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10 Attorneys for Plaintiffs

11 SUPERIOR COURT OF CALIFORNIA

12 COUNTY OF SAN FRANCISCO – UNLIMITED JURISDICTION

13 JOSHUA A. WEAVER and JEREMY S.  
14 KOSSEN on behalf of themselves and a class of  
persons similarly situated,

15 Plaintiffs,

16 v.

17 NESTLÉ USA, INC.,

18 Defendant.

Case No. CGC-08-476890

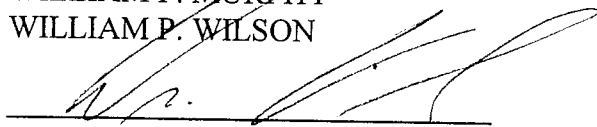
**NOTICE OF ENTRY OF ORDER**

19  
20 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

21 PLEASE TAKE NOTICE that on January 6, 2010, the Court entered its Order After  
22 Hearing on Demurrer of Nestlé USA, Inc. to the [Corrected] Second Amended Complaint and  
23 Briefing Schedule for Any Motion for Stay of Nestlé USA, Inc. A true and complete copy of the  
24 Court's Order is attached hereto as Exhibit A.

25 Dated: January 19, 2010

DILLINGHAM & MURPHY, LLP  
WILLIAM F. MURPHY  
WILLIAM P. WILSON

26  
27   
28 Attorneys for Plaintiffs

JOSHUA A. WEAVER, JEREMY S. KOSSEN

# **EXHIBIT A**

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Attorneys for Plaintiffs

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO – UNLIMITED JURISDICTION

JOSHUA A. WEAVER and JEREMY S.  
KOSSEN on behalf of themselves and a class of  
persons similarly situated,  
  
Plaintiffs,  
  
v.  
  
NESTLÉ USA, INC.,  
  
Defendant.

Case No. CGC-08-476890

**ORDER AFTER HEARING ON  
DEMURRER OF NESTLÉ USA, INC.  
TO THE [CORRECTED] SECOND  
AMENDED COMPLAINT AND  
BRIEFING SCHEDULE FOR ANY  
MOTION FOR STAY OF NESTLÉ  
USA, INC.**

Date: December 21, 2009  
Time: 9:30 a.m.  
Dept: 305  
Judge: Honorable John E. Munter

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

The hearing on the Demurrer of Nestle USA, Inc. to Plaintiffs' [Corrected] Second Amended Complaint came on for hearing on Monday, December 21, 2009, at 9:30 a.m., in Department 305, Hon. John E. Munter presiding. Plaintiffs Joshua A. Weaver and Jeremy S. Kossen appeared through their counsel of record, Stuart Paynter, of The Paynter Law Firm, PLLC, and William P. Wilson, of Dillingham & Murphy, LLP. Defendant Nestlé USA, Inc. appeared through its counsel of record, Peter E. Moll and Leigh A. Kirmssé, of Howrey, LLP. The Court, having considered the moving, opposition, and reply papers of the parties, the supporting

**FILED**

Superior Court of California  
County of San Francisco

JAN 06 2010

GORDON PARK-LI, Clerk

BY: *Craig Blakeslee*  
Deputy Clerk

CB

1 declarations, the papers and records on file herein, and argument offered at the time of hearing,  
2 hereby orders as follows:


3 The Court overrules the demurrer to: (1) the first cause of action (violation of the  
4 Cartwright Act – Business & Professions Code § 16720, *et seq.*), (2) the second cause of action  
5 (violation of the Unfair Competition Law - Business & Professions Code § 17200, *et seq.*), and (3)  
6 the third cause of action (unjust enrichment). The Court overrules the demurrer for uncertainty  
7 and/or ambiguity. The Court sustains the demurrer to the fourth cause of action, that is the one for  
8 civil conspiracy, without leave to amend, and the Court sustains the demurrer to the fifth cause of  
9 action, that is, violation of Business & Professions Code § 17500, *et seq.*, without leave to amend,  
10 based upon the declination of plaintiffs' counsel to seek leave of the Court to amend. The Court's  
11 reasoning for its ruling is reflected in the transcript of the hearing on the demurrer. A true and  
12 correct copy of the transcript of the hearing on the Demurrer is attached hereto as **Exhibit A**.

13 The answer of Nestlé USA, Inc. to the [Corrected] Second Amended Complaint is due to  
14 be filed and served 20 days from entry of the Order herein.

15 The Court further orders that Nestlé USA, Inc. shall file any motion for stay by January 14,  
16 2010. Opposition to any motion for stay is due January 28, 2010. The reply brief in support of  
17 any motion for stay is due February 3, 2010. The hearing on any motion for stay will be February  
18 22, 2010, at 1:30 p.m., in Department 305. A further case management conference will also be  
19 heard at the same time.

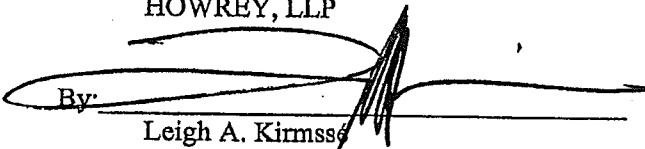
20 **IT IS SO ORDERED.**

21 DATED: January 6, 2010

  
THE HONORABLE JOHN E. MUNTER  
JUDGE OF THE SUPERIOR COURT

24 Approved as to form only:

25 Dated: January 05 2010

HOWREY, LLP  
  
By: Leigh A. Kirmsse  
Attorney for Defendant Nestlé USA, Inc.

# EXHIBIT

A

1 SUPERIOR COURT OF CALIFORNIA  
 2 COUNTY OF SAN FRANCISCO  
 3 BEFORE THE HONORABLE JOHN E. MUNTER, JUDGE PRESIDING  
 4 DEPARTMENT NUMBER 305

5 ---000---

6	JOSHUA WEAVER,	}	Case No. 08-476890 DEMURRER
7	Plaintiff,		
8	vs.		
9	NESTLE USA, INC.,		
10	Defendants.		

11

12 Reporter's Transcript of Proceedings  
 13 Monday, December 21, 2009

14 APPEARANCES OF COUNSEL:

15 For Plaintiff:

16 HOWREY, LLP  
 17 1299 Pennsylvania Avenue, N.W.  
 Washington, D.C. 20004-2402  
 18 By: PETER E. MOLL, ESQ.

19 HOWREY, LLP  
 20 525 Market Street, Suite 3600  
 San Francisco, CA 94105-2708  
 BY: LEIGH A. KIRMSSE, ESQ.

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24 GOVERNMENT CODE § 69954(d): "ANY COURT, PARTY, OR PERSON WHO  
 25 HAS PURCHASED A TRANSCRIPT MAY, WITHOUT PAYING A FURTHER FEE TO  
 THE REPORTER, REPRODUCE A COPY OR PORTION THEREOF AS AN EXHIBIT  
 26 PURSUANT TO COURT ORDER OR RULE, OR FOR INTERNAL USE, BUT SHALL  
 NOT OTHERWISE PROVIDE OR SELL A COPY OR COPIES TO ANY OTHER  
 27 PARTY OR PERSON."

28 Reported by: Rhonda L. Aquilina, CSR #9956, RMR, CRR  
 Official Reporter

122109weaverCMC

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1 Monday, December 21, 2009

9:30 a.m.

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3 THE COURT: We're on the record.

