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INTERIM CLASS COUNSEL

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE FERRERO LITIGATION

Case No.: 3:11-CV-00205-H-CAB

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Judge: The Honorable Marilyn L. Huff

Hearing Date: June 13, 2011
Time: 10:30 a.m.
Location: Courtroom 13

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTRODUCTION

This action challenges the consistent deceptive messaging Ferrero has conveyed to the public in multiple forms and media over the past decade: that Nutella is a healthy "hazelnut spread," like peanut butter, and a good breakfast food, especially for children.

In its June 30, 2011 Order on Ferrero's Motion to Dismiss the prior Master Consolidated Complaint ("MCC"), the Court held Plaintiffs lacked standing to challenge statements made on the Nutella website "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." *In re Ferrero Litig.*, 2011 U.S. Dist. LEXIS 70629, at *6 (S.D. Cal. June 30, 2011). The Court, however, granted Plaintiffs leave "to amend or cure any deficiencies—if they can—in an amended consolidated complaint." *Id.* at *25. That is just what Plaintiffs did. In their First Amended Consolidated Complaint ("FACC"), filed July 3, 2011 (Dkt. No. 45), Plaintiffs allege that:

> 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.

FACC at ¶ 76. *See also id.* at ¶¶ 9, 99, 104-106.

Ferrero nevertheless filed a five-page Motion limited to the sole question of whether Plaintiffs have standing to challenge directly the Defendant's web advertisements for Nutella. Ferrero asserts that these amendments do not give Plaintiffs standing to challenge the website statements "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." Mot. at 2. Ferrero is wrong on both counts.

ARGUMENT

I. LEGAL STANDARD

Federal pleading requirements are "extremely liberal," and require only "a short and plain

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

II. PLAINTIFFS MAY CHALLENGE FERRERO'S WEBSITE

A. Plaintiffs Allege Facts Sufficient Under Rule 9(b) to Demonstrate Ferrero's Advertising Campaign was Long-term and Extensive

Contrary to Defendant's assertion that Plaintiffs' allegations "contain no details about the alleged 'long-term advertising campaign,'" Mot. at 3, Plaintiffs' FACC, under the heading "FERRERO'S LONG-TERM, MULTI-MEDIA, DECEPTIVE ADVERTISING CAMPAIGN," contains no less than 23 paragraphs dedicated to detailing it. FACC at ¶¶ 76-98. The FACC discusses in detail how Ferrero used the label of Nutella, *id.* at ¶¶ 77-78, its website, *id.* at ¶¶ 78-89, television commercials, *id.* at ¶¶ 90-96, word-of-mouth, *id.* at ¶¶ 82-88, and product categorization, *id.* at ¶¶ 98, to convey the deceptive and misleading message that Nutella is healthy and nutritious, including touting Nutella as part of a balanced meal and beneficial for developing and growing children.[1]

It is axiomatic that, "where, as here, a plaintiff alleges exposure to a long-term advertising campaign, the plaintiff is not required to plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements." *In re Tobacco II Cases*, 46 Cal. 4th 298, 328 (2009). Here, Plaintiffs allege that "throughout the [more than ten-year] Class Period, Ferrero engaged in, and Plaintiffs and members of the class were exposed to, a long-term advertising

[1] Incidentally, as detailed in Plaintiffs' Motion for Class Certification (Dkt. No. 51 & 56 (Corrected Brief)), the extensive nature of this campaign has been borne out in discovery and actually shown to be even more extensive than pled.

campaign in which Ferrero utilized various forms of media . . . 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." FACC at ¶ 76. Accordingly, the Court should likewise hold that Plaintiffs do not have to plead specific reliance on statements from the Nutella website in order to have standing to challenge them. That conclusion would not only be in accord with the language of *Tobacco II*, but also its putative purpose.

In arriving at that conclusion, the California Supreme Court relied on earlier tobacco decisions that were allowed to proceed with a Plaintiff challenging a manufacturer's entire advertising campaign despite not pleading reliance on specific statements. In *Boeken v. Philip Morris, Inc.*, 127 Cal. App. 4th 1640 (2005), for example, the Court explained, "there was substantial evidence that Boeken began to smoke 'for reasons that track Philip Morris's advertising at the time'," *Tobacco II*, 46 Cal. 4th at 327 (quoting *Boeken*, 127 Cal. App. 4th at 1663).

The same is true here. For over a decade, Ferrero has been trying to convince American consumers—like European consumers before them—that Nutella is a "hazelnut spread," like peanut butter, despite that it is mostly sugar and oil, and that Nutella is healthy, and an appropriate breakfast food. As detailed in the FACC, this included conveying messages through a variety of media, with the hope and purpose of "spreading the word" about Nutella's purported healthful qualities. And as argued in their Opposition and now pled, Plaintiffs were exposed to the representations that appeared on the Nutella website by virtue of their incorporation into Ferrero's overall deceptive advertising campaign. *See* Opp. at 19 (Dkt. No. 39). Construing the allegations in the best light to Plaintiffs, they have sufficiently alleged a *Tobacco II*-like campaign at this stage to have standing to challenge Ferrero's full campaign without pleading reliance to an unrealistic degree.

