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

IN RE FERRERO LITIGATION

CASE NO. 11-CV-00205-H (CAB)

**ORDER GRANTING JOINT
MOTION FOR PRELIMINARY
APPROVAL OF SETTLEMENT**

On January 20, 2012, the parties filed a joint motion for (1) preliminary approval of their class action settlement, (2) confirmation of certification of the class, (3) approval of the class notice plan, and (4) setting a final approval hearing. (Doc. No. 106.) The Court, pursuant to its discretion under Local Rule 7.1(d)(1), determines that these matters are appropriate for resolution without oral argument and submits the motions on the parties' papers. The Court, for good cause shown, GRANTS the parties' joint motion.

Background

On February 1, 2011, Plaintiff Athena Hohenberg filed an action against Defendant Ferrero USA, Inc., bringing claims under California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and Consumer Legal Remedies Act ("CLRA"), and asserting claims for breach of express and implied warranties. (Doc. No. 1.) On February 4, 2011, Plaintiff Rude-Barbato filed an action against Defendant bringing claims under UCL, FAL,

1 CLRA, and the New Jersey Consumer Fraud Act, and asserting claims for breach of express
2 and implied warranties.

3 On March 22, 2011, the Court entered an order consolidating the Hohenberg and Rude-
4 Barbato actions and appointed The Weston Firm and The Law Offices of Ronald A. Marron,
5 APLC, as interim counsel. (Doc No. 11.) On March 23, 2011, Plaintiffs filed a Master
6 Consolidated Complaint. (Doc. No. 14.) On March 24, 2011, Defendant filed a motion to
7 transfer the action to the District of New Jersey (Doc. No. 19.), which the Court denied on May
8 11, 2011 (Doc. No. 37.). On April 11, 2011, Defendant joint in a motion filed with the Judicial
9 Panel on Multidistrict Litigation (“JPML”) requesting centralization of this action and Glover
10 v. Ferrero USA, Inc., No. 3:11-CV-01086-FLW-DEA (D.N.J.), under 28 U.S.C. § 1407.
11 (MDL No. 2248, Doc. No. 1.) On July 28, 2011, the JPML denied the centralization motion.
12 (MDL No. 2248, Doc. No. 28.)

13 On July 7, 2011, following the Court’s ruling on Defendant’s 12(b) motion to dismiss,
14 Plaintiffs filed their First Amended Consolidated Complaint (“FAC”). (Doc. No. 45.) The
15 FAC alleges that Defendant’s representation that Nutella is a healthy, balanced, and nutritious
16 proudct are misleading and deceptive. The FAC alleges that Defendant made such
17 representations to Plaintiffs and other consumers on television, the Nutella website, and the
18 label of the product. (Doc. No. 45.) The parties began fact discovery in March 2011, and have
19 served and responded to numerous discovery requests, including for the production of
20 documents, interrogatories, deposition notices, and third-party subpoenas.

21 On August 1, 2011, Plaintiffs moved for Class Certification (Doc. No. 51.), which
22 Defendant opposed (Doc. No. 76.). Following oral argument on November 7, 2011, the Court
23 granted Plaintiffs’ motion, certifying a class of “all persons who, on or after August 1, 2009,
24 bought one or more Nutella products in the state of California for their own or household use
25 rather than resale or distribution.” (Doc. No. 59.) It is on behalf of the same class that a
26 settlement agreement has been reached.

27 The parties began initial settlement discussions as early as March 2011 and attended an
28 Early Neutral Evaluation Conference on October 19, 2011, before the assigned magistrate

1 judge. After, the parties continued settlement discussions. On November 28, 2011, the parties
2 attended a second conference before the assigned magistrate judge, during which the parties
3 agreed on the terms reflected in the settlement agreement. Plaintiffs and class counsel believe
4 the settlement provides substantial injunctive and monetary benefits, is fair and reasonable, and
5 is in the best interest of the class.

6 7 Discussion

8 **I. Rule 23 and Class Action Settlement**

9 The decision to approve or reject a settlement is committed to the sound discretion of
10 the trial court. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998). Deciding
11 whether to approve a proposed class action settlement is generally a two-step process. At the
12 preliminary approval stage, the court “should make a preliminary determination that the
13 proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of
14 Rule 23(b).” Fed. Judicial Ctr., Manual for Complex Litigation, § 21.633 (4th ed.2004). The
15 court then approves the form and manner of notice and sets a final fairness hearing, where it
16 will make a final determination on the fairness of the class settlement. See id.

