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

**IN RE FERRERO LITIGATION**

ATHENA HOHENBERG & LAURA RUDE-  
BARBATO, individually and on behalf of all  
others similarly situated,

Plaintiffs,

v.

FERRERO U.S.A, INC., a foreign corporation,

Defendant.

CASE NO. 3:11-CV-00205-H-CAB

**PLAINTIFFS’ OPPOSITION TO  
FERRERO’S MOTION FOR  
TRANSFER OF VENUE**

Judge: The Honorable Marilyn L. Huff

Date: May 16, 2011

Time: 10:30 a.m.

Location: Courtroom 13

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**INTRODUCTION**

Athena Hohenberg and Laura Rude-Barbato, Plaintiffs in this consolidated action, respectfully submit this memorandum in opposition to Ferrero’s motion for transfer of venue to the District of New Jersey (Dkt. No. 19). In support of their Opposition, Plaintiffs also rely on the concurrently-filed Declarations of Athena Hohenberg, Laura Rude-Barbato, and Jack Fitzgerald (and exhibits thereto<sup>1</sup>), and the Master Consolidated Complaint (Dkt. No. 14, the “MCC”).

As the proponent of transfer, Ferrero had the burden of showing specific facts and information justifying disturbing Plaintiffs’ choice of forum. Ferrero’s effort falls woefully short, asserting only conclusory arguments that venue should “plainly” be in New Jersey (Mot. at 8:12) because, “[p]lainly, the key witnesses” are there (*id.* at 9:15-16). Ferrero’s motion should therefore be denied even without regard to Plaintiffs’ strong showing below that the applicable factors weigh against transfer.

**RELEVANT FACTS**

**A. Plaintiffs Have Substantial Contacts with this District**

Plaintiffs brought this action in this District because they live and work in this District, and because they purchased Nutella in this District in reliance on Ferrero’s deceptive labeling and advertising, which Ferrero disseminated intending for them to see in this District, and which they did see in this District.

Plaintiff Athena Hohenberg is a resident of San Diego County and has lived and worked in San Diego since 1996. She currently works in Imperial Beach, California. (MCC ¶ 10; Hohenberg Dec. ¶¶ 2, 4.) Ms. Hohenberg is a single mother of a three-year-old daughter, and also lives with an 18-year-old step daughter. She purchased Nutella from the San Diego Navy Commissary, and viewed Ferrero’s Nutella television commercials in San Diego. (MCC ¶ 26; Hohenberg Dec. ¶¶ 3, 5.)

Plaintiff Laura Rude-Barbato is a resident of San Diego County, and has lived and worked in San Diego her entire adult life. She also currently works in Imperial Beach, California. (MCC ¶ 11; Rude-Barbato Dec. ¶¶ 1-2, 4.) Ms. Rude-Barbato has three children, aged 16, 13 and 7. She purchased

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<sup>1</sup> Pursuant to the Protective Order entered in this action (Dkt. No. 32), Plaintiffs have concurrently filed an unopposed *ex parte* motion to seal exhibits Ferrero designated “Confidential,” including excerpts from the April 14, 2011 Deposition Transcript of Ferrero’s CEO, Bernard Kreilmann (“Kreilmann Dep. Tr.”), attached to the Fitzgerald Dec. as Exhibit B.

1 Nutella in a Vons grocery store and a Costco, both in San Diego, and viewed Ferrero’s Nutella  
 2 television commercials in San Diego. (MCC ¶ 30; Rude-Barbato Dec. ¶¶ 3, 5.)

3 **B. Ferrero Has Substantial Contacts with California and this District**

4 Ferrero has been registered to do business in California since 1980 (Fitzgerald Dec. Ex. A)  
 5 and, as discussed below, has substantial, ongoing contact with California.

6 1. Ferrero Sells Significant Amounts of Nutella in California

7 During the period of January 1, 2007 through February 2011,<sup>2</sup> Ferrero had net sales of Nutella  
 8 of [REDACTED]. (PX-5, Fitzgerald Dec. Ex. C.) Ferrero’s documents show California is probably its  
 9 largest market for Nutella, while New Jersey is much smaller, even in relation to population.<sup>3</sup>

10 a. *Ferrero’s “Food” Sales*

11 [REDACTED]  
 12 (Kleinmann Dep. Tr. 90:12-15.) Ferrero’s documents (PX-6, Fitzgerald Dec. Ex. D) show California  
 13 sales of Nutella from 2007 through March 2011 (for both 13oz and 26.5oz jars) as follows:

	52 weeks ending 12/07	52 weeks ending 12/08	52 weeks ending 12/09	52 weeks ending 12/10	52 weeks ending 3/20/11
16 US Sales	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
17 CA Sales	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
18 CA Sales %	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

19  
 20 While Ferrero was unable to provide similar data for New Jersey or other states, its CEO speculated  
 21 only that [REDACTED] might have a greater percentage of sales. (Kleinmann Dep. Tr. 94:19-95:13.)

22 b. *Ferrero’s “Club” Sales*

23 Ferrero produced sales data from two “club” sources—Costco and Sam’s Club. (Fitzgerald  
 24 Dec. Ex. E.) The data show these major retailers sell between [REDACTED] of their Nutella in  
 25 California:

26 <sup>2</sup> Plaintiffs, however, allege a class period beginning January 1, 2000. (See MCC ¶ 119.)

27 <sup>3</sup> As a baseline, the 2010 census data show California currently has about 12% of the nation’s  
 28 population while New Jersey has about 3%. See 2010 Census Brief, at 2, Table 1, available at  
<http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>.

<b>Costco 26.5oz Nutella 2-Pack Unit Sales</b>	<b>52wks Ending 4.2.10</b>	<b>52wks Ending 4.1.11</b>
US Sales	██████████	██████████
CA Sales	██████████	██████████
CA Sales %	██████████	██████████

<b>Sam’s Club 13oz 3-Pack Unit Sales</b>	<b>52wks Ending 4.2.10</b>	<b>52wks Ending 4.1.11</b>
US Sales	██████████	██████████
CA Sales	██████████	██████████
CA Sales %	██████████	██████████

*c. Ferrero’s “Mass” Sales*

Ferrero produced sales data from two “mass” sources—WalMart and Target. (Fitzgerald Dec. Ex. E.) While WalMart’s small presence in California meant it only sold between ██████████ of its Nutella in California during the past two years (while selling only about ██████ in New Jersey), California accounts for about ██████ of Target’s overall sales:

	<b>Target 13oz Unit Sales 52wks Ending 4.2.10</b>	<b>Target 26.5oz Unit Sales 48wks Ending 4.1.11</b>
US Sales	██████████	██████████
CA Sales	██████████	██████████
NJ Sales	██████████	██████████
CA Sales %	██████████	██████████
NJ Sales %	██████████	██████████

*d. Ferrero’s Distribution to California Customers*

Ferrero’s documents show that from January 2007 to the present, ██████ of its Nutella shipments went to California customers. (See Fitzgerald Dec. ¶¶ 7-8.)

2. Ferrero’s Nutella Spokesperson, Connie Evers, Throws “Nutella Parties” in California

As detailed in the Master Consolidated Complaint (MCC ¶¶ 82-88), Connie Evers is a registered dietitian, author of a book, now in its third edition, titled “How to Talk Nutrition to Kids,” and purported children’s nutrition expert who Ferrero pays to render opinions supporting its false and misleading advertising campaign. (See Kreilmann Dep. Tr. 62:4-5.) It is Evers’ purported nutritional expertise and advice which underlies the entire “Nutella is a healthy breakfast for kids” campaign that Plaintiffs challenge. This past March, Nutella’s nutritional spokesperson was in Orange County telling California mothers to feed Nutella to their children for breakfast. See <http://www.feltstories.com/2011/03/nutella-party-with-registered-dietitian.html>.<sup>4</sup>

3. Ferrero Disseminates False & Misleading Advertising in California

Plaintiffs allege Ferrero’s false and misleading advertising occurs on the labels of Nutella, in television commercials, on the web, and in print advertising. All forms of those media are intentionally disseminated by Ferrero in California and this District.

