

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

CITY OF GREENVILLE, ILLINOIS, *et al.*)

)

Individually and on behalf of all others)

similarly situated,)

)

Plaintiffs,)

)

v.)

Case No. 10-188-JPG

)

SYNGENTA CROP PROTECTION,)

INC., and SYNGENTA AG,)

)

Defendants.)

**PLAINTIFFS’ RESPONSE TO SYNGENTA’S RESPONSE TO
THE COURT’S ORDER TO SHOW CAUSE**

In its order to show cause, the Court specifically instructed Syngenta how to respond: “The response must address each sealed document individually and must set forth a justification, with citation to relevant authority, for maintaining each currently sealed document under seal.” Doc 170 at 4. Instead of complying with the Court’s instructions, Syngenta responded by accusing Plaintiffs of conspiring to “exert pressure” on Syngenta by filing “excessive” exhibits in opposition to Syngenta AG’s motion to dismiss for lack of personal jurisdiction. Although Syngenta did not challenge the relevance of any of these exhibits to the jurisdictional analysis, it nevertheless asked the Court to strike two-thirds of the exhibits because Syngenta deemed them “unnecessary.” Syngenta’s only effort to comply with the Court’s order consisted of invoking the question-begging label “confidential” to justify keeping documents under seal. This effort falls far short of what the Seventh Circuit

requires and what the Court ordered. Because Syngenta failed to meet its burden to show cause, the Court should unseal all sealed documents in the record.

THE STANDARD FOR SEALING COURT DOCUMENTS

The public has a presumptive right to access all court documents relating to dispositive motions. *See Citizens First Nat. Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 946 (7th Cir. 1999). Parties who want to keep documents under seal bear the burden of showing that their interest in secrecy outweighs the public's right to access. *Matter of Cont'l Illinois Sec. Litig.*, 732 F.2d 1302, 1313 (7th Cir. 1984). "In civil litigation only trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information required by statute to be maintained in confidence (such as the name of a minor victim of a sexual assault), is entitled to be kept secret" *Baxter Int'l, Inc. v. Abbott Laboratories*, 297 F.3d 544, 546 (7th Cir. 2002).

Because Syngenta wants to keep documents related to Syngenta AG's motion to dismiss under seal, Syngenta must show that each document contains trade secrets or similar protected information, and that the public release of the information would cause Syngenta competitive harm. *Id.* at 547; *Spindler v. Baker & Daniels, LLP*, 2010 U.S. Dist. LEXIS 23343, 1-3 (N.D. Ind. 2010) ("For material to be protected, it must give the holder an economic advantage and threaten a competitive injury--business information whose release harms the holder only because the information is embarrassing or reveals weaknesses does not qualify for trade secret protection.") (internal quotation, citation omitted).

Syngenta cannot rest on a naked assertion that the documents are “confidential”; it must justify the assertion “by valid reasons and legal citations.” *Baxter Int’l*, 297 F.3d at 548 (“Motions that simply assert a conclusion without the required reasoning ... have no prospect of success.”); *Mercedes-Benz USA LLC v. Conco Motors, Inc.*, 2010 U.S. Dist. LEXIS 167, 49-50 (E.D. Wis. 2010) (“Blanket statements that the documents contain confidential business information will not do; rather, for each document, the party must identify the specific harm that might result from public disclosure and explain why that harm outweighs the public's interest in open court proceedings.”).

If only part of a document needs to be sealed to protect a party’s legitimate interest in secrecy, then those parts that do not contain trade secrets should be made public, with the full versions filed under seal. *See Hicklin Eng’g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006); *Citizens First Nat. Bank of Princeton*, 178 F.3d at 945 (explaining that an order sealing documents containing confidential information is overly broad because a document containing confidential information may also contain material that is not confidential, in which case a party's interest in maintaining the confidential information would be adequately protected by redacting only portions of the document).

ARGUMENT

In its show cause order, the Court unequivocally instructed Syngenta to address whether sealed documents should remain under seal—not whether sealed documents were properly designated as “confidential” under the protective order.

