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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CASE NO.: 11cv0205-H (CAB)

In re FERRERO LITIGATION

PROTECTIVE ORDER

[Doc. No. 29]

The Court recognizes that at least some of the documents and information (“materials”) being sought through discovery in the above-captioned action are, for competitive reasons, normally kept confidential by the parties. The parties have agreed to be bound by the terms of this Protective Order (“Order”) in this action.

The materials to be exchanged throughout the course of the litigation between the parties may contain trade secret or other confidential research, technical, business plans, cost, price, marketing or other commercial information, as is contemplated by Federal Rule of Civil Procedure 26(c)(7). The purpose of this Order is to protect the confidentiality of such materials during the litigation. **THEREFORE:**

DEFINITIONS

1
2 1. The term “Confidential Information” will mean and include information contained or
3 disclosed in any materials, including documents, portions of documents, answers to
4 interrogatories, responses to requests for admissions, trial testimony, deposition testimony, and
5 transcripts of trial testimony and depositions, including data, summaries, and compilations derived
6 therefrom that is deemed to be Confidential Information by any party to which it belongs.

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8 2. The term “materials” will include, but is not be limited to: documents; correspondence;
9 memoranda; emails; bulletins; blueprints; specifications; customer lists or other material that
10 identify customers or potential customers; price lists or schedules or other matter identifying
11 pricing; minutes; telegrams; letters; statements; cancelled checks; contracts; invoices; drafts;
12 books of account; worksheets; notes of conversations; desk diaries; appointment books; expense
13 accounts; recordings; photographs; motion pictures; compilations from which information can be
14 obtained and translated into reasonably usable form through detection devices; sketches; drawings;
15 notes (including laboratory notebooks and records); reports; studies, research (including without
16 limitation, notes, reports, raw data, questionnaires and protocols); presentations; business plans;
17 business records; instructions; disclosures; other writings; models and prototypes and other
18 physical objects.

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20 3. The term “counsel” will mean outside counsel of record, and the attorneys, paralegals,
21 secretaries, and other support staff employed by those law firms as well as in-house attorneys and
22 paralegals for Ferrero U.S.A., Inc.

GENERAL RULES

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25 4. Each party to this litigation that produces or discloses any materials, answers to
26 interrogatories, responses to requests for admission, trial testimony, deposition testimony, and
27 transcripts of trial testimony and depositions, or information that the producing party believes

1 should be subject to this Protective Order may designate the same as “CONFIDENTIAL” or
2 “CONFIDENTIAL - FOR COUNSEL ONLY.”

3 a. Designation as “CONFIDENTIAL”: Any party may designate information as
4 “CONFIDENTIAL” only if, in the good faith belief of such party and its counsel, the
5 unrestricted disclosure of such information could be potentially prejudicial to the business or
6 operations of such party.

7 b. Designation as “CONFIDENTIAL - FOR COUNSEL ONLY”: Any party may
8 designate information as “CONFIDENTIAL - FOR COUNSEL ONLY” only if, in the good
9 faith belief of such party and its counsel, the information is among that considered to be most
10 sensitive by the party, including but not limited to trade secret or other confidential research,
11 development, financial or other commercial information.

12
13 5. In the event the producing party elects to produce materials for inspection, no marking
14 need be made by the producing party in advance of the initial inspection. For purposes of the
15 initial inspection, all materials produced will be considered as “CONFIDENTIAL - FOR
16 COUNSEL ONLY,” and must be treated as such pursuant to the terms of this Order. Thereafter,
17 upon selection of specified materials for copying by the inspecting party, the producing party
18 must, within a reasonable time prior to producing those materials to the inspecting party, mark the
19 copies of those materials that contain Confidential Information with the appropriate confidentiality
20 marking.
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22 6. Whenever a deposition taken on behalf of any party involves a disclosure of Confidential
23 Information of any party:

24 a. the deposition or portions of the deposition must be designated as containing Confidential
25 Information subject to the provisions of this Order; such designation must be made on the
26 record whenever possible, but a party may designate portions of depositions as containing
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1 Confidential Information after transcription of the proceedings; [A] party will have until
2 fourteen (14) days after receipt of the deposition transcript to inform the other party or
3 parties to the action of the portions of the transcript to be designated “CONFIDENTIAL”
4 or “CONFIDENTIAL – FOR COUNSEL ONLY.”

