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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE FERRERO LITIGATION

CASE NO. 3:11-CV-00205-H-CAB
Pleading Type: Class Action
Action Filed: February 01, 2011

MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL [REDACTED VERSION FOR PUBLIC FILING]

Judge: Hon. Marilyn L. Huff
Date: October 11, 2011
Time: 10:30 a.m.
Location: Courtroom 13

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Plaintiffs Athena Hohenberg and Laura Rude-Barbato respectfully submit this Memorandum in support of their Motion to (a) certify a nationwide class for the UCL, FAL and CLRA causes of action alleged in their First Amended Consolidated Complaint ("FAC," Dkt. No. 45) against Defendant, Ferrero U.S.A., Inc.; (b) appoint them Class Representatives; and (c) appoint their attorneys Class Counsel.

INTRODUCTION

Since before the putative class period began on January 1, 2000, Ferrero has been using deceptive practices and misleading advertising to market Nutella as a healthy nut butter despite that it is comprised mostly of sugar and oil laden with cholesterol-raising saturated fat. And, Ferrero misleadingly advertised Nutella as healthy despite that for most the class period it was comprised [redacted] of partially hydrogenated vegetable oil containing [redacted] of toxic artificial trans fat per serving, [redacted]. *See generally* FAC ¶¶ 44-70.

In 2008, Ferrero devised a plan to increase Nutella's sales by leveraging and bolstering its health and wellness marketing with a new advertising campaign backed by a published author on childhood nutrition, Connie Evers, who was hired to tell consumers—especially mothers like Ms. Hohenberg and Ms. Rude-Barbato—that Nutella is part of a daily "balanced breakfast" for children.[2] *See* [redacted]. Ferrero also revamped Nutella's label to include a "balanced breakfast" claim, and began running a series of national television commercials and print ads conveying the same breakfast messaging. FAC ¶¶ 77, 91-93. [redacted]

[1] All exhibit references are to the concurrently-filed Declaration of Gregory S. Weston in Support of Class Certification. All references to "Pl's Ex. __" are to deposition exhibits.

[2] Evers has made a career out of touting highly-processed foods as beneficial for children on behalf of the processed food industry. For example, [redacted]

Ferrero's plan worked. During 2007-2008, the two years preceding this ramped-up advertising campaign, Ferrero [redacted]. During 2009-2010, this number more than doubled, to [redacted] Thus, Ferrero's deceptive advertising over a two-year period inflated Nutella's sales by [redacted]

[redacted]

While the scope of Ferrero's mass advertising was broad, its uniformity compels certification. Indeed, the issue presented by this motion is whether Plaintiffs can present their case on a class-wide basis. They easily can. Whether Ferrero's health messages are false and deceptive is a common question for every class member that can be tested, examined, analyzed, adjudicated and remedied on a class-wide basis. Ferrero has presented universal, class-wide misrepresentations and omissions about Nutella that are consistent between Class Members, and which are appropriate for class-wide adjudication because those representations appear on the

label of every jar of Nutella, in nationally-disseminated television and print ads, on the web, and in materials provided at live presentations, all as part of a long-term, multi-media advertising campaign.

Plaintiffs seek class certification of their claims for violation of the Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, the False Advertising Law, *id.* §§ 17500 *et seq.*, and the Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.*, on behalf of the following Classes:

> **Restitution Class:** All Persons (excluding officers, directors and employees of Ferrero) who purchased, on or after January 1, 2000 (the "Class Period"), one or more Nutella® products in the United States for their own or household use rather than resale or distribution.
>
> **Injunctive Relief Class:** All persons (excluding offices, directors, and employees of Ferrero) who commonly purchase or are in the market for Nutella in the United States for their own or household use rather than resale or distribution.

FACTS

A. Ferrero Engaged in a Long-Term, Multi-Faceted Advertising Campaign Precision-Designed to Deceptively Suggest Nutella is Healthy

1. Ferrero's Efforts at Promoting Nutella as a Healthy Nut Spread

Ferrero's efforts to promote Nutella as a healthy food predate even the proposed class period, beginning when Nutella was introduced in the United States in 1983, FAC ¶ 2, with Ferrero's attempt to position the product as a healthy European alternative to peanut butter. During the class period, from January 2000 through late 2008, Ferrero labeled and marketed Nutella as a "hazelnut spread," made with "over 50 hazelnuts per jar," deceptively implying Nutella is made primarily with nuts and is therefore healthy, despite the fact it is comprised of only 13% hazelnuts but 70% sugar and cheap refined vegetable oils. *Id.* ¶¶ 2, 24-25 75, 77, 81, 91-93. Peanut butter, by contrast, has an FDA-defined standard of identity of 90% peanuts. 21 C.F.R. § 164.150(a). Ferrero buttressed these representations with claims that Nutella contains "quality ingredients, such as skim milk and a hint of cocoa," and is made without artificial

flavoring and coloring, despite its sugar, saturated fat, and trans fat content. [redacted]. Finally, to bolster the image of Nutella as healthy, Ferrero improperly categorized it for placement in grocery stores as a nut spread, like peanut butter, rather than a sugary dessert spread, like icing. FAC ¶ 98.

