

**REDACTED VERISON – FULL VERSION FILED UNDER SEAL**

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**THE WESTON FIRM**

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**INTERIM CLASS COUNSEL**

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

**IN RE FERRERO LITIGATION**

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

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

**DECLARATION OF JACK  
FITZGERALD IN OPPOSITION TO  
FERRERO’S MOTION FOR  
TRANSFER OF VENUE**

Plaintiffs,

Judge: The Honorable Marilyn L. Huff

v.

Date: May 16, 2011

Time: 10:30 a.m.

Location: Courtroom 13

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

Defendant.

**REDACTED VERISON – FULL VERSION FILED UNDER SEAL**

1 I, Jack Fitzgerald, declare:

2 1. I am a member in good standing of the State Bars of California and New York, and of  
3 the United States District Courts for the Northern, Central and Southern Districts of California and the  
4 Southern and Eastern Districts of New York, and of the United States Court of Appeals for the Ninth  
5 Circuit. I make this Declaration in opposition to Ferrero’s Motion to Transfer Venue.

6 **Ferrero’s Substantial Contacts with California**

7 2. Attached hereto as **Exhibit A** is a true and correct copy of the “Business Entity Detail”  
8 for FERRERO U.S.A., INC., shown on the California Secretary of State’s website, accessed April 28,  
9 2011.

10 3. Attached hereto as **Exhibit B** are excerpts of the April 14, 2011 Deposition Transcript  
11 of Bernard Kreilmann, Ferrero’s President and CEO (the “Kreilmann Deposition Transcript.”).  
12 Portions of Exhibit B are being filed under seal pursuant to the Protective Order filed in this action  
13 (Dkt. No. 32).

14 4. Attached hereto as **Exhibit C** is Plaintiffs’ Exhibit 5 for identification (“PX-5,” marked  
15 at the Kreilmann deposition). PX-5 is Attachment A to Ferrero’s Interrogatory Responses, and shows  
16 Ferrero’s net sales of Nutella, by quarter, from 2007 through February 2011. Ferrero’s net sales of  
17 Nutella during this period<sup>1</sup> were [REDACTED]. Ferrero designated PX-5 “Confidential,” and so it is  
18 being filed under seal pursuant to the Protective Order filed in this action.

19 5. Attached hereto as **Exhibit D** is Plaintiff’s Exhibit 6 for identification (“PX-6,” marked  
20 at the Kreilmann deposition.) PX-6 is Attachment B to Ferrero’s Interrogatory Responses, and shows  
21 Ferrero’s Unit and Dollar sales in the United States and California from 2007 to 2010 (p. 1) and the  
22 same information for the 12 weeks ending March 20, 2011 (p. 2). Ferrero designated PX-5  
23 “Confidential,” and so it is being filed under seal pursuant to the Protective Order filed in this action.

24 6. Attached hereto as **Exhibit E** is a printout of a native Microsoft Excel spreadsheet  
25 produced by Ferrero in native format on a CD produced on April 19, 2011, marked FERRERO  
26 001234-001270, and further marked “CONFIDENTIAL” (and therefore, it is being filed under seal).

27 \_\_\_\_\_  
28 <sup>1</sup> Plaintiffs, however, allege a class period beginning January 1, 2000. (See MCC ¶ 119.)

**REDACTED VERISON – FULL VERSION FILED UNDER SEAL**

1 This document shows sales data for Nutella in “mass” stores, Wal-Mart and Target, and “club” stores  
2 Costco and Sams. For the printout, Plaintiffs inserted cover sheets to note each different Excel sheet,  
3 and highlighted the rows for California and New Jersey where appropriate. For the Court’s purposes,  
4 the first sheet shows a summary of the data, while the remaining 5 sheets all provide underlying data.

5 7. Attached hereto as **Exhibit F** is Plaintiffs’ Exhibit 14 for identification (“PX-14,”  
6 marked at the Kreilmann deposition). PX-14 is an excerpt of the first ten pages of FERRERO000134-  
7 001129, which represents every point Ferrero shipped Nutella to from January, 2007 through March  
8 2011, *i.e.*, mostly its retail customers (*see* Kreilmann Dep. Tr. 112:24-114:6). Ferrero designated PX-  
9 14 “Confidential,” and so it is being filed under seal pursuant to the Protective Order filed in this  
10 action. Ferrero subsequently produced FERRERO000134-001129 in native Microsoft Excel format,  
11 on a CD. Since the file is nearly 1,000 pages long, Plaintiffs do not file it.

12 8. Rather, Plaintiffs represent that, using the native file, they calculated the total shipping  
13 entries, and the number of entries for shipping points in California and New Jersey:

14 Total Shipping Entries: [REDACTED]  
15 CA Entries: [REDACTED] ([REDACTED] of Total Shipping Entries)  
16 NJ Entries: [REDACTED] ([REDACTED] of Total Shipping Entries)

17 **The Expense & Inconvenience of Hiring Local Counsel in New Jersey**

18 9. None of Plaintiffs’ attorneys are admitted in New Jersey. Therefore, Pursuant to N.J.  
19 Civ. L.R. 101.1(c)(4) and N.J. Ct. R. 1:21-2(2)(c)(4), if this action is transferred to New Jersey, to  
20 continue to litigate this action, Plaintiffs will incur substantial expense.

21 10. New Jersey Civil Local Rule 101.1(c)(4) provides, “[o]nly an attorney at law of this  
22 Court may file papers, enter appearances for parties, sign stipulations, or sign and receive payments on  
23 judgments, decrees or orders.”

24 11. New Jersey also requires that any attorney admitted *pro hac vice* shall, “have all  
25 pleadings, briefs and other papers filed with the court signed by an attorney of record authorized to  
26 practice in this State, who shall be held responsible for them and for the conduct of the cause and of  
27 the admitted attorney therein.” N.J. Ct. R. 1:21-2(2)(c)(4).

1 12. Various articles and practice guides provide an idea of what local counseling in New  
2 Jersey involves (and therefore, the expense Plaintiffs would incur if this action is transferred).

3 13. See, e.g., David A. Mazie and Ben-David Seligman, *Contractually Narrowing the*  
4 *Duties and Liability of a Mail Drop Local Counsel*, N.J. Lawyer (Feb. 2006) at 16, attached hereto<sup>2</sup> as

5 **Exhibit G:**

6 Thus, aside from being substantively responsible for the content of  
7 pleadings, local counsel is also responsible for what the rule calls ‘the  
8 conduct of the cause.’ Responsibility for the conduct of the cause is no  
9 small matter. New Jersey case law traditionally has treated that phrase as  
10 synonymous with ‘the labor of managing the cause.’ Although *pro hac*  
11 *vice* counsel may seek a local firm to serve as a mere mail drop, court  
12 rules require that the local firm take a greater role.

13 14. See also Donald E. Taylor *et al.*, *Navigating The New Jersey Courts With Local*  
14 *Counsel* (Feb. 2010), attached hereto as **Exhibit H**.

15 15. See also United States District Court, District of New Jersey, *Basic Elements of Civil*  
16 *Practice in the Camden Vicinage* (Oct. 2005) (emphasis added), available at  
17 <http://www.njd.uscourts.gov/camden/basicelements1a.pdf>:

18 Even if an attorney has been admitted *pro hac vice* to participate in a case,  
19 only an attorney at law of this Court may file papers, enter appearances for  
20 parties, sign stipulations, and sign and receive payments on judgments,  
21 decrees or orders. Local counsel remains responsible for the conduct of the  
22 litigation and for the conduct of *pro hac vice* counsel. Local counsel **must**  
23 **continue to appear at all proceedings** (unless excused) and **must continue**  
24 **to sign all briefs and pleadings** even though *pro hac vice* counsel is  
25 otherwise litigating the case. **For example, local counsel must appear at**  
26 **the Scheduling Conference and all other pretrial conferences and at**  
27 **trial, unless expressly excused by the court.**

28 16. In order to file their Motion to Intervene and Motion to Dismiss *Glover*, Plaintiffs  
retained Karen Confoy and Erica Helms of Sterns & Weinroth, P.C. Their firm biographies are  
attached hereto as **Exhibit I**. Ms. Confoy’s hourly rate is \$335, while Ms. Helms’ is \$245. These rates  
appear reasonable. See, e.g., *Miller v. Adco Liberty Mfg. Corp.*, 2005 U.S. Dist. LEXIS 36423, at \*6-7  
(D.N.J. Dec. 27, 2005) (applying “reasonable hourly rates of law firms in New Jersey” in 2005,

<sup>2</sup> Only the first two pages of this article were available online.

