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Interim Class Counsel

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' APPLICATION TO FILE UNDER SEAL THE UNREDACTED VERSION OF PLAINTIFFS' REPLY IN SUPPORT OF CLASS CERTIFICATION, THE UNREDACTED VERISON OF THE DECLARATION OF MELANIE PERSINGER IN SUPPORT OF CLASS CERTIFICATION, AND UNREDACTED PORTIONS OF EXHIBITS 1-2 ATTACHED THERETO

Judge: Hon. Marilyn L. Huff
Date: November 7, 2011
Time: 10:30 a.m.
Location: Courtroom 13

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiffs hereby apply for an order allowing them to file under seal the unredacted versions of Plaintiffs' Reply in Support of Class Certification, the Declaration of Melanie Persinger and **Exhibits 1-2** attached thereto in accordance with Local Rule 79.2.

BACKGROUND

On April 19, 2011, the Court entered a Protective Order (Dkt. 32). The Protective Order permits the parties to designate information as "Confidential . . . if, in the good faith belief of such party and its counsel, the unrestricted disclosure of such information could be potentially prejudicial to the business or operations of such party." Under the Protective Order, the parties have agreed to apply to file such confidential information under seal. *See* Protective Order at ¶ 12. Because Plaintiffs' Reply in Support of Plaintiffs' Motion for Class, the Declaration of Melanie Persinger and Exhibits 1-2 attached thereto contain copies and discussions of documents designated by Defendant and third-party Connie Evers (who was acting under the Protective Order) as confidential, Plaintiffs hereby apply to file these documents under seal. Additionally, Plaintiffs offer the following explanation as to "why any particular statement or portions of the exhibits [ ] may warrant sealing." *In re Ferrero Litig.*, 2011 U.S. Dist. LEXIS 85238, at *5 (S.D. Cal. Aug. 3, 2011).

ARGUMENT

I. LEGAL STANDARD

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

"A party seeking to seal a judicial record then bears the burden of overcoming this strong presumption by meeting the compelling reasons standard. That is, the party must articulate compelling reasons supported by specific factual findings, . . . that outweigh the general history of access and the public policies favoring

disclosure, such as the public interest in understanding the judicial process." *Kamakana v. City & Cnty of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006) (citations and quotation marks omitted).

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

Foltz, 331 F.3d at1135 (citations omitted); *see also Kamakana*, 447 F.3d at 1179 ("In general, 'compelling reasons' sufficient to outweigh the public's interest in disclosure and justify sealing court records exist when such 'court files might have become a vehicle for improper purposes,' such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets.").

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

II. BECAUSE PLAINTIFFS HAVE SHOWN GOOD CAUSE FOR SEALING THESE DOCUMENTS, THE COURT SHOULD GRANT THEIR APPLICATION TO FILE UNDER SEAL

A. The Formulation Of Nutella

The following portion of Exhibit 2 to the Declaration of Melanie Persinger discusses the formulation of Nutella:

- Persinger Decl., Ex. 2, Kreilmann Dep. Tr. 81:5-83:13: Discussing the formulation of Nutella.

The contents of Nutella are a trade secret, disclosure of which would allow Ferrero's competitors to

offer the same product under their label, thus causing substantial harm to Ferrero's business. Good cause thus exists for sealing any information relating to the formulation of Nutella. *See, e.g., Kamakana*, 447 F.3d at 1179 ("[C]ompelling reasons' sufficient to outweigh the public's interest in disclosure and justify sealing court records exist when such 'court files might have become a vehicle for improper purposes,' such as the . . . release [of] trade secrets.").

B. Ferrero's Marketing Strategy

The following exhibit and portions of Plaintiffs' Reply and the Declaration of Melanie Persinger discuss Ferrero's confidential marketing strategies:

- Persinger Decl. ¶ 4: showing and discussing content from Evers Dep. Tr., 163:7-12, and 248:23-249:6.
- Persinger Decl., Ex. 1, Evers Dep. Tr. 162:1-165:25, 163:7-12, and 248:23-149:6.
- Reply page 8, line 5 and lines 7-8: discussing information derived from the Kreilmann declaration (¶ 20), which Ferrero requested, and the Court subsequently ordered, be filed under seal. *See* Dkt. Nos. 73, 78.

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.

CONCLUSION

For the reasons discussed above, the Court should grant Plaintiffs' Application to File Under Seal the Reply in Support of Plaintiffs' Motion for Class Certification, the Declaration of Melanie Persinger and Exhibits 1-2 attached thereto. Plaintiffs will also electronically file public versions of their Reply and the Declaration of Melanie Persinger with confidential information and exhibits redacted.

Dated: October 21, 2011

Respectfully submitted,

/s/ Jack Fitzgerald

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