

Confidential

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
NO. 3:11 CV 00205 H CAB

IN RE FERRERO LITIGATION

VIDEOTAPED DEPOSITION OF CONNIE EVERS
C O N F I D E N T I A L
Taken in behalf of Plaintiffs
Tuesday, July 26, 2011

TSG JOB NO. 39549

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEW JERSEY
3 TRENTON DIVISION
4

5 MARNIE GLOVER, individually
6 and on behalf of all others
7 similarly situated,
8 Plaintiff,

9 v.

No. 11 CV 01086

10 FERRERO USA, INC.,
11 Defendant.
12
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14

15 VIDEOTAPED DEPOSITION OF CONNIE EVERS

16 C O N F I D E N T I A L

17 Taken in behalf of Plaintiffs

18 Tuesday, July 26, 2011
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1 BE IT REMEMBERED THAT, pursuant to the Federal
2 Rules of Civil Procedure, the deposition of CONNIE
3 EVERS was taken before Marilynn T. Hoover, a Certified
4 Shorthand Reporter in Oregon, Washington, and
5 California; on Tuesday, July 26, 2011, commencing at
6 the hour of 9:08 A.M.; at STOLL BERNE P.C., 209 S.W.
7 Oak Street, Suite 500, in Portland, Oregon.

8
9 THE WESTON FIRM

10 BY MR. JACK FITZGERALD
11 888 Turquoise Street
12 San Diego, California 92109
13 On behalf of Plaintiffs

14
15
16
17 DAVIS & TALIAFERRO

18 BY MR. GREG DAVIS
19 7031 Halcyon Park Drive
20 Montgomery, Alabama 36117
21 On behalf of Plaintiff Glover

22
23
24
25 VIDEOGRAPHERS: Ms. Anna Austin, Mr. Mick Irwin

1 APPEARANCES (CONT.)

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5 New York, New York 10110

6 On behalf of Plaintiff Glover

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10 WILSON SONSINI GOODRICH & ROSATI

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14 On behalf of Ferrero

15

16

17

18 FERRERO USA, INC.

19 BY MS. BETH M. KOTRAN

20 600 Cottontail Lane

21 Somerset, New Jersey 08873

22 On behalf of Ferrero USA Inc.

23

24

25

1 A. No.

2 Q. You've provided nutrition consulting
3 services to Bagel Bites; is that right?

4 A. I am currently.

5 Q. Currently doing that. Who's the company
6 that makes Bagel Bites?

7 A. Heinz.

8 Q. Heinz. Thank you. And you've also provided
9 nutrition consulting services to Nesquik, haven't you?

10 A. Yes, I have.

11 Q. And to Kellogg's?

12 A. Kellogg's, not directly. I have worked on a
13 school curriculum that was non product related.

14 Q. That was sponsored by Kellogg's?

15 A. Yes.

16 Q. And you've also provided nutrition
17 consulting services to Nestlé; is that right?

18 A. Yes.

19 Q. And to Ferrero, obviously

20 A. Yes.

21 Q. for Nutella?

22 Other than the ones I've listed, have you
23 provided nutrition consulting services for any other
24 processed foods or processed food companies?

25 A. Please define

1 MR. SHORR: Object. Object as assuming something
2 not in evidence.

3 MR. FITZGERALD: Assuming something not in
4 evidence? Was that the objection?

5 MR. SHORR: Yeah.

6 MR. FITZGERALD: Okay. I'll rephrase the
7 question.

8 Q. BY MR. FITZGERALD: Have Other than Bagel
9 Bites Actually, strike that.

10 Have you also provided nutrition consulting
11 services for Nesquik?

12 A. Yes.

13 Q. Is that a Nestlé brand?

14 A. Yes.

15 Q. Okay. So other than the Bagel Bites, the
16 Nesquik, the Kellogg's, the Nestlé, and the Nutella,
17 have you provided nutrition consulting services for
18 any other processed food product?

19 MR. SHORR: Same objections.

20 THE WITNESS: What is a processed food product?
21 Define that, please.

22 Q. BY MR. FITZGERALD: Do you have an
23 understanding of what processed food is?

24 A. No. There is no legal definition of a
25 processed food. Milk could be considered a processed

1 food because it undergoes processing. Orange juice
2 could be considered a processed food. I need further
3 definition.

4 Q. What other companies have you provided
5 nutrition consulting services for, that made products
6 that you could buy in a grocery store?

7 A. Thank you. I have consulted for a number of
8 commodity groups, including the National Dairy
9 Council, and several many, many produce
10 organizations.

11 Q. Was that "many" or "mini"?

12 A. Many different types of fruits, vegetables,
13 nuts.

14 Q. Like the kiwis or oranges is an example?

15 A. Is an example. Chiquita fresh fruit
16 smoothies. A number of products.

17 Q. Other than providing nutrition consulting
18 services as we've just discussed, what other sources
19 of income do you have?

20 A. I own a publishing company. I speak. I
21 work with government, I work with education, I work
22 with nonprofits, I work developing curriculum. I
23 write a lot of curriculum for various agencies,
24 including nonprofits, industry, government, education.

25 Q. Okay. And do you do all of those services

1 relation services for client and client's breakfast
2 messaging, the program, in support of Nutella hazelnut
3 spread, the product," slash, "service." Do you see
4 that?

5 A. Yes.

6 Q. What did you understand the program to
7 entail?

8 A. The program entailed a series of events
9 targeted at moms, that involved the same messaging,
10 which was the importance of breakfast for children,
11 the importance of using Nutella in moderate amounts on
12 nutrient rich foods, especially whole grains, and the
13 moderation portion control message, and that we would
14 do that in a variety of venues and ways.

15 Q. Okay. Is there any internal code name or
16 project name for this new advertising campaign?

17 A. Not to my knowledge.

18 Q. You just called it "breakfast messaging" or
19 something like that?

20 A. I don't recall.

21 Q. Don't recall giving it a short name?

22 A. No.

23 Q. Okay. You never had to sort of refer to it
24 as a

25 A. No.

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18 Q. Okay. Did you ever promote Nutella without
 19 disclosing to the public or consumers that you were
 20 connected with Nutella as its spokesperson?

21 A. There was one time.

22 Q. When was that?

23 A. It was on an appearance that I was doing
 24 I was asked to do on my local TV station, a non paid
 25 appearance on A.M. Northwest, and I was asked to talk

1 about breakfast. And I did a very editorial segment
 2 on breakfast, and I, on my own, decided to feature
 3 both. I had two toaster waffles and I asked MS&L
 4 if I could do this. And I had two toaster waffles,
 5 one of them I had light cream cheese with strawberries
 6 and one of them I had Nutella with slices of banana,
 7 and it was just part and I had a number of items.
 8 It was a non paid segment. So I did not disclose at
 9 that time; that would be the one case.

10 Q. Okay. So you only you only disclose your
 11 relationship when you're being paid to promote the
 12 product; is that right?

13 A. It just didn't seem necessary, because it
 14 was part of an editorial segment.

15 Q. Okay.

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1 segment.

2 Q. Okay. And has Ferrero conveyed the
3 messaging on television?

4 MS. BAL: Objection. Calls for speculation.

5 MR. SHORR: Same objection.

6 THE WITNESS: I don't know that Fer you know,
7 Fer you would have to ask Ferrero.

8 Q. BY MR. FITZGERALD: Are you familiar with
9 commercials for Nutella?

10 A. Yes.

11 Q. Okay.

12 A. Yes.

13 Q. And are those commercials that Ferrero
14 produced?

15 A. Yes, they are.

16 Q. Okay. And so when I ask if Ferrero promoted
17 the messaging on television, you have an understanding
18 of that, don't you?

19 A. Yes. Yes.

20 Q. Okay. And where on television has Ferrero
21 promoted that messaging?

22 MS. BAL: Objection. Vague and ambiguous. Calls
23 for speculation.

24 MR. SHORR: Same objection. You can answer.

25 THE WITNESS: TV commercials.

1 Q. BY MR. FITZGERALD: Okay. How many TV
2 commercials?

3 MS. BAL: Same objections.

4 MR. SHORR: Same objection.

5 THE WITNESS: My knowledge is that there are
6 currently two TV commercials.

7 Q. BY MR. FITZGERALD: Okay. And over the
8 course of the this advertising campaign, how many
9 commercials has Ferrero run, in total?

10 MR. SHORR: Same objection.

11 MS. BAL: Same.

12 THE WITNESS: I'm not sure.

13 Q. BY MR. FITZGERALD: Are you aware of a third
14 commercial that was run for some time?

15 A. I believe My recollection is that when I
16 first came on, there was a commercial, and my
17 recollection is that there were two additional
18 commercials.

19 Q. The two additional commercials, were those
20 produced after you signed on?

21 MS. BAL: Objection. Calls for speculation.

22 Q. BY MR. FITZGERALD: If you know.

23 A. I'm I don't know when they were produced.

24 Q. Okay. Did they start airing after you
25 signed on?

1 MS. BAL: Same objection.

2 THE WITNESS: As I recall, yes.

3 Q. BY MR. FITZGERALD: And the first commercial
4 was airing before you signed on; is that right?

5 A. I believe so.

6 Q. Okay. How come the first commercial is no
7 longer airing now?

8 MS. BAL: Calls for Objection. Calls for
9 speculation.

10 MR. SHORR: Same objection.

11 THE WITNESS: I have no idea.

12 MR. FITZGERALD: I'll withdraw the question.

13 Q. BY MR. FITZGERALD: Do you have an
14 understanding of why the first commercial is not being
15 aired now?

16 A. No. And can I just say that, as a
17 spokesperson, I have absolutely nothing to do with
18 advertising. Advertising and public relations are two
19 functions I have nothing to do with advertising; it's
20 not in my contract, and I don't know.

21 Q. Okay. Have you ever discussed the
22 television commercial with Ferrero?

23 A. I have viewed the commercials with Ferrero.

24 Q. Have you opined on them?

25 A. I believe so.

1 Q. Is the messaging in the commercials
2 consistent with the messaging that you were hired to
3 promote?

4 A. I don't know.

5 (Pause.)

6 THE WITNESS: Can I speak with you?

7 MR. SHORR: We can take a short break.

8 THE WITNESS: Take a short break.

9 MR. SHORR: Well, let's just take this off.

10 THE WITNESS: Okay.

11 THE VIDEOGRAPHER: The time is 11:24, and we're
12 off the record.

13 (Recess.)

