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

IN RE FERRERO LITIGATION

CASE NO. 11-cv-00205 H KSC

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
OF MOTION FOR APPROVAL OF
ATTORNEY FEES AND INCENTIVE
AWARDS****REDACTED VERSION FOR PUBLIC
FILING**

Judge: Hon. Marilyn L. Huff

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs Athena Hohenberg and Laura Rude-Barbato respectfully submit this application seeking an Order: (1) awarding Class Counsel attorneys' fees of \$985,919.50, equal to their lodestar; (2) awarding Class Counsel reimbursement of their litigation expenses of \$27,503.86; (3) approving incentive awards of \$10,000 for Ms. Hohenberg and \$7,500 for Ms. Rude-Barbato; and (4) making related findings and orders as set forth in the proposed Judgment and Order Granting Final Approval submitted herewith.

Because the Settlement has produced both monetary and injunctive relief, Plaintiffs derive the requested award from two sources. First, Ferrero has agreed to pay \$900,000 in attorneys' fees to cover injunctive relief. Second, Ferrero has agreed to create a settlement fund of \$550,000 from which this application seeks Class Counsel's remaining \$85,920 in lodestar, as well as Class Counsel's costs, and Class Representative incentive awards, in the total amount of \$130,923.36. The structure of the settlement in the New Jersey action is identical, and precedent for it is provided *infra* at Section V.

The fee application is for Class Counsel's actual lodestar, and no multiplier is sought, relieving the Court of the burden of determining if Class Counsel's efforts were unusually risky or unusually skilled and deserving of a multiplier. Counsel's rates and hours are described in detail in Section IV, and additional detail is provided in Appendix 1 to this brief. While counsel's hours spent are a matter of contemporaneous record, they must show that the requested rates are reasonable. For each primary timekeeper, the rate sought is slightly more than awarded by other federal courts in California between 12 and 15 months ago. *See infra* Section III. Further evidence that these rates are reasonable is provided in the Declarations of Ronald A. Marron and Jack Fitzgerald.

This application, like the underlying causes of action, are brought under California statutes, which provide attorneys' fees for prevailing plaintiffs in consumer fraud actions. *See infra* Section I. These statutes are considered substantive and *require* fees be awarded to prevailing plaintiffs, which is defined liberally to include settlements that provide for monetary relief *or* achieve some of the plaintiff's litigation objectives. The lodestar method of determining a reasonable fee is appropriate here because (1) the Settlement contains substantial non-monetary relief that is difficult to value, and (2) the 25% benchmark, if applied only to the monetary relief in this action, would result in a fee far below Class

1 Counsel's lodestar, which is contrary to California's fee-shifting policy. Such policy is designed
2 precisely to encourage "private attorney general" actions like this one, where a traditional contingency
3 fee will not provide a sufficient incentive to enforce the state's consumer protection laws.

4 While this application for fees does not seek any enhancement beyond the lodestar, the request for
5 incentive awards to the Class Representatives of \$10,000 and \$7,500 is higher than the \$5,000 amount
6 several California courts ruled "presumptively reasonable." The upward deviation is justified by the
7 unusual public attention received by class representatives, much of it highly negative and inaccurate, for
8 example portraying them as motivated by greed and receiving millions personally, or being bad mothers
9 and unintelligent for being tricked by Nutella's advertising. *See infra* Section VIII. The awards are also
10 justified by the extraordinary dedication to this action by two busy mothers, who both took time off
11 work on several occasions to prepare for their depositions, be deposed, and attend the two settlement
12 conferences, as well as continuously reviewed and discussed developments in the action with their
13 counsel. *See* Section VIII.

14 **ARGUMENT**¹

15 **I. BASES FOR AN AWARD OF FEES AND LITIGATION EXPENSES**

16 "In a certified class action, the court may award reasonable attorney's fees and nontaxable costs
17 that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). "An award of attorneys'
18 fees incurred in a suit based on state substantive law is generally governed by state law." *Champion*
19 *Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1025 (9th Cir. 2003) *see also Vizcaino v. Microsoft*
20 *Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Kona Enters. v. Estate of Bishop*, 229 F.3d 877, 883 (9th
21 Cir. 2000). Under California law, the Court awards reasonable attorneys' fees and costs where, as here, a
22 litigant proceeding in a representative capacity secures a "substantial benefit" for a class of persons.
23 *Serrano v. Priest*, 20 Cal. 3d 25, 38 (1977). "The task of a federal court in a diversity action is to
24 approximate state law [regarding attorneys' fee awards] as closely as possible to make sure that the
25 vindication of the state right is without discrimination because of the federal forum." *Farmers Ins. Exch.*
26 *v. Sayas*, 250 F.3d 1234, 1236 (9th Cir. 2001).

27 ¹ In their concurrently-filed Motion for Final Settlement Approval, Plaintiffs detailed the history of the
28 litigation, the parties' settlement negotiations, and the terms of the Settlement Agreement, which is
expressly incorporated herein. *See* Mot. for Final Settlement Approval at 2-10.

1 **A. The Contractual Basis**

2 “A request for attorney’s fees should not result in a second major litigation. Ideally . . . litigant
3 will settle the amount of a fee.” *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). That is what the parties
4 have done here through the Settlement Agreement. Ferrero has agreed to separately pay \$900,000 of
5 Class Counsel’s fee in connection with the injunctive relief obtained, while the remainder of Class
6 Counsel’s reasonable fee, and its expenses, are to come from the class fund.

7 A Settlement Agreement is like any other contract and enforced the same. Cal. Code of Civ. P. §
8 664.6; *Nicholson v. Barab*, 233 Cal. App. 3d 1671, 1681 (1991); *Engalla v. Permanente Medical Group,*
9 *Inc.*, 15 Cal. 4th 951, 971 (1971). Thus, a primary basis for the fee award here—at least the greatest
10 portion of it—is Ferrero’s contractual agreement to pay attorneys’ fees awarded, up to the unopposed
11 \$900,000 amount. Cal. Code Civ. P. § 1717; *Farmers Ins. Exch.*, 250 F.3d at 1236-37 (applying § 1717
12 in a California diversity action). This is to be done with the view that such agreements are highly
13 favored at law and interpretation is to be in favor of enforcement if possible. *See Neary v. Regents of*
14 *Univ. of Cal.*, 3 Cal. 4th 273, 277-78 (1992); *Nicholson*, 233 Cal. App. 3d at 1683; *Victoria v. Super.*
15 *Ct.*, 40 Cal. 3d 734, 753, n.8 (1985). Here, the parties are in agreement as to an appropriate amount of
16 compensation for Class Counsel’s efforts in obtaining the injunctive relief. Ferrero has agreed not to
17 oppose the reasonableness of the requested fee. Settlement Agreement ¶ 50. “A court should refrain
18 from substituting its own value for a properly bargained-for agreement.” *In re Apple Computer, Inc.*
19 *Derivative Litig.*, 2008 U.S. Dist. LEXIS 108195, at *12 (N.D. Cal. Nov. 5, 2008).

20 That the actual amount to be awarded in connection with the injunctive relief is left to the Court
21 to determine, up to the unopposed limit, does not render the contractual agreement unenforceable. Every
22 term need not be spelled out to state an enforceable contract, so long as a means to make the terms
23 certain is provided for by the contract’s terms. *Frankel v. Bd. of Dental Examiners*, 46 Cal. App. 4th
24 534, 545 (1996). The Settlement Agreement provides the Court guidance, as it specifies that Ferrero has
25 no objection to a fee award in connection with the injunctive relief that does not exceed the unopposed
26 limit of \$900,000. Further, if an Injunctive Fee Award is not made in the amount contemplated by the
27 Settlement, these funds will remain with Ferrero, since the unopposed amount is wholly independent
28 from the direct class relief. For example, in *Brazil v. Dell Inc.*, 2012 U.S. Dist. LEXIS 47986, at *2

1 (N.D. Cal. Apr. 4, 2012), the court awarded a fee agreed upon between the parties, which was
2 “approximately equal to their combined lodestar in th[e] case with no multiplier,” because, like here:

3 The benefits achieved by Class Counsel are not in the form of a “common fund,” but
4 rather come in the form of structural changes to [Defendant’s] advertising practices and
5 the payment to Class Members on a claims-made basis. Moreover, the fee awarded to
6 Class Counsel will be paid directly by [Defendant], over and above the consideration to be
7 paid to Class Members, and will thus not reduce the benefits available to the Class.

8 *Id.* at *2-3. Where there is no evidence of collusion and no detriment to the parties, courts “should give
9 substantial weight to a negotiated fee amount, assuming that it represents the parties’ best efforts to
10 understandingly, sympathetically, and professionally arrive at a settlement as to attorney’s fees.” *Ingram*
11 *v. Coca-Cola Co.*, 200 F.R.D. 685, 695 (N.D. Ga. 2001) (citation omitted).

