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 9 **Interim Class Counsel**

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

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 14 **IN RE FERRERO LITIGATION**

CASE NO. 3:11-CV-00205-H-CAB
 Pleading Type: Class Action
 Action Filed: February 01, 2011

**PLAINTIFFS' APPLICATION TO FILE
 UNDER SEAL THE UNREDACTED
 MEMORANDUM IN SUPPORT OF
 PLAINTIFFS' MOTION FOR CLASS
 CERTIFICATION, EXHIBITS 1-4, 10, 13-
 17, 20, 22, 24-26, AND 28-34 TO THE
 DECLARATION OF GREGORY S.
 WESTON, AND CONFIDENTIAL
 PORTIONS OF THIS APPLICATION**

Judge: Hon. Marilyn L. Huff
 Date: October 11, 2011
 Time: 10:30 a.m.
 Location: Courtroom 13

1 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

2 PLEASE TAKE NOTICE that Plaintiffs hereby apply for an order allowing them to file
3 under seal the unredacted versions of the Memorandum in Support of Plaintiffs' Motion for
4 Class Certification and Appointment of Class Counsel, Exhibits 1-4, 10, 13-17, 20, 22, 24-26,
5 and 28-34 to the Declaration of Gregory S. Weston, and confidential portions of this Application
6 in accordance with Local Rule 79.2

7 **BACKGROUND**

8 On April 19, 2011, the Court entered a Protective Order (Dkt. 32). The Protective Order
9 permits the parties to designate information as "Confidential . . . if, in the good faith belief of
10 such party and its counsel, the unrestricted disclosure of such information could be potentially
11 prejudicial to the business or operations of such party." Under the Protective Order, the parties
12 have agreed to apply to file such confidential information under seal. *See* Protective Order at ¶
13 12. Because Plaintiffs Memorandum in Support of Plaintiffs' Motion for Class Certification and
14 Appointment of Class Counsel and Exhibits 1-5, 9-11, and 13-34 to the Declaration of Gregory
15 S. Weston contained copies and discussions of documents designated by Defendant and third-
16 party Connie Evers (who was acting under the Protective Order) as confidential, Plaintiffs
17 applied to file these documents under seal on August 1, 2011. (Dkt. No. 52.)

18 On August 3, 2011, the Court denied Plaintiffs' application, holding that "Plaintiffs' one-
19 page motion to seal does not identify each exhibit and explain why any particular statements o
20 portions of the exhibits [] may warrant sealing." *In re Ferrero Litig.*, 2011 U.S. Dist. LEXIS
21 58238, at *5 (S.D. Cal. Aug. 3, 2011). The Court further explained that, "[t]o the extent Plaintiffs
22 argue that the protective order itself assures that Rule 26(c) good cause standard is met in this
23 case, the argument is rejected." *Id.* Finally, the Court instructed that "[s]hould either party in the
24 future request the sealing of any documents, they must designate specific portions based on the
25 appropriate showing." *Id.*

1 In response to the Court’s Order, the parties met and conferred with counsel for both
2 Ferrero and Ms. Evers to discuss withdrawing any unnecessary confidentiality designations,
3 limiting redactions where possible, and articulating good cause for why each document, or
4 excerpt thereof, should be filed under seal. As a result of these discussions, Defendant and Ms.
5 Evers agreed to: (1) withdraw its confidentiality designation on Exhibits 5, 9, 11, 18-19, 21, 23,
6 and 27; (2) designate specific portions of Exhibit 2 (Connie Evers’ Deposition Transcript) as
7 confidential, rather than the entire transcript; (3) limit the redactions of Exhibits 10, 20, 25, 28-
8 29, and 31 to specific excerpts, rather than the entire contents, of each; and (4) reduce the
9 portions of the Memorandum which would need to be redacted. Defendant and Ms. Evers also
10 articulated reasoning for each designation, which Plaintiffs incorporated into this revised
11 Application to File Under Seal the Memorandum in Support of Plaintiffs’ Motion for Class
12 Certification and Appointment of Class Counsel, Exhibits 1-4, 10, 13-17, 20, 22, 24-26, and 28-
13 34 to the Declaration of Gregory S. Weston, and confidential portions of this Application.

