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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

In re FERRERO LITIGATION	CASE NO.: 11 CV 0205 H (CAB)
	FERRERO U.S.A., INC.'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FIRST AMENDED CONSOLIDATED COMPLAINT
	Date: August 29, 2011 Time: 10:30 a.m. Courtroom 13
	Before: Hon. Marilyn L. Huff

These consolidated lawsuits are brought by two California plaintiffs who allege that they were misled by Ferrero U.S.A., Inc.'s ("Ferrero") television advertisements for Nutella and the product's label in 2009 and 2010. Pursuant to the Court's ruling on Ferrero's first motion to dismiss, those claims are now in discovery and will be litigated. This motion will determine whether these two plaintiffs can pursue claims based on additional statements from the Nutella website which plaintiffs acknowledge they never saw.

Attempting to save their dismissed website claims, plaintiffs added a handful of conclusory passages to their complaint about a long-term advertising campaign. FAC ¶¶ 76, 104-106. Plaintiffs chose to include no details in those new allegations – including when the advertisements were issued by Ferrero – because they know the details are fatal not only to their standing to pursue claims based on the Nutella website, but also to the viability of the remaining claims for the majority of their alleged class period. Indeed, rather than forthrightly allege in their amended complaint when Ferrero began using the challenged statements in national advertisements, plaintiffs say that they lack any such knowledge (Opp. at 4-5) while asserting in a footnote that "the extensive nature of this campaign has been borne out in discovery and actually shown to be even more extensive than pled." Opp. at 2 fn. 1.

In any event, the new allegations fall well short of pleading standing under the *In re Tobacco II Cases*. 46 Cal.4th 298, 306 (2009). Plaintiffs continue to assert that the "extensive and long-term advertising campaign took place through the entire class period" (Opp. at 5) but nowhere in the First Amended Complaint do plaintiffs identify a single television commercial, print advertisement, radio spot, or web page that appeared between 2000 and 2008 – much less any such advertisement that was distributed nationally. Instead of details, plaintiffs try to plead standing by merely adding the phrase "long-term advertising campaign" to their complaint. *See* FAC ¶¶ 76, 102-104.

In *Tobacco II*, the court was faced with factual allegations describing a "campaign of deceptive advertising and misleading statements about the addictive nature of nicotine and the relationship between tobacco use and disease," that spanned "over a forty year plus history by

eleven different defendants." *Tobacco II*, 46 Cal.4th at 306, 309. Given the sheer number of statements, plaintiffs were literally unable to identify the advertisements on which they relied.[1] Rather than hold those plaintiffs to the pleading standard ordinarily required under California law – which would have been "unrealistic" in that context – the Supreme Court made an exception. *Tobacco II*, 46 Cal.4th at 328.

Plaintiffs cannot meet their pleading burden under that exception with the conclusory sentences they added to paragraphs 76 and 104-106 of the complaint. The exception made in *Tobacco II* does not stand for any "general relaxation of the pleading requirements under Rule 9(b)." *Herrington v. Johnson & Johnson Consumer Companies, Inc*., No. 09-1597, 2010 WL 3448531, at *8 (N.D. Cal. Sept. 1, 2010). On the contrary, "the overriding purpose of Proposition 64 was to impose limits on private enforcement actions under the UCL." *See Tobacco II*, 46 Cal.4th at 326. Allowing plaintiffs to acquire such standing, based on only general allegations, would run in direct conflict with the express purpose of Proposition 64 and the pleading requirements it imposed.

These two plaintiffs have already identified the statements on which they allegedly relied, quoted those statements in their complaint, and acknowledged that they were never exposed to the statements made on the Nutella website.[2] Hence, even if plaintiffs were able to plead a long-term advertising campaign (which they cannot), their own allegations would be fatal to any claim

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[1] Similarly, in *Boeken v. Phillip Morris, Inc*., plaintiff's claims were based on the decades-long Marlboro advertising campaign that "seemed to be everywhere — at baseball games, sporting events, racing events, and on racing cars" as well as with print advertisements, billboards, and slogans. 127 Cal. App. 4th 1640 (2005). By the time plaintiff filed his claim in 2000, he could not identify any specific advertisement that he saw during his childhood in the 1950s and '60s that induced him to start smoking. *Id*. at 1660-63.

[2] In *Morgan v. AT&T Wireless Services, Inc*., plaintiffs alleged that, in the course of researching the capabilities of AT&T's products, they were each exposed to the challenged statements and were exposed to the statements again at the time of their purchase. 177 Cal. App. 4th 1235 (2009). Nothing in that decision supports plaintiffs' view that they have standing to pursue claims based on statements that they admittedly never saw. In any event, as they filed their action in state court, the *AT&T* plaintiffs were not subject to the pleading standards of Rule 9(b).

based on the website. *See Laster v. T-Mobile USA, Inc*., No. 05cv1167, 2009 WL 4842801, at *6 (S.D. Cal. 2009) ("Laster's attempt to rely on a general false advertising campaign is unpersuasive in light of the specific ad involved in her transaction."); *Princess Cruise Lines, Ltd. v. Superior Court*, 179 Cal. App. 4th 36, 44 (2010) (in light of plaintiffs' admissions about their experiences showing lack of actual reliance, "there is no reason to delve into the contention that what is at issue here is a prolonged advertising campaign and that the [plaintiffs] do not have to show individualized reliance on specific misrepresentations").

To save their website claims, plaintiffs contend that the Court should disregard those earlier allegations of reliance on specific advertisements and, instead, accept their conclusory allegations of purported reliance on unspecified statements. Opp. at 6-7. Rule 9(b) allows no such thing. *Kearns v. Ford Motor Co*., 567 F.3d 1120 (9th Cir. 2009) (rejecting conclusory allegations that plaintiffs were merely "exposed" to some unspecified marketing materials over the course of approximately three to four years). Ferrero is hard-pressed to imagine that "the Court effectively invited Plaintiffs" to replace specificity about what advertising plaintiffs allegedly relied on in favor of conclusory allegations. Opp. at 7.

Plaintiffs were allowed leave to cure the pleading deficiencies identified by the Court. Rather than take that opportunity and add factual allegations "if they can," plaintiffs decided to play a plead-to-win game by adding a few conclusory statements to their complaint, and then seeking refuge behind "extremely liberal" pleading standards. Opp. at 1. But those pleading standards do not exist to promote gamesmanship and are certainly not intended to subvert the substantive requirements of pleading claims. Plaintiffs do not have standing to challenge statements on the Ferrero website, and Ferrero respectfully submits that those claims should be dismissed.

Dated: August 22, 2011

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