2. Ferrero's Ramped-Up "Breakfast Messaging" Advertising Campaign

In approximately 2008, Ferrero concocted a plan to increase Nutella's sales by buttressing these health and wellness claims with an aggressive "breakfast messaging" campaign. That messaging included consistent claims that Nutella was part of and contributed to a "balanced" or "healthy" breakfast, especially for school-aged children.

a. Nutella's Label

As part of its breakfast messaging, Ferrero labeled Nutella to show a photo of fruit, orange juice, milk, and a piece of toast slathered with Nutella, alongside copy saying Nutella is supposedly "An example of a tasty yet balanced breakfast," and instructing consumers to "Start your day with Nutella® spread . . .". *Id.* ¶ 77. Nutella's label also includes *two* references to the Nutella website, which is filled with even more extensive breakfast messaging. And the label still repeats Ferrero's earlier misleading messages that Nutella is a "hazelnut spread," is "made with over 50 hazelnuts per jar," and contains no artificial colors or preservatives.

b. Nationally-Aired Television Commercials and Promotion

As part of its breakfast messaging, Ferrero ran three nationally-aired television commercials. *Id.* ¶¶ 90-96. *See also* Ex. 2, Evers Dep. Tr. at 113:1-117:19, 247:21-248:16 (discussing commercials). Ferrero also promoted Nutella through an appearance Evers made on television, during a "back to school breakfast" segment on a local news channel. [redacted] While promoting a Nutella breakfast as "healthy" on the segment, Evers also misleadingly contrasted Nutella for breakfast with "sugary cereals." *See* http://www.katu.com/amnw/segments/101393754.html.

c. Print Advertisements

Ferrero's breakfast messaging was also conveyed in several national print magazines, including [redacted]

d. Online Advertising

Ferrero heavily touted its breakfast messaging on the Nutella website, whose address appears on the Nutella label twice. *See* FAC ¶¶ 78-89; Ex. 2, Evers Dep. Tr. 169:13-15. But the messaging appeared elsewhere online, too. [redacted]

> If your kids aren't hummus fans, stash a container of Nutella in your room. Made from hazelnut, skim milk and cocoa, your kids won't even realize it's an all-natural, good-for-you dip for their crackers or pretzels.

See Ex. 12, (Pl's Ex. 33, Slide No. 7). Just about everything in this description is inaccurate. [redacted] The Nutella breakfast messaging has appeared elsewhere online, too, for example at [redacted]

e. Live Presentations to Consumer Influencers

One of the first strategies Ferrero employed to promote its breakfast messaging was [redacted]

[redacted]

In furtherance of this goal, Ferrero sent [redacted]

But Ferrero was not content with just seeking to solicit [redacted] to sell Nutella to moms. It also made significant forays into the world of social media, [redacted]

[redacted] Spokesperson Evers also appeared at Nutella "Mommy Parties" in California and elsewhere, touting the purported nutritional qualities of Nutella to mothers. [redacted]

3. Ferrero's Deceptive Omissions of Material Information

a. Sugar and Oil

While touting the purported health qualities of Nutella, Ferrero at the same time deceptively omitted material information about the product's sugar and fat content. *See* FAC ¶¶ 28, 95, 97, 99; [redacted]

[3] However, rather than being used as a vehicle for promoting Nutella as a breakfast food for children, these parties often featured decadent Nutella recipes, even Nutella cocktails. This is a typical use for Nutella. For example, Evers told Ferrero that [redacted]

[4] Ex. 22 (Pl's Ex. 44).

[5] i.e., sent short messages about the event to their "followers" via the micro-blogging website, Twitter.com, while reacting to, or sometimes repeating verbatim, comments made by Ferrero.

[redacted]

Ferrero similarly omits information about sugar and oil when it promotes Nutella's "healthier" ingredients, like skim milk, even if these ingredients form a miniscule portion of the product. *See* [redacted]

b. Serving Size

[redacted]

[redacted]

Evers also testified that [redacted]

Even when Ferrero discusses serving size, its message is inconsistent. For example, while often stating the proper serving size is "1 to 2 tablespoons," Evers told a group of mothers "You only need, you know, 2 teaspoons to a tablespoon for a slice of bread," *see* http://www.youtube.com/watch?v=gocrTJN0DPw, and wrote [redacted]

In addition to the proper serving at a sitting, Ferrero has never provided consumers with information about the *frequency* of "proper" Nutella use for children at breakfast. [redacted] This is despite that [redacted].

c. Proper Proportions for a "Balanced Breakfast"

Although it would be absurd to call Nutella "healthy," [redacted] and although [redacted]

[6] *See* FAC ¶ 93. *See also* [redacted]

[redacted] "balanced" in the context of Ferrero's advertising is nevertheless a euphemism for "healthy." [redacted]. This is also apparent in Ferrero's communications, where Ferrero uses "balanced" and "healthy" interchangeably. *See, e.g.*, [redacted]

A breakfast is healthy for children, according to Evers, if it [redacted] Evers testified that the [redacted]

But none of this information appears in any of Ferrero's promotional materials for Nutella. [redacted]

[redacted]

d. Whole Grain

According to Evers, using Nutella with whole grains is a critical part of the breakfast messaging. [redacted]

e. Connections Between Sugar, Saturated Fat, Trans Fat, and Disease

Finally, Ferrero has consistently omitted material information about the effect of Nutella's ingredients on consumers' health. *See generally* FAC ¶¶ 35-74.