17 A court may approve a settlement that would bind class members only after a final
18 fairness hearing and finding that the settlement is fair, reasonable and adequate. Fed. R. Civ.
19 Proc. 23(e)(2); see Class Plaintiffs v. Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992). When
20 approving a settlement, a court must ensure that notice is made in a “reasonable manner to all
21 class members who would be bound by the proposal.” Fed. R. Civ. Proc. 23(e)(1). To make
22 the ultimate determination of whether a settlement is fair, reasonable and adequate requires
23 evaluating several factors, including:

24 strength of plaintiff’s case; the risk, expense[,] complexity, and likely duration
25 of further litigation; the risk of maintaining class action status throughout the
26 trial; the amount offered in settlement; the extent of discovery completed, and
27 the stage of the proceedings; the experience and views of counsel; the presence
28 of a governmental participant; and the reaction of the class members to the
proposed settlement.

1 Torrise v. Tucson Elec. Power Co., 8 F.3d 1370, 1375 (9th Cir. 1993). Settlements that follow
2 sufficient discovery and genuine arms-length negotiation are presumed fair. Nat'l Rural
3 Telcoms. Coop. v. Directv, Inc., 221 F.R.D. 523, 528 (C.D. Cal. 2004).

4 After reviewing the Complaint, the joint motion and the Settlement Agreement, **IT IS**
5 **HEREBY ORDERED THAT:**

6 1. The terms of the Class Action Settlement Agreement dated January 18, 2012, including
7 all exhibits thereto (the "Settlement Agreement," attached to the Declaration of Gregory
8 S. Weston dated January 19, 2012 ("Weston Decl.") as Exhibit 1) is preliminarily
9 approved, subject to further consideration thereof prior to or at the Fairness Hearing
10 provided for below.

11 2. The Court concludes that the Settlement Notices attached as Exhibits C and D to the
12 Settlement Agreement and the Claim Form attached as Exhibit A to the Settlement
13 Agreement have satisfied the requirements of Rule 23(c)(2) and Due Process and
14 accordingly approves those Settlement Notices. The Court further approves the Notice
15 Program described in the Settlement Agreement.

16 3. The Court further directs that Rust Consulting, Inc. be appointed as the Claims
17 Administrator, and consistent with the Notice Program set forth in the Settlement
18 Agreement, directs the Claims Administrator to provide notice to the Settlement Class
19 in the following manner:

20 (a) Published in the following magazines: People Magazine, Woman's Day,
21 Parents, and Ser Padre. Subject to availability, the settlement notices shall be
22 published in the foregoing publications no later than **90 days** after the date
23 hereof, or **90 days** after preliminary approval of settlement is granted in In Re
24 Nutella Marketing and Sales Practice Litigation, Civil Action No. 11-1086
25 (D.N.J.), whichever is later.

26 (b) Published on the following third-party websites: 24/7 Real Media Network–
27 Parenting Channel (5 million impressions) and Facebook (10 million
28 impressions). Subject to availability, the settlement notices shall be published

1 on the foregoing websites no later than **90 days** after the date hereof, or **90 days**
2 after preliminary approval of settlement is granted in In Re Nutella Marketing
3 and Sales Practice Litigation, Civil Action No. 11-1086 (D.N.J.), whichever is
4 later.

5 (c) No later than **30 days** after the date hereof, or **30 days** after preliminary
6 approval of settlement is granted in In Re Nutella Marketing and Sales Practice
7 Litigation, Civil Action No. 11-1086 (D.N.J.), whichever is later, the Claims
8 Administrator shall establish the Settlement Website which shall contain the
9 Settlement Agreement, Class Notice and information relating to filing a claim,
10 opting out of the Settlement, objecting to the Settlement, deadlines relating to
11 the Settlement, pleadings and other information relevant to the Settlement. The
12 Settlement Website shall also contain an electronic Claim Form to allow online
13 submission of claims as well as a Claim Form which can be downloaded,
14 printed, and mailed to the Claims Administrator.