Id. at 2. Yet in response to the Court’s order, Syngenta attached an exhibit purporting to “provide a justification *for the confidentiality*” of the sealed documents—not an argument for keeping them under seal. Doc 182 at 1 (emphasis added). Indeed, Syngenta’s response did not even identify the Seventh Circuit standard for sealing court documents.

Moreover, Syngenta justified its “confidential” designations by asserting, without explanation, that the documents contain “*confidential* business information,” “*confidential* budget information,” “*confidential* product development information,” “*confidential* internal strategy” and the like. Doc 182-1 (emphasis added). Notably, Syngenta did not claim that *any* of these documents contain “trade secrets,” nor did it explain how public access to the documents would cause it competitive harm. In other words, Syngenta failed to articulate any basis for sealing court documents recognized by the Seventh Circuit.

To put it more bluntly, Syngenta’s argument for keeping “confidential” documents under seal consisted solely of attempting to justify that they are in fact “confidential.” Not only did Syngenta address the wrong issue (whether the documents are “confidential”), but it also assumed the very conclusion the Court ordered Syngenta to prove—that these purportedly “confidential” documents qualify to remain under seal. Such question-begging justifications are not enough. *See Baxter Int’l*, 297 F.3d at 548 (“Motions that simply assert a conclusion without the required reasoning ... have no prospect of success.”); *Mercedes-Benz USA*, 2010 U.S. Dist. LEXIS 167, 49-50 (“Blanket statements that the documents contain

confidential business information will not do; rather, for each document, the party must identify the specific harm that might result from public disclosure and explain why that harm outweighs the public's interest in open court proceedings.”).

Syngenta’s response to the Court’s show cause order highlights a more fundamental problem with Syngenta’s approach to discovery—its abuse of the “confidential” designation. Of the roughly 600,000 documents that Syngenta has produced in the related *Holiday Shores* case, it has designated over 400,000 of them as “confidential.”¹ The vast majority of these designations strain credibility. Indeed, in response to the Court’s show cause order, Syngenta conceded that 73 of the 321 “confidential” documents that Plaintiffs filed under seal are not actually “confidential.” Doc 182-1. For the remaining 248 documents, Syngenta continued to assert confidentiality but did not explain what its “confidential” designation meant. *Id.*

It appears that Syngenta applied the definition of “confidential” found in the protective order. But the protective order defines “confidential information” as that which “*may reasonably be characterized by a party as intellectual property, a trade secret, or confidential and proprietary information.*” Doc 90 at ¶ 3 (emphasis added). The Seventh Circuit has invalidated protective orders containing similar definitions because they provide no objective standard for testing the legitimacy of “confidential” designations. *See Citizens First Nat. Bank of Princeton*, 178 F.3d at 945 (“The order is not limited to trade secrets, or even to documents ‘believed to

¹ Syngenta also designated every word of every deposition taken in this case as “confidential.”

contain trade secrets,’ which anyway is too broad both because ‘believed’ is a fudge.”).

Plaintiffs foresaw this problem when they objected to the use of this expansive definition of “confidential information” in the protective order and asked instead for a narrow definition tied to the Uniform Trade Secret Act’s definition of “trade secret.”² That way, documents that Syngenta designated as “confidential” would by definition contain “trade secrets,” and could thus presumptively be filed under seal in compliance with Seventh Circuit precedent. But since Plaintiffs lost their argument on the protective order, they had only three options in filing “confidential” documents with the Court:

- (1) act as the sole arbiter of which documents contain “trade secrets” and risk violating the protective order;
- (2) disclose all “confidential” documents they intended to file to Syngenta weeks or months *before filing*, so that Syngenta could determine which documents contain “trade secrets”; or
- (3) file all “confidential” documents under seal.³

Plaintiffs chose the only prudent course and filed under seal all documents that Syngenta designated as “confidential.”⁴

² See Exhibit 1, Stephen Tillery’s letter to Judge Frazier dated September 17, 2010.