4. Ferrero Works with California Vendors & Distributors

Plaintiffs allege three television commercials for Nutella are false and misleading (MCC ¶¶ 90-96). [REDACTED] (Kreilmann Dep. Tr. 33:13-23.) Ferrero also engages [REDACTED] in Irvine California, to provide [REDACTED] services for the sale of Nutella across California (*id.* 24:15-26:18); Aspen Logistics, in Ontario California (with a location in Temecula), to provide third-party logistics services (and previously OHL, in Riverside California, for the same function, *id.* 14:22-17:15); and [REDACTED], an [REDACTED] with offices in Los Angeles (*id.* 61:25-62:19, 63:23-64:12, 69:17-23, 71:18-24.)

5. Ferrero Sends Employees Into California to Sell Nutella

Ferrero has a 15-person sales force in California (Kreilmann Dec. ¶ 4, Dkt. No. 19-2).

**C. Ferrero’s Sale of Nutella in the United States is a Multinational Effort**

While Ferrero’s headquarters are in Somerset, New Jersey, the sale of Nutella in the United States involves entities scattered all over the world. For example, the Nutella sold in the United States is manufactured by Ferrero Canada, Ltd., which is headquartered in Toronto, Ontario. Nutella is

<sup>4</sup> See also video of the same, at <http://www.youtube.com/watch?v=gocrTJN0DPw>.

1 actually produced in Brantford, Ontario. (Kreilmann Dec. ¶ 5.) Facilities there include a factory with a  
2 production line, temporary warehousing, and offices related to the management of the factory.  
3 Toronto facilities include administration, marketing, and sales. (Kreilmann Dep. Tr. 13:14-14:7.)  
4 Ferrero U.S.A. has a contract of supply with Ferrero Canada (*id.* 13:10-14), and Ferrero Canada’s  
5 employees were involved in making the decision to [REDACTED]  
6 [REDACTED] (*see id.* 18:12-21:5, 51:10-53:17, 85:2-86:6).

7 Ferrero uses 3PLs<sup>5</sup> to move product from Brantford to its retail customers in the United States,  
8 including Aspen Warehouse, which has two locations that appear to be within 100 miles of this  
9 District.<sup>6</sup> Before using Aspen, Ferrero used OHL, which has a location that appears to be within 100  
10 miles of this District.<sup>7</sup> Ferrero uses a similar outfit in Illinois, and one in New Jersey. Ferrero also  
11 relies on about [REDACTED] scattered across the country, including [REDACTED] in California. (Kreilmann Dep.  
12 Tr. 24:15-26:18, 126:20-127:12.)

13 Ferrero also relies heavily upon its relationship with its parent, Ferrero International, in  
14 making business decisions affecting the sale of Nutella in the United States. As Ferrero’s CEO  
15 testified, [REDACTED]  
16 [REDACTED] (Kreilmann Dep. Tr. 131:20-  
17 24.) This includes a [REDACTED]  
18 [REDACTED] (*Id.* 132:5-8.) As with  
19 Ferrero Canada, Ferrero International was involved in the decision to [REDACTED]  
20 (*Id.* 132:15-133:18.)

21 //  
22 //  
23 //

24 \_\_\_\_\_  
25 <sup>5</sup> Common abbreviation for third-party logistics provider, whose typical services include  
26 transportation, warehousing, distribution, customs brokerage, freight forwarding, trade consulting  
27 services, etc. Ferrero uses 3PLs primarily for warehousing and transportation. (*See* Kreilmann Dep.  
Tr. 15:19-16:15.)

28 <sup>6</sup> 1901 California Street, Redlands, CA 92374 and 43385 Business Park Drive, Temecula, CA 92590.

<sup>7</sup> 1580 Eastridge Avenue, Riverside, CA 92507.

ARGUMENT

**A. Legal Standard Governing Motions to Transfer Venue Under 28 U.S.C. § 1404(a)**

A district court “may transfer any civil action to any other district or division where it might have been brought” “for the convenience of parties and witnesses” and “in the interest of justice.”<sup>8</sup> 28 U.S.C. § 1404(a). Under this section, the district court has discretion to adjudicate motions for transfer “according to an ‘individualized, case-by-case consideration of convenience and fairness.’” *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000) (quoting *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)). “The Court must consider public factors relating to ‘the interest of justice’ and private factors relating to ‘the convenience of the parties and witnesses.’” *Shultz v. Hyatt Vacation Mktg. Corp.*, 2011 U.S. Dist. LEXIS 24692, at \*6 (N.D. Cal. Feb. 28, 2011) (citing *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986)). *See generally Schott v. Ivy Asset Mgmt. Corp.*, 2010 U.S. Dist. LEXIS 113674, at \*9 (N.D. Cal. Oct. 19, 2010) (

Private factors generally concern the relative impact of the venue on the private parties participating in the litigation, their access to evidence, the availability of compulsory process, “and all other practical problems that make trial of a case easy, expeditious and inexpensive.” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). Public factors concern relative institutional advantages, burdens on the public, and the general interest in having disputes adjudicated where there is a genuine interest in the controversy.)

Such factors may include (1) the location where the relevant agreements were negotiated and executed,<sup>9</sup> (2) the state that is most familiar with the governing law, (3) the plaintiff’s choice of forum, (4) the respective parties’ contacts with the forum, (5) the contacts relating to the plaintiff’s cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses (8) the ease of access to sources of proof, and (9) the forum state’s relevant public policy. *See Jones*, 211 F.3d at 498-99. Other factors California courts have considered in this analysis,<sup>10</sup> and which are relevant here,

<sup>8</sup> Plaintiffs do not dispute this action could have been brought in the District of New Jersey.

<sup>9</sup> Because no agreements are at issue, this factor is neutral.

<sup>10</sup> “The court has broad discretion to address some of the[ *Jones* factors] or other factors based on the particular facts of each case.” *Johansson v. Cent. Garden & Pet Co.*, 2010 U.S. Dist. LEXIS 130449, at \*6 (N.D. Cal. Dec. 2, 2010) (citing *Bibo v. Federal Express, Inc.*, 2007 U.S. Dist. LEXIS 78388 (N.D. Cal. Oct. 10, 2007)).

1 include (10) the relative court congestion and time of trial in each forum,<sup>11</sup> and (11) related pending  
 2 litigation.<sup>12</sup> “No single factor is dispositive and a district court has broad discretion to adjudicate  
 3 motions to transfer on a case-by-case basis.” *Gatdula v. CRST Int’l, Inc.*, 2011 U.S. Dist. LEXIS  
 4 13706, at \*8 (E.D. Cal. Feb. 8, 2011) (citing *Ctr. for Biological Diversity v. Kempthorne*, 2008 U.S.  
 5 Dist. LEXIS 84978 (N.D. Cal. Oct. 10, 2008), in turn citing *Stewart*, 487 U.S. at 29; *Sparling v.*  
 6 *Hoffman Constr. Co.*, 864 F.2d 635, 639 (9th Cir. 1988)).

7 As the moving party, Ferrero carried the burden of showing that transfer is warranted.  
 8 *Commodities Futures Trading Comm’n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979); *see also Sequel*  
 9 *Techs., Inc. v. Stern*, 2011 U.S. Dist. LEXIS 37007, at \*8 (S.D. Cal. Apr. 4, 2011) (citation omitted)  
 10 (“The moving party bears the burden of establishing these factors weigh in favor of transfer.”).

11 “The general rule is that the plaintiff’s choice of forum is to be given substantial weight.”  
 12 *Ansel Adams Publ’g Rights Trust v. PRS Media Partners, LLC*, 2010 U.S. Dist. LEXIS 126791, at \*6  
 13 (N.D. Cal. Dec. 1, 2010) (citation omitted). “The defendant must make a strong showing of  
 14 inconvenience to warrant upsetting the plaintiff’s choice of forum.” *Decker*, 805 F.2d at 843; *see also*  
 15 *Shultz*, 2011 U.S. Dist. LEXIS 24692, at \*8 (citations omitted) (“Generally, the plaintiff’s choice of  
 16 forum is treated with great deference, and only significant inconvenience or unfairness will justify  
 17 transfer.”); *Sec. Investor Protection Corp. v. Vigman*, 764 F.2d 1309, 1317 (9th Cir. 1995) (“[U]nless  
 18 the balance of the factors is strongly in favor of the defendants, the plaintiff’s choice of forum should  
 19 rarely be disturbed.”); *accord Getz v. Boeing Co.*, 547 F. Supp. 2d 1080, 1086 (N.D. Cal. 2008) (even  
 20 where “Plaintiffs’ choice of forum merits only minimal deference,” denying transfer where defendant  
 21 “fail[ed] to meet its burden of establishing that the balance of inconveniences weighs heavily in favor  
 22 of transfer to” another district).