14 THE VIDEOGRAPHER: The time is 11:26, and we're
15 back on the record.

16 Q. BY MR. FITZGERALD: Ms. Evers, now that
17 you've had a chance to consult with your counsel, I'm
18 going to ask my question again.

19 Is the messaging in the commercials consistent
20 with the messaging that you were hired to promote?

21 A. I don't know.

22 Q. Do you have an opinion about whether it's
23 consistent?

24 A. The message that

25 MS. BAL: Objection. The question is vague and

1 ambiguous.

2 THE WITNESS: Nutella is a tool for getting
3 your kids to eat breakfast on a busy morning, that
4 specific message is consistent.

5 Q. BY MR. FITZGERALD: Okay. Are Do you
6 have an opinion as to whether there are messages in
7 commercials, which are inconsistent with the messaging
8 that you were hired to promote?

9 MS. BAL: Objection. Vague and ambiguous.

10 THE WITNESS: No.

11 MS. BAL: Just give me one second to object, just
12 if you can pause.

13 THE WITNESS: Okay. Sorry.

14 MS. BAL: Thanks.

15 Q. BY MR. FITZGERALD: To clarify your answer:
16 Is it you have no opinion as to whether there are
17 messages that are inconsistent, or that there are no
18 messages that are inconsistent?

19 A. I have no opinion.

20 Q. Okay. Is the messaging you were hired to
21 promote also conveyed on Nutella's label?

22 MS. BAL: Objection. Vague and ambiguous.

23 THE WITNESS: Yes.

24 Q. BY MR. FITZGERALD: Was it ever conveyed on
25 posters?

1 A. Would you be more specific regarding a
2 poster.

3 Q. Well, we'll get to it later. I think
4 there's an e mail where you said something about
5 about bringing Nutella posters with you, maybe, to an
6 event. Does that refresh your recollection?

7 A. Yes.

8 Q. Okay. So the messaging was conveyed on
9 posters as well?

10 A. Yes.

11 Q. Okay. Do you have those posters in your
12 possession?

13 A. No.

14 Q. Was the messaging conveyed in print
15 magazines?

16 A. Yes.

17 Q. Which magazines?

18 A. I recall Working Mother and I recall a nurse
19 practitioner magazine. And there could be others;
20 those are just the two I recall.

21 Q. And in what form was it promoted in Working
22 Mothers?

23 A. It was an advertorial that I wrote, that I
24 wrote with the MS&L team, we wrote together, and
25 facing an advertisement.

1 A. Okay.

2 Q. But it is verbatim off the Web site.

3 A. Okay. Okay.

4 Q. I'll represent that to you.

5 A. I wanted that clarification. Thank you.

6 Q. Okay. Thank you. Looking at the first page
7 here, you see at the bottom it has an address, it's
8 NutellaUSA.com/about.htm?

9 A. Yes.

10 Q. And there's a little paragraph here about
11 Nutella?

12 A. Um hum.

13 Q. What on here constitutes the breakfast
14 messaging that you were hired to promote, if anything?

15 A. I did not write this page; but having said
16 that, it talks about whole wheat bread and it talks
17 about breakfast and it also has the combination of
18 orange juice or skim milk is a good combination for a
19 balanced breakfast that the entire family will enjoy.

20 Q. Okay.

21 A. Those Those would be the points that I'm
22 involved with.

23 Q. Okay. So this first sentence, where it
24 says, "Nutella is a tasty hazelnut spread that
25 contains quality ingredients such as skim milk and a

1 hint of cocoa," that's not a message that you were
2 hired to promote?

3 A. No.

4 Q. Okay. And then the last sentence, that
5 says, "Nutella contains no artificial colors or
6 preservatives," that's also not a message you were
7 hired to promote?

8 A. No. If someone asked a question regarding
9 those things, I would give information; but those were
10 not the messages that I was hired to promote.
11 Correct.

12 Q. Okay. The second sentence, which reads,
13 "Nutella, spread on whole wheat bread or any
14 multi grain product, with orange juice or skim milk,
15 is a good combination for a balanced breakfast that
16 the entire family will enjoy," that's consistent with
17 the message you were hired to promote?

18 A. It's consistent. I didn't write that, but
19 that's consistent with the messaging that I was hired
20 to promote.

21 Q. Okay. Is there anything about that wording
22 that you would change?

23 A. Just looking at it as an editor right now, I
24 would probably say "whole grain" as opposed to
25 "multi grain," because "multi grain" can be a

1 confusing word.

2 Q. Okay. Anything else?

3 A. No.

4 Q. You see where it says: "Is a good
5 combination for a balanced breakfast"?

6 A. Yes.

7 Q. What does "good combination" mean?

8 A. A good combination for a balanced breakfast
9 would include protein, carbohydrate, and fat; and I
10 always recommend a whole grain, a fruit or vegetable,
11 and a protein source.

12 Q. Okay. So in order Are you I'm sorry.
13 I didn't want to interrupt you.

14 A. Yeah, including protein, carbohydrate, and
15 fat.

16 Q. Okay. So the definition of a "good
17 combination for a balanced breakfast" is any breakfast
18 that includes a carbohydrate, a protein, and a fat?

19 A. No.

20 Q. Okay. Can you clarify

21 A. Okay.

22 Q. how I misspoke?

23 A. Okay. A balanced breakfast has the correct
24 ratio of carbohydrate, protein, and fat; but in terms
25 of food, it includes a whole grain, it includes a

1 fruit or a vegetable, and it includes a protein
2 source, which also has somewhere in there, there's
3 a source of fat, as well as carbohydrate and protein.

4 So I guess what's confusing you know, as a
5 nutrition educator, we can talk about nutrients, and
6 that doesn't mean a lot to people. What I'm trying to
7 do is I'm trying to translate for you, when I say
8 "protein, carbohydrate, and fat," into a specific food
9 pattern that would constitute a balanced breakfast.

10 Q. Okay. And the phrase "good combination,"
11 specifically, what does that mean to you, "good
12 combination"?

13 A. That says to me that that is that
14 appropriate combination that I just outlined.

15 Q. Okay. And so if some foods together are a
16 good combination for a balanced breakfast, that means
17 that that breakfast would be healthy, then; right?

18 A. It means that the breakfast overall would be
19 balanced and would provide nutrients

20 Q. Okay.

21 A. would contribute nutrients.

22 Q. Okay. Does it also mean the breakfast would
23 be healthy?

24 A. "Healthy" has no legal definition.

25 Q. And as in your role as a registered

1 provides the correct ratio of protein, carbs, and fat,
2 a healthy breakfast?

3 MS. BAL: Objection. Vague and ambiguous.
4 Incomplete hypothetical.

5 THE WITNESS: A healthy breakfast would include a
6 whole grain, a fruit or vegetable, and a protein
7 source, along with optimal amounts of protein,
8 carbohydrate, and fat. That is a healthy breakfast.

9 MR. FITZGERALD: Okay.

10 THE WITNESS: And please note that I would
11 include that whole statement, not part of it.

12 Q. BY MR. FITZGERALD: The breakfast described
13 here, "Nutella spread on whole wheat bread, with
14 orange juice or skim milk," is that a healthy
15 breakfast?

16 A. That would meet the criteria for a healthy
17 breakfast.

18 Q. Okay. Would you tell consumers that that's
19 a healthy breakfast?

20 A. I would say that the breakfast in totality
21 would be a healthy breakfast if

22 Q. Okay. So that's not you wouldn't have a
23 problem

24 A. if it is in all the proper proportions.

25 Q. Okay.

1 A. You know, if it's a carton of orange juice
2 and two drops of milk...

3 Q. Right.

4 A. In the proper proportions, those foods can
5 comprise a healthy breakfast.

6 Q. Okay. It doesn't talk about the proper
7 proportion here, does it?

8 A. Not here.

9 Q. These These other representations, the
10 first the first para sentence and the last
11 sentence, that you earlier testified were not the
12 messaging that you were hired to promote specifically,
13 did you have an understanding of those messages being
14 used to promote Nutella, before you were hired on?

15 MS. BAL: Objection.

16 MR. FITZGERALD: That's That's an inartful
17 question. I'll I'll rephrase it.

18 Q. BY MR. FITZGERALD: Before you were hired,
19 had you ever heard that Nutella is a tasty hazelnut
20 spread that contains quality ingredients such as skim
21 milk and a hint of cocoa?

22 A. No.

23 Q. No? Before you were hired on, had you ever
24 heard that Nutella contains no artificial colors or
25 preservatives?

1 A. Yes, I do.

2 Q. Is this a statement you agree with?

3 A. Generally, yes.

4 (Reporter request.)

5 MS. BAL: I just wanted to clarify which
6 statement you're referring to.

7 MR. FITZGERALD: Okay. The whole paragraph.

8 Q. BY MR. FITZGERALD: This whole paragraph, do
9 you agree with?

10 A. Generally.

11 Q. Okay. What is the quantity of an eating
12 pattern? Do you see the last sentence says: "The key
13 is to eat a wide variety of foods and monitor the
14 quantity and frequency of your eating patterns"?

15 A. Quantity refers to how much you eat.

16 Q. Okay. Just the amount of food calories
17 overall?

18 A. Right. The amount of foods, the amount of
19 nutrients.

20 Q. Okay. Directing your attention to
21 plaintiffs' Exhibit No. 33. This is the article.

22 Would you take a moment to review that, please

23 A. Okay.

24 Q. and let me know when you've had a chance.

25 A. Yes.

1 Q. Have you seen this document before?

2 A. Yes, I did. Um hum.

3 Q. And what is it?

4 A. A reporter interviewed me for this.

5 Q. It's an online article?

6 A. Yes. It's an online article that I was
7 interviewed for.

8 Q. Okay. And that's at parentsconnect.com; is
9 that right?

10 A. Yes. Um hum.

11 Q. And is that a Web site that's owned by
12 Nickelodeon?

13 A. That's correct.

14 Q. Do you see on the first page The title of
15 this article is "Perfect snacks to stock up on for a
16 trip"; right?

17 A. Correct.

18 Q. Do you see on the first page it says the
19 last sentence says: "Here are some easy to pack
20 snacks suggested by registered dietitians, Keri
21 Glassman and Connie Evers"?

