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

PATRICK MCMORROW, *et al.*,

Plaintiffs,

v.

MONDELÉZ INTERNATIONAL,
INC.,

Defendant.

Case No. 17-cv-2327-BAS-JLB

ORDER:
**(1) GRANTING PLAINTIFFS’
MOTION TO SEAL**
**(2) GRANTING DEFENDANT’S
MOTION TO SEAL**
**(3) GRANTING IN PART
PLAINTIFFS’ MOTION TO
SEAL**

[ECF No. 71, 84, 103]

Presently before the Court are three motions by the parties to file documents under seal. (ECF Nos. 71, 84, 103.) The Court analyzes each motion in turn.

I. LEGAL STANDARD

“[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978). “Unless a particular court record is one ‘traditionally kept secret,’ a ‘strong presumption in favor of access’ is the starting point.” *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir.

1 2006) (citing *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir.
2 2003)). “The presumption of access is ‘based on the need for federal courts, although
3 independent—indeed, particularly because they are independent—to have a measure
4 of accountability and for the public to have confidence in the administration of
5 justice.’” *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir.
6 2016) (quoting *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995)).

7 A party seeking to seal a judicial record bears the burden of overcoming the
8 strong presumption of access. *Foltz*, 331 F.3d at 1135. The showing required to
9 meet this burden depends upon whether the documents to be sealed relate to a motion
10 that is “more than tangentially related to the merits of the case.” *Ctr. for Auto Safety*,
11 809 F.3d at 1102. When the underlying motion is more than tangentially related to
12 the merits, the “compelling reasons” standard applies. *Id.* at 1096–98. When the
13 underlying motion does not surpass the tangential relevance threshold, the “good
14 cause” standard applies. *Id.*

15 “In general, ‘compelling reasons’ sufficient to outweigh the public’s interest
16 in disclosure and justify sealing court records exists when such ‘court files might
17 have become a vehicle for improper purposes,’ such as the use of records to gratify
18 private spite, promote public scandal, circulate libelous statements, or release trade
19 secrets.” *Kamakana*, 447 F.3d at 1179 (quoting *Nixon*, 435 U.S. at 598). However,
20 “[t]he mere fact that the production of records may lead to a litigant’s embarrassment,
21 incrimination, or exposure to further litigation will not, without more, compel the
22 court to seal its records.” *Id.* (citing *Foltz*, 331 F.3d at 1136). The decision to seal
23 documents is “one best left to the sound discretion of the trial court” upon
24 consideration of “the relevant facts and circumstances of the particular case.” *Nixon*,
25 435 U.S. at 599.

26 **II. ANALYSIS**

27 The parties seek to seal portions of motions, briefs, declarations and/or
28 exhibits in connection with Plaintiffs’ motion for class certification and the parties’

1 *Daubert* motions. Because these motions are “more than tangentially related to the
2 merits of [the] case,” there must be “compelling reasons” for sealing documents
3 attached thereto. *Lucas v. Breg, Inc.*, 15-CV-00258-BAS-NLS, 2016 WL 5464549,
4 at *1 (S.D. Cal. Sept. 28, 2016).

5 **A. Plaintiffs’ Motion to Seal: ECF No. 71**

6 Plaintiffs seeks to file under seal portions of their motion for class certification
7 and supporting declaration and exhibits. (ECF No. 71.)

8 The redacted information was designated as confidential by Defendant. (ECF
9 No. 71 at 4.) To support the sealing request, Defendant submitted a declaration by
10 Alexander Smith. Mr. Smith attests that several of Plaintiffs’ exhibits consist of
11 marketing, advertising and consumer research that Defendant has conducted in
12 connection with its products. (“Smith Decl.,” ECF No. 72-1, ¶¶ 2, 4, 6.) This
13 research provides Defendant with a competitive advantage in the marketplace. (*Id.*
14 ¶¶ 3, 6.) Further, Defendant claims that two excerpts of depositions should be
15 redacted because the transcripts refer to the information in the exhibits. (*Id.* ¶ 7.)

16 Compelling reasons may exist if sealing is required to prevent documents from
17 being used “as sources of business information that might harm a litigant’s
18 competitive standing.” *Nixon*, 435 U.S. at 598. “[A] trial court has broad discretion
19 to permit sealing of court documents for, inter alia, the protection of ‘a trade secret
20 or other confidential research, development, or commercial information.’” *GPNE*
21 *Corp. v. Apple Inc.*, 2015 WL 4381244, at *1 (N.D. Cal. July 16, 2015) (quoting Fed.
22 R. Civ. P. 269(c)(1)(G)); *see also Bauer Bros. LLC v. Nike, Inc.*, No. 09cv500–
23 WQH–BGS, 2012 WL 1899838, *2 (S.D. Cal. May 24, 2012) (finding compelling
24 reasons to seal because “public disclosure of Nike’s confidential business materials,
25 including marketing strategies, sales and retailer data, product development plans,
26 unused prototypes, and detailed testimony regarding the same, could result in
27 improper use by business competitors seeking to replicate Nike’s business practices
28 and circumvent the considerable time and resources necessary in product and

1 marketing development”).

