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

14 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 [UNREDACTED
 VERSION FILED UNDER SEAL]**

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

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Cal. Civ. Code § 1781(a) 13

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

6 INTRODUCTION

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

14 In 2008, Ferrero devised a plan to increase Nutella’s sales by leveraging and bolstering
15 its health and wellness marketing with a new advertising campaign backed by a published author
16 on childhood nutrition, Connie Evers, who was hired to tell consumers—especially mothers like
17 Ms. Hohenberg and Ms. Rude-Barbato—that Nutella is part of a daily “balanced breakfast” for
18 children.² See Ex. 2, Evers Dep. Tr. 366:7-19 (Ferrero’s “breakfast” pitch is directed to mothers
19 of school-aged children). Ferrero also revamped Nutella’s label to include a “balanced breakfast”
20 claim, and began running a series of national television commercials and print ads conveying the
21 same breakfast messaging. FAC ¶¶ 77, 91-93. ██████████
22 ██████████
23 ██████████

24 _____
25 ¹ All exhibit references are to the concurrently-filed Declaration of Gregory S. Weston in
26 Support of Class Certification. All references to “Pl’s Ex. ___” are to deposition exhibits.

27 ² Evers has made a career out of touting highly-processed foods as beneficial for children on
28 behalf of the processed food industry. For example, she is currently or has in the past provided
consulting services to companies like Heinz, for its Bagel Bites microwave pizza product, Nestle,
for its Nesquick product (87% sugar), Chiquita for a smoothie product (90% sugar), and Kellogg.
See Ex. 2, Evers Dep. Tr. 30:2-32:16.

1 Ferrero's plan worked. During 2007-2008, the two years preceding this ramped-up
2 advertising campaign, Ferrero [REDACTED]
3 [REDACTED]. During 2009-2010, this number [REDACTED]. Thus, Ferrero's
4 deceptive advertising over a two-year period inflated Nutella's sales by \$ [REDACTED] [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

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

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

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

8 **Restitution Class:** All Persons (excluding officers, directors and
9 employees of Ferrero) who purchased, on or after January 1, 2000 (the “Class
10 Period”), one or more Nutella® products in the United States for their own or
11 household use rather than resale or distribution.

12 **Injunctive Relief Class:** All persons (excluding offices, directors, and
13 employees of Ferrero) who commonly purchase or are in the market for Nutella in
14 the United States for their own or household use rather than resale or distribution.

15 FACTS

16 **A. Ferrero Engaged in a Long-Term, Multi-Faceted Advertising Campaign Precision-** 17 **Designed to Deceptively Suggest Nutella is Healthy**

18 **1. Ferrero’s Efforts at Promoting Nutella as a Healthy Nut Spread**

19 Ferrero’s efforts to promote Nutella as a healthy food predate even the proposed class
20 period, beginning when Nutella was introduced in the United States in 1983, FAC ¶ 2, with
21 Ferrero’s attempt to position the product as a healthy European alternative to peanut butter.
22 During the class period, from January 2000 through late 2008, Ferrero labeled and marketed
23 Nutella as a “hazelnut spread,” made with “over 50 hazelnuts per jar,” deceptively implying
24 Nutella is made primarily with nuts and is therefore healthy, despite the fact it is comprised of
25 only 13% hazelnuts but 70% sugar and cheap refined vegetable oils. *Id.* ¶¶ 2, 24-25 75, 77, 81,
26 91-93. Peanut butter, by contrast, has an FDA-defined standard of identity of 90% peanuts. 21
27 C.F.R. § 164.150(a). Ferrero buttressed these representations with claims that Nutella contains
28 “quality ingredients, such as skim milk and a hint of cocoa,” and is made without artificial

1 flavoring and coloring, despite its sugar, saturated fat, and trans fat content. *See generally* Ex. 2,
2 Evers Dep. Tr. at 125:23-126:11, 164:20-165:15, 222:11-223:5 (Evers was hired to promote the
3 breakfast messaging, not these prior health and wellness messages). Finally, to bolster the image
4 of Nutella as healthy, Ferrero improperly categorized it for placement in grocery stores as a nut
5 spread, like peanut butter, rather than a sugary dessert spread, like icing. FAC ¶ 98.