22 A. Right.

23 Q. Who is Keri Glassman?

24 A. I don't know.

25 Q. So you didn't work with her on this article?

1 A. No. It was whoever wrote the article
2 interviewed us both.

3 Q. Separately?

4 A. Yes.

5 Q. Okay. You had just reviewed this. You saw
6 that there were ten perfect snacks to stock up on for
7 a trip?

8 A. Right. Again, I did not write this; I was
9 interviewed for this.

10 Q. Okay. Which are the snacks that you
11 contributed to for the interview, as opposed to
12 Ms. Glassman?

13 A. I don't completely remember, but I do
14 believe that the oatmeal packets I I'm not sure.
15 Because I always carry oatmeal packets. It's very
16 likely I talked about chocolate milk. And it says
17 that I talked about trail mix. I'm not sure on
18 hummus. I mentioned nut butters, including Nutella.
19 I didn't She did not submit this for approval to
20 me. Had she, I would have probably maybe reworded
21 this.

22 Q. Okay.

23 A. When you give an interview to a reporter,
24 oftentimes it's out of your control what they actually
25 say.

1 Q. Okay. I'll ask you some questions about it.

2 A. Okay.

3 Q. Let's just Let's just finish what we're
4 doing.

5 A. I don't know about pudding. I don't recall
6 cheese. I you know, I honestly don't, unless
7 and Cuties California mandarins were probably me, I'm
8 speculating.

9 Q. What's the purpose of the Nickelodeon
10 Parents Connect Web site?

11 A. I do not know.

12 Q. And how did this article come about?

13 A. A reporter called me or e mailed me.

14 Q. Just a cold call?

15 A. E mailed or called me.

16 Q. Just like a cold caller? A cold e mail,
17 just out of the blue?

18 A. Right. I get those all the time.

19 Q. Right. All right. Directing your attention
20 to the Nutella slide, which is slide number 7. Did
21 you review the copy before it was printed?

22 A. No, I did not.

23 Q. As the copy appears here on this page, do
24 you believe that it's complete, accurate, and fair?

25 A. No.

1 Q. Why not?

2 A. Because I don't I think that it is not
3 accurately portrayed.

4 Q. In what respect?

5 A. It says "all natural." "Natural" is not
6 really something that's defined. And it sounds like a
7 claim to me, so I would not have ever said that. I
8 would never have said "good for you dip." That is
9 Those are not my words.

10 Q. Anything else?

11 A. The only thing that I recognize is that I
12 mentioned crackers and pretzels. Actually, I I
13 don't think I even mentioned pretzels. I think what I
14 said was "whole grain crackers," to my best
15 recollection.

16 Q. Okay. And so

17 A. It was a phone interview.

18 Q. And the reason you don't think you said
19 pretzels is because pretzels would be inconsistent
20 with the whole grain messaging?

21 A. Right. Pretzels are just real there's no
22 whole grain in them; they're just a refined
23 carbohydrate. It's not something I usually talk
24 about.

25 Q. Okay.

1 A. It's not something I usually recommend, and
2 I always recommend Nutella in conjunction with a whole
3 grain.

4 So my opinion is that the reporter took great
5 liberty, and she may have even gone and gotten
6 information in other sources; but it wasn't sourced
7 from me, other than I did mention Nutella as I was
8 mentioning a whole slew of items.

9 Q. Okay. Was Ferrero aware that this article
10 would be published, before it was published?

11 MS. BAL: Objection. Calls for speculation.

12 THE WITNESS: My recollection is that I sent it
13 to Elise, once I became aware of it. But I'm not
14 sure, because I don't even know when this happened.
15 When was this published? That's a problem with Web
16 articles.

17 Q. BY MR. FITZGERALD: Yeah, I don't really see
18 a date either; but, you know, I have an e mail that
19 may help to put it in context, that we can look at.

20 A. Okay. Yes, I did, at some point, I recall,
21 share it with Elise Titan.

22 Q. Okay. Is Nutella a good substitute for
23 hummus?

24 A. No.

25 Q. So when it said, "If your kids aren't hummus

1 fans, stash a container of Nutella in your room," you
2 wouldn't agree with that?

3 A. No. I didn't give that information.

4 Q. And Nutella is not all natural, because it
5 contains vanillin; correct?

6 A. Correct. And "all natural" is something
7 that has no legal definition either; it's not
8 something that I would use to describe it.

9 As I said, I probably mentioned the product. The
10 reporter took great liberties.

11 Q. Okay. Does "balanced breakfast" have a
12 legal definition?

13 A. Not to my knowledge other than, I would
14 say, it has an accepted definition in terms of USDA.

15 Q. Okay. As what you defined before, the
16 proper proportions and so forth?

17 A. (Nods head.)

18 MR. SHORR: Say yes.

19 Q. BY MR. FITZGERALD: That's a yes?

20 A. Yes.

21 Q. Yes. And then where it says that it's "good
22 for you," that was something you said that you
23 wouldn't you wouldn't have put in there either;
24 right?

25 A. No.

1 Q. And why is that?

2 A. Because, on its own, it is not.

3 Q. It's not good for you?

4 A. I always talk about it in combination, as a
5 tool, as a vehicle, to eat the whole grains.

6 Q. Okay. So Nutella

7 A. So on its own.

8 Q. So Nutella, on its own, is not good for you?

9 A. Nutella, on its own, does contribute
10 nutrients as well, but I would not classify it as a
11 I would not make a nutrition or a health claim about
12 it; but the fact of the matter is, Nutella does
13 contribute nutrients.

14 Q. Well, that's true of every food, isn't it?

15 A. No.

16 Q. What foods don't contribute nutrients?

17 A. I would say that sugared beverages.

18 Q. Aren't sugars carbohydrates, and aren't
19 carbohydrates nutrients?

20 A. Refined carbohydrates, yes; but that is a
21 completely devoid, empty calorie That's what I
22 would consider a complete empty calorie food.

23 Q. Okay.

24 A. Nutella does contribute nutrients.

25 Q. Okay. So a food that's loaded with sugar,

1 you would consider nutritionally empty calories?

2 MS. BAL: Objection.

3 Q. BY MR. FITZGERALD: Is that right?

4 A. That is not what I said.

5 Q. Okay. How did I misstate your testimony?

6 A. What I said is a food, such as a sugared
7 beverage that is 100 percent sugar

8 Q. Okay.

9 A. is devoid of all other nutrients, would
10 be considered an empty calorie food.

11 Q. Okay.

12 A. That's what I said.

13 Q. Okay. What other foods don't contribute
14 nutrients, besides sugared beverages?

15 A. Pure candy.

16 Q. So anything pure sugar, basically?

17 A. Anything that is pure sugar.

18 Q. Okay. Anything else?

19 A. You know, I'm not going to classify every
20 food that was ever made.

21 Q. Would you Do you agree that Nutella is a
22 dip?

23 A. That is not how I would classify Nutella.

24 Q. Okay. Would you

25 A. Nutella is a spread, it's a condiment.

1 Q. Okay. So if you had the choice, you
2 wouldn't have used you wouldn't have used the word
3 "dip" in this article?

4 A. I don't know where she got that copy. None
5 of the copy really came from anything I said.

6 Q. Okay. So during the interview, you didn't
7 talk about Nutella using Nutella as a dip?

8 A. No.

9 Q. And you wouldn't agree with using Nutella in
10 that way?

11 A. No.

12 Q. All right. Directing your attention to
13 plaintiffs' Exhibit 34, which bears production number
14 952.

15 THE REPORTER: Excuse me, Counsel. There was no
16 34 in the binder.

17 MR. FITZGERALD: Oh, that's right. Okay. The
18 court reporter's right. I didn't have I didn't
19 I somehow missed putting it in the binder, so I don't
20 have it for you, but

21 MS. BAL: We're talking about lunch. Sorry.

22 MR. MARRON: Maybe we can make a copy at a break
23 or something.

24 MR. FITZGERALD: Okay. All right. I haven't
25 asked questions yet, so...

1 MS. BAL: Wait. Look, if now's not a good time
2 I just thought, since there was some other stuff
3 going on, we would talk about how he wanted to handle
4 lunch.

5 MR. FITZGERALD: Okay. Let me get Let me
6 Let me ask a few more questions, then we can then
7 we can discuss.

8 Q. BY MR. FITZGERALD: So to clarify: I have a
9 document in front of me, it's Bates stamped CEVERS
10 952, but I don't have extra copies of it. And,
11 actually, I didn't even put it in her binder, so I'm
12 not going to use it as an exhibit.

13 I'll just ask: So I have in front of me what
14 appears to be an e mail from you to Elise Titan, dated
15 July 19, 2010. And it looks like it was produced in
16 this case; it bears production number CEVERS 952.

17 And the second paragraph of the e mail, it's just
18 three paragraphs, it's a short e mail, it says: "I
19 think that's why the Nickelodeon parent piece ended up
20 recommending Nutella as a snack," parentheses, "I
21 didn't say 'all natural,' by the way; the writer came
22 up with that."

23 Is that referring to the piece we just looked at,
24 the perfect snacks, the Nutella parent piece?

25 A. I believe so.

1 Q. Excuse me. The Nickelodeon parent piece?

2 A. I believe so. It sounds like it to me.

3 Q. And since this e mail is dated July 19th,
4 2010, does that refresh your recollection as to when
5 the article may have been published?

6 A. Sometime in that Vicinity, or that might
7 have just been when I became aware of it too.

8 Q. Okay.

9 A. Often, when I'm interviewed by reporters,
10 they don't you know

11 Q. Follow up?

12 A. remember to follow up and tell me that
13 it's published. So I may have just found it.

14 Q. Okay. So it could have been a couple months
15 later or something?

16 A. Yeah, I don't know.

17 Q. Don't recall. When you saw the copy, did
18 you contact the writer?

19 A. I don't recall.

20 Q. Do you recall making any efforts to address
21 what what you perceived to be incorrect about the
22 copy?

23 A. I don't believe I did.

24 MR. FITZGERALD: All right. Why don't we take a
25 lunch break.

[Redacted text block containing multiple lines of obscured content]

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[Redacted text block consisting of multiple lines of obscured content]

[Redacted text block containing multiple lines of obscured content]

[Redacted text block containing multiple lines of obscured content]

[Redacted text block containing multiple lines of obscured content]

1 Q. Okay. Does the label give any indication of
2 what the correct proportion is?

3 A. Other than just viewing a picture, it you
4 know, there's a serving size.

5 Q. Well, the serving size is for Nutella;
6 right?

7 A. Right.

8 Q. So does the label give any information about
9 the correct proportions for a balanced breakfast?

10 A. No. It just gives a visual.

11 Q. Did you have any input on that label?

12 A. No.

13 Q. And the serving size it shows is two
14 tablespoons; right?

15 MR. SHORR: Objection. Calls for speculation.
16 She said she had nothing to do with the label.

17 THE WITNESS: I had nothing to do with the label.
18 I wasn't there when the food was photographed.

19 Q. BY MR. FITZGERALD: The question is: The
20 label indicates that the serving size is two
21 tablespoons; correct?

22 A. The label says two tablespoons.

23 Q. How much Nutella is depicted in that
24 picture?

25 MR. SHORR: Same objection.

1 MS. BAL: Join.

2 THE WITNESS: I wasn't at the photo shoot, so I
3 wouldn't know.

4 Q. BY MR. FITZGERALD: Based on your experience
5 as a spokesperson for Nutella and as a registered
6 dietitian using foods, can you give your best estimate
7 of how much Nutella is on the piece of bread in the
8 picture?

