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 18 and the Proposed Class;
 19 Counsel for Related-Case Plaintiff, Laura Rude-Barbado;
 20 and the Proposed Class

21 **UNITED STATES DISTRICT COURT**
 22 **SOUTHERN DISTRICT OF CALIFORNIA**

23 ATHENA HOHENBERG, individually and on
 24 behalf of all others similarly situated,
 25
 26 Plaintiffs,
 27
 28 v.
 29 FERRERO U.S.A, INC., a foreign corporation,
 30
 31 Defendant.

CASE NO. 11-cv-00205 H CAB
 CLASS ACTION

REPLY BRIEF
IN FURTHER SUPPORT OF MOTION BY
PLAINTIFF ATHENA HOHENBERG AND
RELATED CASE PLAINTIFF LAURA
RUDE-BARBATO TO:
 (1) CONSOLIDATE CASES, AND
 (2) APPOINT INTERIM LEAD CO-
 CLASS COUNSEL

Date: March 28, 2011
Time: 10:30 a.m.
Location: Courtroom 13
Judge: Hon. Marilyn L. Huff

1 LAURA RUDE-BARBATO, on behalf of herself
2 and all others similarly situated,

3 Plaintiff,

4 v.

5 FERRERO U.S.A, INC.,

6 Defendant.
7
8

Case No. 11-cv-00249-DMS-BLM
Class Action

Hon. Dana M. Sabraw

9 **I. REPLY BRIEF IN FURTHER SUPPORT OF MOTION BY PLAINTIFF ATHENA**
10 **HOHENBERG AND RELATED CASE PLAINTIFF LAURA RUDE-BARBATO TO:**
11 **CONSOLIDATE CASES, AND (2) APPOINT INTERIM LEAD CO-CLASS COUNSEL**

12 This case and the related action, Rude-Barbato v. Ferrero U.S.A., Case No. 11-cv-00249 H
13 CAB, are ripe for consolidation. As Ferrero’s non-opposition to plaintiffs’ motion to consolidate
14 attests, consolidation is both proper and warranted. That Ferrero has been sued in other venues and
15 apparently intends to take action in response to those claims is not relevant to the issues presently
16 before this Court weighing on the question of whether to consolidate the two related cases pending in
17 this District. Moreover, Ferrero has not filed any motion with respect to those actions, and it is
18 uncertain whether Ferrero would be successful in its efforts to transfer all of the actions pending
19 against it to any particular jurisdiction. Accordingly, Plaintiffs respectfully request that in ruling on
20 Plaintiffs’ motion to consolidate and appoint interim lead co-class counsel, this Court decline to take
21 into consideration the two additional class action complaints filed against Defendant.¹

22 Even if the Court considered the copycat New Jersey actions, they would only reinforce the
23 need for appointment of interim counsel, since appointment of interim class counsel is especially
24 appropriate where “there are a number of overlapping, duplicative, or competing suits pending in
25 other courts, and some or all of those suits may be consolidated, [and] a number of lawyers may

26 ¹ Moreover, we note the New Jersey state action appears to be brought by an attorney on behalf of a
27 named plaintiff who appears to be a direct family member (the plaintiff’s last name is the same as her
28 attorney, and she alleges she purchased Nucoa in the same town of her attorney). Thus it is
questionable whether that action will survive long. Also, the second copycat action, though filed in
New Jersey, was brought by attorneys located in San Diego.

1 compete for class counsel appointment. In such cases, designation of interim counsel clarifies
2 responsibility for protecting the interests of the class during precertification activities” *Manual of*
3 *Complex Litigation* 4th § 21.11 (2004).

4 Here, Plaintiffs’ counsel, The Law Offices of Ronald A. Marron and the Weston Firm,
5 dedicated substantial time and resources investigating Plaintiffs’ claims and drafting their class action
6 complaints. In addition, the parties in the *Hohenberg* action have already held their Rule 26(f)
7 conference and are finalizing their joint statement to be submitted to this court. Furthermore, as of the
8 date of this Motion, discovery has been initiated, with a focus on issues pertaining to venue and choice
9 of law.

10 Moreover, due to counsels’ efforts, Plaintiffs are prepared to file an Amended Consolidated
11 Complaint that substantially expands their claims against Ferrero, and which includes allegations well
12 beyond those raised in the late-filed copycat actions. Attached hereto as Exhibit A is a true and
13 correct copy of Plaintiff’s [Proposed] First Amended Consolidated Complaint Against Defendant
14 Ferrero U.S.A., Inc., For: Unfair Competition; False Advertising; Violations of Consumer Legal
15 Remedies Act; Violations of the New Jersey Consumer Fraud Act; Breach of Express Warranty; and
16 Breach of Implied Warranty of Merchantability.

17 Plaintiffs also made a strong showing of the experience and qualifications of their counsel in
18 successfully managing and overseeing class actions similar to the instant cases,² justifying their
19 selection as Interim Lead Co-Class Counsel in the consolidated action. Counsels’ commitment to the
20 interests of plaintiffs and the putative classes and their ability to manage, oversee and take the lead
21 with respect to Plaintiffs’ claims, is also undeniable. Accordingly, Plaintiffs’ counsel, The Law
22 Offices of Ronald A. Marron and the Weston Firm, should be appointed Interim Lead Co-Class
23 Counsel in the consolidated action.

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27 ² Indeed, on February 24, this Court denied in full a motion to dismiss made by a defendant in a
28 similar false advertising action brought by a plaintiff represented by proposed interim counsel the
Weston Firm. *See Peviani v. Natural Balance, Inc.*, No. 10-CV-2451 H (BGS), 2011 U.S. Dist.
LEXIS 18110 (S.D. Cal. Feb. 24, 2011) (Huff, J.).

1 **II. CONCLUSION**

2 Because the instant actions share common issues of law and fact because Ferrero does not
3 oppose consolidation, Plaintiffs respectfully request that the Hohenberg and Rude-Barbato actions be
4 consolidated. Plaintiffs further request that The Law Offices of Ronald A. Marron and the Weston
5 Firm, be appointed Interim Lead Co-Class Counsel in the consolidated action.

6
7 DATED: March 21, 2011

Respectfully submitted by,

8 /s/ Ronald A. Marron

Ronald A. Marron

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