15 4. The Court finds that the settlement fund escrow established pursuant to the Settlement
16 Agreement (“Settlement Fund”) is a “qualified settlement fund” as defined by Section
17 1.468B-1(a) of the Treasury Regulations in that it satisfies each of the following
18 requirements:

- 19 (a) The Settlement Fund is established pursuant to an order of this Court and is
20 subject to the continuing jurisdiction of this Court;
- 21 (b) The Settlement Fund is established to resolve or satisfy one or more claims that
22 have resulted or may result from an event that has occurred and that has given
23 rise to at least one claim asserting liabilities; and
- 24 (c) The assets of the Settlement Fund are segregated from other assets of the
25 Defendants, the transferor, or payments to the Settlement Fund.

26 5. Under the relation-back rule provided under section 1.468B-1(j)(2)(i) of the Treasury
27 Regulations, the Court finds that:

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- 1 (a) The Settlement Fund meets the requirements of paragraphs 9(b) and (c) of this
2 Order approving the establishment of the Settlement Fund subject to the
3 continued jurisdiction of this Court; and
- 4 (b) Defendants and Claims Administrator may jointly elect to treat the Settlement
5 Fund as coming into existence as a “qualified settlement fund” on the later of the
6 date the Settlement Fund met the requirements of paragraphs 9(b) and (c) of this
7 Order or January 1, of the calendar year in which all requirements of paragraph
8 15 of this Order are met. If such a relation-back election is made, the assets held
9 by the Settlement Fund on such date shall be treated as having been transferred
10 to the Settlement Fund on that date.
- 11 6. The Court directs that pursuant to Fed. R. Civ. P. 23(e)(2) a hearing will be held on
12 **Monday, July 9 at 10:30 a.m.** in Courtroom 13, to consider final approval of the
13 Settlement (the “Fairness Hearing”) including, but not limited to, the following issues:
14 (a) the fairness, reasonableness, and adequacy of the Settlement; and (b) Class
15 Counsel’s application for an award of attorneys’ fees and costs. The Fairness Hearing
16 may be rescheduled by the Court without further notice to the Class other than which
17 may be posted at the Court and on the Court’s and Claims Administrator’s websites.
- 18 7. Persons wishing to object to the proposed settlement and/or be heard at the Fairness
19 Hearing shall follow the following procedures:
- 20 (a) Any objection must be in writing, filed with the Court, with a copy delivered to
21 Class Counsel and Defense Counsel at the addresses set forth in the Class
22 Notice, no later than **30 days** before the Fairness Hearing. Class Members may
23 object either on their own or through an attorney hired at their own expense.
- 24 (b) If a Class Member hires an attorney to represent him or her at the Fairness
25 Hearing, he or she must do so at his or her own expense. No Class Member
26 represented by an attorney shall be deemed to have objected to the Agreement
27 unless an objection signed by the Class Member also is filed with the Court and
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1 served upon Class Counsel and Defense Counsel at the addresses set forth in the
2 Class Notice **30 days** before the Fairness Hearing.

3 (c) Any objection regarding or related to the Agreement shall contain a caption or
4 title that identifies it as “Objection to Class Settlement in In re Ferrero
5 Litigation, Case No. 11-CV-205 H (CAB)” and also shall contain information
6 sufficient to identify and contact the objecting Class Member (or his or her
7 attorney, if any), as well as a clear and concise statement of the Class Member's
8 objection(s), documents sufficient to establish the basis for their standing as a
9 Class member, i.e., verification under oath as to the approximate date(s) and
10 location(s) of their purchase(s) of Nutella or receipt(s) reflecting such
11 purchase(s), the facts supporting the objection(s), and the legal grounds on
12 which each objection is based. If an objecting party chooses to appear at the
13 hearing a notice of intention to appear, either in person or through an attorney,
14 must be filed with the Court no later than **30 days** before the Fairness Hearing,
15 and list the name, address, and telephone number of the attorney, if any, who
16 will appear.

17 (d) Any Class Member who does not timely file and serve an objection containing
18 the information set forth above and any witness to testify on behalf of such Class
19 Member not identified to the parties shall not be permitted to appear at the
20 Fairness Hearing, except for good cause shown.