1 finding the rate of \$350 - \$375 per hour reasonable for partners and \$250 reasonable for a 6th-year  
2 associate). If this action is transferred to New Jersey, Plaintiffs would anticipate further retaining these  
3 attorneys as local counsel.

4 17. According to the most recent statistics, New Jersey has a time-to-trial in civil actions of  
5 40.6 months. This action was filed in February. If this action were transferred to New Jersey and  
6 Plaintiffs were required to hire local counsel starting in June (*i.e.*, discounting 4 months) Assuming a  
7 conservative estimate of only 10 hours per month, with only 2 of those hours performed by the higher  
8 biller, Plaintiffs would incur \$2,630 per month, for a total of \$96,258. If half the hours were  
9 performed by the higher biller, Plaintiffs would incur \$2,900 per month, for a total of \$106,140.

10 18. Because this estimate does not include trial, Plaintiffs' additional expenses from  
11 transfer to the District of New Jersey could easily amount to well over \$100,000.

12 **Plaintiffs' Willingness to Defray Inconvenience to Ferrero & Third Parties**

13 19. In order to defray the expense and inconvenience to Ferrero's employee witnesses, and  
14 any third parties located outside this Court's subpoena power, Plaintiffs' counsel will travel to  
15 whatever location is most convenient for those witnesses in order to depose them, and will only  
16 require the attendance at trial of witnesses deemed necessary to proving Plaintiffs' case.

17 **Potential Third-Party Witnesses**

18 20. Attached hereto as **Exhibit J** is a table showing all potential third-party witnesses of  
19 whom Plaintiffs are currently aware, their potential testimony and its relevance, and the source or  
20 basis for that knowledge.

21 //  
22 //  
23 //  
24 //  
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1 **Relative Court Congestion and Time to Trial**

2 21. Attached hereto as **Exhibit K** are true and correct copies of the most recent Judicial  
3 Caseload Profile data sheets maintained by the United States Judiciary, for both this District and the  
4 District of New Jersey. These data sheets show caseload data for the 12-month period ending  
5 September 30, 2010, and are available at <http://www.uscourts.gov>.

6  
7 I declare under penalty of perjury of the United States that the foregoing is true and correct to  
8 the best of my knowledge.

9  
10 Executed in Santa Clara, California, this 2nd day of May, 2011.

11  
12 /s/ Jack Fitzgerald  
13 Jack Fitzgerald

14  
15 Dated: May 2, 2011

16 Respectfully submitted,

17 By: /s/ Jack Fitzgerald

18 Jack Fitzgerald  
19 Gregory S. Weston  
20 THE WESTON FIRM

21 Ronald A. Marron  
22 LAW OFFICES OF RONALD A. MARRON, APLC

23 **INTERIM CLASS COUNSEL**

# **Exhibit A**



*privacy* *All people* *Liberty* *Speak* *without discrimination.*  
*Conscience*

# California Secretary of State Debra Bowen

Secretary of State

Administration

Elections

**Business Programs**

Political Reform

Archives

Registries

## Business Entities (BE)

### Online Services

- **Business Search**
- **Disclosure Search**
- **E-File Statements**
- **Processing Times**

### Main Page

### Service Options

### Name Availability

### Forms, Samples & Fees

### Annual/Biennial Statements

### Filing Tips

### Information Requests

(certificates, copies & status reports)

### Service of Process

### FAQs

### Contact Information

### Resources

- **Business Resources**
- **Tax Information**
- **Starting A Business**
- **International Business Relations Program**

### Customer Alert

(misleading business solicitations)

## Business Entity Detail

Data is updated weekly and is current as of Friday, April 22, 2011. It is not a complete or certified record of the entity.

Entity Name:	FERRERO U.S.A., INC.
Entity Number:	C0976452
Date Filed:	02/28/1980
Status:	ACTIVE
Jurisdiction:	DELAWARE
Entity Address:	600 COTTONTAIL LN
Entity City, State, Zip:	SOMERSET NJ 08873
Agent for Service of Process:	CORPORATION SERVICE COMPANY WHICH WILL DO BUSINESS IN CALIFORNIA AS CSC - LAWYERS INCORPORATING SERVICE
Agent Address:	2730 GATEWAY OAKS DR STE 100
Agent City, State, Zip:	SACRAMENTO CA 95833

\* Indicates the information is not contained in the California Secretary of State's database.

- If the status of the corporation is "Surrender," the agent for service of process is automatically revoked. Please refer to California Corporations Code [section 2114](#) for information relating to service upon corporations that have surrendered.
- For information on checking or reserving a name, refer to [Name Availability](#).
- For information on ordering certificates, copies of documents and/or status reports or to request a more extensive search, refer to [Information Requests](#).
- For help with searching an entity name, refer to [Search Tips](#).
- For descriptions of the various fields and status types, refer to [Field Descriptions and Status Definitions](#).

[Modify Search](#) [New Search](#) [Printer Friendly](#) [Back to Search Results](#)

[Privacy Statement](#) | [Free Document Readers](#)

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# **Exhibit B**

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CONFIDENTIAL - KREILMANN

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
CASE NO. 3:11-CV-00205-H-CAB

IN RE: )  
)  
NUTELLA DECEPTIVE SALES )  
PRACTICES & MARKETING )  
LITIGATION )  
----- )

DEPOSITION OF BERNARD F. KREILMANN, C.F.O.  
BRIDGEWATER, NEW JERSEY  
APRIL 14, 2011

\*\*CONTAINS HIGHLY CONFIDENTIAL PORTIONS\*\*

REPORTED BY:  
SILVIA P. WAGE, CCR, CRR, RPR  
JOB NO. 37839

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9:19 a.m.  
April 14, 2011

Deposition of BERNARD F. KREILMANN, CHIEF FINANCIAL OFFICER, held at the offices of NORRIS, McLAUGHLIN, 721 Route 202-206, First Floor Board Room, Bridgewater, New Jersey, pursuant to agreement before SILVIA P. WAGE, a Certified Shorthand Reporter, Certified Realtime Reporter, Registered Professional Reporter, and Notary Public for the State of New Jersey.

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A P P E A R A N C E S:

THE WESTON FIRM  
Attorneys for Plaintiffs  
2811 Sykes Court  
Santa Clara, California 95051  
BY: JACK FITZGERALD, ESQ

BY: GREGORY WESTON, ESQ.

WILSON SONSINI GOODRICH & ROSATI  
Attorneys for Nutella and Ferrero  
650 Page Mill Road  
Palo Alto, California 94304  
BY: DALE BISH, ESQ.

A L S O P R E S E N T:

BETH M. KOTRAN, ESQ.  
FERRERO

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CONFIDENTIAL - KREILMANN  
BERNARD F. KREILMANN, C. F. O.,  
(Ferrero Business Address) 600 Cottontail Lane, Somerset, New Jersey 08873, called as a witness, having been duly sworn by a Notary Public, was examined and testified as follows:  
EXAMINATION BY  
BY MR. FITZGERALD:  
Q. Good morning, Mr. Kreilmann.  
A. Good morning.  
Q. Am I saying that right --  
A. Yes.  
Q. -- Kreilmann?  
A. Perfect.  
MR. BISH: Should we introduce ourselves for the record.  
MR. FITZGERALD: Sure, let's make appearances.  
Jack Fitzgerald and Gregory Weston of The Weston Firm on behalf of Plaintiffs.  
MR. BISH: Dale Bish, Wilson Sonsini, for Ferrero U.S.A.  
MS. KOTRAN: Beth Kotran, legal counsel for Ferrero U.S.A. in-house.

