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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)
	REPLY MEMORANDUM IN SUPPORT OF DEFENDANT FERRERO U.S.A., INC.'S MOTION TO DISMISS CONSOLIDATED COMPLAINT
	Before: Hon. Marilyn L. Huff

INTRODUCTION

Unable to oppose Ferrero's motion to dismiss on the merits, plaintiffs have changed their allegations and legal theories in their Opposition Brief. The Court should therefore dismiss the complaint. *Tietworth v. Sears*, 720 F. Supp. 2d 1123, 1145 (N.D. Cal. 2010) ("'It is axiomatic that the complaint may not be amended by briefs in opposition to a motion to dismiss.'").

The core of plaintiffs' theory of deception, as set forth in the Master Consolidated Complaint (Dkt. No. 14), is that by touting certain ingredients, Ferrero implies that Nutella® is a "healthy" product and that consumers are surprised to learn that it contains "high" levels of "unhealthy" nutrients – *i.e.*, saturated fat and sugar. As plaintiffs acknowledge, however, federal law preempts state law claims directed to food labeling statements about a product's ingredients that suggest the absence or low level of nutrients, including sugar and saturated fat. To avoid preemption, and in contrast to their complaint, plaintiffs now argue that Ferrero's statements concerning the ingredients in Nutella® do *not* suggest anything about the amount of nutrients in the product. Plaintiffs cannot have it both ways. Either they are alleging that Ferrero's marketing practices imply that Nutella® contains little or no sugar and fat – in which case their claims are largely preempted – or, if there is no such implication, then plaintiffs have abandoned their original theory of consumer deception and their claims must be dismissed.

Similarly, plaintiffs have changed their theory of consumer deception with respect to the "tasty yet balanced breakfast" statement and depictions of Nutella® being served as part of a balanced breakfast. In the Consolidated Complaint, plaintiffs do not allege that the depicted breakfast is *un*balanced; rather, they allege that consumers were deceived into thinking "that Nutella® is the key element that makes the depicted breakfast 'balanced' or nutritious." Compl. ¶ 77. As explained in its Opening Brief, Ferrero never said anything of the sort. Rather than defend their original "key element" theory, plaintiffs now argue that it is deceptive to suggest that Nutella® "*contributes* to a 'balanced breakfast.'" Plaintiffs' Opposition to Motion to Dismiss ("Opp.") at 2-4, 16, 19, 23-24 (emphasis added). But plaintiffs have not pled any facts or identified any guidelines suggesting that Nutella® – containing 3.5 grams of saturated fat (*i.e.*, 18% of the daily recommended value), 22 grams of carbohydrates (*i.e.*, 7% of the daily

recommended value), 1 gram of fiber (*i.e.*, 6% of the daily recommended value) and 3 grams of protein, each of which are essential nutrients for the human body – does not "contribute" to a "balanced breakfast." In the absence of such "objective, measurable facts" or standards, plaintiffs are trying to enforce their own subjective views of what "balanced" means to them (apparently, a low-fat, sugar-free breakfast) – which is not actionable.

Finally, plaintiffs have failed to allege a claim for breach of warranty. Plaintiffs' express warranty claim fails because it depends on inferences that are unsupported, while their implied warranty claims fail because plaintiffs do not contend that Nutella® is unfit for human consumption, which is the applicable legal standard in the context of a food product.

Because the Consolidated Complaint fails to allege sufficient facts or articulate a legal theory upon which relief can be granted, it should be dismissed pursuant to Rule 12(b)(6).

