

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

**IN RE FERRERO LITIGATION**

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

**JOINT RULE 26(F) REPORT**

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

Judge: The Honorable Marilyn L. Huff

Plaintiffs,

v.

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

Defendant.

1 On April 29, 2011, counsel for the parties met by telephone to conduct a Rule 26(f) conference  
2 in accordance with the Federal Rules of Civil Procedure. Representing Plaintiff was Jack Fitzgerald  
3 and representing Defendant Ferrero U.S.A., Inc. (“Ferrero”) was Colleen Bal and Dale Bish. The  
4 parties discussed the case and jointly (except as noted below) make the following report.

5 **I. PROCEDURAL STATUS AND INITIAL MATTERS**

6 This is a consolidated putative class action against Ferrero, the maker of Nutella. On March  
7 22, 2011, the Court consolidated *Hohenberg v. Ferrero U.S.A., Inc.*, No. 11-cv-00205 (S.D. Cal., filed  
8 Feb. 1, 2011), and *Rude-Barbato v. Ferrero U.S.A., Inc.*, No. 22-cv-0249 (S.D. Cal., filed Feb. 4,  
9 2011), and appointed their counsel Interim Lead Co-Class Counsel. *See Hohenberg v. Ferrero U.S.A.,*  
10 *Inc.*, 2011 U.S. Dist. LEXIS 38471 (S.D. Cal. Mar. 22, 2011). Plaintiffs filed their Master  
11 Consolidated Complaint the next day, on March 23 (Dkt. No. 14).

12 On March 24, Ferrero filed a Motion for Transfer of Venue (Dkt. No. 19), which was denied  
13 (Dkt. No. 37). On March 29, Ferrero filed a motion seeking an extension of time in which to respond  
14 to the Complaint, and a stay of discovery (Dkt. No. 21). The Court granted Ferrero’s motion in part by  
15 extending its deadline to respond to the Complaint to April 18, and denied Ferrero’s request for a  
16 discovery stay. (Dkt. No. 24.) Ferrero filed a Motion to Dismiss the Master Consolidated Complaint  
17 on April 18, with the hearing set for June 13. Plaintiffs’ Opposition is due May 30.

18 At this time, the parties have not come to any agreement as to stipulating to dismissing or  
19 striking of any claims or defenses.

20 **III. STATEMENT OF CLAIMS, COUNTERCLAIMS AND AFFIRMATIVE DEFENSES**

21 **1. Plaintiffs’ Position**

22 Plaintiffs’ position is fully set forth in their Master Consolidated Complaint. In sum,  
23 Plaintiffs—both mothers of young children—allege that, at various times during the Class Period, they  
24 purchased Nutella spread after being exposed to and relying upon Ferrero’s advertisements and  
25 representations that Nutella is, for example, a “healthy breakfast” and is “nutritious.” Plaintiffs were  
26 searching for healthy foods to serve their families for breakfast or snacks because they are aware that  
27 healthy nutrition is important for maintaining the overall health of their families. Plaintiffs trusted the  
28

1 representations Ferrero made in its labeling Nutella, “An example of a tasty yet *balanced breakfast*,”  
2 in association with a picture showing fresh fruits, whole wheat bread, and orange juice. Plaintiffs were  
3 vexed to learn that Nutella is in fact not a “healthy” or “nutritious” food but instead is the next best  
4 thing to a candy bar, and that Nutella contains dangerous levels of saturated fat, the consumption of  
5 which has been shown to cause heart disease and other serious health problems. Saturated fat is the  
6 main dietary cause of high blood cholesterol, which can increase ones’ risk of a heart attack, stroke,  
7 and narrowed arteries (atherosclerosis). Nutella also contains over 55% processed sugar, the  
8 consumption of which has been shown to cause type-2 diabetes and other serious health problems.  
9 Moreover, during some of the Class Period, Nutella contained artificial trans fat, a substance widely  
10 recognized as dangerous to human health, and which is banned in many places, including in  
11 California’s schools and restaurants. In short, Nutella® is simply not a “healthy” or “nutritious”  
12 product to consume.

13           The Nutella label also included a link to a website showing pictures of a mother feeding  
14 Nutella to happy, healthy children. Ferrero also broadcast television commercials portraying a mother  
15 feeding Nutella to happy, healthy children. Plaintiffs believed, based on these representations both  
16 individually and especially when taken together as a whole, that Nutella consumption is beneficial to  
17 children. Nutella, however, contains about 70% saturated fat and processed sugar by weight. Both  
18 these ingredients significantly contribute to America’s alarming increases in childhood obesity, which  
19 can lead to life-long health problems. Therefore, Nutella is not part of a nutritionally “balanced”  
20 breakfast for consumption by children as Ferrero’s advertising deceptively suggests.

21           Plaintiff seeks an order compelling Ferrero to (1) cease marketing its products using the  
22 misleading tactics complained of herein, (2) conduct a corrective advertising campaign, (3) restore the  
23 amounts by which Ferrero was unjustly enriched, and (4) destroy all misleading and deceptive  
24 materials and products.

25           **2. Defendant’s Position**

26           As set forth in its motion to dismiss, it is Ferrero’s position that plaintiffs have failed to state a  
27 viable claim. First, many of plaintiff’s claims are preempted by federal law. Second, plaintiffs have  
28

1 failed to adequately allege facts demonstrating that any of the challenged statements are actionable  
2 under California’s Unfair Competition Law, False Advertising Law, or Consumer Legal Remedies  
3 Act, or that Ferrero has breached any alleged warranty (whether express or implied).

4 In the event any of plaintiffs’ claims survive the pleading stage – and Ferrero respectfully  
5 submits they should not – Ferrero will answer the operative complaint and assert affirmative defenses  
6 against the remaining claims.

7 **III. INITIAL DISCLOSURES**

8 **1. Plaintiff’s Position**

9 Plaintiffs made their initial disclosures on May 4, 2011.

10 **2. Defendant’s Position**

11 Pursuant to stipulation of counsel, Ferrero will serve its initial disclosures on or before May  
12 20, 2011.

13 **IV. COMPLEXITY OF THE CASE**

14 The parties agree that this is a complex case and that certain procedures of the Manual for  
15 Complex Litigation may be useful for the management of this section. The parties may consult the  
16 Manual for Complex Litigation to assess whether specified procedures should be utilized as the case  
17 progresses.

18 **V. DISCOVERY PLAN**

19 The parties have been able to cooperate and make reasonable compromises with respect to  
20 plaintiffs’ venue-related discovery, and anticipate continuing to do so. During their Rule 26  
21 conference, the parties discussed and agreed to work in good faith to divide discovery into reasonably-  
22 limited “rounds,” that will allow for rolling discovery. The parties therefore propose the following  
23 discovery plan, subject to adjustment pending the outcome of Ferrero’s motion(s) to dismiss, as well  
24 as the pending motion before the Panel on Multi-District Litigation:

25 //

26 //

27 //

Event	Parties' Proposed Date(s)
<p><u>Discovery Round 1:</u></p> <ul style="list-style-type: none"> <li>• Third-party discovery, consistent with the Federal Rules of Civil Procedure.</li> <li>• Rule 30(b)(6) depositions, consistent with the Federal Rules of Civil Procedure: <ul style="list-style-type: none"> <li>◦ on 30 days' notice (with parties to meet and confer on mutually agreeable dates);</li> <li>◦ Objections and Responses due 14 days after service of Rule 30(b)(6) Deposition Notice</li> <li>◦ parties to meet and confer within 7 days after that to agree to scope of any such deposition.</li> </ul> </li> <li>• Interrogatories: <ul style="list-style-type: none"> <li>◦ Limited to identification and location of witnesses, records, physical evidence, or other relevant documents or things:</li> <li>◦ Responses and Objections due in 30 days.</li> </ul> </li> <li>• Document requests <ul style="list-style-type: none"> <li>◦ Requests to be served one week after Ferrero' service of Responses and Objections to initial Interrogatories.</li> <li>◦ Directed at a reasonable number of specific custodians, records or other things identified in response to Interrogatories.</li> <li>◦ Responses and Objections due 30 days after service of document requests. Parties to meet and confer within 7 days thereafter.</li> </ul> </li> <li>Document production to begin on a rolling basis at producing party's earliest convenience, and in any event, no later than 25 days after service of Responses and Objections.</li> <li>• Party Depositions, consistent with the Federal Rules of Civil Procedure. <ul style="list-style-type: none"> <li>◦ Parties may begin serving party deposition notices, with dates for deposition on or after August 15, 2011.</li> </ul> </li> </ul>	<p>Beginning Immediately</p>
<p><u>Discovery Round 2:</u></p> <ul style="list-style-type: none"> <li>• Third-party discovery, consistent with the Federal Rules of Civil Procedure.</li> <li>• Party depositions no earlier than August 15, 2011 and consistent with the Federal Rules of Civil Procedure.</li> <li>• Remaining Interrogatories and Requests for Admission. <ul style="list-style-type: none"> <li>◦ Objections and Responses due in 30 days. Parties to meet and confer thereafter if necessary.</li> </ul> </li> </ul>	<p>July 25, 2011 – October 14, 2011</p>

1	• Document requests, if any, directed at any remaining specific custodians, records or other things, which were not requested as part of Discovery	
2	Round 1 and/or not yet produced in response to such requests, so long as the	
3	requests are narrowly tailored and there exists a reasonable basis for making	
4	the supplemental request.	
5	• September 5, 2011: Deadline to amend complaint, add new parties or	
6	claims by stipulation or leave of court.	
7	<u>Discovery Round 3:</u>	
8	• Expert discovery (class certification)	October 3, 2011 –
9	◦ Initial expert disclosures due September 23, 2011	November 4, 2011
10	◦ Responsive expert disclosures due October 26, 2011	
11	<u>Discovery Round 4:</u>	
12	• Expert discovery (merits)	March 1, 2012 – April
	◦ Initial expert disclosures due March 1, 2012	13, 2012
	◦ Responsive expert disclosures due April 1, 2012	

### **MOTION & TRIAL SCHEDULE**

The parties propose the following motion and trial schedule:

<b>Motion</b>	<b>Proposed Date</b>
Fact Discovery Cutoff	October 14, 2011
Plaintiffs' Motion for Class Certification	October 24, 2011
Defendant's Opposition to Class Certification	42 days before hearing
Plaintiffs' Reply in Support of Class Certification	21 days before hearing
Hearing on Motion for Class Certification	Plaintiffs to set hearing on a date which allows Ferrero at least 4 weeks to file any Opposition
Expert Discovery Cutoff	April 13, 2012
Motions for Summary Judgment and Motions to Exclude Experts	May 1, 2012
Oppositions to Summary Judgment and Motions to Exclude Experts	June 1, 2012
Reply in Support of Summary Judgment and Motions to Exclude Experts	June 29, 20112

Motion	Proposed Date
Hearings on Summary Judgment and Motions to Exclude Experts	To be determined, consistent with the Court's availability
Pretrial Conference (including motions <i>in limine</i> )	To be determined, consistent with the Court's availability
Jury Trial	To be determined, consistent with the Court's availability; the parties anticipate being prepared for trial by October 2012

**SETTLEMENT**

The parties will engage in settlement discussions at the appropriate time. Plaintiffs are willing to discuss settlement at any time.

**TRIAL ESTIMATE**

Plaintiffs estimate 7 trial days.

Defendant estimates 7-14 trial days depending on number and scope of remaining claims.

**ADDITIONAL PARTIES**

Plaintiffs do not anticipate adding additional parties at this time, but its investigation is ongoing and Plaintiffs reserve the right to add parties until the deadline for adding parties has passed.

Defendant contends that no other Parties are anticipated.

**TRIAL DATE**

The parties currently suggest a trial date on or after October 2012 subject to the Court's availability.

**TRIAL BY JURY OR BY COURT**

Plaintiffs' Statement

Plaintiffs have demanded a trial by jury. Plaintiffs' claims under the Unfair Competition Law, however, are entirely equitable and not subject to jury trial. Plaintiffs believe a bench trial for Plaintiffs' claims for equitable relief should be concurrent with the jury trial on damages claims.

Defendant's Statement

Defendant demands a jury trial on all claims and defenses so triable.

1 **ADDITIONAL INFORMATION**

2 The Court has entered a protective order entered in this action (Dkt. No. 32). The parties  
3 anticipate entering a mutually acceptable protocol for electronic discovery, including an agreement  
4 governing the return of any inadvertently produced privileged material.

5  
6 Respectfully submitted,

7  
8 Dated: May 19, 2011

WILSON SONSINI GOODRICH & ROSATI,

A Professional Corporation

By: /s/ Dale Bish

Dale Bish

DBish@wsgr.com

**Attorneys for Defendant FERRERO, U.S.A., INC.**

9  
10  
11  
12  
13 Dated: May 19, 2011

THE WESTON FIRM

By: /s/ Jack Fitzgerald

JACK FITZGERALD

jack@westonfirm.com

**Interim Class Counsel**