23 While paying lip service to the *Jones* factors (Mot. at 6), Ferrero divides its argument into only  
 24 two subsections: “Interest of Justice” (*id.* at 6-8) and “Convenience of Parties and Witnesses” (*id.* at 8-  
 25 10). For its “Interest of Justice” argument, Ferrero argues only that (1) the pending *Glover* action, and

26 <sup>11</sup> *See Haley v. Cohen & Steers Capital Mgmt.*, 2011 U.S. Dist. LEXIS 24849, at \*2 (N.D. Cal. Feb.  
 27 24, 2011) (citation omitted); *Clark v. Sprint Spectrum L.P.*, 2010 U.S. Dist. LEXIS 136510, at \*6  
 (N.D. Cal. Dec. 15, 2010) (citing *Williams v. Bowman*, 157 F. Supp. 2d 1103, 1106 (N.D. Cal. 2001)).

28 <sup>12</sup> *See A.J. Indus. v. U.S. Dist. Ct.*, 503 F.2d 384 (9th Cir. 1974).

1 (2) New Jersey’s supposedly greater interest weigh in favor of transfer. (Mot. at 6-7.) For its  
 2 “Convenience of Parties and Witness” argument, Ferrero asserts only that (1) plaintiff’s choice of  
 3 forum is entitled to little deference because this is a class action and this district supposedly has little  
 4 connection to the operative facts, (2) relevant employees and third parties supposedly reside in New  
 5 Jersey, and (3) the availability of compulsory process to compel attendance of unwilling non-party  
 6 witnesses located in New Jersey and New York (*i.e.*, within the New Jersey court’s “100 mile  
 7 bubble”) supposedly justifies transfer. (Mot. at 8-10.) Ferrero’s arguments are wrong.

8 **B. The Private Factors Weigh Against Transfer**

9 1. Plaintiffs’ Choice of Forum

10 While Ferrero is correct that the plaintiff choice of forum in putative class actions is generally  
 11 given less weight than in other contexts (Mot. at 8), “affording less deference to representative  
 12 plaintiffs does not mean they are deprived of all deference in their choice of forum,” and “that choice  
 13 should nonetheless be honored unless defendant[] make[s] a *convincing showing* that venue should be  
 14 changed.” *In re Geopharma, Inc.*, 2005 U.S. Dist. LEXIS 8885, at \*2-5 (S.D.N.Y. May 11, 2005)  
 15 (emphasis added, citation and internal quotations omitted); *accord Bibo*, 2007 U.S. Dist. LEXIS  
 16 78388, at \*6 (“Plaintiffs’ choice of forum remains significant in a class action where it is preferable to  
 17 other forums in administering the action and protecting the class.”).

18 Moreover, “in a class action, ‘[i]n judging the weight to be accorded [plaintiff’s] choice of  
 19 forum, consideration must be given to the extent of both [plaintiff’s] and the [defendant’s] contacts  
 20 with the forum, including those relating to [plaintiff’s] cause of action . . . .’” *Rolling v. E\*Trade Sec.,*  
 21 *LLC*, 2010 U.S. Dist. LEXIS 123714, at \*9 (N.D. Cal. Nov. 22, 2010) (alterations in original)  
 22 (quoting *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987)); *accord Ctr. for Biological Diversity v.*  
 23 *Lubchenco*, 2009 U.S. Dist. LEXIS 119794, at \*13 (N.D. Cal. Nov. 30, 2009) (“[D]istrict court  
 24 opinions have . . . stated the standard in the disjunctive: ‘The degree to which courts defer to the  
 25 plaintiff’s chosen venue is substantially reduced where the plaintiff’s venue choice is not its residence  
 26 or where the forum chosen lacks a significant connection to the activities alleged in the complaint.’”  
 27 (quoting *Fabus Corp. v. Asiana Express Corp.*, 2001 U.S. Dist. LEXIS 2568, at \*4 (N.D. Cal. Mar. 5,  
 28 2001)); *Bibo*, 2007 U.S. Dist. LEXIS 78388, at \*6 (“The plaintiff’s choice of forum is given less

1 weight where the plaintiff does not reside in the selected forum and the forum has no interest in the  
 2 alleged unlawful activity. These exceptions are not applicable here because the named plaintiffs reside  
 3 in this district, and the court has a clear interest in protecting such residents against unlawful . . .  
 4 practices.”).

5 *a. The Parties’ Contacts with Forum*

6 As demonstrated above, both Plaintiffs and Ferrero have extensive contacts with this District.  
 7 This factor therefore affords Plaintiffs’ choice of forum deference and so weighs against transfer.

8 Moreover, because “the reduced weight on plaintiff’s choice of forum in class actions serves  
 9 as a guard against the dangers of forum shopping,” *Roling*, 2010 U.S. Dist. LEXIS 123714, at \*9,  
 10 where, as here, representative plaintiffs reside in their chosen forum and were subject to Ferrero’s  
 11 unlawful conduct in this District, their choice is entitled to deference. *See id.* at \*10 (In putative class  
 12 action, “[b]ecause there is no evidence that plaintiffs engaged in forum shopping and both plaintiffs  
 13 and defendant have significant contacts with the Northern District of California, plaintiffs’ choice of  
 14 forum carries *significant weight*.” (emphasis added)); *see also Haley*, 2011 U.S. Dist. LEXIS 24849,  
 15 at \*2 (“As plaintiff is a resident of this forum, her decision to file suit here is accorded substantial  
 16 weight . . . .”); *Kemphorne*, 2008 U.S. Dist. LEXIS 84978, at \*9 (citation omitted) (“[A] plaintiff’s  
 17 choice of forum is ordinarily given significant weight . . . . This is especially true when the plaintiff  
 18 resides in the forum . . . .”); *Schott*, 2010 U.S. Dist. LEXIS 113674, at \*10-12 (affording plaintiff’s  
 19 choice of forum “substantial weight” where plaintiff lived and worked in California, had his office and  
 20 home located in the District, and where many of the alleged interactions between him and defendant  
 21 occurred in California); *Parrish v. NFL Players Inc.*, 2007 U.S. Dist. LEXIS 43732, at \*16-17 (N.D.  
 22 Cal. June 4, 2007) (because representative plaintiffs would “bear a great deal of responsibility in  
 23 representing the class” if one was certified, their “choice of forum still deserves deference, and this  
 24 factor weighs against transfer.”); *accord Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 244 (1981)  
 25 (presumption in favor of plaintiff’s choice of forum is especially strong where plaintiff brings action  
 26 in home state).

27 Even Ferrero concedes, as it must, that this principle weighs against transfer. (Mot. at 8 n.5  
 28 (citing *Milton v. TruePosition, Inc.*, 2009 WL 323036, at \*2 (N.D. Cal. 2009) (finding plaintiffs’

1 choice of forum should be accorded “some deference” where brought in plaintiffs’ home forum).)

2 *b. Contacts Relating to Plaintiffs’ Cause of Action*

3 Plaintiffs’ contacts with this District relating to their causes of action are substantial. Ferrero  
 4 argues Plaintiffs’ choice of forum should be disregarded because “the challenged conduct occurred in  
 5 New Jersey,” but cites for that proposition only a single inapposite case expressly limited to securities  
 6 actions, *see In re Yahoo! Inc.*, 2008 U.S. Dist. LEXIS 20605, at \*11 (C.D. Cal. Mar. 10, 2008)  
 7 (“Because this is a securities fraud action, . . .”). And, Ferrero provides no analysis. (*See Mot.* at 9:4-  
 8 8.)