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE LARGELY PREEMPTED BY FEDERAL LAW

A. Statements Regarding The Contents of Nutella®

As explained in the Opening Brief, plaintiffs' state law claims are preempted to the extent they rely upon statements in the product's labeling about ingredients of Nutella® that plaintiffs allege suggest Nutella® is low in, or free of, sugar and saturated fat. The FDA has determined for which nutrients and at what levels specific language is required to draw the consumer's attention to the amount of such nutrients in the product in connection with statements implying the product is healthy or otherwise low in such nutrients. *See* 21 U.S.C. §§ 343(r)(2)(B), 343(r)(3)(A)(ii). It is undisputed that Nutella® does not exceed those levels, and therefore, Ferrero is not required to make those, or any other, disclosures regarding sugar or saturated fat in connection with any nutrient content claims. *See* 21 C.F.R. §§ 101.13(h)(1), 101.14(a)(4). Any state law claim to the contrary therefore is preempted.[1] In their attempt to avoid preemption,

[1] *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111 (N.D. Cal. 2010), is on point. There, the Court found the statement "contains whole grain oats" was an implied nutrient content claim considering the context of plaintiffs' allegations – *i.e.*, that the statement conveyed the product was healthy, notwithstanding the presence of trans fat. *Id.* at 1121. But the FDA had already considered and declined to set a level of trans fat that would disqualify nutrient content claims in (continued...)

plaintiffs argue that the challenged statements on the Nutella® label and website concerning product ingredients (such as "Hazelnut Spread with Skim Milk & Cocoa," and "Made with over 50 Hazelnuts per Jar") "are not implied nutrient content claims." Opp. at 5, 10. In taking this position, however, plaintiffs are walking away from their own complaint.

While plaintiffs are correct that hazelnuts, skim milk and cocoa are not the specified "nutrients" required by 21 U.S.C. § 343(q) or 21 C.F.R. § 101.9, as plaintiffs pleaded their complaint, statements about these ingredients are implied nutrient content claims. Plaintiffs acknowledge that the FDA has defined implied nutrient content claims to include any statement that "[d]escribes the food *or an ingredient therein* in a manner that suggests that a nutrient is absent or present in a certain amount (*e.g.*, "high in oat bran"). 21 C.F.R. § 101.13(b)(2)(i) (emphasis added). Under the plain language of Section 101.13(b), the fact that the challenged statements concern "ingredients" rather than "nutrients" does not mean they are not implied nutrient content claims.

Indeed, plaintiffs' allegations fit squarely within Section 101.13(b)(2)(i)'s definition of a nutrient content claim. Saturated fat and sugar are "nutrients" under any definition and the entire thrust of the Consolidated Complaint is that Ferrero's statements about hazelnuts, skim milk, and cocoa suggest that the product does not contain sugar or saturated fat, or contains them at levels that consumers would deem "healthy." While Ferrero does not believe that statements about hazelnuts, skim milk and cocoa imply that Nutella® is low in saturated fat or sugar, that is plaintiffs' theory of deception—that Ferrero draws consumers attention to certain ingredients in Nutella® while supposedly failing to give equal prominence to the fact that the product "contains

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the labeling without additional disclosures. Any state law claims alleging the statement was misleading due to trans fat content would not be identical to the federal scheme and therefore were preempted. *Id.* Similarly here, the FDA has already considered and set the levels of total fat and saturated fat that are disqualifying and concluded (as with trans fat) that no amount of sugar makes a nutrient content claim in the labeling misleading. *See* Mem. in Support of Mot. to Dismiss ("Mem."), at 10-11. Under *Chacanaca*, plaintiffs' claims are expressly preempted to the extent they rely upon the statements concerning contents of Nutella®. *Chacanaca*, at 1123. *Red v. Kraft Foods, Inc.*, 754 F. Supp. 2d 1137 (C.D. Cal. 2010) is not to the contrary. There the plaintiffs apparently did not contend that the phrases at issue implied anything about the product's nutrient contents. *See id.* at 1142.

dangerous levels of saturated fat [and] over 55% processed sugar" (Compl. ¶¶ 25, 32, 34, 112, 131, 143, 145) and that consumers, like plaintiffs, are allegedly "surprised and upset to learn that Nutella® [contains] very high levels of refined sugar and saturated fat." *Id*. ¶¶ 28, 32.[2] Under that theory, the statement is a nutrient content claim under the plain language of 101.13(b)(2)(i).

