

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

<p>ATHENA HOHENBERG, individually and on behalf of all others similarly situated,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>FERRERO U.S.A., INC., a foreign corporation,</p> <p style="text-align: right;">Defendant.</p> <hr/> <p>LAURA RUDE-BARBATO, on behalf of herself and all other similarly situated,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>FERRERO U.S.A., INC.,</p> <p style="text-align: right;">Defendant.</p>	
--	--

CASE NO. 11-CV-205 H (CAB)

ORDER

**(1) GRANTING MOTION TO
CONSOLIDATE CASES**

**(2) GRANTING MOTION TO
APPOINT INTERIM LEAD CO-
CLASS COUNSEL**

CASE NO. 11-CV-249 H (CAB)

On February 1, 2011, Plaintiff Athena Hohenberg filed a class action against Defendant Ferrero U.S.A., Inc. (“Ferrero”) alleging (1) violations of California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200 et seq.; (2) violations of California’s False Advertising Law, (“FAL”), Cal. Bus. & Prof. Code §§ 17500 et seq.; (3) violations of California’s Consumer Legal Remedies Act (“CLRA”), Cal. Civ. Code §§ 1770 et seq.; (4)

1 breach of express warranty; and (5) breach of implied warranty of merchantability.
2 (Hohenberg Doc. No. 1.) On February 4, 2011, Plaintiff Laura Rude-Barbato filed a class
3 action against Defendant Ferrero alleging (1) violations of California’s UCL; (2) violations of
4 California’s FAL; (3) violations of California’s CLRA; (4) breach of express warranty; (5)
5 breach of implied warranty of merchantability; and (6) violations of the New Jersey Consumer
6 Fraud Act, N.J. Stat. § 56:8 et seq. (Rude-Barbato Doc. No. 1.)

7 On February 28, 2011, the Plaintiffs in both actions filed a motion to consolidate the
8 cases and appoint interim lead co-class counsel. (Hohenberg Doc. No. 8.) On March 14, 2011,
9 Defendant filed a non-opposition to Plaintiffs’ motion. (Hohenberg Doc. No. 9.) On March
10 21, 2011, Plaintiffs filed their reply. (Hohenberg Doc No. 10.) A hearing on the matter is
11 currently set for March 28, 2011 at 10:30 a.m. The Court, pursuant to its discretion under
12 Local Rule 7.1(d)(1), determines this matter is appropriate for resolution without oral
13 argument, submits it on the parties’ papers, and vacates the motion hearing. For the reasons
14 below, the Court GRANTS the Plaintiffs’ motions.

15 **Background**

16 Both actions are consumer class action lawsuits brought on behalf of people who have
17 purchased Ferrero’s Nutella® spread after relying on allegedly deceptive and misleading
18 labeling. (See Hohenberg Doc. No. 1; Rude-Barbato Doc. No. 1.) Specifically, the core
19 factual allegation of both complaints is that Ferrero misleadingly promotes its Nutella® spread
20 as “An example of a tasty yet balanced,” when in fact it contains dangerous levels of sugar.
21 (Hohenberg Doc. No. 8-1 at 3.) Plaintiffs in both actions allege economic injuries caused by
22 the products’ deceptive and misleading labeling. (Hohenberg Doc. No. 1 ¶ 25; Rude-Barbato
23 Doc. No. 1 ¶ 40.)

24 **Discussion**

25 **1. Consolidation of Related Actions**

26 Rule 42 of the Federal Rules of Civil Procedure permits consolidation of cases “[w]hen
27 actions involving a common question of law or fact are pending before the court” Fed.
28 R. Civ. P. 42(a). The Court has discretion to “order a joint hearing or trial of any or all matters

1 in issue in the actions; it may order all the actions consolidated; and it may make such orders
2 concerning proceedings therein as may tend to avoid unnecessary costs or delay.” Id. A
3 district court has broad discretion under Rule 42 to consolidate cases pending in its district.
4 See Investors Research Co. v. U.S. Dist. Ct. for Cent. Dist. Cal., 877 F.2d 777, 777 (9th Cir.
5 1989). “The district court, in exercising its broad discretion to order consolidation of actions
6 presenting a common issue of law or fact under Rule 42(a), weighs the saving of time and
7 effort consolidation would produce against any inconvenience, delay, or expense that it would
8 cause.” Huene v. United States, 743 F.2d 703, 704 (9th Cir. 1984).