6 **2. Ferrero’s Ramped-Up “Breakfast Messaging” Advertising Campaign**

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

11 **a. Nutella’s Label**

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

19 **b. Nationally-Aired Television Commercials and Promotion**

20 As part of its breakfast messaging, Ferrero ran three nationally-aired television
21 commercials. *Id.* ¶¶ 90-96. *See also* Ex. 2, Evers Dep. Tr. at 113:1-117:19, 247:21-248:16
22 (discussing commercials). Ferrero also promoted Nutella through an appearance Evers made on
23 television, during a “back to school breakfast” segment on a local news channel. [REDACTED]

24 [REDACTED]
25 [REDACTED]
26 [REDACTED] *See* Ex. 2, Evers Dep. Tr. at 98:10-100:21. While promoting a Nutella breakfast as
27 “healthy” on the segment, Evers also misleadingly contrasted Nutella for breakfast with “sugary
28 cereals.” *See* <http://www.katu.com/amnw/segments/101393754.html>.

1 **c. Print Advertisements**

2 Ferrero’s breakfast messaging was also conveyed in several national print magazines,
3 including *Working Mother*, *Parents*, *Parenting – School Years*, *Woman’s Day*, *Good*
4 *Housekeeping*, and *Ready, Set, Grow*, a journal published by the National Association of
5 Pediatric Nurse Practitioners. *See* Ex. 2, Evers Dep. Tr. at 118:14-25; Exs. 6-8 (print ads); Ex. 9
6 (CEVERS221) (attaching materials for publication); Ex. 10 (CEVERS946-47) (noting “Nutella
7 named one of Good Housekeeping’s ’50 Best Low-Calorie Snacks” and attaching article
8 claiming Nutella is “low on unhealthy fat”). Ferrero also disseminated an “advertorial” as part of
9 these print advertisements, in which Evers recommends consumption of Nutella. *See* Ex. 11 (Pl’s
10 Ex. 43); Ex. 2, Evers Dep. Tr. 181:3-20.

11 **d. Online Advertising**

12 Ferrero heavily touted its breakfast messaging on the Nutella website, whose address
13 appears on the Nutella label twice. *See* FAC ¶¶ 78-89; Ex. 2, Evers Dep. Tr. 169:13-15. But the
14 messaging appeared elsewhere online, too. Failing once again to disclose her position as
15 Nutella’s paid spokesperson, when approached by a reporter for Nickelodeon’s Parents Connect
16 website for an article on children’s snacks, Evers provided information that led the reporter to
17 write:

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

21 *See* Ex. 12, (Pl’s Ex. 33, Slide No. 7). Just about everything in this description is inaccurate.
22 While Evers claims she did not provide the inaccurate information, both she and Ferrero have
23 known this was published in an online parents’ magazine for over a year, but neither has sought
24 to correct it. *See* Ex. 2, Evers Dep. Tr. 141:20-148:2, 149:21-150:11, 151:13-152:23. The Nutella
25 breakfast messaging has appeared elsewhere online, too, for example at RealSimple.com. *See*
26 Ex. 9 (CEVERS221).

27 **e. Live Presentations to Consumer Influencers**

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

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[REDACTED]

But Ferrero was not content with just seeking to solicit medical professionals to sell Nutella to moms. It also made significant forays into the world of social media, hosting or participating in various “blogger” events and “Mommy Parties.” For example, Ferrero set up an event in New York, where Evers appeared live in front of approximately 25 “mommy bloggers.” *See, e.g.,* Ex. 18 (CEVERS185) (“As part of our Nutella campaign, we are pulling together a [REDACTED] r event where we’re inviting mom bloggers to meet with Nutella and learn about our breakfast positioning. [REDACTED]

[REDACTED]

1 Evers also represented Nutella at the San Francisco “BlogHer” event, a similar gathering
2 of consumers and food bloggers. Ex. 19 (CEVERS1068-70); Ex. 2, Evers Dep. Tr. at 317:14-
3 318:20. Spokesperson Evers also appeared at Nutella “Mommy Parties” in California and
4 elsewhere, touting the purported nutritional qualities of Nutella to mothers. *See* Ex. 20,
5 CEVERS1155-57 (describing Mommy Parties in California and Colorado).³

6 3. Ferrero’s Deceptive Omissions of Material Information

7 a. Sugar and Oil

8 While touting the purported health qualities of Nutella, Ferrero at the same time
9 deceptively omitted material information about the product’s sugar and fat content. *See* FAC ¶¶
10 28, 95, 97, ¶9; [REDACTED] [REDACTED] [REDACTED]