Lest there be any doubt that plaintiffs allege the challenged statements are implied nutrient content claims, the Court need only look at plaintiffs' First Cause of Action. There, plaintiffs allege that Ferrero violated 21 C.F.R. § 101.13(i)(3), which "bars *nutrient content claims* voluntarily placed on the front of a product label" as well as California Health & Safety Code Section 110670, which "bars *nutrient content and health claims* voluntarily placed on the front of a product label that fail to comply with the federal regulation for nutrient content and health claims." Compl. ¶¶ 132(b), 133 (emphasis added). Plaintiffs must commit to a theory. If their theory is that Ferrero's statements imply the nutrients fat and sugar were absent or present in low amounts when, in fact, Nutella® contains "dangerous" levels of those nutrients, then their claims are preempted. If on other hand, their theory is that Ferrero did not make any implied nutrient claims, then they are walking away from their assertion that consumers are deceived by the fat and sugar content of Nutella®, and the complaint should be dismissed since it does not allege that the statements are otherwise deceptive (*i.e*., that Nutella® does not contain hazelnuts, skim milk, or cocoa).

B. Statements Regarding Artificial Colors, Preservatives and Flavoring

As set forth in Ferrero's Opening Brief, plaintiffs' claims also are preempted to the extent they are based upon Ferrero's labeling statements that Nutella® "contains no artificial colors" and "contains no artificial preservatives" without an accompanying statement that Nutella® contains the artificial flavoring vanillin. This is because Ferrero – in accordance with FDA requirements that artificial flavoring be disclosed in a manner likely to be read and understood

[2] The Court has previously characterized the gist of plaintiffs' claims as "alleg[ing] that Ferrero misleadingly promotes its Nutella® spread as healthy and beneficial to children when in fact it contains dangerous levels of sugar." Order Denying without Prejudice Def.'s Motion to Transfer, at 1. (Dkt. No. 37).

by the ordinary individual – does disclose on the product label and on its website that Nutella® contains an artificial flavoring. *See* Mem. at 12-13.

In their Opposition, plaintiffs argue there can be no preemption of claims based on these statements because the FDA does not "expressly permit Ferrero to represent that Nutella 'contains no artificial colors or preservatives.'" Opp. at 11-12. Plaintiffs misstate the test for preemption in this context. The appropriate inquiry is not whether a statement is "expressly permitted" as plaintiffs contend, but whether the state law claim seeks to impose a requirement that is ***non-identical*** to the federal labeling requirements for disclosures of artificial ingredients. *See* 21 U.S.C. § 343-1(a)(3) ("no State or political subdivision of a State may directly or indirectly establish under any authority . . . any requirement for the labeling of food of the type required by section . . . 343(k) of this title that is ***not identical*** to the requirement of such section.") (emphasis added). Section 343(k) deems a food to be misbranded if it contains any artificial flavoring, coloring, or chemical preservative and the label does not disclose that fact. 21 U.S.C. § 343(k). Because Ferrero already complies with Section 343(k) by disclosing the presence of artificial flavoring in the manner required by the FDA, plaintiffs' claims are seeking to impose requirements that are "not identical" to federal law.

In addition, plaintiffs now take the position that they have not alleged inadequate disclosure of the artificial flavoring in Nutella®. Opp. at 11. But that is exactly what the Consolidated Complaint alleges: "Ferrero deceptively omits that Nutella® contains the artificial *flavoring*, vanillin." Compl. ¶¶ 79, 97. Once again, plaintiffs improperly seek to amend their complaint by way of their Opposition brief.

II. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UNDER CALIFORNIA'S CONSUMER PROTECTION LAWS

In its Opening Brief, Ferrero demonstrated that the statements challenged in the Consolidated Complaint are not likely to deceive the public as a matter of law. Mem. at 13-20. Although plaintiffs chose to plead their case by lumping together a "cornucopia" of statements (Opp. at 5), Ferrero showed that none of the statements on the Nutella® label, website, or television advertisements are likely to deceive a reasonable consumer acting diligently under the

circumstances. Recognizing that many of these statements should be "knocked out," plaintiffs contend that none of their claims "depend upon the Court finding any particular statement or behavior actionable." Opp. at 5. That is not correct. California's consumer protection statutes require plaintiffs to identify "specific individual phrases" that are likely to deceive the public. *Janda v. T-Mobile USA, Inc.*, 378 Fed. Appx. 705, 708-09 (9th Cir. 2010).

A. The Nutella® Label

Aside from the content claims and FDA-required statement of identity – which are not deceptive in any way and for which plaintiffs' claims are preempted in any event – the only statement on the Nutella® label that plaintiffs are challenging is "[a]n example of a tasty yet balanced breakfast: a glass of skim milk, orange juice and Nutella® on whole wheat bread," which appears on the label with a depiction of the same. Steinhart Decl. in Support of Mot. to Dismiss, Ex. 1 (Dkt. No. 30-3). As explained in the Opening Brief, this statement would not confuse a "reasonably prudent purchaser exercising ordinary care" into thinking that eating Nutella® with a spoon would be a "balanced breakfast." Rather, any reasonable consumer would "appreciate the nutritional benefits associated with whole wheat bread, fruit, skim milk and orange juice," which are prominently displayed and described on the label. Mem. at 15. Because the actual statement on the label is not deceptive, the complaint challenges something that Ferrero never said, *i.e.*, "'that Nutella® is the key element that makes the depicted breakfast "balanced" or nutritious.'" *Id*. (*quoting* Compl. ¶ 77).

Attempting to sidestep these arguments, plaintiffs abandon the "key element" theory alleged in the Consolidated Complaint, and argue the "tasty yet balanced breakfast" statement is not puffery because that phrase "is a concrete, specific factual assertion" that can be measured according to "objective, measurable facts." Opp. at 16. Plaintiffs do not and cannot, however, identify any allegation in their complaint that the depicted breakfast is not "balanced" according to those "objective, measureable facts." *Id*.

Moreover, there are no factual allegations in the Consolidated Complaint to support the (unplead) conclusion that a breakfast becomes unbalanced by "contributing" the nutrients in Nutella®, *i.e.*, 3.5 grams of saturated fat (18% of the FDA's daily recommended amount), 22

grams of carbohydrates (7% of the FDA's daily recommended amount), 1 gram of fiber (6% of the FDA's daily recommend amount), 3 grams of protein and 21 grams of sugar. Rather than point to a factual basis for their new theory, plaintiffs argue that requiring such allegations would be "well beyond the scope of a pleadings motion." *Id*. But that is precisely the purpose of a Rule 12(b)(6) motion – to ensure that plaintiffs have alleged a sufficient factual basis to support a legal theory. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'"); *Oestreicher v. Alienware Corp.*, 322 Fed. Appx. 489, 493 (9th Cir. 2009) ("A Rule 12(b)(6) dismissal may be based on either 'the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.'").

If plaintiffs contend the depicted breakfast is not "balanced" according to "objective, measurable facts," then they must plead those facts. If, on the other hand, plaintiffs are seeking to enforce their own idiosyncratic views of what constitutes a "balanced breakfast," (*i.e.*, one without fat or sugar), then their claims are nonactionable and fail as a matter of law. *Newcal Indus., Inc. v. IKON Office Solution*, 513 F.3d 1038, 1053 (9th Cir. 2008).[3]

B. The Television Advertisements for Nutella®

Plaintiffs contend Ferrero's television advertisements are deceptive because they portray "mothers feeding Nutella® to happy, healthy children" thereby implying that Nutella® is itself a healthy product (Compl. ¶ 90) and rely upon *Chacanaca v. Quaker Oats Co*., 752 F. Supp. 2d 1111 (N.D. Cal. 2010) in support of that proposition. Opp. at 13-14. In *Chacanaca*, plaintiffs alleged it was misleading to depict "children in soccer uniforms" in connection with a product that contained trans fats – which plaintiffs alleged "are not safe in any amount." *Chacanaca*, 752 F. Supp. 2d at 1126. Because plaintiffs alleged that "trans fats are not safe in any amount" and