4 Please call the case.

5 THE CLERK: Calling the case of Joshua Weaver and Jeremy  
6 Kossen versus Nestle USA., Inc., Case No. CGC-08-476890.

7 Counsel, please state your appearances for the record.

8 MR. PAYNTER: Stuart Paynter for the plaintiffs in this  
9 action, Joshua Weaver and Jeremy Kossen.

10 MR. WILSON: Good morning, Your Honor. William Wilson on  
11 behalf of plaintiffs Joshua Weaver and Jeremy Kossen.

12 MR. MOLL: Good morning, Your Honor. Peter Moll of Howrey  
13 on behalf of the defendant Nestle USA.

14 MS. KIRMSSE: Good morning, Your Honor. Leigh Kirmsse for  
15 Howrey on behalf of Nestle USA.

16 THE COURT: Good morning. There were two things on the  
17 calendar today, one of them was a case management conference  
18 which we're not holding because of failure to comply with the  
19 Court's requirement that you submit a joint case management  
20 conference statement at least three court days before the case  
21 management conference. I received yours at around 4:00 o'clock  
22 last Friday when I was in session in another matter. That's  
23 nowhere near timely, so we won't be doing that today.

24 The matter on the calendar, though, is a demurrer by  
25 defendant Nestle USA, Inc. to the Second Amended Complaint.  
26 And, counsel, you're free to argue, you're free to submit, the  
27 choice is yours. I think the matter was well briefed.

28 MR. MOLL: Thank you, Your Honor.

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1 We did file the one directive that we got from the Court the  
2 last time we were here and we did bring some Nestle candy with  
3 us for everybody.

4 THE COURT: But, you know, to be honest, and I see that you

5 have, we can't accept that gift, so I appreciate the thought.  
6 We can't accept gifts from litigants in pending cases, so I'm  
7 going to have to return that to you, unfortunately, but that's  
8 our ethical responsibility here. The thought is nice, but the  
9 gift cannot be received.

10 MR. MOLL: That's fine, Your Honor, that's fine.

11 THE COURT: Okay. Thank you.

12 MR. MOLL: To frame this, and to put it into some context,  
13 the question that one is tempted to ask one's self is what we're  
14 doing here. We have these 90 cases consolidated in MDL in  
15 Harrisburg, Pennsylvania. Four of those cases seek  
16 certification of classes of California consumers on basically  
17 the same claims, the same --

18 THE COURT: There's no demurrer based on another action  
19 pending, is there?

20 MR. MOLL: No, there isn't, Your Honor.

21 THE COURT: So is that a matter for today or is that a  
22 matter for some different procedure?

23 MR. MOLL: Well, the point is that in order to achieve the  
24 feat that plaintiffs achieved here and to plead around the Class  
25 Action Fairness Act, they had to make certain choices when they  
26 filed their complaint, because the Class Action Fairness Act  
27 relaxes the diversity requirement and you don't need complete  
28 diversity, and the only way that the plaintiffs could achieve

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1 complete diversity is to just have one defendant, Nestle USA,  
2 and so now having made that decision, having gerrymandered the  
3 complaint, that's the claim that plaintiffs have; it's against  
4 Nestle USA, the sole defendant, and we are here on what is now  
5 the corrected second amended complaint.

6 The other point that I'd like to make upfront is that now

7 that plaintiffs accepted the Court's suggestion and went through  
8 the complaint and took out the references to some collective  
9 Nestle and defendants and other references, it's very clear that  
10 there's a stark contrast here between Canada and the U.S.,  
11 because what we have in Canada, according to the Canadian  
12 Competition Bureau affidavits, are certain breakfast meetings,  
13 certain passing of envelopes, certain things like that happened  
14 up there, but there's no allegation that any of that happened  
15 down here.

16 And so what we are left with here is a conscious parallelism  
17 case with allegations of market structure and trade association  
18 membership and cross-licensing to try to somehow get over the  
19 burden. And what we are left here with is plaintiffs keep  
20 referring to this oligopoly, and I will tell Your Honor the same  
21 thing that I told the MDL court, that I represent the it'sy bitsy  
22 teeny weeny oligopolist, Nestle, with 9 percent of the market,  
23 which is the sole defendant here the plaintiffs are trying to  
24 hold responsible.

25 So I'm sure Your Honor has gone through the briefs, and you  
26 have plaintiffs take a selective quote out of the Quelimane case  
27 and try to say that you just have to have these general  
28 allegations, but when one looks at Chicago Title and the other  
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1 cases, one can see that the courts in California have talked  
2 about allegations with specificity, allegations with  
3 particularity as to the meetings and as to the allegations of  
4 some sort of a conspiracy here, and that language is all in the  
5 cases in the briefs.

6 And while it is true that no California court has  
7 specifically yet adopted Twombly, Twombly is probably the most  
8 important federal United States Supreme Court decision on

9 section 1 of the Sherman Act in at least the last 20, 25 years,  
10 and, as the Court knows, in the G.H.I.I case we've cited and  
11 other cases, federal Sherman Act cases, decisions are  
12 applicable.

13 But whether one is looking at Twombly or one is looking at  
14 the various California cases, one finds a common thread. There  
15 have to be well pled facts above and beyond mere conclusions.  
16 There must be some well pled facts. And, so the question is  
17 what are the well pled facts here against Nestle USA? There's  
18 not a single well pled fact that we attended any meeting with  
19 anyone, that we passed any envelopes, that we had breakfast,  
20 that we did any of the things alleged, there's none of that.  
21 There are some of these generalized allegations, and I think,  
22 Your Honor, the most interesting case on this is the Elevator  
23 case where the Court, at page 47, 502 Fed 3d., 47, talks about  
24 conclusory allegations of agreement. This was a 12(b)(6). This  
25 was a motion to dismiss. Specifically, plaintiffs assert that  
26 in order to effect a conspiracy, defendants participated in  
27 meetings in the United States and Europe to discuss pricing and  
28 market divisions, agreed to fix prices for elevators and

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1 services, rigged bids for sales and maintenance, exchanged price  
2 quotes, allocated markets for sales and maintenance, et cetera,  
3 a litany from A to G. And one of the district courts, and in  
4 this case the Second Circuit, found these were conclusory  
5 allegations. This list in its entirety is general terms without  
6 any specification of any particular activities by any particular  
7 defendant; it is nothing more than a list of theoretical  
8 possibilities which one could postulate without knowing any of  
9 the facts in this case, and that's exactly what we have here on  
10 the issue of a single meeting or communication or a contact.

11 what we do have is we have the allegation of parallel  
12 pricing, and this is really the central or core allegation in  
13 the plaintiffs' complaint. Interesting, they allege that in  
14 paragraph 59, that between '95 and '02 there were no price  
15 increases, so for seven years the prices were flat. And then in  
16 December '02, November and December '04, and March and  
17 April '07, there were announcements of price increases by either  
18 Hershey or Mars, and Hershey and Mars, which represent on the  
19 plaintiffs' allegations 45 and 27 percent respectively, or  
20 72 percent of the market went up, and Nestle, with its 9 percent  
21 followed, and we know that's not sufficient under Twombly, under  
22 the California Biljac case, under any other case it's not  
23 sufficient. Because in the Travel Agents case, Your Honor, and  
24 we've cited this extensively in our brief, but in the Travel  
25 Agents case, the Court said a firm in a concentrated industry  
26 typically has reason to decide to copy the industry leader, and  
27 those quotes that we have from Travel Agent on page 11 of our  
28 brief. That was a perfectly rational business decision for

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1 Nestle to make. It was a perfectly rational business decision  
2 for Nestle to make not only on the basis of the usual facts, but  
3 on these facts where retailers are the ones that are pricing the  
4 product to consumers.

