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 9 UNITED STATES DISTRICT COURT
 10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

11	ATHENA HOHENBERG and LAURA RUDE-	)	CASE NO.: 11 CV 0205 H (CAB)
12	BARBATO, on Behalf of Themselves and All)	
13	Others Similarly Situated,	)	MEMORANDUM OF POINTS AND
		)	AUTHORITIES IN SUPPORT OF
14	Plaintiffs,	)	DEFENDANT FERRERO U.S.A.,
		)	INC.'S <i>EX PARTE</i> MOTION FOR AN
15	v.	)	ORDER POSTPONING DEADLINE
		)	TO RESPOND TO CONSOLIDATED
16	FERRERO U.S.A., INC., a foreign corporation,	)	COMPLAINT AND STAYING
		)	DISCOVERY
17	Defendant.)	
		)	Time: N/A
		)	Date: N/A
18		)	Before: Hon. Marilyn L. Huff
19)	
20)	

21 **INTRODUCTION**

22 By this *ex parte* motion, defendant Ferrero U.S.A., Inc. (“Ferrero”) respectfully requests
 23 that the Court postpone Ferrero’s deadline to respond to the consolidated complaint (due April 6,
 24 2011) and general discovery deadlines until venue issues in this action are resolved. On March
 25 25, 2011, Ferrero filed a motion to transfer this consolidated action to its home state of New
 26 Jersey, where another action raising identical issues is pending in New Jersey federal court (and
 27 another in New Jersey state court). Ferrero’s motion to transfer is scheduled for hearing on May

1 2, 2011. Thus, absent *ex parte* relief, Ferrero will be required to respond to the consolidated
2 complaint and potentially meet a variety of additional discovery deadlines before this Court
3 decides whether to transfer the action to the federal court in New Jersey, and before it is apparent
4 which court should decide motions to dismiss and other disputes between the parties.
5 Accordingly, Ferrero hereby seeks an order postponing its deadline to respond to the
6 consolidated complaint and general discovery deadlines until after the motion to transfer is
7 decided.

8 BACKGROUND FACTS

9 A. The California and New Jersey Actions Pending Against Ferrero

10 On March 22, 2010, the Court entered an order granting Plaintiffs' motion to consolidate
11 the two purported class actions against Ferrero before this Court, namely (1) *Hohenberg v.*
12 *Ferrero U.S.A., Inc.*, Case No. 11-cv-0205 H CAB, and (2) *Rude-Barbato v. Ferrero U.S.A.,*
13 *Inc.*, Case No. 11-cv-00249 H CAB ("March 22 Order"). [Dkt. No. 11]. The March 22 Order
14 also (1) appointed the law offices of Ronald A. Marron and the Weston Firm interim lead co-
15 counsel, and (2) ordered Plaintiffs to file a consolidated complaint within 30 days. *Id.* at 4.

16 Plaintiffs served their consolidated, amended complaint on March 23, 2011. Under
17 Federal Rule Civil Procedure 15(a)(3), Ferrero's response to the consolidated complaint will be
18 due on April 6, 2011, *i.e.*, within 14 days of service.

19 New Jersey is Ferrero U.S.A.'s home state, and there are two other actions currently
20 pending in New Jersey that raise issues against Ferrero identical to those raised in the
21 consolidated action before this Court.¹ Thus, on March 25, 2011, Ferrero filed a motion to
22

23 ¹ The first is a purported nationwide class action filed in New Jersey federal district court,
24 and titled *Glover v. Ferrero U.S.A., Inc.*, Case No. 11-cv-01086 FLW DEA (filed February 27,
25 2011). The second is filed in New Jersey state court, and titled *Metcalf v. Ferrero U.S.A., Inc.*,
26 Case No. SOM-L 367-11 (Super. Ct. Somerset County, filed February 28, 2011). Ferrero seeks
27 to consolidate the California proceedings with the New Jersey federal action in New Jersey
28 federal court.

1 transfer this consolidated California action to New Jersey federal court. If the Court decides that
2 transfer of the consolidated action is not warranted, Ferrero will petition the Judicial Panel on
3 Multidistrict Litigation (“MDL Panel”) to consolidate pretrial proceedings among the courts.

4 **B. The Status of Discovery In the California Proceedings**

5 Since at least March 14, 2011, Ferrero has advised Plaintiffs in the California
6 consolidated action of its intention to try to consolidate all the federal actions pending against it
7 in New Jersey. Ferrero has in addition sought an agreement with Plaintiffs to coordinate
8 deadlines, so that this Court, the District of New Jersey and, if necessary, the MDL Panel could
9 decide venue, consolidation and lead plaintiff issues before Ferrero would be required to respond
10 to the various complaints and undertake general discovery obligations in each of the actions.
11 Plaintiffs have resisted such coordination and have instead sought to press their action forward
12 rapidly, in an apparent effort to try to avoid transfer to New Jersey.