21 8. Any Class Member who does not wish to participate in this Settlement must write to the
22 Claims Administrator stating an intention to be “excluded” from this Settlement. This
23 written Request for Exclusion must be sent via first class United States mail to the
24 Claims Administrator at the address set forth in the Class Notice and postmarked no
25 later than 30 days before the date set for the Fairness Hearing. The Request for
26 Exclusion must be personally signed by the Class Member. So-called “mass” or “class”
27 opt-outs shall not be allowed.
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- 1 9. Any Class Member who does not request exclusion from the Settlement has the right
2 to object to the Settlement. Any Class Member who wishes to object must timely
3 submit an objection as set forth in Paragraph 7 above. If a Class Member submits an
4 objection and a written Request for Exclusion, the Class Member shall be deemed to
5 have complied with the terms of the opt-out procedure and shall not be bound by the
6 Settlement Agreement if approved by the Court. However, any objector who has not
7 timely requested exclusion from the Settlement will be bound by the terms of the
8 Settlement Agreement upon Final Approval of the Settlement.
- 9 10. Class Counsel shall submit papers in support of final approval of the Settlement no later
10 than **45 days** before the Fairness Hearing.
- 11 11. Class Counsel's final application for any Fee Award, and any documents submitted in
12 support thereof, shall be filed no later than **45 days** before the Fairness Hearing.
- 13 12. Class Counsel and Defendant shall file responses to objections, if any, to the Settlement
14 no later than **seven days** before the Fairness Hearing.
- 15 13. In the event that the Settlement Agreement is terminated in accordance with the
16 applicable provisions thereof, the Settlement Agreement, the proposed Settlement, and
17 all related proceedings shall, except as expressly provided to the contrary in the
18 Settlement Agreement, become null and void, shall have no further force and effect, and
19 Class Members shall retain all of their current rights to assert any and all claims again
20 Defendant and any other released party, and the Defendant and any other released
21 parties shall retain any and all of their current defenses and arguments thereto
22 (including but not limited to arguments that the requirements of Fed. R. Civ. P. 23(a)
23 and (b)(3) are not satisfied for purposes of continued litigation). These actions shall
24 thereupon revert forthwith to their respective procedural and substantive status prior to
25 the date of execution of the Settlement Agreement and shall proceed as if the Settlement
26 Agreement and all other related orders and papers had not been executed.
- 27 14. Neither this Order nor the Settlement Agreement nor any other settlement-related
28 document nor anything contained herein or therein or contemplated hereby or thereby

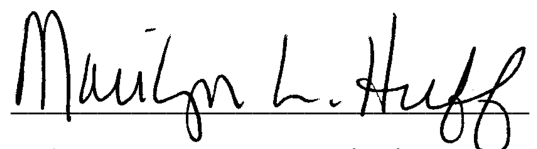
1 nor any proceedings undertaken in accordance with the terms set forth in the Settlement
2 Agreement or herein or in any other settlement-related document, shall constitute, be
3 construed as or be deemed to be evidence, of or an admission or concession by
4 Defendants as to, the validity of any claim that has been or could have been asserted
5 against any or all of them or as to any liability by any or all of them as to any matter set
6 forth in this Order.

7 15. After consideration of issues relating to comity and the complexity of this action, the
8 Court finds that allowing simultaneous proceedings and Related Actions in other fora
9 relating to the claims in this action to be decided by another court would inhibit this
10 Court's flexibility and authority to decide this case while substantially increasing the
11 cost of litigation, creating risk of conflicting results, and wasting Court resources. The
12 Court, therefore, finds that an order protecting its jurisdiction is necessary in aid of this
13 Court's jurisdiction.

14 16. Accordingly, in order to protect its jurisdiction to consider the fairness of this
15 Settlement Agreement and to enter a Final Order and Judgment having binding effect
16 on all Class Members, the Court hereby enjoins all Class Members, and anyone who
17 acts or purports to act on their behalf, from pursuing all other proceedings in any state
18 or federal court that seeks to address any parties' or Class Members' rights or claims
19 relating to, or arising out of, any of the Released Claims. This injunction expressly
20 applies to the Class Members and to all potential Class Members pursuing any Related
21 Actions.

22 **IT IS SO ORDERED.**

23 DATED: January 23, 2012



MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT