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UNITED STATES DISTRICT COURT  
 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

In re FERRERO LITIGATION	)	CASE NO.: 11 CV 0205 H (CAB)
	)	
	)	DEFENDANT FERRERO U.S.A.,
	)	INC.'S MEMORANDUM IN
	)	SUPPORT OF MOTION TO STRIKE
	)	PARAGRAPHS 3 THROUGH 6 OF
	)	THE DECLARATION OF MELANIE
	)	PERSINGER AND EXHIBIT 5
	)	THERE TO
	)	
	)	Date: November 7, 2011
	)	Time: 10:30 a.m.
	)	Location: Courtroom 13
	)	
	)	Judge: Honorable Marilyn L. Huff
	)	
	)	

1 **I. INTRODUCTION**

2 Defendant Ferrero U.S.A., Inc. (“Ferrero”) respectfully requests that the Court strike  
3 Paragraphs 3 through 6 of the Declaration of Melanie Persinger (“the Persinger Declaration”)  
4 (Dkt. 83) and Exhibit 5 to that declaration (Dkt. 83-6), both filed with plaintiffs’ reply in support  
5 of their motion for class certification. First, the Persinger Declaration and 51-page “exhibit”  
6 violate the Local Rule limiting reply briefs to 10-pages and embody plaintiffs’ sole and belated  
7 attempt to satisfy their burden under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).  
8 Second, the Persinger Declaration should be stricken since it improperly contains legal argument.

9 **II. THE DECLARATION AND EXHIBIT ATTEMPT TO CIRCUMVENT THE**  
10 **PAGE LIMITATION ESTABLISHED IN THE RULES**

11 Local Rule 7.1(h) states that “[n]o reply memorandum will exceed ten (10) pages without  
12 leave of the judge.” CivLR 7.1(h). After Ferrero filed its 25-page opposition to plaintiffs’  
13 motion for class certification (Docket Number (“Dkt. No.”) 76), plaintiffs requested that Ferrero  
14 stipulate to allow plaintiffs to file a 30-page reply memorandum, in lieu of the 10 pages allowed  
15 under Local Rule 7.1(h). Declaration of Amir Steinhart (“Steinhart Decl.”), Exhibit (“Ex.”) 1.  
16 As is apparent from plaintiffs’ reply papers, a primary reason for plaintiffs’ request for additional  
17 pages was to respond to Ferrero’s argument that, considering the nature of Ferrero’s contacts  
18 with California, the Supreme Court’s *Shutts* decision prohibits the certification of a nationwide  
19 class of consumers under California law. Specifically, as highlighted in Ferrero’s opposition  
20 brief (“Opp.”), plaintiffs bear the burden of showing, among other things, that no material  
21 conflict exists between the consumer protection laws of California and other states. Opp. at 5.

22 While Ferrero was amenable to a reasonable expansion of plaintiffs’ page limits, it would  
23 not agree to the 30-page reply memorandum sought by plaintiffs. Steinhart Decl., Exs. 1-2.  
24 Plaintiffs therefore “decided to cut to 10 pages[.]” Steinhart Decl., Ex. 2. In doing so, they  
25 adopted a self-help strategy designed to circumvent the Local Rules. In addition to their 10-page  
26 reply brief, plaintiffs filed the 3-page Persinger Declaration that includes legal argument. *See*,  
27 *e.g.*, Persinger Decl. ¶3 (“Ferrero’s assertion that its Nutella messaging greatly varied is  
28 contradicted by the record. [citing deposition testimony]”); *id.* ¶ 4 (“Evers’ testimony

1 demonstrates that Plaintiffs’ claims can be proved or disproved by common evidence. [citing  
2 deposition transcripts].”); *id.* ¶ 6 (“In sum, any responses Plaintiffs provided that Ferrero  
3 characterizes as ‘not objecting’ to the claims are based on incomplete knowledge and clarified by  
4 other testimony.”). Plaintiffs’ reply brief liberally relies on the Persinger Declaration to make  
5 plaintiffs’ arguments. *See, e.g.*, Reply at 2 (“Finally, questions of science, such as the effect of  
6 Nutella on human health, are demonstrated on a generalized basis. Ferrero agrees its messaging  
7 may be evaluated by reference to such common evidence. Persinger Decl. ¶ 4”).

8         Worse still, instead of using their reply brief to try to respond to their failure to satisfy  
9 their *Shutts* burden, plaintiffs’ reply brief includes just a sentence-long reference to material  
10 conflicts in the law. Reply at 10. It then cites to Exhibit 5 to the Persinger Declaration, which is  
11 a 51-page, purported state-by-state comparison of California’s consumer protection laws with  
12 those of the other 49 states and District of Columbia. This exhibit, with its citations to case law  
13 and state statutes, as well as over 200 footnotes, is an obvious attempt by plaintiffs to evade the  
14 page limits imposed by Local Rule 7.1(h). It is also an improper effort by plaintiffs to try to  
15 meet their affirmative burden by raising issues on reply.

16         In total, between their reply brief, the Persinger Declaration, and Exhibit 5, plaintiffs filed  
17 64-pages worth of argument. Good cause exists for the Court to strike Paragraphs 3 through 6 of  
18 the Persinger Declaration and Exhibit 5 in its entirety.

19         **III. THE DECLARATION SHOULD BE STRICKEN ON THE GROUND THAT IT**  
20         **IMPROPERLY CONTAINS LEGAL ARGUMENTS**

21         A declaration should be limited to facts and should not include legal argument.  
22 *Okada v. Green Tree*, C-10-00487, 2010 WL 700660, at \*1 n.1 (N.D. Cal. Feb. 25, 2010) (“A  
23 declaration is a statement of facts which are personally known to the person making the  
24 declaration. The facts in a declaration must be admissible in evidence, i.e., evidentiary facts and  
25 not conclusions or argument.”). Paragraphs 3 through 6 of the Persinger Declaration comprise  
26 legal argument, not statements of fact that Ms. Persinger could possibly “declare under penalty  
27 of perjury” are “true and correct.” *See* Dkt. No. 83. For this additional reason, Ferrero requests  
28 that the Court strike Paragraphs 3 through 6 of the Persinger Declaration.

1 **IV. CONCLUSION**

2 Ferrero respectfully requests that the Court strike Paragraphs 3 through 6 of the Persinger  
3 Declaration and Exhibit 5 thereto.

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Respectfully submitted,

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7 Dated: October 27, 2011

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Professional Corporation

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By:           /s/ Keith E. Eggleton            
Keith E. Eggleton

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