5 And if the retailers were going to raise the price of the  
6 chocolate bars, the Hershey, the Mars, and the Nestle bars at  
7 the same time, then Nestle has got absolutely no advantage by  
8 leaving its price where it was. And the plaintiffs, in their  
9 opposition brief, are schizophrenic on this point, because at  
10 page 5 of their brief they say, at lines 9 through 11, this is  
11 because the chocolate manufacturer that pre-announces a price  
12 increase in a competitive market faces the prospect of

13 significant lost sales if the price increase isn't followed by  
14 competitors, which means that if Hershey goes up and no one  
15 follows, Hershey may well come down. Then at the same time on  
16 page 6 of the brief, at lines 21 through 23 they argue in a  
17 competitive market, Nestle USA and Hershey's unilateral interest  
18 in response to price increase would have been to increase unit  
19 sales by offering lower prices than their competitors. Those  
20 two statements are inconsistent with one another, and they're  
21 inconsistent with the way the world works. And in this case not  
22 only do we have the usual rationale, not only do we have the  
23 retailer issue that had to be taken into account and makes it  
24 reasonable for Nestle to have followed, but we also have  
25 plaintiffs' own allegation that there hadn't been a price  
26 increase in seven years, which makes it all the more reasonable.  
27 So, we know that the allegations of parallel price increases  
28 get plaintiffs no place in and of themselves, and those are the  
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1 core allegations.

2 Now they allege also that Nestle USA is a member of a trade  
3 association, but we know that that's not enough, and the case  
4 law in Twombly and in Elevator is clearly insufficient. In  
5 Graphics Processing, membership and trade association is  
6 presumed innocent. And so we know on the basis of Twombly,  
7 Elevator, and Graphics Processing, those cases, that its  
8 parallel conduct and membership in a trade association is  
9 presumably insufficient, because both of those factors were  
10 present in all three of those cases.

11 They allege there's a DOJ investigation, paragraph 61 of  
12 their complaint. They start by alleging that Mars was contacted  
13 by the DOJ. This is an allegation that goes back to the  
14 original complaint and it goes back in essence to the original

15 complaints that were filed in the federal court in December of  
16 2007. This allegation hasn't changed in two years.

17 THE COURT: I don't see the relevance to a department  
18 investigation.

19 MR. MOLL: Thank you, Your Honor.

20 THE COURT: I mean, it may have some relevance in some  
21 respect to show something else, but the fact that there's an  
22 investigation means nothing.

23 MR. MOLL: And that's what the case law -- and we all agree  
24 on that, Your Honor.

25 And then we have the cross-licensing agreements for the  
26 KitKats, but if you look at the allegation at paragraph 37,  
27 that's Nestle SA.

28 THE COURT: I don't look -- in making that statement, I

10

1 don't mean to be critical or cast aspersions on the Department  
2 of Justice. I'm merely saying that the fact that a government  
3 investigates something proves nothing.

4 MR. MOLL: Well, the fact of the matter is, Your Honor, that  
5 there isn't -- the Department of Justice hasn't opened up an  
6 investigation, a formal investigation.

7 THE COURT: Even if it had --

8 MR. MOLL: Even if it had, it proves nothing because many  
9 department investigations lead to being closed without taking  
10 any action.

11 THE COURT: Well, you know, the Department of Justice's  
12 opinions wouldn't be admissible in a trial anyway.

13 MR. MOLL: So then we have the cross-licensing agreement  
14 between Nestle SA and Hershey, not Nestle USA and Hershey, but  
15 Nestle SA. And the plaintiffs then make the conclusory  
16 allegation in paragraph 37 -- and if I could just use the board

17 for one minute, Your Honor.

18 Nestle SA in Switzerland owns, indirectly owns Nestle USA.  
19 There's a conclusory allegation that because Nestle SA has this  
20 cross-licensing agreement with Hershey where they get sales  
21 information so they can figure out what the license fees are as  
22 they accumulate, that that information is somehow freely  
23 available to Nestle USA - again a conclusory allegation that is  
24 counter to the facts, I mean, if it was -- if Nestle USA, with  
25 Nestle SA owning a hundred percent, it might be arguably freely  
26 available, but that's not the way this relationship flows; it's  
27 not the way it flows at all. And so the cross-licensing  
28 agreement again, because the Court asked to take out and say

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1 instead of Nestle, say who it is, that's Nestle SA.

2 And then we have the Canadian investigation, and lo and  
3 behold we finally figure out who all these individuals are up  
4 there who were referenced in the First Amended Complaint as  
5 "Nestle," and we know they're Nestle Canada, and we know the  
6 investigation of the Canadian government is an investigation  
7 into Canadian companies on the sale of chocolate in Canada, and  
8 that's what they themselves said.

9 THE COURT: I may be missing something, but what do you see  
10 as the relevance of all that? What difference does it make what  
11 governmental agency is investigating what? An investigation is  
12 not a determination, except a determination to look into  
13 something.

14 MR. MOLL: Right. And, again, we agree with that, Your  
15 Honor.

16 THE COURT: That's why I say I don't think the opinion of  
17 somebody in starting an investigation would be relevant or  
18 admissible. Frankly, even if an investigation results in an

19 indictment, that in itself, until there's a determination of  
20 guilt or a plea, would be nothing more than a charge.

21 MR. MOLL: Exactly. Your Honor, and we agree with the Court  
22 a hundred percent.

23 THE COURT: Okay. So why are you telling me, well, their  
24 investigation was into X instead of Y? What difference does it  
25 make what it was into?

26 MR. MOLL: Well, I agree with that. The plaintiffs are  
27 arguing the existence of these investigations are factors that  
28 ought to be taken into account in the Court denying our demurrer  
12

1 and in the fact that they've stated some sort of a claim here,  
2 and that's the only reason I add them, because I agree a hundred  
3 percent, Your Honor. A Government investigation, whether it's  
4 Canada, the U.S. or wherever it is, if there was a grand jury  
5 sitting someplace, it's irrelevant because nothing has happened.

6 THE COURT: There's been no determination of guilt.

7 MR. MOLL: Right. Right.

8 THE COURT: I mean, by the mere fact of an investigation.

9 MR. MOLL: Right.

10 THE COURT: There hasn't even been a charge, and if there  
11 was a charge that wouldn't be a determination of guilt.

12 Has there been a charge?

13 MR. MOLL: No, there hasn't. I mean, there's no -- the fact  
14 of the matter is in two years there really hasn't been any  
15 action anyplace.

16 THE COURT: I guess the question that I'm asking is not  
17 whether there's been a charge, it's whether there's even an  
18 allegation that there's been a charge or indictment.

19 MR. MOLL: No, there hasn't been, no, and I think we would  
20 know that.

21 THE COURT: No. what I'm saying to you is I think what's  
22 relevant to me is what's in the pleading.

23 MR. MOLL: And in the pleading there is no --

24 THE COURT: What factual matters exist outside of the  
25 pleading are not properly considered on a demurrer unless  
26 they're a proper subject of judicial notice. Nobody has asked  
27 me to take judicial notice about some charge being filed, so,  
28 really, I was asking you not have charges been filed, but is

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1 there any allegation even that charges have been filed, even  
2 assuming that's relevant?

