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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HOMELAND HOUSEWARES, LLC, a California LLC; NUTRIBULLET, LLC, a California LLC,	)	Case No. CV 14-03954 DDP (MANx)
	)	ORDER RE: PRELIMINARY INJUNCTION
Plaintiffs,	)	[Dkt. No. 13]
v.	)	
EURO-PRO OPERATING LLC, a Massachusetts LLC,	)	
Defendant.	)	

Presently before the court is Plaintiffs Homeland Housewares, LLC and Nutribullet, LLC (collectively, "Homeland")'s Motion for Preliminary Injunction. (Dkt. No. 13.) The motion is fully briefed. Having considered the parties' submissions and heard oral argument, the court adopts the following order.

I. Background

In the instant motion, Homeland seeks a preliminary injunction in relation to its claims against Defendant Euro-Pro Operating LLC ("Euro-Pro") for false advertising and trade dress infringement under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

1 Homeland and Euro-Pro are competitors in the home blender
2 market. Homeland sells three products under its "NUTRIBULLET" line:
3 the NUTRIBULLET CLASSIC, the NUTRIBULLET SPORT¹, and the
4 NUTRIBULLET PRO 900 SERIES ("NUTRIBULLET PRO"). (Motion at 2;
5 Declaration of Colin Sapire in Support of Motion ¶¶ 3, 6). Euro-Pro
6 sells a line of blenders under its "NINJA" line, including the
7 NUTRI NINJA PRO. The NUTRI NINJA PRO is sold alongside or in close
8 proximity to the NUTRIBULLET blenders on the shelves of such
9 retailers as Target, Walmart, and Bed, Bath, and Beyond. (Sapire
10 Decl. 8, 18 and Ex. 11.)

11 Homeland contends that Euro-Pro makes a number of false claims
12 on the packaging of the NUTRI NINJA PRO. The packaging includes,
13 *inter alia*, the following two elements.

14 First, the packaging includes a comparison chart, presented
15 below, labeled "NUTRI NINJA vs. NUTRIBULLET," ("Comparison Chart"
16 or "Chart"). The Chart includes three columns. (Id.) The first
17 column lists various product features, including "Nutrient &
18 Vitamin Extraction," "900 Watts," "21,000 RPMs," "Finer
19 Consistency," "Ice Crushing," "Pulse Technology," "Sip & Seal
20 Lids," and "Fits in Cupholders." The second and third columns,
21 labeled, respectively, "NUTRI NINJA" and "NUTRIBULLET," indicate
22 the presence or absence of the listed features with either a check
23 mark ("✓") or an X ("X"). (Id.) As relevant for this motion, the
24 Chart indicates that the NUTRI NINJA PRO operates at 900 Watts,
25 produces 21,000 RPMs, has ice crushing capability, has pulse

26
27 ¹ The NUTRIBULLET SPORT is apparently at an early stage in its
28 introduction to the market. (See Declaration of Carrie P. Price in
Support of Opposition ¶ 11.)

1 technology, has sip & seal lids, and fits in cupholders, but that
2 the "NUTRIBULLET" has none of these features.



13 (Sapire Decl. Ex. 5.) Homeland contends that each of these factual
14 assertions are false as to each product in its NUTRIBULLET line of
15 blenders.

16 Second, the NUTRI NINJA PRO packaging contains the text "#1
17 MOST POWERFUL*," which Homeland likewise contends is false. (Id.
18 Ex. 6.) The asterisk following the phrase corresponds to a
19 disclaimer presented in small text at the bottom of the NUTRI NINJA
20 PRO box, which states: "*Based on wattage of single serve blenders
21 and nutrition extractors MSRP under \$100." (Id.)²

22 Homeland additionally asserts that Euro-Pro is infringing its
23 protected trade dress. As described further below, it contends that
24 Euro-Pro has "duplicate[d] the color scheme, fonts, phraseology,
25 and overall look and feel of the Homeland's NUTRIBULLET packaging

27 ² The parties dispute whether any Homeland blenders other than
28 the NUTRIBULLET CLASSIC are within the class of blenders described
by the disclaimer. (See Mot. at 1; Sapire Decl. Ex. 10; Opp. at 13;
Price Decl. ¶¶ 13, 15-16, Exs. N & O.)