9 At issue in *Yahoo* were allegedly false and misleading public statements defendants made  
 10 regarding Yahoo!’s business model, financial results, continued sales and earnings growth, acquisition  
 11 of another company, and more. *Id.*, at \*2. Several courts have recognized that is dissimilar to the  
 12 situation here, where Plaintiffs were exposed to Ferrero’s false and misleading advertising in this  
 13 forum, which weighs *against* transfer. *See GlaxoSmithKline Consumer Healthcare, L.P. v. Merix*  
 14 *Pharm. Corp.*, 2005 U.S. Dist. LEXIS 40007, at \*18 (D.N.J. May 10, 2005) (Where 4.5% of  
 15 defendant’s sales occurred in district, retailers in district carried and displayed defendant’s product,  
 16 and defendant directed radio and television advertisements at listeners in the district, “[t]hese contacts  
 17 with New Jersey show that the underlying false advertising dispute has a connection to New Jersey,”  
 18 which “weigh[s] in favor of keeping the action in New Jersey.”); *Student Advantage, Inc. v. Int’l*  
 19 *Student Exch. Cards, Inc.*, 2000 U.S. Dist. LEXIS 13138, at \*21-22 (S.D.N.Y. Sept. 12, 2000) (“ISEC  
 20 makes false statements and competes unfairly in selling its discount cards in this District via the  
 21 internet and through businesses located here. The locus of operative facts is thus in this District, even  
 22 if ISEC’s principal place of business is elsewhere or ISEC sells its discount cards elsewhere.”); *NBA*  
 23 *Props., Inc. v. Salvino, Inc.*, 2000 U.S. Dist. LEXIS 3799, at \*11 (S.D.N.Y. Mar. 27, 2000) (

24 Here, Plush Toys have been sold in this District through the medium of defendant’s  
 25 Internet site and, allegedly, through the medium of New York dealers and distributors  
 26 who are part of the defendant’s national network. Consequently, regardless of where the  
 27 Plush Toys were manufactured, where defendant’s business location is, or where else the  
 28 Plush Toys have been sold, the locus of the operative events in the instant action is New  
 York.)

2. Convenience of the Parties

While Ferrero’s headquarters are in the District of New Jersey so that litigating there is unquestionably more convenient to *Ferrero*, that alone cannot justify transfer because it would only shift the inconvenience—and disproportionately at that—onto Plaintiffs. *See In re Nat’l Presto Indus.*, 347 F.3d 662, 665 (7th Cir. 2003) (“When plaintiff and defendant are in different states there is no choice of forum that will avoid imposing inconvenience; and when the inconvenience of the alternative venues is comparable there is no basis for a change of venue; the tie is awarded to the plaintiff . . . .”); *Sunds Defibrator v. Durametal Corp.*, 1997 U.S. Dist. LEXIS 1859, at \*12-13 (D. Del. Jan.22, 1997) (citation omitted, emphases in original) (

As to the overall *respective* convenience of the parties, the defendant has a slight edge, but this slight tip of the balance of convenience stems not from evaluation of the transfer criteria, but from the fact that it is almost *always* more convenient for a defendant to litigate in its home district. That advantage, in and of itself without more is insufficient to tip the balance in favor of depriving a plaintiff of its choice of forum.)

In addition, Ferrero has provided no basis for believing litigating in the Southern District of California actually *is* inconvenient. To the contrary, Ferrero hired California attorneys with offices in this District<sup>13</sup> to represent it in both this litigation and *Glover*. Thus for hearings, depositions, in-person meet-and-confers (*see* S.D. Cal. Civ. L.R. 26.1(a) (“If counsel have offices in the same county, they are to meet in person.”)), and other attorney-driven litigation, this District should be *more* convenient to Ferrero than New Jersey. Moreover, this forum is demonstrably convenient to Ferrero, because it has voluntarily litigated in California before. *See Huang, et al. v. Ferrero U.S.A., Inc., et al.*, No. 3:98-cv-00795-FMS (N.D. Cal. Filed Mar. 2, 1998).<sup>14</sup> “Given that Defendant has not described any real inconvenience that would result for the parties if the motion is denied, . . . this factor does not weigh in favor of transfer.” *Bibo*, 2007 U.S. Dist. LEXIS 78388, at \*7-8.

a. *Differences in Costs of Litigation*

Ferrero does not address this factor, which weighs heavily against transfer. While litigating in either forum would increase the travel costs of the distant party, transfer to New Jersey would impose

<sup>13</sup> *See* [http://www.wsgr.com/WSGR/Display.aspx?SectionName=locations/loc\\_sandiego.htm](http://www.wsgr.com/WSGR/Display.aspx?SectionName=locations/loc_sandiego.htm).

<sup>14</sup> Ferrero did not apparently seek to transfer this action though other defendants did, *see* Dkt. No. 18 (Ferrero U.S.A.’ s Motion to Dismiss) & 19 (co-defendants’ Motion to, *inter alia*, Transfer Venue).

1 a substantial additional cost on Plaintiffs not imposed on Ferrero—the expense of hiring local counsel,  
 2 which New Jersey’s Local Rules require but California’s do not.

3 “Only an attorney at law of this Court may file papers, enter appearances for parties, sign  
 4 stipulations, or sign and receive payments on judgments, decrees or orders.” D. N.J. Civ. L.R.  
 5 101.1(c)(4). New Jersey also requires that any attorney admitted *pro hac vice* shall, “have all  
 6 pleadings, briefs and other papers filed with the court signed by an attorney of record authorized to  
 7 practice in this State, who shall be held responsible for them and for the conduct of the cause and of  
 8 the admitted attorney therein.” D. N.J. Ct. R. 1:21-2(2)(c)(4). These requirements impose substantial  
 9 responsibility on New Jersey local counsel. (*See* Fitzgerald Dec. ¶¶ 12-15 & Exs. G-H.)

10 A conservative estimate places the additional cost imposed upon Plaintiff by transfer to New  
 11 Jersey—solely due to the hiring of local counsel—at about \$100,000 through trial. (*See* Fitzgerald  
 12 Dec. ¶¶ 16-18.) By contrast, Ferrero’s California lawyers have already been admitted *pro hac vice* in  
 13 the New Jersey *Glover* action, sponsored by a member of the firm’s New York office admitted in New  
 14 Jersey. (*See Glover* Dkt. No. 8.) Thus, New Jersey’s requirement for local counsel does not increase  
 15 Ferrero’s costs at all. *See Unique Prod. Solutions, Ltd. v. Otis Prods.*, 2010 U.S. Dist. LEXIS 137857,  
 16 at \*23-24 (N.D. Ohio Sept. 21, 2010) (Denying transfer where, “[i]f this case were transferred . . . ,  
 17 Unique would likely need to obtain local counsel in and travel to New York on several occasions,  
 18 whereas Defendant has already incurred the costs of obtaining local counsel in this District.”)

19 Moreover, even if litigating in California increased Ferrero’s expenses, “corporations are  
 20 better-equipped than individuals to absorb increased litigation costs.” *Shultz*, 2011 U.S. Dist. LEXIS  
 21 24692, at \*17 (citing *Healthtrac Corp. v. Caterpillar Inc.*, 2005 U.S. Dist. LEXIS 25272, at \*12-13  
 22 (N.D. Cal. Oct. 26, 2005)); *see also Dilmore v. Alion Sci. & Tech. Corp.*, 2011 U.S. Dist. LEXIS  
 23 43244, at \*24-25 (W.D. Pa. Apr. 21, 2011) (where defendant had 2010 sales exceeding \$800 million  
 24 and individual plaintiff was unemployed, relative financial condition of the parties favored  
 25 maintaining action in plaintiff’s chosen forum); *Church & Dwight v. Mayer Labs., Inc.*, 2010 U.S.  
 26 Dist. LEXIS 103939, at \*31-32 (D.N.J. Sept. 28, 2010) (“[W]hile both parties would incur financial  
 27 burden by litigating in a form outside its home state, on balance, this factor tips slightly in favor of  
 28 Mayer in light of its smaller size and fewer resources.”); *Fellus v. Sterne, Agee & Leach, Inc.*, 2011

1 U.S. Dist. LEXIS 33704, at \*12 (S.D.N.Y. Mar. 29, 2011) (“The relative means of the parties also  
2 weighs against transfer because Fellus is an individual whereas SAL is a corporation.”); *Unique Prod.*  
3 *Solutions*, 2010 U.S. Dist. LEXIS 137857, at \*14, 23-24 (citation omitted) (

4 Defendant is a large manufacturer of consumer products distributed throughout the  
5 country which is asking this Court to give significant weight to its own conveniences at  
6 Unique’s expense, after allegedly violating a federal statute for at least the last four years.  
7 Therefore, due to the unproportionate burden to be placed upon Unique if this lawsuit is  
8 transferred . . . , this factor also weighs heavily in favor of denying Defendant’s Motion.

9 \* \* \*

10 Defendant, a “high volume manufacturer of consumer products” with a nationwide  
11 distribution chain, is better suited than Unique, a *qui tam* relator attempting to protect the  
12 public . . . to bear the costs of defending this cause of action in this District, particularly  
13 because it is Defendant’s actions which gave rise to this suit. . . . In conclusion,  
14 Defendant’s Motion is based solely on one premise—that transferring this case . . . would  
15 be more convenient for the Defendant. Defendant’s failure to show more than a mere  
16 shift in conveniences to justify a transfer of venue . . . support denial of Defendant’s  
17 Motion.).

18 *b. The Substantial Inconvenience to Plaintiffs if Forced to Litigate in New Jersey*

19 In addition to the expense they will incur, transfer presents a number of difficulties for  
20 Plaintiffs. Ms. Hohenberg’s 3-year-old daughter has a medical condition and is currently undergoing  
21 medical testing, diagnostics and evaluation to determine the cause of an apparent disability, and is also  
22 involved in speech therapy. Ms. Hohenberg arranges her daughter’s appointments and care with  
23 various health care providers and a speech therapist, and attends about 90% of those appointments,  
24 ensuring that her daughter has transportation for the times she cannot get time off work. Having to  
25 litigate in New Jersey would mean spending time away from her daughter and losing income during  
26 whatever period she is in New Jersey to testify at deposition or trial, or appear for mediation or  
27 hearings, which would probably preclude Ms. Hohenberg from further participating in this lawsuit.  
28 (Hohenberg Dec. ¶¶ 5-6.)

Ms. Rude-Barbato lives with and cares for her three youngest children, aged 16, 13, and 7, and  
her elderly, disabled mother. All three of Plaintiff’s children are involved in extracurricular activities  
and sports programs, and rely on Plaintiff for transportation. Plaintiff’s mother suffers from back and  
knee problems, causing her limited mobility, and suffers from psychological conditions that require  
medication and treatment. As such, she relies completely on Ms. Rude-Barbato for her care and well-

1 being. Having to litigate in New Jersey would mean, for Ms. Rude-Barbato, facing practical and  
 2 financial difficulty, including finding and paying for babysitting and transportation for all three  
 3 children, and specialized in-home care for her mother, during whatever period she is in New Jersey to  
 4 testify at deposition or trial, or appear for mediation or hearings. (Rude-Barbato Dec. ¶¶ 5-8.)

5 3. Convenience of Witnesses & Access to Evidence

6 “The relative convenience to the witnesses is often recognized as the most important factor to  
 7 be considered in ruling on a motion under § 1404(a).” *Saleh v. Titan Corp.*, 361 F. Supp. 2d 1152,  
 8 1160 (S.D. Cal. 2005) (quotation omitted). To carry its burden, a party moving for transfer on the  
 9 basis of witness convenience “must identify potential witnesses by name and describe their  
 10 testimony.” *Id.*, at 1161-65. Moreover, “[i]n determining whether this factor weighs in favor of  
 11 transfer, the court must consider not simply how many witnesses each side has and the location of  
 12 each, but, rather, the court must consider the importance of the witnesses.” *Id.* at 1160-61. *See also*  
 13 *Bohara v. Backus Hosp. Med. Benefit Plan*, 390 F. Supp. 2d 957, 963 (C.D. Cal. 2005) (citations  
 14 omitted) (“[I]f the transfer is for the convenience of witnesses, defendant must name the witnesses it  
 15 wishes to call, the anticipated areas of their testimony and its relevance, and the reasons why the  
 16 present forum would present a hardship to them.”); *Ctr. for Food Safety v. Vilsack*, 2011 U.S. Dist.  
 17 LEXIS 31688, at \*18 (N.D. Cal. Mar. 17, 2011) (“As moving party, Federal Defendants are ‘obligated  
 18 to identify the key witnesses to be called and to present a generalized statement of what their  
 19 testimony would include.’” (quoting *Florens Container v. Cho Yang Shipping*, 245 F. Supp. 2d 1086,  
 20 1093 (N.D. Cal. 2002))); *Reid-Ashman Mfg., Inc. v. Swanson Semiconductor Serv., L.L.C.*, 2006 WL  
 21 3290416, at \*7 (N.D. Cal. Nov. 13, 2006) (“To demonstrate an inconvenience to witnesses, the  
 22 moving party must identify relevant witnesses, state their location and describe their testimony and its  
 23 relevance.”); *SEC v. Rose Fund, LLC*, 2004 U.S. Dist. LEXIS 22491, at \*9 (N.D. Cal. Jan. 9, 2004)  
 24 (same); *ADS Security L.P. v. Advanced Detection Security Servs., Inc.*, 2010 U.S. Dist. LEXIS 27903,  
 25 at \*11 (W.D. Tex. Mar. 23, 2010) (“A party seeking a transfer of venue must do more than make  
 26 general allegations that key witnesses are unavailable or are inconveniently located . . . . Rather, the  
 27 moving party must identify specific witnesses and outline the substance of their testimony.”); *NBA*  
 28 *Props*, 2000 U.S. Dist. LEXIS 3799, at \*14 (citations omitted) (“A party seeking transfer based on the

1 convenience of the witnesses must provide the court with a specific list of probable witnesses who  
 2 will be inconvenienced by the current forum and a general statement of what the witnesses’ testimony  
 3 will cover.”). *Accord Sunds*, 1997 U.S. Dist. LEXIS 1859, at \*10-11 (“Because of the lack of  
 4 specificity as to these witnesses’ important to Durametal’s case and their availability, the Court is not  
 5 persuaded the possibility they may not attend trial is sufficient to dip the balance in favor of a  
 6 transfer.”).

7 Far from meeting its burden, Ferrero’s motion is devoid of *any* specifics, instead only asserting  
 8 in conclusory fashion that, “[p]lainly, the key witnesses in this action are located in New Jersey (or  
 9 elsewhere on the east coast) while none (besides plaintiffs themselves) are located in California.”  
 10 (Mot. at 9.) Ferrero fails to identify a single relevant witness by name, much less state their location  
 11 and describe their testimony and its relevance, or why this forum is inconvenient for them. Instead,  
 12 relying on the Declaration of Bernard Kreilmann (Dkt. No. 19-2), Ferrero asserts only that  
 13 “employees responsible for marketing, advertising and labeling the Nutella product, work at the  
 14 Company’s New Jersey Headquarters,” while its “third-party vendors used in connection with the  
 15 labeling, marketing and advertising of Nutella are primarily located in New Jersey and New York,  
 16 including Ferrero U.S.A.’s advertising agency, media planning & buying agency, and agency used to  
 17 design its labels.” (Kreilmann Dec. ¶¶ 3, 6.<sup>15</sup>). These conclusory arguments fall short. *See Affymetrix,*  
 18 *Inc. v. Synteni, Inc.*, 28 F. Supp. 2d 192, 205 (D. Del. 1998) (

19 [W]ith respect to numerous “unnamed” individuals possibly residing in Silicon Valley  
 20 who might possess some knowledge about . . . facts giving rise to this lawsuit, the Court  
 21 affords them no weight in its “balance of convenience” analysis. Given the complete lack  
 22 of specificity with which these witnesses were identified and the absence of “adequate  
 information with respect to the content and materiality” of their testimony, the Court has  
 no choice but to discount them in its weighing test. (citation omitted)).

23 *Dilmore*, 2011 U.S. Dist. LEXIS 43244, at \*28 (“[S]ince Defendants bear the burden of showing that  
 24 inconvenience would make non-party witnesses unavailable for trial and because the Court finds that  
 25 they have not done so, this factor weighs in favor of Plaintiff.”); *NBA Props*, 2000 U.S. Dist. LEXIS  
 26 3799, at \*15 (internal citation omitted) (“Defendant identifies its party witnesses simply as witnesses

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27 <sup>15</sup> Ferrero also asserts without specifics that “[a]lthough some vendors have offices elsewhere, . . .  
 28 Ferrero U.S.A.’s contacts within those companies are located in New Jersey and New York.”

1 ‘associated with [defendant]’ who reside in California. Because defendant has failed to satisfy its  
 2 burden of specifically identifying the witnesses who will be inconvenienced, defendant’s motion to  
 3 transfer should be denied.” (alteration in original)).

4 In addition, while such conclusory assertions fail as a matter of law to demonstrate witness  
 5 inconvenience warranting transfer, they also ignore the nature of this false advertising case, where, “it  
 6 is apparent that the majority of witnesses will not be the occurrence-type witnesses suggested by the  
 7 defendants, but rather will be expert witnesses who testify as to the allegedly . . . misleading  
 8 commercials and as to the proof of damages.”<sup>16</sup> *Ragold, Inc. v. Ferrero, U.S.A., Inc.*, 506 F. Supp.  
 9 117, 121 (N.D. Ill. 1980) (denying Ferrero’s motion to transfer venue).

10 Plaintiffs’ claims only require them to show that the challenged statements were likely to  
 11 deceive the public under the reasonable consumer standard. *See Yumul v. Smart Balance, Inc.*, 733 F.  
 12 Supp. 2d 1117, 1125 (C.D. Cal. May 24, 2010) (citing *In re Tobacco II Cases*, 46 Cal. 4th 298, 312  
 13 (2009) (“A [common law] fraud deception must be actually false, known to be false by the perpetrator  
 14 and reasonably relied upon by a victim who incurs damages. None of these elements are required to  
 15 state a claim for injunctive relief under the UCL” (internal quotations and citation omitted)); *Buckland*  
 16 *v. Threshold Enterprises, Ltd.*, 155 Cal. App. 4th 798, 801 (2007) (“To state a cause of action under  
 17 [the CLRA], it is necessary only to show that ‘members of the public are likely to be deceived.’ [ ]  
 18 Allegations of actual deception, reasonable reliance, and damage, are unnecessary,” quoting  
 19 *Committee on Children’s Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 211 (1983)  
 20 (quotation omitted)); *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 682 (2006)  
 21 (same standard applies to FAL)).

22 Indeed, “the primary evidence” in a California law false advertising case such as this “is the  
 23 advertising.” *Brockey v. Moore*, 107 Cal. App. 4th 86, 100 (2003).

24 a. *Convenience of the Party Witnesses*

25 In addition, Ferrero’s assertion that litigating in this forum would be inconvenient to its

26 \_\_\_\_\_  
 27 <sup>16</sup> Plaintiffs in this case have already retained a nutrition expert and a survey expert, Dr. Nathan D.  
 28 Wong, of UC-Irvine and UCLA, and have consulted a possible survey and statistical evidence expert. Plaintiffs expect these experts, as well as a possible damages expert, to be their most important and primary trial witnesses.

1 employees does not weigh in favor of transfer because party witnesses “can be compelled to testify  
 2 regardless of the forum in which the lawsuit is ultimately litigated.” *Allstar Mktg. Group, LLC v. Your*  
 3 *Store Online, LLC*, 666 F. Supp. 2d 1109, 1132 (C.D. Cal. 2009) (citing, *inter alia*, *Applied*  
 4 *Elastomerics, Inc. v. Z-Man Fishing Prods., Inc.*, 2006 U.S. Dist. LEXIS 75339 (N.D. Cal. Oct. 6,  
 5 2006); *STX, Inc. v. Trik Stik, Inc.*, 708 F. Supp. 1551, 1556 (N.D. Cal. 1988) (courts should “discount  
 6 inconvenience to [a] party’s witnesses when they are employees who can be compelled to testify”);  
 7 *Hartfield v. Offshore Oil Servs., Inc.*, 2006 U.S. Dist. LEXIS 69469 (S.D. Tex. Sept. 14, 2006) (“The  
 8 Court reiterates that the convenience of key witnesses who are employees of the defendant requesting  
 9 transfer is ‘entitled to less weight because that party will be able to compel their testimony at trial.’”  
 10 (quoting *Continental Airlines, Inc. v. American Airlines, Inc.*, 805 F. Supp. 1392, 1397 (S.D. Tex.  
 11 1992))); *see also Jonathan Brown, Inc. v. Venetian Casino Resort, LLC*, 2007 WL 4532214, at \*6  
 12 (N.D. Cal. Dec. 19, 2007); *Transperfect Global, Inc. v. Motionpoint Corp.*, 2010 U.S. Dist. LEXIS  
 13 99947, at \*9 (N.D. Cal. Sept. 13, 2010) (citation omitted) (“The Court . . . discounts inconvenience to  
 14 the parties’ employees, whom the parties can compel to testify.”); *Getz*, 547 F. Supp. 2d at 1084  
 15 (same); *Dilmore*, 2011 U.S. Dist. LEXIS 43244, at \*26 (citation omitted) (“[T]he convenience of the  
 16 witnesses employed by Defendant is not to be weighted in Defendant’s favor.”).

17 Moreover, while it is unclear whether the testimony of many fact-based Ferrero witnesses will  
 18 be necessary at trial, *Plaintiffs’* testimony is necessary to establish the foundation for their claims. But  
 19 “[t]ransfer is not appropriate if it simply shifts the inconvenience from one party to another.” *Shultz*,  
 20 2011 U.S. Dist. LEXIS 24692, at \*17-18 (citing *Decker*, 805 F.2d at 843).

21 To the extent litigating in this forum is inconvenient to Ferrero’s employees, however,  
 22 *Plaintiffs’* counsel will mitigate any inconvenience by traveling to New Jersey to depose them if their  
 23 testimony is necessary and, in fact, have already done so. (Fitzgerald Dec. ¶ 19.) *See DPIX, LLC v.*  
 24 *Am. Guar. & Liab. Ins. Co.*, 2011 U.S. Dist. LEXIS 38130, at \*9 (N.D. Cal. Mar. 30, 2011) (denying  
 25 transfer where plaintiff agreed to travel to location of fact witnesses residing outside district).

26 *b. Convenience of Non-Party Witnesses and Availability of Compulsory Process*  
 27 *to Compel Them if Unwilling to Testify*

28 Convenience of non-party witnesses is a more important factor than the convenience of the

1 parties. *Saleh.*, 361 F. Supp. 2d at 1160; *see also Transperfect Global*, 2010 U.S. Dist. LEXIS 99947,  
 2 at \*8 (“The convenience of witnesses includes ‘a separate but related concern, the availability of  
 3 compulsory process to bring unwilling witnesses live before the jury.’” (quoting *Brackett v. Hilton*  
 4 *Hotels Corp.*, 619 F. Supp. 2d 810, 820 (N.D. Cal. 2008))).

5 Ferrero has not shown the availability of compulsory process to compel attendance of  
 6 unwilling non-party witnesses favors transfer to New Jersey, because Ferrero has failed to identify  
 7 even a single witness, much less explained why there is a concern that specific witness’ testimony  
 8 may need to be compelled. *See, e.g., NBA Props*, 2000 U.S. Dist. LEXIS 3799, at \*25 (citations  
 9 omitted) (factor weighed against transfer where “defendant fails to provide any affidavits from its  
 10 witnesses stating that the witnesses will not voluntarily appear absent transfer”); *Student Advantage*,  
 11 2000 U.S. Dist. LEXIS 13138, at \*23 (“Neither party identifies any witnesses that it believes will  
 12 need to be compelled to testify in this action. Accordingly, the Court can make no judgment as to  
 13 whether process to compel the attendance of unwilling witnesses is more readily available here or in  
 14 Arizona.”). In addition, as with Ferrero’s employees, Plaintiffs’ counsel will travel to the location of  
 15 third-party witnesses for deposition, and will minimize inconvenience to them by limiting the third-  
 16 party witnesses it calls at trial to only those witnesses that are crucial to Plaintiffs’ case. (Fitzgerald  
 17 Dec. ¶ 19.)

18 Moreover, as Plaintiffs previously argued, the existence of fact-based witnesses in a California  
 19 false advertising action is of relatively little importance, except with respect to punitive damages  
 20 (since those witnesses may shed a light on Ferrero’s intentions or knowledge, which is not an element  
 21 of Plaintiffs’ UCL, FAL, and CLRA injunctive relief, restitution and damages claims). Expert  
 22 witnesses are really crucial here, and their convenience is not a factor in the transfer analysis. *See,*  
 23 *e.g., Costco Wholesale Corp. v. Liberty Mut. Ins. Co.*, 472 F. Supp. 2d 1183, 1195 (S.D. Cal. 2007)  
 24 (“[T]he convenience of expert witnesses carries little or no weight.”) If the Court disregards the  
 25 convenience of fact-based witnesses as Plaintiffs urge, this factor presents no basis for disturbing  
 26 Plaintiffs’ choice of forum, and so it weighs against transfer.

