2009). Several California district courts have recently held similar claims actionable under the UCL as borrowed FDCA or Sherman Law violations. *See Zupnik v. Tropicana*, 2010 U.S. Dist. LEXIS 142060 (C.D. Cal. Feb. 1, 2010)[20] (claim that Tropicana's *Pomegranate Blueberry Flavored Blend* misleadingly suggested the product primarily consisted of pomegranate and blueberry juice when it was actually mostly pear juice); *Chavez v. Blue Sky*, 268 F.R.D. 365, 372 (N.D. Cal. 2010); *Zeisel v. Diamond Foods, Inc.*, 2010 U.S. Dist. LEXIS 141941, *6-9 (N.D. Cal. Sept. 3, 2010) (designated Not for Publication). *Accord People ex rel. Brown v. Tri-Union Seafoods, LLC*, 171 Cal. App. 4th 1549, 1558 (2009) (The FDA has "authority to regulate food labeling, with jurisdiction over labeling of food that is false or misleading in any particular. . . [under] 343(a).").

3. UCL's "Unfair" Prong

Under the balancing test[21] for the UCL's "unfair" prong invoked in the Complaint, *see* MCC ¶ 142, Plaintiffs "may be able to prove facts showing that 'the harm to the consumer' from [Ferrero's advertising] outweighed the [advertising's] 'utility.' [They] may, for example, be able to show that removing the term '[balanced breakfast],' an action that would have cost [Ferrero] nothing, could have

[20] "[T]he authority strongly suggests" that the FDA could sue under § 343(a) "for a 'false and misleading' label where the label does not violate another, more specific, food labeling statute or regulation." *Zupnik*, 2010 U.S. Dist. LEXIS 142060, at *5 (citing *United States v. 45/194 Kg. Drums of Pure Vegetable Oil*, 961 F.2d 808, 811 (9th Cir. 1992) ("The statute condemns every statement, design, and device which may mislead or deceive.") (citation omitted)).

[21] *South Bay Chevrolet v. General Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 886 (1999).

prevented consumer confusion." *Rubio v. Capital One Bank*, 613 F.3d 1195, 1205 (9th Cir. 2010) (citing *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 735 (9th Cir. 2007)). *See also Safjr v. BBG Communs., Inc.*, 2011 U.S. Dist. LEXIS 26407, at *12-13 (S.D. Cal. Mar. 15, 2011) (Huff, J.) (concluding plaintiffs' allegations were sufficient to withstand a motion to dismiss where they plausibly alleged the utility of the defendant's practice is outweighed by the harm suffered), quoting *Linear Tech. Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 134-35 (2007) ("Whether a practice is deceptive, fraudulent, or unfair is generally a question of fact which requires consideration and weighing of evidence from both sides and which usually cannot be made on demurrer.") (internal citations omitted).

Here, Plaintiffs allege that Ferrero's "false and misleading labeling of Nutella® . . . outweighs any conceivable benefit," and that Ferrero "placed Nutella® into the stream of commerce with knowledge that, through the *intended use*[22] of [Nutella], individuals, including young children, will be exposed to high and dangerous levels of saturated fat, trans fat, highly-refined sugars, and other objectionable ingredients." MCC ¶¶ 142-43 (emphasis added). Seizing on the "stream of commerce" language in paragraph 143 and ignoring the thrust of the Complaint and the language discussing how Ferrero's "false and misleading labeling" is "unfair" in paragraph 142, Ferrero re-invokes field preemption expressly excluded under the NLEA's savings clause, cites an inapplicable case that only begs the question,[23] and invokes the U.S. Constitution's dormant commerce clause without providing any real analysis. Mot. at 22. These arguments are inapt, though, because they rely on Ferrero's erroneous assertion that "plaintiffs are asking the Court to effectively prohibit the sale of" Nutella. Mot. at 22. As discussed above, that is simply not true.

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[22] *i.e.*, the use promoted by Ferrero, children eating Nutella for breakfast

[23] *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 182 (1999), provides state law should not punish behavior that other statutes or regulations permit, but Ferrero has not shown any statutes or regulations permitting any of the statements Plaintiffs challenge. *See Chacanaca*, 752 F. Supp. 2d at 1125 n.8 (in light of preemption principles, "defendant's safe harbor argument is moot"). In any event, *Cel-Tech* is expressly limited to *competitor* actions. 20 Cal. 4th at 187 n.12 (1999) ("Nothing we say relates to actions by consumers or by competitors alleging other kinds of violations of the unfair competition law . . . .").

