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

11	In re FERRERO LITIGATION)	CASE NO.: 11 CV 0205 H (CAB)
12)	DEFENDANT FERRERO U.S.A.,
13)	INC.'S REPLY IN SUPPORT OF ITS
14)	MOTION TO TRANSFER VENUE
15)	Date: May 16, 2011
16)	Time: 10:30 a.m.
17)	Before: Hon. Marilyn L. Huff
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1 **INTRODUCTION**

2 As set forth in its opening memorandum, Ferrero U.S.A., Inc. (“Ferrero”) does not
3 dispute that this judicial district is one proper forum for this action. Indeed, at the outset of the
4 litigation, Ferrero intended to litigate the case here – and retained California-based lawyers to do
5 so – notwithstanding that Ferrero’s headquarters and relevant witnesses are located in and around
6 New Jersey.

7 But the landscape changed once another plaintiff filed a nearly-identical complaint in the
8 District of New Jersey that challenges the same conduct, seeks the same relief, and purports to
9 represent the same nationwide class of consumers who purchased Nutella® in the United States
10 between 2008 and the present.¹ From the moment that case was filed, Ferrero has attempted to
11 have these cases litigated together and efficiently. For reasons unclear to Ferrero, the California
12 and New Jersey plaintiffs have refused to work together to try to agree on a common venue, and,
13 instead, required Ferrero to seek transfer of one of the cases – *i.e.*, either transferring the *Glover*
14 action to California, or transferring the *Hohenberg* action to New Jersey – under 28 U.S.C.
15 Section 1404(a). For the reasons set forth in this transfer motion, including that its headquarters
16 and the vast majority of witnesses and evidence are located in New Jersey, Ferrero seeks in this
17 motion to transfer the *Hohenberg* action to New Jersey.²

18 The only other options to avoid duplicative litigation are to seek dismissal of the New
19 Jersey action (as the *Hohenberg* plaintiffs prefer) or to petition the Panel on Multi-District
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21 ¹ Although the *Hohenberg* plaintiffs purport to represent a class of consumers dating back to
22 January 1, 2000, the challenged advertisements at the core of their claims did not appear in the
23 United States until 2008 (when they were aired in test markets in Providence, Rhode Island and
24 Albany, New York) and did not appear in California until 2009. Moreover, neither plaintiff
25 purchased Nutella® until 2009 (Compl. ¶¶ 26, 29) and therefore lack standing to pursue any
26 claims based on a prior formulation of Nutella® that they never purchased. Compl. ¶ 69
27 (alleging that Nutella® was reformulated in 2008 to remove PHVO). Therefore, the two
28 purported classes are fundamentally identical and overlapping.

² Concurrently, Ferrero is seeking to dismiss the *Hohenberg* action entirely for its failure to
state any viable claims against Ferrero; the motion to dismiss is scheduled to be heard on June
13, 2011. In addition, today is the deadline for Ferrero to respond to the complaint filed in the
District of New Jersey. Ferrero will do so by moving to dismiss that complaint as well for
failure to state a claim.

1 Litigation for pre-trial consolidation under Section 1407 (as Ms. Glover prefers). But it is
2 unnecessary to form an MDL with only two cases pending when Section 1404(a) can be used to
3 bring the cases together. Indeed, this is a type of situation Section 1404(a) is perfectly situated to
4 address.

5 Ferrero respectfully submits that transfer under Section 1404(a) is the right procedural
6 mechanism under these circumstances. The question then becomes which judicial district – the
7 Southern District of California or District of New Jersey – has a stronger connection to the
8 parties and witnesses, the challenged conduct, and the claims asserted. As set forth in Ferrero’s
9 opening memorandum, those factors support transfer to the District of New Jersey.

10 **A. There Is Nothing Unique About the “Substantial Contacts” with California**

11 In their opposition, plaintiffs argue that Ferrero has “substantial contacts” with
12 California. Opp. at 1-5, 9-10. Ferrero has not suggested otherwise and does not contest this
13 Court’s jurisdiction over it. Because Ferrero sells Nutella® throughout the United States, it has
14 contacts with states around the country. However, there is nothing unique about its California
15 “substantial contacts” that makes the Southern District of California any more appropriate than
16 other judicial districts, much less the District of New Jersey.

17 Plaintiffs place most of their emphasis on the fact that two of the named plaintiffs live
18 here and that Ferrero sells a “significant amount” of Nutella® in the state. Opp. at 1-2. If those
19 were the dispositive factors under Section 1404, as plaintiffs suggest, then California’s sheer size
20 and population density would effectively convert this state into the *de facto* forum for resolving
21 nationwide class actions. Under plaintiffs’ approach, California residents would be able to
22 defeat virtually any motion to transfer – notwithstanding the location of relevant witnesses,
23 events, and evidence – a result that is contrary to the principles underlying Section 1404 and
24 notions of comity amongst the federal courts. *Italian Colors Restaurant v. American Express*
25 *Co.*, No. C. 03-3719 SI, 2003 WL 22682482 (N.D. Cal. Nov. 10, 2003) (cautioning that due to
26 California’s population, “virtually every significant class action case would need to be litigated
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1 in California, a logic that has been repeatedly rejected”) quoting *Ho v. Ikon Office Solutions,*
2 *Inc.*, 143 F.Supp.2d 1163, 1167-68 (N.D. Cal.2001).³

3 Other than its enormous population, there is nothing unique about the “significant” sales
4 of Nutella® in California – much less in this judicial district. Although plaintiffs suggest that
5 sales of Nutella® in California are disproportionately higher than its population (*id.* at 2 n.3),
6 Ferrero has repeatedly explained to plaintiffs that they could not draw such conclusions from the
7 data. For example, plaintiffs emphasize the sales data from Target and Costco (which have a
8 relatively high presence in California) while deemphasizing Wal-Mart – the largest retailer in the
9 United States by orders of magnitude – that has a substantially smaller footprint in California
10 than in other parts of the country. *Opp.* at 2-3. That Californians prefer to shop at Target and
11 Costco instead of Wal-Mart has no bearing whatsoever on whether this case can be transferred to
12 the District of New Jersey to avoid duplicative and wasteful litigation.

13 The other “substantial contacts” identified by plaintiffs are even less relevant. For
14 example, Nutella® is advertised nationally and despite plaintiffs’ characterization (*id.* at 4), there
15 is nothing unique about the advertisements that run in California. Similarly, Ferrero “sends” its
16 sales force into every state, not just California (*id.* at 4), and its third-party distributors “move
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18 ³ Plaintiffs argue this case is “localized” in the Southern District of California because many
19 class members live in this state. *See Opp.* at 22-23. Under plaintiffs’ definition, this dispute is
20 “localized” in every judicial district in the United States given the widespread distribution of
21 Nutella® in this country. But the case law does not support that proposition. For example, in
22 *NBA Props*, cited by plaintiffs, the court explained that “the action’s nexus with this District go
23 beyond mere sales” because, for example, the parties had attended meetings with each other in
24 New York and “[c]onsequently, for reasons other than sales of the Plush Toys in New York, the
25 locus of the operative events is New York.” 2000 U.S. Dist. LEXIS 3799 at *12 (S.D.N.Y.
26 March 27, 2000). Similarly, in *King v. Johnson*, the court considered the large number of class
27 members in California but emphasized that California was a more appropriate venue than
28 Maryland (plaintiff’s preferred venue) because:

24 USI’s principal office and manufacturing facilities are located in Compton, California, within
25 the district to which transfer is sought. USI has no Maryland offices. Of the companies’ six
26 top managers, four live in California. None live anywhere near Maryland. All of the
27 corporate records are located in California. Should the case proceed to trial in this Court, USI
28 personnel and documents will have to be shuffled back and forth between Los Angeles and
Baltimore. Clearly, this would inconvenience USI.

565 F. Supp. 711, 719 (D.Md. 1983).

1 product” to retailers throughout the country, not just California (*id.* at 5). None of these facts
2 weigh in favor of litigating this case in the Southern District of California, or in any other
3 particular district for that matter. *Italian Colors*, 2003 WL 22682482, at *3 (explaining that
4 location of named plaintiff’s transaction with defendant, when the same as those “executed by
5 merchants at thousands of individual businesses throughout the country, deprives this factor of
6 any weight in the analysis of proper venue.”).

7 **B. The Southern District of California Is Not More Convenient for the Parties**
8 **or the Witnesses**

9 Plaintiffs acknowledge that the District of New Jersey would be more convenient for
10 Ferrero but argue that transferring this action to that court would “shift the inconvenience—and
11 disproportionately at that—onto Plaintiffs.” Opp at 11. Unlike plaintiffs, Ferrero did not
12 voluntarily file litigation and it is not correct that the named plaintiffs in a consumer class action
13 will “disproportionally” bear the “inconvenience” of litigation. The inconvenience of class
14 actions is overwhelmingly borne by the defendant, its employees, and third-party vendors.
15 *Italian Colors*, 2003 WL 22682482, at *5 (location of defendants’ documents and witnesses
16 more important in transfer analysis where named plaintiff, “can be expected to contribute
17 comparatively little documentary evidence to the action”); *Metz v. U.S. Life Ins. Co. in City of*
18 *New York*, 674 F.Supp.2d. 1141, 1147-48 (C.D. Cal. 2009) (granting transfer of class action
19 where inconvenience was unevenly borne by defendant, its employees, and third-party
20 witnesses); *Gomez v. Wells Fargo Bank, NA*, No. CV-09-00181-PHX-GMS, 2009 WL 1936790,
21 at *4 (D. Ariz. Jul. 2, 2009) (where plaintiffs are the only local connection to the class action,
22 and defendant’s state is the “center of discovery in this case,” as most witnesses and documents
23 are located there, transfer “will ease access to sources of proof, lessen the relative financial
24 burdens of litigation, and reduce the overall cost of litigation.”).

25 True, the named plaintiffs will each be deposed (in San Diego), will each produce the
26 documents they have (in San Diego) and attend mediations (at a mutually agreeable location).
27 But the location of those proceedings will not be affected if the case is transferred to New Jersey.
28 The only proceeding that would require the named plaintiffs to travel to New Jersey is trial

1 (likely, one day of testimony each) and, possibly, a very few number of other hearings in which
2 their participation may be required.⁴ While Ferrero is sympathetic to the challenges faced by
3 these individuals in their personal lives – and will work in good faith to accommodate their
4 schedules and commitments – transferring this case to New Jersey will not uproot their daily
5 lives or preclude them from participating in this lawsuit. Opp. at 13-14. Moreover, the
6 possibility of litigating this case in a different forum is attendant to plaintiffs’ decision to pursue
7 claims against a foreign defendant on behalf of a nationwide class of consumers.⁵

8 With respect to the convenience of individuals, Ferrero notes – for future purposes –
9 plaintiffs’ repeated representation that “the existence of fact-based witnesses in a California false
10 advertising action is of relatively little importance” (Opp. at 17-18) and plaintiffs’ position that it
11 is the expert witnesses that “are really crucial here.” *Id.* Although Ferrero agrees with plaintiffs
12 that this case involves a very small number of fact witnesses, plaintiffs would have the Court
13 believe that the key witnesses in this case include employees at a Los Angeles production
14 company (Believe Media) that hired actors and operated film cameras, Ferrero’s third-party
15 distributors (Aspen and OHL) that move product from warehouses to shelves, and the two
16 California brokers who sell Nutella® to California retailers (but not the brokers located
17 elsewhere, despite pursuing claims on behalf of a nationwide class). Opp at 19. But those
18 witnesses have little, if any, connection to the allegations of false and deceptive practices alleged
19 in plaintiffs’ complaint. *See Italian Colors*, 2003 WL 22682482, at *5 (“Since the claims arise
20 solely out of defendants’ business practices, the parties would expect that most of the witnesses
21 will be the defendants’ employees.”).

23 ⁴ If traveling to New Jersey would constitute a burden on the named plaintiffs, Ferrero would
24 not object to their telephonic participation at pre-trial hearings.

25 ⁵ Although they acknowledge plaintiff’s choice of forum is given less weight in class actions
26 (Opp. at 8), plaintiffs go on to cite a number of cases for the proposition that their choice of
27 forum is entitled to “significant weight.” *Id.* at 9. Many of those cases were not class actions
28 and not one involved a situation where, as here, there are virtually identical actions pending in
separate districts. Although plaintiffs’ choice of forum is given some weight under the
circumstances, that preference does not outweigh the considerable burden that would be placed
on Ferrero and the courts of litigating the same claims on opposite sides of the country.

1 Plaintiffs also argue that this Court has subpoena power over various agencies that have
2 locations in Los Angeles, without regard to the fact that the individuals who actually interact
3 with Ferrero do not work in those locations. Kreilmann Decl. ¶ 6. It does not require an
4 affidavit to demonstrate that testifying in New Jersey would be more convenient for individuals
5 who live and work in New Jersey and New York.

6 Finally, plaintiffs argue that Ferrero did not satisfy its burden under Section 1404(a) in
7 moving to transfer. They are wrong. As explained in Ferrero’s opening brief, the most
8 important factor in circumstances like this are the interests of justice. Opening Memo. at 6.⁶
9 Had Ferrero moved to transfer this case to a judicial district that did not have a nearly-identical
10 case pending, those interests would not have been as strong. But where there are two parallel
11 actions – both in their nascent stages – that assert substantially identical claims and seek identical
12 relief on behalf of the same class members, transfer “is strongly favored because it facilitates
13 pre-trial proceedings and discovery and avoids duplicative litigation and inconsistent results.”
14 *Gatdula v. CRST Int’l, Inc.*, No. Civ. 2:10-58 WBS CMK, 2011 WL 445798, at *3 (E.D. Cal.
15 Feb. 8, 2011) (cited in Opp. at 7). As explained in Ferrero’s opening brief, the accompanying
16 declaration of Bernard Kreilmann, and reiterated above, the relevant factors weigh in favor of
17 transferring this action to the District of New Jersey.

18 The cases that plaintiffs selectively cite do not suggest otherwise. For example,
19 plaintiffs’ quotation from *Affymetrix, Inc. v. Synteni, Inc.*, 28 F. Supp. 2d 192 (D. Del. 1998)
20 (Opp. at 15) suggests that court denied a motion to transfer because the movant failed to “name”
21 relevant individuals. In fact, the court explained “that transferring the two actions to the

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23 ⁶ Plaintiffs claim that the District of New Jersey is substantially more congested than the
24 Southern District of California. Although plaintiffs cite the higher number of civil filings in New
25 Jersey, they ignore the criminal statistics. *See Ellis v. Costco*, 372 F.Supp.2d 530, 544 (N.D. Cal.
26 2005) (cited by plaintiffs, Opp. at 23) (“Congestion in the civil docket of the Southern District of
27 California is lower than the Northern District, but that district’s dramatically heavier criminal
28 docket renders the advantages of transfer on grounds of court congestion at best a marginal note
in favor of the Southern District.”). In fact, the Southern District of California has substantially
more total filings per judgeship (734) than the District of New Jersey (465) and the District of
New Jersey had a 1.2 % decline in total filings whereas the Southern District of California had a
3.8% increase. Fitzgerald Decl. Exh. K.

1 Northern District of California where another suit filed by Affymetrix is pending may achieve a
2 certain degree of judicial economy.” *Id.* at 209. Similarly, plaintiffs cite *King v. Johnson* (Opp.
3 at 23), which actually rejected plaintiffs’ position. 565 F. Supp. at 720 n.15 (“Plaintiffs assert in
4 their opposition memorandum that USI must identify the witnesses that will be inconvenienced,
5 and that probabilities may not be relied upon to carry its burden as moving party. It seems,
6 though, that to require detailed witness lists at this stage of a proceeding as potentially
7 complicated and far-reaching as the instant suit would be impractical, at best.”).

8 * * * *

9 In their opposition, plaintiffs cite more than 75 cases – many of which weigh in favor of
10 transfer – but have failed to cite a single case in which a court denied a Section 1404(a) motion
11 where the moving party sought to transfer a case to a forum in which there was a parallel action
12 asserting the same claims on behalf of the same purported class. On the contrary, plaintiffs’ own
13 cases explain that any “inconvenience that transfer will impose on Plaintiff” does not outweigh
14 “the possibility of inconsistent rulings and the inefficiency of duplicative litigation.” *Schott v.*
15 *Ivy Asset Mgmt. Corp*, No. 10-CV-01562-LHK, 2010 WL 4117467, at *10 (N.D. Cal. Oct. 19,
16 2010) (cited in Opp. at 6, 9); *Gatdula*, 2011 WL 445798, at *3 (cited in Opp. at 7); *see also*,
17 *Baird v. Cal. Faculty Ass’n.*, No. 00-CV-0628, 2000 WL 516378, at *1 (N.D. Cal. Apr. 24, 2000)
18 (granting transfer and holding that related litigation pending in another forum weighs heavily in
19 favor of transfer). Under these circumstances, the private and public interests overwhelmingly
20 weigh in favor of transfer to avoid the needless duplication of litigation and waste of resources
21 while also promoting the convenience of witnesses.

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CONCLUSION

For the reasons set forth above and in its opening memorandum, Ferrero respectfully submits that this action can and should be transferred to the District of New Jersey under 28 U.S.C. Section 1404(a).

Dated: May 9, 2011

Respectfully submitted,

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