11 [REDACTED] Ferrero even went so far as to tell consumers Nutella has only four
12 ingredients, which is wholly false. The following messages were “live tweeted”⁵ from consumers
13 attending the Mommy Blogger Roundtable event hosted by Evers and Karl Krohn, Nutella’s
14 brand manager:

15 classymommy (6,240 followers)

- 16 • *Surprised to learn #nutella only has 4 ingredients- hazlenuts, skim milk, sugar, hint of cocoa*
- 17 jenrab (2,615 followers)
- 18 • *#nutella has 4 ingredients. Hazelnut, cocoa, skim milk and sugar (nom nom)*
- 19 • *nutella can be considered a vehicle for eating healthy items for breakfast*
- 20 • *#nutella does have nutritious properties but as with everything, it should be eaten in*
21 *moderation*
- 22 • *#nutella is a hazelnut spread and NOT a chocolate spread*

23 _____
24 ³ However, rather than being used as a vehicle for promoting Nutella as a breakfast food for
25 children, these parties often featured decadent Nutella recipes, even Nutella cocktails. This is a
26 typical use for Nutella. For example, Evers told Ferrero that she was “a little worried that too
27 many of the BlogHers are more geared towards the decadent side of Nutella, using it as an
28 ingredient in rich desserts.” Ex. 21 (PI’s Ex. 48). *See generally* Evers Dep. Tr. 319:23-321:6
(discussing use of Nutella in desserts).

⁴ Ex. 22 (PI’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.

1 ComplicatedMama (4,424 followers)

- 2 • *If you are sending a #nutella sandwich to school for Lunch. Send in a string cheese for extra*
- 3 *protein*
- 4 • *#nutella sandwich is Really not more sugary than PB&J*
- 5 • *Did you Know there's actually very little chocolate in #nutella? It's hazelnuts, skim milk, and*
- 6 *a hint of cocoa.*

7 Dagmar Bleasdale (3,857 followers)

- 8 • *back from the #Nutella event in NYC. I learned that it's actually a nut butter, not chocolate*
- 9 *butter. NUTtella) Plus it's gluten free!*

10 primetimeparent (3,183 followers)

- 11 • *What is in #nutella?? Hazelnut, skim milk, sugar, & cocoa I'm in love & #kosher O U D (not*
- 12 *#kosher 4 Passover)*

13 *See Ex.23 (Pl's Ex. 63, at CEVERS 280, 282-84, 286-87); see also Ex. 2, Evers Dep. Tr. at*

14 *306:2-317:5. Ferrero similarly omits information about sugar and oil when it promotes Nutella's*

15 *"healthier" ingredients, like skim milk, even if these ingredients form a miniscule portion of the*

16 *product. See Ex. 2, Evers Dep. Tr. at 174:9-176:19.*

17 ***b. Serving Size***

18 Although the ideas of moderation and proper serving size are fundamental elements of

19 using Nutella in the "proper" way, *see, e.g., Ex. 2, Evers Dep. Tr. at 94:6-14, 323:5-12, Ferrero*

20 *has repeatedly attempted to skirt the issue.* [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 Even when Ferrero discusses serving size, its message is inconsistent. For example, while
10 often stating the proper serving size is “1 to 2 tablespoons,” Evers told a group of mothers “You
11 only need, you know, 2 teaspoons to a tablespoon for a slice of bread,” *see*
12 <http://www.youtube.com/watch?v=gocrTJN0DPw>, and wrote she herself uses only 1.5 *teaspoons*
13 of Nutella—a *quarter* of the 2 Tablespoon amount she instructs mothers to feed their children at
14 breakfast. *See* Ex. 27 (Pl’s Ex. 79); Ex. 2, Evers Dep. Tr. 337:9-22.

15 In addition to the proper serving at a sitting, Ferrero has never provided consumers with
16 information about the *frequency* of “proper” Nutella use for children at breakfast. *See* Ex. 2,
17 Evers Dep. Tr. at 322:20-324:16. This is despite that “children often, frequently tend to be picky
18 and like the same food again and again.” *Id.* at 367:4-7.

