EXHIBIT 3

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

	:	Case No. 11-1086 (FLW) (DEA)
IN RE:	:	Hon. Freda L. Wolfson, U.S.D.J. Hon. Douglas E. Arpert, U.S.M.J.
NUTELLA MARKETING AND SALES PRACTICES LITIGATION	:	Motion Day: October 3, 2011
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SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF CALIFORNIA PLAINTIFFS' MOTION TO INTERVENE

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INTRODUCTION

The Glover Plaintiffs' argument that the Court should not apply the first-filed rule because New Jersey is the "most appropriate forum," *see* Suppl. Opp., Dkt. No. 48 at 2, is directly at odds with the prior decisions of two federal courts, one by the Southern District of California's former Chief Judge, the Honorable Marilyn L. Huff, denying *Ferrero's* request to transfer the action to New Jersey pursuant to 28 U.S.C. § 1404(a),[1] the other by a panel of five federal judges denying *Glover's* request to transfer the action to New Jersey pursuant to § 1407.[2] In effect, the Glover Plaintiffs ask that the Court substitute *their* idea of the best forum for principles of federal comity. But the Third Circuit requires district courts to apply the first-filed rule and defer to earlier-filed actions in "all cases" of concurrent jurisdiction, unless an exception applies. *See EEOC v. Univ. of Pennsylvania*, 850 F.2d 969, 971 (3d Cir. 1988).

The Glover Parties' alternative argument, that minor differences between the actions mean they are not "truly duplicative" so that the first-filed rule does not

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[1] *In re Ferrero Litig.*, 768 F. Supp. 1074 (S.D. Cal. 2011).

[2] *In re Nutella Mktg. & Sales Practices Litig.*, 2011 U.S. Dist. LEXIS 92669 (J.P.M.L. 2011) (decision by the Hon. John G. Heyburn II (W.D. Ky.), the Hon. Chief Judge Kathryn H. Vratil (D. Kan.), the Hon. Frank C. Damrell, Jr. (E.D. Cal.), the Hon. W. Royal Furgeson, Jr. (W.D. Tx.), and the Hon. Barbara S. Jones (S.D.N.Y.)). Moreover, the Panel did not "find[] that these actions could proceed in separate District Courts," Suppl. Opp. at 3, but held that "*deference among the courts* should minimize the possibility of duplicative discovery and inconsistent pretrial rulings," *see* Suppl. R. at 21 (quoting *In re: Nutella Mktg. & Sales Practices Litig.*, 2011 U.S. Dist. LEXIS 92669, at *2 (J.P.M.L. Aug. 16, 2011) (emphasis added)).

apply, has already been addressed,[3] and remains wrong because the subject matter of the two actions is "substantially similar." *See infra* Point I. Moreover, Judge Walls' decision in *Catanese* was not abrogated by the Supreme Court's decision in *Smith v. Bayer*, which dealt with substantive issue preclusion, not comity. Aware of *EEOC's* mandate, the Glover Plaintiffs alternatively argue that the California Plaintiffs' request for a nationwide class, and their supposed "bad faith," constitute exceptions to the first-filed rule. They are wrong on both counts, since the request for a nationwide class is neither a legal nor practical bar to application of the first-filed rule, *see infra* Point II, and since the "bad faith" exception focuses on the motivation for bringing the second-filed action, not the supposed content of inter-counsel communications during the course of litigation, and the Glover Plaintiffs misrepresent the record. *See infra* Point III.

ARGUMENT

I. The First-Filed Rule Applies to the Copycat New Jersey Action because it is "Substantially Similar" and the Putative Classes Overlap, Despite Differences in Named Plaintiffs and State Law Claims Asserted

The Glover Plaintiffs assert that the first-filed rule does not apply to the two actions challenging identical Nutella advertising because the "parties and claims" supposedly "differ" in that: (a) the actions are brought under different state consumer protection laws; (b) one asserts an additional theory of why Ferrero's advertising was deceptive; and (c) while both complaints "focus" on Nutella's label, they supposedly

[3] *See* Reply, Dkt. No. 32 at 9-11.

also focus on different *other* examples of the same "nutrition breakfast food for children" multimedia advertising campaign.[4] *See* Suppl. Opp. at 6-7, 11.