B. Plaintiffs Were Exposed to Ferrero's Long-Term Advertising Campaign Precision-Tuned to Make Nutella Seem Healthy

Plaintiffs are both mothers of young children and were exposed to and relied upon Ferrero's deceptive campaign, including through Ferrero's television commercials and product label. *See, e.g.*, *id.* at ¶¶ 9, 24, 26-32, 76-96, 99-102, 104-106.

ARGUMENT

I. THIS CASE SATISFIES THE REQUIREMENTS OF RULE 23

A. Standards for Class Certification

California "has a public policy which encourages the use of the class action device." *Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 473 (1981); *Aguiar v. Cintas Corp. No. 2*, 144 Cal. App. 4th 121, 132 (2006) (quoting *Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 340 (2004)). "In determining whether class certification is appropriate, 'the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather, whether the requirements of Rule 23 are met.'" *Hofstetter v. Chase Home Fin., LLC*, 2011

[8] *See also* Evers "Mommy Party" interview, *available at* http://www.youtube.com/watch?v=gocrTJN0DPw ("I would always use [Nutella] with whole grain")

U.S. Dist. LEXIS 38124, at *16 (N.D. Cal. Mar. 31, 2011) (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974)); *see also In re Ramtek Sec. Litig.*, 1991 U.S. Dist. LEXIS 5490, at *9 (N.D. Cal. Feb. 4, 1991) ("In determining whether to certify a class, the focus is simply whether the prerequisites of Fed. R. Civ. P. 23 have been met.").

The party seeking certification must make "a *prima facie* showing that each of the prerequisites set forth in Rule 23(a) has been satisfied, i.e., (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation." *Heffelfinger v. Elec. Data Sys. Corp*., 2008 U.S. Dist. LEXIS 5296, at *25 (C.D. Cal. Jan. 7, 2008). Upon such showing, "a plaintiff whose suit meets the specified criteria" is "entitl[ed]" to an order of certification, as the "discretion suggested by Rule 23's 'may' is discretion residing in the plaintiff" rather than the court. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437-38 (2010).

When ruling on "a motion for class certification, the court 'is bound to take the substantive allegations of the complaint as true.'" *Wiegele v. FedEx Ground Package Sys*., 2008 U.S. Dist. LEXIS 10246, at *8 (S.D. Cal. Feb. 12, 2008) (quoting *Blackie v Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975)). Likewise, "in deciding whether to certify a class under Rule 23, an inquiry regarding 'the merits of the claims is [generally] inappropriate.'" *Heffelfinger*, 2008 U.S. Dist. LEXIS 5296, at *32 (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure: Civil 2d § 1759 (2006)).

> In determining the propriety of a class action, . . . [n]either the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to certify a class which apparently satisfies [FRCP 23].

Pecover v. Elec. Arts Inc., 2010 U.S. Dist. LEXIS 140632, at *22-23 (N.D. Cal. Dec. 21, 2010) (quoting *United Steel v. ConocoPhillips Co.*, 593 F.3d 802, 808-809 (9th Cir. 2010) (citations omitted)).

Moreover, on "a motion for class certification . . . the court makes no findings of fact" and "the Federal Rules of Evidence take on a substantially reduced significance, as compared to a typical evidentiary hearing or trial." *Mazza v. Am. Honda Motor Co*., 254 F.R.D. 610, 616 (C.D. Cal. 2008) (citation omitted). Sometimes, however, the court must "probe behind the

pleadings" to determine that the requirements of Rule 23(a) have been met. Such analysis "will entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes*, 180 L. Ed. 2d 374, 390 (2011) ("*Wal-Mart*") (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982)).

After satisfying the Rule 23(a) requirements, "the proposed class must satisfy at least one of the three requirements listed in Rule 23(b)," *Wal-Mart*, 180 L. Ed. 2d at 387. Plaintiffs seek certification under Rule 23(b)(3), which is appropriate where the "questions of law or fact common to class members predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). These prerequisites are referred to as predominance and superiority. *See, e.g., Browning v. Yahoo! Inc.*, 2007 U.S. Dist. LEXIS 86266, at *27-28 (N.D. Cal. Nov. 16, 2007).

B. Plaintiff Satisfies the Rule 23(a) Prerequisites

1. Numerosity

Numerosity is generally satisfied if a proposed class has at least 40 members. *See Mazza*, 254 F.R.D. at 617 ("As a general rule, classes of forty or more are considered sufficiently numerous."). A Ferrero document indicates [redacted] If [redacted], several times that many must have purchased it in the preceding decade, during the putative class period. In addition, Nutella has been sold in grocery stores, discount stores like Wal-Mart and Target, and club stores like Sam's Club and CostCo, throughout the country. Ferrero's net Nutella sales from 2007 to 2010 totaled [redacted] Accordingly, numerosity is satisfied. *See Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 377 (N.D. Cal. 2010) (inferring "from the allegation that Blue Sky sold over $20 million of product . . . that there are numerous purchasers who are potential class members so as to satisfy the numerosity requirement").