9 The Court grants the Plaintiffs’s motion for consolidation of the related actions of
10 Hohenberg v. Ferrero U.S.A., Inc., case no. 11-cv-205-H (CAB), and Rude-Barbato v. Ferrero
11 U.S.A., Inc., case no. 11-cv-249-H (CAB). The two cases involve sufficient common
12 questions of law and facts such that efficiency would be enhance by their consolidation, as
13 each allege economic injuries based on the deceptive and misleading labeling on Ferrero’s
14 Nutella® spread. Both complaints also name the same Defendant, Ferrero, and Ferrero
15 believes that the two proceedings should be consolidated. (Hohenberg Doc. No. 9.) In
16 addition, because the related actions are based on the same facts and involve the same subject
17 matter, the same discovery will be relevant to both lawsuits. Consolidation is appropriate to
18 save time and effort and will not produce inconvenience, delay, or expense on the litigants or
19 trial judge. See Huene, 743 F.2d at 704.

20 **2. Appointment of Interim Lead Co-Class Counsel**

21 Federal Rule of Civil Procedure 23(g)(3) allows courts to “[d]esignate interim counsel
22 to act on behalf of a putative class before determining whether to certify the action as a class
23 action.” “[W]here a number of overlapping, duplicative or competing suits are present, a
24 number of lawyers may compete for class counsel appointment.” Four in One Co. v. SK
25 Foods, L.P., 2009 U.S. Dist. LEXIS 28657, at *7 (E.D. Cal. 2009). ““In such cases,
26 designation of interim class counsel clarifies responsibility for protecting the interests of the
27 class during precertification activities.”” Id. (quoting Manual for Complex Litigation, Fourth,
28 § 21.11 at 246 (Federal Judicial Center 2004).

1 “Although Rule 23(g)(3) does not provide any guidance for selecting interim class
2 counsel, a court may consider the factors enumerated in Rule 23(g)(1).” Levitte v. Google,
3 Inc., 2009 U.S. Dist. LEXIS 18198, at *5 (N.D. Cal. 2009); accord. Four in One, 2009 U.S.
4 Dist. LEXIS 28657, at *7-8. Under Federal Rule of Civil Procedure 23(g)(1), a court considers
5 “(i) the work counsel has done in identifying or investigating potential claims in the action; (ii)
6 counsel’s experience in handling class actions, other complex litigation, and the types of claims
7 asserted in the action; (iii) counsel’s knowledge of the applicable law; and (iv) the resources
8 that counsel will commit to representing the class.”

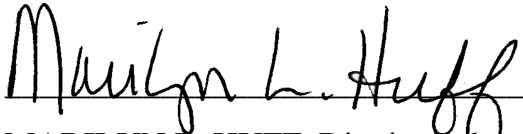
9 The Court grants Plaintiffs’ motion to appoint the law offices of Ronald A. Marron and
10 the Weston Firm as interim lead co-class counsel. The appointment of interim class counsel
11 is appropriate here, as there are multiple class actions that are being consolidated into a single
12 action. See, e.g., Amador v. Logistics Express, Inc., 2010 U.S. Dist. LEXIS 97999 (C.D. Cal.
13 2010). Each proposed class counsel appears to be well qualified to represent the interests of
14 the purported class and to manage this litigation. (Hohenberg Doc. No. 8-1 at 6-8.) In
15 addition, Ferrero does not oppose Plaintiffs’ motion for appointment of lead counsel.
16 (Hohenberg Doc. No. 9.)

17 **Conclusion**

18 For the reason above, the Court GRANTS Plaintiffs’ motion to consolidate and
19 GRANTS Plaintiffs’ motion for the appointment of interim lead co-class counsel. The Court
20 ORDERS Plaintiffs to file a consolidated complaint within thirty (30) days of the date that this
21 order is filed.

22 **IT IS SO ORDERED.**

23 DATED: March 22, 2011

24 
25 MARILYN L. HUFF, District Judge
26 UNITED STATES DISTRICT COURT
27
28