KEITH E. EGGLETON, State Bar No. 159842
COLLEEN BAL, State Bar No. 167637
DALE R. BISH, State Bar No. 235390
AMIR STEINHART, State Bar No. 275037
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
650 Page Mill Road
Palo Alto, CA 94304-1050
Telephone: (650) 493-9300
Facsimile: (650) 565-5100
E-mail: keggleton@wsgr.com

Attorneys for Defendant
FERRERO U.S.A, INC.

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 FIRST AMENDED CONSOLIDATED COMPLAINT
	Date: August 29, 2011 Time: 10:30 a.m. Courtroom 13
	Before: Hon. Marilyn L. Huff

INTRODUCTION

On June 30, 2011, the Court issued an order (the "Order") granting in part and denying in part Ferrero U.S.A.'s ("Ferrero") motion to dismiss plaintiffs' Amended Consolidated Complaint. The Court held in part that plaintiffs did not have standing to challenge statements appearing on Ferrero's website.

In their First Amended Complaint ("FAC"), plaintiffs have added a handful of allegations attempting to address the Court's holding with respect to the website allegations. Specifically, plaintiffs modified four paragraphs, as shown in redline form, as follows:

> 76. Throughout the Class Period, Ferrero ~~made various representations that Nutella® is, variously,~~engaged in, and Plaintiffs and members of the class were exposed to, a long-term advertising campaign in which Ferrero utilized various forms of media, including, but not limited to, print advertising on the Nutella label and elsewhere, websites, television commercials, physicians, and unpaid press coverage, to consistently convey the deceptive and misleading message that Nutella is healthy, nutritious, part of a healthy meal, part of a balanced meal, and/or beneficial for developing and growing children.
>
> 104. Plaintiffs were exposed and Ferrero's long-term advertising campaign concerning the purported healthfulness of Nutella. They understood and relied upon Ferrero's misrepresentations for each purchase of Nutella® made during the Class Period, including, for example, "moms are helping nourish their children with whole grains," "A *balanced breakfast* is key to a great start each morning for the entire family, especially for children," "An example of a tasty yet *balanced breakfast*," and "Nutella® can form a part of a *balanced meal*."
>
> 105. ~~Specifically, for~~For each purchase of Nutella® she made during the Class Period, Plaintiff Hohenberg was exposed to, saw, read, understood, and relied upon Nutella's® label, as described herein. Throughout the class period, Plaintiff Hohenberg further was exposed to, saw, heard, understood, and relied upon various ~~Nutella® television commercials aired during the Class Period~~statements made about Nutella's® purported healthful qualities as part of Ferrero's long-term advertising campaign.
>
> 106. For each purchase of Nutella® she made during the Class Period, Plaintiff Rude-Barbato was exposed to, saw, read, understood and relied upon Nutella's® label, as described herein. Throughout the class period, Plaintiff Rude-Barbato further was exposed to, saw, heard, understood, and relied upon various ~~Nutella® television commercials aired during the Class Period~~statements made about Nutella's® purported healthful qualities as part of Ferrero's long-term advertising campaign.

These conclusory allegations do not address the standing deficiency identified in the Court's June 30 Order. Therefore, claims based on the website should be dismissed.

ARGUMENT

In the Order, the Court held that "based on the allegations in the consolidated complaint, Plaintiffs did not actually rely on the statements on Nutella®'s website before making their purchases and lack standing to challenge these statements under the UCL, FAL, and CLRA." Order at 4 (citing *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 326-27 (2011); *In re Tobacco II Cases*, 46 Cal. 4th 298, 306 (2009); *Cohen v. DIRECTV, Inc*, 178 Cal. App. 4th 966, 973 (2009)).

In reaching that conclusion, the Court considered plaintiffs' argument that "they did not have to rely on the individual misrepresentations on the website because they were part of a long-term, multifaceted advertising campaign, citing In re Tobacco II Cases, 46 Cal. 4th 298 (2009)." Order at 3. The Court explained "Tobacco II is distinguishable from this action because although Plaintiffs argue that they were exposed to a long-term advertising campaign in their opposition, Plaintiffs never allege this in their consolidated complaint." *Id.* The Court then granted plaintiffs leave "to amend or cure any deficiencies–if they can–in an amended consolidated complaint." Order at 13.

On July 3, 2011, plaintiffs filed a First Amended Consolidated Complaint, in which they attempt to cure their lack of standing by modifying four paragraphs, including the following:

> Throughout the Class Period, Ferrero engaged in, and Plaintiffs and members of the class were exposed to, a long-term advertising campaign in which Ferrero utilized various forms of media, including, but not limited to, print advertising on the Nutella label and elsewhere, websites, television commercials, physicians, and unpaid press coverage, to consistently convey the deceptive and misleading message that Nutella is healthy, nutritious, part of a healthy meal, part of a balanced meal, and/or beneficial for developing and growing children.

FAC ¶ 76. These allegations do not revive plaintiffs' website claims because (1) plaintiffs have not alleged any facts demonstrating Ferrero's advertising campaign was "long-term and extensive," and (2) unlike plaintiffs in *Tobacco II*, these plaintiffs can (and did) identify the specific statements that they allegedly relied on in making their purchasing decision.