2. Commonality

To certify a class, there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "In the Ninth Circuit, the requirements of Rule 23(a)(2) are to be construed 'permissively.'" *Quintero v. Mulberry Thai Silks, Inc*., 2008 U.S. Dist. LEXIS 84976, at *8 (N.D. Cal. Oct. 21, 2008) (quoting *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1019 (9th Cir. 1998)). For the purposes of Rule 23(a)(2), a single question of law or fact common to the class will satisfy the commonality requirement. *Wal-Mart*, 180 L. Ed. 2d at 395 (internal citations omitted) ("We quite agree that…even a single common question will do[.]"). The FAC identifies a number of significant common questions of fact and law:

(a) Whether Ferrero contributed to, committed, and/or is responsible for the conduct alleged;

(b) Whether Ferrero's conduct constitutes the violations of law;

(c) Whether Ferrero acted willfully, recklessly, negligently, or with gross negligence;

(d) Whether Class Members are entitled to injunctive relief; and

(e) Whether Class Members are entitled to restitution.

FAC at ¶ 120a-e. In addition, each of Plaintiffs' claims presents common questions of whether the elements are satisfied. For example, for Plaintiffs' UCL claims, the materiality of Ferrero's representations is a common question.

3. Typicality

The typicality prerequisite of Rule 23(a)(3) is also a "permissive standard" and the named plaintiffs' claims are typical if they are "reasonably co-extensive with those of absent class members." *Hanlon*, 150 F.3d at 1020. They "need not be identical or even substantially identical. . . . [but] need only be *similar* . . . ." *Mazza*, 254 F.R.D. at 618 (emphasis in original); *see also In re Juniper Networks Sec. Litig.*, 264 F.R.D. 584, 589 (N.D. Cal. 2009) ("[T]he typicality requirement is permissive: representative claims are 'typical' if they are reasonably co-extensive . . . they need not be substantially identical." (citations omitted)). Plaintiffs satisfy the typicality standard because their claims are identical to the claims of other Class Members: in order to

induce consumers to purchase Nutella, Ferrero deceptively labeled and marketed the product as healthful, like peanut butter, part of a "balanced breakfast," and appropriate for school-aged children for breakfast, despite the fact Nutella is made primarily of high-saturated-fat palm oil plus sugar and—during much of the class period—contained highly toxic artificial trans fat, all of which increase the risk of cardiovascular disease, childhood type-2 diabetes, and other chronic diseases. The typicality requirement is thus satisfied.

4. Adequacy of Representation

"To meet the requirement of adequacy of representation, the class representatives must not have interests antagonistic to the unnamed class members and the representative must be able to prosecute the action vigorously through qualified counsel." *Mazza*, 254 F.R.D. at 619 (citation omitted). While a plaintiff has the burden of persuasion, adequacy is presumed absent evidence to the contrary. *See Madison Assocs. v. Baldante*, 183 B.R. 206, 217 (Bankr. C.D. Cal. 1995). A "plaintiff may adequately represent the class if he or she has a basic understanding about the nature of the suit." *Stuart v. RadioShack Corp.*, 2009 U.S. Dist. LEXIS 12337, at *33 (N.D. Cal. Feb. 5, 2009) (citation omitted). Here, there is no conflict of interest between the proposed Class Representatives, their counsel, and the Class. On the contrary, Plaintiffs and the unnamed Class Members share a common interest in establishing Ferrero's liability.

Rule 23(g)(1) also requires the Court to appoint Class Counsel. For the reasons set forth in the concurrently-filed Declarations of Gregory S. Weston, Jack Fitzgerald, and Ronald A. Marron, Plaintiffs request the Court appoint The Weston Firm and the Law Offices of Ronald A. Marron, APLC as Class Counsel.[9]

C. <u>The Proposed Class Satisfies Rule 23(b)(3)</u>

The proposed Class satisfies both the predominance and superiority components of Rule 23(b)(3).

[9] The Court has already appointed the Weston Firm and Law Offices of Ronald A. Marron Interim Class Counsel, finding "[e]ach proposed class counsel appears to be well qualified to represent the interests of the purported class and to manage this litigation." *Hohenberg v. Ferrero U.S.A., Inc.*, 2011 U.S. Dist. LEXIS 38471, at *6 (S.D. Cal. Mar. 22, 2011).

1. Common Issues Predominate

While Rule 23(a) requires only the *existence* of common questions among members of the proposed class, certification under Rule 23(b)(3) requires a finding that those common questions *predominate* over individual ones.