19 ***c. Proper Proportions for a “Balanced Breakfast”***

20 Although it would be absurd to call Nutella “healthy,” *see, e.g.*, Ex. 2, Evers Dep. Tr. at
21 147:21-48:2, 226:17-227:22, 334:19-21, 369:1-4, and although Ferrero makes it a point not to
22 use the words like “healthy” or “nutritious” when talking about Nutella anymore, *see* Ex. 27
23 (Pl’s Ex. 79) (“we never say that Nutella itself is nutritious or healthy”), 247:21-248:16
24 (discussing [REDACTED] commercial that Ferrero no longer airs, which used “healthy” multiple times⁶),
25 271:22-272:2 (“we don’t want to be making official health claims about Nutella – specifically,
26

27 ⁶ *See* FAC ¶ 93. *See also* [REDACTED]
28 [REDACTED]

1 Nutella on its own, we don't want to be perceived as making health or nutrition claims"), Evers
2 testified that "balanced" in the context of Ferrero's advertising is nevertheless a euphemism for
3 "healthy." Ex. 2, Evers Dep. Tr. at 247:15-20. This is also apparent in Ferrero's communications,
4 where Ferrero uses "balanced" and "healthy" interchangeably. *See, e.g.*, [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED] Ex. 31 (CEVERS265) ("I am very excited about the work that
8 Ferrero is doing in regards to . . . the role that Nutella plays in promoting a healthy breakfast.");
9 Ex. 32 (CEVERS38) (Evers' job duties as Nutella spokesperson would include "incorporating
10 Nutella into an overall healthy, balanced breakfast").

11 A breakfast is healthy for children, according to Evers, if it "has the correct ratio of
12 carbohydrate, protein, and fat" and "includes a fruit or a vegetable, and . . . a protein source." *Id.*
13 at 127:23-128:3; *see also id.* at 131:5-8. Evers testified that the "correct ratio" should be
14 determined by reference to the Institute of Medicine's recommendations. *Id.* 216:12-25.⁷

15 But none of this information appears in any of Ferrero's promotional materials for
16 Nutella. *See* Evers Dep. Tr. 125:6-132:8 (Nutella "about" webpage does not discuss proper
17 proportions for a "balanced breakfast"); 167:6-168:10 (Nutella label does not give any indication
18 of the correct proportions for a "balanced breakfast"); 224:16-225:18 (although "balanced
19 breakfast" has a specific, qualitative meaning, Ferrero uses the term on Nutella's label without
20 providing that information); 278:14-281:2 (Nutella "advertorial" used phrases like "appropriate
21 amount" and "dab" instead of providing specific measurements to create a properly
22 proportioned, "balanced breakfast"); 291:18-292:10 (Evers does not think it is necessary to tell
23 consumers "every single time," when defining "balanced breakfast," what the proper proportions
24 for a balanced breakfast are).

25
26
27
28 ⁷ According to IOM, protein should account for 10-25% of daily calories, carbohydrate 45-65%,
and fat 20-35%. *Id.*

1 **d. Whole Grain**

2 According to Evers, using Nutella with whole grains is a critical part of the breakfast
3 messaging. *See, e.g.*, Ex. 2, Evers Dep. Tr. at 146:2-3 (“I always recommend Nutella in
4 conjunction with a whole grain”).⁸ Nevertheless, Ferrero has often tempered its whole grain
5 messaging, [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 Evers testified this [REDACTED] language is inconsistent with breakfast messaging she endorses.
9 *See* Ex. 2, Evers Dep. Tr. at 165:23-166:11, 341:6-342:7.

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

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

13 **B. Plaintiffs Were Exposed to Ferrero’s Long-Term Advertising Campaign**
14 **Precision-Tuned to Make Nutella Seem Healthy**

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

18 **ARGUMENT**

19 **I. THIS CASE SATISFIES THE REQUIREMENTS OF RULE 23**

20 **A. Standards for Class Certification**

21 California “has a public policy which encourages the use of the class action device.”
22 *Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 473 (1981); *Aguiar v. Cintas Corp. No. 2*, 144
23 Cal. App. 4th 121, 132 (2006) (quoting *Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319,
24 340 (2004)). “In determining whether class certification is appropriate, ‘the question is not
25 whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but
26 rather, whether the requirements of Rule 23 are met.’” *Hofstetter v. Chase Home Fin., LLC*, 2011

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

1 U.S. Dist. LEXIS 38124, at *16 (N.D. Cal. Mar. 31, 2011) (quoting *Eisen v. Carlisle &*
2 *Jacquelin*, 417 U.S. 156, 178 (1974)); *see also In re Ramtek Sec. Litig.*, 1991 U.S. Dist. LEXIS
3 5490, at *9 (N.D. Cal. Feb. 4, 1991) (“In determining whether to certify a class, the focus is
4 simply whether the prerequisites of Fed. R. Civ. P. 23 have been met.”).