9 MR. SHORR: Same objection.

10 MS. BAL: Objection. Calls for speculation.

11 THE WITNESS: I wasn't at the photo shoot, I
12 didn't have a measuring spoon, so I do not know.

13 Q. BY MR. FITZGERALD: Do you see that the
14 Nutella Web site address appears on the label twice?

15 A. I see it once. I see it twice, yes.

16 Q. Okay. Do you have an understanding of when
17 the Web site was added to the label?

18 A. No.

19 Q. Do you have an understanding of whether the
20 Web site being on the label has increased traffic to
21 the Nutella Web site since it was added?

22 A. I have no idea.

23 MR. FITZGERALD: Okay. You can set that aside.

24 THE WITNESS: Okay. I can't keep it?

25 MR. FITZGERALD: You probably have some, I would

1 MR. FITZGERALD: Forty one.

2 Q. BY MR. FITZGERALD: Have you had a chance to
3 review it?

4 A. Yes, I have.

5 Q. Is this an e mail where you're e mailing
6 comments back on a couple of the mommy party
7 materials?

8 A. Yes, those are my comments.

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

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[REDACTED]

[REDACTED]

17 Q. BY MR. FITZGERALD: Do you think there's
18 anything misleading about advertising Nutella as being
19 made with skim milk?

20 A. It is made with skim milk. That's a fact.

21 Q. Okay. Is there anything misleading about
22 that, even though it's factually correct?

23 A. No.

24 Q. Does advertising Nutella as being made with
25 skim milk imply that it's healthy?

1 A. No.

2 Q. Does it imply that it's healthier than if it
3 were made with regular milk?

4 A. No.

5 Q. Do you have an understanding of why Ferrero
6 advertises Nutella as being made with skim milk?

7 A. Because that's the factual truth.

8 Q. Does Ferrero advertise Nutella as being made
9 with sugar and modified palm oil?

10 A. It's on the label, it's on the Web site.

11 Q. My question was: Does Ferrero advertise or
12 promote Nutella as being made with sugar and palm oil?

13 A. I don't know.

14 Q. Have you ever seen such an advertisement?

15 A. I've seen that information.

16 Q. Have you ever seen such an advertisement?

17 A. I've seen it on the Web site.

18 MS. BAL: Objection. Vague and ambiguous.

19 THE WITNESS: I've seen it on the label.

20 Q. BY MR. FITZGERALD: Can I direct your
21 attention to the next exhibit, please. It's
22 Exhibit 42; the range is 1116 to 21.

23 A. Okay.

24 MR. FITZGERALD: I'm just going to take a moment
25 so your counsel can get a copy of it as well.

1 A. Yeah. The serving size is 37 grams for two
2 tablespoons. This is 18, so it's roughly half.

3 Q. Okay. Directing your attention to the next
4 exhibit, 43; 246 to 47.

5 A. Yes.

6 Q. You're familiar with this document?

7 A. (Nods head.)

8 MR. FITZGERALD: I'll just give a chance to hand
9 it out to your attorneys.

10 THE WITNESS: Okay.

11 Q. BY MR. FITZGERALD: Now, earlier you had
12 testified about an advertorial that appeared in one of
13 the magazines you identified. Was it Working Mother?

14 A. Yes.

15 Q. Is this the advertorial that appeared in the
16 Working Mother magazine?

17 A. That is correct.

18 Q. And has this advertorial appeared elsewhere?

19 A. The nurse practitioner magazine; and, in
20 addition, we've used it for other events in marketing.

21 Q. You've brought it along with For
22 instance, did you bring this to the mommy party?

23 A. I didn't personally bring it. It was sent
24 as part of the packets.

25 Q. It was in that package?

1 way of saying the same thing.

2 Q. Do you think that the word "perfect" would
3 be a compelling word to consumers when they read this?

4 MS. BAL: Objection. Vague. Oh, sorry. It
5 calls for speculation.

6 THE WITNESS: I don't know.

7 MR. SHORR: Same objection.

8 Q. BY MR. FITZGERALD: Did you use the word
9 "perfect" in order to bolster the idea that you were
10 conveying here?

11 A. Perhaps.

12 Q. What is the optimal ratio of protein to
13 carbohydrate to fat, for for a perfect balanced
14 nutrition breakfast?

15 A. The IOM, the Institute of Medicine, which
16 also is the basis for the U.S. dietary guidelines
17 the U.S. dietary guidelines use the Institute of
18 Medicine and they give a range. So for protein, it's
19 10 to 25 percent of their calories; carbohydrate is 45
20 to 65 percent of their calories. What did I just say?
21 I said protein. Did I say fat?

22 Q. Not yet.

23 A. Fat is 20 to 35 percent.

24 Q. Twenty to 35 percent?

25 A. Percent of your calories.

1 Q. So it's just less for the younger children,
2 basically, in the same ratios?

3 A. It depends on what age you're talking about.
4 At certain levels of young children, they need more
5 protein, so you will have a higher protein. That's
6 why those ranges are pretty wide.

7 Q. Okay. Going back to the answer you provided
8 to what is considered a balanced breakfast: Do you
9 see that you said "a half cup of sliced strawberries
10 and one cup of 1 percent milk"?

11 A. Yes.

12 Q. Why is it that you provided measurements
13 there?

14 A. I was giving an example, and that's why I
15 referenced the school age child. I was trying to just
16 give an example based on a child of about a certain
17 age, and do it in a very general way.

18 Q. Okay. And you also said, I'm sorry, "a
19 small whole grain bagel" as well, there, too; right?

20 A. Yes, I did.

21 Q. Okay. Now, when you talked about Nutella,
22 you didn't give a serving size for Nutella, did you?

23 A. No, I did not.

24 Q. Why not?

25 A. I'm not sure.

1 Q. Do you think that would be important to
2 consumers, to know what serving size is appropriate to
3 feed the children?

4 A. I've already done that in this document, on
5 that page, and I've said that many times: One to two
6 tablespoons.

7 Q. Do you think it's important for consumers to
8 know that information?

9 A. It's important for them to know one to two
10 tablespoons.

11 Q. Okay. Handing you back Exhibit 34, which is
12 the Nutella label. Would you look on the To the
13 left of the word "Nutella," there's a little yeah,
14 there's a column there and there's a couple bolded
15 sentences.

16 A. Yes.

17 Q. Can you read the first one to me.

18 A. "Made with over 50 hazelnuts per jar."

19 Q. That's not a message you were hired to
20 promote; right?

21 A. No.

22 Q. What about the one underneath that?

23 A. "Contains no artificial colors."

24 Q. You weren't hired to promote that message?

25 A. No.

1 Q. And the one underneath that?

2 A. "Contains no artificial preservatives."

3 Q. Okay. And you weren't hired to promote that
4 either?

5 A. No.

6 Q. Where on the label does it say consumers
7 should have one to two tablespoons for a balanced
8 breakfast?

9 A. On a label, any label, there's a serving
10 size which serves as an official reference amount
11 based on a reference 2000 calorie diet. It is simply
12 a reference amount, because all individuals are
13 different with you know, based on age, gender, and
14 activity; so this is based on about a 2000 calorie
15 diet.

16 Q. Okay. Do you think that stating on the
17 label an example of a tasty yet balanced meal, without
18 identifying the one to two tablespoons of Nutella as
19 being part of that balanced meal, is misleading?

20 A. No.

21 MS. BAL: Objection.

22 Q. BY MR. FITZGERALD: Why not?

23 A. Because it's a photograph.

24 Q. It's also a sentence, isn't it?

25 A. Which sentence are you referring to?

1 Q. Doesn't it say: "An example of a tasty yet
2 balanced breakfast"?

3 A. Yes, and it doesn't give amounts of
4 anything. It says: "A glass of skim milk, orange
5 juice, and Nutella on whole wheat bread."

6 Q. Okay. Do you think it would be important
7 for consumers to know how much skim milk, orange
8 juice, whole wheat bread, and Nutella they would have
9 to eat in order for it to meet your definition of a
10 balanced breakfast, which is the optimal ratio of
11 protein to carbohydrate to fat, plus some of the other
12 things you said?

13 MS. BAL: Can I have the question read back.

14 (Record read.)

15 MR. FITZGERALD: I'll rephrase the question.

16 Q. BY MR. FITZGERALD: You previously defined a
17 balanced breakfast as one that has the optimal ratios
18 of protein to carbohydrate to fat, plus what's
19 comprised of a whole grain, a protein, and so forth.

20 Do you think, when consumers read that label, it
21 would be important for them to know how how much of
22 those ingredients they would need to eat in order to
23 have this optimal ratio?

24 MS. BAL: Objection. Calls for speculation.

25 MR. SHORR: Same objection.

1 THE WITNESS: No.

2 Q. BY MR. FITZGERALD: Why not?

3 A. It's a label. It's a product that many
4 people will use. You can't put amounts on it, because
5 it's based on your age, gender, and activity level,
6 how much you need.

7 Q. Okay. But Ferrero wasn't required to put on
8 the label that this is an example of a balanced
9 breakfast, was it?

10 A. They're giving quantitative information, not
11 qualitative. I mean, they're giving Excuse me.

12 They're giving qualitative information in a
13 photo, not specific quantitative information, because
14 that's an individualized factor.

15 Q. Okay. But when you use the phrase "balanced
16 breakfast" or "balanced meal," you're referring to
17 something very specific and quantitative, aren't you?

18 A. When I give an example.

19 Q. Okay. The next Q&A says: "Why do you
20 recommend eating Nutella as part of a balanced
21 breakfast?" Do you see that?

22 A. Yes.

23 Q. And the second sentence says: "When used in
24 moderation with complementary foods, Nutella can form
25 part of a balanced meal. You can start your day with

1 a genuine and tasty breakfast by spreading Nutella
2 hazelnut spread on a variety of bakery goods,
3 preferably whole wheat or multi grain bread."

