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8 **Interim Class Counsel**

9
 10 **UNITED STATES DISTRICT COURT**
 11 **SOUTHERN DISTRICT OF CALIFORNIA**

12
 13 **IN RE FERRERO LITIGATION**

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

14
 15 **DECLARATION OF GREGORY S.**
 16 **WESTON IN SUPPORT OF**
 17 **PLAINTIFFS' MOTION FOR CLASS**
 18 **CERTIFICATION**

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

1 I, Gregory S. Weston, declare:

2 **PART I**

3 **EXHIBITS RELATING TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

4 1. Attached hereto as **Exhibit 1** is a true and correct copy Defendant's Response to
5 Interrogatory No. 8, designated by Ferrero as "HIGHLY CONFIDENTIAL." Accordingly,
6 Exhibit 1 is being filed under seal.

7 2. Attached hereto as **Exhibit 2** is a true and correct copy of excerpts from the
8 deposition of Connie L. Evers, dated July 26, 2011 and designated by Ferrero as
9 "CONFIDENTIAL." Accordingly, Exhibit 2 is being filed under seal.

10 3. Attached hereto as **Exhibit 3** is a true and correct copy of a document titled
11 "ATTACHMENT C," which contains quarterly advertising and promotional spending data for
12 Nutella during the years 2007 through 2010. Exhibit 3 was labeled at the April 14, 2011
13 deposition of Bernard Kreilmann, Nutella's CEO, as "Plaintiff's Exhibit 7," and is designated by
14 Ferrero as "CONFIDENTIAL." Accordingly, Exhibit 3 is being filed under seal.

15 4. Attached hereto as **Exhibit 4** is a true and correct copy of a document titled
16 "ATTACHMENT A," which contains quarterly net sales data for Nutella during the years 2007
17 through 2010. Exhibit 4 was marked at the Kreilmann deposition as "Plaintiff's Exhibit 5" and is
18 designated by Ferrero as "CONFIDENTIAL." Accordingly, Exhibit 4 is being filed under seal.

19 5. Attached hereto as **Exhibit 5** is a true and correct copy of an email chain bearing
20 production number CEVERS953, which was produced by third-party Connie Evers.

21 6. Attached hereto as **Exhibit 6** is a true and correct copy of a print advertisement
22 for Nutella which, upon information and belief, appeared in national print magazines, including
23 *Parents*.

24 7. Attached hereto as **Exhibit 7** is a true and correct copy of a print advertisement
25 for Nutella which, upon information and belief, appeared in national print magazines, including
26 *Parenting – School Years*.

1 8. Attached hereto as **Exhibit 8** is a true and correct copy of a print advertisement
2 for Nutella which, upon information and belief, appeared in national print magazines, including
3 *Woman's day*.

4 9. Attached hereto as **Exhibit 9** is a true and correct copy of an email chain bearing
5 production numbers CEVERS221, which was produced by third-party Connie Evers.

6 10. Attached hereto as **Exhibit 10** is a true and correct copy of an email chain bearing
7 production numbers CEVERS 946-47, which was produced by third-party Connie Evers, and
8 designated by Evers as "CONFIDENTIAL." Accordingly, Exhibit 10 is being filed under seal.

9 11. Attached hereto as **Exhibit 11** is a true and correct copy of an email chain bearing
10 production numbers CEVERS246-47, and marked at the July 26, 2011 deposition of Ms. Evers
11 as "Plaintiffs' Exhibit 43."¹ Exhibit 11 was produced by third-party Connie Evers.

12 12. Attached hereto as **Exhibit 12** is a true and correct copy of an article titled
13 "Perfect Snacks to Stock Up on for a Trip," appearing at the Nickelodeon website,
14 ParentsConnect.com, and marked at the Evers deposition as "Plaintiffs' Exhibit 33."

15 13. Attached hereto as **Exhibit 13** is a true and correct copy of an executed
16 November 17, 2009 Spokesperson Agreement between Connie Evers and MS&L, as agent for
17 Ferrero, bearing production numbers CEVERS847-51, and marked at the Evers deposition as
18 "Plaintiffs' Exhibit 25." Exhibit 13 was produced by third-party Connie Evers, and designated by
19 Evers as "CONFIDENTIAL." Accordingly, Exhibit 13 is being filed under seal.