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

12 When ruling on “a motion for class certification, the court ‘is bound to take the
13 substantive allegations of the complaint as true.’” *Wiegele v. FedEx Ground Package Sys.*, 2008
14 U.S. Dist. LEXIS 10246, at *8 (S.D. Cal. Feb. 12, 2008) (quoting *Blackie v Barrack*, 524 F.2d
15 891, 901 n.17 (9th Cir. 1975)). Likewise, “in deciding whether to certify a class under Rule 23,
16 an inquiry regarding ‘the merits of the claims is [generally] inappropriate.’” *Heffelfinger*, 2008
17 U.S. Dist. LEXIS 5296, at *32 (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay
18 Kane, *Federal Practice & Procedure: Civil 2d* § 1759 (2006)).

19 In determining the propriety of a class action, . . . [n]either the possibility that a
20 plaintiff will be unable to prove his allegations, nor the possibility that the later
21 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].

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

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

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

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

13 **B. Plaintiff Satisfies the Rule 23(a) Prerequisites**

14 **1. Numerosity**

15 Numerosity is generally satisfied if a proposed class has at least 40 members. *See Mazza*,
16 254 F.R.D. at 617 (“As a general rule, classes of forty or more are considered sufficiently
17 numerous.”). A Ferrero document indicates [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED] several times that many must have purchased it in the preceding decade, during the
21 putative class period. In addition, Nutella has been sold in grocery stores, discount stores like
22 Wal-Mart and Target, and club stores like Sam’s Club and CostCo, throughout the country.
23 Ferrero’s net Nutella sales from 2007 to 2010 totaled [REDACTED]
24 Accordingly, numerosity is satisfied. *See Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D.
25 365, 377 (N.D. Cal. 2010) (inferring “from the allegation that Blue Sky sold over \$20 million of
26 product . . . that there are numerous purchasers who are potential class members so as to satisfy
27 the numerosity requirement”).

1 **2. Commonality**

2 To certify a class, there must be “questions of law or fact common to the class.” Fed. R.
3 Civ. P. 23(a)(2). “In the Ninth Circuit, the requirements of Rule 23(a)(2) are to be construed
4 ‘permissively.’” *Quintero v. Mulberry Thai Silks, Inc.*, 2008 U.S. Dist. LEXIS 84976, at *8
5 (N.D. Cal. Oct. 21, 2008) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir.
6 1998)). For the purposes of Rule 23(a)(2), a single question of law or fact common to the class
7 will satisfy the commonality requirement. *Wal-Mart*, 180 L. Ed. 2d at 395 (internal citations
8 omitted) (“We quite agree that...even a single common question will do[.]”). The FAC identifies
9 a number of significant common questions of fact and law:

- 10 (a) Whether Ferrero contributed to, committed, and/or is responsible for the
11 conduct alleged;
- 12 (b) Whether Ferrero’s conduct constitutes the violations of law;
- 13 (c) Whether Ferrero acted willfully, recklessly, negligently, or with gross
14 negligence;
- 15 (d) Whether Class Members are entitled to injunctive relief; and
- 16 (e) Whether Class Members are entitled to restitution.

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

20 **3. Typicality**

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

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

7 **4. Adequacy of Representation**

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

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

22 **C. The Proposed Class Satisfies Rule 23(b)(3)**

23 The proposed Class satisfies both the predominance and superiority components of Rule
24 23(b)(3).

25
26
27 ⁹ The Court has already appointed the Weston Firm and Law Offices of Ronald A. Marron
28 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 **1. Common Issues Predominate**