³ Syngenta argues that Plaintiffs could also have challenged its “confidential” designations under the protective order. While the protective order does provide a mechanism for challenging “confidential” designations, any challenge by the Plaintiffs would be futile because the definition of “confidential information” is so vague that virtually any document could fall within it. Further, Plaintiffs would have to initiate any challenge months ahead of any actual filing with the Court to allow the process to run its course, thus requiring Plaintiffs to produce their work product to Syngenta long before they are required to file their papers.

Instead of explaining why those documents should remain under seal, as the Court ordered, Syngenta asks the Court to strike two-thirds of Plaintiffs' exhibits based upon its conspiracy theory that Plaintiffs "*may have* filed hundreds of documents in the public record for the sole purpose of obtaining an order unsealing them" Doc 182 at 5 (emphasis added). Syngenta analogizes this case to *Walker v. Gore*, 2008 WL 4649091 (S.D. Ind. 2008), where the plaintiffs gratuitously attached to their complaint certain documents that they were contractually forbidden from making public. *Id.* at *1. Plaintiffs here did not gratuitously file confidential documents with the Court; they did so because Syngenta AG moved to dismiss for lack of personal jurisdiction. To avoid dismissal, Plaintiffs had to respond with evidence showing that Syngenta AG has sufficient contacts with Illinois. Because the personal jurisdiction analysis takes into account the quantity of a defendant's contacts with a state, it was appropriate for Plaintiffs to present the Court with their admittedly voluminous evidence in support of jurisdiction.

Importantly, Syngenta does not argue that even one of Plaintiffs' exhibits is irrelevant to the jurisdictional analysis. Instead, Syngenta complains that Plaintiffs did not specifically cite every exhibit in the body of their brief—rendering all uncited exhibits “unnecessary and excessive.” Syngenta's argument—to continue the theme of the day—is “hogwash.” First, Plaintiffs attached and cited as Exhibit 1 to their opposition brief a summary of the important features of *all* other exhibits,

⁴ Plaintiffs also inadvertently filed under seal several documents that Syngenta did not designate as “confidential.” That error resulted from Plaintiffs grouping their exhibits, per the Clerk's instructions, into as few discreet documents as possible to avoid entering over 365 separate CM/ECF transactions for a single pleading.

explaining how each exhibit supports the Court's exercise of jurisdiction over Syngenta AG. Doc 112-1. These exhibits are obviously cited in Plaintiffs' opposition brief because Exhibit 1 is cited in the brief. Second, Syngenta provides no coherent argument for why Plaintiffs' failure to *specifically cite* each exhibit in the body of its brief renders the uncited exhibits "unnecessary and excessive," and thus subject to being struck. Finally, Syngenta offers no support for its mistaken speculation that Plaintiffs put these exhibits in the record "for the sole purpose of obtaining an order unsealing them." Doc 182 at 5. Because the exhibits are relevant and the Court may rely on them in its decision on Syngenta AG's motion to dismiss, there is no basis for striking any of them.

CONCLUSION

Syngenta has refused to comply with the Court's show cause order and failed to offer any explanation for why any documents should be kept under seal. The Court should unseal every document in the record.

Respectfully submitted,

By: /s/ Stephen M. Tillery
STEPHEN M. TILLERY
KOREIN TILLERY, LLC
CHRISTINE J. MOODY
CHRISTOPHER A. HOFFMAN
CHRISTIE R. DEATON
MICHAEL E. KLENOV
505 N. Seventh Street, Suite 3600
St. Louis, Missouri 63101
Telephone: (314) 241-4844
Facsimile: (314) 241-3525
STillery@koreintillery.com
CMoody@koreintillery.com
CHoffman@koreintillery.com
CDeaton@koreintillery.com
MKlenov@koreintillery.com

PATRICIA S. MURPHY
MURPHY LAW OFFICE
P.O. Box 220
Energy, Illinois 62933-0220
Telephone: (618) 964-9640
Facsimile: (618) 964-1275
tsuemurphy@gmail.com

