

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that, pursuant to Rule 79.2 of the Local Rules for the Southern
3 District of California, Ferrero U.S.A., Inc. (“Ferrero”) hereby moves for an order allowing it to
4 file under seal the unredacted version of Ferrero U.S.A., Inc.’s Opposition to Plaintiffs’ Motion
5 for Class Certification (“the Opposition”) as well as the declaration of Bernard F. Kreilmann in
6 Support of Ferrero U.S.A., Inc.’s Opposition to Plaintiffs’ Motion for Class Certification.

7 **BACKGROUND**

8 As the Court is aware, this putative class action involves allegations by two named
9 plaintiffs pertaining to the marketing and sales of Ferrero’s popular hazelnut spread, Nutella. As
10 a privately held company (Compl. ¶ 13) that operates in an extremely competitive industry,
11 Ferrero regards its financial results, sales information and marketing strategies as confidential
12 and proprietary – the disclosure of which “could be potentially prejudicial to its business or
13 operations.” *See* Dkt No. 32 (“Protective Order”) at 2; Kreilmann Decl. ¶ 19. Indeed, Ferrero
14 considers certain information that has been produced in this litigation to be highly confidential as
15 set forth in the Protective Order and therefore subject to additional protections. *Id.* at 2
16 (“Confidential – For Counsel Only”).

17 On August 1, 2011, plaintiffs moved for certification of a nationwide class and submitted,
18 among other things, confidential information of Ferrero, including (1) information pertaining to
19 the formulation of Nutella; (2) commercially sensitive financial information and data; and (3)
20 documents reflecting Ferrero’s confidential marketing strategies.

21 On August 15, 2011, plaintiffs filed a motion seeking to file certain exhibits under seal,
22 along with a redacted version of plaintiffs’ memorandum, to protect Ferrero’s confidential
23 information. Dkt. 57. On August 17, 2011, the Court granted plaintiffs’ motion. Dkt. 65. In
24 doing so, the Court held that “good cause exists” to seal the documents containing Ferrero’s
25 sensitive information. *Id.* at 2.

26 Ferrero opposes plaintiffs’ motion for class certification and, in connection with its
27 opposition papers, is filing declarations from its Chief Executive Officer and President, Bernard
28 Kreilmann and the Category Manager for Nutella, Karl Krohn, which provide the Court with

1 facts regarding Ferrero’s operations, marketing and sales information. This information is
2 necessary for the Court’s analysis as to whether plaintiffs have satisfied their burden in moving
3 for a nationwide class. One of the declarations (Mr. Kreilmann’s) contains confidential and
4 proprietary information of Ferrero, which, if disclosed, “could be potentially prejudicial to
5 [Ferrero’s] business or operations.” Dkt No. 32 at 2; Kreilmann Decl. ¶ 19. As a result, Ferrero
6 seeks to file this declaration, along with its unredacted memorandum, under seal. Ferrero is
7 filing public versions of those documents that will contain a minimum number of redactions to
8 protect only that information that Ferrero regards as confidential or highly confidential.

9 ARGUMENT

10 I. LEGAL STANDARD

11 Although courts have held that there is “a strong presumption in favor of access to court
12 records[.]” (*Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003)), courts
13 recognize that public access is often outweighed by the need to protect a party’s confidential and
14 proprietary information so long as the restriction is narrowly tailored. *Oregonian Publ’g Co. v.*
15 *United States Dist. Court*, 920 F.2d 1462, 1465 (9th Cir.1990) (quoting *Press-Enterprise Co. v.*
16 *Superior Court*, 446 U.S. 501, 510 (1985)); *Kamakana v. City & Cnty of Honolulu*, 447 F.3d
17 1172, 1179 (9th Cir. 2006) (“In general, ‘compelling reasons’ sufficient to outweigh the public’s
18 interest in disclosure and justify sealing court records exist when such ‘court files might become a
19 vehicle for improper purposes,’ such as the use of records to . . . release trade secrets.”).

20 II. THERE IS GOOD CAUSE TO SEAL DOCUMENTS REFLECTING 21 FERRERO’S CONFIDENTIAL AND PROPRIETARY FINANCIAL 22 INFORMATION

23 Consistent with the Court’s August 17 Order, this motion seeks to protect Ferrero’s
24 commercially sensitive financial information. Dkt. No. 65 (“The Court concludes that good cause
25 exists to seal the requested documents[.]” which contain Ferrero’s commercially sensitive
26 financial information). In seeking this protection, Ferrero is mindful of the public’s right to access
27 and – as a result – has exercised restraint in redacting the documents that are to be filed publicly.
28 Only one footnote in the brief and only the confidential financial information present in the
Kreilmann declaration have been redacted.

1 In addition to this court's August 17 order, other courts have long-recognized that
2 protecting a company's confidential commercial information can outweigh the public's right to
3 access. See *Nutrastech, Inc. v. Syntech Int'l, Inc.*, 242 F.R.D. 552, 555, n. 4 (C.D. Cal. 2007)
4 ("Fed. R. Civ. P. 26(c)[(1)(G)] does not limit its reach to 'trade secrets,' but also allows for
5 protection of 'confidential commercial information.' Customer/supplier lists and sales and
6 revenue information qualify as 'confidential commercial information.'"). Indeed, such concerns
7 are even more pressing where a company, like Ferrero, is not publicly traded and its financial
8 results are not generally made public. Therefore, Ferrero seeks to restrict access to the following
9 portions of Ferrero's filings that reflect its propriety financial information:

- 10 • Declaration of Bernard F. Kreilmann in Support of Ferrero U.S.A., Inc.'s Opposition
11 to Plaintiffs' Motion for Class Certification, paragraphs 19 through 29.
- 12 • Opposition, page 7, footnote 5.

13 CONCLUSION

14 For the reasons discussed above, the Court should grant Ferrero's Motion to File Under
15 Seal the unredacted versions of Ferrero U.S.A., Inc.'s Opposition to Plaintiffs' Motion for Class
16 Certification and the declaration of Bernard F. Kreilmann in Support of Ferrero U.S.A., Inc.'s
17 Opposition to Plaintiffs' Motion for Class Certification. Ferrero will also electronically file
18 public versions of its Motion and Memorandum with confidential information and exhibits
19 redacted.

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21 Dated: October 10, 2011

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25 Attorneys for Defendant Ferrero U.S.A., Inc.
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