12 Here, Class Counsel negotiated with Ferrero to reach a fee for the injunctive relief obtained
13 based on their lodestar. In addition, the fee was negotiated only after the parties reached agreement in
14 principle on the key injunctive relief terms, and only then after months of negotiations, including two
15 sessions before the Honorable Cathy Ann Bencivengo. It was at the second conference when the
16 “breakthrough” occurred and the parties came to agreement on all the major terms of the settlement. *See*
17 *Brazil*, 2012 U.S. Dist. LEXIS 47986, at *4-5 (“[t]he requested award amount was approved by [the]
18 mediator . . . which serves as ‘independent confirmation that the fee was not the result of collusion or a
19 sacrifice of the interest of the class.’” (quoting *Hanlon v. Chrysler Group, Inc.*, 150 F.3d 1011, 1029
20 (9th Cir. 1998))).

21 Moreover, Class Members have overwhelmingly indicated their approval by the total absence of
22 any objections at the time of this application after a fair and effective notice, including the substance of
23 this fee application. Thus, one can fairly say that truly “all parties” are in agreement on the contractual
24 Injunctive Relief Award.

25 In sum, the parties, in arms’ length negotiations, have determined that an Injunctive Fee Award
26 within the unopposed limit falls within the reasonable range of awards for the particular circumstances
27 and relief obtained in this case. For the reasons discussed further below, the Court should confirm the
28 agreed-upon amount.

1 **B. California Law Provides Fees for Successfully Prosecuting Consumer Fraud**
2 **Claims**

3 “Shifting fees in a statutory-fee case serves the public policy of encouraging private enforcement
4 of statutory or constitutional rights.” FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION
5 (FOURTH) § 14.13 (2004) [hereinafter *Manual for Complex Litigation*]. California has two statutes
6 providing for an award of attorney fees here, the Consumer Legal Remedies Act and the private attorney
7 general statute.

8 **1. Plaintiffs are “Prevailing Plaintiffs” Entitled Fees & Costs Under the CLRA**

9 The CLRA “shall be liberally construed and applied to promote its underlying purposes, which
10 are to protect consumers against unfair and deceptive business practices and to provide efficient and
11 economical procedures to secure such protection.” Cal. Civ. Code § 1760; *see also Wang v. Massey*
12 *Chevrolet*, 97 Cal. App. 4th 856, 869 (2002). The Act provides a fee-shifting provision directing that
13 “[t]he court shall award court costs and attorney’s fees to a prevailing plaintiff in litigation filed pursuant
14 to this section” Cal. Civ. Code § 1780(e).

15 “[T]he availability of costs and attorneys fees to prevailing plaintiffs is integral to making the
16 CLRA an effective piece of consumer legislation, increasing the financial feasibility of bringing suits
17 under the statute.” *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 644 (2009) (quoting *Broughton v.*
18 *Cigna Healthplans*, 21 Cal. 4th 1066 (1999)). “Accordingly, an award of attorney fees to ‘a prevailing
19 plaintiff’ in an action brought pursuant to the CLRA is mandatory, even where the litigation is resolved
20 by a pretrial settlement agreement.” *Kim v. Euromotors West/The Auto Gallery*, 149 Cal. App. 4th 170,
21 178-79 (2007).

22 In the settlement of a CLRA claim, a plaintiff prevails if there is a “net monetary recovery,”
23 *Reveles v. Toyota by the Bay*, 57 Cal. App. 4th 1139, 1151 (1997), or where she is “denied direct relief”
24 but nonetheless the lawsuit “has otherwise achieved its main litigation objective.” *Graciano v. Robinson*
25 *Ford Sales, Inc.*, 144 Cal. App. 4th 140, 151 (2006). *See also Kim*, 149 Cal. App. 4th at 178-81
26 (discussing *Reveles* and *Graciano* and concluding that court may determine plaintiff prevailed if “he
27 obtained a net monetary recovery or because he achieved most or all of what he wanted by filing the
28 action or a combination of the two.”). Injunctive relief that is “‘socially beneficial’ . . . justifi[ies] a fee

award under” the CLRA. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944 (9th Cir. 2011).

While either is sufficient, here both factors are present. Plaintiffs obtained a net monetary recovery and achieved “most or all of what” they wanted by filing the action: (1) across-the-board changes to Nutella’s current advertising, (2) a fund to provide restitution, (3) an agreement to pay attorneys’ fees and costs, (4) precedents that will assist other consumers in vindicating claims for consumer fraud, and (5) a deterrent to other food companies tempted to make exaggerated health claims.

2. Plaintiffs are “Successful Parties” Entitled to Fees & Costs Under California’s Private Attorney General Statute

California’s private attorney general statute provides for an award of attorneys’ fees to a “successful party”:

in any action which has resulted in the enforcement of an important right affecting the public interest if (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement . . . are such as to make the award appropriate, and (c) such fees should not in the interest of justice, be paid out of the recovery, if any.

Cal. Civ. Code § 1021.5. *See generally Serrano v. Priest*, 20 Cal. 3d 25 (1977).

“Similar to California’s fee-shifting statute, the private attorney general statute makes a plaintiff a ‘successful party’ if it achieves its litigation objectives.” *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1170 (C.D. Cal. 2010). The statute applies “when a plaintiff ‘acts as a true private attorney general, prosecuting a lawsuit that enforces an important public right and confers a significant benefit, despite the fact that his or her own financial stake in the outcome would not by itself constitute an adequate incentive to litigate.’” *Heston v. Taser Int’l, Inc.*, 431 Fed. Appx. 586, 589 (9th Cir. 2011) (quoting *Flannery v. Cal. Highway Patrol*, 61 Cal. App. 4th 629, 635 (1998) (internal quotation marks and citation omitted)). “The key question is ‘whether the financial burden placed on the party [claiming fees] is out of proportion to its personal stake in the lawsuit.’” *Id.* (quoting *Lyons v. Chinese Hosp. Ass’n*, 136 Cal. App. 4th 1331, 1351 (2006)).² Here, Nutella typically retailed for around \$3.49, so even frequent buyers could not possibly have a stake adequate to litigate.

² That an action is brought on a contingency basis does not undermine a plaintiff’s request for attorneys’ fees under the statute. *Lyons*, 136 Cal. App. 4th at 1351.

1 **C. The Equitable Basis**

2 Class actions serve the policy goals of efficient judicial management, by setting a procedure
3 whereby one judgment covers all claimants, and of ensuring that the rights of citizens are exonerated
4 even where their individual claims are relatively small and/or their financial means are lean, such that an
5 attorney would be unlikely to accept the financial risk of individual representation. *Keating v. Super. Ct.*,
6 31 Cal. 3d 584, 609 (1982); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977). Accordingly, “it is well settled
7 that the lawyer who creates a common fund is allowed an *extra* reward, so that he might share the wealth
8 of those upon whom he has conferred a benefit.” *Paul, Johnson, Alston & Hunt v. Graulity*, 886 F.2d
9 268, 271 (9th Cir. 1989); *see also Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977).

10 **II. THE COURT SHOULD APPLY THE LODESTAR METHOD TO DETERMINE CLASS**
11 **COUNSEL’S REASONABLE FEE**

12 Under California law, “a court assessing attorney fees begins with a touchstone or lodestar
13 figure, based on the careful compilation of the time spent and reasonable hourly compensation of each
14 attorney . . . involved in the presentation of the case.” *Ketchum v. Moses*, 24 Cal. 4th 1122, 1131-32
15 (2001) (quoting *Serrano*, 20 Cal. 3d at 48); *see also Hensley v. Eckhart*, 461 U.S. 424, 433 (1983) (“The
16 most useful starting point for determining the amount of a reasonable fee is the number of hours
17 reasonably expended on the litigation multiplied by a reasonable hourly rate.”); *Perdue v. Kenny A.*, 130
18 S. Ct. 1662, 1672-73 (2010) (expressing strong preference for lodestar approach).