4 Do you see that?

5 A. Yes.

6 Q. What is a genuine breakfast?

7 A. It's real food.

8 Q. What's What's What's not real food?

9 Processed food is not real food?

10 A. It's "Genuine" to me would be more along
11 the terms of wholesome. It would be recognizable,
12 safe ingredients, in this case, that contribute
13 nutrients.

14 Q. Okay. Would you

15 A. It's genuine. It's a genuinely balanced
16 breakfast. That means true.

17 Q. Would you characterize Nutella on its own as
18 a genuine product?

19 A. Nutella by itself is not you know, I
20 don't make health claims or nutrition claims on
21 Nutella by itself.

22 Q. Would you characterize Nutella by itself as
23 a genuine product?

24 A. Yes, it's a genuine product. It's a true
25 product; it has real ingredients.

1 Q. Earlier you said "genuine" was synonymous
2 with "wholesome." Would you Would you characterize
3 Nutella as a wholesome product

4 MS. BAL: Objection. Mischaracter

5 Q. BY MR. FITZGERALD: on its own?

6 MS. BAL: Sorry. Mischaracterizes prior
7 testimony.

8 MR. SHORR: Same objection.

9 THE WITNESS: Yes.

10 Q. BY MR. FITZGERALD: What about Nutella on
11 its own is wholesome?

12 A. You just asked me that.

13 Q. I asked you if you would characterize it
14 that way, and you said yes.

15 A. Nutella on its own? I don't recommend using
16 Nutella on its own.

17 Q. Okay. So you wouldn't characterize Nutella
18 on its own as wholesome; is that right?

19 A. Nutella, on its own, is a wholesome product.
20 I wouldn't recommend Nutella on its own, that you eat
21 it on its own. You should pair it with nutrient rich
22 ingredients.

23 Q. Looking at the next page, the first question
24 and answer at the top. The question says: "What is"
25 "What is an appropriate amount of Nutella hazelnut

1 for two tablespoons of Nutella?

2 A. That's correct. In calories.

3 Q. But syrup has no fat; right?

4 A. That's correct.

5 Q. What's the difference between a condiment
6 and a spread?

7 A. I would say, in this case, they're
8 synonymous, a spread and a condiment. You're using
9 them as an added food to another food.

10 Q. Okay. Earlier you testified that mustard
11 was a condiment?

12 A. Yes.

13 Q. Would you characterize mustard as a spread
14 as well?

15 A. If you spread it on your bread.

16 Q. What about salad dressing?

17 A. You use that condiment on a salad,
18 generally, or as a dip with vegetables.

19 Q. Okay. So how you characterize it depends on
20 how you use it, basically?

21 A. Um hum.

22 Q. That's a yes?

23 A. Yes.

24 Q. Yes. Can I direct your attention, please,
25 to Exhibit No. 52.

1 MR. MARRON: What's the Bates?

2 MR. FITZGERALD: Sorry. It's 537 through 541.

3 MS. BAL: Did you say 52?

4 MR. FITZGERALD: Fifty two. Right.

5 MS. BAL: Fifty two. Thank you.

6 MR. SHORR: Yes.

7 MS. SCOLNICK: What number is this?

8 MR. MARRON: Fifty two.

9 MR. FITZGERALD: Fifty two.

10 THE WITNESS: Okay.

11 Q. BY MR. FITZGERALD: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
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[REDACTED]

[REDACTED]

[REDACTED]

24 MR. SHORR: Let's take a break before we get to

25 the next exhibit.

1 MS. BAL: Objection. Calls for speculation.

2 THE WITNESS: No.

3 Q. BY MR. FITZGERALD: A few times throughout
4 the day, you've defined "balanced breakfast." Do you
5 recall that?

6 A. Yes.

7 Q. Do you have an understanding of what
8 consumers take "balanced breakfast" to mean?

9 A. No.

10 Q. If you don't know what consumers take
11 "balanced breakfast" to mean, does that make you
12 uncomfortable promoting Nutella as part of a balanced
13 breakfast?

14 A. No.

15 Q. Is "balanced breakfast" a synonym for
16 "healthy breakfast"?

17 A. Yes.

18 Q. So "balanced" is in this context, it's a
19 euphemism for "healthy"; right?

20 A. Yes.

21 Q. And occasionally Ferrero has talked about
22 healthy breakfasts featuring Nutella, correct, as
23 opposed to balanced breakfasts?

24 A. I believe so.

25 Q. And does that include in the commercial

1 that's no longer running, the television commercial?

2 A. You're asking me about a commercial that's
3 no longer running?

4 Q. Earlier you testified that you were aware
5 that there was a commercial about Nutella, that is no
6 longer running; isn't that right?

7 A. Yes.

8 Q. Have you seen that commercial before?

9 A. Yes.

10 Q. Did that commercial promote Nutella as being
11 part of a healthy breakfast?

12 A. I don't recall.

13 Q. Did that commercial use the word "healthy"?

14 A. I don't know.

15 Q. Did it use the word multiple times?

16 A. I don't remember.

[REDACTED]

1 to say that Nutella provides a good source of
2 vitamin E; is that correct?

3 A. That's correct. Nutella provides 9 percent
4 of the daily value in a 2 tablespoon serving size.

5 Q. Of vitamin E?

6 A. Yes. So that is not a good source. It's
7 under the good source, but it does contribute
8 vitamin E.

9 Q. Okay. And what about B vitamins?

10 A. I don't know the exact right off the top of
11 my head, but it does contribute amounts of B vitamins.

12 Q. Okay. Directing your attention to
13 Exhibit 56, which is 974.

14 I think you have to hand this one out, 974.

15 MR. MARRON: 974?

16 MR. FITZGERALD: Yeah. I think we may have
17 handed this out already. Oh, no.

18 MS. BAL: Did you say yes, you think we have?

19 MR. FITZGERALD: I don't think so.

20 MS. BAL: Oh.

21 MR. FITZGERALD: It's just It's a one
22 basically a one paragraph e mail, Scott. Do you mind
23 looking at it?

24 THE WITNESS: Right. It was Karl

25 Q. BY MR. FITZGERALD: Have you had a chance to

1 review the

2 A. Yeah.

3 Q. exhibit? And this is an e mail where
4 you're talking to Karl Krohn about the new Nutella
5 commercial; is that right?

6 A. Yes.

7 Q. And in this e mail, you said that
8 MS. BAL: I'm sorry. Do I have that? Is this
9 it?

10 MR. FITZGERALD: You don't. No, sorry. I
11 don't

12 MR. MARRON: 975?

13 MR. FITZGERALD: 974.

14 MR. MARRON: 974.

[REDACTED]

■ [REDACTED]

3 MS. BAL: You know what? I'm sorry. I really
4 need to see If we're talking about Ferrero here, I
5 really need to see the document, so...

6 MR. FITZGERALD: Here.

7 MS. BAL: Thank you.

8 MS. KOTRAN: And, Connie, could you speak up a
9 little bit more, because I'm having trouble hearing
10 you too.

11 THE WITNESS: Oh, okay. Sorry.

12 MS. KOTRAN: It's okay.

13 THE WITNESS: I have something in my eye.

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

21 MR. FITZGERALD: Can I have it back, Colleen?

22 MS. BAL: Oh, I'm sorry. Is this it?

23 MS. KOTRAN: No, that's not it.

24 MS. BAL: Oh.

25 Q. BY MR. FITZGERALD: Have you ever

1 MS. KOTRAN: We still didn't get it.

2 MS. BAL: Oh.

3 MR. FITZGERALD: I'm sorry. I think we might be
4 missing an extra copy; but you've had a chance to read
5 it, so...

6 (Sotto voce remarks.)

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

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■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

[REDACTED]

17 Q. Earlier you testified that "balanced
18 breakfast" is synonymous with "healthy breakfast." Do
19 you recall that?

20 A. Yes.

21 Q. And you said that, in that context, the word
22 "balanced" is a euphemism for "healthy." Do you
23 remember that?

24 A. Yes.

25 Q. Isn't that essentially the same thing as

1 calling Nutella or advertising Nutella using the
2 words "health" and "nutrition"?

3 MS. BAL: Objection. Vague and ambiguous.

4 THE WITNESS: The commercial is for Nutella. The
5 commercial depicts a healthy and balanced breakfast,
6 but the commercial is a Nutella commercial. So it's

[REDACTED]

1 THE WITNESS: I don't really understand your
2 question. You're not being specific enough.

3 MR. FITZGERALD: Well, I'll withdraw it.

4 Q. BY MR. FITZGERALD: Directing your attention
5 to plaintiffs' Exhibit 57. It's 973. It's the other
6 page that was stapled on the front of it.

7 MS. BAL: It was the other page that was stapled
8 where?

9 MR. FITZGERALD: On front of the last exhibit.

10 MS. KOTRAN: The first page of it.

11 MS. BAL: Oh, this is...

12 THE WITNESS: Oh, that's Karl and Elise. Okay.
13 Sorry, I'm talking to myself.

14 Okay. Let me see. Karl that was from Elise
15 to Karl Okay.

16 Q. BY MR. FITZGERALD: Have you had a chance to
17 review it?

18 A. Yeah. I needed to make sure who was talking
19 to who.

20 Q. Sure.

21 A. Yes.

22 Q. Okay. I understand.

23 A. Okay.

24 Q. And this is an e mail from Elise Titan at
25 MS&L to Karl Krohn?

1 A. Correct.

2 Q. And there's some other people, including
3 yourself, copied on it?

4 A. Yes.

5 Q. Who is Anthony Jackson?

6 A. Anthony Jackson, I have never met him. I
7 presume he's a MS&L on the PR team.

8 Q. Okay. But not somebody you worked with
9 regularly, then?

10 A. I recall an occasional seeing him. It's not
11 somebody I know personally.

12 Q. Okay. And Allison Showalter, I'm not sure
13 if we had said her name earlier or not, but she

14 A. I believe you did.

[REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

6 Q. Had you ever talked to anybody about online
7 reactions to Ferrero's breakfast messaging vis a vis
8 Nutella?

9 A. The only online activity that I that they
10 shared with me was after the New York event, the
11 Twitter feed from the actual event that I spoke at to
12 the mommy bloggers at the roundtable. Other than
13 that, no.

14 Q. Directing your attention to Exhibit 43.
15 This is the advertorial?

16 A. Um hum.

17 Q. At the very bottom of the first column,
18 there's it starts "it's no surprise," and then
19 there's a paragraph talking about the benefits of
20 children eating breakfast. Do you see that?