20 14. Attached hereto as **Exhibit 14** is a true and correct copy of an email chain bearing
21 production numbers CEVERS43-48, and marked at the Evers deposition as "Plaintiffs' Exhibit
22 20." Exhibit 14 was produced by third-party Connie Evers, and designated by Evers as
23 "CONFIDENTIAL." Accordingly, Exhibit 14 is being filed under seal.

24 _____
25 ¹ Because of the short time between Ms. Evers' deposition and the filing of this Motion,
26 Plaintiffs have not yet received marked copies of the Evers deposition exhibits. Therefore, for the
27 purposes of this Motion, Plaintiffs file non-marked copies of the identical documents that were
marked as exhibits during the deposition.

1 15. Attached hereto as **Exhibit 15** is a true and correct copy of an email chain bearing
2 production numbers CEVERS49-60, and marked at the Evers deposition as “Plaintiffs’ Exhibit
3 21.” Exhibit 15 was produced by third-party Connie Evers, and designated by Evers as
4 “CONFIDENTIAL.” Accordingly, Exhibit 15 is being filed under seal.

5 16. Attached hereto as **Exhibit 16** is a true and correct copy of a document titled
6 “Nutella Recommended Opinion Leaders for Industry Briefings,” bearing production numbers
7 CEVERS117-21, which was produced by third-party Connie Evers, and designated by Evers as
8 “CONFIDENTIAL.” Accordingly, Exhibit 16 is being filed under seal.

9 17. Attached hereto as **Exhibit 17** is a true and correct copy of an email chain bearing
10 production numbers CEVERS103-110, and marked at the Evers deposition as “Plaintiffs’ Exhibit
11 35.” Exhibit 17 was produced by third-party Connie Evers, and designated by Evers as
12 “CONFIDENTIAL.” Accordingly, Exhibit 17 is being filed under seal.

13 18. Attached hereto as **Exhibit 18** is a true and correct copy of an email chain bearing
14 production number CEVERS185, which was produced by third-party Connie Evers.

15 19. Attached hereto as **Exhibit 19** is a true and correct copy of an email chain bearing
16 production numbers CEVERS1068-70, which was produced by third-party Connie Evers.

17 20. Attached hereto as **Exhibit 20** is a true and correct copy of an email chain bearing
18 production numbers CEVERS1155-57, which was produced by third-party Connie Evers, and
19 designated by Evers as “CONFIDENTIAL.” Accordingly, Exhibit 20 is being filed under seal.

20 21. Attached hereto as **Exhibit 21** is a true and correct copy of an email chain bearing
21 production number CEVERS1045, and marked at the Evers deposition as “Plaintiffs’ Exhibit
22 48.” Exhibit 21 was produced by third-party Connie Evers.

23 22. Attached hereto as **Exhibit 22** is a true and correct copy of an email chain bearing
24 production numbers CEVERS1028-31, and marked at the Evers deposition as “Plaintiffs’ Exhibit
25 44.” Exhibit 22 was produced by third-party Connie Evers, and designated by Evers as
26 “CONFIDENTIAL.” Accordingly, Exhibit 22 is being filed under seal.

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1 23. Attached hereto as **Exhibit 23** is a true and correct copy of an email chain bearing
2 production numbers CEVERS278-87, and marked at the Evers deposition as “Plaintiffs’ Exhibit
3 63.” Exhibit 23 was produced by third-party Connie Evers.

4 24. Attached hereto as **Exhibit 24** is a true and correct copy of an email chain bearing
5 production numbers CEVERS537-41, and marked at the Evers deposition as “Plaintiffs’ Exhibit
6 52.” Exhibit 24 was produced by third-party Connie Evers, and designated by Evers as
7 “CONFIDENTIAL.” Accordingly, Exhibit 24 is being filed under seal.

8 25. Attached hereto as **Exhibit 25** is a true and correct copy of an email chain bearing
9 production numbers CEVERS271-77, and marked at the Evers deposition as “Plaintiffs’ Exhibit
10 77.” Exhibit 25 was produced by third-party Connie Evers, and designated by Evers as
11 “CONFIDENTIAL.” Accordingly, Exhibit 25 is being filed under seal.

12 26. Attached hereto as **Exhibit 26** is a true and correct copy of an email bearing
13 production number CEVERS595, which was produced by third-party Connie Evers, and
14 designated by Evers as “CONFIDENTIAL.” Accordingly, Exhibit 26 is being filed under seal.