19 “[T]he ‘lodestar method’ is appropriate in class actions brought under fee-shifting statutes . . .
20 where the relief sought—and obtained—is often primarily injunctive in nature and thus not easily
21 monetized, but where the legislature has authorized the award of fees to ensure compensation for
22 counsel undertaking socially beneficial litigation.” *In re Bluetooth*, 654 F.3d at 941; *see also Manual for*
23 *Complex Litigation* § 21.7 at p. 334-35 (“Statutory awards are generally calculated using the lodestar
24 method.”). While Ferrero’s agreement to pay refunds, fees, notice, and administration costs is “easily
25 monetized,” Plaintiffs—both mothers who were duped by Ferrero’s commercials suggesting Nutella was
26 nutritious for their young children—brought this case primarily to remedy a public health hazard created
27 by Ferrero’s deceptive advertising. Hohenberg Decl. ¶ 2; Rude-Barbato Decl. ¶ 15. And Ferrero agreed
28

1 to wide-ranging advertising changes as a result of the lawsuit.³

2 While in “common fund” cases “where the settlement or award creates a *large* fund for
3 distribution to the class, the district court has discretion to use either a percentage or lodestar method,”
4 *Hanlon*, 150 F.3d at 1029 (emphasis added, citation omitted), even then its discretion “must be exercised
5 so as to achieve a reasonable result.” *In re Bluetooth*, 654 F.3d at 942 (citing *In re Petroleum Prods.*
6 *Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997)). Because this is a blended settlement that includes
7 primarily injunctive relief, but also a fund for class member claims (though not especially “large”),
8 applying the common fund method would not “achieve a reasonable result.” Accordingly, Plaintiffs
9 respectfully request that the Court use the lodestar method to determine Class Counsel’s reasonable fee.

10 **III. CLASS COUNSEL’S LODESTAR IS FAIR AND REASONABLE**

11 Class Counsel’s lodestar of \$985,919.50 is summarized in Appendix 1 hereto. This lodestar is
12 based on 2,137.9 hours (1,652.7 attorney hours, 385.2 paralegal and law clerk hours, and 100 “blended”
13 post-application hours, *see* App. 1 n.1), and is supported by fair and reasonable rates and hours.

14 **A. Class Counsel’s Rates Are Reasonable**

15 Class Counsel’s rates are reasonable because they are in line with hourly rates charged by
16 attorneys of comparable experience, reputation and ability for similar litigation. *See Ketchum*, 24 Cal.
17 4th at 1133; *see also Blum v. Stenson*, 465 U.S. 886, 895 (1984). Courts look to prevailing market rates
18 in the community in which the court sits. *Schwarz v. Sec’y of Health & Human Servs.*, 73 F.3d 895, 906
19 (9th Cir. 1995); *see also Camancho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008).
20 Accordingly, Class Counsel’s current rates are reasonable if they are in line with the prevailing rates for
21 other attorneys practicing complex litigation in San Diego. *See Manual for Complex Litigation* at §
22 14.122 (“The rate should reflect what the attorney would normally command in the relevant
23 marketplace.”).

25 ³ It is not just the parties who believe the primary benefit of this settlement is Ferrero’s commitment to
26 modify its advertising practices. *See* Vincent Iannelli, M.D., *Lessons from the Nutella Lawsuit*,
27 About.com Pediatrics (May 6, 2012) (“If you bought Nutella . . . you may be eligible to receive a
28 payment from the Nutella class action settlement. *More importantly*, ‘Ferrero has also agreed to
prospective relief by agreeing to modify certain marketing statements about Nutella, create new
television ads, and change the Nutella website.’” (emphasis added)), *available at*
<http://pediatrics.about.com/b/2012/05/06/lessons-from-the-nutella-lawsuit.htm>.

Here, Class Counsel's requested rates are as follows:

Attorney	Position	Hourly Rate
Ronald A. Marron	Partner (MF)	\$650
Gregory S. Weston	Partner (WF)	\$525
Jack Fitzgerald	Partner (WF)	\$525
Courtland Creekmore	Associate (WF)	\$500
Margarita Salazar	Associate (MF)	\$450
Skye Resendes	Associate (MF)	\$385
Maggie Realin	Associate (MF)	\$375
Melanie Persinger	Associate (WF)	\$300
Paralegals (MF)		\$215
Paralegals (WF)		\$195

To assist the court in calculating the lodestar, a plaintiff must submit "satisfactory evidence . . . that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonable comparable skill, experience and reputation." *Blum*, 465 U.S. at 896 n.11.⁴

Rates Other Courts Have Awarded. "[R]ate determinations in other cases, particularly those settling a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990).

In March 2011, the Honorable Janis L. Sammartino awarded Mr. Marron fees based on an hourly rate of \$595. *Iorio v. Allianz Life Ins. Co. of N. Am., Inc.*, 2011 U.S. Dist. LEXIS 21824, at *31 (S.D. Cal. Mar. 3, 2011). In that case, however, despite being of similar seniority and experience to three partners whose rates of \$750 were approved, Mr. Marron, at the request of and in deference to his co-counsel, reduced his request to \$595. Marron Decl. ¶ 20. Mr. Marron's rate of \$650 is his current rate

⁴ But compare *Collado v. Toyota Motor Sales, U.S.A., Inc.*, 2011 U.S. Dist. LEXIS 133572, at *14 (C.D. Cal. Oct. 17, 2011) ("The Ninth Circuit has advised that courts are allowed to rely on their own familiarity with the legal market and subject matter of the lawsuit when awarding attorneys' fees," citing *Ingram v. Oroudjian*, 647 F.3d 925 (9th Cir. 2011)).

1 and a modest increase (9%) over the rate approved in *Iorio*.

2 In June 2011, the Honorable James Ware awarded the Weston Firm fees based on an hourly rate
3 of \$500 for Mr. Weston and Mr. Fitzgerald. Fitzgerald Decl. ¶ 33. This April, in a tentative order giving
4 final approval to a class action settlement that has not yet been entered, the Honorable Margaret M.
5 Morrow also awarded the Weston Firm fees based on rates of \$500 for Mr. Weston and Mr. Fitzgerald,
6 as well as rates of \$275 for Ms. Persinger, and \$150 for paralegals (which Judge Morrow noted was
7 “below the standard rate for paralegals”). *See id.* ¶ 33 & Ex. 3 at 50-51. The firm’s current rates reflect a
8 modest increase since Judge Ware approved its partner’s \$500 in June of last year.⁵

9 In addition, Class Counsel’s rates are reasonable and consistent with the rates charged by both
10 plaintiff and defense firms in San Diego, California, and around the country. *See* Marron Decl. ¶¶ 21-24;
11 Fitzgerald Decl. ¶¶ 34-40. The rates are also consistent with those awarded by other courts. *See* Marron
12 Decl. ¶¶ 22-24; Fitzgerald Decl. ¶¶ 36-41.

13 Finally, Class Counsel’s rates are reasonable because they reflect counsel’s practice of not billing
14 or seeking reimbursement of several categories of costs like photocopying, telephone, Lexis, Westlaw
15 PACER, faxes, postage, and meals, including while traveling. Class Counsel estimate these uncharged
16 expenses are approximately \$13,000 in this case. *See* Marron Decl. ¶ 31; Fitzgerald Decl. ¶ 51. *Accord*
17 *Parkinson*, 796 F. Supp. 2d 1160, 1177 n.14 (noting such costs factored into requested lodestar).

18 **Survey Data.** “Courts also frequently use survey data in evaluating the reasonableness of
19 attorneys’ fees.” *B-K Lighting, Inc. v. Vision3 Lighting*, 2009 U.S. Dist. LEXIS 111968, at *18 (C.D.
20 Cal. Nov. 16, 2009) (citing *Mathis v. Spears*, 857 F.2d 749, 755-56 (9th Cir. 1988)). National Law
21 Journal surveys confirm that the rates charged by Class Counsel are reasonable. Marron Decl. ¶ 23;
22 Fitzgerald Decl. ¶¶ 38-40.

23 **Blended Rate.** The reasonableness of Class Counsel’s rates is also shown by its blended lodestar,
24 calculated by taking the total lodestar and dividing it by the total hours of all timekeepers (attorneys,
25 paralegals, etc.). The blended rate in this case is \$461.16 (\$985,919.50 divided by 2137.9 hours). This
26 compares favorably to blended lodestar rates approved in other actions. *See* Marron Decl. ¶ 25;

27 ⁵ “The Supreme Court [has] expressly held the use of current, rather than historical, rates to be an
28 appropriate adjustment to lodestar rates to compensate for delays.” *In re Commercial Consortium of*
Cal., 135 B.R. 120, 126 (C.D. Cal. 1991); *see also Mo. v. Jenkins*, 491 U.S. 274, 283-84 (1989).