5 b. the disclosing party will have the right to exclude from attendance at the deposition, during
6 such time as the Confidential Information is to be disclosed, any person other than the
7 deponent, counsel (including their staff and associates), the court reporter, and the
8 person(s) agreed upon pursuant to paragraph 8 below; and

9
10 c. the originals of the deposition transcripts and all copies of the deposition must bear the
11 legend “CONFIDENTIAL” or “CONFIDENTIAL - FOR COUNSEL ONLY,” as
12 appropriate, and the original or any copy ultimately presented to a court for filing must not
13 be filed unless it can be accomplished under seal, identified as being subject to this Order,
14 and protected from being opened except by order of this Court.

15
16 7. All Confidential Information designated as “CONFIDENTIAL” or “CONFIDENTIAL -
17 FOR COUNSEL ONLY” must not be disclosed by the receiving party to anyone other than those
18 persons designated within this order and must be handled in the manner set forth below and, in
19 any event, must not be used for any purpose other than in connection with this litigation, unless
20 and until such designation is removed either by agreement of the parties, or by order of the Court.

21 8. Information designated “CONFIDENTIAL - FOR COUNSEL ONLY” must be viewed
22 only by counsel (as defined in paragraph 3) of the receiving party, and by independent experts
23 under the conditions set forth in this Paragraph. The right of any independent expert to receive
24 any Confidential Information will be subject to the advance approval of such expert by the
25 producing party or by permission of the Court. The party seeking approval of an independent
26 expert must provide the producing party with the name and curriculum vitae of the proposed
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1 independent expert, and an executed copy of the form attached hereto as Exhibit A, in advance of
2 providing any Confidential Information of the producing party to the expert. Any objection by
3 the producing party to an independent expert receiving Confidential Information must be made
4 in writing within fourteen (14) days following receipt of the identification of the proposed
5 expert. Confidential Information may be disclosed to an independent expert if the fourteen (14)
6 day period has passed and no objection has been made. The approval of independent experts
7 must not be unreasonably withheld.

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9 9. Information designated “CONFIDENTIAL” must be viewed only by counsel (as defined
10 in paragraph 3) of the receiving party, by independent experts (pursuant to the terms of
11 paragraph 8), and by the additional individuals listed below, provided each such individual has
12 read this Order in advance of disclosure and has agreed in writing to be bound by its terms:

13 a. Executives who are required to participate in policy decisions with reference to this
14 action;

15 b. Personnel of the parties with whom Counsel for the parties find it necessary to
16 consult, in the discretion of such counsel, in preparation for trial of this action; and

17 c. Stenographic and clerical employees associated with the individuals identified above.
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19 10. With respect to material designated “CONFIDENTIAL” or “CONFIDENTIAL – FOR
20 COUNSEL ONLY,” any person indicated on the face of the document to be its originator, author
21 or a recipient of a copy of the document, may be shown the same.

22 11. All information which has been designated as “CONFIDENTIAL” or “CONFIDENTIAL
23 -FOR COUNSEL ONLY” by the producing or disclosing party, and any and all reproductions of
24 that information, must be retained in the custody of the counsel for the receiving party identified in
25 paragraph 3, except that independent experts authorized to view such information under the terms
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1 of this Order may retain custody of copies such as are necessary for their participation in this
2 litigation.

3 12. Before any materials produced in discovery, answers to interrogatories, responses to
4 requests for admissions, deposition transcripts, or other documents which are designated as
5 Confidential Information are filed with the Court for any purpose, the party seeking to file such
6 material must seek permission of the Court to file the material under seal.

