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9 **Interim Class Counsel**

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

13 IN RE FERRERO LITIGATION

Case No. 3:11-cv-00205-H-CAB
 Pleading Type: Class Action
 Action Filed: February 01, 2011

16 **DECLARATION OF MELANIE**
 17 **PERSINGER IN SUPPORT OF**
 18 **PLAINTIFFS' REPLY IN SUPPORT OF**
 19 **MOTION FOR CLASS CERTIFICATION**

Judge: Hon. Marilyn L. Huff
 Date: November 7, 2011
 Time: 10:30 a.m.
 Location: Courtroom 13

1 I, Melanie Persinger, declare:

2 1. I am a member in good standing of the State Bar of California and of the United States District
3 Courts for the Northern, Central and Southern Districts of California. I make this Declaration in support of
4 Plaintiff’s Motion for Class Certification.

5 2. Attached hereto as **Exhibit 1** is a true and correct copy of the transcript for the deposition of
6 Connie Evers.

7 3. Ferrero’s assertion that its Nutella messaging greatly varied is contradicted by the record. *See*
8 Ex. 1, Evers Dep. Tr. 117:2-4 (“Nutella is a tool for getting your kids to eat breakfast on a busy morning, that
9 specific message is consistent.”); 117:20-23 (“Q. Is the messaging you were hired to promote also conveyed
10 on Nutella’s label? A. Yes.”); 118:8-16 (“Q. So was the messaging conveyed on posters as well? A. Yes. . . .
11 Q. Was the messaging conveyed in print magazines? A. Yes.”); 247:15-24 (“Q. Is ‘balanced breakfast’ a
12 synonym for ‘healthy breakfast’? A. Yes. Q. So ‘balanced’ is—in this context, it’s a euphemism for ‘healthy’;
13 right? A. Yes.”).

14 4. Evers’ testimony demonstrates that Plaintiffs’ claims can be proved or disproved by common
15 evidence. *See* Ex. 1, Evers Dep. Tr. at 65:4-23 (describing Evers’ desire for “breakfast research studies” that
16 she could share with key opinion leaders); 163:7-12 (“
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19 195:2-198:21, 211:21-212:19 (discussing academic studies that purportedly support Nutella messaging);
20 248:23-249:6 (“
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23
24 of moms want to provide something their child will eat without supervision,’ do you have an understanding of
25 where that number is derived from? A. My understanding is from this Just Kid Inc. March 2009 survey. That’s
26 my understanding.”); 282:2-12 (stating that “I’ve referenced, market surveys, American Dietetic
27 Association—many studies, including Rampersaud” to support Nutella messaging claim); 284:13-19 (the
28

1 percentage of children who skip breakfast “varies among studies”); 353:4-355:19 (discussing scientific
2 understanding of effects of sugar and saturated fat on health).

3 5. Though at this stage, they are required only to show that there is an issue of fact as to reliance,
4 Plaintiffs’ testimony readily establishes their reliance. *See* Hohenberg Dep. Tr., Dkt. No. 76-4 at 27:12-14,
5 28:4-11, 29:1-12, 58:4-59:1, 61:15-62:16, 94:20-95:4, 119:7-12, 136:22-137:17, 184:17-185:11, 188:3-189:1;
6 Rude-Barbato Dep. Tr., Dkt. No. 76-5 at 27:12-28:15, 28:25-29:11, 30:18-24, 50:25-51:11, 90:12-91:12,
7 108:16-24, 117:15-21, 125:20-22, 126:20-192:1, 129:4-131:17, 137:22-139:1, 152:14-154:5, 162:19-163:10,
8 191:12-22.

9 6. Ms. Hohenberg testified that Ferrero’s “hazelnut” representations would only be appropriate if
10 Nutella was made “mostly” of hazelnuts, which it is not. Hohenberg Dep. Tr. 12:2-15 (“I wouldn’t be
11 educated enough to know if that is a quantity amount to say that the product’s mostly made of hazelnut. . . . If
12 it’s made mostly of hazelnut, if that 50 hazelnuts is that amount, then I would be okay with that.”); *see also id.*
13 at 11:20-24 (propriety of identifying number of hazelnuts depends on proportion in product); 127:7 (Ms.
14 Hohenberg learned Nutella “wasn’t a hazelnut spread”); *see generally id.* at 139:9-22 (representation is
15 material because “I feel hazelnuts are healthy.”). But Plaintiffs’ Complaint alleges Nutella is made of only
16 13% hazelnut, and Ms. Hohenberg’s impression that it meant Nutella was “mostly” hazelnut is exactly why
17 the claim is deceptive. *See* FACC ¶ 81. Similarly, Ms. Rude-Barbato testified “it would be okay to put
18 [hazelnut] in the ingredients. But to advertise it as a hazelnut spread, I don’t believe is accurate.” Rude-
19 Barbato Dep. Tr. at 42:1-3. In sum, any responses Plaintiffs provided that Ferrero characterizes as “not
20 objecting” to the claims are based on incomplete knowledge and clarified by other testimony.

21 7. Attached hereto as **Exhibit 2** is a true and correct copy of excerpts from the deposition
22 transcript of Ferrero’s CEO, Bernard Kreilmann. According to Mr. Kreilmann, before using Aspen Logistics
23 to distribute Nutella to the west coast, Ferrero used OHL. *See* Ex. 2, Kreilmann Dep. Tr. at 16:21-17:8.

24 8. Mr. Kreilmann also testified that Los Angeles’ Believe Media filmed Nutella commercials, *see*
25 *id.* at 33:16-23.

26 9. Mr. Kreilmann also testified about Nutella’s formulation, *see id.* at 81:5-83:13.

27 10. Attached hereto as **Exhibit 3** is Defendant Ferrero’s Response to Interrogatory No. 4.
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1 11. Attached hereto as **Exhibit 4** is a true and correct copy of a document produced by Aspen
2 Logistics entitled "ITEM 89371." Exhibit 4 shows that Aspen delivers Nutella to the following 11 states:
3 Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, and
4 Washington.

5 12. Attached hereto as **Exhibit 5** is a multi-state conflicts of law analysis.

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

8
9 Executed on October 21, 2011 in San Diego, California.

10
11 /s/Melanie Persinger
Melanie Persinger

12
13 Dated: October 21, 2011

Respectfully submitted,

14 /s/ Jack Fitzgerald

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