1 Fitzgerald Decl. ¶ 41.

2 **B. Class Counsel's Hours Expended Are Reasonable**

3 Class Counsel are entitled to be compensated for reasonable time spent at all points in the
4 litigation. Courts should avoid engaging in an “*ex post facto*” determination of whether attorney hours
5 were necessary to the relief obtained.” *Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir. 1992). The issue “is
6 not whether hindsight vindicates an attorney’s time expenditures, but whether at the time the work was
7 performed, a reasonable attorney would have engaged in similar time expenditures.” *Id.*

8 Here, Class Counsel expended a total of 1652.7 attorney hours and 385.2 paralegal and law clerk
9 hours. *See* Marron Decl. ¶¶ 27-29; Fitzgerald Decl. ¶¶ 42-46. This includes, *inter alia*, time billed for
10 investigating the claims and drafting pleadings (Ms. Hohenberg’s Complaint, Ms. Rude-Barbato’s
11 Complaint, the Master Consolidated Complaint, and then the First Amended Consolidated Complaint);
12 extensive law and motion practice relative to the time the case was litigated; drafting and responding to
13 discovery, including taking and defending depositions and third-party discovery; reviewing documents
14 and researching legal authorities; preparing for and participating in meetings, settlement conferences and
15 mediations; preparing for and arguing one motion hearing before this Court (for class certification), and
16 an MDL hearing; and communications and meetings among parties and counsel.

17 The three senior attorneys collaborating on this action, Messrs. Marron, Weston and Fitzgerald,
18 have over thirty years combined experience in complex civil litigation, false advertising, and class
19 actions. Their experience is detailed in the supporting declarations. *See* Marron Decl. ¶¶ 9-17; Fitzgerald
20 Decl. ¶¶ 28-31. Cumulatively, these attorneys have performed 1,262.7 hours of work on this case, or
21 approximately 78% of the total attorney time: Mr. Fitzgerald (614.7), Mr. Marron (476.4), and Mr.
22 Weston (196.3).

23 That this time is reasonable is demonstrated by comparing the average hours billed per month to
24 the averages approved as reasonable in other false advertising actions. *See* Fitzgerald Decl. ¶ 45.
25 Moreover, although this action was litigated far more vigorously and substantively than the New Jersey
26 action, which involved little other than stipulating to delays and then settling on identical terms on the
27 heels of the Settlement in this case, counsel in that action claim a remarkable **3,000** hours for a lodestar
28 of \$1.8 million. Class Counsel’s hours in this case are far more reasonable (and likely accurate) by

1 comparison. *Id.* ¶ 46. Accordingly, Class Counsel should be compensated for all hours claimed, which
2 are documented and based on contemporaneous time records.⁶

3 **IV. CLASS COUNSEL’S REQUESTED FEE AWARD IS REASONABLE**

4 Fee awards in class actions encourage and support compliance with federal and state law. “The
5 guiding principles in determining awards of attorneys’ fees should be to provide compensation sufficient
6 to stimulate the motive for representation of classes[.]” *In re Equity Funding Corp. Sec. Litig.*, 438 F.
7 Supp. 1303, 1325 (C.D. Cal. 1977). Payment at full market rates is essential to fulfill the goal of enticing
8 well-qualified counsel to undertake difficult consumer interest litigation. *San Bernadino Valley Audubon*
9 *Soc’y v. San Bernadino*, 155 Cal. App. 3d 738, 755 (1984).

10 When determining a reasonable fee upon the settlement of a class action, the lodestar figure is
11 “presumptively reasonable,” *In re Bluetooth*, 654 F.3d at 941 (quoting *Cunningham v. County of Los*
12 *Angeles*, 879 F. 2d 481, 488 (9th Cir. 1988)); *see also Harris v. Marhoefer*, 24 F.3d 16, 18 (9th Cir.
13 1994) (the lodestar “presumptively provides an accurate measure of attorney’s fees”). Courts may then
14 adjust counsel’s lodestar “upward or downward by an appropriate positive or negative multiplier
15 reflecting a host of ‘reasonableness’ factors, ‘including quality of representation, the benefit obtained for
16 the class, the complexity and novelty of the issues presented, and the risk of nonpayment,’” *In re*
17 *Bluetooth*, 654 F.3d at 941-42 (quoting *Hanlon*, 150 F.3d at 1029 (citation omitted)). While Class
18 Counsel here do not request an enhancement (or “multiplier”), neither is a downward departure

19 ⁶ Class Counsel’s detailed time sheets are not necessary for this motion because the Court need only be
20 provided enough information to assess the reasonableness of the fees claim, and Class Counsel’s
21 declarations provide this. *Margolin v. Regional Planning Com.*, 134 Cal. App. 3d 999, 1006-1007
22 (1982) (attorney declaration as to number of hours worked by firm members was sufficient); *Trustees of*
23 *Cent. States v. Golden Nugget, Inc.*, 697 F. Supp. 1538, 1558-59 (C.D. Cal. 1988). Moreover, the
24 lodestar analysis requires “neither mathematical precision nor bean-counting,” and allows the Court to
25 “rely on summaries submitted by the attorneys and . . . not review actual billing records,” *In re Rite Aid*
26 *Corp. Sec. Litig.*, 396 F.3d 294, 306-307 (3d Cir. 2005). California authorities likewise “permit[] fee
27 awards in the absence of detailed time sheets,” since “[a]n experienced trial judge is in a position to
28 assess the value of the professional services rendered in his or her court.” *Wershba v. Apple Computer,*
Inc., 91 Cal. App. 4th 224, 255 (2001) (citing *Sommers v. Erb*, 2 Cal. App. 4th 1644, 1651 (1992); *Dunk*
v. Ford Motor Co., 48 Cal. App. 4th 1794, 1810 (1996); *Nightingale v. Hyundai Motor Am.*, 31 Cal.
App. 4th 99, 103 (1994)). Here, the extent of the discovery and law and motion practice, as reflected on
the Court’s docket and summarized in the Motions for Preliminary and Final Approval, and supporting
declarations, readily demonstrates the time expended was reasonable and necessary to obtain this
substantial Settlement for the Class. Nevertheless, Class Counsel’s detailed time records can and will be
provided to the Court immediately upon its request should it desire a more detailed review.

1 warranted.

2 **A. The Results Achieved for the Class**

3 This resolution of this case represents an excellent result for the Class and consumers
4 nationwide, but even more so for California consumers. In less than a year, Plaintiffs filed this action,
5 pushed it past pleadings, conducted targeted discovery, and obtained class certification, litigating the
6 case quickly and efficiently for the Class. By doing so, Plaintiffs obtained Ferrero's commitment to
7 effecting wide-ranging changes in the way it advertises and markets Nutella, a circumstance that will
8 improve public knowledge and health.

9 **1. The Injunctive Relief Provides the Class and Public a Significant Benefit**

10 For Ferrero to agree to modify its label to *prominently* disclose Nutella's nutritional content, to
11 revise its Nutella slogan, and to cease its *successful* health-oriented marketing strategy by shooting new
12 television commercials and editing its web advertising, is no small matter.

13 Although injunctive relief of the type provided in the Settlement may be difficult to monetize, it
14 undoubtedly has value for the Class. *See Brazil*, 2012 U.S. Dist. LEXIS 47986, at *4 ("The structural
15 changes to Dell's marketing practices resulting from this litigation, particularly Dell's elimination of
16 allegedly false representations . . . conferred a benefit on both the class members and the public at large."
17 (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1049 (9th Cir. 2002) ("Incidental or nonmonetary
18 benefits conferred by the litigation" are factors to be considered in a fee application). There is intrinsic
19 value to truth in advertising. Yet, this benefit is not easily valued.

20 Nevertheless, the injunctive relief's value here may be fairly and objectively ascertained by
21 comparing sales before and after the advertising began in August 2009, if one assumes that Ferrero's
22 modifications *away* from the challenged advertising are likely to have the opposite effect on its sales
23 than the challenged advertising had.

24 From August 1, 2009 to December 31, 2010 (17 months), Nutella sales were \$ [REDACTED] (or
25 \$ [REDACTED] per month⁷). From January 1, 2008 to July 31, 2009 (19 months), sales were \$ [REDACTED] (or
26
27

28 ⁷ Because August is the second month of the third quarter, we calculated this by adding 2010 sales
(\$ [REDACTED]) to 2/3 of Q3 2009 sales (\$ [REDACTED]) and Q4 2009 sales (\$ [REDACTED]).

1 \$ [REDACTED] per month).⁸ Thus Ferrero sold an average of \$3,897,417 more Nutella per month when
2 using the challenged advertising. The class period runs from August 1, 2009 to January 23, 2012 (the
3 date of preliminary approval), or approximately 30 months. Thus the additional Nutella sales during this
4 period amount to \$116,922,510 more in nationwide sales, and \$14,615,313 for California's 12.5% share.
5 Thus, it may be fair to value the injunctive relief somewhere near \$14 million for the California Class as
6 an approximation of what Class Members and the public are likely to save when Ferrero's deceptive
7 advertising has ceased.

8 The Court may also consider the financial commitment required of Ferrero to effect the
9 injunctive relief. Although Ferrero has not provided that information in response to Plaintiffs' request,
10 the cost of the required labeling changes, re-shooting television commercials, and revising web content
11 is easily likely to number in the seven figures. In addition, the notoriety of this suit in the media alerts
12 consumers to the subtle ways in which some companies can mislead—which is especially insidious
13 when it comes to health—and warns other food manufacturers against using a health-based advertising
14 campaign likely to mislead the public.