15 27. Attached hereto as **Exhibit 27** is a true and correct copy of an email chain bearing
16 production numbers CEVERS1114-15, and marked at the Evers deposition as “Plaintiffs’ Exhibit
17 79.” Exhibit 27 was produced by third-party Connie Evers.

18 28. Attached hereto as **Exhibit 28** is a true and correct copy of an email chain bearing
19 production number CEVERS974, and marked at the Evers deposition as “Plaintiffs’ Exhibit 56.”
20 Exhibit 28 was produced by third-party Connie Evers, and designated by Evers as
21 “CONFIDENTIAL.” Accordingly, Exhibit 28 is being filed under seal.

22 29. Attached hereto as **Exhibit 29** is a true and correct copy of an email chain bearing
23 production number CEVERS973, and marked at the Evers deposition as “Plaintiffs’ Exhibit 57.”
24 Exhibit 29 was produced by third-party Connie Evers, and designated by Evers as
25 “CONFIDENTIAL.” Accordingly, Exhibit 29 is being filed under seal.

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1 36. I am a graduate of Ohio State University and Harvard Law School and have
2 always devoted all or substantially all of my practice to representing plaintiffs in class actions.

3 37. On June 14, 2011, the Honorable Richard Seeborg appointed the Weston Firm,
4 together with the Law Offices of Ronald A. Marron, Interim Class Counsel, in a contested
5 proceeding. *See Chacanaca v. Quaker Oats Co.*, 2011 U.S. Dist. LEXIS 65023, at *8-9 (N.D.
6 Cal. June 14, 2011) (“There is no question here that both the Weston/Marron counsel . . . have
7 ample experience handling class actions and complex litigation. It is also clear that both have
8 particular familiarity with suits involving issues of mislabeling in the food industry.”).

9 38. Additionally, the Weston Firm was recently appointed Class Counsel in the matter
10 of *Red et al. v. Unilever United States et al.*, No. CV 10-0387 JW (N.D. Cal.), an action
11 challenging the labeling of Unilever margarine products containing trans fat. Judge Ware
12 recently granted final approval to a nationwide class settlement that requires Unilever to remove
13 all trans fat from its entire margarine portfolio, including Imperial, Brummel & Brown, I Can’t
14 Believe It’s Not Butter! and numerous generic and regional brands.

15 39. Moreover, the Weston Firm was appointed Interim Class Counsel, together with
16 Lieff Cabraser, to represent purchases of Apple iPad 3Gs in an action alleging a “bait and
17 switch” scheme concerning the promise by Apple and AT&T Mobility of an unlimited 3G data
18 plan, in *In re Apple and AT&T iPad Unlimited Data Plan Litig.*, Case No. 10-02553 RMW (N.D.
19 Cal.) (Dkt. No. 79).

20 40. The Weston Firm was also appointed sole Class Counsel to represent purchasers
21 of approximately 145 condominiums in *Adachi et al. v. Carlyle/Galaxy San Pedro L.P. et al.*,
22 No. 09-793 (C.D. Cal.), which settled in 2009 on a class-wide all-cash basis for approximately
23 \$1.35 million.

24 41. Before founding the Weston Firm, as an attorney at the firm now called Robbins,
25 Geller, Rudman & Dowd (“RGR&D”), I represented plaintiffs in the following class actions:

- 26 • *The Apple iPod iTunes Antitrust Litigation* (N.D. Cal.) (nationwide consumer class
27 certified and RGR&D appointed class counsel)

- 1 • *Bruce v. Crompton Corp.* (Los Angeles County Super. Ct.)
- 2 • *In re Carbon Black Antitrust Litigation* (D. Mass.)
- 3 • *In re Digital Music Antitrust Litigation* (S.D.N.Y.) (RGR&D appointed interim
4 class counsel)
- 5 • *In re Graphics Processing Units Antitrust Litigation* (N.D. Cal.)
- 6 • *In re International Air Transportation Surcharge Antitrust Litigation* (N.D. Cal.)
- 7 • *In re Medical Waste Services Antitrust Litigation* (D. Utah) (RGR&D appointed
8 interim class counsel)
- 9 • *Ross et al. v. Metropolitan Life Insurance Company* (W.D. Pa.)
- 10 • *Williams v. Interinsurance Exchange of the Automobile Club* (San Diego County
11 Super. Ct.) (California consumer class certified, RGR&D appointed class counsel)

12 42. This year my firm has obtained a number of favorable decisions in several actions
13 challenging “health and wellness” labeling of foods made with unhealthy ingredients, like trans
14 fat, including a recent decision denying Defendant Kraft Foods’ motion to dismiss the Second
15 Amended Complaint in *Red et al. v. Kraft Foods, Inc., et al.*, 2010 U.S. Dist. LEXIS 122849
(C.D. Cal. Nov. 18, 2010).