1 trade dress in order to draw consumers to the NUTRI NINJA PRO as a
2 result of the consumer's sense of familiarity with the NUTRIBULLET
3 packaging trade dress." (Mot. at 4.)

4 Homeland seeks a preliminary injunction requiring, among other
5 things, that Euro-Pro immediately advise retailers that no further
6 NUTRI NINJA PRO can be sold using the current packaging, recall all
7 NUTRI NINJA PRO products from retailers, and remove the alleged
8 false statements and confusingly similar trade dress from the
9 packaging of the NUTRI NINJA PRO. (See Dkt. No. 13-1.)

11 **II. Legal Standard**

12 Plaintiffs seeking a preliminary injunction must establish
13 that (1) they are likely to succeed on the merits; (2) they are
14 likely to suffer irreparable harm in the absence of preliminary
15 relief; (3) the balance of equities tips in their favor; and (4) a
16 preliminary injunction is in the public interest. Sierra Forest
17 Legacy v. Rey, 577 F.3d 1015, 1021 (9th Cir. 2009) (citing Winter
18 v. Natural Resources Defense Council, Inc., 555 U.S. 7, 29 (2008)).

20 **III. Discussion**

21 **A. False Advertising**

22 The court considers each requirement for the issuance of a
23 preliminary injunction as to the false advertising claim in turn.

24 **1. Likelihood of Success on the Merits**

25 The elements of a Lanham Act § 43(a)³ false advertising claim

27 ³ The Lanham Act § 43(a), codified at 15 U.S.C. § 1125(a),
provides in pertinent part:

28 (1) Any person who, on or in connection with any goods or
(continued...)

1 are: "(1) a false statement of fact by the defendant in a
2 commercial advertisement about its own or another's product; (2)
3 the statement actually deceived or has the tendency to deceive a
4 substantial segment of its audience; (3) the deception is material,
5 in that it is likely to influence the purchasing decision; (4) the
6 defendant caused its false statement to enter interstate commerce;
7 and (5) the plaintiff has been or is likely to be injured as a
8 result of the false statement, either by direct diversion of sales
9 from itself to defendant or by a lessening of the goodwill
10 associated with its products." Southland Sod Farms v. Stover Seed
11 Co., 108 F.3d 1134, 1139 (9th Cir. 1997).

12 To demonstrate falsity within the meaning of the Lanham Act,
13 Homeland may show that a statement by Euro-Pro was (1) literally
14 false, either on its face or by necessary implication, or (2) that
15 the statement was literally true but likely to mislead or confuse
16 consumers. Century 21 Real Estate Corp. v. Re/Max South County, 882
17 F.Supp. 915, 922 (C.D. Cal. 1994). In the case of a literally false
18 claim, the plaintiff need not prove any impact on the buying
19 public. Id. However, where a plaintiff cannot show literal falsity
20 and instead relies on a claim of an implied falsehood, the

21
22 ³(...continued)
23 services, or any container for goods, uses in commerce any ...
24 false or misleading representation of fact, which—
25 (A) ...
26 (B) in commercial advertising or promotion, misrepresents the
27 nature, characteristics, qualities, or geographic origin of
28 his or her or another person's goods, services, or commercial
activities, shall be liable in a civil action by any person
who believes that he or she is or is likely to be damaged by
such act.
15 U.S.C. § 1125(a) (1988).

1 plaintiff must prove, by extrinsic evidence, that the challenged
2 advertisements tend to mislead or confuse consumers. Id.; Taser
3 Int'l, Inc. v. Bestex Co., Inc., 2007 WL 2947564, at *5 (C.D. Cal.
4 Feb. 9, 2007) aff'd, 314 F. App'x 46 (9th Cir. 2008). In this case,
5 Homeland contends that Euro-Pro's claims are literally false. (Mot.
6 at 6.)

7 "When evaluating whether an advertising claim is literally
8 false, the claim must always be analyzed in its full context."
9 Southland Sod., 108 F.3d at 1138 (citing, *inter alia*, Robot-Coupe
10 Int'l Corp., 1982 WL 121559, at *2 (S.D.N.Y. June 9, 1982) ("[I]n
11 determining facial falsity the court must view the face of the
12 statement in its entirety, rather than examining the eyes, nose,
13 and mouth separately and in isolation from each other.")).