[3] Plaintiffs' attempts to distinguish this Court's holding in *Fraker v. KFC Corporation* are not persuasive. First, there is no reason why a statement would constitute puffery "because it involved restaurant food" as opposed to "packaged food." Opp. at 15. Similarly, there is no reason why the statement "all foods can fit into a balanced diet plan" would constitute puffery when discussing "fast food" but not when discussing Nutella®." *Id*. (emphasis added). Presumably, KFC's "fast food" could have been measured by the same "objective, measurable (continued...)

"crediting the inference plaintiffs draw from the box (that is, that active, healthy children are fueled with Chewy Bars)," the court concluded it could not determine "whether or not a reasonable consumer might be duped by these depictions." *Id*. *Chacanaca* is distinguishable.

Here, plaintiffs are challenging Ferrero's use of actors who appear healthy and happy while eating Nutella® at the breakfast table. Presumably, plaintiffs would only be satisfied if Ferrero (or any other company whose product contains sugar or saturated fat) advertised using actors who look unhealthy and unhappy. The implications of plaintiffs' preferred advertising standard would sweep far and wide while introducing a level of uncertainty that would be hard to overstate. *C.f.*, *Welch v. TD Ameritrade Holding Corp.*, No. 07 Civ. 6904, 2009 WL 2356131, at *6 (S.D.N.Y. Jul. 27, 2009) (finding "no legal merit" to argument that defendant "cement[ed] its false image as a truthful and non-deceptive firm by [using the actor] Sam Waterston, who has become immediately identified as the highly ethical government prosecutor role in the 'Law & Order' television series'") (citation omitted). Doing so would substantially extend the holding in *Chacanaca* (*i.e.*, fueling kids in sports) to a broad prohibition of using "happy, healthy" actors in any advertisement for a product that someone considers to be "unhealthy."

While it should not affect the outcome of this motion (because it is not alleged in their complaint), Ferrero is compelled to address plaintiffs' contention that Ferrero "invented a problem" of "'families rush[ing] around in the morning'" while not taking the time to eat breakfast. Opp. at 1 (citation omitted). As most parents are well-aware, the "battle over breakfast" is not a Ferrero invention, and, as nutritionists agree, skipping breakfast is a pervasive problem, especially for children. Ferrero's advertisements recreate the morning reality for millions of households. There is nothing imaginary, or deceptive, about this scene.

C. The Nutella® Website

Plaintiffs acknowledge that they have not "personally visited the Nutella website" but claim they were "nevertheless exposed to the representations there, because they underlie

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facts" as Nutella® but the Court dismissed the "balanced diet" claims against KFC and should do so here as well.

Ferrero's 'balanced breakfast' message." *Id*. at 19. The argument is sophistry. A consumer is not "exposed to" a representation that s/he did not see or hear. If the statements that plaintiffs did see (*i.e*., the label and the television advertising) are not deceptive, then plaintiffs have no claim. The law is clear that plaintiffs do not have standing to pursue claims based on statements or concepts that are unique to the website. *See* Mem. at 16-17 (citing cases).

The cases cited by plaintiffs on this point are inapposite. Those courts held that there is no requirement for plaintiffs to allege that they were exposed to every repetition of the same statement. *See Rikos v. Proctor & Gamble Co.*, No. 11-cv-226, 2011 WL 1707209, at *1 (S.D. Ohio May 4, 2011) (challenging "digestive benefits" claims on label, which were "emphasize[d] and repeat[ed]" in advertising campaigns); *Fitzpatrick v. General Mills, Inc.*, 263 F.R.D. 687 (S.D. Fla. 2010) (challenging statements that each touted the same benefits); *Morey v. Nextfoods, Inc.*, No. 10-cv-761, 2010 WL 2473314 (S.D. Cal. June 7, 2010) (statements at issue all made the same claim). Here, in contrast, there are numerous statements challenged by plaintiffs that are exclusive to the Nutella® website. Compl. ¶¶ 80, 82-89. Since plaintiffs admittedly were never exposed to these statements, they are not actionable here.