13 On March 28, 2011, Ferrero’s counsel met and conferred with Plaintiffs’ counsel
14 regarding a variety of scheduling and discovery issues. Ferrero agreed that it would provide
15 responses to Plaintiffs’ recently-served discovery requests specifically related to venue issues,
16 which include a request for a Rule 30(b)(6) deposition, a set of document requests, and a set of
17 interrogatories. Ferrero also agreed that it would seek to produce documents and provide the
18 witness as quickly as possible, to facilitate Plaintiffs’ opposition to the motion to transfer and the
19 Court’s resolution of transfer issues. However, Plaintiffs refused to grant Ferrero an extension to
20 respond to the consolidated complaint or to postpone general discovery deadlines.² See
21 Declaration of Colleen Bal, ¶¶3-4. After reconsidering the issue, Plaintiffs agreed the next day
22 to grant Ferrero a 3-week extension to respond to the consolidated complaint, but not to the
23 extension requested by Ferrero. Plaintiffs also stated that they could agree not to serve additional

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25 ² Plaintiffs did give Defendants an initial 30-day extension to respond to the original
26 complaints in the *Hohenberg* and *Rude-Barbato* actions, but that was before Ferrero had decided,
27 and had advised Plaintiffs of its decision, to seek transfer to New Jersey federal court.

1 discovery until after the Court ruled on Ferrero's motion to transfer, *but only if* Ferrero refrained
2 from filing this *ex parte* motion. *Id.*, ¶5.

3 Accordingly, without an order from the Court:

- 4 • Ferrero's response to the consolidated California complaint will be due on or
5 before April 6, 2011;
- 6 • Ferrero's motion to transfer will be heard on May 2, 2011, the earliest date
7 available from the court clerk consistent with the Twenty-Eight Day Rule (Civ.
8 L.R. 7.1c); and
- 9 • Ferrero may be required to respond to additional, non-venue related discovery
10 propounded by Plaintiffs.

11 **ARGUMENT**

12 By way of this motion, Ferrero respectfully requests that the Court postpone certain
13 deadlines, to give this Court the time necessary to determine the appropriate forum for this
14 litigation. In making this request, Ferrero is mindful of the Court's March 22 Order granting the
15 California Plaintiffs' motion to file their consolidated amended complaint and ordering the
16 deadline to do so, but respectfully submits that the pendency of multi-district litigation over the
17 same subject matter weighs in favor of a modification to the current schedule that would provide
18 the courts sufficient time to resolve these issues.

19 Whether or not the Court ultimately agrees to transfer the current actions to New Jersey,
20 Ferrero respectfully submits that it should not be required to press forward with litigation in the
21 interim, including filing responses to the competing complaints and engaging in general (*i.e.*,
22 non-venue related), discovery with multiple plaintiffs. While Plaintiffs have offered to give
23 Ferrero a 3-week extension to April 27, 2011 to respond to the consolidated complaint, Ferrero
24 would still be required to file its motion to dismiss with this Court before the May 2, 2011

1 hearing on Ferrero's motion to transfer.³ In Ferrero's view, that sequencing is not an optimal use
2 of resources.

3 Once the transfer motion is decided, the Court and the parties will be in a better position
4 to evaluate, among other things, which actions will be consolidated with one another, what the
5 roles of the various plaintiffs' counsel will be, and which Court will decide any motions to
6 dismiss or other disputes between the parties. Thus, Ferrero submits that certain aspects of the
7 cases should be postponed while the Court resolves the threshold issue of transfer. Accordingly,
8 Ferrero respectfully requests that the Court issue an order:

- 9 1. That Ferrero U.S.A.'s response to the consolidated, amended complaint be due
10 thirty (30) days after the Court's order on Ferrero U.S.A.'s motion to transfer,
11 and
- 12 2. That all Rule 26 requirements and discovery be postponed until after the
13 Court's ruling on Ferrero U.S.A.'s motions to transfer, with the exception of the
14 venue discovery already propounded by Plaintiffs in connection with Ferrero's
15 Motion to Transfer.

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17 In the alternative, if the Court is not inclined to base Ferrero's deadline to respond to the
18 consolidated complaint on the Court's resolution of the motion to transfer, Ferrero respectfully
19 requests that the Court extend its current April 6, 2011 deadline to respond to the consolidated
20 complaint to April 27, 2011, the date proposed by Plaintiffs.

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Dated: March 29, 2011

Respectfully submitted,

ILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: /s/ Colleen Bal

Colleen Bal

Attorneys for Defendant Ferrero U.S.A., Inc.