BARON & BUDD, P.C.
SCOTT SUMMY
CARLA BURKE
CELESTE EVANGELISTI
CARY MCDOUGAL
3102 Oak Lawn Avenue, Suite 1100
Dallas, Texas 75219-4281
Telephone: (214) 521-3605
Facsimile: (214) 520-1181
SSummy@baronbudd.com
CBurke@baronbudd.com
CEvangel@baronbudd.com
CMcdouga@baronbudd.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2011, I electronically filed Plaintiffs' Response to Syngenta's Response to the Court's Order to Show Cause with the Clerk of Court using the CM/ECF system, which will electronic deliver notice of the filing to:

Kurtis B. Reeg
Reeg Lawyers, LLC
1 North Brentwood Blvd.
Suite 950
St. Louis, MO 63105
314-446-3350
Fax: 314-446-3360

Mark C. Surprenant
Charles Adam Cerise
David M. Stein
Lara E. White
Adams and Reese LLP
4500 One Shell Square
New Orleans, LA 70139
504-581-3234

Michael A. Pope
Christopher MacNeil
Murphy
Jocelyn D. Francoeur
Todd R. Wiener
McDermott, Will et al. -
Chicago
227 West Monroe Street
Suite 4400
Chicago, IL 60606-5096
312-984-7780
Fax: 312-984-7700

By: /s/ Stephen M. Tillery
STEPHEN M. TILLERY
KOREIN TILLERY, LLC
505 N. Seventh Street, Suite 3600
St. Louis, Missouri 63101
Telephone: (314) 241-4844
Facsimile: (314) 241-3525
STillery@koreintillery.com



KOREIN TILLERY

Attorneys at Law

One US Bank Plaza
505 North 7th Street, Suite 3600
St. Louis, Missouri 63101
www.koreintillery.com

STEPHEN M. TILLERY

stillery@koreintillery.com

p: 314.241.4844

f: 314.241.3525

September 17, 2010

Magistrate Judge Philip M. Frazier
U.S. District Court – Southern District of IL
301 West Main Street
Benton, IL 62812

RE: City of Greenville, Illinois, et al. v. Syngenta Crop Protection, Inc.
Cause No. 310-cv-188-JPG-PMF

Dear Judge Frazier:

Plaintiffs have not moved for the entry of a protective order. Rather, Syngenta has refused to produce any documents until a protective order is entered. Under Fed. R. Civ. P. 26(c), the Court may enter a protective order only for “good cause.” Syngenta bears the burden of establishing that there is “good cause” for the entry of a protective order. Plaintiffs will be perfectly happy if the Court enters no protective order and the evidence in this case is a matter of public record rather than kept under seal.

But in light of the fact that Syngenta simply won’t produce documents without one in place – Plaintiffs have discussed the parameters of a mutually acceptable protective order with Syngenta. While we have largely resolved our differences, we have stalled on one issue – the paragraph describing what documents may be designated as Confidential (¶ 3).

With the exception of ¶ 3, the order proposed by Syngenta closely tracks the language of a Protective Order entered in the case of *Holiday Shores Sanitary District, et al. v Syngenta Crop Protection, Inc., et al.*, Madison County Cause No. 04-L-710 (the “HSSD case”). When Syngenta initially raised the issue of a protective order in this case, I believed a protective order substantially similar to the one in the HSSD case would ease the coordination of discovery and avoid confusion. But recent events in the HSSD case have changed my mind.

Specifically, Syngenta has used the overbroad definition of what may be designated as confidential in the HSSD Protective Order to designate virtually every document as confidential. Many of these confidential designations are simply untenable. For example, Syngenta has designated as confidential documents such as press releases, submissions to the EPA and water monitoring data made public by the EPA. The list goes on and on.