The Glover Plaintiffs are wrong. In *Catanese*, Judge Walls applied the first-filed rule to dismiss a copycat class action brought under New Jersey law in favor of a first-filed action brought under California law because "the most important consideration in a first-filed rule analysis is overlapping subject matter. . . . A plain reading of . . . *EEOC* strongly suggests that whether the cases share subject matter is more important than the absolute identity of the parties." *Catanese v. Unilever*, 774 F. Supp. 2d 684, 687-88 (D.N.J. 2011) (transferring action brought under New Jersey law to district where action brought under California law was pending); *see also Alvarez v. Gold Belt, LLC*, 2011 U.S. Dist. LEXIS 38034 (D.N.J. Apr. 7, 2011) (deferring to first-filed class action where cases were "essentially identical"[5]).

Specifically, the Glover Plaintiffs argue, contrary to Judge Walls' decision in *Catanese*, that because the proposed lead plaintiffs in the California and New Jersey actions are different, the first-filed rule cannot apply. Suppl. Opp. at 7-8. But while the parties in two actions must be similar, the "parties involved . . . need not be identical." *Cretson Elecs., Inc. v. Lutron Elecs. Co.*, 2010 U.S. Dist. LEXIS 78109, at *5 (D.N.J. Aug. 2, 2010); *see also Medlock v. HMS Host USA, Inc.*, 2010 U.S. Dist.

[4] This is not even true. *See, e.g., In re Ferrero* First Am. Consolidated Compl. ¶¶ 90-96 (discussing television commercials).

[5] Here, 29 paragraphs of Glover's complaint were copied verbatim from the earlier *In re Ferrero* Complaint. *See* Suppl. Mem., Dkt. No. 42-1 at 13-14.

LEXIS 133143, at *9-10 (E.D. Cal. Dec. 15, 2010) ("[E]xact identity of parties is not required to satisfy the first-to-file rule. The rule is satisfied if some [of] the parties in one matter are also the same in the other matter, regardless of whether there are additional unmatched parties in one or both matters." (internal quotation omitted)); *accord Gardner v. GC Servs., LP*, 2010 U.S. Dist. LEXIS 67912, at *13 (S.D. Cal. July 6, 2010) (Explaining that the first-file rule "only requires the parties be 'substantially similar,'" and declining to apply first-to-file rule where, "[a]s for the putative classes, there is no overlap at all, much less 'substantial overlap.'")

Nevertheless, the Glover Plaintiffs assert that *Catanese* has been abrogated by *Smith v. Bayer Corp*., 131 S. Ct. 2368 (2011) ("*Bayer*"). *See* Suppl. Opp. at 8-9, 12-13. But the decision in *Bayer* has nothing to do with application of the first-filed rule as an exercise of comity between federal courts of equal rank. Instead, *Bayer* concerned the power of a federal court under the Anti-Injunction Act, 28 U.S.C. § 2283, to enjoin subsequent litigation in state court against a defendant on the basis that the class claims asserted in the subsequent state action were issue-precluded by the federal court's decision denying class certification. *See* 131 S.Ct. at 2373, 2376 n.7 ("we rest our decision on the Anti-Injunction Act and the principles of issue preclusion that inform it").

The *Bayer* Court held that a state court putative class action plaintiff could not suffer claim preclusion—that is, be substantively *bound* on the merits—by a United

States District Court order denying certification of the same class. *See* 131 S. Ct. at 2373. It did not hold that federal district courts should not exercise principles of judicial comity and efficiency to abstain from hearing a duplicative class action where an earlier-filed action on behalf of the same putative class is pending elsewhere. Moreover, *Bayer* did not announce a new rule at all, *see, e.g.*, Suppl. Opp. at 9 (citing *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008)),[6] and accordingly could not have abrogated *Catanese*. Indeed, in noting that proposed named plaintiffs in the New Jersey action could "re-file if . . . the [first-filed] action is dismissed on procedural grounds," *Catanese*, 774 F. Supp. 2d at 691, Judge Walls undermined the Glover Plaintiffs' argument that the application of the first-filed rule is similar to application of issue preclusion in *Bayer*.