15 **2. The California Restitution Fund Affords Injured Californians Far More Relief**
16 **Than the 49-State Fund Affords Injured Consumers Outside California**

17 Class Counsel obtained a better monetary component for the California Class than that obtained
18 for the 49-state class. First, the California fund is proportionally larger. While "total unit sales in
19 California [were] approximately 12.5% of national sales," Order Granting Class Cert., Dkt. No. 95 at 10
20 (record citation omitted), the California Fund (\$550,000) is 18% of the overall common fund (e.g.,
21 \$3,050,000 including the \$2,500,000 49-State Fund). Put another way, the California Fund is 44% larger
22

23 ⁸ Plaintiffs previously filed Nutella sales information under seal. *See* Dkt. No. 22-1, Ex. D. *See also*
24 Order Granting Class Cert., Dkt. No. 95 at 4 (referring to Nutella sales). Plaintiffs previously filed
25 Nutella sales information under seal. *See* Dkt. No. 22-1, Ex. D; Dkt. No. 95 at 4, 10 (referring to
26 evidence of Nutella sales). Plaintiffs requested that Ferrero de-designate the sales information as
27 "confidential" under the Protective Order for purposes of this Motion so that the public and Class
28 Members might be able to fairly and fully evaluate the strength of the Settlement, but Ferrero declined.
Ferrero has agreed as a compromise, however, that if any member of the public or Class Member, other
than a competitor of Ferrero, wishes to review the unredacted version of this memorandum or the
concurrently-filed memorandum in support of Plaintiffs' motion for final settlement approval, he or she
may do so by contacting Class Counsel and signing an agreement to abide by the terms of the Protective
Order entered in this action (Dkt. No. 32).

1 than its proportion of sales.

2 More importantly, however, the 49-State Fund is being used to compensate Nutella purchases
3 beginning January 2008, *twenty months* before Ferrero began using the challenged advertising, as it
4 repeatedly represented to this Court. *See* Kreilmann Decl. in Opp. to Class Cert. Mot. (filed under seal)
5 ¶¶ 30-34; Class Cert. Hrg. Tr., Dkt. No. 93 at 31. By including unaffected purchases in its settlement
6 class, the 49-State Fund is being inappropriately diluted for class members with cognizable injuries. This
7 effect is not small. Based on our review of the Nutella sales data and calculations, approximately 30.4%
8 of the sales covered by the 49-State Fund are those from January 2008 to August 2009, when Ferrero did
9 not even advertise Nutella in the challenged manner. As a result, the California Fund is more than two-
10 and-a-half times larger on a per capita basis for affected sales than the 49-State Fund.

11 **B. The Novelty and Difficulty of Issues and Skill of Counsel**

12 This case was novel and difficult. The issue in this case concerned the marketing of a product
13 containing high levels of fat and sugar with suggestive, but not explicit, health claims. Moreover, the
14 statements challenged appeared in a variety of media, including on the product’s label, website, and in
15 print and national television commercials, all of which included different variations and combinations of
16 phrases so that Plaintiffs were tasked with the particularly difficult challenge of demonstrating a
17 common message or theme. And there was an added complication in that the advertising at issue was
18 underwritten or supported by a purported children’s nutrition expert.

19 The action was widely criticized in the media (along with Plaintiffs, particularly Ms.
20 Hohenberg), because to many it seemed “obvious” that Nutella was unhealthy; yet California law
21 prohibits food manufacturers from making even “obvious” misrepresentations. But even the Court, at
22 times, expressed skepticism about some of the claims or the overall viability of the suit. Nevertheless,
23 Plaintiffs persevered and ultimately obtained exactly what they set out to do in this lawsuit—change
24 Nutella’s advertising.

25 Plaintiffs respectfully suggest that their track record in this case demonstrates the skill of their
26 counsel, who prevailed either entirely or almost entirely on two Rule 12 motions (Dkt. Nos. 43, 69), a
27 motion to stay discovery (Dkt. No. 24), two motions to transfer the case away from this Court and
28 Plaintiffs’ hometown and into Ferrero’s back yard (Dkt. Nos. 37, 63), and who obtained a certified Class

(Dkt. No. 95). This is especially noteworthy in light of Class Counsel's opponents, accomplished and respected attorneys at the highly-regarded firm, Wilson Sonsini Goodrich & Rosati. For example, Ferrero's primary counsel, Keith Eggleton, was a Ninth Circuit clerk from 1990 to 1991, is a repeat Northern California Super Lawyer, and sits on Wilson Sonsini's Board of Directors.

Moreover, Class Counsel was extremely efficient, bringing this action from filing to a certified class in just nine months, during that time also defeating the plethora of motions discussed above. And Plaintiffs obtained the Settlement in less than a year despite Ferrero's strong initial reluctance to change its practices or refund the Class for their Nutella purchases. Moreover, it was only after Class Counsel obtained the certified Class, and after Class Counsel negotiated the California Settlement, that Ferrero agreed to the similar but less favorable terms with the New Jersey plaintiffs for the remaining states.

All these factors demonstrate the reasonability of Class Counsel's lodestar.

C. Preclusion of Other Employment and Risk of Non-Payment

Devoting more than 2,000 attorney and staff hours, and substantial costs to the prosecution of this action, necessarily precluded other employment for Class Counsel. There was significant risk that Class Counsel, despite committing these resources, would not have received any compensation for its services. And Class Counsel's ability to collect compensation was entirely contingent upon it prevailing. The substantial risk of non-recovery inherent in class action litigation is well-documented. *See* Fitzgerald Decl. ¶¶ 47-49.

D. Additional Factors

1. Class Counsel's Uncompensated Contribution to the 49-State Settlement

Class Counsel's fee is especially reasonable in light of the effect of its work in generating the identical settlement for consumers in the other 49 states, even while Class Counsel will not be compensated for that contribution. After Plaintiffs negotiated the Settlement on behalf of the certified California class, Ferrero settled *Glover* on identical injunctive relief terms in exchange for a release covering Nutella purchasers in the other 49 states. This is emblematic of the involvement of the attorneys in the cases throughout the litigation, who merely followed in Class Counsel's footsteps and reaped huge rewards for doing so (Ferrero agreed to separately pay New Jersey counsel \$3,000,000, and they are seeking an extra \$750,000 in fees, and over \$80,000 in expenses, from the \$2,500,000 49-State

1 Fund).

2 Indeed, after Alabama resident Marnie Glover filed her New Jersey action with 29 paragraphs
3 copied *verbatim* from Plaintiffs' Complaint in this case, her attorneys did little other than try to disturb
4 and obtain control over Plaintiffs' case, for example filing an MDL motion while Ferrero's transfer
5 motion was already pending. New Jersey counsel then simply delayed the *Glover* case until they could
6 negotiate a settlement on the heels of the California class certification and Settlement. Thus, although
7 *Glover* was filed just three weeks after *Hohenberg*, there was almost no actual litigation involved. For
8 example, Ferrero filed a Motion to Dismiss, but it was terminated, never heard, and never re-filed after
9 the New Jersey plaintiffs moved for consolidation then stipulated to more delay (*see Glover*, 11-cv-1086
10 (D.N.J.) Dkt. Nos. 24, 52, 56, 58). That was the full extent of "motion practice" between the *Glover*
11 plaintiffs and Ferrero. Compare generally *In re Ferrero* Docket (113 entries, with lots of motion &
12 substantive papers) with *Glover* Docket (67 entries, mostly administrative in nature, repeated
13 stipulations for continuances, etc.).

14 The deposition of Nutella's "children's nutrition expert," Connie Evers perfectly illustrates the
15 point. On April 28, 2011, Plaintiffs subpoenaed Evers deposition, which was initially scheduled for May
16 25. While Class Counsel was initially preparing to take the deposition, on May 16 Evers' counsel invited
17 New Jersey counsel to attend. When they were not prepared to do so on May 25, Class Counsel agreed
18 to postpone the deposition to July 26 to accommodate them. Class Counsel spent considerable time
19 preparing for the deposition, ultimately shipping four bankers' boxes of documents to Portland for use in
20 the proceeding. Besides that, Class Counsel were prepared with Ms. Evers' nutrition books, DVDs of
21 Nutella commercials, demonstrative exhibits, and a slew of non-produced materials located as part of
22 their investigation and preparation for the deposition.

23 Less than a week before the deposition, New Jersey counsel first contacted Class Counsel to
24 coordinate, but then were unreachable on two separate occasions at the times the parties had agreed to
25 have telephone conferences. As a result, the two sets of counsel first spoke when New Jersey counsel
26 arrived a few minutes before the deposition—with few documents, asking for a stapler to prepare them.