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CONFIDENTIAL - KREILMANN  
THE WITNESS: And Bernard Kreilmann, Chief Executive Officer, for Ferrero U.S.A.  
Q. Mr. Kreilmann, have you ever been deposed before?  
A. Once.  
Q. When was that?  
A. In 2001.  
Q. So it's been a while?  
A. It's been a while.  
Q. Okay. Well, I'm sure you had some discussions with your attorney about how today is going to go and you had some experience from doing it ten years ago. So you know that I'm going to ask you questions today and you have to answer under oath?  
A. Yes.  
Q. Okay. Is there any physical or medical reason you can't give your best testimony today?  
A. No.  
Q. Was that a no?  
A. It was a no.  
Q. Okay. So, actually, as another reminder --

1 CONFIDENTIAL - KREILMANN  
 2 objections to the topics?  
 3 A. I do.  
 4 Q. And that's what Plaintiff's Exhibit 2  
 5 is?  
 6 A. Yes.  
 7 Q. So the question I'd like to ask just  
 8 before we get into the substantive testimony, is  
 9 there any deposition topic which you don't  
 10 understand?  
 11 A. No, there is not.  
 12 Q. Okay.  
 13 MR. BISH: Again, to clarify it, that  
 14 he has been designated on? Because there were  
 15 two that we did not designate him on, that we  
 16 just objected.  
 17 MR. FITZGERALD: I understand.  
 18 MR. BISH: Right.  
 19 MR. FITZGERALD: Right. And...  
 20 MR. BISH: So you're talking about  
 21 the 9 or the 11?  
 22 MR. FITZGERALD: So it was 11 total,  
 23 2 you objected to?  
 24 MR. BISH: You have 11 topics and, I  
 25 believe, we designated him on 9 of the 11.

1 CONFIDENTIAL - KREILMANN  
 2 MR. FITZGERALD: Right.  
 3 Q. So, for the ones that you are  
 4 designated on, are there any you don't  
 5 understand?  
 6 A. No.  
 7 Q. Okay, thank you.  
 8 You can put those two aside.  
 9 A. (The witness complies.)  
 10 MR. FITZGERALD: Can I have this  
 11 marked as Plaintiff's Exhibit 3, please.  
 12 (Plaintiff's Exhibit No. 3, Declaration of  
 13 Bernard F. Kreilmann in Support of Defendant's  
 14 Motion to Transfer Venue to The District of New  
 15 Jersey, was marked for identification.)  
 16 Q. Mr. Kreilmann, I'm handing you what's  
 17 been marked as Plaintiff's Exhibit 3. Would you  
 18 take a minute to review that, please.  
 19 A. (The witness complies.)  
 20 Q. Mr. Kreilmann, do you understand  
 21 Plaintiff's Exhibit 3 as a Declaration you  
 22 submitted in support of Ferrero's Motion to  
 23 Transfer Venue to the District of New Jersey?  
 24 A. Yes, I do.  
 25 Q. In Paragraph 25 of the Declaration,

1 CONFIDENTIAL - KREILMANN  
 2 you say that, "Ferrero U.S.A. sells product that  
 3 is manufactured by Ferrero Canada LTD." Do you  
 4 see that?  
 5 A. Yes.  
 6 Q. What is the relationship of Ferrero  
 7 Canada LTD to Ferrero U.S.A.?  
 8 A. Ferrero Canada LTD is supplier of  
 9 Ferrero U.S.A.  
 10 Q. Is there any sort of parent or  
 11 subsidiary relationship between the companies?  
 12 A. For U.S.A. is parent company Ferrero  
 13 International. So we have a contract of supply  
 14 with Ferrero Canada.  
 15 Q. Does Ferrero Canada and Ferrero  
 16 U.S.A. share a common parent?  
 17 A. I'm not sure about direct ownership  
 18 of Ferrero Canada -- direct relationship of  
 19 Ferrero Canada but, ultimately, yes.  
 20 Q. All the way -- eventually at the top?  
 21 A. Yes.  
 22 Q. I see.  
 23 Are Ferrero Canada and Ferrero U.S.A.  
 24 considered affiliates?  
 25 A. I'm not sure about the terms

1 CONFIDENTIAL - KREILMANN  
 2 "affiliates."  
 3 Q. Okay. In Paragraph 5 of the  
 4 Declaration, it says that, "The Nutella sold  
 5 within the United States by Ferrero U.S.A. is  
 6 primarily manufactured in Brantford, Ontario."  
 7 Do you see that?  
 8 A. Yes.  
 9 Q. What sort of facilities are there in  
 10 Brantford, Ontario for manufacturing Nutella?  
 11 MR. BISH: Object to form.  
 12 A. Can you precise your question?  
 13 Q. Sure. I'll rephrase.  
 14 What sort of physical facilities are there  
 15 in Brantford, Ontario relating to Ferrero or to  
 16 Nutella; for example, is there a factory, is  
 17 there an office?  
 18 A. Okay.  
 19 Q. What's there?  
 20 A. Yeah, it's a production entity. So  
 21 it's a factory with a production line, temporary  
 22 warehousing and offices related to the management  
 23 of the factory exclusively.  
 24 Q. Paragraph 5 says, "Ferrero Canada is  
 25 headquartered in Toronto, Ontario." Do you see

1 CONFIDENTIAL - KREILMANN  
 2 that?  
 3 A. Yes, I see that.  
 4 Q. What facilities are in Toronto?  
 5 A. To my knowledge, the entity of  
 6 Toronto is administration, marketing and sales  
 7 entity.  
 8 Q. Is the Brantford facilities, is that,  
 9 also, Ferrero Canada LTD?  
 10 A. I am not sure. I don't know the  
 11 corporate structure of Ferrero Canada LTD.  
 12 Q. If you wanted to find out, what would  
 13 you do?  
 14 A. I would ask the COO of Ferrero  
 15 Canada.  
 16 Q. And who is that?  
 17 A. Allen Cosman.  
 18 Q. Can you spell the last name for the  
 19 court reporter.  
 20 A. C-O-S-M-A-N.  
 21 Q. Thank you.  
 22 In Paragraph 5 you say That, "Nutella is  
 23 distributed in the United States using  
 24 third-party distributors at various facilities  
 25 including one that's located in Ontario,

1 CONFIDENTIAL - KREILMANN  
 2 California." Do you see that?  
 3 A. Yes.  
 4 Q. Okay. What is the name of the  
 5 distributorship located in Ontario, California?  
 6 A. It's Aspen Warehouse.  
 7 Q. Aspen Warehouse?  
 8 A. Aspen, A-S-P-E-N, like the ski  
 9 resort.  
 10 Q. Like in Colorado?  
 11 A. Yes. But that has been a recent  
 12 choice.  
 13 Q. How long have you been using them?  
 14 A. The contract, to my knowledge, is  
 15 within the last six months.  
 16 Q. Before Aspen Warehouse -- well, let  
 17 me back up. Let me strike that and let me back  
 18 up.  
 19 Aspen Warehouse is a distributorship,  
 20 correct?  
 21 A. No, it's what we call a 3PL.  
 22 Q. Excuse me?  
 23 A. A 3PL, which is a public warehouse.  
 24 So it perform activities of warehousing and  
 25 shipping --

1 CONFIDENTIAL - KREILMANN  
 2 Q. Okay.  
 3 A. -- for us.  
 4 Q. What's the distinction you draw  
 5 between that and being a distributorship?  
 6 A. That they have -- for me a  
 7 distributor is also responsible for selling in  
 8 all terms. This is not the responsibility of  
 9 this warehouse. This warehouse is only managing  
 10 the floor of goods.  
 11 Q. I see.  
 12 So Ferrero makes the sale and then  
 13 forwards the purchase orders to Aspen who then  
 14 does the shipping?  
 15 A. Deploy, exactly.  
 16 Q. And what region does Aspen cover in  
 17 terms of shipping?  
 18 A. Precisely, I can't tell. But I would  
 19 say most of the West Coast and all the way down  
 20 to the Rockies.  
 21 Q. Before Ferrero was using Aspen for  
 22 that function, who was it using to supply to ship  
 23 products to that region?  
 24 A. We were -- we had the global logistic  
 25 contract with the company OHL.