2 The Court finds compelling reasons to seal the marketing, advertising and
3 consumer research identified in paragraphs 2, 3, 4, and 6 of the Smith Declaration.
4 Further, any portions of the depositions of Marion Saenen Delgutte and Sandra
5 Morreale that refer to these exhibits may be sealed. (*See* Smith Decl. ¶ 7.)¹

6 Plaintiffs also provide that the Declaration of Colin B. Weir “contains unit and
7 dollar sales information Plaintiffs received from third party marketing research
8 company IRI, which IRI designated ‘HIGHLY CONFIDENTIAL AEO [Attorneys’
9 Eyes Only],’ as well as damages figures calculated using that IRI data.” (ECF N. 71,
10 at 5.) Plaintiffs state that disclosure of this information would harm IRI “by
11 providing for free what IRI has expended resources collecting and charges its clients
12 for” and would put it at a competitive disadvantage. *Id.* The Court finds compelling
13 reasons to seal this information.

14 The Court **GRANTS** Plaintiff’s Motion.

15 **B. Defendant’s Motion to Seal: ECF No. 84**

16 Defendant seeks to file under seal portions of its opposition to Plaintiff’s
17 motion for class certification, its motion to exclude expert testimony, and various
18 supporting exhibits. (ECF No. 84.)

19 Defendant seeks to seal exhibits 1-10, 12-18, and 23-29 because they “consist
20 of or refer to internal marketing, product, advertising, and consumer research that
21 MDLZ has conducted, commissioned, or purchased in connection with the belVita
22 products challenged in this lawsuit, as well internal scientific research that MDLZ
23 has conducted to substantiate the “4 Hours of Nutritious Steady Energy’ claim
24

25 ¹ Defendant also references one exhibit, MDLZ-00035886 which is an excerpt from a report
26 licensed from a marketing research company. Defendant seeks to seal this document solely because
27 its license with the company “require that the document be kept confidential and not be disclosed
28 to the public.” (Smith Decl. ¶ 5.) Simply because another company seeks to keep the information
confidential does not mean there are compelling reasons for this Court to seal the document.
However, because the Court assumes the report also contains marketing research data that provides
Defendant with a competitive advantage, it allows the document to be sealed.

1 challenged in this lawsuit.” (ECF No. 104, at 2.) The Court finds compelling reasons
2 to seal these exhibits because Defendant’s marketing and research information gives
3 Defendant a competitive advantage. The Court also seals portions of Defendant’s
4 expert reports, opposition brief, and motion that quote from and incorporate these
5 documents. (*Id.* at 3–4.) The Court also seals the portions of the reports that contain
6 market research data by IRI. (*Id.*) See *Algarin v. Maybelline, LLC*, No. 12-3000,
7 2014 WL 690410, at *3 (S.D. Cal. Feb. 21, 2014) (granting L’Oreal’s motion to seal
8 where “[p]ublic disclosure of L’Oréal’s confidential business material, marketing
9 strategies, [and] product development plans could result in improper use by business
10 competitors seeking to replicate L’Oréal’s business practices and circumvent the time
11 and resources necessary in developing their own practices and strategies”).

12 The Court **GRANTS** Defendant’s Motion to Seal.

13 **C. Plaintiffs’ Motion to Seal: ECF No. 103**

14 Plaintiffs seek to file under seal Exhibits 1–3 and 8, as well as portions of their
15 reply brief, two motions to strike, and their opposition brief that cite those exhibits.
16 (ECF No. 103.) Plaintiffs state they seek to seal the information because Defendant
17 designed the information as confidential. Defendant then filed a declaration by Mr.
18 Smith stating Defendant has no objection to the public disclosure of the deposition
19 transcripts of Ronald Wilcox (Exhibit 1), Itamar Simonson (Exhibit 2), and Daniel
20 McFadden (Exhibit 3). Defendant further “does not seek to seal any of the
21 information Plaintiffs have redacted from their motion to strike the expert testimony
22 of Dr. Itamar Simonson (ECF No. 97-1) or their motion to strike the expert testimony
23 of Drs. Ronald Wilcox and Daniel McFadden (ECF No. 96-1).” (ECF No. 107, ¶ 2.)

24 Defendant provides that portions of Exhibit 8 as well as the redacted portions
25 of Paragraph 9 of the Omnibus Declaration of Paul Joseph “refer to internal scientific
26 or nutritional research that MDLZ has conducted in connection with the challenged
27 ‘Steady Energy’ claims in this case, including research designed to substantiate those
28 claims.” (*Id.* ¶ 3.) Plaintiffs’ reply brief and opposition references this research

1 information. (*Id.* ¶ 4.) The Court finds compelling reasons to seal this information
2 which Defendant has provided to be confidential research information.


3 Because Defendant does not seek to seal some of the information presented in
4 Plaintiffs; motion to seal, the Court **GRANTS IN PART** Plaintiff's motion. Plaintiff
5 must file Exhibits 1 through 3 on the public docket. Further, because Plaintiff has
6 filed redacted versions of two motions (ECF Nos. 96-1, 97-1) and Defendant does
7 not seek to seal any of the material in the motions, Plaintiff is to file public,
8 unredacted versions of the motions.

9 **IT IS SO ORDERED.**

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11 **DATED: January 24, 2020**

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Hon. Cynthia Bashant
United States District Judge

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