The Glover Plaintiffs also attempt to distinguish *Catanese* on two other unavailing grounds, that the first-filed motion there was brought by the defendant, and that Judge Walls transferred the action, rather than dismissing it. *See* Suppl. Opp. at 12-13. First, the principles of comity and efficiency underlying the first-filed rule do not vary by the party seeking its application. *See generally* Suppl. Mem. at 22-26. Moreover, while asking that the Court hold off on deciding a "comity motion [until]

[6] *Accord Bayer*, 131 S.Ct. at 2375 n.4 (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 141 (3d Cir. 1998) (holding that putative "class members are not parties" and so cannot be bound by a court's ruling when "there is no class pending")); *id.* at 2379 ("This case . . . is little more than a rerun of *Chick Kam Choo* [*v. Exxon Corp.*, 486 U.S. 140 (1988)].").

after additional developments in the cases" (or "at a later time," *id.* at 4—Ferrero never says when it believes the Court should apply comity principles or why it should wait to do so), Ferrero admits it "might itself seek relief (in either this Court or the California court) to avoid duplicative litigation and conflicting decisions affecting the class." Ferrero Resp., Dkt. No. 47 at 2. Similarly, Ferrero's assertion that its pending Rule 12 motion presents no potential conflicts with *In re Ferrero*, *id.* at 3-4, is self-serving and untrue, since Ferrero's pending motion now effectively seeks a review of many issues that Judge Huff already decided. Second, the California Plaintiffs always sought alternative relief of stay, *see, e.g.*, Mot., Dkt. No. 21-1 at 1, and now that the JPML has denied the motion for centralization, the California Plaintiffs are also open to transfer, as they discuss (not "merely allude to," Suppl. Opp. at 13). *See* Suppl. Mem. at 18.

Alternatively, the Glover Plaintiffs argue that the cases are not "truly duplicative" because the "substantive elements" of the California and New Jersey state law claims at issue differ. *See* Suppl. Op. at 11 (citing *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 168, 196-97 (3d Cir. 2009), for proposition that "[i]t is the substantive elements of a statutory claim that inform the contours of a F.R.C.P. Rule 23 class"). However, many courts have recognized the similarity of the "substantive elements" of the New Jersey Consumer Fraud Act and California's Unfair Competition Law and CLRA. *See Johansson v. Cent. Garden & Pet Co.*, 2011 U.S.

Dist. LEXIS 56463, at *10 (D.N.J. May 26, 2011) ("Plaintiffs' causes of action under the UCL and CLRA are similar to the causes of action provided under the [NJCFA]."); *Tatum v. Chrysler Group LLC*, 2011 U.S. Dist. LEXIS 32362, at *2 (D.N.J. Mar. 28, 2011) (NJCFA and UCL are "comparable" statutes). Accordingly, the Glover Plaintiffs are wrong when they assert that certification of a nationwide class in *In re Ferrero* would not preclude certification of a nationwide class in this case.

II. The California Plaintiffs' Request to Certify a Nationwide Class does not Preclude Application of the First-Filed Rule

The argument that the Court should refrain from applying the first-filed rule because it will supposedly be impossible for the California Plaintiffs to obtain certification of a nationwide class, *see, e.g.*, Suppl. Opp. at 8, under California law is simply wrong. In fact, the California Interim Class Counsel *just obtained*, in a tentative order,[7] certification of a nationwide California class against a New Jersey defendant. *See* concurrently-filed Supplemental Reply Declaration of Gregory S. Weston ("Weston Decl.") ¶ 1 & Ex. A at 37-40. To the extent there is some question of a nationwide class, however, the remedy may be accordingly tailored. *See* Suppl.