1 CONFIDENTIAL - KREILMANN  
 2 Q. Does that stand for something that  
 3 you know?  
 4 A. Osborn and then something.  
 5 Q. Okay.  
 6 A. And so they were -- we were in  
 7 contract with OHL and they were performing this  
 8 activity for us in California.  
 9 Q. Okay. Why did that contract end?  
 10 A. Because the service that was  
 11 performed wasn't satisfactory.  
 12 Q. In what respect?  
 13 A. The service level, the  
 14 responsiveness, the accuracy of the inventory.  
 15 We had a list of issues that didn't improve.  
 16 Q. When Nutella is being distributed --  
 17 well, let me back up.  
 18 Nutella is manufactured in Brantford,  
 19 Ontario, correct?  
 20 A. Correct.  
 21 Q. When it's then distributed, does it  
 22 go directly from Brantford to your shippers like  
 23 Aspen?  
 24 A. If it is an order that transit to  
 25 this warehouse, it is, from the factory directly

1 CONFIDENTIAL - KREILMANN  
 2 to this warehouse.  
 3 Q. Okay. Are there other things that  
 4 might happen under other circumstances?  
 5 A. We can ship directly from the factory  
 6 of Brantford some customers, if they have  
 7 sufficient quantities, so what we call  
 8 truckloads, or there is a possibility also if the  
 9 orders are too small, that there is a  
 10 cross-docking in between. So that can't be  
 11 excluded.  
 12 Q. Previously, you testified that there  
 13 are offices as well as a factory in Brantford,  
 14 Ontario; is that right?  
 15 A. Yeah, there are offices related to  
 16 the manufacturing activity.  
 17 Q. Okay. What sort of -- well, how many  
 18 people work in the offices versus the factory?  
 19 A. I don't know.  
 20 MR. BISH: Object, calls for  
 21 speculation.  
 22 Q. Okay. If you know. If you don't --  
 23 A. I --  
 24 Q. If I ask you question that you don't  
 25 know, you can tell me you don't know.

1 CONFIDENTIAL - KREILMANN  
 2 A. I don't know the answer.  
 3 Q. Okay. If you wanted to find out, how  
 4 would you find that out?  
 5 A. I would call the plant manager.  
 6 Q. Do you know who that is?  
 7 A. Yes.  
 8 Q. Who is that?  
 9 A. It's Del Lucca, D-E-L space L-U-C-C-A.  
 10 Q. What functions do the people in the  
 11 office part of the Brantford facilities perform?  
 12 MR. BISH: Objection, calls for  
 13 speculation.  
 14 A. Well, it's not my accountability. So  
 15 I can only speculate about the function that they  
 16 perform. I would say procurement, planning,  
 17 those kind of things.  
 18 Q. What about things like formulation of  
 19 the product?  
 20 MR. BISH: Same objection.  
 21 Q. Is that handled in Canada?  
 22 A. What exactly do you mean with  
 23 "formulation?"  
 24 Q. So, for example, if Nutella is going  
 25 to change the ingredient -- excuse me.

1 CONFIDENTIAL - KREILMANN  
 2 If Ferrero is going to change an  
 3 ingredient in Nutella or say change the amount of  
 4 an ingredient or do something to mix it up, who  
 5 at Ferrero is responsible for making decisions or  
 6 determinations about the formulation of the  
 7 product?  
 8 MR. BISH: Object to form.  
 9 A. I'm not sure exactly who is  
 10 responsible for that. I suspect that there are  
 11 many steps and it is not the sole responsibility  
 12 of Brantford.  
 13 Q. Are they involved in the formulation  
 14 of the product, to your knowledge?  
 15 A. To my knowledge, they should be  
 16 involved in the ability to -- in this kind of  
 17 event being able to execute a change in  
 18 formulation.  
 19 Q. Okay. Does Ferrero do periodic  
 20 quality control testing, sampling of product that  
 21 is being manufactured in Brantford to --  
 22 A. Absolutely.  
 23 Q. And who is responsible for that  
 24 function?  
 25 MR. BISH: Objection, calls for

1 CONFIDENTIAL - KREILMANN  
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CONFIDENTIAL - KREILMANN

A. A broker is assisting the company in  
the [REDACTED]

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1 CONFIDENTIAL - KREILMANN  
2 A. I would like -- generally speaking,  
3 the

1 CONFIDENTIAL - KREILMANN  
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MR. BISH: Object to form.

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CONFIDENTIAL - KREILMANN

Q. Mr. Kreilmann, I'm handing you what's been marked as Plaintiff's Exhibit 9. I'm going to represent to you that this is a business information report we ran through Dunn and Bradstreet on March 23, 2011.

If you'd take a moment to review it. The questions I want to ask are on the fourth page.

MR. BISH: This is a document he's, obviously, never seen before, correct?

THE WITNESS: Correct.

Q. Have you had a chance to review it?

A. Up to the page that you want to interrogate me.

Q. Okay, fair enough.

So, on Page 4 of this Dunn and Bradstreet report, and recognizing that you haven't seen this before, I just want to ask about the substantive information in it.

You see it says, subsidiaries Ferrero Salesco, all one word, U.S.A., Inc.?

A. Yes.

Q. What is Ferrero Salesco?

A. Ferrero Salesco is an entity that has been created and I don't remember when it was --

CONFIDENTIAL - KREILMANN

it was way before my time -- to separate the sales entity from the rest of the organization.

Q. Okay. Does it share offices with Ferrero U.S.A.?

A. Yes.

MR. BISH: Object to form.

Q. Does Ferrero Salesco have any other offices, other than in Somerset, New Jersey?

A. No, not to my knowledge.

Q. Do you see underneath that it says, branches U.S.?

A. Yes.

Q. And do you see it has three purported branches of Ferrero U.S.A. in the United States?

A. Yes.

Q. The first one says there is a branch in Rockford, Illinois. Do you see that?

A. I see that.

Q. Do you have an understanding about it -- well, let me just start, is there a branch of Ferrero U.S.A. in Rockford, Illinois?

A. Absolutely not, not to my knowledge.

Q. Do you have an understanding of where Dunn and Bradstreet got this information?

CONFIDENTIAL - KREILMANN

A. I don't know.

Q. Is there anything in Rockford, Illinois that Ferrero Salesco interacts with, say, a third party?

A. Really, to my knowledge, this is new information for me.

Q. Does Ferrero have a distributorship or shipper in Illinois?

A. We used to have a cost docking operation in Illinois but, again, as third-party supply.

Q. Today does Ferrero U.S.A. use anybody in Illinois?

A. Broadly speaking?

Q. For services relating to Nutella; broadly speaking, yes.

A. A broker. But, again it's a third party and we may still, I can't exclude use the close docking operation but it's very small.

Q. What's the name of the broker in Illinois?

A. The name is Carline O'Brien.

Q. Is that a company or a person?

A. It's a company.

CONFIDENTIAL - KREILMANN

Q. And what territory is Illinois in?

A. Precisely, again, I cannot define the territory as they moving. But let's say that it's probably encompass most of the Great Lakes, Minnesota, Indiana, Michigan.

Q. Okay. And who is responsible for shipping Nutella to that region, in the same way that Aspen is responsible for the region that covers California?

A. Again, it can come from various sources. If the volume is big enough, it can go directly from Brantford to the customer. The dedicated warehouse for that area should be Granite City, but it's not excluded that some shipment are made out of Somerset.

Q. See underneath the Rockford, Illinois it says that there is a branch in New York, New York; is that true?

A. I'm not aware of that. It's new information. All I know is that we used to be located in New York, but we closed this location several years ago.

Q. When did you close the New York location?

1 CONFIDENTIAL - KREILMANN  
 2 A. Actually, I don't know when we  
 3 effectively legally closed this location. I know  
 4 where -- when we moved out of the location.  
 5 Q. Okay. When did you move out of the  
 6 location?  
 7 A. Which was, approximately, in the  
 8 '90s, early '90s.  
 9 Q. Okay. And, finally, underneath that  
 10 it says that there is a branch in Newark, New  
 11 Jersey; is that true?  
 12 A. New information.  
 13 Q. Okay.  
 14 A. Never come across this information.  
 15 Q. Do you have any understanding what  
 16 that might refer to like an earlier --  
 17 A. I -- I, honestly, can't refer to the  
 18 location at all with what I know about the  
 19 company.  
 20 Q. Okay. Do your attorneys, Wilson  
 21 Sonsini, represent you in any other litigation  
 22 that's pending?  
 23 MR. BISH: Okay. Objection. First  
 24 of all, what topic, what deposition topic, are we  
 25 talking about now?

1 CONFIDENTIAL - KREILMANN  
 2 Q. I just want to know if Wilson Sonsini  
 3 represents you in any other litigation other than  
 4 the litigation over -- well, let's put it this  
 5 way.  
 6 Wilson Sonsini represents Ferrero in this  
 7 case, correct?  
 8 A. Yes.  
 9 Q. Does Wilson Sonsini represent Ferrero  
 10 with respect to any other cases involving  
 11 Nutella?  
 12 MR. BISH: Okay. So I'm going to  
 13 object to form. And let's just be -- I mean,  
 14 plainly, there is the New Jersey case. Is that  
 15 what you're referring to, or are you referring to  
 16 other unrelated --  
 17 MR. FITZGERALD: There is two New  
 18 Jersey cases.  
 19 MR. BISH: That's right.  
 20 MR. FITZGERALD: And I don't know the  
 21 answer with respect to both of them.  
 22 MR. BISH: Okay.  
 23 MR. FITZGERALD: So that's my first  
 24 question.  
 25 Q. So there's our case. There's the

1 CONFIDENTIAL - KREILMANN  
 2 MR. FITZGERALD: I mean, if you want  
 3 me to -- if you want to get into the topics and  
 4 do a specific -- I mean, do you have a problem  
 5 with the question?  
 6 MR. BISH: I might. And I really  
 7 don't understand how that's related to any of the  
 8 deposition topics about venue.  
 9 MR. FITZGERALD: Well, I think it's  
 10 related to venue because it has to do with  
 11 convenience and so forth. And not only that, but  
 12 --  
 13 MR. BISH: Okay. So we're going to  
 14 tread carefully on privileged grounds.  
 15 MR. FITZGERALD: Sure.  
 16 MR. BISH: The answer to the question  
 17 is going to be a yes or no.  
 18 MR. FITZGERALD: I'm not going to ask  
 19 --  
 20 MR. BISH: And let's be careful on  
 21 the words we're using here.  
 22 Okay.  
 23 MR. FITZGERALD: Okay. Yeah, I'm not  
 24 going to ask anything privileged about any  
 25 communications.

1 CONFIDENTIAL - KREILMANN  
 2 Glover case in New Jersey, which I believe Wilson  
 3 represents you; is that correct?  
 4 A. Yes.  
 5 Q. Okay. And then there's the state  
 6 case in New Jersey. Does Wilson Sonsini  
 7 represent you with respect to the case that was  
 8 brought in New Jersey State Court?  
 9 A. Yes.  
 10 [REDACTED]

1 CONFIDENTIAL - KREILMANN  
2 A. Connie Evers is -- I don't know if I  
3 car

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2 Q. I see. So the first one is the week  
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CERTIFICATE

IN RE: NUTELLA DECEPTIVE )
SALES PRACTICES & MARKETING )
LITIGATION )
( )

I, SILVIA P. WAGE, a Notary Public within
and for the State of New York, do hereby certify:
BERNARD F. KREILMANN, C.F.O., the witness
whose deposition is hereinbefore set forth, was
duly sworn by me and that such deposition is a
true record of the testimony given by such
witness.

I further certify that I am not related to
any of the parties to this action by blood or
marriage; and that I am in no way interested in
the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand
this 26th day of April 2011.

SILVIA P. WAGE, CCR, CRR, RPR

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EXHIBITS

Table with 2 columns: EXHIBIT NO. and PAGE/LINE. Includes entries for Plaintiff's Exhibits 1-10, Defendant Ferrero U.S.A., Inc.'s Objections to Plaintiffs' Amended Notice of Taking Deposition, and various attachments (A, B, C) marked Confidential.

# **Exhibit C**

**Exhibit Redacted Pursuant to  
Protective Order**

**See Plaintiffs' *Ex Parte*  
Motion to File Under Seal**



# **Exhibit D**

**Exhibit Redacted Pursuant to  
Protective Order**

**See Plaintiffs' *Ex Parte*  
Motion to File Under Seal**

# **Exhibit E**

**Exhibit Redacted Pursuant to  
Protective Order**

**See Plaintiffs' *Ex Parte*  
Motion to File Under Seal**

# **Exhibit F**

**Exhibit Redacted Pursuant to  
Protective Order**

**See Plaintiffs' *Ex Parte*  
Motion to File Under Seal**

# **Exhibit G**

# Contractually Narrowing the Duties and Liability of a Mail Drop Local Counsel

by David A. Mazie and Ben-David Seligman

Most firms acting as local counsel function as mere mail drops or conduits for *pro hac vice* counsel. In one matter successfully pursued by the authors' firm, however, the court found triable issues of fact regarding the scope of duty of a mail drop local counsel, acknowledging that local counsel has a general duty to supervise *pro hac vice* counsel and to provide expertise regarding local laws, procedures, and customs.<sup>1</sup>

Those duties can surprise a firm that views its role as limited. Realistically, many out-of-state firms procure local counsel only in grudging compliance with state and federal rules.<sup>2</sup> That attitude may flow from a firm's business clients, whose experience in the era of express mail and the Internet may lead them to view local counsel requirements as a costly vestige of a less mobile era.<sup>3</sup> Given those attitudes, it's no wonder when a client's chosen counsel directs unwanted local counsel to simply sign pleadings without asking questions.<sup>4</sup>

However, unless the direction and limitation of local counsel's responsibilities come directly from the client, local counsel may be exposed to liability in the event of malpractice. This article examines local counsel's obligations, and considers how local counsel contractually might narrow the scope of his or her professional duties, to bring potential legal malpractice exposure in line with those limited powers.

## What New Jersey Court Rules Expect From Local Counsel

Any comforting visions local counsel might have about the scope of their duties (and thus their potential malpractice exposure) evaporate upon even a casual reading of Rule 1:21-2(c)(4). Under that rule, a firm admitted *pro hac vice* shall:

have all pleadings, briefs and other papers filed with the court signed by an attorney of record authorized to practice in this

State, who shall be held responsible for them and for the conduct of the cause and for the admitted attorney therein. The order [admitting counsel *pro hac vice*] may contain further requirements concerning the participation of New Jersey counsel as the court from time to time deems necessary.<sup>5</sup>

Thus, aside from being substantively responsible for the content of pleadings, local counsel also is responsible for what the rule calls "the conduct of the cause."<sup>6</sup> Responsibility for the conduct of the cause is no small matter. New Jersey case law traditionally has treated that phrase as synonymous with "the labor of managing the cause."<sup>7</sup> Although *pro hac vice* counsel may seek a local firm to serve as a mere mail drop, court rules require that the local firm take a greater role.

State courts, however, provide relatively little insight into the practical construction and application of the local counsel rule—most likely because litigation involving out-of-state parties is less common in state than in federal court. Suffice it to say that the few cases discussing the role of local counsel emphasize that "strict application" is mandated, and that courts must "vigilantly scrutinize" the conduct of all counsel.<sup>8</sup>

## What Local Federal Rules Expect From Local Counsel

If local counsel is handling a matter in federal court, that firm must comply with both state and local federal rules.<sup>9</sup> The local federal rule is not a carbon copy of the state rule, but it similarly imposes specific duties and a general role:



[After an out-of-state counsel has successfully moved to be admitted *pro hac vice*, if] it has not been done prior to the granting of such motion, an appearance as counsel of record shall be filed promptly by a member of the bar of this Court upon whom all notices, orders and pleadings may be served, and who shall promptly notify his or her specially admitted associate of their receipt. Only an attorney at law of this Court may file papers, enter appearances for parties, sign stipulations, or sign and receive payments on judgments, decrees or orders.<sup>10</sup>

Like the state rule, the local federal rule refers to local counsel as counsel “of record,” and requires the local firm to sign all pleadings.<sup>11</sup> The local federal rule broadens local counsel’s role by adding further specific duties (*e.g.*, providing that only local counsel may “enter appearances for parties”).<sup>12</sup> Because it does not expressly impose an overall managerial duty of conduct of the cause, the federal rule plausibly might be construed as setting forth a narrower scope of duty than the state rule.<sup>13</sup>

However, although the local federal rule does not impose a managerial duty on its face, federal courts have inferred it. In one case, the local federal rule was held to impose an obligation “to supervise the conduct” of *pro hac vice* counsel.<sup>14</sup> In another, the court did not directly address the issue of whether the local federal rule imposed a supervisory role. Instead, the court simply noted that the equivalent state rule required *pro hac vice* counsel to be “adequately supervised” by local counsel, and accepted that state standards governing the practice of law are applicable in federal court.<sup>15</sup>

New Jersey’s federal courts have laid out local counsel’s duties, as follows:

First, members of our Bar are familiar with the rules and customs of this

Court and are expected to both *educate pro hac vice attorneys on, and enforce, those rules and customs*. Second, members of the Bar of this Court are more readily available than *pro hac vice* attorneys for conferences or other matters which arise in the course of litigation. Third, the Court looks to members of its Bar to serve as liaison between it and *pro hac vice* attorneys and to ensure effective communication between the Court and *pro hac vice* attorneys.<sup>16</sup>

Federal courts treat the duties to “educate” and “enforce” as considerably more than casual guidelines: Breach of those duties has been held to be grounds for disciplinary penalties as well as malpractice liability.<sup>17</sup>

### **Contractually Narrowing the Scope of Local Counsel’s Duty**

The most obvious means of narrowing the scope of local counsel’s duties (and malpractice liability) is under the Rules of Professional Conduct, which provide that an attorney generally “may limit the scope of his representation if the limitation is reasonable under the circumstances and the client gives informed consent.”<sup>18</sup> Under that provision, local counsel may sign a retainer agreement with the client, actively releasing local counsel of the duties to educate, supervise, manage, and enforce local rules, and instead ceding all practical control of the case to the client’s chosen out-of-state counsel. It cannot be stressed enough that the limitation must be signed by the client after consultation, as opposed to *pro hac vice* counsel, in order for the limitation to comply with the Rules of Professional Conduct.

New Jersey case law on the whole has no objection to limited representation, so long as the limits are objectively reasonable, and the client provides informed consent.<sup>19</sup> However, no New Jersey state or federal court has express-

ly ruled upon contractual limits on representation by local counsel.

In at least two other jurisdictions, courts have approved contractual limitations upon the scope of local counsel’s duty.<sup>20</sup> Unlike New Jersey, however, local rules in those jurisdictions do not require local counsel to assume any sort of managerial role. Rather, they appear to presume that local counsel will be a passive messenger or mail-drop, unless he or she expressly assumes broader duties.<sup>21</sup> Thus, such cases assist little in deciding whether a retainer agreement can be used to free local counsel from supervisory duties under New Jersey’s rules. Closer on point is *Armor v. Lantz*, which discusses New Jersey federal precedent, and holds that a client may contractually limit the duties of local counsel. Any limitation must be only to the extent permissible by local *pro hac vice* rules, which seek to ensure good communication and competent representation.<sup>22</sup>

In light of the cited portion of the rules and New Jersey precedent, as well as cases from other jurisdictions, local counsel may enter into a retainer agreement with the client placing “reasonable” limits upon the scope of his or her duty under New Jersey law. Contractual limits upon the scope of an attorney’s duty necessarily place equivalent limits on the scope of the attorney’s malpractice liability.<sup>23</sup> Accordingly, the remaining question is: What contractual limits upon the scope of local counsel’s duties are reasonable, and thus permissible?

### **The Reasonable Needs of the Client and the Court**

In determining which restrictions upon the scope of local counsel’s representation are reasonable, one must look at an out-of-state client’s reasonable needs.

Paying for two different law firms’ services can be expensive, and a client seeking to limit local counsel’s role is frequently seeking to limit local counsel’s

# **Exhibit H**

## Navigating The New Jersey Courts With Local Counsel



by Donald E. Taylor, Esq. and James E. Tonrey, Jr., Esq.

February 2010

Consider the following scenario:

*A high-powered Chicago litigator, directing a New Jersey litigation, is aware that discovery will not be completed by the Court-generated discovery end date. A full two weeks before discovery closes, the Chicago lawyer instructs local counsel, who had been serving merely as a New Jersey "mailbox" to this point, to extend discovery. Because the New Jersey Court Rules require motions to extend discovery to be filed on 16 days' notice, and returnable prior to the end of the discovery period, this prominent litigator must now show "exceptional circumstances" for the "late" extension request, or be foreclosed from taking basic discovery while being forced to reckon with an automatic trial date.*

No lawyer -- let alone one practicing in an unfamiliar jurisdiction -- wants to be placed in such an uncomfortable situation. Yet, given some peculiarities of New Jersey practice, in both State and Federal Court, this type of situation can befall even the most diligent out-of-state lawyer admitted pro hac vice.

Retaining local counsel to serve merely as a "mailbox" or filing assistant can transform the best prepared papers into objects of scorn. No lawyer wants to explain to a client that carefully-prepared (and expensive) papers have not been accepted for filing, or that deadlines established by Court rules, by oversight, were not met.

With this in mind, it is useful to consider a few nuances of New Jersey practice that may be unfamiliar to out-of-state lawyers, and

which demonstrate the importance of retaining competent, active local counsel in New Jersey.

A good starting point is the recent amendments to New Jersey's State Court rules concerning the form of Case Information Statement ("CIS") that all parties must file at the commencement of the case. The form was recently amended to require the filer to certify that he or she has removed or redacted personal-identifying information such as social security numbers or financial account numbers. While this new innovation may elude practitioners relying on outdated CIS forms, breach of this requirement could lead to the imposition of sanctions upon the filer.

Another nuance of New Jersey practice, illustrated above, involves the time period for concluding discovery and the requirement that a motion to extend discovery be filed and made returnable prior to the expiration of the discovery period. While this requirement may sound mundane and easily satisfied, it may be challenging in practice. Motion days in New Jersey are generally every other Friday, and the schedule is rigidly enforced. Couple that with the fact that motions must be filed at least 16 days in advance of the scheduled return date, the well-prepared practitioner, as a practical matter, must be thinking about extending the discovery period at least three weeks to a month prior to the discovery end date, depending on when the discovery period expires in relation to the court's motion schedule. If the discovery period ends without a motion to extend being timely filed and argued, the clerk's office automatically generates a trial date regardless of whether discovery is complete, and the lawyer

needing additional discovery must contend with adjourning a trial date (which, following the expiration of the discovery period, cannot be adjourned on the grounds that discovery is not complete).

Another noteworthy aspect of New Jersey practice involves expert discovery. The New Jersey Court rules protect from discovery draft expert reports and communications between the expert and the attorney, which is a practice that differs from the current Federal Rules of Civil Procedure. Consequently, familiarity with the New Jersey Court rules will enable counsel to remove draft reports and other communications between the attorney and the expert from production and avoid the potential waiver of applicable privileges.