IV. PLAINTIFFS STATE BREACH OF EXPRESS & IMPLIED WARRANTY CLAIMS[24]

Ferrero created an express warranty with (a) any affirmation of fact or promise relating to Nutella that became part of the basis of the bargain, which created an express warranty that the Nutella shall conform to the affirmation or promise; or (b) any description of Nutella that was made part of the basis of the bargain, which created an express warranty that the Nutella shall conform to the description. *See* Cal. Com. Code § 2313. To plead a cause of action for breach of express warranty, a plaintiff must allege (1) the exact terms of the warranty, (2) reasonable reliance thereon, and (3) proximate injury. *See Baltazar v. Apple, Inc.*, 2011 U.S. Dist. LEXIS 13187, at *5 (N.D. Cal. Feb. 10, 2011), citing *Williams v. Beechnut Nutrition Corp.*, 185 Cal. App. 3d 135, 142 (1986).

A complaint states an express warranty claim where it "alleges [defendant] utilized the advertising media to urge the use and application of [the subject product] and expressly warranted to the general public including plaintiff herein, that said product was effective, proper and safe for its intended use." *Williams*, 185 Cal. App. 3d at 142. (internal quotations omitted, second alteration original); *see also Aaronson*, 2010 U.S. Dist. LEXIS 14160, at *17 ("Statements made by a manufacturer through its advertising efforts can be construed as warranty statements." (citing *Keith v. Buchanan*, 173 Cal. App. 3d 13 (1985))). Thus, a court in this District recently held allegations that a plaintiff relied on a manufacturer's safety representations in purchasing a dietary supplement were "adequate . . . to establish a warranty that was a 'basis of the bargain.' Accordingly [plaintiff] has sufficiently stated a breach of express warranty claim." *Id.* at *18-19.

Here, through a coordinated, multi-media advertising campaign spearheaded by a purported children's nutrition expert, Ferrero intentionally conveyed the specific and unequivocal messages that Nutella *itself* is part of a "balanced breakfast," that Nutella is a healthful food to serve children at breakfast, and that Nutella is nutritionally comparable to peanut butter. The challenged Ferrero statements,

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[24] Although Ferrero does not raise the issues in its Motion, for the sake of completeness it is worth noting that while the plaintiff must ordinarily be in privity with the seller to state a warranty claim, there is a well-recognized exception in transactions involving the sale of foods. *See Aaronson v. Vital Pharms., Inc.*, 2010 U.S. Dist. LEXIS 14160, at *13-15 (S.D. Cal. Feb. 17, 2010) (citations omitted). Similarly, "[i]n claims against a manufacturer [rather than a seller] of goods…California law does not require notice." *Id.* at *15 (citations omitted).

> when inferences are viewed in favor of Plaintiffs, are sufficiently specific and unequivocal. The thrust of [Ferrero's] statement is that [Nutella is wholesome and healthy]; more specifically, [Ferrero's] statements convey that [Nutella is part of a balanced breakfast, nutritionally comparable to peanut butter, jelly and syrup, and healthy for children to eat for breakfast]. Plaintiffs' allegations, if proven, represent the antithesis of these statements . . . .

In re Toyota Unintended Acceleration Cases, 2010 U.S. Dist. LEXIS 131330, at *168-69.

Plaintiffs also state a claim for breach of the implied warranty. The California Commercial Code implies a warranty of merchantability that goods "[a]re fit for ordinary purposes for which such goods are used." Cal. Com. Code § 2314(2)(c). A plaintiff also states a claim for breach of the implied warranty of merchantability if she alleges the good does not "conform to the promises or affirmation of fact made on the container or label." *See Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 n.2 (9th Cir. 2009). Here, Ferrero represented that Nutella is part of a "balanced breakfast," a term which Ferrero concedes is measurable and which makes reference to objective criteria. As with Plaintiffs' express warranty claim, the *Aaronson* court recently upheld a similar breach of implied warranty claim. 2010 U.S. Dist. LEXIS 14160, at *13-17.

CONCLUSION

Plaintiffs respectfully request the Court deny Ferrero's Motion to Dismiss. If the Court is, however, inclined to grant any portion of Ferrero's Motion, Plaintiffs respectfully request it be without prejudice and that they be permitted to amend their Complaint, including in order to allege new facts learned through additional investigation and discovery that would support their claims.

Dated: May 31, 2011 By: /s/ Jack Fitzgerald

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