[7] We did not attach the tentative order in *Yumul* to our Supplemental Memorandum because we hoped by the time we filed this Reply there would be a final order to cite. We acknowledge, of course, that this is only a tentative order, though we have every expectation it will be maintained, and it illustrates our underlying point, that California state claims may apply to a nationwide class where a New Jersey defendant has requisite contacts, like Ferrero.

Mem. at 18. "In deciding whether to dismiss, stay, or transfer an action, a court can look at whether the first-filed action is vulnerable to dismissal on jurisdictional grounds, and if so, the court should stay or transfer the second action rather than dismiss it." *Clean Harbors, Inc. v. ACSTAR Ins. Co.*, 2010 U.S. Dist. LEXIS 46582, at *18 (D.N.J. May 12, 2010).

III. Any "Bad Faith" is on the Part of the Glover Plaintiffs

Alabama plaintiff Marnie Glover copied a quarter of her Complaint from the first-filed *Hohenberg* Complaint, then, after shopping her case to a larger firm, filed in New Jersey seeking to take advantage of Ms. Hohenberg's choice to bring suit where she lived and was injured. Glover then immediately filed an MDL motion to transfer the first-filed case to New Jersey, even while Ferrero's motion seeking identical relief was already pending before Judge Huff. Two days before the hearing on Glover's MDL motion, Jayme Kaczmarek filed her complaint, then shortly thereafter moved by letter application to Magistrate Judge Arpert, together with Glover's counsel, to be appointed interim counsel, including submitting a proposed order giving counsel "sole authority" to negotiate settlement with Ferrero on behalf of the same putative class over which California Plaintiffs' counsel was appointed Interim Class Counsel long ago. As a result, the New Jersey action is now being manned by six firms spread across the country. *Accord Castaneda v. Burger King Corp.*, 2009 U.S. Dist. LEXIS 99084, at *50 (N.D. Cal. Sept. 25, 2009) (in class

action, overall number of timekeepers should be kept to a small, efficient core group of lawyers). Thus, it is not the California Plaintiffs, but the Glover Plaintiffs who have attempted to "wrest control over all claims of Nutella purchasers," Suppl. Opp. at 19. Their other accusations of "bad faith" also fall flat.

A. Mediation

The Glover Plaintiffs point to circumstances surrounding mediation as a supposed example of the California Plaintiffs' "bad faith." *See* Suppl. Opp. at 19-20; Guglielmo Decl. ¶¶ 1-10. But the story they tell is misleading.

On July 13, the California Plaintiffs, Glover, and Ferrero agreed they would mediate together, in San Diego, on August 31, with the hopes that the resolution of Glover's MDL motion being heard on July 28 would inform those discussions. *See* Weston Decl. ¶ 4 & Exs. C.[8] But on July 26, just two days before the JPML was to hear Ms. Glover's argument that the first-filed California cases should be centralized in New Jersey, Kaczmarek filed her Complaint, using the same template as Glover,[9] who then argued at the July 28 hearing that the *Kaczmarek* filing bolstered the case for centralization in New Jersey.[10]

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[8] The Glover Plaintiffs claim that an agreement to mediate was reached on June 20. Guglielmo Decl. ¶ 3. This is not true, as shown in the parties' actual communications. *See* Weston Decl. at ¶ 3 & Ex. B.

[9] *See* Suppl. Mem. at 20.

[10] Following the Panel's denial, before Kaczmarek served her complaint, her and Glover's counsel requested in a letter that Judge Arpert appoint them interim class

Just four days after the MDL hearing, despite their earlier agreement, Glover's counsel cancelled the mediation. According to Glover, although Mr. Guglielmo, Ms. Skonick, and Mr. Davis—who are spearheading the New Jersey litigation for Glover on behalf of three different law firms—were available on the date and in the location agreed, Mr. Burke apparently had obligations in San Francisco the day *before* and the day *after* the mediation, but not on August 31. Glover therefore requested that all the parties and the San Diego-based mediator travel to San Francisco to accommodate Mr. Burke, rather than proceeding with him available by phone or taking one of the many available daily commuter flights between San Francisco and San Diego. *See* Weston Decl. ¶ 5 & Exs. D-E.