Here, the central, overriding, and predominating question is whether a limited group of label claims and advertisements are misleading. This determination is not made with regard to each class member, but under a single, objective, and *common* "reasonable consumer standard." *See Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997) ("Predominance is a test readily met in certain cases alleging consumer . . . fraud"); *Mazza*, 254 F.R.D. 610 (certifying UCL, FAL, and CLRA class where defendant misrepresented the characteristics of its Collision Mitigation Braking System); *Faigman v. AT&T Mobility LLC*, 2007 U.S. Dist. LEXIS 52192 (N.D. Cal. July 17, 2007) (certifying UCL, FAL, and CLRA class where defendant advertised company debit cards as cash-equivalent rebates); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 238 F.R.D. 482 (C.D. Cal. 2006) (certifying UCL and FAL class where defendant misled the class into purchasing deferred annuities); *Smith v. Wells Fargo Bank, N.A.*, 135 Cal. App. 4th 1463 (2005) (certifying UCL, FAL, and CLRA class where defendant misrepresented an involuntarily per-transaction "overdraft protection" charge on checking account cards).

"The predominance inquiry hinges on the cohesiveness of the class—whether common legal and factual questions appear more significant than individual legal and factual questions." *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 588-89 (C.D. Cal. 2008); *see also Pecover*, 2010 U.S. Dist. LEXIS 140632, at *45 ("The predominance inquiry focuses on 'whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'"(citation omitted)). "[W]hen common questions present a significant aspect of a case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than an individual basis." *Cruz v. Dollar Tree Stores, Inc.*, 2009 U.S. Dist. LEXIS 46855, at *21-22 (N.D. Cal. May 26, 2009) (citation omitted).

The predominance requirement demands only predominance of common questions, not exclusivity or unanimity of them. Fed. R. Civ. P. 23(b)(3); *see also Gartin v. S&M NuTec LLC*, 245 F.R.D. 429, 435 (C.D. Cal. 2007) ("When one or more of the central issues in the action are common to the class and can be said to predominate, [a class action] will be considered proper . . . even though other matters will have to be tried separately." (citation omitted)).

a. Plaintiffs Will Show Ferrero's Liability by Common Evidence.

Where plaintiffs "may prove the essential issues in [the] case with common proof, . . . class-wide issues predominate over individualized issues." *Nelson v. Mead Johnson Nutrition Co.*, 270 F.R.D. 689, 697-98 (S.D. Fla. 2010). "[T]he primary evidence in a false advertising case is the advertising itself." *Brockey v. Moore*, 107 Cal. App. 4th 86, 100 (2003).

Ferrero's Nutella has been the subject of a well-documented, long-term advertising campaign. This campaign took place on the packaging of every Nutella jar Class Members saw during the Class Period. Plaintiffs offer dozens of examples of Ferrero's advertising, specifically on Nutella's packaging and elsewhere in print and media advertisements.

Plaintiffs will also prove elements of their claims by offering expert testimony on the health effects of consuming Nutella. The jury may then determine whether a reasonable consumer would find Ferrero's advertising and labeling misleading, given evidence of the product's actual effects on human health. In addition, if necessary, Plaintiffs may offer the testimony of a consumer survey expert to show how consumers interpret Ferrero's claims. *See generally Hitt v. Arizona Bev. Co., LLC*, 2009 U.S. Dist. LEXIS 16871, at *16-19 (S.D. Cal. Feb. 4, 2009) (permitting plaintiff "the opportunity to present evidence, such as a consumer survey, showing that [Defendant's] labeling and promotion is likely to deceive reasonable consumers"); *see also Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1129 (C.D. Cal. 2010).

b. Whether Ferrero's Health and Balanced Breakfast Claims are Misleading is Subject to Common Proof and can Be Established without Individualized Proof of Reliance.

If Ferrero's health and balanced breakfast claims concerning Nutella are "likely to deceive" a reasonable consumer, Ferrero is liable under the UCL without individual evidence of reliance or deception. *See Tobacco II*, 46 Cal. 4th at 306, 312, 320-24. As noted by another

federal court deciding a motion to certify a UCL class against a packaged food manufacturer:

> individualized proof of deception and reliance are not necessary for [Plaintiff] to prevail on the [UCL and CLRA] class claims . . . the common issue that predominates is whether [Defendant's] packaging and marketing communicated a persistent and material message that [the product] promotes digestive health.

Johnson v. General Mills, 2011 U.S. Dist. LEXIS 45120, at *13-14 (C.D. Cal. Apr. 20, 2011). *See also Cartwright v. Viking Indus.*, 2009 U.S. Dist. LEXIS 83286, at *36-37 n.11 (E.D. Cal. Sept. 11, 2009) ("To state a claim under [the UCL], plaintiffs must demonstrate that members of the public are likely to be deceived. The standard is that of a 'reasonable consumer,' and proof of actual deception or confusion caused by misleading statements is not required. Therefore, this claim[] is subject to common proof by the class."); *Fitzpatrick v. General Mills, Inc.*, 635 F.3d 1279, 1282-83 (11th Cir. 2011); *McAdams v. Monier, Inc.*, 182 Cal. App. 4th 174, 189 (2010) ("This language…in light of the limited nature of relief under the UCL…has led courts repeatedly and consistently to hold that relief [including restitution] under the UCL is available without individualized proof of deception, reliance and injury."); *Baghdasarian v. Amazon.com, Inc.*, 258 F.R.D. 383, 387 (C.D. Cal. 2009) (certifying UCL class and holding "Plaintiff does not need to show affirmative proof that each individual class member relied on Defendant's deceptive conduct").