7 13. At any stage of these proceedings, any party may object to a designation of the materials
8 as Confidential Information. The party objecting to confidentiality must notify, in writing,
9 counsel for the designating party of the objected-to materials and the grounds for the objection. If
10 the dispute is not resolved consensually between the parties within seven (7) days of receipt of
11 such a notice of objections, the objecting party may move the Court for a ruling on the objection.
12 The materials at issue must be treated as Confidential Information, as designated by the
13 designating party, until the Court has ruled on the objection or the matter has been otherwise
14 resolved.
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16 14. All Confidential Information must be held in confidence by those inspecting or receiving
17 it, and must be used only for purposes of this action. Counsel for each party, and each person
18 receiving Confidential Information must take reasonable precautions to prevent the unauthorized
19 or inadvertent disclosure of such information. If Confidential Information is disclosed to any
20 person other than a person authorized by this Order, the party responsible for the unauthorized
21 disclosure must immediately bring all pertinent facts relating to the unauthorized disclosure to the
22 attention of the other parties and, without prejudice to any rights and remedies of the other parties,
23 make every effort to prevent further disclosure by the party and by the person(s) receiving the
24 unauthorized disclosure.
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1 15. No party will be responsible to another party for disclosure of Confidential Information
2 under this Order if the information in question is not labeled or otherwise identified as such in
3 accordance with this Order.

4 16. If a party, through inadvertence, produces any Confidential Information without labeling
5 or marking or otherwise designating it as such in accordance with this Order, the designating
6 party may give written notice to the receiving party that the document or thing produced is
7 deemed Confidential Information, and that the document or thing produced should be treated as
8 such in accordance with that designation under this Order. The receiving party must treat the
9 materials as confidential, once the designating party so notifies the receiving party. If the
10 receiving party has disclosed the materials before receiving the designation, the receiving party
11 must notify the designating party in writing of each such disclosure. Counsel for the parties will
12 agree on a mutually acceptable manner of labeling or marking the inadvertently produced
13 materials as "CONFIDENTIAL" or "CONFIDENTIAL - FOR COUNSEL ONLY"- SUBJECT
14 TO PROTECTIVE ORDER.
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17 17. Nothing within this order will prejudice the right of any party to object to the production
18 of any discovery material on the grounds that the material is protected as privileged or as
19 attorney work product.

20 18. Nothing in this Order will bar counsel from rendering advice to their clients with respect
21 to this litigation and, in the course thereof, relying upon any information designated as
22 Confidential Information, provided that the contents of the information must not be disclosed.
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24 19. This Order will be without prejudice to the right of any party to oppose production of any
25 information for lack of relevance or any other ground other than the mere presence of Confidential
26 Information. The existence of this Order must not be used by either party as a basis for discovery
27 that is otherwise improper under the Federal Rules of Civil Procedure.

1 20. Nothing within this order will be construed to prevent disclosure of Confidential
2 Information if such disclosure is required by law or by order of the Court.

3 21. Upon final termination of this action, including any and all appeals, counsel for each party
4 must, upon request of the producing party, return all Confidential Information to the San Diego
5 office for the attorney for the party that produced the information, including any copies, excerpts,
6 and summaries of that information. Notwithstanding the foregoing, counsel for each party may
7 retain all pleadings, briefs, memoranda, motions, and other documents filed with the Court that
8 refer to or incorporate Confidential Information, and will continue to be bound by this Order with
9 respect to all such retained information. Further, attorney work product materials that contain
10 Confidential Information need not be destroyed, but if they are not destroyed, the person in
11 possession of the attorney work product will continue to be bound by this Order with respect to all
12 such retained information.
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14 22. The restrictions and obligations set forth within this Order will not apply to any
15 information that: (a) the parties agree should not be designated Confidential Information; (b) the
16 parties agree, or the Court rules, is already publicly available; (c) the parties agree, or the Court
17 rules, has become publicly available other than as a result of disclosure by the receiving party, its
18 employees, or its agents in violation of this Order; or (d) has come or will come into the receiving
19 party's legitimate knowledge independently of the production by the designating party.
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21 23. The restrictions and obligations within this Order will not be deemed to prohibit
22 discussions of any Confidential Information with anyone if that person already has or obtains
23 legitimate possession of that information.
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25 24. Transmission by facsimile is acceptable for all notification purposes within this Order.

26 25. This Order may be modified by agreement of the parties, subject to approval by the Court.
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26. The Court may modify the terms and conditions of this Order for good cause, or in the interest of justice, or on its own order at any time in these proceedings. The parties prefer that the Court provide them with notice of the Court's intent to modify the Order and the content of those modifications, prior to entry of such an order.

IT IS SO ORDERED.

Date: April 18, 2011



CATHY ANN BENCIVENGO
United States Magistrate Judge