27 To the extent the Court does wish to consider possible third-party witnesses, however—in  
 28 contrast to Ferrero’s conclusory assertions that “key” third-party witnesses are within the District of

1 New Jersey’s subpoena power (Mot. at 9-10)—Plaintiffs offer a detailed table showing all potential  
2 third-party witness of whom they are currently aware, their potential testimony and its relevance, and  
3 the source or basis for that knowledge. (Fitzgerald Dec. ¶ 20 & Ex. J.)

4 Some caveats: Most of this comes from the deposition of Bernard Kreilmann, who Ferrero  
5 designated on venue issues pursuant to Rule 30(b)(6). Ferrero has not yet served its initial disclosures,  
6 having finally agreed to schedule a Rule 26(f) conference this past Friday, April 29. Thus, Plaintiffs  
7 are unsure (a) what testimony each third-party witnesses may offer, (b) of that testimony, what will be  
8 necessary at trial, (c) of the testimony necessary for trial, which is most crucial, and (d) of the third-  
9 party witnesses who are to provide that crucial testimony, which are unwilling to attend trial in New  
10 Jersey or San Diego.

11 Plaintiffs’ list of third-party witnesses shows nine individuals and eight entities. Of the nine  
12 individuals, Connie Evers is clearly the most important because her opinions form the basis for  
13 Ferrero’s challenged advertising campaign, and are challenged directly in the complaint (MCC ¶¶ 82-  
14 88). She lives in Beaverton, Oregon. Presumably, San Diego is more convenient to her than New  
15 Jersey.

16 Of the remaining eight individuals, seven are former Ferrero U.S.A. employees, and one is an  
17 employee of Ferrero International. Two live in Brantford, Ontario, Canada; one in Princeton, New  
18 Jersey; one in Bogota, Columbia; one in Germany; one in Luxemburg; and the location of the  
19 remaining two is unknown. Thus, the District of New Jersey Court would have subpoena power over  
20 one individual, and this District none. Of the eight entities, three have locations in California within  
21 this Court’s subpoena power, and another two have locations in Los Angeles. Three are within New  
22 Jersey’s subpoena power. In sum, there is almost no difference between the proposed forums with  
23 respect to the number of currently-identifiable potential third-party witnesses over whom subpoena  
24 power could be exercised if necessary. But even if there were, Ferrero fails to show that any third-  
25 party witnesses would be unwilling to testify in San Diego, or that the testimony of such unwilling  
26 third-party witnesses is necessary for trial. Because this factor is neutral, it provides no basis on which  
27 to disturb Plaintiffs’ choice of forum.

1                   c.       *Ease of Access to Sources of Proof*

2                   Ferrero does not discuss this factor, which is neutral and therefore does not justify disturbing  
 3 Plaintiffs’ choice of forum. In the age of electronic discovery, modern decisions frequently find this  
 4 factor is neutral. *See, e.g., Ctr. for Food Safety*, 2011 U.S. Dist. LEXIS 31688, at \*20; *DPIX*, 2011  
 5 U.S. Dist. LEXIS 38130, at \*9 (citing *Lubchenco*, 2009 U.S. Dist. LEXIS 119794, at \*9 (“The  
 6 documentary evidence is easily transported to any venue, in this era of electronic communication.”));  
 7 *Metz v. U.S. Life Ins. Co.*, 674 F. Supp. 2d 1141 (C.D. Cal. 2009) (“[E]ase of access to documents  
 8 does not weigh heavily in the transfer analysis, given that advances in technology have made it easy  
 9 for documents to be transferred to different locations.”). Consistent with the rationale underlying those  
 10 decisions, Ferrero has produced over 1,200 of pages of discovery, some in electronic and some in  
 11 hard-copy format, in a short time, without difficulty.

12       **C.       The Public Factors Weigh Against Transfer**

13                   1.       Interest of Justice: Efficiency and Related Pending Litigation

14                   “In determining whether a case should be transferred based on the interests of justice, the  
 15 Court can consider whether transfer will avoid duplicative litigation, affect judicial economy, and  
 16 limit waste of time and money.” *Bibo*, 2007 U.S. Dist. LEXIS 78388, at \*9 (citing *Van Dusen v.*  
 17 *Barrack*, 376 U.S. 612, 616 (1964)). “Among factors to be considered are the speed cases proceed to  
 18 trial and the public interest in having a case resolved in a particular forum.” *IP Innovation, L.L.C. v.*  
 19 *Matsushita Elec. Indus. Co.*, 2005 U.S. Dist. LEXIS 11892, at \*9 (N.D. Ill. June 13, 2005) (citation  
 20 omitted).

21                   Ferrero’s argument that the pending *Glover* action warrants transfer in the interest of justice is  
 22 limited to a single conclusory sentence, which is not even accurate (there is only *one* action pending in  
 23 the District of New Jersey) (Mot. at 6:21-22 (“Here, the ‘interest of justice’ weighs in favor of transfer  
 24 given the pendency of substantially similar actions in the transferee forum.”).)

25                   *Glover* is, of course, similar to this action because it is a “copycat” of this action brought by a  
 26 San Diego class action law firm seeking to take advantage of Plaintiffs’ choice of forum and their  
 27 counsels’ considerable effort investigating and filing this important pro-consumer case. While  
 28 Ferrero’s implicit argument is correct, that consolidation of the two pending actions would promote

1 judicial efficiency, Ferrero “fails to note the [New Jersey] action could also be consolidated with this  
2 case.”<sup>17</sup> *Applied Elastomerics*, 2006 U.S. Dist. LEXIS 75339, at \*18.

3 “[W]hen two identical actions are filed in courts of concurrent jurisdiction, the court which  
4 first acquired jurisdiction should try the lawsuit . . . .” *Pacesetter Sys, Inc. v. Medtronic, Inc.*, 678 F.2d  
5 93, 95 (9th Cir. 1982). Similarly, “the court in the second-filed action would [normally] defer to the  
6 court in the first-filed action to decide the appropriate forum.” *Ctr. for Food Safety*, 2011 U.S. Dist.  
7 LEXIS 31688, at \*15 (citing *Pacesetter*, 678 F.2d at 96).<sup>18</sup>

8 “The Ninth Circuit instructs that the first-to-file rule promotes efficiency and ‘should not be  
9 disregarded lightly.’” *Applied Elastomerics*, 2006 U.S. Dist. LEXIS 75339, at \*18. Moreover,  
10 “[w]here two actions involving overlapping issues and parties are pending in two federal courts, there  
11 is a strong presumption across the federal circuits that favors the forum of the first-filed suit under the  
12

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13 <sup>17</sup> Although there are only two federal actions pending against Ferrero and it filed this transfer motion  
14 on March 24, on April 12, Glover filed an MDL motion seeking the exact relief this Court is set to  
15 rule on. Plaintiffs have filed a motion to intervene in *Glover*, in order to move for its dismissal under  
16 the first-to-file rule, which allows for dismissal or stay of substantially duplicative later-filed actions.  
17 Plaintiffs will also vigorously oppose MDL transfer to New Jersey—it will only disrupt the orderly  
18 progress of this action and increase Plaintiffs’ expense and inconvenience tremendously—and will  
19 likely succeed. *See, e.g., In re Toyota Motor Corp. Prius Hid Headlamp Prods. Liab. Litig.*, MDL No.  
20 2198, 2010 U.S. Dist. LEXIS 128416, at \*1-2 (J.P.M.L. Nov. 30, 2010) (“Given that there are only  
21 three actions pending in two districts, and the coordinated Central District of California actions are at  
22 a more advanced stage of proceedings, movants have failed to convince us that there are sufficiently  
23 complex or numerous questions of fact shared among these actions to justify Section 1407 transfer . . .  
24 .”). Moreover, Plaintiffs’ motion to dismiss *Glover* may moot the MDL motion. Thus, this Court  
25 should, respectfully, not refrain from ruling on this motion. *See* J.P.M.L. R. 1.5 (

21 The pendency of a motion, order to show cause, conditional transfer order or conditional  
22 remand order before the Panel concerning transfer or remand of an action pursuant to 28  
23 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in the district  
24 court in which the action is pending and does not in any way limit the pretrial jurisdiction  
25 of that court.)

24 “In other words, a district judge should not automatically stay discovery, postpone rulings on pending  
25 motions, or generally suspend further rulings upon a parties’ motion to the MDL Panel for transfer  
26 and consolidation.” *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1360 (C.D. Cal. 1997) (citing  
27 Manual For Complex Litigation, Third, at 252 (1995)).