14 ARGUMENT

15 I. LEGAL STANDARD

16 “[T]he Supreme Court recognize[s] a federal common law right ‘to inspect and copy
17 public records and documents.’ This right extends to pretrial documents filed in civil cases . . .
18 .”*Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1134 (9th Cir. 2003) (quoting *Nixon v.*
19 *Warner Communications*, 435 U.S. 589, 597 (1978)). As such, there is “a strong presumption in
20 favor of access to court records,” *id.* at 1135 (citation omitted), unless the documents are “among
21 those which have ‘traditionally been kept secret for important policy reasons,’” *id.* at 1134
22 (quoting *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989)).

23 “A party seeking to seal a judicial record then bears the burden of overcoming this strong
24 presumption by meeting the compelling reasons standard. That is, the party must articulate
25 compelling reasons supported by specific factual findings, . . . that outweigh the general history
26 of access and the public policies favoring disclosure, such as the public interest in understanding

1 the judicial process.” *Kamakana v. City & Cnty of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir.
2 2006) (citations and quotation marks omitted).

3 The common law right of access, however, is not absolute and can be overridden
4 given sufficiently compelling reasons for doing so. In making the determination,
5 courts should consider all relevant factors, including: the public interest in
6 understanding the judicial process and whether disclosure of the material could
7 result in improper use of the material for scandalous or libelous purposes or
8 infringement upon trade secrets. . . . After taking all relevant factors into
9 consideration, the district court must base its decision on a compelling reason and
10 articulate the factual basis for its ruling, without relying on hypothesis or
11 conjecture.

12 *Foltz*, 331 F.3d at 1135 (citations omitted); *see also Kamakana*, 447 F.3d at 1179 (“In general,
13 ‘compelling reasons’ sufficient to outweigh the public’s interest in disclosure and justify sealing
14 court records exist when such ‘court files might have become a vehicle for improper purposes,’
15 such as the use of records to gratify private spite, promote public scandal, circulate libelous
16 statements, or release trade secrets.”).

17 Moreover, there is an exception to the presumption of access to court records for
18 documents attached to a non-dispositive motion and filed under seal pursuant to a valid
19 protective order. *Foltz*, 331 F.3d at 1135 (““when a party attaches a sealed discovery document to
20 a nondispositive motion, the usual presumption of the public's right of access is rebutted.’ . . .
21 [T]he presumption of access [is] rebutted because ‘when a court grants a protective order for
22 information produced during discovery, it already has determined that “good cause” exists to
23 protect this information from being disclosed to the public by balancing the needs for discovery
24 against the need for confidentiality.”’ (quoting *Phillips v. GMC*, 307 F.3d 1206, 1213 (9th Cir.
25 2002))).

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1 555, n.4 (C.D. Cal. 2007) (“Fed. R. Civ. P. 26(c)(7) does not limit its reach to ‘trade secrets,’ but
2 also allows for protection of ‘confidential commercial information.’ Customer/supplier lists and
3 sales and revenue information qualify as ‘confidential commercial information.’”), the public
4 disclosure of which would limit Ferrero’s ability to compete in the marketplace.

5 **C. FERRERO’S MARKETING STRATEGY**

6 The following exhibits, excerpts thereof, and portions of the Memorandum discuss
7 Ferrero’s confidential marketing strategies:

- 8 • Exhibits 15-17, 22, 24, and 26
- 9 • Exhibit 10, [REDACTED]
- 10 • Exhibit 20, [REDACTED]
- 11 [REDACTED]
- 12 [REDACTED]
- 13 • Exhibit 25, the text of the email on CEVERS271
- 14 • Exhibit 28, [REDACTED]
- 15 [REDACTED]
- 16 • Exhibit 29, [REDACTED]
- 17 [REDACTED]
- 18 [REDACTED]
- 19 • Exhibit 31, [REDACTED]
- 20 [REDACTED]
- 21 [REDACTED]
- 22 [REDACTED]
- 23 • Exhibit 2, Connie Evers’ Deposition Transcript, page 98, line 10 – to page 99, line
24 17
- 25 • Exhibit 2, Connie Evers’ Deposition Transcript, page 11, lines 16-35