27 In short, New Jersey counsel (apparently because they were travelling and relying on California
28 counsel to take the deposition, which required an enormous amount of preparation), were not as well

1 prepared to take the deposition. The varying preparedness was obvious in the deposition. Mr. Fitzgerald
2 was responsible for 342 pages of the 378-page transcript, over 90%. During his examination, Mr.
3 Fitzgerald marked 93 exhibits. Glover’s attorneys marked one. The evidence developed in Evers’
4 deposition was crucial to this case. Besides citing it extensively in support of their Motion for Class
5 Certification, Evers’ testimony certainly bolstered Plaintiffs’ merits case. Unsurprisingly, one of the
6 main forms of relief for the Class is Ferrero’s agreement to remove content written by or attributed to
7 Ms. Evers, and she is no longer employed as a Nutella spokesperson.

8 2. *The California Class’s Far Higher Claims Rate*

9 As of May 23, the California Class had 55,504 claims for reimbursement of 259,362 four-dollar
10 jars of Nutella (\$1,037,448). Young Aff. ¶ 10. This is ■■■% of the affected California sales. By contrast,
11 the 49-state class includes 197,909 claims for 912,693 Nutella jars (\$3,650,772), just ■■■% of the sales
12 covered by that settlement. Thus, the California claims rate is almost three times higher.

13 **V. AWARDING THE REMAINDER OF CLASS COUNSEL’S REASONABLE FEE FROM** 14 **THE SETTLEMENT FUND IS PERMISSIBLE AND APPROPRIATE**

15 Although Class Counsel seek a total fee of \$985,919.50, the source of these funds would be
16 divided between Ferrero (\$900,000) and the Settlement Fund (\$85,919.50), and so in some sense Class
17 Counsel requests separate fee awards. “[S]eparate fee awards are appropriate for independent injunctive
18 and monetary relief settlements.” *White v. Experian Info. Solutions, Inc.*, 2011 U.S. Dist. LEXIS 79044,
19 at *18 (C.D. Cal. 2011). Moreover, courts have “allowed distinct fee awards for injunctive and monetary
20 relief when both kinds of relief were included in the same settlement agreement.” *Id.* (citing *Weiss v.*
21 *York Hosp.*, 628 F. Supp. 1392, 1415 (M.D. Pa. 1986)).

22 The Eleventh Circuit Court of Appeals, for example, recently upheld separate fee awards for the
23 injunctive and monetary components of a class action settlement in *Faught v. Am. Home Shield Corp.*,
24 668 F.3d 1233 (11th Cir. 2011). The district court had “approved an attorneys’ fee award with two
25 components: (1) a \$1.5 million lump sum paid directly by [defendant] to class counsel as payment for
26 the business practice changes researched and negotiated by class counsel for the benefit of the class, and
27 (2) 25% of the monetary compensation received by class members,” *id.* at 1243. The Eleventh Circuit
28 upheld the awards because the parties intended that “the \$1.5 million . . . not come from the money set

1 aside for the class; rather, it is a separate lump sum from [defendant] to class counsel,” and “the \$1.5
2 million was intended to compensate class counsel for additional work performed and value added to the
3 settlement, specifically, the work done in changing [defendant’s] business practices” *Id.* The
4 situation is similar here. The Settlement Agreement expressly separates the injunctive and monetary
5 relief and contemplates separate payments for them, one from Ferrero and one from the monetary fund.

6 Other California courts have made similar awards. For example, in *Brazil*, the parties settled a
7 putative class action with Dell agreeing to “structural changes to [its] advertising practices and the
8 payment to Class Members on a claims-made basis.” 2012 U.S. Dist. LEXIS 47986, at *2-3. Dell
9 separately agreed to pay over \$6 million in attorneys’ fees. The court noted that because “the fee
10 awarded to Class Counsel will be paid directly by Dell, over and above the consideration to be paid to
11 Class Members, . . . [it] will thus not reduce the benefits available to the Class.” *Id.* at *3 (record citation
12 omitted). And just as Plaintiffs assert here, the *Brazil* court held that “[i]n such circumstances, the most
13 appropriate method for calculating reasonable attorneys’ fees is the lodestar method.” *Id.* (citing *Hanlon*,
14 150 F.3d at 1029-30).

15 **VI. APPLYING THE COMMON FUND METHOD BASED ON THE SETTLEMENT’S**
16 **MONETARY COMPONENTS WOULD ACHIEVE AN UNREASONABLE RESULT**

17 If the common fund method were applied here based only on the monetary components of the
18 Settlement (e.g., without valuing the injunctive relief), the Class would have a constructive common
19 fund of \$1,450,000, comprised of the \$550,000 restitution fund and the Injunctive Fee Award of up to
20 \$900,000. By this method, Plaintiffs’ fee request would be 70.3% of the common fund. Applying the
21 “benchmark” of 25% instead, however, Class Counsel’s fee would be just \$362,500, or a negative
22 lodestar of 0.36. The result is unreasonable because the size of the Class’s restitution fund is a function
23 of the size of the case (involving only \$ [REDACTED] in California Nutella sales during the class period),
24 not Class Counsel’s failure to obtain a good result. Accordingly, attorneys’ fees are more reasonably
25 calculated under the lodestar method. As the Honorable Alicemarie Stotler explained:

26 One-way fee shifting statutes encourage litigation in cases that are not likely candidates to
27 produce high-dollar judgments, either because relief sought is non-monetary or because
28 only modest amounts of money are at stake. California’s fee-shifting and private attorney
general statutes incentivize counsel to take cases on behalf of plaintiffs who could not
otherwise afford to vindicate their rights through litigation.

1 *Parkinson*, 2010 U.S. Dist. LEXIS 144107, at *26 (internal quotations and citation omitted). For this
2 reason, both state and federal courts favor the lodestar method in fee-shifting cases even when—
3 especially when—class recoveries are low.

4 The United States Supreme Court and California courts have also rejected the proposition that a
5 lodestar fee must be proportional to the class’s recovery on the grounds that enforcing such a
6 requirement would reflect a fundamental misunderstanding of the policy rationale for fee-shifting. In
7 *City of Riverside v. Rivera*, 477 U.S. 561 (1986), the Supreme Court upheld attorneys’ fees of
8 \$245,456.25 for recovery of \$33,350 in damages, explaining that “[a] rule of proportionality would
9 make it difficult, if not impossible, for individuals with meritorious . . . claims but relatively small
10 potential damages to obtain redress from the courts,” and that such an approach would “seriously
11 undermine Congress’ purpose in enacting [its fee-shifting statute].” *Id.* at 576-78. *See also Graciano*,
12 144 Cal. App. 4th at 164 (favorably analogizing to *City of Riverside* and stating that because the case
13 was brought under “consumer protection statutes involving mandatory fee-shifting provisions, the
14 legislative policies are in favor of Graciano’s recovery of all attorney fees reasonably expended without
15 limiting the fees to a proportion of her actual recovery”); *United Auto. Workers Local 259 Soc. Sec.*
16 *Dep’t. v. Metro Auto Ctr.*, 501 F.3d 283, 295 (3d Cir. 2007) (“When delinquencies are small, the cost of
17 recovery may be disproportionate, and requiring proportionality would, in effect, discourage [plaintiffs]
18 from taking their claims to federal courts.”).

19 The rationale for this is clear. If the recovery far outstripped the fee, a client could easily find a
20 lawyer to take the case on a contingency basis, as such a case has “positive value” that will attract
21 private counsel without fee-shifting. The problem that fee-shifting laws address is one of “negative
22 value,” in which a standard contingency rate of 30%-40% of the client’s recovery may be less than the
23 cost of pursuing it. Many small individual claims class actions like this one fall into this category.
24 Because the recovery in such cases cannot support private lawyering, they present a collective action
25 problem whereby, absent some form of government intervention into the market for fees, the harms at
26 issue will go unaddressed and defendants’ actions will remain unaddressed and undeterred. In sum, the
27 very purpose of fee-shifting is, in large part, to fund cases in which the recoveries are so small that no
28 lawyer would pursue the case otherwise. It is therefore not a condemnation of fee-shifting to note that

the class recovered less than the fee that the lawyers may receive—that is the very rationale for fee-shifting. As the California Court of Appeal explained in *Graciano*:

The legislative policy to allow prevailing plaintiffs reasonable attorney’s fees [in actions under the CLRA] is clear. [The Act] provides remedies for consumers who have been victims of unfair or deceptive business practices. The provision for recovery of attorney’s fees allows consumers to pursue remedies in cases as here, where the compensatory damages are relatively modest. To limit the fee award to an amount less than that reasonably incurred in prosecuting such a case, would impede the legislative purpose underlying section 1780.