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

5 Here, the central, overriding, and predominating question is whether a limited group of
6 label claims and advertisements are misleading. This determination is not made with regard to
7 each class member, but under a single, objective, and *common* “reasonable consumer standard.”
8 *See Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997) (“Predominance is a test readily met
9 in certain cases alleging consumer . . . fraud”); *Mazza*, 254 F.R.D. 610 (certifying UCL, FAL,
10 and CLRA class where defendant misrepresented the characteristics of its Collision Mitigation
11 Braking System); *Faigman v. AT&T Mobility LLC*, 2007 U.S. Dist. LEXIS 52192 (N.D. Cal.
12 July 17, 2007) (certifying UCL, FAL, and CLRA class where defendant advertised company
13 debit cards as cash-equivalent rebates); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 238 F.R.D.
14 482 (C.D. Cal. 2006) (certifying UCL and FAL class where defendant misled the class into
15 purchasing deferred annuities); *Smith v. Wells Fargo Bank, N.A.*, 135 Cal. App. 4th 1463 (2005)
16 (certifying UCL, FAL, and CLRA class where defendant misrepresented an involuntarily per-
17 transaction “overdraft protection” charge on checking account cards).

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

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

6 ***a. Plaintiffs Will Show Ferrero’s Liability by Common Evidence.***

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

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

15 Plaintiffs will also prove elements of their claims by offering expert testimony on the
16 health effects of consuming Nutella. The jury may then determine whether a reasonable
17 consumer would find Ferrero’s advertising and labeling misleading, given evidence of the
18 product’s actual effects on human health. In addition, if necessary, Plaintiffs may offer the
19 testimony of a consumer survey expert to show how consumers interpret Ferrero’s claims. *See*
20 *generally Hitt v. Arizona Bev. Co., LLC*, 2009 U.S. Dist. LEXIS 16871, at *16-19 (S.D. Cal. Feb.
21 4, 2009) (permitting plaintiff “the opportunity to present evidence, such as a consumer survey,
22 showing that [Defendant’s] labeling and promotion is likely to deceive reasonable consumers”);
23 *see also Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1129 (C.D. Cal. 2010).

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

27 If Ferrero’s health and balanced breakfast claims concerning Nutella are “likely to
28 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

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

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

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

18 Because each Class Member need not have relied on the alleged misstatements and
19 omissions, there is no need for individualized proof of reliance that otherwise might weigh
20 against predominance. See *Chavez v. Blue Sky Natural Bev. Co.*, 268 F.R.D. 365, 376 (N.D. Cal.
21 2010) (certifying under Rule 23(b)(3) similar claims against the manufacturer of beverage over
22 allegedly misleading label statements and finding “‘relief under the UCL is available without
23 individualized proof of deception, reliance and injury.’” (quoting *Tobacco II*, 46 Cal 4th at 320)).
24 Like the UCL, the standard for stating a claim under the FAL is “only [a showing] that members
25 of the public are ‘likely to be deceived.’ The standard is that of the ‘reasonable consumer.’
26 Actual deception or confusion . . . is not required.” *Mazza*, 254 F.R.D. at 627 (citations omitted).

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

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

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

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

14 “A misrepresentation is judged to be material if a reasonable man would attach
15 importance to its existence or nonexistence in determining his choice of action in the transaction
16 in question.” *Estrella v. Freedom Fin. Network, LLC*, 2010 U.S. Dist. LEXIS 61236, at *32
17 (N.D. Cal. June 2, 2010) (quoting *Tobacco II*, 46 Cal. 4th at 327) (citation omitted); *see also*
18

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

21 As it is unlawful to engage in any of the deceptive business practices enumerated
22 in [Cal. Civ. Code] section 1770, consumers have a corresponding legal right not
23 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.

24 *Id.* Plaintiffs are thus entitled to initiate a class action on any of the “unlawful” practices listed in
25 § 1770 of the CLRA. *See, e.g., Outboard Maine Corp. v. Super. Ct.*, 52 Cal. App. 3d 30, 37
26 (1975) (Under § 1770, “[f]raud or deceit may consist of the suppression of a fact by one who is
27 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”
28 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).

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

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

14 **2. Class Treatment is the Superior Means to Adjudicate Plaintiffs’** 15 **Claims**

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

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

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

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

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

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

11 A federal court in a diversity action applies not only the substantive law, but also the
12 choice-of-law rules of the state in which it sits. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487,
13 496 (1941). The Due Process Clause however constrains the scope of a class under one state law
14 unless the class action proponent shows there is a “significant contact or significant aggregation
15 of contacts to the claims” asserted such that “application of the forum law is not arbitrary or
16 unfair” and “so long as the interests of other states are not found to outweigh California’s interest
17 in having its law applied.” *Wash. Mut. Bank v. Super. Ct.*, 24 Cal. 4th 906, 919-21 (2001)
18 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985)). “In resolving whether
19 application of state law would be unfair, the court can look to the expectations of the parties.”
20 *Pecover*, 2010 U.S. Dist. LEXIS 140632, at *48. (citation omitted).