3 MR. MOLL: There has not, Your Honor.

4 THE COURT: Okay.

5 MR. MOLL: And so plaintiffs are arguing that somehow the  
6 U.S. and the Canadian markets are integrated and the Court ought  
7 to take into account what's going on in Canada and somehow pin  
8 it on Nestle USA. The fact of the matter is that whatever has  
9 been submitted on Canada, you can shake it up and down nine ways  
10 to Sunday and look at it, there's no allegation that anybody  
11 from Nestle USA did anything, met with anyone, exchanged  
12 anything from anybody in Canada.

13 Indeed, the MDL court on this jurisdictional issue said,  
14 look, Nestle Canada is up there selling chocolate in Canada and  
15 Nestle USA is here in the U.S. selling chocolate. And the fact  
16 of the matter is that while plaintiffs again say, well, there  
17 could be this arbitrage over the boarder, well, I'm not denying  
18 that somebody from Buffalo might go to Toronto for an hour and  
19 have a chocolate bar up there, but as we set forth in page 17 of  
20 our brief, you can't sell the Canadian candy down here because  
21 it doesn't meet the labeling requirements of the federal  
22 government, and this Your Honor can take advantage of or notice

23 of, and you can't sell the U.S. chocolate up there because it's  
24 not in French, it's not in metric, it's not this and it's not  
25 that. You can't do that. You can't do that.

26 So, really, all that we are left with here is that Nestle  
27 has a corporate structure. Yes. Of course, under Copperweld,  
28 Nestle cannot conspire with itself, and so when one goes through  
14

1 the complaint and strips it down to the well pled factual  
2 allegations that the federal and California cases require, what  
3 one finds is, Your Honor, there's just -- where's the beef? One  
4 is tempted to keep asking that question.

5 Plaintiffs also try to allege fraudulent concealment. I  
6 mean, I think Your Honor has seen paragraph 80 of the complaint;  
7 it's two sentences; it's purely conclusory. For fraudulent  
8 concealment, plaintiffs have to show the substantive elements of  
9 fraud and they have to show some sort of excuse; they have to  
10 show reliance - all those elements are in there. There's no  
11 question it has to be done with specificity.

12 THE COURT: What would the consequence of failure to plead  
13 that be here if there were a failure to plead fraudulent  
14 concealment? Would that resolve an issue as to an entire cause  
15 of action?

16 MR. MOLL: No, it would simply go to the applicability of  
17 the statute of limitations.

18 THE COURT: Is that a proper matter for a demurrer to an  
19 entire cause of action?

20 MR. MOLL: It may not be, Your Honor.

21 And then let me also address, and I won't address the  
22 conspiracy and some of those others, but let me also just make a  
23 couple points on this false advertising claim that is in there.

24 Again, what we're looking at here is, in paragraph 97,

25 Nestle's reason for being is to understand, anticipate, and  
26 fulfill its customers' needs, and Nestle is concerned about its  
27 customers. There's no allegation in the complaint that this  
28 even relates to some advertisement that was made relating to

15

1 chocolate, parenthetically. There's no allegation in the  
2 complaint they ever read this. There's no allegation in the  
3 complaint they ever bought a Butterfinger bar because of it or  
4 they wouldn't have bought one not because of it; it's just not  
5 there; it's devoid of any of that. And on top of it, I think as  
6 Your Honor can see from the cases that we've gone through, this  
7 is non-actionable puffery. It's not something that you can sit  
8 there and verify. It's not a statement of fact that can be  
9 verified, and if you go through Echostar and Southland and all  
10 those other cases I think that's fairly clear.

11 And then plaintiffs say, well, in paragraph 96 they say, we  
12 omitted to disclose the material fact that we are setting  
13 prices. Of course they don't -- with all the price fixing cases  
14 that have been brought in California and other places, there's  
15 not a single case cited to support this rather unique  
16 proposition. There's not -- and they cite the Mazza case and  
17 the Negrete case, but, Your Honor, in those cases you had -- in  
18 Mazza it was Honda and they put out the brochures and all the  
19 information was in there except they left out things that were  
20 material to make the brochure not misleading. And the same  
21 thing on the annuities in the Negrete case, things were left  
22 out.

23 There's no allegation of that here. What plaintiffs are  
24 really urging this Court is to say if you're allegedly engaged  
25 in a price fixing conspiracy, you have an affirmative duty to go  
26 out and disclose it, but there's not a single case anywhere that

27 ever says anything like that, and so that claim should also be  
28 dismissed.

16

1 And the other claims should be dismissed, Your Honor, for  
2 the reasons set forth in our brief, and I will rest on that, so  
3 thank you very much.

4 THE COURT: Thank you.

5 MR. PAYNTER: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MR. PAYNTER: Let me start by apologizing for the late CMC.  
8 That was partially my fault. I had a hearing on Thursday and I  
9 thought it had been wrapped up before that hearing started, but  
10 we'll make sure that does not happen again.

11 THE COURT: You understand that my canceling the CMC is not  
12 an act of vindictiveness. I need these case management  
13 conference statements three days before --

14 MR. PAYNTER: Absolutely, Your Honor.

15 THE COURT: -- because that's my agenda.

16 MR. PAYNTER: I understand.

17 THE COURT: Let me just get the words out.

18 I want the record to show that I've told you this, so what  
19 I'm telling you is I'm not doing this to be vindictive. I need  
20 these three court days before in order to get ready for the case  
21 management conferences because they're my agenda of what you  
22 want me to be ready to discuss with you.

23 MR. PAYNTER: Absolutely, Your Honor.

24 I'd like to start, Your Honor, as my colleague did, with the  
25 heart of this case, which is obviously the Cartwright Act claim.  
26 And Nestle's argument, Your Honor, is essentially that we had  
27 failed to plead this claim with adequate particularity, and of  
28 course, as Your Honor knows, Nestle made that exact same

1 argument for the federal MDL court and that court rejected the  
2 argument even though it was under the higher standard  
3 established by the U.S. Supreme Court's decision in Twombly, and  
4 of course that decision is not binding on this Court, but it is  
5 persuasive authority.

6 The actual pleading standard for this Court, Your Honor, is  
7 established by California Supreme Court's decision in I believe  
8 it's Quelimane, but I may be pronouncing that wrong and, under  
9 that standard, Your Honor, we are required to allege the  
10 formation of a conspiracy, wrongful acts done in furtherance of  
11 it, and injury.

12 THE COURT: You say that the United States Supreme Court  
13 decision in Twombly is "persuasive authority," and then you tell  
14 me in the next breath I shouldn't follow it because California  
15 has a lower standard.

16 MR. PAYNTER: Sorry, Your Honor. The MDL court is  
17 persuasive authority, even though it was applying a higher  
18 standard than the Supreme Court's decision in Twombly.