Because each Class Member need not have relied on the alleged misstatements and omissions, there is no need for individualized proof of reliance that otherwise might weigh against predominance. See *Chavez v. Blue Sky Natural Bev. Co*, 268 F.R.D. 365, 376 (N.D. Cal. 2010) (certifying under Rule 23(b)(3) similar claims against the manufacturer of beverage over allegedly misleading label statements and finding "'relief under the UCL is available without individualized proof of deception, reliance and injury.'" (quoting *Tobacco II*, 46 Cal 4th at 320)). Like the UCL, the standard for stating a claim under the FAL is "only [a showing] that members of the public are 'likely to be deceived.' The standard is that of the 'reasonable consumer.' Actual deception or confusion . . . is not required." *Mazza*, 254 F.R.D. at 627 (citations omitted).

As for Plaintiffs' CLRA claims, under California law, if Ferrero made material misrepresentations to the Class Members, an inference of reliance—*i.e.*, causation—arises as to

the entire class. *Occidental Land, Inc. v. Super. Ct.*, 18 Cal. 3d 355, 363 (1976); *Massachusetts Mutual Life Ins. Co. v. Super. Ct.*, 97 Cal. App. 4th 1282, 1292 (2002) (causation/reliance as to each class member is commonly proved by the materiality of the misrepresentation).

"Materiality of the alleged misrepresentation generally is judged by a 'reasonable man' standard." *In re Steroid Hormone Product Cases*, 181 Cal. App. 4th 145, 157 (2010). *See also Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (CLRA "prohibits 'unfair methods of competition and unfair or deceptive acts or practices.' . . . [The] unfair business practices claim must be evaluated from the vantage of a reasonable consumer. . . . Under the reasonable consumer standard, [plaintiffs] 'must show that members of the public are likely to be deceived.'" (citations omitted)).[10]

Here, Plaintiffs have a simple claim—Ferrero deceptively represents that Nutella is part of a healthy balanced breakfast, but in fact, it is primarily refined sugar and saturated fat, more akin to chocolate cake frosting.

"A misrepresentation is judged to be material if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." *Estrella v. Freedom Fin. Network, LLC*, 2010 U.S. Dist. LEXIS 61236, at *32 (N.D. Cal. June 2, 2010) (quoting *Tobacco II*, 46 Cal. 4th at 327) (citation omitted); *see also*

[10] The standard for certifying a class under the CLRA is exceedingly liberal. Individual damage does not require any pecuniary loss. *Kagan v. Gibraltar Sav. & Loan Assn.*, 35 Cal. 3d 582, 593 (1984). Moreover:

> As it is unlawful to engage in any of the deceptive business practices enumerated in [Cal. Civ. Code] section 1770, consumers have a corresponding legal right not to be subjected thereto. Accordingly, we interpret broadly the requirement of section 1780 that a consumer 'suffer[] any damage' to include the infringement of any legal right as defined by section 1770.

Id. Plaintiffs are thus entitled to initiate a class action on any of the "unlawful" practices listed in § 1770 of the CLRA. *See, e.g., Outboard Maine Corp. v. Super. Ct.*, 52 Cal. App. 3d 30, 37 (1975) (Under § 1770, "[f]raud or deceit may consist of the suppression of a fact by one who is bound to disclose it or who gives information of other facts which are likely to mislead for want of communication of the fact."). Further, Plaintiffs need not have been individually "damaged" in a traditional sense because, in purchasing Nutella and being exposed to Ferrero's advertisements, Plaintiffs were denied their legal right to avoid being subjected to Ferrero's unlawful practices. Class certification for Plaintiffs' claims are thus proper under Cal. Civ. Code §1781(a).

Johnson, 2011 U.S. Dist. LEXIS 45120, at *7-8 (quoting *Tobacco II*, 46 Cal. 4th at 327); *Fitzpatrick*, 2011 U.S. App. LEXIS 6047, at *8 ("'recovery . . . does not hinge on whether a particular plaintiff actually relied on [Defendant's] claims about [the product's] alleged digestive health benefits'; rather, 'whether that allegedly deceptive conduct would deceive an objective reasonable consumer [is a] common issue[ ] for all the putative class members, amenable to classwide proof.'" (quoting, with approval, *Fitzpatrick v. General Mills, Inc.*, 263 F.R.D. 687, 699 (S.D. Fla. 2010))).

"Materiality of the misrepresentations is an objective standard that is susceptible to common proof," and therefore "statements made on the packing and labels present common proof on the issues of materiality and falsity." *Wolph v. Acer Am. Corp.*, 272 F.R.D. 477, 488 (N.D. Cal. 2011) (citation omitted). Moreover, when the alleged misrepresentations are shown at the point of purchase as here, "it is reasonable to infer that they were communicated to all class members." *Id.* at 488.