14 A threshold issue in this case is whether the Comparison Chart
15 presented on the NUTRI NINJA PRO packaging refers, as Homeland
16 contends, to each of Homeland's NUTRIBULLET-branded blenders,
17 including the NUTRIBULLET CLASSIC, NUTRIBULLET SPORT, and
18 NUTRIBULLET PRO or only, as Euro-Pro contends, to the NUTRIBULLET
19 CLASSIC. (See Mot. at 5; Opp. at 7.) The matter is significant
20 because there is no dispute that three of the statements made in
21 the Comparison Chart are false if applied to the NUTRIBULLET SPORT
22 and NUTRIBULLET PRO, namely that the products (1) do not have a 900
23 Watt motor, (2) do not produce 21,000 RPMs, and (3) do not have
24 "sip and seal" functionality. (See Opp. at 9-11.)

25 The court agrees with Homeland that the statements in the
26 Comparison Chart apply, in the context in which they are presented,
27 to each of the three "NUTRIBULLET" models. The name NUTRIBULLET is
28 prominently displayed on the packaging of the NUTRIBULLET CLASSIC,

1 NUTRIBULLET SPORT, and NUTRIBULLET PRO. (See First Amended
2 Complaint Exs. 2, 4.) Indeed, in the case of the NUTRIBULLET PRO
3 and NUTRIBULLET SPORT, the NUTRIBULLET mark is the dominant feature
4 relative to the modifiers "PRO" and "SPORT." (Id.) A consumer
5 viewing the products in their retail packaging would thus naturally
6 consider each to be a "NUTRIBULLET." However, the Chart does not
7 differentiate between the NUTRIBULLET models, referring only to
8 "NUTRIBULLET" with no disclaimer or other information to clarify
9 the scope of the statements. This presentation has the effect of
10 blurring the distinctions between the NUTRIBULLET models and
11 creating the impression that all NUTRIBULLET products lack the
12 features listed in the Chart.

13 Euro-Pro makes several arguments against this conclusion, none
14 of which the court finds convincing. Its primary argument begins
15 with the premise, agreed upon among the parties, that the NUTRI
16 NINJA PRO appears alongside or nearby the NUTRIBULLET CLASSIC and
17 the NUTRIBULLET PRO on retail store shelves. Euro-Pro argues that
18 if a consumer encounters a representation on the NUTRI NINJA PRO
19 box that is then contradicted by representations on the box of a
20 NUTRIBULLET PRO located nearby, the consumer would resolve the
21 contradiction by concluding that the statement must refer to a
22 different NUTRIBULLET product model. (See Opp at 8.) In essence,
23 Euro-Pro does not attempt to argue that the claims it makes in the
24 Comparison Chart are true as to the NUTRIBULLET PRO or SPORT, but
25 instead seeks to shift the burden to the consumer to discover the
26 statements' falsity. The court does not believe that requiring a
27 consumer to undertake such an investigation is consistent with the
28 Lanham Act's purpose of protecting consumers from false

1 advertising. Nor is placing such a burden on the consumer realistic
2 in the particular circumstances in which the products are sold.
3 Because, as the parties agree, the products at issue are often sold
4 on shelves with numerous other competing blender products, there is
5 strong reason to doubt that a typical consumer would make a one-to-
6 one comparison between the features of the parties' products and
7 then have the realization Euro-Pro envisions. Indeed, as Homeland
8 pointed out at oral argument, some consumers may never undertake
9 their own comparison because, having trusted the representations on
10 the NUTRI NINJA PRO box and concluded that it is plainly the
11 superior product, they do not bother to seek out and review the
12 labels on the various NUTRIBULLET models.

13 Second, Euro-Pro contends that Homeland concedes that the
14 Chart refers only to the lower-end NUTRIBULLET because its trade
15 dress infringement claim asserts infringement only with respect to
16 the packaging of its NUTRIBULLET CLASSIC model. (See Opp. at 7
17 (citing Mot. at 18.)) In particular, Euro-Pro makes reference to
18 the green background used in the NUTRIBULLET packaging, a color
19 different from that used in the NUTRIBULLET SPORT and NUTRIBULLET
20 PRO. (See Mot. at 18.) The court is not persuaded. The fact that
21 the packaging of the NUTRI JINJA PRO is most similar to that of the
22 NUTRIBULLET--essentially because it shares the same background
23 color--does not establish that the reference to "NUTRIBULLET" in
24 the Chart would cause a consumer to understand the reference to
25 apply only to that model.