19 THE COURT: Okay. Thank you.

20 MR. PAYNTER: Yes. And under the decision of the California  
21 Supreme Court in Quelimane, Your Honor, we easily satisfy --  
22 we've alleged a conspiracy that started in about 2002 and  
23 continued, we've alleged the members of the conspiracy, and  
24 we've alleged that pursuant to this conspiracy Nestle USA raised  
25 its prices on a coordinated basis in the United States. And,  
26 contrary to Nestle's argument, Your Honor, we're not required to  
27 identify specific meetings at which specific personnel at Nestle  
28 USA showed up. And if you actually look at the Quelimane court,  
18

2 price fixing agreements, and I am quoting, "It is usually the  
3 situation that such agreements are made covertly thereby making  
4 it difficult for the plaintiff to allege the full details of  
5 such agreement." And in the Quelimane case itself, Your Honor,  
6 all the plaintiffs there did was allege an agreement among title  
7 insurers, in a single county, that none would issue policies on  
8 property purchased at tax sale. They didn't allege any specific  
9 meetings. They didn't allege any documents memorializing the  
10 conspiracy, and they didn't even allege when the conspiracy in  
11 that action started, Your Honor.

12 And, in its reply, Nestle USA says that, well, this Court  
13 can ignore the Quelimane standard because of California court,  
14 Supreme Court precedent but says interpretations of the Sherman  
15 Act are persuasive authority, and that's true, Your Honor. But  
16 Twombly was not an interpretation of the Sherman Act, Your  
17 Honor, it was an interpretation of the pleading standard under  
18 the Federal Rules of Civil Procedure, in particular Rule 8, and  
19 it does not just apply to antitrust cases, Your Honor, it  
20 applies to any case pled in federal court. And, in fact, in my  
21 hearing on Thursday it was -- the allegations were under  
22 publicity rights statutes and the defendants were relying on  
23 Twombly.

24 But, even under Twombly, Your Honor, our allegations clearly  
25 suffice to allege a plausible antitrust conspiracy. And again,  
26 as found by the MDL court, we've alleged a market clearly  
27 susceptible to price fixing, that there's an undifferentiated  
28 commodity product, they're a high market concentration, there

19

1 are extremely high barriers to entry for new competitors,  
2 cross-licensing agreements. And the key, which is during this  
3 relevant period in which there were coordinated price increases,

4 we've alleged there was waning consumer demand and there were  
5 actually decreasing, stable or decreasing costs, Your Honor, and  
6 significant excess capacity in the market, including significant  
7 excess capacity specifically of Nestle USA.

8 And, finally, Your Honor, throughout this period profit  
9 margins were constant, and even if prices were rising,  
10 economically you would not expect, Your Honor, profit margins to  
11 remain constant; you would expect a squeeze on profit margins.  
12 And the MDL court correctly found that these characteristics  
13 depicted, and I'm quoting, prototypical market susceptible to  
14 price fixing.

15 And, Your Honor, in addition, we've alleged that there was  
16 conduct occurring in Canada. And I agree, Your Honor, that the  
17 mere fact of a government investigation is not -- does not prove  
18 the case, but the fact is there were actual documents produced  
19 in this Canadian investigation, and we've alleged there was  
20 price fixing in Canada, and the MDL court, Your Honor, correctly  
21 found that this was absolutely relevant, but for two reasons.

22 First, we've alleged that the Canadian and U.S. markets are  
23 essentially one market, and I realize that Nestle is putting its  
24 briefs on factual assertions, Your Honor, about labeling  
25 requirements. There's nothing to indicate, and that's clearly a  
26 factual issue, whether you can simply re-label chocolate bars,  
27 you know, it seems you can; but, second, Your Honor, we have  
28 demonstrated direct connections between Nestle USA and Nestle 20

1 Canada. For example, and I don't believe this was actually  
2 alleged by the MDL claimants but was something we put in the  
3 amended complaint, there was a shared services committee set up,  
4 and it was to coordinate trade spend, and trade spend is  
5 basically payments to retailers for shelf space, and it's

6 actually a significant component of your net price, and on the  
7 committee was the CEO of Nestle USA and the CEO of Nestle  
8 Canada, Bob Leonidas, who was the very person in Canada who was  
9 agreeing with his competitors about prices and about trade  
10 spend.

11 Now, Nestle says, Nestle USA says that the MDL court in its  
12 subsequent jurisdictional decision somehow rejected these  
13 connections, Your Honor, but -- well, there are a couple  
14 problems with that. First, for a demurrer, obviously this Court  
15 cannot rely on the factual findings of another court in another  
16 case, but, more fundamentally, our allegations are a hundred  
17 percent consistent with the factual findings of the MDL court,  
18 and we actually --

19 THE COURT: You're saying factual findings of the MDL court?

20 MR. PAYNTER: The MDL court on the subsequent decision on  
21 personal jurisdiction.

22 THE COURT: Yes, on jurisdiction.

23 MR. PAYNTER: Yes, and that's what Nestle is relying on.

24 So, putting aside the question of whether this Court can  
25 even rely on factual findings in another proceeding, all our  
26 allegations are completely consistent with those factual  
27 findings, and we actually put a table in our brief, Your Honor,  
28 where we have our allegation, the cite to our allegation, and

21

1 then the cite to the factual finding in the MDL court. All the  
2 MDL court said was that it didn't have jurisdiction over Nestle  
3 Canada because it found that Nestle Canada and Nestle USA were  
4 not alter egos of each other. We've never claimed that, Your  
5 Honor; we've never claimed that they were alter egos of each  
6 other, that somehow there's no distinction between the corporate  
7 form of Nestle USA and Nestle Canada.

8 And in its reply, Your Honor, Nestle USA doesn't respond to  
9 our chart at all; it just says in its brief, and I'm quoting,  
10 that it's not clear that the MDL court would have come to the  
11 same conclusion had it already dismissed Nestle Canada. But in  
12 fact, Your Honor, when it decided to deny Nestle USA's motion to  
13 dismiss, the federal court in the exact same opinion also  
14 allowed the jurisdictional discovery, so it obviously knew that  
15 there was a possibility that Nestle Canada could be dismissed.

16 Now, let me briefly just -- because this is something that  
17 was brought up. The assertion in Nestle's brief that we don't  
18 have any, quote, legal support for the economic assertions that  
19 we make, and that's on the section on page 13 in our brief, I  
20 think the whole point of that section, Your Honor, was that  
21 these are not legal issues, these are factual issues about the  
22 market that really cannot be resolved on a demurrer; and you  
23 can't just look at a case, you know, involving elevators and  
24 conclude that the same behavior would apply in a market for  
25 chocolate.

26 But even if this Court were to delve into some of those  
27 factual disputes, the really required expert testimony, Nestle's  
28 really don't make sense, Your Honor, and the prime example is

22

1 this assertion that one -- that the reason it didn't follow the  
2 leader is because had it maintained its lower prices, it says  
3 retailers would have just pocketed the difference, Your Honor,  
4 and that's -- well, that's a factual assertion about the  
5 pass-through rate which, as Your Honor probably knows, is the  
6 rate -- it's a way to measure the degree to which changes at the  
7 wholesale level affect changes farther down on the distribution  
8 chain. And I can't tell you what the pass through rate is in  
9 this case; it's a very specific factual issue, Your Honor. I

10 can tell you that in general it's going to be positive, and  
11 given that the retail markets are extremely competitive, it's  
12 probably going to be close to or even exceeding a hundred  
13 percent.