A final nuance concerns practice in federal court in New Jersey. Three vicinages comprise the District of New Jersey, in Newark, Camden and Trenton. Regardless of the vicinage in which one is practicing, however, the District Judges require a very comprehensive form of final pretrial order. While the specifics may vary from judge to judge, some general requirements include: specifying all deposition

read-in testimony, by page and line, setting forth objections and counter-designations to such read-in testimony; listing all trial exhibits and objections thereto; and having to meet with adverse counsel prior to the trial to agree upon proposed jury charges, where applicable. The Court may also require counsel to submit a statement of stipulated facts, a statement of contested facts, and list all contemplated in limine motions. While it is obvious that preparing a final pretrial order is time-consuming, a well-prepared practitioner will be aware of the form of final pretrial order that a particular judge requires, will prepare and organize the case accordingly, and will begin preparing the final pretrial order well in advance of the due date. Counsel that is unaware of this aspect of New Jersey federal court practice may find him or herself in quite an uncomfortable position at the end of the case.

Undoubtedly, New Jersey practice has a number of nuances of which counsel from outside the State should be cognizant and/or have competent local counsel. Otherwise, litigating a case in New Jersey can become burdensome and needlessly frustrating.



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*Donald E. Taylor is a shareholder and James E. Tonrey, Jr., is counsel in the complex commercial litigation department at Wilentz, Goldman & Spitzer, P.A.*

# **Exhibit I**



## Karen A. Confoy

Karen Confoy has extensive litigation experience in the federal and state courts, particularly with complex litigation matters and business, intellectual property and employment disputes. She has represented clients in multi-district litigations, class actions, multi-party actions and nationally coordinated multi-jurisdictional litigations, and regularly serves as New Jersey litigation local counsel for leading firms across the United States.

Ms. Confoy also provides clients with a variety of counseling services, including in-house training sessions on employment issues and public contracting matters, and has represented clients in numerous mediations and arbitrations.

Ms. Confoy served as judicial clerk to the Honorable Garrett E. Brown, Jr., United States District Court Judge for the District of New Jersey, during the 1986 - 1987 court terms.

Ms. Confoy is past president and serves on the Board of Directors of Mobile Meals of Trenton/Ewing, a nonprofit service organization that delivers meals to the homebound.

### Education

- Rutgers University School of Law, Camden (J.D., 1985)
- Rutgers College, Rutgers University (B.A., 1981)

### Bar Admissions

- New Jersey (1985)
- United States District Court for the District of New Jersey (1985)
- United States District Court for the Eastern District of Pennsylvania (1987)
- United States Court of Appeals, Third Circuit (1994)

### Professional Memberships and Appointments

- Member, Mercer County Bar Association
- Member, District VII (Mercer County) Ethics Committee of the Supreme Court of New Jersey (2003 - 2007)
- Barrister, Mercer County American Inns of Court (2002-2003)
- Member, New Jersey State Bar Association (Federal Practice and Procedures Section)
- Member, American Bar Association (Litigation and Intellectual Property Sections)
- Member, The Association of the Federal Bar of the State of New Jersey





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### Practice Areas

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[Employment Law](#)

[Intellectual Property Law](#)

[Local Counsel](#)

### Publications

[Implied Contracts in the Employment Relationship \(New Jersey Law Journal\)](#)



## Erica S. Helms

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#### PRACTICE AREAS

##### Administrative/Governmental

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##### Litigation

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#### EDUCATION

Widener University School of Law  
(J.D., *cum laude*, 2003)  
Miami University (B.S., 2000)

#### BAR ADMISSIONS

New Jersey (2003)  
United States District Court for the  
District of New Jersey (2003)  
United States Court of Appeals for the  
Third Circuit (2006)  
United States Court of Appeals for the  
Federal Circuit (2006)

## Erica S. Helms

Erica Helms focuses her practice on complex business litigation, as well as on administrative and regulatory compliance matters involving agencies throughout the State of New Jersey, and related appellate proceedings. Ms. Helms has extensive public procurement experience at the State and local levels, which includes challenging bid specifications and unjust contract awards, and defending successful bidders. In this regard, Ms. Helms has represented bidders in connection with some of the largest procurements in the State. Ms. Helms also routinely counsels corporate clients with regard to various employment matters involving wage and hour compliance, employee terminations and layoffs, employee discipline, workplace privacy, State and federal leave laws, employment policies and handbooks, and the protection of trade secrets.

Erica Helms also routinely serves as New Jersey local counsel to leading law firms across the country in connection with a wide variety of cases, including patent, copyright, trademark, unfair competition, employment discrimination and commercial disputes. She has served as local counsel in a number of high stakes patent infringement actions implicating a range of technologies, including patent infringement actions filed under the Hatch Waxman Act. Ms. Helms' local counsel experience also includes working with the Recording Industry Association of America and the Motion Picture Association of America in conjunction with their anti-piracy efforts.

#### PROFESSIONAL MEMBERSHIPS AND APPOINTMENTS

Member, Mercer County Bar Association  
Member, The Association of the Federal Bar of the State of New Jersey

# **Exhibit J**



**REDACTED VERSION – FULL VERSION FILED UNDER SEAL**

Third-Party Witness	Basis	Location	Possible Testimony	Possible Relevance
<p>Connie Evers – <i>Purported children’s nutrition expert on whose opinion Ferrero relies for the campaign Plaintiffs challenge as false and misleading</i></p>	<ul style="list-style-type: none"> <li>• MCC ¶¶ 82-88</li> <li>• Kreilmann Dep. Tr. 61:25-73:16</li> </ul>	<p>Beaverton, Oregon</p>	<ul style="list-style-type: none"> <li>• Basis for Ferrero’s nutritional and health claims with respect to Nutella</li> <li>• Ferrero’s knowledge of the effects of Nutella on children’s health</li> <li>• Ferrero’s intentions with respect to the Nutella advertising campaign Plaintiffs challenge</li> <li>• What Ferrero told and provided to Ms. Evers, and what Ms. Evers told and provided to Ferrero</li> </ul>	<ul style="list-style-type: none"> <li>• Whether Ferrero’s nutritional and health claims with respect to Nutella are substantiated, accurate, truthful, and complete</li> <li>• Whether Ferrero intentionally misled consumers, such that the imposition of punitive damages is appropriate</li> </ul>
<p>Del Lucca – <i>Plant manager of Ferrero Canada, Ltd.’s Brantford, Ontario factory</i></p>	<p>Kreilmann Dep. Tr. 18:12-21:5, 51:10-52:2</p>	<p>Brantford, Ontario, Canada</p>	<p>[REDACTED]</p>	<p>[REDACTED]</p>
<p>[REDACTED]</p>	<p>Kreilmann Dep. Tr. 27:8-25</p>	<p>Unknown</p>	<p>[REDACTED]</p>	<p>[REDACTED]</p>

**REDACTED VERSION – FULL VERSION FILED UNDER SEAL**

Third-Party Witness	Basis	Location	Possible Testimony	Possible Relevance
<p>[REDACTED]</p>	<p>Kreilmann Dep. Tr. 52:3-20</p>	<p>Unknown</p>	<p>[REDACTED]</p>	<p>[REDACTED]</p>
<p>[REDACTED]</p>	<p>Kreilmann Dep. Tr. 52:3-53:17, 85:2-13</p>	<p>Brantford, Ontario</p>	<p>[REDACTED]</p>	<p>[REDACTED]</p>
<p>[REDACTED]</p>	<p>Kreilmann Dep. Tr. 65:4-24</p>	<p>Princeton, NJ</p>	<p>[REDACTED]</p>	<p>[REDACTED] onal value of Nutella</p>
<p>[REDACTED]</p>	<p>Kreilmann Dep. Tr. 70:6-71:17</p>	<p>Bogota, Columbia</p>	<p>[REDACTED]</p>	<p>[REDACTED]</p>