26 Finally, Euro-Pro asserts that "the NUTRI NINJA and the
27 NUTRIBULLET were sold for under \$100," while the "NUTRIBULLET PRO
28 and the NUTRIBULLET SPORT retailed at well over \$100." (Opp. at 8.)

1 Homeland contests the accuracy of this statement in relation to the
2 NUTRIBULLET SPORT, presenting evidence that the model has retailed
3 in at least one instance at \$119 with a special \$20 discount. (See
4 Safire Decl. ¶ 15 and Ex. 10.) Even accepting Euro-Pro's assertions
5 as to pricing, however, the range of prices among the NUTRIBULLET
6 models--which spans approximately \$90 to \$130--is not so great that
7 Euro-Pro's reference could refer only to the lower-end NUTRIBULLET
8 CLASSIC.⁴

9 The court therefore concludes that the Chart makes a claim as
10 to each of the products that contain NUTRIBULLET in their names. As
11 alluded to above, it follows from this conclusion that three of the
12 statements made in the Comparison Chart are false. Specifically, it
13 is undisputed that the NUTRIBULLET PRO (1) operates at 900 Watts,
14 (2) produces 21,000 RPMs, and (3) features "sip & seal" (i.e.
15 sealable drink through) lids. Euro-Pro's assertion in the Chart
16 that the model lacks these features is literally false.

17 The other elements of a Lanham Act false advertising claim are
18 met with respect to these statements. First, the claims are plainly
19 material in that they are "likely to influence the purchasing
20 decision" of consumers. Cook, Perkiss & Liehe, Inc. v. N.
21 California Collection Serv. Inc., 911 F.2d 242, 244 (9th Cir.
22 1990). Indeed, that the statements relate to key factors informing
23

24 ⁴ Nor does the disclaimer "*Based on wattage of single serve
25 blenders and nutrition extractors MSRP under \$100," presented in
26 small print at the bottom of the NUTRI NINJA PRO packaging, clarify
27 the scope as to the statements made in the Comparison Chart. The
28 disclaimer is associated in the packaging only with the statement
"#1 MOST POWERFUL!," not with the Chart. Euro-Pro does not, in any
case, argue that the disclaimer limits the scope of the statements
made in the Chart.

1 consumer decisions is evidenced by the fact that Euro-Pro itself
2 felt the features were significant enough to consumers to highlight
3 prominently in comparing its goods to those of its competitor. See
4 In re Century 21-RE/MAX Real Estate Adver. Claims Litig., 882 F.
5 Supp. 915, 923-24 (C.D. Cal. 1994) (citing In re Uranium Antitrust
6 Litigation, 473 F.Supp. 393, 408 (N.D. Ill. 1979) for the
7 proposition that, in evaluating materiality, courts look to whether
8 the advertising "relates to the principal bases of competition
9 among sellers"). Second, there is no debate that Euro-Pro caused
10 the products bearing the false statements to enter interstate
11 commerce. Finally, given the statements' materiality and the fact
12 that the products are sold by the same retailers, there is little
13 basis for doubt that Homeland is likely to be injured as a result
14 of the false statements in the form of diverted sales or diminished
15 goodwill.

16 Accordingly, Homeland has demonstrated a likelihood of success
17 on the merits as to its false advertising claim with respect to the
18 Euro-Pro's claims regarding wattage, RPMs, and "sip & seal"
19 functionality.

20 The court does not believe that the record is sufficiently
21 developed to reach a conclusion with respect to the veracity of the
22 other allegedly false statements on the NUTRI NINJA PRO packaging
23 that Homeland has cited. Accordingly, a preliminary injunction is
24 not warranted as to those statements. The court states no opinion
25 as to the ultimate merits of the claim with respect to those
26 statements on a fully developed record.