2. Class Treatment is the Superior Means to Adjudicate Plaintiffs' Claims

Rule 23(b)(3) also requires a finding that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Courts have wide discretion to evaluate superiority because they are "in the best position to consider the most fair and efficient procedure for conducting any given litigation." *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 712 (9th Cir. 2010) (quoting *Doniger v. Pac. N.W. Bell, Inc.*, 564 F.2d 1304, 1309 (9th Cir. 1977) (reversing denial of class certification where district court improperly relied on the disproportionality between the potential liability and the actual harm suffered, the enormity of the potential damages, and the defendant's good faith compliance in determining superiority)).

Given the small size of each Class Member's claim, class treatment is not merely the superior, but the only manner in which to ensure fair and efficient adjudication of the present action. "[T]he modest amount at stake for each purchaser renders individual prosecution impractical. Thus, class treatment likely represents plaintiffs' only chance for adjudication."

Pecover, 2010 U.S. Dist. LEXIS 140632, at *68. As Chief Justice Burger wrote,

> Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device.

Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980). *See also Ballard v. Equifax Check Servs., Inc.*, 186 F.R.D. 589, 600 (E.D. Cal. 1999) ("Class action certifications to enforce compliance with consumer protection laws are desirable and should be encouraged." (citation omitted)).

II. BECAUSE *SHUTTS* IS SATISFIED, CALIFORNIA LAW APPLIES NATIONWIDE

A federal court in a diversity action applies not only the substantive law, but also the choice-of-law rules of the state in which it sits. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). The Due Process Clause however constrains the scope of a class under one state law unless the class action proponent shows there is a "significant contact or significant aggregation of contacts to the claims" asserted such that "application of the forum law is not arbitrary or unfair" and "so long as the interests of other states are not found to outweigh California's interest in having its law applied." *Wash. Mut. Bank v. Super. Ct.*, 24 Cal. 4th 906, 919-21 (2001) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985)). "In resolving whether application of state law would be unfair, the court can look to the expectations of the parties." *Pecover*, 2010 U.S. Dist. LEXIS 140632, at *48. (citation omitted).

In determining whether significant contacts exist, "the focus . . . is on both the plaintiffs' and defendant's contacts with the forum states." *Id.* (citation omitted). The location of the event which gave rise to the cause of action is not controlling. *See Id.* at *49-50 ("Courts . . . have moved away from the view that the location of the event is controlling."). "Moreover, 'the relative interests of other states generally is not a matter of constitutional concern.'" *Id.* at *50 (citation omitted) ("California could have a smaller actual interest in the claims than that of other states yet still have significant contacts to satisfy due process.").

"[S]o long as the requisite significant contacts to California exist, a showing that is properly borne by the class action proponent, California may constitutionally require the [Defendant] to shoulder the burden of demonstrating that foreign law, rather than California law, should apply to class claims." *Wash. Mut.*, 24 Cal. 4th at 921. Such significant contacts exist here, so a nationwide class under only California law does not offend due process.

Ferrero is and has been admitted and authorized to conduct business, and does in fact conduct significant business, in California. *See* FAC at ¶¶ 13, 22-23. The Court has *already* found Ferrero has "substantial contacts with this district." *In re Ferrero Litig.*, 768 F. Supp. 2d 1074, 2011 U.S. Dist. LEXIS 50592, at *8 (S.D. Cal. May 11, 2011). That is, in part, because Ferrero's "California sales alone account for between 13% and 15.2% of its total U.S. sales of Nutella® over the last five years." *Id.* (citation omitted). In addition, "13.7% of Defendant's Nutella shipments went to California customers," and "Ferrero employs a 15-person sales force in California . . . and Ferrero works with California vendors and distributors in marketing its Nutella® product." *Id.* (citations omitted). And, as discussed above, [redacted] Thus, as the Court earlier concluded, "by choosing to market and sell [its Nutella® product] nationwide, . . . Defendant exposed itself to the risk of being sued in the districts in which its product is sold." *In re Ferrero*, 768 F. Supp. 2d 1074, 2011 U.S. Dist. LEXIS 50592, at *7 (alterations in original), quoting *Rafton v. Rydex Series Funds*, 2010 U.S. Dist. LEXIS 75411, at *9 (N.D. Cal. June 29, 2010).

Given these contacts, the application of California law to a nationwide class does not violate Ferrero's right to due process. *See Roberts v. Heim*, 670 F. Supp. 1466, 1493-95 (N.D. Cal. 1987); *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 598 (C.D. Cal. 2008) (certifying nationwide UCL and CLRA class where "plaintiffs allege that defendant conducts substantial business in the state through its fifty California dealerships. . . . [and] given the volume of California automobile sales and the number of in-state dealerships, plaintiffs claim it is likely that more class members reside in California than any other state. Thus, plaintiffs' alleged contacts are sufficient to satisfy the test under *Shutts*."); *Pecover*, 2010 U.S. Dist. LEXIS