21 A. Um hum.

22 Q. Is that source also the Rampersaud article?

23 A. I believe so.

24 Q. Do you see the darkened box that says "ask
25 Connie"

1 A. Yes.

2 Q. in the second column?

3 A. Um hum.

4 Q. Let's see. A few lines down, it says: "A
5 slice of whole wheat toast, spread with an appropriate
6 amount of hazelnut" "of Nutella hazelnut spread, a
7 serving of fresh fruit, and a cup of yogurt or
8 1 percent milk, provides balanced nutrition to start
9 the day." Do you see that?

10 A. Yes.

11 Q. And the appropriate amount is one to two
12 tablespoons; is that right?

13 A. Yes.

14 Q. How would consumers know from reading this
15 what the appropriate amount was?

16 A. Again, this is going in a consumer
17 publication where it's up to a mom at some point to
18 determine, because it's based on age, gender, and
19 activity of your child whether to use one or two
20 tablespoons.

21 Q. But how is a mother to know that the
22 appropriate amount is either one or two tablespoons
23 from this article?

24 A. She would look at the product label.

25 Q. So looking at the product label, a mother

1 would discern that the appropriate amount is two
2 tablespoons?

3 A. Or she could look on the Web site, or she
4 could use her own judgment in feeding her child.

5 Q. Do you see right below that, it says: "For
6 example, serve your child whole wheat toast or a
7 whole grain toast or waffle, with a dab of Nutella
8 hazelnut spread"?

9 A. Right. "Dab."

10 Q. Yeah. What is a dab?

11 A. Again, this is a consumer publication. That
12 would refer, colloquially, to a small amount

13 Q. Okay.

14 A. and which is very consistent with my
15 messaging of using a small amount to enhance a
16 nutrient rich food.

17 Q. Part of the messaging you talked about is
18 is conveying the proper serving size and proper
19 proportions; right?

20 A. Um hum.

21 Q. This article doesn't do that, does it?

22 A. A dab would refer to a small amount

23 Q. Okay.

24 A. in most moms' minds, I presume.

25 Q. Okay. But it doesn't refer to a specific

1 quantitative serving size, does it?

2 A. It says a dab.

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 Q. Are sugar and palm oil simple and healthy
21 ingredients?

22 A. They're simple ingredients.

23 Q. Are they quality ingredients?

24 A. Yes.

25 Q. Are they healthy ingredients?

1 Q. And then "hectic mornings" is what we talked
2 about: Either the mom or the child is busy?

3 A. Um hum.

4 Q. School obligations, that sort of thing?

5 A. Yes.

6 Q. Other than hectic mornings and finicky
7 appetites, is there any other reason why breakfast is
8 a challenge?

9 MS. BAL: Objection. The question's been asked
10 and answered.

11 THE WITNESS: I believe we discussed time,
12 distraction, you know, picky eating, et cetera.

13 Q. BY MR. FITZGERALD: I'm directing your
14 attention to page 1135, and you see there's a
15 question

16 THE WITNESS: Oops. Sorry. Can you still hear
17 me? Okay.

18 Q. BY MR. FITZGERALD: Do you see this appears
19 to be a question and answer card?

20 A. Um hum.

21 Q. And the question is: "What makes a balanced
22 breakfast?"

23 A. Um hum.

24 Q. And the answer is: "Nutella hazelnut spread
25 on your favorite whole grain bakery item, with a glass

1 of skim milk and a serving of fruit, is a quick and
2 easy solution for a balanced breakfast."

3 A. Yes.

4 Q. How come there's no portions provided here?

5 A. It was a trivia game.

6 Q. Do you think it's important, when making
7 references to a balanced breakfast, to tell people
8 what the proportions are?

9 A. I don't think we have to do it every single
10 time.

[REDACTED]

1

A. Oh, okay.

[Redacted text block]

■ [REDACTED] [REDACTED] [REDACTED]

2 Q. Can I direct your attention to Exhibit 58,
3 please. I think we might have to get this. This is
4 115 to 121.

5 MR. MARRON: 115 to 121?

6 MR. FITZGERALD: 121.

7 MR. MARRON: Is it 115 or 121?

8 MR. FITZGERALD: It's 115 to 121.

9 THE WITNESS: Is that still okay?

10 MS. SCOLNICK: If we're off the record, can we
11 take a very short break, give you five or six exhibits
12 to copy?

13 MR. SHORR: Yeah. Do you mind just walking out
14 there, or do you need

15 MS. SCOLNICK: Not at all. Not at all. They
16 just don't know me, so...

17 MR. SHORR: Sure. If you ask Anne, that's okay,
18 and she'll walk you out.

19 MS. SCOLNICK: Okay. Thanks.

20 MS. BAL: Are we off the record? Are we going
21 off the record?

22 THE REPORTER: We're still on the record.

23 MS. BAL: Oh, okay.

24 MR. SHORR: Let's just let her move this and
25 we'll start...

1 MR. FITZGERALD: Judy, there's a door at the
2 other side.

3 Q. BY MR. FITZGERALD: Okay. Ms. Evers, sorry
4 for all the goings on.

5 Have you had a chance to review Exhibit 58?

6 A. No. I was distracted.

7 Q. Okay. Sure. Will you please do that.

8 I'm directing your attention to the first page,
9 the e mail at the bottom.

10 A. Um hum. Right.

11 Q. The final bullet point.

12 A. Yes.

13 Q. This is an e mail that you sent to Chris
14 Montemurro; right?

15 A. Right. Um hum.

16 Q. You see at the bottom: "I would like to
17 discuss the build your own breakfast feature. I think
18 it could be significantly improved and build a more
19 compelling case for using Nutella at breakfast"?

20 A. Yes.

21 Q. Does that refresh your recollection as to
22 whether, in terms of creating content, the purpose of
23 that was to build a compelling case for using Nutella
24 at breakfast?

25 MS. BAL: Objection. Calls for speculation.

1 THE WITNESS: My point in this bullet was that
2 the build your own breakfast feature could more
3 accurately show the comparisons of a Nutella breakfast
4 and other types of breakfasts, that it would be along
5 the lines of those balanced guidelines.

6 Q. BY MR. FITZGERALD: Okay. And that was to
7 build a compelling case for using Nutella as opposed
8 to something else?

9 A. A compelling case that Nutella at breakfast
10 is one choice that could be a balanced breakfast.

11 Q. What is the breakfast builder?

12 A. The breakfast builder is a feature on the
13 Web site for 14 year olds and 14 and up, and it
14 does a couple of things. It shows comparative
15 breakfasts that are already kind of set, that I
16 designed; and then it also does some kind of
17 pick and choose and combination, so a consumer can see
18 what happens to the nutrient profile with different
19 combinations.

20 Q. Okay. When you said it's 14 and up, is
21 there some sort of a disclaimer on the front page for
22 that?

23 A. When you click on breakfast builder or build
24 your own breakfast, you have to put in your birth
25 date; and if you're younger than 14, it won't go

[REDACTED]

12 Q. What was the mommy blogger roundtable in New
13 York?

14 A. In New York City? It was an event where
15 some, you know, key mommy bloggers were invited to a
16 breakfast event, and it was in a child care facility,
17 so the children were all off doing their little fun
18 things, and we presented a program.

19 Q. Okay. How many people attended?

20 A. I don't know for sure. Perhaps in the range
21 of 20, maybe. I would say 10 to 20, I would guess.

22 Q. Okay.

23 A. That's just an estimation. That was a long
24 time ago.

25 Q. Okay. And that was on March 9th, 2010?

1 A. That is correct.

2 Q. Directing your attention to Exhibit 63,
3 which is 278 to 87.

4 THE WITNESS: If you want to fix my thing, you're
5 welcome to.

6 MR. FITZGERALD: Yeah, let's take a let's take
7 a You want to Oh, the holes came out.

8 THE WITNESS: Thank you. It's fine.

9 MR. FITZGERALD: Okay.

10 MR. MARRON: 278 to?

11 MR. FITZGERALD: 278 to 87.

12 THE WITNESS: Okay.

13 MR. MARRON: There it is.

14 THE WITNESS: Do you want me to read the complete
15 Twitter feeds of everybody?

16 Q. BY MR. FITZGERALD: You don't have to.

17 A. Okay.

18 Q. We'll go through some of the individual
19 comments, but...

20 A. Okay.

21 Q. And I realize it's very, very, very small
22 print as well.

23 A. Yes, it sure is. And there's a lot of them.

24 Q. Directing your attention to the first page.

25 A. Right.

1 Q. Earlier you testified that you had seen
2 tweets from the New York City mom blogger roundtable
3 event; is that right?

4 A. Right. These were shared with me.

5 MR. MARRON: There's one or two of those.

6 Q. BY MR. FITZGERALD: And that's what this
7 exhibit is?

8 A. Yes, this is what I was referring to.

9 Q. Okay. Directing your attention to page 280.
10 This is a tweet deck, I guess you would call it, from
11 a tweeter called Classy Mommy?

12 A. Yes.

13 Q. Do you see the first comment at the top
14 says: "Surprised to learn Nutella only has four
15 ingredients: Hazelnuts, skim milk, sugar, hint of
16 cocoa"?

17 A. Yes, I see that she's

18 Q. Is that accurate?

19 A. No.

20 Q. Is that something you said?

21 A. No.

22 Q. Is there anything else that you said, that
23 would have led her to believe that Nutella has only
24 four ingredients?

25 MS. BAL: Objection. Calls for speculation.

1 MR. SHORR: Same objection.

2 THE WITNESS: I don't Nothing that I said
3 would would lead to that.

4 Q. BY MR. FITZGERALD: Okay. I'm directing
5 your attention to page 282. Do you see there's two
6 columns there?

7 A. Um hum.

8 Q. And this is a tweet deck from a tweeter
9 called Jenrab, J E N R A B?

10 A. Yes. Um hum.

11 Q. In the second column, the third comment
12 down, do you see it says: "Nutella has four
13 ingredients: Hazelnut, cocoa, skim milk, and sugar
14 nom nom"?

15 A. Um hum. Nom nom, who knows what that is?

16 Q. I think that's like yum yum, almost,
17 nom nom.

18 That's not accurate; right?

19 A. No, that's not accurate.

20 Q. So both both of these bloggers got the
21 same inaccurate impression?

22 A. Right. You know, they were tweeting and
23 listening at the same time.

24 MR. SHORR: Hold on. Wait for him to finish the
25 question. Calls for speculation. You can answer.

1 THE WITNESS: Yes.

2 Q. BY MR. FITZGERALD: In the first column, the
3 second comment up from the bottom, do you see it says:
4 "Nutella can be considered a vehicle for eating
5 healthy items for breakfast"?

6 A. Where is that? On Jen Are we still on
7 Jenrab?

8 Q. Jenrab, yes. So it's the second comment up
9 from the bottom, on the first column.

10 A. Yes.

11 MS. BAL: It's the second one from the bottom?

12 MR. SHORR: It's on the left column.

13 MS. BAL: Oh, the left.

14 THE WITNESS: Yes.

15 Q. BY MR. FITZGERALD: At the event, did you
16 talk about using Nutella to eat a healthy breakfast?

17 A. I did mention that Nutella can be a vehicle
18 for getting kids to eat more whole grains.

19 Q. Did you use the word "healthy items"?

20 A. Perhaps.

21 Q. If you go four comments up from there, it
22 says: "Nutella is a hazelnut spread and not a
23 chocolate spread." Do you see that?

24 A. Yes, I see that.

25 Q. Is that something that you said at the

1 event?

2 A. As I recall, that wasn't me that said that.

3 Q. Who else was presenting at the event?

4 A. Karl Krohn.

5 Q. Did Karl Krohn ever say that Nutella only
6 has four ingredients, at the event?

7 A. I don't I don't believe so.

8 Q. Why isn't Nutella a hazelnut spread and not
9 a chocolate spread?

10 A. Hazel Nutella doesn't contain any
11 chocolate.

12 Q. Why is Nutella not a sugar spread?

13 A. Because the characteristic ingredient is
14 hazelnut.

15 Q. I'm directing your attention to the next
16 page, 283, the second column, the second comment up.
17 Do you see it says: "If you are sending a Nutella
18 sandwich to school for lunch, send in a string cheese
19 for extra protein"?

20 Is that a suggestion you made during the mommy
21 roundtable bloggers event?

22 A. As I recall, that could have been an answer
23 I gave to a question. I'm not sure. I may have
24 gotten asked about that and that may have been the
25 answer that I gave. I don't have full recollection.

1 Q. Okay. But you recommend children eating
2 Nutella sandwiches for lunch?

3 A. I don't recommend that, no. Again, that
4 would have been a response to a question, would be my
5 best recollection.

6 Q. Okay. Then the comment above that, do you
7 see it says: "Nutella sandwich is really not more
8 sugary than PB&J"?

9 A. Um hum.

10 Q. Is that something that you said?

11 A. I don't recall whether I said that or not.
12 I don't recall.

13 Q. Why is it, in responding to a question, that
14 you recommended that, if you're sending a Nutella
15 sandwich to school for lunch, that you send along a
16 string cheese for extra protein too?

17 A. I don't recall that that's exactly but if
18 I did say it, it's because that would include the
19 protein.

20 Q. Okay. Because Nutella doesn't provide that
21 enough protein on its own?

22 A. Right, on its own.

23 Q. Is that a true statement, the comment that
24 Nutella sandwich a Nutella sandwich is really not
25 more sugary than a PB&J?

1 A. I would have to do the nutrient breakdown,
2 but I would presume that if you were using a
3 tablespoon of jam I don't know. I would have to do
4 the nutritional breakdown.

5 Q. Okay.

6 A. You're definitely adding sugar to a peanut
7 butter sandwich.

8 Q. Right. If you were

9 A. Depends on how much jam.

10 Q. If you were going to compare a Nutella
11 sandwich with a peanut butter and jelly sandwich, in
12 order to make it a fair comparison, what what
13 servings of each of those things would you use on
14 them?

15 A. That's not something I ever do.

16 Q. Okay. But if you wanted to do that, would
17 you So, in other words, if you were comparing a
18 peanut butter and jelly sandwich to a Nutella
19 sandwich, would you compare two tablespoons of Nutella
20 to a tablespoon of peanut butter plus a tablespoon of
21 jelly, or is there some other ratio?

22 A. I wouldn't do that, because that's not what
23 I do.

24 Q. Okay.

25 A. I talk about messaging for breakfast, so I

1 wouldn't talk about sandwiches for lunch.

2 Q. Okay. Isn't it true that a tablespoon of
3 peanut butter plus a tablespoon of jelly contains
4 about 50 percent less sugar than two tablespoons of
5 Nutella?

6 A. Why are you changing the peanut butter
7 serving size down to one tablespoon, when the serving
8 size of peanut butter is two tablespoons?

9 Q. Well, because I want to make a comparison
10 between peanut butter and jelly and Nutella, and I
11 want to have the same amounts of the products, which
12 is why I was asking you about how how you would do
13 a comparison before.

14 A. A serving size of peanut butter is two
15 tablespoons; a serving size of Nutella is two
16 tablespoons.

17 Q. Oh, okay. So earlier you testified that
18 Nutella is a replacement for a combination of spreads;
19 right?

20 MS. BAL: Objection. Mischaracterizes prior
21 testimony.

22 THE WITNESS: It can We were talking in terms
23 of breakfast.

24 Q. BY MR. FITZGERALD: Right. So is one of
25 those combinations peanut butter and jelly?

1 A. If it's eaten for breakfast.

2 Q. Okay. And if you were replacing peanut
3 butter and jelly, for breakfast, with Nutella would
4 you replace the I mean, are you suggesting that, in
5 using Nutella to replace peanut butter and jelly, you
6 would have to use less Nutella than you would use
7 peanut butter and jelly?

8 A. A serving size of peanut butter is two
9 tablespoons; a serving size of jelly is one
10 tablespoon. It's frequently eaten together; so if
11 somebody puts that on bread, it's frequently three
12 tablespoons, the if you're going to do it by the
13 jar serving size. A serving size of Nutella is two
14 tablespoons.

15 Q. Okay. So when you suggest to consumers that
16 Nutella is a good replacement for peanut butter and
17 jelly at breakfast

18 A. I never suggested that. You're assuming.

19 Q. We just talked about combining peanut butter
20 and jelly for breakfast; right?

21 A. You did.

22 Q. Can I direct your attention to the next
23 page, please, the first column, second down from the
24 top.

25 Do you see the comment says: "Did you know

1 there's actually very little chocolate in Nutella?
2 It's hazelnuts, skim milk, and a hint of cocoa"? Do
3 you see that?

4 A. Yes, I see that.

5 Q. And like the other comments, this doesn't
6 say that Nutella contains sugar or oil, does it?

7 A. It does not say that.

8 Q. I'm directing your attention to page 286.
9 Do you see the first small comment from the top says:
10 "Back from the Nutella event in NYC. I learned that
11 it's actually a nut butter, not chocolate butter,
12 Nutella, plus its gluten free."

13 Did you say at the mommy blogger event in NYC
14 that Nutella is a nut butter not a chocolate butter?

15 A. I may have said that. It does not contain
16 chocolate.

17 Q. Are you aware of whether the FDA has any
18 standard of identity for peanut butter?

19 A. Asked and answered. I said I believe they
20 do; I'm not sure.

21 Q. Okay. And do you know what it is? You
22 don't know what it is?

23 A. Do I have the standard of identity of peanut
24 butter memorized? No.

25 Q. I'm going to represent to you that in order

1 to market a product as peanut butter in the United
2 States, it must contain at least 90 percent peanuts as
3 a standard of identity.

4 A. Okay.

5 Q. Do you understand that?

6 A. Yes.

7 Q. And I'm also going to represent to you that
8 Nutella contains about 13 percent hazelnuts.

9 A. Okay.

10 Q. Do you think that it's fair to call Nutella
11 a hazelnut spread when it contains about 10 percent of
12 the amount of peanuts that have to be in a product in
13 order to be called peanut butter?

14 A. That's not my decision to make.

15 Q. Does it surprise you that Nutella contains
16 only 13 percent hazelnuts?

17 A. No.

18 Q. Did you think it was less than that?

19 A. I didn't ever think about it.

20 Q. Did you think it was more than that?

21 A. I never thought about it.

22 Q. Directing your attention to page 287. In
23 the first column, four comments down, do you see it
24 says: "What is in Nutella? Hazelnut, skim milk,
25 sugar, and cocoa. I'm in love. Kosher OUD. Not

1 kosher for Passover." Do you see that?

2 A. Um hum.

3 Q. So this is another blogger who said that
4 there's only four ingredients in Nutella; right?

5 A. Um hum.

6 MS. BAL: Objection. Mischaracterizes the
7 document.

8 Q. BY MR. FITZGERALD: What was BlogHer?

9 A. Oh, this is BlogHer?

10 Q. No, I'm on to a new question.

11 A. Oh. Oh.

12 Q. We're done with this exhibit.

13 A. Right.

14 Q. What What was BlogHer?

15 A. BlogHer?

16 Q. Right.

17 A. BlogHer Food was an event in San Francisco.

18 Q. And did that take place on October 8th to
19 9th, 2010?

20 A. Yes.

21 Q. Is that a yearly event?

22 A. I believe so.

23 Q. Where was it held?

24 A. San Francisco.

25 Q. Where in San Francisco?

[REDACTED]

9 Q. As a registered dietitian, does it make you
10 uncomfortable advocating feeding children a food that
11 you refer to in other contexts as decadent, as a
12 decadent ingredient in rich desserts?

13 MR. SHORR: Object. Argumentative.

14 THE WITNESS: Any ingredient, any single
15 ingredient, almost anything can be used to create a
16 decadent dessert.

17 Q. BY MR. FITZGERALD: Isn't Nutella itself
18 decadent?

19 A. Not when it's used appropriately in the
20 messaging that I'm the way that I'm presenting it,
21 no.

22 Q. Okay. But if it's used on its own, then it
23 is decadent; is that right?

24 A. No. I was referring to using it in
25 combination to create dessert items, high high fat,

1 high calorie dessert items.

2 Q. If somebody just ate a tablespoon of it out
3 of the jar, would that be a decadent thing to do?

4 A. I think that that's not the messaging that I
5 do. It's irrelevant. That's not what I am educating.
6 That's not anything I ever talk about or advocate.

7 Q. What is School Family Media?

8 A. School Family Media was a project that runs
9 articles on their site, informational articles, and I
10 believe there was an article that referenced the
11 importance of breakfast.

