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

IN RE FERRERO LITIGATION

CASE NO. 3:11-CV-00205-H-CAB

Pleading Type: Class Action

Action Filed: February 01, 2011

**PLAINTIFFS' OPPOSITION TO
FERRERO'S MOTION TO STRIKE THE
DECLARATION OF MELANIE
PERSINGER**

Judge: Hon. Marilyn L. Huff

Date: November 7, 2011

Time: 10:30 a.m.

Location: Courtroom 13

INTRODUCTION

Ferrero’s “Motion to Strike Paragraphs 3 through 6 of the Declaration of Melanie Persinger and Exhibit 5 Thereto” should be denied for several reasons. First, case law provides that Plaintiffs may represent a multi-state class if they demonstrate that the laws of the states included within the proposed class do not materially conflict with their state-law claims, but such an analysis is impossible in a ten-page brief that must also address Ferrero’s remaining arguments opposing class certification. Second, the use of such exhibits to perform the required conflicts analysis is routine. Third, the introductory sentences in paragraphs 3 through 6 of the Persinger Declaration are not argument, but instead merely repeat the argument made in the brief for transition and ease of reference.

ARGUMENT

I. An Adequate Multi-State Conflicts-of-Law Analysis is Permissible Yet Cannot be Accomplished in Ten Pages

Multi-state class actions may be certified where counsel “affirmatively demonstrate[s]” that “variations regarding [state] claims . . . could be managed in a practical manner.” *Grayson v. 7-Eleven, Inc.*, 2011 U.S. Dist. LEXIS 62211, at *14-15 (S.D. Cal. June 10, 2011). Thus, Plaintiffs’ counsel must be “prepared to demonstrate the commonality of substantive law applicable to all class members.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. Cal. 1998) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-23 (1985)).

Such a complex conflicts-of-law analysis sufficient to support Plaintiffs’ request that the Court certify a multi-state class if it does not certify a nationwide class,¹ simply cannot be accomplished within the confines of a ten-page brief. This is especially so because Plaintiffs also had to address the remaining arguments against class certification raised in Ferrero’s opposition. If confined to ten pages in their conflicts-of-law analyses (or even 25 pages if advanced as part of an opening brief), no plaintiff would be able to meet her burden of demonstrating the

¹ Plaintiffs advanced this argument solely as an alternative to certification of a nationwide class in the event the Court agrees with Ferrero’s argument, raised in its Opposition, that there are insufficient contacts to satisfy due process. Plaintiffs maintain that certification of a nationwide class is proper and, if the Court agrees, their multi-state analysis will, in any event, be moot.

1 commonality of substantive law among many states, and no multi-state class action would ever
2 be certified (for example, Plaintiffs’ detailed analysis here comprises 51 pages). This outcome is
3 at odds with “the United States Supreme Court [which] has instructed that ‘multi-state . . . class
4 actions can be, and are, maintained in many instances.’” *Khorrami v. Lexmark Int’l*, 2007 U.S.
5 Dist. LEXIS 98807, at *12 (C.D. Cal. Sept. 13, 2007).

6 **II. Court’s Routinely Consider Detailed Conflicts-of-Law Analyses in Exhibits**

7 Because a detailed conflicts-of-law analysis cannot be made within the confines of a
8 short brief, Courts routinely consider such analyses contained in exhibits or appendices. *See, e.g.,*
9 *Mazza v. Am. Honda Motor Co.*, 254 F.R.D. 610, 620 (C.D. Cal. 2008) (“Defendant’s Appendix
10 lists the relevant law from all 44 of the jurisdictions in which proposed class members reside”);
11 *In re HP Inkjet Printer Litig.*, 2008 U.S. Dist. LEXIS 56979, at *21 (N.D. Cal. July 25, 2008)
12 (noting that defendant “submitted a detailed analysis of the variations in state consumer
13 protection and deceptive trade practices laws” in the form of exhibits attached to its class
14 certification opposition).²

15 **III. Plaintiffs Do Not Rely on Paragraphs 3 Through 6 of the Persinger Declaration as**
16 **Argument**

17 To the extent paragraphs 3 through 6 of the Persinger Declaration could be construed as
18 legal argument, Plaintiffs do not rely on these statements. Instead, the introductory sentences in
19 these paragraphs merely repeat the assertions made in Plaintiffs’ Reply for the reader’s ease of
20 reference and transition. *See, e.g.,* Reply at 1:20-21, 1:23 (“Using the same class-wide evidence
21 Plaintiffs submitted, Ferrero asserts it did not convey to consumers uniform messaging. . . .

22 ² *See also In re St. Jude Med., Inc. Silzone Heart Valves Prods. Liab. Litig.*, MDL No. 01-1396
23 (JRT/FLN), 2006 U.S. Dist. LEXIS 74797, at * 13 (D. Minn. Oct. 13, 2006) (“Plaintiffs have
24 provided the Court with a detailed analysis of consumer protection statutes across the United
25 States.”); *id.* at Dkt. No. 409-1 through 409-54 (showing separate exhibits for each state and the
26 District of Columbia, with each exhibit ranging from 3 to 18 pages in length); *Lyon v.*
27 *Caterpillar, Inc.*, 194 F.R.D. 206, 220-21 (E.D. Pa. May 22, 2000) (discussing exhibits that both
28 plaintiff and defendant attached relating to argument that multi-state class should be certified);
Anderson v. Atl. Recording Corp., 2010 U.S. Dist. LEXIS 44168, at *24 (D. Or. May 4, 2010)
(on motion for class certification, considering plaintiff exhibits titled “Fifty State Analysis for a
Claim of Abuse of Process,” “Fifty State Analysis of a Negligence Cause of Action,” and “Fifty
State Analysis of Civil Conspiracy Cause of Action”).

Ferrero's argument is contradicted by the record."); Persinger Decl. ¶ 3("Ferrero's assertion that its Nutella messaging greatly varied is contradicted by the record.").

Moreover, Paragraph 6 of the Persinger Declaration contains statements of fact, not legal argument. This paragraph summarizes Plaintiffs' testimony and comments on the ingredients of Nutella, all of which are facts that Ms. Persinger declares are true and correct. Accordingly, the Court should decline to strike this paragraph on those separate grounds.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court deny Defendant's Motion to Strike portions of the Persinger Declaration.

Dated: November 3, 2011

Respectfully submitted,

/s/ Gregory S. Weston

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