2. Irreparable Harm

The court finds that Homeland has shown a likelihood of irreparable harm absent the issuance of a preliminary injunction. The Ninth Circuit has held that “intangible injuries, such as damage to ... goodwill, qualify as irreparable harm.” Rent-A-Car, Inc., v. Canyon Television and Appliance Rental, Inc., 944 F.2d 597, 603 (9th Cir. 1991) (citation omitted). In this case, by blurring the distinctions among Homeland’s products through its Comparison Chart, Euro-Pro has made materially false statements regarding Homeland’s NUTRIBULLET PRO and NUTRIBULLET SPORT models. These statements effectively amount to the assertion that Homeland manufactures inferior products. It is self-evident that the assertion that a company sells inferior products would have the tendency to diminish the company’s goodwill among customers. Homeland has asserted such a result. (See Sapire Decl. ¶¶ 15-20.) Moreover, Euro-Pro’s statement that the NUTRIBULLET PRO and SPORT lack a feature which Homeland’s packaging specifically states that those products have carries the implication that Homeland is lying about its product’s features, an assertion with obvious reputational consequences. Accordingly, the court finds that the requirement of a likelihood of irreparable harm is met. The court need not address the parties’ additional arguments on this issue.

3. Balance of Equities

The balance of equities favors issuance of an injunction under the terms set forth below. Homeland will clearly suffer hardship in the absence of an injunction because Euro-Pro would be able to continue to disseminate false claims regarding Homeland’s products.

1 At the same time, Euro-Pro will not suffer undue hardship if
2 an injunction preventing the dissemination of such false claims is
3 issued. As a general matter, "there is no harm to a defendant from
4 an injunction which prevents continuing dissemination of false
5 statements." POM Wonderful LLC, 2008 WL 4222045 at *16. Such an
6 injunction would not prevent Euro-Pro from describing the quality
7 of its blenders, comparing the quality of such products to that of
8 Homeland's products, or touting its unique features, so long as it
9 does not make claims that are false. See Visioneer, Inc. v. UMAX
10 Technologies, Inc., 1998 WL 856080, at *3 (N.D. Cal. Dec. 7, 1998)
11 (making similar observation with respect to comparative false
12 advertising claim involving desktop scanners).

13 Euro-Pro complains that the terms of Homeland's proposed order
14 would require it to recall all of its products and re-package them
15 and force it out of a crowded market just prior to the start of the
16 holiday season, thus harming not only Euro-Pro but consumers as
17 well. (Opp. at 24.) However, the injunction issued herein will not
18 require an immediate recall of products from retail shelves and
19 will instead allow Euro-Pro a reasonable period of four months to
20 liquidate its inventory and phase-in new packaging that eliminates
21 the false statements.

22 **4. Public Interest**

23 "There is a strong public interest in preventing false
24 advertising of products in the marketplace." POM Wonderful LLC v.
25 Purely Juice, Inc., 2008 WL 4222045 (C.D. Cal. July 17, 2008)
26 aff'd, 362 F. App'x 577 (9th Cir. 2009) (citing Kennedy Industries,
27 Inc. v. Aparo, 416 F.Supp.2d 311, 317 (E.D.Pa. 2005)). See also
28 Church & Dwight Co., Inc. v. S.C. Johnson & Son Inc., 873 F.Supp.

1 893, 912 (D.N.J. 1994) (granting injunction preventing defendant
2 from deceptive advertising and stating that "the public has a right
3 not to be deceived or confused"). In contending that the public
4 interest is not served by the issuance of a preliminary injunction
5 in this case, Euro-Pro's only argument is that Homeland has not
6 offered proof of consumer confusion. (See Opp. at 24.) However, as
7 discussed above, such proof is not required in the case of
8 statements that are literally false such as those at issue here.
9 See Taser Int'l, Inc., 2007 WL 2947564 at *5. Accordingly, the
10 court finds that the issuance of a preliminary injunction will
11 serve the public interest.

12
13 In sum, Homeland has demonstrated that a preliminary
14 injunction barring Homeland from continuing to make the false
15 statements described above is justified. The terms of the
16 preliminary injunction are set forth below.

17
18 **B. Trade Dress Infringement**

19 The court next considers Homeland's request for a preliminary
20 injunction with respect to its trade dress infringement claim,
21 concluding that no such relief is warranted. The trade dress
22 infringement claim applies only to the NUTRIBULLET CLASSIC.