14 But the point we were making, Your Honor, was that even if  
15 Nestle is right, even if Nestle is right, that actually gives  
16 Nestle an even greater incentive, Your Honor, to maintain the  
17 low prices and gain market share. Because if retailers were  
18 actually able to quote-unquote pocket the difference, they would  
19 obviously have an enormous incentive, a huge incentive to sell  
20 Nestle USA products instead of the products of its competitors,  
21 and so Nestle in turn would have a huge incentive to maintain  
22 that lower price or maybe only raise it slightly so that it  
23 could gain market share.

24 So, assuming we prove the allegations of our complaint, Your  
25 Honor, our economic assertions of a conspiracy absolutely are  
26 plausible, and nothing in the Elevator Antitrust Litigation  
27 decision that they keep citing requires a different result, Your  
28 Honor, and I think the MDL court actually dealt with that

23

1 opinion very well in -- it was footnote 46, where the MDL court  
2 pointed out that in that case you had plaintiffs allege, you  
3 know, a price fixing conspiracy in Europe and then they allege  
4 that it extended to the U.S., but they didn't allege any  
5 linkages between the European and the U.S. markets, and, in  
6 fact, as the MDL court, Your Honor, points out, they didn't  
7 allege -- they didn't even allege any actual price increases in  
8 the United States.

9 And, moreover, chocolate is a fungible commodity and  
10 elevators are not, Your Honor, so there's no reason on its face  
11 that you would even think it could be a single integrated

12 market.

13 So let me turn, Your Honor, briefly to our other causes of  
14 action that I think there's basically agreement that 17200 and  
15 the conspiracy causes of action rise or fall with the Cartwright  
16 Act claim, and with respect to the 17500 claim, Your Honor,  
17 again, the Court may agree or disagree, but Nestle USA simply  
18 misunderstood our theory of the case, Your Honor. We agree that  
19 under 17500 we require --

20 THE COURT: I want to go back for a minute to your civil  
21 conspiracy cause of action. Is that based solely on the  
22 Cartwright Act claims?

23 MR. PAYNTER: Yes, Your Honor.

24 THE COURT: What does it add? Is it redundant?

25 MR. PAYNTER: It is, I mean, yes, I think -- if that claim  
26 disappeared, I don't think it would add any relief.

27 THE COURT: Is it just an unnecessary appendage here,  
28 because if you prevail in the Cartwright Act, the civil

24

1 conspiracy claim would add nothing to it, and if you fail in the  
2 Cartwright act you'd fail in the civil conspiracy as well?

3 MR. PAYNTER: Correct, Your Honor. The substantive  
4 allegations I think we'd want to keep because it may be relevant  
5 to the Cartwright Act conspiracy, but, yes, I don't think  
6 there's any argument, and we'd probably all agree that it  
7 basically rises and falls with the Cartwright Act claim.

8 THE COURT: So you're saying it basically adds nothing to  
9 it?

10 MR. PAYNTER: Yes.

11 THE COURT: Thank you.

12 MR. MOLL: We certainly agree with that, Your Honor.

13 THE COURT: You're interrupting his argument.

14 MR. MOLL: Oh, I'm sorry. I thought Your Honor --

15 MR. PAYNTER: So, anyway, our theory of the 17500 claim,  
16 Your Honor, is we agree that we are required to demonstrate  
17 injury in fact, we absolutely agree with that, and we agree that  
18 this is usually done by demonstrating a reliance on the  
19 misrepresentation or the omission. But in this situation, Your  
20 Honor, our theory -- and, again, the Court can take it or leave  
21 it, but our theory is that had Nestle actually revealed its  
22 participation in the price fixing conspiracy, the DOJ would have  
23 intervened earlier in 2002 and prices would have been restored  
24 to their competitive levels and plaintiffs would not have been  
25 injured. And Nestle is correct, Your Honor, this would allow a  
26 section 17500 claim in most price fixing cases, but there's  
27 really nothing unusual about that, Your Honor; it's often the  
28 case that a violation of one statute violates another, and it's

25

1 really hardly going to open up the floodgates to section 17500  
2 litigation since you're still going to have to prove an  
3 underlying antitrust conspiracy.

4 Now, let me finish up, Your Honor, by briefly addressing the  
5 statute of limitations argument, and I don't know if Your Honor  
6 even wants me to address it because it sounds like Your Honor  
7 agrees it's not appropriate for a demurrer.

8 THE COURT: It doesn't resolve an entire cause of action.

9 MR. PAYNTER: No, it doesn't, Your Honor, and it's, I think,  
10 pretty clear even if it could meet -- even if market trends  
11 could give someone notice -- and, again, actually, the case law  
12 is the opposite that as a matter of law they can't -- but even  
13 if they could, Your Honor, it would at most be a factual issue  
14 for the jury about precisely when -- whether people should have  
15 been on notice in this situation and when they should have been

16 on notice.

17 THE COURT: More to the point, it may not be properly raised  
18 on this demurrer.

19 MR. PAYNTER: Point taken, Your Honor.

20 So, unless the Court has any further questions, I have  
21 nothing further, and we would request the demurrer be denied.

22 THE COURT: Okay. Thank you. Anything further?

23 MR. MOLL: Just a couple of points if I might, Your Honor.

24 On this point on the false advertising with the omission  
25 paragraph 98 of the complaint, they're saying if we had  
26 advertised we were fixing prices, the prices would have gone  
27 down. That's not -- this is not a false advertising claim, it's  
28 not reliance, it's not a false advertising claim, and they

26

1 themselves say it.

2 we agree with the Court, obviously, on conspiracy.  
3 Conspiracy is you can't just have a conspiracy, it must be a  
4 conspiracy to do something wrong. Here, the alleged conspiracy  
5 is a conspiracy to conspire under the Cartwright Act, so we  
6 think it absolutely is redundant.

7 Counsel keeps saying the products are undifferentiated,  
8 they're fungible commodity products. There's allegations that  
9 one of the various entries is extensive advertising. One  
10 doesn't advertise commodity products. There's allegations that  
11 there's cross-licensing agreements on KitKat and other products.  
12 One doesn't cross license commodity products like wheat and  
13 whatnot. The labeling requirements are not factual issues,  
14 they're differences, they're legal differences between the two  
15 states, between the two countries.

16 Counsel asked you to ignore the factual findings of the MDL  
17 court on jurisdiction and yet asked you to accept the

18 allegations, the factual allegations of some investigation up in  
19 Canada, allegations versus findings, Canada versus the U.S.

20 And on jurisdiction, Your Honor -- and I think if Your Honor  
21 looked at the opinion, Your Honor knows there's no allegation  
22 that the issue was not whether Nestle Canada was somehow an  
23 alter ego of Nestle USA, Nestle Canada is a sub of Nestle SA  
24 indirectly. The issue is whether Nestle Canada had such  
25 systematic continuous contacts with the United States that it  
26 was found here for jurisdictional purposes, and the Court found  
27 that it did not.

28 And with that, Your Honor, we'll thank the Court for all the  
27

1 time that you've given us on this.

2 THE COURT: Thank you. Matter submitted? Is the matter  
3 submitted?

4 MR. PAYNTER: Yes, Your Honor.

5 MR. MOLL: Yes, Your Honor.

6 THE COURT: The matter submitted, and here's the ruling.  
7 Defendant Nestle USA, Inc. has demurred to each cause of  
8 action of the Second Amended Complaint on the ground of failure  
9 to state facts sufficient to constitute a cause of action  
10 against Nestle USA. An additional ground of demurrer asserted  
11 with each cause of action is uncertainty and ambiguity.