**REDACTED VERSION – FULL VERSION FILED UNDER SEAL**

Third-Party Witness	Basis	Location	Possible Testimony	Possible Relevance
[REDACTED]	Kreilmann Dep. Tr. 85:2-86:6	Germany	[REDACTED]	[REDACTED]
[REDACTED]	Kreilmann Dep. Tr. 133:19-135:12	Luxemburg	[REDACTED]	[REDACTED]
[REDACTED]	Kreilmann Dep. Tr. 24:15-26:18	[REDACTED]	[REDACTED]	[REDACTED]
[Representative of] Aspen Logistics – <i>3PL Ferrero uses to distribute Nutella on the West Coast</i>	Kreilmann Dep. Tr. 14:22-16:20	<ul style="list-style-type: none"> <li>• 5505 Concurs St., Ontario, CA 91764</li> <li>• 1901 California Street, Redlands, CA 92374</li> <li>• 43385 Business Park Dr., Temecula, CA 92590</li> </ul>	<ul style="list-style-type: none"> <li>• Ferrero’s policies and procedures relating to the distribution and sale of Nutella</li> <li>• Ferrero’s customers</li> </ul>	<ul style="list-style-type: none"> <li>• Foundational</li> <li>• What Ferrero tells its customers about shelf placement, etc.</li> </ul>

**REDACTED VERSION – FULL VERSION FILED UNDER SEAL**

Third-Party Witness	Basis	Location	Possible Testimony	Possible Relevance
<p>[Representative of] OHL – <i>3PL Ferrero previously used to distribute Nutella on the West Coast</i></p>	<p>Kreilmann Dep. Tr. 16:21-17:15</p>	<p>1580 Eastridge Avenue Riverside, CA 92507</p>	<ul style="list-style-type: none"> <li>• Ferrero’s policies and procedures relating to the distribution and sale of Nutella</li> <li>• Ferrero’s customers</li> </ul>	<ul style="list-style-type: none"> <li>• Foundational</li> <li>• What Ferrero tells its customers about shelf placement, etc.</li> </ul>
<p>[REDACTED]</p>	<p>Kreilmann Dep. Tr. 56:13-25</p>	<p>Unknown</p>	<p>[REDACTED]</p>	<p>[REDACTED]</p>
<p>[REDACTED]</p>	<p>Kreilmann Dep. Tr. 36:4-7</p>	<p>[REDACTED]</p>	<p>[REDACTED]</p>	<p>[REDACTED]</p>
<p>[REDACTED]</p>	<ul style="list-style-type: none"> <li>• Kreilmann Dep. Tr. 33:13-37:6</li> <li>• FERRERO001207</li> <li>• Ferrero Interrogatory Response No. 4</li> </ul>	<p>[REDACTED]</p>	<p>[REDACTED]</p>	<p>[REDACTED]</p>

REDACTED VERSION – FULL VERSION FILED UNDER SEAL

Third-Party Witness	Basis	Location	Possible Testimony	Possible Relevance
[REDACTED]	Kreilmann Dep. Tr. 41:13-17	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	Kreilmann Dep. Tr. 61:25-62:19, 63:23- 64:12, 69:17-23, 71:18- 24	[REDACTED]	[REDACTED]	[REDACTED]

# **Exhibit K**

## U.S. DISTRICT COURT - JUDICIAL CASELOAD PROFILE

		12-MONTH PERIOD ENDING SEPTEMBER 30								
CALIFORNIA SOUTHERN		2010	2009	2008	2007	2006	2005	Numerical Standing		
OVERALL CASELOAD STATISTICS	Filings*	9,543	9,191	7,723	7,371	6,845	6,566	U.S.	Circuit	
	Terminations	10,061	9,414	8,130	7,822	6,389	6,694			
	Pending	4,870	4,682	4,252	3,942	3,776	3,324			
	% Change in Total Filings	Over Last Year	3.8						36	6
Over Earlier Years				23.6	29.5	39.4	45.3	5	1	
Number of Judgeships		13	13	13	13	13	13			
Vacant Judgeship Months**		16.5	.0	11.8	11.6	12.0	12.0			
ACTIONS PER JUDGESHIP	FILINGS	Total	734	706	594	567	527	504	8	3
		Civil	241	244	204	218	220	208	72	9
		Criminal Felony	375	364	308	254	209	193	5	2
		Supervised Release Hearings**	118	98	82	95	98	103	3	2
	Pending Cases		375	360	327	303	290	256	53	9
	Weighted Filings**		530	539	445	439	421	387	26	8
	Terminations		774	724	625	602	491	515	6	2
	Trials Completed		16	20	22	30	23	29	65	9
MEDIAN TIMES (months)	From Filing to Disposition	Criminal Felony	3.8	3.9	3.9	4.3	3.9	4.2	2	1
		Civil**	6.0	6.0	6.2	5.9	6.6	6.3	9	2
	From Filing to Trial** (Civil Only)		31.6	32.0	25.5	24.0	33.0	25.4	61	9
OTHER	Civil Cases Over 3 Years Old**	Number	165	159	133	111	153	138		
		Percentage	6.9	6.7	6.5	5.2	6.9	7.1	58	7
	Average Number of Felony Defendants Filed Per Case		1.1	1.1	1.1	1.2	1.2	1.1		
	Jurors	Avg. Present for Jury Selection	56.16	56.77	55.28	55.77	53.64	58.66		
		Percent Not Selected or Challenged	47.8	43.8	43.3	43.5	42.2	44.5		

### 2010 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE

Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	3132	62	79	844	63	240	124	329	290	157	283	35	626
Criminal*	4876	318	719	3220	46	381	35	46	3	7	30	47	24

\* Filings in the "Overall Caseload Statistics" section include criminal transfers, while filings "By Nature of Offense" do not.

\*\* See "[Explanation of Selected Terms.](#)"

## U.S. DISTRICT COURT - JUDICIAL CASELOAD PROFILE

		12-MONTH PERIOD ENDING SEPTEMBER 30								
NEW JERSEY		2010	2009	2008	2007	2006	2005	Numerical Standing		
OVERALL CASELOAD STATISTICS	Filings*	7,907	8,003	7,710	7,699	7,275	7,539	U.S.	Circuit	
	Terminations	8,188	8,334	7,654	7,752	7,480	7,605			
	Pending	6,712	6,866	7,101	6,892	6,855	6,987			
	% Change in Total Filings	Over Last Year		-1.2				62	5	
Over Earlier Years			2.6	2.7	8.7	4.9	36	3		
Number of Judgeships		17	17	17	17	17	17			
Vacant Judgeship Months**		11.7	.0	.0	.0	32.3	27.8			
ACTIONS PER JUDGESHIP	FILINGS	Total	465	471	454	454	428	444	38	3
		Civil	414	412	391	392	369	387	20	3
		Criminal Felony	39	48	52	51	51	48	81	3
		Supervised Release Hearings**	12	11	11	11	8	9	79	3
	Pending Cases		395	404	418	405	403	411	49	5
	Weighted Filings**		492	511	511	496	481	493	37	3
	Terminations		482	490	450	456	440	447	34	3
	Trials Completed		11	12	13	13	11	10	84	6
MEDIAN TIMES (months)	From Filing to Disposition	Criminal Felony	12.3	11.0	11.7	10.8	12.1	10.0	78	4
		Civil**	6.8	7.6	7.6	7.6	8.2	7.3	17	3
	From Filing to Trial** (Civil Only)		40.6	37.7	38.5	36.0	33.0	36.7	72	5
OTHER	Civil Cases Over 3 Years Old**	Number	306	307	362	316	306	346		
		Percentage	5.2	5.1	5.8	5.3	5.2	5.7	50	3
	Average Number of Felony Defendants Filed Per Case		1.1	1.1	1.1	1.2	1.2	1.3		
	Jurors	Avg. Present for Jury Selection	63.98	78.07	81.01	67.94	88.98	75.41		
Percent Not Selected or Challenged		37.5	37.2	20.7	34.9	39.2	38.3			

2010 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE													
Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	7046	171	456	1254	68	68	948	1121	754	325	979	8	894
Criminal*	649	6	148	34	80	206	55	29	9	13	12	13	44

\* Filings in the "Overall Caseload Statistics" section include criminal transfers, while filings "By Nature of Offense" do not.

\*\* See "[Explanation of Selected Terms.](#)"