12 MR. SHORR: Before we get to another, are you...

13 THE WITNESS: Hmm?

14 MR. SHORR: I wanted you to finish your answer.
15 I'm sorry.

16 THE WITNESS: Yeah. Well, maybe we should just
17 finish this line, School Family Media.

18 MR. SHORR: But I need to take a break just to
19 check in with staff and see where we are.

20 THE WITNESS: Oh. Oh, sure. Okay.

21 MR. FITZGERALD: This is a great time.

22 MR. SHORR: We can all talk about what

23 THE WITNESS: Okay.

24 MR. FITZGERALD: Let's go off the record.

25 THE VIDEOGRAPHER: The time is 4:57. We're off

1 the record.

2 (Recess.)

3 THE VIDEOGRAPHER: The time is 5:19, and we're
4 back on the record.

5 Q. BY MR. FITZGERALD: You attended three mommy
6 parties; is that right?

7 A. That's correct.

8 Q. And two of them were in California?

9 A. Yes.

10 Q. And what counties were they in?

11 A. Orange County, Riverside, and then Denver.

12 Q. And you also attended the BlogHer event in
13 San Francisco?

14 A. That's correct.

15 Q. Other than the two mommy parties in Orange
16 County and Riverside and the BlogHer event in San
17 Francisco, are there any other events for which you've
18 appeared on behalf of Nutella in California?

19 A. Oh, in just in California? No.

20 Q. What is the appropriate frequency for a
21 school age child to eat Nutella for breakfast?

22 A. That's not something I've determined or ever
23 talked about.

24 Q. The balanced breakfast that you suggest,
25 featuring Nutella, is that something that you would

1 recommend a child eating every day?

2 A. No. I would never recommend the same
3 breakfast every day. Part of good nutrition is
4 getting a variety of foods, mixing it up.

5 Q. Other than the interest in getting a variety
6 of foods, is there any other reason you wouldn't
7 suggest eating a breakfast with Nutella every day?

8 A. I just wouldn't suggest it, because, again,
9 I advocate variety. Moderation, variety, and balance
10 are kind of the three hallmarks of good nutrition; so
11 I would never recommend the same meal, of any kind,
12 every single day.

13 Q. Okay. Don't the U.S. dietary guidelines
14 talk about how it's the nutrients that count; the
15 source of them isn't isn't really an issue? Or
16 isn't it important?

17 A. Yes, it's important, because You mix it
18 up because it's more than nutrients. There's a lot we
19 don't know about food. There's a lot of protective
20 healthful substances in foods, in plant based foods
21 specifically, and so mixing it up is important to get
22 in all those healthful compounds.

23 Q. So if you wouldn't recommend a child eat
24 Nutella for breakfast every day, what's the most
25 frequent you would recommend a child eating Nutella

1 for breakfast?

2 A. That's something I would have to consider,
3 what a you know, I haven't really defined, you
4 know, how many days.

5 Q. Okay. Do you think, as part of the
6 breakfast messaging and talking about proper
7 proportions, proper amounts, and moderation, that it
8 would be important to consumers to know with what
9 frequency they should feed their children Nutella for
10 breakfast?

11 MR. SHORR: Objection. Calls for speculation.

12 MS. BAL: Same objection.

13 THE WITNESS: Yeah, I think that that's
14 difficult. I think it's an individual I think the
15 breakfast builder is a good example of us showing
16 other breakfasts and variety.

17 Q. BY MR. FITZGERALD: I'm directing your
18 attention to Exhibit 77, which bears Bates numbers 271
19 through 277.

20 MR. MARRON: Actually

21 MR. FITZGERALD: This has an extra document on
22 top of it.

23 MR. MARRON: 269, yeah.

24 Q. BY MR. FITZGERALD: I'm just going to ask
25 you about the e mail.

1 A. Oh, just the first page?

2 Q. Just the first page.

3 MS. BAL: When you say that, you mean 271?

4 MR. FITZGERALD: You can Yes, 271.

5 THE WITNESS: Well, I kind of need to see what
6 you're referring to.

7 MR. FITZGERALD: Go ahead, yes. Yeah, I just
8 wanted to let you know.

9 THE WITNESS: Okay.

[REDACTED]

25 remember why.

1 Q. Did you think that her her language that
2 there are multiple different solutions than adding two
3 and a half teaspoons of sugar to a food that tastes
4 great without it, was a valid point?

5 A. I did I understand her point of view. I
6 think there are different solutions. I think Nutella
7 is also a valid solution.

8 Q. Okay. Do you see, in the second paragraph
9 of your e mail, the last sentence, you say: "Nutella
10 and many other foods are here to stay, whether
11 dietitians approve or not"? Do you see that?

12 A. Let me see. What paragraph is that?

13 Q. It's the second It's the second paragraph
14 and the last sentence.

15 A. Yes.

16 Q. Would you agree that most dietitians would
17 not approve of feeding Nutella to children?

18 A. No.

19 Q. Do you agree that most dietitians would not
20 approve of Nutella as a standalone product?

21 A. Most likely, but that's speculation.

22 Q. Have any other nutritionists or dietitians,
23 other than Kathy Richards, expressed disappointment
24 that you're the spokesperson for Nutella to you?

25 A. Not to me directly.

1 Q. BY MR. FITZGERALD: At the mommy parties,
2 one of the mommy parties you attended, did somebody
3 serve sandwiches that were made with Nutella and
4 lingonberry jelly?

5 A. Yes. It was a lingonberry pure
6 lingonberries, as I believe that was the Riverside
7 party, and I believe that was her own homemade
8 creation made out of berries.

9 Q. The next paragraph down, the last sentence,
10 you tell Ms. Richards that you usually use about one
11 and a half teaspoons on a piece of toast, which is
12 about 50 calories.

13 That's just 25 percent or a quarter of the two
14 two tablespoons that you recommend children eat for
15 breakfast; right?

16 A. I recommend one to two tablespoons.

17 Q. So this is between a quarter and a half of
18 that amount?

19 A. Um hum.

20 Q. Is that a yes?

21 [REDACTED]

23 Q. I understand. You attended a mommy party in
24 California that was hosted by a woman named Shelby;
25 right?

1 to use it on whole grains, but not required, that
2 would be misleading?

3 MS. BAL: Objection. The question is vague and
4 ambiguous. Also calls for speculation.

5 THE WITNESS: Could you clarify that question.

6 Q. BY MR. FITZGERALD: If somebody said that
7 you should use Nutella, preferably with whole
8 grains

9 A. Yes.

10 Q. would that be misleading?

11 MS. BAL: Same objection.

12 MR. SHORR: Yeah, I join those objections.

13 THE WITNESS: I'm not sure.

14 Q. BY MR. FITZGERALD: Do you think that is an
15 incomplete statement?

16 MS. BAL: Same objection, and vague and
17 ambiguous.

18 MR. SHORR: And I join in those objections. You
19 can answer.

20 THE WITNESS: No.

21 Q. BY MR. FITZGERALD: Would you yourself say
22 that it's only preferable to use whole grains with
23 Nutella?

24 A. As a spokesperson, I recommend whole grains
25 because that's what I think is the best way to use it.

1 Q. Okay. What if somebody said that Nutella is
2 a great option, especially if it's paired with whole
3 grains? Is that also incomplete?

4 MS. BAL: Objection. Vague and ambiguous. Calls
5 for speculation.

6 THE WITNESS: As a dietitian, I recommend using
7 whole grains.

8 MR. FITZGERALD: Let's take a break. And I think
9 I'm just about ready to pass off. I just want to make
10 sure I have nothing else before doing that.

11 MR. SHORR: Why don't we just sit here.

12 THE WITNESS: Yes. I don't need

13 THE VIDEOGRAPHER: The time is 5:43 and we're off
14 the record.

15 (Recess.)

16 THE VIDEOGRAPHER: Okay. The time is 5:53. We
17 are back on the record.

18

19 EXAMINATION

20 BY MS. SCOLNICK:

21 Q. Ms. Evers, my name is Judy Scolnick. And I,
22 along with my co counsel, Mr. Greg Davis, represent
23 the plaintiff in another action. I'm just going to
24 state the name for the record: It's Glover versus
25 Ferrero, filed in the District of New Jersey, case

1 MR. SHORR: Object as vague and ambiguous. You
2 can answer.

3 THE WITNESS: Adolescence end at age 18 in my
4 book.

5 Q. BY MS. SCOLNICK: Okay. Let me reword this
6 one last time, see if we can get it right.

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

20 Q. BY MS. SCOLNICK: Okay. Thank you. I
21 believe you said earlier that children like variety?

22 A. No, I don't believe I said that.

23 Q. That they might want Children like to
24 pick and choose? They might want a cookie one day?

25 A. I think in regards to variety, I said it's

1 important to introduce variety to children.

2 Q. Right. But that's a difference, because I
3 was going to say that would never happen in my house.

4 Is it a fair statement that children often,
5 frequently tend to be picky and like the same food
6 again and again?

7 A. That does happen.

8 MS. BAL: Objection. Vague and ambiguous. Calls
9 for speculation. Please let me have time to object.

10 Q. BY MS. SCOLNICK: That does happen. And
11 have Are you aware of a theory in nutrition that
12 says something I'm not going to say it the
13 technical correct way at all; I promise you that
14 but it's something along the lines that, the more
15 sweets given, the more sweets wanted? I suppose it
16 could be something like a sweet tooth. Are you aware
17 of any such theory?

18 MS. BAL: Objection. Vague and ambiguous.

19 THE WITNESS: I have heard the theory of sugar
20 addiction. I do not believe there is sound science.

21 MR. SHORR: We're getting to our last few
22 minutes, and all the questions seem to be about theory
23 and I know she's a fact witness, and I want to if
24 there's some key fact questions you want to finish up
25 on.

1 Q. BY MS. SCOLNICK: And is it a fair statement
2 that Nutella on its own is a low nutrient food?

3 A. I don't recommend Nutella to be used on its
4 own.

5 Q. Right.

6 A. Nutella does contain nutrients, however.

7 Q. But is it Do you Do you Is there
8 such a term as a low nutrient food?

9 A. I believe you're getting at empty calorie;
10 and I would not classify Nutella as empty calorie the
11 way I would other foods.

12 Q. Right. You said this morning that sweetened
13 beverages are empty calories?

14 A. Yes.

15 Q. But Nutella is Is it a fair statement to
16 say Nutella is low nutrient caloric food?

17 A. I would not characterize it that way.

18 For the record, carbohydrate, protein, and fat
19 are nutrients.

20 Q. Would you characterize Nutella as a
21 high nutrient food?

22 A. No.

23 Q. In the

24 A. And the terminology would be nutrient dense.

25 MS. SCOLNICK: Nutrient dense. Thank you.