By the time Mr. Burke finally agreed on August 10 that he could, in fact, be in San Diego to mediate on August 31, Judge Papas was no longer available. *Id.* ¶ 6 & Ex. F. The Glover Plaintiffs claim that, following these machinations, "the California Plaintiffs[] again inexplicably refused to participate in mediation." Suppl. Opp. at 20 (citing Gulglielmo Decl. ¶ 8). Again, that is not true. The California Plaintiffs informed Ferrero that they were unavailable on September 2, and Ferrero requested that the plaintiffs propose alternative mediators or locations for August 31, which

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counsel. Moreover, the letter did not make Judge Arpert aware of the pending California action in which Interim Class Counsel had already been appointed. *See* Dkt. No. 39.

neither California Plaintiffs nor New Jersey Plaintiffs have yet done. *See* Weston Decl. ¶ 6 & Ex. F.

In sum, because of gamesmanship surrounding the venue, and despite the California Plaintiffs' attempts to be inclusive of Glover in settlement proceedings, mediation has stalled. Significantly, none of this is at the hands of California Plaintiffs, who have been the targets of multiple motions, and have only intervened in this action to prevent the New Jersey action from prejudicing their case, which is a wholly proper purpose for intervening.[11]

B. Discovery

The Glover Plaintiffs assert that they "have made every attempt to coordinate depositions with the California Plaintiffs," who have supposedly "refused to reasonably share or split time in depositions of witness in this matter." Suppl. Opp. at 20. Their hyperbole-filled brief claims California Plaintiffs "engage in blatant misrepresentations of facts," then assert that counsel "attempt[ed] to exclude [New Jersey] counsel" from the deposition of Connie Evers, and that "California Plaintiffs refused to allot an equal amount of time in the deposition," *see* Suppl. Opp. at 21-22 (citing "Guglielmo Decl."). The reality is much different.

Connie Evers is likely the most important witness as she was the one who developed and implemented the "healthy breakfast for children" marketing campaign.

[11] *See* discussion of *Hyland v. Harrison*, 2006 U.S. Dist. LEXIS 5744, at *15-17 (D. Del. Feb. 7, 2006), Suppl. Mem. at 22-23.

Accordingly, the California Plaintiffs subpoenaed her deposition testimony and requested documents from her early on, which was initially scheduled for May 25. California Plaintiffs began to prepare, for example obtaining and reading Ms. Evers' books and studies she cites in them. On May 16, however, Ms. Evers' counsel invited Glover to attend. When they were not prepared to do so on the initial date scheduled, California Plaintiffs agreed to postpone the deposition to permit coordination. *See* Weston Decl. ¶ 7 & Ex. G.

Less than a week before the deposition, on Wednesday, July 20, Glover first contacted California Plaintiffs asking to coordinate on the deposition by having a phone call the following Friday, which they agreed to do. *See id.* ¶ 8 & Ex. H. Counsel preparing to take the deposition, Mr. Fitzgerald, attempted to reach Ms. Skolnick on Friday but was unable. On Saturday, Ms. Scolnick sent another email asking to coordinate on Sunday, just 2 days before the deposition, and again California counsel agreed, this time also asking when Ms. Scolnick would be arriving in Portland and what hotel she was staying at in order that counsel could meet in person the evening before the deposition. But Ms. Scolnick never responded, and California counsel never met her until she arrived just as the deposition was about to begin. *See id.*

After spending considerable time preparing for the deposition, the California counsel also shipped four bankers' boxes of documents to Portland, Oregon[12] for the deposition, during which nearly 100 exhibits were marked, since there were *six* other sets of counsel attending, besides California counsel.[13] Besides that, California Plaintiffs were prepared with Ms. Evers' nutrition books, DVDs of Nutella commercials, a bottle of Nutella for demonstrative purposes, and a slew of non-produced materials located as part of their investigation and preparation for the deposition. By contrast, Ms. Scolnick arrived with few documents, asking the witness's counsel for a stapler to prepare them. In short, New Jersey counsel (apparently because they were travelling and relying on California counsel to take the deposition, which required an enormous amount of preparation), were not as well prepared to take the deposition.