First, plaintiffs' new conclusory allegations offer none of the specificity required under Rule 9(b) or even Rule 8(a). *See* Order at 7 ("Under Rule 9(b), '[a]verments of fraud must be

accompanied by 'the who, what, when, where, and how' of the misconduct charged.'") (alteration in original) (citation omitted). The new allegations contain no details about the alleged "long-term advertising campaign." For example, the FAC does not allege when Ferrero began television advertisements for Nutella, or when the "tasty yet balanced" statement first appeared on the label or anywhere else. In other words, plaintiffs have not pleaded any additional *facts* regarding Ferrero's advertising campaign. Instead, they simply reworded paragraphs to include vague catch-phrases such as "various forms of media," "including, but not limited to" and "elsewhere" that supposedly support the allegation that Ferrero's advertising campaign was "long-term."

It is worth noting that, from discovery conducted in this case, plaintiffs are well-aware that they cannot, consistent with Rule 11, allege that Ferrero advertised Nutella in nationwide television commercials prior to 2009. Similarly, plaintiffs know they cannot allege that the "tasty yet balanced breakfast" statement from the product label appeared throughout the class period. *See Yumul v. Smart Balance, Inc*., 733 F. Supp. 2d 1117, 1124 (C.D. Cal. 2010) ("Moreover, the complaint does not allege that Nucoa packaging remained consistent throughout the decade, i.e., that Smart Balance represented that the product contained no cholesterol and was healthy (saludable) during the entire class period.") (footnote omitted). Rather than allege specific facts regarding the time period of the alleged "long-term advertising campaign," plaintiffs lump together "various forms of media" into a single allegation and suggest that each statement appeared "[t]hroughout the Class Period." FAC ¶ 76. Presumably, plaintiffs have done so because they recognize that adding details required by Rule 9(b) would reflect they have not stated a claim for the vast majority of the alleged class period and to avoid raising additional issues relating to their own standing.

In contrast to the conclusory allegations here, the operative complaint in *In re Tobacco II Cases* contained allegations regarding the decades-long advertising campaign, which the appellate court summarized as follows:

> The marketing and advertising campaign consisted of a myriad of representations occurring over a long period, indeed, over more than half a century. The complaint alleges the tobacco companies were aware cigarette smoking was harmful in the 1950's and by the 1960's were fully aware nicotine was addictive.

> In the 1940's and 1950's, the tobacco companies ran advertisements suggesting cigarettes had no harmful effects, could protect against colds, and claimed filters were effective in removing tar and nicotine. In the 1970's, The Tobacco Institute ran advertisements suggesting there was continuing scientific debate about the connection between smoking and lung cancer. In 1994, tobacco company executives, during hearings by the congressional subcommittee on health and environment on the potential regulation of nicotine-containing products, claimed nicotine was not addictive.

47 Cal. Rptr. 3d 917, 922 (2006).

On review, the California Supreme Court held that "a plaintiff must plead and prove actual reliance to satisfy the standing requirement of section 17204 but, consistent with the principles set forth above, is not required to necessarily plead and prove individualized reliance on specific misrepresentations or false statements where, as here, those misrepresentations and false statements were part of an extensive and long-term advertising campaign" because requiring otherwise – as in the context of the tobacco cases – would be "unrealistic" given the sheer number of statements made by the tobacco industry over its decades-long, pervasive advertising campaign. *Tobacco II*, 46 Cal. 4th at 583. Here, plaintiffs have not pleaded facts sufficient to show that Ferrero's advertising campaign was "extensive and long-term."

Second, unlike *Tobacco II*, it is not "unrealistic" for these named plaintiffs to "plead and prove actual reliance" on the specific statements that influenced their decision to purchase Nutella. On the contrary, plaintiffs can – and did – identify the statements they saw. *See* Consolidated Complaint (Dkt. No. 14) ¶¶ 105-06 (alleging exposure to and reliance on the product label and television commercials); Opposition to Motion Dismiss (Dkt. No. 39) at 4 (same). Furthermore, plaintiffs "admit that they have not personally visited the website" (Order at 3) and offer no reason why they have standing to challenge statements they never saw or heard and that played no part in their purchasing decision. *See Tobacco II*, 46 Cal. 4th at 326-27 (plaintiff must allege representation "played a substantial part, and so had been a substantial factor, in influencing his decision."); *Laster v. T-Mobile USA, Inc.*, No. 05cv1167, 2009 WL 4842801, at *8 (S.D. Cal. Dec. 14, 2009) (plaintiff lacks standing to bring claims of misrepresentation in advertisements she had not seen, and that therefore had no influence on her

purchasing decision). Therefore, plaintiffs do not have standing to assert claims based on Ferrero's website.

Finally, plaintiffs now – for the first time – allege that Ferrero "convey[ed] the deceptive and misleading message" about Nutella utilizing "physicians, and unpaid press coverage." FAC ¶ 76. But plaintiffs do not identify any statements made to or by any physician or in the press, let alone the "who what, when, where, and how" of such statements, let alone any reliance on these unspecified statements. The Ninth Circuit has held these types of conclusory allegations regarding exposure to an advertising campaign are not sufficient. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009) (finding complaint insufficient where plaintiff alleged exposure to and reliance on a series of marketing statements without identifying "the particular circumstances surrounding such representations. Nowhere in the TAC does Kearns specify what the television advertisements or other sales material specifically stated."); *Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992, 1005 (N.D. Cal. 2009) ("[P]laintiff must first identify with some specificity what the allegedly false representations contained, who made them, where, and whether plaintiff had even seen them").

CONCLUSION

Pursuant to Rule 12(b)(6), Ferrero respectfully requests that the allegations in plaintiffs' First Amended Complaint relating to statements on the Ferrero website be dismissed.

Dated: July 18, 2011

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: /s/ Colleen Bal
Colleen Bal
Attorneys for Defendant Ferrero U.S.A., Inc.