205 North Michigan, Suite 1950
Chicago, Illinois 60601-4269
Tel: 312.641.9750 Fax: 312.641.9751

SANDOR KOREIN
STEPHEN M. TILLERY
STEVEN A. KATZ
DOUGLAS R. SPRONG
CHRISTINE J. MOODY
*STEPHEN A. SWEDLOW
*GEORGE A. ZELCS
JOHN W. HOFFMAN
PETER H. RACHMAN
AARON M. ZIGLER

DIANE MOORE HEITMAN
CHRISTIE R. DEATON
JOHN A. LIBRA
ALEXIS C. TILLERY
*MAXIMILIAN C. GIBBONS
CHRISTOPHER A. HOFFMAN
**AIDAN M. MCNAMARA
*MATTHEW C. DAVIES
MICHAEL E. KLENOV

ROBERT L. KING
*KLINT L. BRUNO
KATHERINE J. TILLERY
Of Counsel

*Not Licensed in Missouri
**Not Licensed in Illinois

Magistrate Judge P. M. Frazier

September 17, 2010

Page 2

Not surprisingly, Plaintiffs dispute that these documents are confidential and are challenging the designations of these and hundreds of other documents. In light of Syngenta's abuse of the confidential designation, I will be asking the state court to reconsider the wording of the HSSD protective order consistent with language in the proposal I attach here.

The Seventh Circuit has been clear that confidential designations under protective orders must not be overbroad and must provide the parties and courts with an objective standard for evaluating a document's confidential status. *Citizens First Nat. Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944-46 (7th Cir. 1999). In *Citizens First Nat. Bank*, the protective order allowed the parties to designate as confidential any documents "believed to contain trade secrets of other confidential or government information, including information held in a fiduciary capacity." *Id.* at 944. The Seventh Circuit chided the district court for entering such a protective order, explaining that the order was "far too broad to demarcate a set of documents clearly entitled without further inquiry into confidential status." *Id.* at 945. Instead, the Seventh Circuit said the district court should have entered an order "that allows the parties to keep their trade secrets (or some other properly demarcated category of legitimately confidential information) out of the public record, provided the judge . . . satisfies himself that the parties know what a trade secret is and are acting in good faith in deciding which parts of the record are trade secrets." *Id.* at 946. Given Syngenta's history of bad faith designations in the HSSD case, the need for a clear and objective standard of confidentiality is even greater.

Syngenta seeks to define what is a "trade secret" or "confidential" in terms of what "**may reasonably be characterized by a party as**" such and thus offers no objective standard at all. The definition proposed by Syngenta in ¶ 3 would protect information that, if made public, would cause no competitive injury, but would only impact its reputation. The advantage of the Plaintiffs' proposed definition, which uses the Uniform Trade Secret Act's (UTSA) definition of "trade secret," is that it provides an objective test for what is a trade secret.

From a practical standpoint, this Court will have to determine what constitutes a confidential document or a trade secret when disputes arise. Plaintiffs believe that Syngenta's vague, overbroad, and subjective definition of confidential information will lead to endless arguments without an objective basis to resolve them. The well established definition of trade secret in the UTSA, on the other hand, will preclude many disputes from arising in the first place, and will help the court objectively resolve those disputes that may arise in any event. In deciding which protective order to enter, the Court should consider which proposed definition of confidentiality it would prefer to use in resolving future disputes.

Sincerely,


STEPHEN M. TILLERY

SMT:cam

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

CITY OF GREENVILLE, ILLINOIS, *et al.*,
Individually and on behalf of all
others similarly situated,
Plaintiffs,
v.
SYNGENTA CORP PROTECTION, INC.,
and SYNGENTA AG,
Defendants.

Case No. 10-188-JPG

PROTECTIVE ORDER

1. This Protective Order shall govern the use and dissemination of all information, documents or materials that are produced in this action and designated as Confidential.
2. The term “document” or “documents”, as used in this Protective Order, shall have the same meaning as contemplated by the Federal Rules of Civil Procedure.
3. The term “Trade Secret”, as used in this Protective Order, is defined to include (a) documents or information constituting a trade secret under The Uniform Trade Secrets Act, Uniform Trade Secrets Act § 1(4), 14 U.L.A. 437, 438 (Master Edition 1990) or (b) information, documents or materials that are prohibited or barred from publication/release to the public by any state or federal law.
4. Any party to this action or other person or entity, including any third party, who produces or supplies information, documents or other materials used in this action (hereinafter the “Designated Party” or the “Producing Party”) may designate as “Confidential Information” any such information, document or material that it reasonably and in good faith believes constitutes or contains Trade Secret information. The designation “Confidential Information”

shall be made by affixing on the document or material containing such information, and upon each page so designated if practicable, a legend that in substance states: **“CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN ATRAZINE LITIGATION”**.