The Glover Plaintiffs also attempt to create an issue out of another deposition first noticed by California Plaintiffs, where California counsel have again been agreed to coordinate while both cases are pending. The Glover Plaintiffs claim that after they

[12] At a cost of $749.67. In addition, the California Plaintiffs' counsel paid $5,765.20 in court reporter and videographer fees for Evers' deposition, while Glover's counsel paid nothing. *See* Weston Decl. ¶ 9 & Ex. I.

[13] The third-party witness was represented by two separate attorneys/firms, Ferrero was represented by in-house and outside counsel, and Glover was represented by Alabama's Mr. Davis and Scott+Scott's Ms. Skolnick.

requested half of the California Plaintiffs' deposition time,[14] "California Plaintiffs objected to dividing the deposition and informed counsel for Plaintiff Glover and . . . Ferrero that [they] required one week on [their] 'substantive right to complete 7 hours of Deposition testimony.'" That same email, however—which Mr. Guglielmo did not attach to his Declaration—says that California Plaintiffs "are not opposed to the NJ Plaintiffs participating in Ms. Lambotte's deposition as they did with Ms. Connie Evers." Weston Decl. ¶ 10 & Ex. J. Later, California counsel clarified that they agreed to the proposed split (3.5 hours each), reserving all rights. *See id.* ¶ 11 & Ex. K at 2. The deposition is now scheduled for October 4. *Id.*

C. *Patrick*

The Glover Plaintiffs argue the California Plaintiffs' Motion to Intervene brought on May 2 is in "bad faith" because they have not yet moved to intervene in *Patrick v. Ferrero U.S.A., Inc.*, No. 11-cv-03361-SI (N.D. Cal.), the fourth-filed action brought in the Northern District of California on July 8, 2011. Like *Kaczmarek*, *Patrick* was filed shortly before the MDL hearing by attorneys who have a practice of filing copycat complaints. Following the Panel's denial of centralization,

[14] The Glover Plaintiffs claim "Ferrero has recently made available a witness *noticed by both Plaintiffs and the California Plaintiffs* for deposition, *see* Suppl. Opp. at 20 (emphasis added). In fact, Ms. Lambotte is a third party, so the California Plaintiffs subpoenaed her deposition on May 2, 2011. The Glover Plaintiffs do not state when they subpoenaed Ms. Evers, nor attach a copy of the subpoena. However, an August 24 email from Ferrero's counsel directed to California counsel makes it clear they spearheaded the deposition, as with Ms. Evers. *See* Weston Decl. Ex. K at 5 ("I'm copying . . . Joe on the assumption that counsel for Ms. Glover would like to attend").

Patrick appears to have not yet even been served, and has only 8 docket entries. Moreover, there is no indication what response Ferrero will have if Patrick does elect to serve her complaint.

D. The Glover Plaintiffs' Accusations of "Bad Faith" Do Not Provide an Exception Justifying Departure from the First-Filed Rule

Moreover, even if the Court *did* credit the Glover Plaintiffs' account, they have provided no authority for the proposition that the behavior they arbitrarily label "bad faith"—supposedly cancelling a mediation and failing to timely respond to an email—constitute the "bad faith" on which a district court may rely to decline application of the first-filed rule under the "exceptional circumstance" test.

For example, in *Crosley*, the case on which *EEOC* relied when announcing bad faith as an exception to the first-filed rule, *see EEOC*, 850 F.2d at 976, the Court of Appeals affirmed a district court's application of the first-filed rule where the court did not "find that the declaratory suit was not brought in good faith . . . ." *Crosley Corp. v. Westingonhouse Electric & Mfg. Co.*, 130 F.2d 474, 476 (3d Cir. 1942). In other words, the "bad faith" inquiry is on the intent in bringing the earlier action, not the litigants' behavior during the course of litigation.

CONCLUSION

For the foregoing reasons, the California Plaintiffs respectfully request the Court grant their Motion.

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Respectfully submitted,

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