12 With respect to the first cause of action brought under  
13 section 16720 of the Business & Professions Code and the second  
14 cause of action brought under Sections 17200, et seq. of that  
15 Code, the Court holds that (1) those causes of action state  
16 facts sufficient to constitute a cause of action against Nestle  
17 USA for antitrust violations under California pleading  
18 requirements; (2) that even under the federal pleading  
19 requirements, as set forth in the United States Supreme Court

20 case of Bell Atlantic versus Twombly, 550 U.S. 544, the first  
21 two causes of action state facts sufficient to constitute a  
22 cause of action for antitrust violations. In this latter  
23 connection, the first two causes of action aver facts creating a  
24 plausible inference that Nestle USA entered into an unlawful  
25 agreement to restrain trade. Authority for that conclusion is  
26 found in the opinion of the United States District Court for the  
27 Middle District of Pennsylvania in the MDL cases labeled In Re  
28 Chocolate Confectionary Antitrust Litigation, 602 F.Supp. 538, 28

1 at pages 574, et seq. But even absent that opinion, which is  
2 not binding precedent, this Court would reach, and does reach,  
3 the same conclusions regarding the adequacy of the first and  
4 second causes of action in stating claims for relief under  
5 Section 16720 and section 17200, et seq. In this Court's  
6 opinion, the same conclusions are reached, irrespective of  
7 whether the applicable standards of pleading are those set forth  
8 in the case of Quelimane, Q-U-E-L-I-M-A-N-E, Co. versus Stewart  
9 Title Guarantee Co., 19 Cal.4th 26, as plaintiffs contend, or  
10 the Bell Atlantic case, as defendants contend.

11 Nestle's contention that plaintiffs' claims relating to  
12 sales prior to June 27, 2004 are time-barred must be, and is,  
13 rejected at this stage and on this record, and for two  
14 independently sufficient reasons. First, the allegations of the  
15 second amended complaint are sufficient on the matter of  
16 fraudulent concealment. Second, the limitations contention  
17 would not dispose of an entire cause of action. Even if the  
18 first and second causes of action could be viewed as including a  
19 large number of separate causes of action for each day or moment  
20 in time, the allegations of conduct in the earlier times would  
21 be proper allegations to support or explain the allegations with

22 respect to the more recent times.

23       Turning to the third cause of action for unjust enrichment,  
24 there appears to be authority that unjust enrichment is a cause  
25 of action and authority that it is merely a remedy. Assuming  
26 that it is a cause of action, the complaint alleges facts  
27 sufficient to support it. Assuming that it is a remedy, no harm  
28 results from leaving it in the pleading.

29

1       Addressing the fourth cause of action for civil conspiracy,  
2 plaintiffs counsel candidly admitted at the oral argument that  
3 that cause of action is based solely on the Cartwright Act  
4 claims, and that it does not add anything to the Cartwright Act  
5 claims and is merely redundant.

6       As respects the fifth cause of action brought under  
7 Sections 17500 et seq. of the Business & Professions Code, there  
8 is no allegation of any reliance or causation between any  
9 alleged advertisement or omission to disclose on the one hand  
10 and any injury to any plaintiff on the other hand. Both  
11 reliance and injury in fact connecting the plaintiff to the  
12 alleged violation are requirements under Section 17500, as shown  
13 by the case law, including among other cases as well the case of  
14 Caro, C-A-R-O, versus Proctor & Gamble Co., 18 Cal.App.4th 664,  
15 at pages 666 through 669; the case of In Re Tobacco II Cases, 46  
16 Cal.4th 298, at pages 306, and 324 through 328; and the case of  
17 Princess Cruise Lines, LTD versus Superior Court, 2009 Westlaw  
18 374211, at \*4-5. In the instant case there is no allegation  
19 that either plaintiff was aware of anything advertised or  
20 otherwise said by Nestle USA or any alleged co-conspirator.  
21 Thus, there is no allegation that any representation or failure  
22 to disclose caused a plaintiff to be misled by anything that was  
23 said.

24 In the context of this case, plaintiffs necessarily turn to  
25 the contention that prices would have been lower if there had  
26 been disclosure of the alleged price-fixing conspiracy.  
27 However, the question presented in the context of a  
28 section 17500 claim is not whether Nestle USA would have been 30

1 able to increase its prices or maintain increased prices absent  
2 the alleged representations or omissions. Instead, the question  
3 is whether the plaintiffs would have purchased the products at  
4 issue absent the alleged representations or omissions. Yet, as  
5 previously noted, there is no allegation connecting any alleged  
6 representation or omission to any purchase by either plaintiff  
7 or indeed to any failure to purchase by either plaintiff.

8 It is true, as plaintiffs contend, that the disclosure of a  
9 price-fixing conspiracy may lead to an undoing of the higher  
10 prices charged pursuant to the conspiracy. However, in that  
11 circumstance, it is the conspiracy itself, and not the failure  
12 to disclose it, that causes the prices to increase. Therefore,  
13 it is a non sequitur to say that it is the omission to disclose  
14 the existence of conspiratorial conduct that causes prices to be  
15 higher than they would have been with disclosure being made of  
16 the conspiracy. At most, disclosure would end the pernicious  
17 effects of the conspiracy.

18 In short, there has been failure to allege sufficient facts  
19 under Section 17500.

20 In conclusion, the Court overrules the demurrer to the  
21 first, second, and third causes of action. The Court overrules  
22 the demurrer for uncertainty and/or ambiguity. The Court  
23 sustains the demurrer to the fourth cause of action, that is the  
24 one for civil conspiracy, without leave to amend based on  
25 plaintiffs' counsel's candid admission, and the Court sustains

26 the demurrer to the fifth cause of action with the question  
27 being put to plaintiffs' counsel do you want leave to amend as  
28 to that cause of action.

31

1 MR. PAYNTER: No, your Honor.

2 THE COURT: Okay. Then that is a demurrer sustained to the  
3 fifth cause of action without leave to amend. And the Court  
4 proposes to give Nestle 20 days within which to answer, as  
5 requested in the joint CMC statement to which the Court would be  
6 otherwise blind because it came in untimely way, but I did pick  
7 up that statement, so I take it 20 days is sufficient?

8 MR. MOLL: Thank you, Your Honor, yes, it is.

9 THE COURT: Okay. I need a volunteer to prepare a form of  
10 order, and I guess, since the plaintiffs prevailed, the  
11 plaintiff largely prevailed, I think you should probably.

12 MR. PAYNTER: We'd be happy to.

13 THE COURT: All right. Would you prepare a proposed form of  
14 order, submit it to defense counsel for approval as to form.

15 My suggestion is that you note the appearances and the  
16 Court's conclusions and attach a copy of the transcript and  
17 state in the order that the transcript reflects the Court's  
18 reasoning that has led to the rulings; is that agreeable?

19 MR. PAYNTER: Sure.

20 MR. MOLL: Yes, Your Honor.

21 THE COURT: Okay. And that way we'll have in one place what  
22 the rulings were and what the reasoning was.

23 Now, when do you want to have a case management conference?  
24 If you want, we can go off the record for a minute while we talk  
25 about dates.