27 <sup>18</sup> In recognition of this principle, the *Glover* court recently entered a consent order for an extension of  
28 Ferrero’s time to answer the *Glover* complaint, since “[t]here are now pending two motions to transfer  
to this Court the two additional complaints filed in the United States District Court for the Southern  
District of California . . . .” (*Glover* Dkt. No. 16 at 1 ¶ 4.)

1 first-filed rule.” *Id.* (quoting *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1135 (11th Cir. 2005); *see*  
 2 *also Kempthorne*, 2008 U.S. Dist. LEXIS 84978, at \*12 (“[T]he preferred venue in the case of parallel  
 3 litigation is the district in which the first lawsuit was filed.” (citing *Alltrade, Inc. v. Uniweld Prods,*  
 4 *Inc.*, 946 F.2d 622, 623 (9th Cir. 1991)). Thus where, as here, there is another, late-filed copycat action  
 5 pending in another district and a party seeks transfer *away* from the first-filed forum based on that  
 6 action, “this factor weighs *against* transfer.” *Applied Elastomerics*, 2006 U.S. Dist. LEXIS 75339, at  
 7 \*18 (emphasis added).

8 2. The State Most Familiar with Governing Law

9 Ferrero does not address this factor, which weighs against transfer. Plaintiffs’ causes of action  
 10 arise entirely under California law. “This factor strongly favors retention of the action in this district.  
 11 Where, as here, there are state law claims, the ‘forum’s familiarity with governing law’ supports  
 12 retention of the action.” *NBA Props*, 2000 U.S. Dist. LEXIS 3799, at \*26 (citations omitted). And  
 13 while “other federal courts are fully capable of applying California law,” *Shultz*, 2011 U.S. Dist.  
 14 LEXIS 24692, at \*11 (citation omitted), “[t]his Court is likely more familiar than the [District of New  
 15 Jersey] with the California laws underlying” Plaintiffs’ claims, *id.* Thus this factor weighs against  
 16 transfer. *See id.*; *see also Getz*, 547 F. Supp. 2d at 1085 (“[T]he Court finds that this factor weighs  
 17 against transfer. A court in the Northern District of California is more familiar with California law  
 18 than a court in the District of Arizona.”); *accord Ironworkers Local Union No. 68 & Participating*  
 19 *Employers Health & Welfare Fund, et al. v. Amgen, Inc.*, 2008 U.S. Dist. LEXIS 8740, at \*21 (C.D.  
 20 Cal. Jan. 22, 2008) (“This Court is more familiar with California’s choice-of-law rules than a New  
 21 Jersey court. Therefore, this factor weighs against transfer.”<sup>19</sup>).

22 3. California’s Public Policy

23 Ferrero assumes that because it is headquartered in New Jersey, this controversy is “localized”  
 24 there. (*See Mot.* at 7.) Ferrero is wrong, as federal courts routinely find false advertising cases  
 25 “localized” where a substantial portion of consumers were exposed to the challenged statements,  
 26 which is true of this District. *See Van Slyke v. Capital One Bank*, 503 F. Supp. 2d 1353, 1365 (N.D.

27 \_\_\_\_\_  
 28 <sup>19</sup> Compare *Mot.* at 8:2-3 (“[W]hether this case is litigated in New Jersey or California, the courts will  
 need to decide choice of law issues.”)

1 Cal. 2007) (denying transfer where estimated 20% of potential class members resided in California,  
 2 which has an interest in “preventing fraudulent practices which may have an effect both in California  
 3 and throughout the country” supported California’s local interest in controversy); *Ellis v. Costco*  
 4 *Wholesale Corp.*, 372 F. Supp. 2d 530 (N.D. Cal 2005) (denying venue transfer motion where  
 5 Northern District of California was “home to a proportionately large segment of the putative class”);  
 6 *Brody v. Am. Med. Ass’n*, 337 F. Supp. 611, 613 (S.D.N.Y. 1971) (“Where a large percentage of class  
 7 members comes from or near New York, transfer to another district will be denied.”); *accord*  
 8 *Berenson v. Nat’l Fin. Servs., LLC*, 319 F. Supp. 2d 1, 4 (D.D.C. 2004) (transferring class action to  
 9 District of Massachusetts where “Massachusetts has the greatest interest in deciding the controversy”  
 10 because “this is a class action lawsuit, with claims arising in Massachusetts and the largest amount of  
 11 potential plaintiffs residing there”); *King v. Johnson Wax Assocs., Inc.*, 565 F. Supp. 711, 719-20 (D.  
 12 Md. 1983) (transferring class action to the Central District of California upon finding that “should a  
 13 class eventually be certified, the interests of the class would seem better served by a trial in Los  
 14 Angeles than by one in Baltimore, as many more class members would likely reside in close  
 15 proximity to the courthouse”).

16 In reality, both New Jersey and this District have an interest in the matter, regardless of the  
 17 exact consumer distribution. The District of New Jersey has an interest because it is the site of  
 18 Ferrero’s headquarters, while the Southern District of California has an interest in protecting the rights  
 19 of the putative class and enforcing California law. *See Unique*, 2010 U.S. Dist. LEXIS 137857, at  
 20 \*24-25 (“This District certainly has a local interest in protecting consumers . . . located in the District  
 21 who have been deceived by the Defendant’s . . . violations. Further, jurors in this case, residents of  
 22 this District, will be genuinely interested in learning about Defendant’s activities and adequately  
 23 protecting unsuspecting consumers located in the District.”) This factor is therefore neutral. *See*  
 24 *Shultz*, 2011 U.S. Dist. LEXIS 24692, at \*23; *see also Meijer, Inc. v. Abbott Labs.*, 544 F. Supp. 2d  
 25 995, 1009 (N.D. Cal. 2008) (

26 It is true that the only apparent connection between the case and California is that  
 27 California is home to a large number of . . . individuals who may be consumers . . . .  
 28 However, this case has no greater connection to Illinois, except that Illinois is the site of  
 [Defendant’s] headquarters. Illinois this has no particular interest in this case other than  
 the generalized interest in ensuring that its citizens receive fair adjudications.).

1 *Accord Ironworkers Local*, 2008 U.S. Dist. LEXIS 8740, at \*21-22 (finding stronger interest in  
2 resolving controversy at location of injury than location of defendant’s headquarters).

3 4. The Relative Court Congestion and Time to Trial of Each Forum

4 Ferrero does not address this factor, which weighs against transfer. The most recent Federal  
5 Court Management Statistics maintained by the Federal Judiciary<sup>20</sup> show, for the 12-month period  
6 ending September 30, 2010, that the District of New Jersey had 414 civil filings per judgeship, while  
7 the Southern District of California had 241 filings per judgeship, a difference of almost 60%. In  
8 addition, the District of New Jersey’s time to trial for civil cases is currently 40.6 months, whereas  
9 this forum’s time to trial is 31.6 months. Thus, this factor weighs against transfer. *See Vice v.*  
10 *Woodline USA, Inc.*, 2011 U.S. Dist. LEXIS 8014, at \*16 (N.D. Cal. Jan. 21, 2011) (citation omitted)  
11 (denying motion to transfer where “[i]n this judicial district, the median time interval for cases  
12 disposed of at trial is approximately twenty-four months; in the Middle District of Tennessee, it is  
13 approximately twenty-eight months. Thus, this factor does not weight in favor of Defendant.”);  
14 *accord Ctr. for Food Safety*, 2011 U.S. Dist. LEXIS 31688, at \*21-22 (where time to trial was 21.5  
15 months in Northern District of California and 40.1 months in District of Columbia, concluding this  
16 was a “significant difference” and “the Northern District of California is less congested”); *IP*  
17 *Innovation*, 2005 U.S. Dist. LEXIS, at \*10 (10.5 month difference in time to trial weighed against  
18 transfer).

19 **CONCLUSION**

20 Plaintiffs respectfully request the Court deny Ferrero’s Motion for Transfer of Venue.

21 Dated: May 2, 2011

By: /s/ Jack Fitzgerald

22 Jack Fitzgerald  
23 Gregory S. Weston  
24 THE WESTON FIRM

25 Ronald A. Marron  
26 LAW OFFICES OF RONALD A. MARRON, APLC

27 **INTERIM CLASS COUNSEL**

28 <sup>20</sup> <http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx> (data sheets for District  
of New Jersey and Southern District of California are attached to the Fitzgerald Dec. as Exhibit K).