D. Because Plaintiffs Have Failed to Allege Consumer Deception, Plaintiffs Have Not Stated A Claim under the CLRA or the Unlawful/Unfair Prongs of the UCL

In their Opposition, plaintiffs make clear that their CLRA claims, as well as their claims under the unlawful and unfair prongs of the UCL, are based on the same consumer deception theories discussed above, *i.e*., that Ferrero's statements are likely to deceive the public. *See* Opp. at 20-22. Because Nutella®'s labeling is not misleading – let alone false – these claims fail for the same reasons as their claims under the deceptive prong.

Plaintiffs also claim, in two conclusory sentences, that "Ferrero's conduct violated the FDCA, which prohibits labeling that is 'false or misleading in any particular' and the Sherman Law, which incorporates all of the requirements of the FDCA and its implementing regulations." *Id*. at 21. For all the reasons set forth above and in Ferrero's Opening Brief, there is nothing "false or misleading" about the Nutella® label.

III. PLAINTIFFS HAVE FAILED TO STATE A WARRANTY CLAIM

Plaintiffs argue that 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." *Id*. at 23. But Ferrero never expressly represents that "Nutella is a healthful food" or is "balanced" when eaten by "itself." Because plaintiffs' warranty theory depends on an ***implication*** rather than an express statement, it fails to state a claim. *See* Mem. at 24 (citing cases).

Plaintiffs also assert that they have sufficiently stated a claim for breach of implied warranty of merchantability but ignore well-settled law that, in this context, the test is whether food is fit for human consumption. *See* 18 Williston on Contracts § 52:76 (4th ed. 2009) (equating "merchantable" quality with "fitness for human use or consumption"); *Sugawara v. Pepsico, Inc.*, No. 2:08-cv-01335, 2009 WL 1439115, at *5 (E.D. Cal. May 21, 2009) (implied warranty of merchantability claim fails when plaintiffs received what was described on product box). Indeed, plaintiffs stress that they are not trying to "'prohibit the sale of' Nutella" (Opp. at 22) – which would not be the case if they believed Nutella® to be unfit for human consumption.[4]

Accordingly, plaintiffs' claims for breach of express and implied warranty fail as a matter of law and should be dismissed.

CONCLUSION

Ferrero respectfully requests that the Master Consolidated Complaint be dismissed pursuant to Federal Rule of Civil Procedure Rule 12(b)(6).

Dated: June 13, 2011

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: /s/ Dale R. Bish
Dale R. Bish
Attorneys for Defendant Ferrero U.S.A., Inc.

[4] Although plaintiffs contend that the court in *Aaronson v. Vital Pharms., Inc.* "recently upheld a similar breach of implied warranty claim" (Opp. at 24), that action concerned a dietary supplement that allegedly was "not safe . . . for use by consumers" and "not fit for human use and/or consumption." *Aaronson* Compl. ¶ 68. No such allegation was made here.

CERTIFICATE OF SERVICE

I am employed in the County of Santa Clara, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 650 Page Mill Road, Palo Alto, California 94104-1050.

On June 13, 2011, I served the following document on the interested parties in this action: **REPLY MEMORANDUM IN SUPPORT OF DEFENDANT FERRERO U.S.A., INC.'S MOTION TO DISMISS CONSOLIDATED COMPLAINT**

I caused the above documents to be served via the Court's Electronic Filing System on the following registered party shown on the court's service list by posting such documents electronically to the ECF website of the United States District Court for the Southern District of California:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: June 13, 2011

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