16 43. In *Yumul v. Smart Balance, Inc.* 733 F. Supp. 2d 1117 (C.D. Cal. 2010) and
17 *Yumul v. Smart Balance, Inc.* 2010 U.S. Dist. LEXIS 116960 (C.D. Cal. Oct. 8, 2010), the Court
18 denied a motion to dismiss a complaint challenging the labeling of margarine containing trans
19 fat, holding that plaintiff had adequately alleged deception. The Court further denied the
20 defendant’s challenge to a class period extending back ten years, holding the complaint
21 adequately alleged tolling of the statute under the delayed discovery rule.

22 44. In a 40-page Tentative Order dated July 25, 2011, the Honorable Margaret M.
23 Morrow also certified a nationwide class of purchasers of Nucoa Real Margarine beginning
24 January 1, 2000 and extending through class notice (i.e., an 11+ year class), in the matter of
25 *Yumul v. Smart Balance, Inc.*, No. 10-927 (C.D. Cal.). Judge Morrow also tentatively appointed
26 the Weston Firm Class Counsel. Although the Order has not yet been finalized, we expect the
27

1 Court will follow its tentative ruling, and expect to cite the decision in Plaintiffs' upcoming
2 Reply in Support of Class Certification.

3 45. In *Chacanaca v. The Quaker Oats Co.*, 752 F. Supp. 1111 (N.D. Cal. 2010), the
4 Honorable Richard Seeborg found certain health claims on Quaker Oats granola bar products
5 containing trans fat actionable under California's UCL, FAL and CLRA.

6 46. In *Henderson v. J.M. Smucker Co.*, 2011 U.S. Dist. LEXIS 27953 (C.D. Cal. Mar.
7 17, 2011), the Honorable George H. King largely denied a defendant's motion to dismiss claims
8 that it's Crisco vegetable shortening and other packaged foods contained misleading health
9 claims in light of the products' trans fat content.

10 47. In *Henderson v. Gruma Corp.*, 2011 U.S. Dist. LEXIS 41077 (C.D. Cal. Apr. 11,
11 2011), the Honorable A. Howard Matz held claims that representations on Guacamole and Bean
12 Dip containing trans fat were actionable under the UCL, FAL and CLRA.

13 48. In addition to these decisions, the Weston Firm recently obtained a favorable
14 decision on behalf of a putative consumer class from this Court in *Peviani v. Natural Balance,*
15 *Inc.*, 2011 U.S. Dist. LEXIS 18110 (S.D. Cal. Feb. 24, 2011), denying in full a defendant's
16 motion to dismiss an action challenging the advertising and sale of a "natural herbal" dietary
17 supplement drug that makes false and deceptive claims about its effectiveness as an aphrodisiac

18 49. The Weston Firm is also counsel for a proposed class of deaf and hard-of-hearing
19 consumers in an action alleging violations of the Americans with Disabilities Act, false
20 advertising, and unlawful business practices, against Netflix, Inc., in an action styled *Cullen v.*
21 *Netflix, Inc.*, No. 11-cv-1199-HRL (N.D. Cal.).

22 50. In sum, the Weston Firm has dedicated substantial resources and efforts to
23 prosecuting consumer fraud similar to those in this case, especially against food manufacturers
24 who deceptively label products containing toxic artificial trans fat in a manner that implies the
25 products are nevertheless healthy, and against companies that engage in unlawful or unfair
26

1 business practices. This provides the Weston Firm with the benefits of expertise in the subject
2 area and economies of scale that will benefit the Class.

3 51. My firm and I are fully committed to prosecuting this action against Ferrero, Inc.
4 to achieve a successful outcome for the Class, and have the means and resources to do so.

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6 I declare under penalty of perjury of the laws of the United States that the foregoing is
7 true and correct.

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9 Executed on August 15, 2011, in San Diego, California.

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/s/ Gregory S. Weston
Gregory S. Weston

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1 DATED: August 15, 2011

Respectfully Submitted,

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/s/Jack Fitzgerald

Jack Fitzgerald

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THE WESTON FIRM

GREGORY S. WESTON

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MELANIE PERSINGER

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Interim Class Counsel

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