144 Cal. App. 4th at 150 (quoting *Hayward v. Ventura Volvo*, 108 Cal. App. 4th 509, 512 (2004)).

VII. THE REQUESTED COSTS ARE FAIR AND REASONABLE

Under Cal. Civ. P. Code § 1033.5(a)(1), (3), (4), and (7), the Court must award costs for court fees; deposition costs for transcribing, recording and travel; service of process fees; and witness fees. In addition, § 1033.5(c) provides discretion to award reimbursement for other costs if they are “reasonably necessary to conduct the litigation, rather than merely convenient or beneficial to its preparation.” *Parkinson*, 2010 U.S. Dist. LEXIS 144107, at *40 (quoting *Science App. Int’l corp. v. Super. Ct.*, 39 Cal. App. 4th 1095, 1103 (1995)). Class Counsel has incurred \$13,473.31 in recoverable costs. Counsel also seeks \$14,030.55 in costs “reasonably necessary to conduct the litigation.” The recoverable and necessary costs are summarized in Appendix 2, below.⁹ Accordingly, the Court should grant Class Counsel’s request for \$27,503.86 in costs.

VIII. THE REQUESTED INCENTIVE AWARDS ARE FAIR AND REASONABLE

Incentive awards “are fairly typical in class action cases,” *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009), and “serve an important function in promoting class action settlements,” *Sheppard v. Consol. Edison Co. of N.Y., Inc.*, 2002 U.S. Dist. LEXIS 16314, at *16 (E.D.N.Y. Aug. 1, 2002). Such awards “are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.” *Rodriguez*, 563 F.3d at 958-59. Whether to authorize an incentive payment to a class representative is a matter within the court’s discretion.

⁹ As discussed above, in addition to the costs requested, Class Counsel incurred thousands of dollars of otherwise reasonable costs for which they do not seek reimbursement because they are reflected in Class Counsel’s rates.

Factors courts consider include:

1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

Van Vracken v. Atlantic Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995). Considering these factors, the requested incentive awards of \$10,000 and \$7,500 for Ms. Hohenberg and Ms. Rude-Barbato, respectively, are fair and reasonable. Similar awards, even greater, have been approved by courts in this Circuit. *See, e.g., Rausch v. Hartford Fin. Servs. Group*, 2007 U.S. Dist. LEXIS 14740 (D. Or. Feb. 26, 2007) (\$10,000 award); *Cook v. Niedert*, 142 F.3d 1004, 1016 (9th Cir. 1998) (affirming \$25,000 award); *Van Vranken*, 901 F. Supp. at 299 (\$50,000 award). The requested awards are easily justified in this case.

A. The Notoriety & Personal Difficulties Encountered by the Class Representative

Incentive awards are particularly appropriate where class representatives have attracted significant media attention and notoriety as a result of the litigation, and experienced personal difficulty as a result. *See Wilson v. Airborne, Inc.*, 2008 U.S. Dist. LEXIS 110411, at *37 (C.D. Cal. Aug. 13, 2008) (granting incentive award based in part on “the media attention [the class representative] endured after announcement of the settlement”).

This case received enormous media attention, and as the first filer, Ms. Hohenberg was the ostensible face of the litigation. Marron Decl. ¶¶ 6-7; Fitzgerald Decl. ¶¶ 18-19; Hohenberg Decl. ¶ 15. Unfortunately, as a result, she was unfairly portrayed in the media and even harassed online. *See* Marron Decl. ¶¶ 6-7 & Ex. 1;¹⁰ Hohenberg Decl. ¶¶ 15-18. In addition, Ms. Hohenberg was subject to harassing phone calls at work, causing her embarrassment. Hohenberg Decl. ¶ 16.

Although not to the same degree, Ms. Rude-Barbato also experienced scrutiny and notoriety as a result of the lawsuit. Rude-Barbato Decl. ¶ 14. To address the criticism, Ms. Rude-Barbato courageously decided to appear on Good Morning America to defend herself and explain to the public that she

¹⁰ The examples attached to the Marron Declaration represent just a tiny fraction of the sordid material online about Ms. Hohenberg. Even a cursory Google search for “Hohenberg AND Nutella” will reveal a shocking amount and level of relentlessly negative and ugly comments, even by legitimate news media, about Ms. Hohenberg, which greatly affected her life during the pendency of this action, especially at the beginning and starting on April 26, when news broke of the Settlement.

1 brought the lawsuit on behalf of thousands of moms, out of a genuine desire for truth in advertising. *Id.*

2 Both Plaintiffs were subject to further embarrassment and discomfort by virtue of being
3 examined during their depositions on sensitive personal matters such as their and their families' food
4 choices. Moreover, years of Plaintiffs' personal purchases were revealed after Ferrero subpoenaed
5 records of their Costco purchasing history. Marron Decl. ¶ 8. The disclosure of such personal
6 information weighs in favor of an incentive award.

7 In sum, the notoriety and extreme amount of unwanted negative attention Plaintiffs received
8 justifies providing Ms. Hohenberg with the requested \$10,000 award, and Ms. Rude-Barbato with the
9 requested \$7,500 reward, for persevering and seeing the suit through notwithstanding.

10 **B. The Amount of Time and Effort Expended by the Class Representative**

11 An incentive award is appropriate where the “class representative [] remain[s] fully involved and
12 expended considerable time and energy during the course of the litigation.” *Razilov v. Nationwide Mut.*
13 *Ins. Co.*, 2006 U.S. Dist. LEXIS 82723, at *12 (D. Or. Nov. 13, 2006). Here, both Plaintiffs have been
14 significantly involved in this action throughout its pendency. This includes, for both Plaintiffs, preparing
15 for deposition and being deposed; reviewing court filings and rulings; reviewing and responding to
16 discovery, including drafting initial interrogatory responses for counsel and searching for and producing
17 documents; actively participating in two settlement conferences with Judge Bencivengo; and having
18 continuous meetings and communications with Class Counsel throughout the litigation. Hohenberg
19 Decl. ¶¶ 3-12; Rude-Barbato Decl. ¶¶ 2-11; Marron Decl. ¶ 8. Consequently, this factor favors the
20 requested incentive award. *See Garner v. State Farm Mut. Auto Ins. Co.*, 2010 U.S. Dist. LEXIS 49477,
21 at *46-47 (N.D. Cal. Apr. 22, 2010) (approving \$20,000 incentive award where plaintiff “made herself
22 available for deposition on two separate occasions . . . ; met with Class Counsel on six separate
23 occasions; attended the full-day Court-ordered appraisal hearing; spoke with Class Counsel and their
24 staff on many occasions; reviewed all major pleadings; and . . . responded to interrogatories and
25 document requests”).

26 **C. Personal Benefit Enjoyed as a Result of the Litigation**

27 Incentive awards are appropriate when a class representative will not benefit beyond ordinary
28 class members. For example, where a class representative's claim makes up “only a tiny fraction of the

1 common fund,” an incentive award is justified. *Van Vracken*, 902 F. Supp. at 299. Here, Plaintiffs have
2 not received any unusual or extraordinary benefit, justifying their requested awards. *See Razilov*, 2006
3 U.S. Dist. LEXIS 82723, at *12 (approving \$10,000 incentive award for representative who’s “only
4 personal benefit . . . from a successful result in this litigation is the . . . entitlement of any class member .
5 . . together with the likelihood that any further [statutory] violations . . . would cease”).

6 **D. Remaining Factors**

7 The other *Van Vracken* factors (such as risk and duration of the litigation) do not particularly
8 inform the incentive award analysis. Neither factor, however, weighs against providing incentive
9 awards. Because of the extreme notoriety and personal hardships Plaintiffs have endured as a result of
10 volunteering for this suit, however, and because of their substantial contribution and significant attention
11 to the case (including to the 49-state settlement as the architects of this lawsuit) and willingness to take
12 their role of protecting the interests of the Class seriously, for example attending both settlement
13 conferences and participating in the negotiations and the decision to accept the Settlement on behalf of
14 the Class, Plaintiffs’ incentive award requests are fair and reasonable, and should be approved.

