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 7 FERRERO U.S.A, INC.

8 UNITED STATES DISTRICT COURT
 9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
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| 11 | ATHENA HOHENBERG and |) | CASE NO.: 11 CV 0205 (H CAB) |
| 12 | LAURA RUDE-BARBATO, individually and |) | REPLY TO PLAINTIFF'S |
| 13 | on behalf of all others similarly situated, |) | OPPOSITION TO DEFENDANT |
| 14 | Plaintiffs, |) | FERRERO U.S.A, INC.'S <i>EX PARTE</i> |
| 15 | v. |) | MOTION FOR AN ORDER |
| 16 | FERRERO U.S.A., INC., a foreign corporation, |) | POSTPONING DEADLINE TO |
| 17 | Defendant. |) | RESPOND TO CONSOLIDATED |
| 18 | |) | COMPLAINT AND STAYING |
| 19 | |) | DISCOVERY |
| 20 | |) | Time: N/A |
| 21 | |) | Date: N/A |
| 22 | |) | Before: Hon. Marilyn L. Huff |
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1 Ferrero would have preferred not to trouble the Court with a reply submission on its *ex*
2 *parte* motion, but feels compelled to do so here in light of various mischaracterizations and
3 insinuations made in plaintiffs' opposition papers. As a threshold matter, plaintiffs suggest
4 Ferrero's response is due on April 12 pursuant to stipulation; in fact, it is currently due on April
5 6 pursuant to Federal Rule of Civil Procedure 15(a)(1)(3).

6 More importantly, plaintiffs suggest that Ferrero "failed to disclose" that its response to
7 the complaint in the District of New Jersey is currently due on April 25, 2011 therefore
8 "revealing Ferrero's true interest is not to delay litigation while the venue is decided generally,
9 but to delay *this action* before *this Court*." Opp. at 6. The implication that Ferrero has not been
10 candid with this Court is neither true nor well-taken. In fact, Ferrero requested the exact same
11 extension – *i.e.*, that responses be postponed pending resolution of its transfer motion – from
12 counsel in the *Glover* action. Although plaintiff in that action agreed to an initial 30-day
13 extension, the parties stipulated (and the consent order expressly states) "that Defendant's time to
14 respond to Plaintiff's Complaint is extended 30 days to, and including, April 25, 2011, without
15 prejudice to the parties' ability to seek a further extension of this date to facilitate the
16 consolidation of the aforementioned [California] actions and a single response thereto."
17 Fitzgerald Decl., Ex. A (emphasis added). Ferrero certainly intends to seek an additional
18 extension on that date to accommodate an orderly progression of the litigation.

19 Second, plaintiffs mischaracterize the relief sought in Ferrero's *ex parte* motion as "an
20 indefinite stay." That is incorrect. The relief sought is tethered to the Court's decision on a
21 motion to transfer. *See* Motion at 4 ("Ferrero respectfully requests that the Court issue an order:
22 1. That Ferrero U.S.A.'s response to the consolidated, amended complaint be due thirty (30) days
23 after the Court's order on Ferrero U.S.A.'s motion to transfer"). Moreover, Ferrero had noticed
24 the hearing on its motion for transfer for May 2 – the first available date – and is accelerating its
25 venue-related discovery responses to facilitate prompt resolution of that issue.

26 Third, plaintiffs imply that Ferrero had already decided to seek transfer when stipulating
27 to the first extension in this case. Opp. at 7 ("Ferrero was well aware of these circumstances
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1 when it agreed on February 23 to respond to the Master Consolidated Complaint within 20 days
2 after its filing”). Of course, plaintiffs are well aware that the parallel action in New Jersey was
3 not filed until February 27, 2011 and the pendency of a parallel action in that forum is plainly
4 one of the most important factors supporting transfer.

5 In addition to unfairly attacking Ferrero’s motives for seeking an extension, plaintiffs
6 argue that the courts – both this Court and the District of New Jersey – should “first resolve the
7 pleadings before deciding venue issues.” Opp. at 11. Ferrero understands that plaintiffs are
8 trying to push forward their case in order to bolster an argument that the case should stay in this
9 district, but that is no reason to require duplicative briefing in two courts with possibly
10 conflicting rulings. Moreover, there is no reason to press forward with merits discovery given
11 that Ferrero has agreed to reasonable discovery pertaining to the threshold issue of venue. Thus,
12 Ferrero respectfully submits that the only question for the Court on this *ex parte* motion is
13 whether certain activity – such as resolving the legal sufficiency of the claims in “copycat”
14 complaints (Opp. at 1) and merits discovery – can and should be temporarily postponed to allow
15 the Court to resolve threshold issue of forum.

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17 Dated: March 31, 2011

Respectfully submitted,

18 WILSON SONSINI GOODRICH & ROSATI
19 Professional Corporation

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21 By: /s/Colleen Bal
Colleen Bal

22 Attorneys for Defendant Ferrero U.S.A., Inc.
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1 **CERTIFICATE OF SERVICE**

2 I am employed in the County of Santa Clara, State of California. I am over the age of
3 eighteen years and not a party to the within action; my business address is 650 Page Mill Road,
4 Palo Alto, California 94104-1050.

5 On March 31, 2011, I served the following document on the interested parties in this
6 action: **REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT FERRERO U.S.A,**
7 **INC.'S EX PARTE MOTION FOR AN ORDER POSTPONING DEADLINE TO**
8 **RESPOND TO CONSOLIDATED COMPLAINT AND STAYING DISCOVERY** by
9 causing the above document to be served via the Court's Electronic Filing System on the
10 following registered parties shown on the court's service list by posting such document
11 electronically to the ECF website of the United States District Court for the Southern District of
12 California:

13
14 Ronald A. Marron, Esq.
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17 Gregory S. Weston
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The Weston Firm
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San Diego, CA 92109

1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct.

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4 Dated: March 31, 2011

Respectfully submitted,

5 WILSON SONSINI GOODRICH & ROSATI
6 Professional Corporation

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8 By: /s/ Colleen Bal
Colleen Bal

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