Ignoring its deceptive advertising and unlawful conduct before 2008, Ferrero nevertheless asserts that because the majority of the challenged advertising took place beginning in 2008 as part of a "ramped-up" campaign to better spread the same healthful messaging, Plaintiffs have not shown a "long-term" campaign. But even if the Court limited its analysis to the period starting in 2008, Plaintiffs have still shown a multi-faceted campaign that is more than three years long, and continuing. Given the putative purposes of the rule, other California courts have found long-term

campaigns entitling a plaintiff to challenge a defendant's full advertising campaign, even when the time period was shorter. In *Morgan v. AT&T Wireless Services, Inc.*, 177 Cal. App. 4th 1235 (Cal. App. 2d Dist. 2009), for example, the court held that "[a]lthough the advertising campaign alleged in this case was not as long-term a campaign as the tobacco companies' campaign discussed in *Tobacco II*, it is alleged to have taken place *over many months*, in *several different media*, in which [Defendant] consistently promoted its GSM/GPRS network as reliable, improving, and expanding." *Id.* at 1258 (emphasis added). Thus, each individual statement need not have been present throughout the entire advertising campaign, as long as Defendant "consistently promoted" the same deceptive and misleading message throughout. *See id.*

Despite the great detail in the FACC, Ferrero nevertheless argues that Plaintiffs have not met the pleading requirements of Federal Rule of Civil Procedure 9(b), despite that it did not raise Rule 9(b) in its motion to dismiss the original complaint. Rule 9(b) requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). The heightened pleading standard set by Rule 9(b) applies to claims for violation of the UCL, FAL, or CLRA that are "grounded in fraud." *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-06 (9th Cir. 2003). The purpose of Rule 9(b) is to ensure the allegations are "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). And while averments of fraud must be particularized, the "Rule 9(b) particularity requirements must be read in harmony with Fedral Rule of Civil Procedure 8's requirement of a 'short and plain' statement of the claim." *Baas v. Dollar Tree Stores, Inc.*, 2007 U.S. Dist. LEXIS 65979, at *5 (N.D. Cal. Aug. 29, 2007). The particularity requirement is satisfied "if the complaint 'identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations.'" *Id.* (quoting *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989)). Simply put, "[a]verments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Vess*, 317 F.3d at 1106. However, the requirements of Rule 9(b) "may be relaxed with respect to matters within the

opposing party's knowledge. In such situations, plaintiffs cannot be expected to have personal knowledge of the relevant facts." *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993).

Plaintiffs' FACC satisfies the pleading requirements of Rule 9(b). Unlike the complaint dismissed in *Kearns v. Ford Motor Co.*, 567 F.3d 1120 (9th Cir. 2009), which failed to even state the wording of the allegedly deceptive statements, *id.* at 1126, Plaintiffs' FACC specifies the exact wording of each deceptive and misleading statement and even includes images of each of the claims on the product label and website, and transcripts of the television commercials. FAC at ¶¶ 76-98. The FACC also explains in detail how each statement or image is deceptive and misleading. *Id.* Thus, Plaintiffs have clearly identified the "what," "where," and "how" of their allegations. Nor can Defendant challenge Plaintiffs identification of the "who," since the FACC clearly identifies all parties involved in this case. FACC at ¶¶ 10-20.

The only Rule 9(b) requirement Ferrero really challenges is the "when" of Plaintiffs' allegations. Mot. at 3-4. As discussed above, Plaintiffs have alleged that Defendant's extensive and long-term advertising campaign took place throughout the entire class period (as defined in the FACC), during which Ferrero utilized the forms of media discussed above to consistently convey the deceptive and misleading message that Nutella is healthy and nutritious. FACC at ¶¶ 76-98. While Plaintiffs have not identified the exact date that each individual statement was in effect, Ferrero is in the best position to know this information and the requirements of 9(b) "may be relaxed with respect to matters within the opposing party's knowledge." *Neubronner*, 6 F.3d at 672. But Plaintiffs have certainly identified the challenged statements with enough specificity to allow Defendants to "prepare an adequate answer from the allegations." *Baas*, 2007 U.S. Dist. LEXIS 65979, at *5.