23 **1. Likelihood of Success on the Merits**

24 Trade dress, or the "total image of a product," is protectable
25 under Section 43(a) of the Lanham Act. Int'l Jensen, Inc. v.
26 Metrosound U.S.A., Inc., 4 F.3d 819, 822 (9th Cir. 1993). To
27 succeed on a trade dress infringement claim, which is analytically
28 similar to an unregistered trademark claim, a plaintiff must show

1 that a trade dress is (1) nonfunctional, (2) inherently distinctive
2 or has acquired secondary meaning, and (3) that a defendant's use
3 of a similar mark or trade dress is likely to confuse consumers.
4 Id. at 823. Homeland's motion for a preliminary injunction is
5 unsuccessful because it has not shown a likelihood of success as to
6 either prong of the second element of its claim.

7 Homeland's trade dress for the NUTRIBULLET is not inherently
8 distinctive. To be "inherently distinctive," a trade dress must
9 identify a particular source of a product. Two Pesos, Inc. v. Taco
10 Cabana, Inc., 505 U.S. 763, 768 (1992). "The attribution of
11 inherent distinctiveness to certain categories of . . . product
12 packaging derives from the fact that the very purpose of . . .
13 encasing [a product] in a distinctive packaging, is most often to
14 identify the source of the product. Where it is not reasonable to
15 assume consumer predisposition to take . . . packaging as
16 indication of source, inherent distinctiveness will not be found."
17 Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 212
18 (2002). In other words, inherently distinctive trade dress is that
19 which has a "design, shape or combination of elements [] so
20 unique, unusual or unexpected in this market that one can assume
21 without proof that it will automatically be perceived by customers
22 as an indicator of origin." 1 J. Thomas McCarthy, McCarthy on
23 Trademarks and Unfair Competition § 8:13 at 8-77 (4th ed. 2014).

24 Here, Homeland describes its trade dress as follows: "Homeland
25 has developed a unique color scheme, fonts, phraseology, and
26 overall look and feel in its packaging trade dress as an indicator
27 of source." (Mot at 16.) It contends that Euro-Pro is infringing
28 its trade dress by use of "(a) phraseology ("Nutri," "Pro,"

1 "Extractor," "Watts"), (b) layout of texts and pictorial elements,
2 (c) selected orange lettering, and (d) most conspicuously, its
3 depiction of a blender with an inverse container against a
4 predominantly green background, showing a cornucopia of fruits and
5 vegetables in similar position[s]." (Mot. at 18) (emphasis in
6 original). Homeland argues that "[s]ince Homeland's unique color
7 scheme, fonts, and phraseology are arbitrary, its packaging trade
8 dress is inherently distinctive and supports a conclusion that
9 Euro-Pro infringed Homeland's trade dress." (Id. at 16.)

10 The court is not persuaded. Leaving aside the vague
11 description of several elements of its asserted trade dress,
12 Homeland's trade dress claim fails because most of the elements it
13 contends comprise its trade dress are not, in fact, arbitrary or
14 unexpected given the nature of the product. There is nothing
15 arbitrary about the phrases "nutri" (connoting the product's
16 capacity for making nutritious beverages and snacks), "watts"
17 (describing the product's power, as blenders are often marketed for
18 their power), "extractor" (describing the product's capacity to
19 extract nutrition from fruits and vegetables), and "pro" (implying
20 increased functionality more suitable for use by professionals in
21 commercial setting). Nor is the presentation of an arrangement of
22 fruits and vegetables behind the blender arbitrary given that the
23 product's primary function is to create drinks by blending fruits
24 and vegetables. The presentation of an "inverse container" merely
25 refers to an image of the product itself, which, like other
26 products of its sort, operates with the vessel upside down.
27 Finally, the green background, the feature most distinguishing the
28 NUTRIBULLET CLASSIC's packaging from competing products cited by

1 Homeland other than the NUTRI NINJA PRO, does not appear to be
2 especially arbitrary given the Homeland's emphasis in its marketing
3 on the nutritional benefits of the product. (See Sapire Decl. Ex 2
4 (presenting packaging of selected competitor blenders).) In sum,
5 Homeland has not offered evidence that its packaging is "so
6 uniquely designed that a buyer would rely on it to differentiate
7 the source of the product." Seirus Innovative Accessories, Inc. v.
8 Gordini U.S.A. Inc., 849 F. Supp. 2d 963, 984 (S.D. Cal. 2012).