15 **CONCLUSION**

16 Plaintiffs respectfully request that their motion be granted.

17 DATED: May 25, 2012

Respectfully Submitted,

18 /s/ Jack Fitzgerald

Jack Fitzgerald

19 **THE WESTON FIRM**

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20 JACK FITZGERALD

21 MELANIE PERSINGER

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Class Counsel

APPENDIX 1: CLASS COUNSEL'S LODESTAR

FEE LODESTAR (through May 23, 2012):

<u>Firm and Attorney</u>	<u>Hours</u>	<u>Hourly Rate</u>	<u>Lodestar</u>
Law Offices of Ronald A. Marron, APLC:			
Ronald A. Marron	476.4	\$650	\$309,660
Margarita Salazar	93.0	\$450	\$41,850.00
Maggie Realin	156.3	\$375	\$58,612.50
Skye Resendes	17.0	\$385	\$6,545.00
Law Clerks	56.9	\$225	\$12,802.50
Paralegals	53.8	\$215	\$11,567.00
Subtotal:			\$441,037.00
The Weston Firm:			
Gregory S. Weston	196.3	\$525	\$103,057.50
Jack Fitzgerald	614.7	\$525	\$322,717.50
Courtland Creekmore	4.4	\$500	\$2,200.00
Melanie Persinger	94.6	\$300	\$28,380.00
Paralegals	274.5	\$195	\$53,527.50
Subtotal:			\$509,882.50
Post-Application Hours (Est.)¹¹	100	\$350	\$35,000.00
Subtotal:			\$35,000.00
TOTAL:			\$985,919.50

LITIGATION EXPENSE LODESTAR

Law Offices of Ronald A. Marron	\$18,066.15
Weston Firm	\$9,437.71

TOTAL: \$27,503.86

¹¹ Class Counsel will perform additional work after this application is filed on May 25, minimally including attending the July 9 Final Approval Hearing, reviewing and providing input on Ferrero's final television commercial concepts before they air, and coordinating with Ferrero, New Jersey counsel and the Class Administrator on final claims processing (for example, creating a set of procedures and rules to audit and de-duplicate the claims). Class Counsel may also be required to respond to objections, which could substantially increase the additional time spent. To account for the known additional work and the possibility of more if there are objections, Class Counsel estimates 100 post-application hours, which Class Counsel believes does not significantly overstate additional hours if there are no objections, or understate additional hours if there are objections. Moreover, in an exercise of discretion and in recognition that such work may be performed by various attorneys and staff, Class Counsel value these additional hours at a modest \$350 per hour, representing the approximate average billing rate of all timekeepers (\$334.38).

APPENDIX 2: CLASS COUNSEL'S EXPENSES

Marron Firm Expenses Recoverable Under Cal. Civ. P. Code § 1033.5

Date	Description	Amount
2/1/2011	Filing Fee for <i>Hohenberg</i> Complaint	\$350.00
2/10/2011	Fee for Service of Process of Complaint on Ferrero U.S.A., Inc.	\$30.00
4/14/2011	Transcription of Bernard Kreilmann Deposition (half)	\$357.25
4/12/2011	Fee for non-service of subpoena to Connie Evers	\$55.00
4/13/2011	Fee for Service of Process of deposition subpoena on Connie Evers	\$80.00
4/25/2011	Fee for Service of Process of third party subpoena on Aspen Logistics	\$124.53
4/25/2011	Fee for Service of Process of third party subpoena on Believe Media	\$126.30
4/28/2011	Witness Fee for Connie Evers deposition (originally set for May 25, 2011)	\$43.30
4/28/2011	Fee for Service of Process of subpoena on Isabelle Lambotte	\$145.00
7/25/2011	Airfare for RM travel to Portland, Oregon for Connie Evers deposition	\$436.80
7/25/2011	Lodging in Portland, Oregon for Connie Evers deposition (RM and JF of Weston Firm)	\$392.63
7/25/2011	Car rental in Portland, Oregon for Connie Evers deposition	\$166.85
7/25/2011	Transcription of Connie Evers deposition (half)	\$2,173.85
7/25/2011	Connie Evers deposition videographer (half)	\$708.75
7/26/2011	Parking for Connie Evers deposition	\$10.00
9/1/2011	Fee for Service of Process of deposition subpoena on Chris Montemurro	\$185.00
9/5/2011	Fee for Service of Process of subpoena on Elise Titan, MS&L New York (wrong address)	\$87.50
9/29/2011	Transcript of Athena Hohenberg Deposition (half)	\$621.13

Date	Description	Amount
9/30/2011	Transcript of Laura Rude-Barbato (half)	\$655.73
10/14/2011	Fee for Service of third party document subpoena on Zenithmedia	\$122.50
10/14/2011	Fee for Service of third party document subpoena on Vision Creative Group	\$125.00
10/14/2011	Fee for Service of third party document subpoena on Merkley +Partners	\$105.00
10/14/2011	Fee for Service of third party document subpoena on The Wilson Group	\$105.00
Total:		\$7,207.12

Additional Marron Firm Expenses Reasonably Necessary to Prosecute Action

Date	Description	Amount
3/28/2011	"Good for You!" Nutritional Book & Games by Connie Evers (preparation/exhibit for deposition)	\$22.73
4/25/2011	Fee for Cal Kik Investigations skip trace on Isabelle Lambotte, Princeton, NJ.	\$85.00
5/25/2011	Flat rate charge for case deadline calculations (CompuLaw Deadlines on Demand software)	\$230.00
6/20/2011	Professional Fees to Sterns & Weinroth (New Jersey Local Counsel) for services rendered through May 31, 2011 (half)	\$1,162.85
7/22/2011	FedEx deposition exhibits and copies to Portland hotel (3 bankers' boxes)	\$749.67
7/25/2011	Jar of Nutella for use as exhibit in Connie Evers deposition	\$3.49
7/27/2011	RM lodging in San Francisco (Hotel Whitcomb) for MDL hearing	\$137.53
7/28/2011	RM flight to San Diego from San Francisco after MDL hearing	\$159.40
7/28/2011	Professional Fees to Sterns & Weinroth (New Jersey Local Counsel) for services rendered through June 30, 2011	\$528.30

Date	Description	Amount
9/28/2011	Professional Fees for Sterns & Weinroth (New Jersey Local Counsel) for services rendered through August 31, 2011	\$2,124.75
10/19/2011	Mileage for client transportation to and from ENE	\$18.06
10/24/11	Professional Fees for Sterns & Weinroth (New Jersey Local Counsel) for services rendered through September 30, 2011	\$4,074.16
10/26/2011	Poster-sized copies for Weston Firm of color mechanicals of Nutella print ads produced by third-party (Kinkos)	\$72.99
11/2/2011	RM airfare to West Palm Beach, FL to participate in joint mediation with Hon. Leo S. Papas (Ret.)	\$689.60
11/9/2011	Transcript of Class Certification Hearing	\$327.50
11/18/2011	Professional Fees for Sterns & Weinroth (New Jersey Local Counsel) for services rendered through October 31, 2011	\$445.00
12/14/2011	Professional Fees for Sterns & Weinroth (New Jersey Local Counsel) for services rendered through November 30, 2011	\$28.00
Total:		\$10,859.03

Marron Firm Subtotal: \$18,066.15

Weston Firm Expenses Recoverable Under Cal. Civ. P. Code § 1033.5

Date	Description	Amount
2/4/2011	Filing Fee for <i>Rude-Barbato</i> Complaint	\$350.00
4/13/2011	JF Air travel to New Jersey for Bernard Kreilmann (Ferrero CEO) deposition	\$578.00
4/13/2011	GW Air travel to New Jersey for Bernard Kreilmann (Ferrero CEO) deposition	\$538.80
4/14/2011	Transcription of Bernard Kreilmann Deposition (half)	\$357.25
7/25/2011	JF Airfare to Portland, OR for Connie Evers (Nutella spokesperson) deposition	\$272.70
7/25/2011	Transcription of Connie Evers deposition (half)	\$2,173.85
7/25/2011	Connie Evers deposition videographer (half)	\$708.75

Date	Description	Amount
9/29/2011	Transcript of Athena Hohenberg Deposition (half)	\$621.12
9/30/2011	Transcript of Laura Rude-Barbato Deposition (half)	\$665.72
Total:		\$6,266.19

Additional Weston Firm Expenses Reasonably Necessary to Prosecute Action

Date	Description	Amount
6/16/2011	Flight to San Diego to meet with Scott+Scott (counsel for Glover in NJ action)	\$239.40
6/20/2011	Professional Fees for Stearns & Weinroth (New Jersey Local Counsel) for services rendered through May 31, 2011 (half)	\$1,662.85
7/24/2011	Supplies for Deposition of Connie Evers	\$199.07
7/28/2011	Air travel for GW to MDL hearing in San Francisco	\$148.70
7/28/2011	Parking for MDL hearing in San Francisco	\$9.00
10/17/2011	JF airfare to San Diego for ENE	\$283.40
11/7/2011	JF airfare for trip to San Diego for class certification hearing	\$333.40
11/28/2011	JF travel from Los Angeles to San Diego for Settlement Conference (Amtrak)	\$60.00
11/28/2011	JF Flight home from San Diego after Settlement Conference	\$202.70
11/28/2011	JF Parking at SFO	\$33.00
Total Expenses:		\$3,171.52

Weston Firm Subtotal: \$9,437.71

GRAND TOTAL: \$27,503.86