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- Exhibit 2, Connie Evers’ Deposition Transcript, page 154, line 1 – page 167, line 25
- Exhibit 2, Connie Evers’ Deposition Transcript, page 174, line 9 – page 175, line 16
- Exhibit 2, Connie Evers’ Deposition Transcript, page 236, line 11 – page 243, line 23
- Exhibit 2, Connie Evers’ Deposition Transcript, page 248, lines 17-25
- Exhibit 2, Connie Evers’ Deposition Transcript, page 271, line 15 – page 272, line 2
- Exhibit 2, Connie Evers’ Deposition Transcript, page 272 lines 14-20
- Exhibit 2, Connie Evers’ Deposition Transcript, page 273, line 7 – page 274, line 16
- Exhibit 2, Connie Evers’ Deposition Transcript, page 275, lines 7-25
- Exhibit 2, Connie Evers’ Deposition Transcript, page 277, line 15 – page 278, line 5
- Exhibit 2, Connie Evers’ Deposition Transcript, page 281, lines 3-19
- Exhibit 2, Connie Evers’ Deposition Transcript, page 292, lines 11-25
- Exhibit 2, Connie Evers’ Deposition Transcript, page 293, line 2 – page 294, line 1
- Exhibit 2, Connie Evers’ Deposition Transcript, page 305, lines 1-11
- Exhibit 2, Connie Evers’ Deposition Transcript, page 319, line 23 – page 320, line 8
- Exhibit 2, Connie Evers’ Deposition Transcript, page 325, line 10 – page 326, line 25
- Exhibit 2, Connie Evers’ Deposition Transcript, page 337, lines 21-22
- Exhibit 2, Connie Evers’ Deposition Transcript, page 366, lines 7-19

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- Memorandum, page 4, lines 23-26
- Memorandum, page 5, line 28 – page 6, line 18
- Memorandum, page 6, lines 25-27
- Memorandum, page 7, lines 10-11
- Memorandum, page 8, line 20 – page 9, line 8
- Memorandum, page 9, footnote 6
- Memorandum, page 10, lines 4-7
- Memorandum, page 11, lines 5-7
- Memorandum, page 13, lines 17-20
- Memorandum, page 13, line 23
- Memorandum, page 22, lines 14-15

Ferrero’s marketing strategy should be filed under seal because public disclosure of this information would harm Defendant’s ability to compete in the marketplace. Disclosure would allow Ferrero’s competitors to learn the details of and imitate its effective marketing strategies, which cost Ferrero millions of dollars to develop and implement. Thus, Ferrero’s competitors would be saved the costs of researching and developing a marketing strategy of their own, thereby putting Ferrero at a substantial financial and competitive disadvantage.

For example, allowing the public to access to Exhibit 16 would save competitors the time and costs associated with finding opinion leaders to endorse their advertising campaigns since they could simply contact those already identified by Defendant. Giving competitors access to opinion leaders which Defendant may have contacted regarding their Nutella advertising campaign also gives Defendant’s competitors the implied information of who may have turned down Defendant’s offer, and thus might be willing to engage in a campaign directly aimed at disparaging Defendant or its advertising campaign.

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D. CONNIE EVERS' CONTRACT WITH FERRERO

The following exhibits and portions of the Memorandum contain the Spokesperson Agreement between Connie Evers and Defendant, as well as discussions about the contents and surrounding negotiations of said agreement:

- Exhibits 13, 14, 15, 30, and 32
- Exhibit 2, Connie Evers' Deposition Transcript: page 98, line 1 – page 99, line 17
- Exhibit 2, Connie Evers' Deposition Transcript, page 100, lines 16-25
- Exhibit 2, Connie Evers' Deposition Transcript, page 154, lines 1-15
- Exhibit 2, Connie Evers' Deposition Transcript, page 292, lines 2-25
- Exhibit 2, Connie Evers' Deposition Transcript, page 293, line 2 – page 294, line 1
- Exhibit 2, Connie Evers' Deposition Transcript, page 305, lines 1-11
- Memorandum page 4, lines 24-26
- Memorandum page 5, line 27- page 6, line 6
- Memorandum Page 10, lines 4-7

Connie Evers' Spokesperson Agreement and surrounding negotiations, including discussions thereof, should be filed under seal because this information is confidential commercial information, the disclosure of which would prejudicially affect Ms. Evers' freedom to contract with other companies. If the terms of Ms. Evers' agreement with Ferrero, or the surrounding negotiations, become public, her ability to contract for more beneficial or different terms will be severely limited and her business is likely to suffer as a result.

CONCLUSION

For the reasons discussed above, the Court should grant Plaintiffs' Application to File Under Seal the Memorandum in Support of Plaintiffs' Motion for Class Certification and Appointment of Class Counsel, Exhibits 1-4, 10, 13-17, 20, 22, 24-26, and 28-34 to the Declaration of Gregory S. Weston, and confidential portions of this Application. Plaintiffs will

1 also electronically file public versions of their Application and Memorandum with confidential
2 information and exhibits redacted.

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1 Dated: August 15, 2011

Respectfully Submitted,

2 /s/Gregory S. Weston
3 Gregory S. Weston

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