140632, at *55 ("California, for purposes of its UCL, 'has a clear and substantial interest in preventing fraudulent practices in this state and a legitimate and compelling interest in preserving a business climate free of . . . deceptive practice.' . . . For this reason, the state 'has a legitimate interest in extending state-created remedies to out-of-state parties harmed by wrongful conduct occurring in California.'" (citations omitted)); *accord Church v. Consol. Freightways, Inc.*, 1992 U.S. Dist. LEXIS 18234, at *13-14 (N.D. Cal. Sept. 14, 1992) ("[I]t is very probable that the deceit claims would not be addressed comprehensively if California law is not applied. Thus, even if other states have an interest in applying their own law, this interest does not outweigh California's interest in facilitating a class action. [citation]." Moreover, "[a]ll jurisdictions share the goal of deterring fraudulent conduct and providing a remedy for the victims of fraud [and] each jurisdiction would rather have the injuries of its citizens litigated and compensated under another state's law than not litigated or compensated at all . . . It appears that the maximum attainment of the underlying purposes of all the states will be achieved best by certifying the class.").

Where "plaintiffs show that application of California law is constitutional under *Shutts*, defendant must show that another state's laws apply under the California governmental interest choice-of-law test." *Parkinson*, 258 F.R.D. at 598. "California follows a three-step 'governmental interest analysis' to address conflict of laws claims and ascertain the most appropriate law applicable to the issues where there is no effective choice-of-law agreement . . . ." *Wash. Mut.*, 24 Cal. 4th at 919 (citations omitted). Under the first step of the governmental interest analysis, the foreign law proponent "must identify the applicable rule of law in each potentially concerned state and must show it materially differs from the law of California." *Id.* Importantly, "[t]he fact that two or more states are involved does not in itself indicate there is a conflict of laws problem." *Id*. at 919-20. *See also Wershba v. Apple Computer, Inc*., 91 Cal. App. 4th 224, 242 (2001) (certifying nationwide CLRA and UCL class, holding differences among states' consumer protection laws were not material and therefore were not a sufficient basis on which to deny nationwide class treatment); *Hanlon*, 150 F.3d at 1020 (same).

Only if the trial court finds the laws are "materially different" must it proceed to the second step and "determine what interest, if any, each state has in having its own law applied to the case." *Wash. Mut.,* 24 Cal. 4th at 920. "This means the trial court may properly find California law applicable without proceeding to the third step in the analysis if the foreign law proponent fails to identify any actual conflict or to establish the other state's interest in having its own laws applied." *Id.* "Defendants must do more than show a variance in the law. They must show that the interest of other states in having their laws followed in this case is greater than California's interest in applying its own laws." *In re Activision Sec. Litig.*, 621 F. Supp. 415, 430 (N.D. Cal. 1985) ("Despite defendants' showing that material differences may indeed exist between California law and the law of other states, defendants have failed to indicate why California law would not apply in this case.").

Even if some other states may have more restrictive consumer protection laws than California's, those states lack any interest in applying them here, since this case does not involve local defendants: "the purpose behind liability limits is to protect resident defendants, not limit damages awards to resident plaintiffs." *Pecover,* 2010 U.S. Dist. LEXIS 140632, at *56-57 (citation omitted); *see also Kearney v. Salomon Smith Barney, Inc*., 39 Cal. 4th 95, 110 (2006) (A "state by enacting a limitation on damages is seeking to protect its residents from the imposition of these excessive financial burdens. Such a policy does not reflect a preference that widows and orphans should be denied full recovery." (citations omitted) (quoting and discussing *Hurtado v. Super. Ct.*, 11 Cal. 3d 574 (1974))); *Hanlon,* 150 F.3d at 1022-23 ("idiosyncratic differences between state consumer protection laws are not sufficiently substantive to predominate over the shared claims.").

"To the extent that California's consumer protection laws are more generous than those of foreign states, foreign states have no legitimate interest in denying higher recoveries to their residents, and thus there can be no true conflict under California law" *Pecover,* 2010 U.S. Dist. LEXIS 140632, at *57 (citation omitted). Thus, for example, Arizona may have more restrictive consumer protection laws than California, but it has no local defendant to protect and no interest in seeing those more restrictive laws applied over California's, especially if asserting such an

interest would deprive the state's citizens of membership in the Classes. *See Hurtado*, 11 Cal. 3d at 581 ("Since it is the plaintiffs and not the defendants who are the Mexican residents in this case, Mexico has no interest in applying its limitation of damages—Mexico has no defendant residents to protect and has no interest in denying full recovery to its residents injured by non-Mexican defendants.").

CONCLUSION

The Court should grant Plaintiffs' Motion for Class Certification by certifying a nationwide class for the causes of action alleged in Plaintiffs Master Consolidated Complaint. Further, the Court should appoint Athena Hohenberg and Laura Rude-Barbato as Class Representatives because these Plaintiffs will adequately represent the class as they share a common interest in establishing Ferrero's liability. Finally, the Court should appoint The Weston Firm and the Law Offices of Ronald A. Marron Class Counsel as they will adequately and zealously represent the Class Representatives and Class Members against Ferrero U.S.A.

DATED: August 1, 2011

Respectfully Submitted,

/s/ Jack Fitzgerald
By: Jack Fitzgerald

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