9 Nor has Homeland presented convincing evidence that its
10 packaging has acquired secondary meaning. Secondary meaning is the
11 "mental association by a substantial segment of consumers and
12 potential customers between the alleged trade dress and a single
13 source of the product." Levi Strauss & Co. v. Blue Bell, Inc., 778
14 F.2d 1352, 1354 (9th Cir. 1985) (en banc) (internal quotations
15 omitted). Secondary meaning can be established through direct
16 evidence such as consumer surveys and testimony or circumstantially
17 through "exclusivity, manner, and length of use of a mark; amount
18 and manner of advertising; amount of sales and number of customers;
19 established place in the market; and proof of intentional copying
20 by the defendant." Filipino Yellow Pages, Inc. v. Asian Journal
21 Publ'n, Inc., 198 F.3d 1143, 1151 (9th Cir. 1999).

22 Homeland's sole basis for its contention that its trade dress
23 has acquired secondary meaning is that it has spent "several
24 hundred million dollars on advertising and promoting the
25 NUTRIBULLET line of kitchen appliances and associated trade dress
26 to single itself [out] as the producer of the NUTRIBULLET line."
27 (Mot. at 16 (citing Sapire Decl. ¶¶ 3, 6).) However, "the true test
28 of secondary meaning is the effectiveness of the advertising

1 effort." Art Attacks Ink, LLC v. MGA Entm't. Inc., 581 F.3d 1138,
2 1146 (9th Cir. 2009) (internal quotations omitted). The crucial
3 issue is not "the fact of product promotion, but the effectiveness
4 of such promotion in creating a secondary meaning for the trade
5 dress at issue." DCNL Inc. v. Almar Sales Co., 1997 WL 913941
6 (N.D. Cal. Dec. 22, 1997) aff'd sub nom. DCNL, Inc. v. Almar Sales
7 Co., Inc., 178 F.3d 1308 (Fed. Cir. 1998).

8 In this case, Homeland has not pointed to any evidence of the
9 effectiveness of its advertising in creating a secondary meaning
10 for its trade dress other than providing the dollar figure of its
11 overall advertising budget, which has little meaning without
12 context. Indeed, as Euro-Pro points out, Homeland has not presented
13 evidence that its advertising efforts, which it states included
14 television commercials and advertising in magazines, were directed
15 to or focused on the NUTRIBULLET's packaging trade dress, as
16 opposed to promoting the NUTRIBULLET products themselves. (Opp. at
17 18.) Accordingly, Homeland's argument that the trade dress has
18 acquired secondary meaning is unsuccessful.

19 Because the court finds that Homeland has not shown a
20 likelihood of satisfying either prong of the second element of its
21 trade dress infringement claim, its request for a preliminary
22 injunction as to that claim must be denied.

23 24 **IV. Preliminary Injunction**

25 In light of the foregoing, the court issues the following
26 preliminary injunction:

27 DEFENDANT EURO-PRO OPERATING LLC, and all persons acting under
28 its direction, control, permission, or authority of them, and all

1 persons acting in concert therewith, are ordered to take the
2 following actions: Within 120 days of the issuance of this Order,
3 remove, or cause the removal of, the following statements from the
4 packaging of all NUTRI NINJA PRO products on sale to consumers and
5 from any other Euro-Pro advertisements or commercials:

6 (1) that "NUTRIBULLET" products do not operate at 900 watts;

7 (2) that "NUTRIBULLET" products do not produce 21,000 RPMs;

8 and

9 (3) that "NUTRIBULLET" products do not have "sip & seal" (or
10 drink through) lids.

11 In light of the ample opportunity afforded Euro-Pro to make
12 modifications to the packaging and advertising that is the subject
13 of this injunction, only a minimal undertaking is required.

14 Therefore, this preliminary injunction is effective immediately
15 upon the plaintiffs' filing with the court proof of an undertaking
16 in the sum of \$50,000.

17
18 IT IS SO ORDERED.

19
20
21 Dated: August 22, 2014


DEAN D. PREGERSON

United States District Judge