That the Court should permit the FACC to proceed under the Rule 9(b) standard is dramatically illustrated in the case of *Walter v. Hughes Communs., Inc.*, 682 F. Supp. 2d 1031 (N.D. Cal. 2010), which involved similar circumstances to those here. There, the Court held a much less detailed complaint met Rule 9(b)'s pleading requirement under the "long-term advertising" rule:

> The Court is satisfied that the pleadings in the Amended Complaint are sufficiently particular to plead reliance. Although Plaintiffs have not cited specific advertisements that predate their use of Hughes' services, each Plaintiff alleges that they subscribed to Hughes' services based on Hughes' representations, which (although roughly described) are comparable to the more recent representations, which are alleged with greater

> particularity. Plaintiffs are, in essence, asking this Court to make an inference that Hughes' representations have been consistent over time in certain material respects, dating back for the last several years. The Court finds this to be a reasonable inference. Because Plaintiffs have identified recent, particular representations from Hughes' marketing campaign, and alleged that they relied on similar or identical representations made at earlier times, Plaintiffs have adequately notified Hughes of the claims against it.

Id. at 1045 (citations to record omitted) (citing *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001); *Tobacco II*, 46 Cal. 4th at 328).

B. Plaintiffs' Standing is not Defeated by Allegations in a Prior Complaint

Ferrero alternatively argues that Plaintiffs insufficiently allege a long-term campaign because Plaintiffs specified some advertisements on which they relied in a prior complaint. But "when a plaintiff files an amended complaint, '[t]he amended complaint supercedes the original, the latter being treated thereafter as non-existent.'" *Rhodes v. Robinson*, 621 F.3d 1002, 1005 (9th Cir. 2010) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967)); *accord Henderson v. Gruma Corp.*, 2011 U.S. Dist. LEXIS 41077, at *15-16 (C.D. Cal. Apr. 11, 2011) ("Defendant's argument that Plaintiffs lack standing relies entirely on a contrast between Plaintiffs' original complaint . . . and the First Amended Complaint. . . . Defendant is incorrect. . . . While prior pleadings may be admissible *in evidence* against the pleader, the Court is bound to accept as true allegations in the Plaintiffs' pending pleadings . . . ." (citations omitted)). Accordingly, the determination of whether Plaintiffs have standing to assert their claims against Ferrero's entire Nutella advertising campaign, including its website advertising, must be determined on the basis of the allegations in the currently-operative Complaint alone.[2]

Plaintiffs' allege they "were exposed [to] Ferrero's long-term advertising campaign concerning the purported healthfulness of Nutella . . . [and] understood and relied upon Ferrero's misrepresentations for each purchase of Nutella® made during the Class Period, including, for

[2] While not directly on point, "[l]eave to amend is warranted if the deficiencies can be cured with additional allegations that are 'consistent with the challenged pleading' and do not contradict the allegations in the original complaint. *United States ex rel. Lee v. Corinthian Colleges*, 2011 U.S. App. LEXIS 16618, at *22 (9th Cir. Aug. 12, 2011) (citing *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296-97 (9th Cir. 1990)). Here, as in *United States ex rel. Lee v. Corinthian Colleges*, Plaintiffs' allegations of exposure to a long-term advertising campaign are entirely consistent with their identifying in the original complaint some specific advertisements to which they were exposed. *Compare* MCC ¶¶ 104-106 *with* FACC ¶¶ 104-106.

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*." FACC ¶ 104. Plaintiffs further allege they were "exposed to, saw, read, understood, and relied upon Nutella's® label . . . [and were] further exposed to, saw, heard, understood, and relied upon various statements made about Nutella's® purported healthful qualities as part of Ferrero's long-term advertising campaign." *Id.* ¶¶ 105-106. These allegations, when construed in the light most favorable to Plaintiffs, are sufficient to allege exposure to a long-term advertising campaign at this juncture.

Notably, in amending their Complaint to adequately allege exposure to a long-term campaign, Plaintiffs did not dramatically alter the pleading, but merely "shored it up," just as the Court invited. *See In re Ferrero Litig.*, 2011 U.S. Dist. LEXIS 70629, at *6 (Noting that "Plaintiffs *argue* 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," and distinguishing this case "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." (emphasis added)). That is because the seeds of sufficient allegations were already in the Complaint—details about the many ways and means Ferrero has deceptively promoted Nutella as healthy throughout the years.

In sum, the Court effectively invited Plaintiffs to amend their Complaint to incorporate the *argument* from their opposition into their *allegations*. That is just what Plaintiffs did. In their Opposition, Plaintiffs argued they "allege dozens of statements, including several on Nutella's label, which, as part of Nutella's long-term, multi-media advertising campaign, contributed to the deceptive context of Nutella's packaging as a whole." Opp. at 17. That statement referenced the many statements about Nutella and forms of media discussed in the original complaint, and argued that Plaintiffs were indirectly exposed to elements of the campaign, like the advice of Ferrero's child nutrition expert, Connie Evers. *Id.* at 19. The FACC now properly *alleges* that the many statements Plaintiffs were exposed to were elements of a long-term campaign, such that Plaintiffs may challenge the entirety of the campaign.

CONCLUSION

Plaintiffs respectfully request the Court deny Ferrero's Motion to Dismiss. Should the Court grant any portion of Ferrero's Motion, Plaintiffs respectfully request it be without prejudice.

Dated: August 15, 2011

By: /s/ Jack Fitzgerald
Jack Fitzgerald

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