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

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

6 Ferrero is and has been admitted and authorized to conduct business, and does in fact
7 conduct significant business, in California. *See* FAC at ¶¶ 13, 22-23. The Court has *already*
8 found Ferrero has “substantial contacts with this district.” *In re Ferrero Litig.*, 768 F. Supp. 2d
9 1074, 2011 U.S. Dist. LEXIS 50592, at *8 (S.D. Cal. May 11, 2011). That is, in part, because
10 Ferrero’s “California sales alone account for between 13% and 15.2% of its total U.S. sales of
11 Nutella® over the last five years.” *Id.* (citation omitted). In addition, “13.7% of Defendant’s
12 Nutella shipments went to California customers,” and “Ferrero employs a 15-person sales force
13 in California . . . and Ferrero works with California vendors and distributors in marketing its
14 Nutella® product.” *Id.* (citations omitted). And, as discussed above, [REDACTED]

15 [REDACTED] Thus, as the Court
16 earlier concluded, “by choosing to market and sell [its Nutella® product] nationwide, . . .
17 Defendant exposed itself to the risk of being sued in the districts in which its product is sold.” *In*
18 *re Ferrero*, 768 F. Supp. 2d 1074, 2011 U.S. Dist. LEXIS 50592, at *7 (alterations in original),
19 quoting *Rafton v. Rydex Series Funds*, 2010 U.S. Dist. LEXIS 75411, at *9 (N.D. Cal. June 29,
20 2010).

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

1 140632, at *55 (“California, for purposes of its UCL, ‘has a clear and substantial interest in
2 preventing fraudulent practices in this state and a legitimate and compelling interest in
3 preserving a business climate free of . . . deceptive practice.’ . . . For this reason, the state ‘has a
4 legitimate interest in extending state-created remedies to out-of-state parties harmed by wrongful
5 conduct occurring in California.” (citations omitted)); accord *Church v. Consol. Freightways,*
6 *Inc.*, 1992 U.S. Dist. LEXIS 18234, at *13-14 (N.D. Cal. Sept. 14, 1992) (“[I]t is very probable
7 that the deceit claims would not be addressed comprehensively if California law is not applied.
8 Thus, even if other states have an interest in applying their own law, this interest does not
9 outweigh California's interest in facilitating a class action. [citation].” Moreover, “[a]ll
10 jurisdictions share the goal of deterring fraudulent conduct and providing a remedy for the
11 victims of fraud [and] each jurisdiction would rather have the injuries of its citizens litigated and
12 compensated under another state’s law than not litigated or compensated at all . . . It appears that
13 the maximum attainment of the underlying purposes of all the states will be achieved best by
14 certifying the class.”).

15 Where “plaintiffs show that application of California law is constitutional under *Shutts*,
16 defendant must show that another state’s laws apply under the California governmental interest
17 choice-of-law test.” *Parkinson*, 258 F.R.D. at 598. “California follows a three-step
18 ‘governmental interest analysis’ to address conflict of laws claims and ascertain the most
19 appropriate law applicable to the issues where there is no effective choice-of-law agreement . . .
20 .” *Wash. Mut.*, 24 Cal. 4th at 919 (citations omitted). Under the first step of the governmental
21 interest analysis, the foreign law proponent “must identify the applicable rule of law in each
22 potentially concerned state and must show it materially differs from the law of California.” *Id.*
23 Importantly, “[t]he fact that two or more states are involved does not in itself indicate there is a
24 conflict of laws problem.” *Id.* at 919-20. See also *Wershba v. Apple Computer, Inc.*, 91 Cal. App.
25 4th 224, 242 (2001) (certifying nationwide CLRA and UCL class, holding differences among
26 states’ consumer protection laws were not material and therefore were not a sufficient basis on
27 which to deny nationwide class treatment); *Hanlon*, 150 F.3d at 1020 (same).

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

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

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

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

6 **CONCLUSION**

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

14 DATED: August 15, 2011

Respectfully Submitted,

15 /s/ Jack Fitzgerald

By: Jack Fitzgerald

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