26 MR. PAYNTER: Sure, sure.

27 THE COURT: All right. We're off the record.

1 THE COURT: All right. We're back on the record.  
2 While I've stated that we're not having a case management  
3 conference, we did chat a little bit about the defendant wants  
4 to make a motion to stay discovery, and we've agreed on a  
5 briefing and hearing schedule as follows: The motion will be  
6 filed by January 14th, the opposition by January 28th, the reply  
7 by February 3rd, and the hearing February 22nd of next year,  
8 here at 1:30 p.m., with both sides stipulating to waive further  
9 notice of time and place; is that so stipulated?

10 MR. PAYNTER: Yes, Your Honor.

11 MR. MOLL: It is, Your Honor.

12 THE COURT: All right. And the other thing we discussed was  
13 that the plaintiff has agreed, because we've set this briefing  
14 and hearing schedule with the holidays in mind and somewhat a  
15 little bit the Court's schedule too, as I understand it you're  
16 willing to agree there won't be any claim of estoppel or delay  
17 on the part of the defense in opposition to this motion to stay  
18 as applied to the period of time between now and the hearing  
19 date.

20 MR. PAYNTER: Correct, Your Honor.

21 THE COURT: All right. And that's agreeable with you?

22 MR. MOLL: Yes, Your Honor.

23 THE COURT: Okay. And that, so the record is clear, I  
24 understand from our chat off the record that you may have some  
25 arguments about delay or estoppel or something that occurred  
26 before today; those arguments, whatever they may be, are  
27 preserved.

28 MR. PAYNTER: Correct. Thank you.

1 THE COURT: Okay. Is there anything else today?

2 MR. MOLL: I just want to make sure that we're clear, Your  
3 Honor, on the 22nd, it will be the argument on --

4 THE COURT: Oh, the motion to stay. Let's also set a case  
5 management conference for that time as well, if that's what you  
6 were going to say.

7 MR. MOLL: I was.

8 THE COURT: Yes, definitely. So, do I have a stipulation  
9 that we'll also have a case management conference at the same  
10 time and place?

11 MR. PAYNTER: Yes, Your Honor.

12 MR. MOLL: Yes, Your Honor.

13 THE COURT: And I guess, for purposes of giving me a joint  
14 case management conference statement, I hope this isn't awkward  
15 for you, I think you ought to make your operating assumption  
16 that I'm not going to stay the case, because if I'm going to  
17 stay the case, then everything in that statement is moot; I  
18 mean, are you uncomfortable doing that?

19 MR. MOLL: In a hypothetical, no, Your Honor. We will  
20 simply say, in the event Your Honor denies the motion, this is  
21 how we think the case should proceed.

22 THE COURT: Right, so we could do one of two things. I  
23 either grant the stay or we could move forward with the case,  
24 because I'll hear from you about how we move forward if it is  
25 not stayed.

26 MR. MOLL: That's fine.

27 MR. PAYNTER: Absolutely.

28 THE COURT: Okay.

□

34

1 MR. MOLL: And, Your Honor, I know -- I just want to make

2 sure on the format of the case management conference statement,  
3 which is what held it up, unfortunately, this time.

4 THE COURT: Yes, let's talk about it.

5 MR. MOLL: Exactly what format would the Court want it so we  
6 know exactly what to exchange?

7 THE COURT: Well, I want one statement that both sides sign  
8 onto. To the extent -- and you remember when we had our first  
9 meeting I told you the things that should be in there like, you  
10 know, what has happened recently --

11 MR. MOLL: Right.

12 THE COURT: -- and what do you want me to do and what are  
13 your plans for the future and stuff like that, that still  
14 applies. Sometimes lawyers are able to put in sections where  
15 everybody agrees on something, sometimes they're not and they'll  
16 say plaintiff's position, defendants' position. I'm not a  
17 stickler on the format, whatever works for you in the context of  
18 the particular events that you are anticipating for the future,  
19 and your description of the past.

20 MR. MOLL: That's fine.

21 THE COURT: I'm flexible about that. There may be some  
22 sections where you both agree on things, there may be some  
23 sections where you say different things, but at least by  
24 requiring one joint statement I'll know that you've -- both  
25 sides have spoken on all of the issues, and, you know, what the  
26 other side is going to say, so you won't be like two ships  
27 passing in the night.

28 Okay. Have a happy holiday season, everybody.

35

1 MR. MOLL: Same to you, Your Honor. Thank you very much.

2 MR. PAYNTER: Same to you.

3 THE COURT: Thank you. We can go off the record.

6 Court of California, County of San Francisco, do hereby certify:

7 That I was present at the time of the above proceedings;

8 That I took down in machine shorthand notes all proceedings  
9 had and testimony given;

10 That I thereafter transcribed said shorthand notes with the  
11 aid of a computer;

12 That the above and foregoing is a full, true, and correct  
13 transcription of said shorthand notes, and a full, true and  
14 correct transcript of all proceedings had and testimony taken;

15 That I am not a party to the action or related to a party  
16 or counsel;

17 That I have no financial or other interest in the outcome  
18 of the action.

19

20

21 Dated: December 24, 2009

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Rhonda L. Aquilina, CSR No. 9956

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1 **PROOF OF SERVICE**

2 I, Sandy LeCompte, hereby declare: I am a citizen of the United States, and employed  
3 in the City and County of San Francisco. I am over the age of eighteen (18) years, and not a  
4 party to the within above-entitled action. My business address is 225 Bush Street, 6th Floor,  
5 San Francisco, California 94104-4207. On January 20, 2010, I served the following on each  
6 party listed below:

7 **NOTICE OF ENTRY OF ORDER**

8 X **(BY MAIL)** By depositing for collection and mailing, following ordinary  
9 business practices, a true copy thereof enclosed in a sealed envelope with  
10 postage thereon fully prepaid. I am readily familiar with this business' practice  
11 for collection and processing of correspondence for mailing with the U.S. Postal  
Service. The correspondence is deposited with the U.S. Postal Service the same  
day in the ordinary course of business.

12 Roxann E. Henry, Esq. Leigh Aimee Kirmsse, Esq.  
13 Howrey LLP Howrey LLP  
14 1299 Pennsylvania Avenue, N.W. 525 Market Street, #3600  
Washington, DC 20004 San Francisco, CA, 94105

15  **(BY HAND DELIVERY)** By causing a true copy thereof enclosed in a sealed  
envelope, to be hand delivered delivered on the date indicated below.

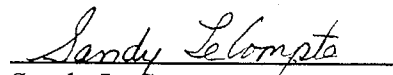
16  **(BY OVERNIGHT DELIVERY)** By causing a true copy thereof, enclosed in a  
sealed envelope, to be delivered via overnight courier service.

17  **(BY FEDERAL EXPRESS NEXT DAY DELIVERY)** By causing a true copy  
18 thereof, enclosed in a sealed envelope, to be delivered via overnight courier  
service.

19  **(BY FAX)** By sending a true copy thereof by facsimile machine to the numbers  
20 listed below, and then depositing for collection and mailing, following ordinary  
21 business practices, a true copy thereof, enclosed in a sealed envelope with  
postage thereon fully prepaid.

22  **(BY ELECTRONIC DELIVERY)** By sending a true copy thereof in pdf  
23 format electronically the party(ies) listed below at the appropriate email  
address(es).

24 I declare under penalty of perjury under the laws of the State of California that the  
25 foregoing is true and correct. Executed on January 20, 2010, at San Francisco, California.

26  
27   
28 Sandy LeCompte