5. Depositions may be designated Confidential by indicating that fact on the record at the deposition. If a Designating Party has advised the court reporter that Confidential Information has been disclosed during a deposition, the court reporter shall include on the cover page the following indication: **“DEPOSITION CONTAINS CONFIDENTIAL INFORMATION OF [Name of Designating Party] – SUBJECT TO PROTECTIVE ORDER IN ATRAZINE LITIGATION.”** Within ten (10) business days of receipt of the initial deposition transcript, the Designating Party shall advise the court reporter and opposing counsel of the specific pages and lines in which Confidential Information appears. The court reporter shall supplement the transcript to mark the specific pages and lines designated as Confidential and amend the cover page to reflect that these specific designations have been made. Counsel for the opposing party may have immediate access to the deposition transcript, but prior to the page and line designations, shall treat the entire transcript as Confidential, if so designated at the deposition.

6. Confidential Information that has been produced in this litigation may be disclosed only to:

- a. This Court and its personnel.
- b. Outside counsel of record and in-house counsel in this litigation (including staff persons employed by such counsel). In-house counsel for a Defendant may have access to Confidential Information produced by a Plaintiff, but not that produced by another Defendant.
- c. Any consultant, investigator or expert (collectively, “Expert”) who is assisting in the preparation and trial of this litigation, but only to the extent reasonably necessary to enable such Expert to render such assistance.

With respect to Experts for the Defendants, only outside retained Experts may have access to the Confidential Information of a co-Defendant.

- d. A deponent, but only in connection with preparation for and during the course of his or her deposition.
- e. A court reporter and a videographer.

7. If a party wishes to disclose Confidential Information to any person not described in paragraph 6 of this Protective Order, permission to so disclose must be requested from the Designating Party in writing. If the Designating Party objects to the proposed disclosure, such disclosure shall not be made unless, upon motion by the party requesting such permission, this Court orders otherwise.

8. Prior to obtaining access to Confidential Information, any person to whom Confidential Information may be disclosed pursuant to paragraphs 6 and 7 hereof, except this Court and its personnel, shall be provided a copy of this Protective Order and shall agree in writing to be bound by its terms by signing a copy of the Confidentiality Acknowledgment annexed hereto as Exhibit A ("Confidentiality Acknowledgment A"). Counsel for the party obtaining a person's signature on the Confidentiality Acknowledgment shall retain the original signed acknowledgment. If at any time the Designating Party has a good faith reason to believe that Confidential Information has been disclosed in violation of this Protective Order, it may move this Court to obtain copies of the signed acknowledgments, which motion shall be granted upon good cause shown.

9. Where any Confidential Information or information derived from Confidential Information is included in any court filing, the parties shall comply with the applicable Local Rules for the Southern District of Illinois for the filing of materials under seal, and such filing shall be marked "**CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE**

ORDER IN ATRAZINE LITIGATION” and placed in a sealed envelope marked with the caption of the case, filed with the Clerk of the Court and/or Court and held under seal.

10. Except to the extent expressly authorized in this Protective Order, Confidential Information shall not be used or disclosed for any purpose other than the preparation and trial of this case, and/or any appeal thereof, subject to the provision of paragraph 19.

11. Any summary, compilation, notes, copy, electronic image or database containing Confidential Information shall be subject to the terms of the Protective Order to the same extent as the material or information from which such summary, compilation, notes, copy, electronic image or database is made or derived.

12. Any party may object to a designation by notifying the Designating Party in writing of that objection and specifying the designated material to which the objection is made. The parties shall, within seven (7) days of service of the written objection, begin conferring concerning the objection. If the objection is not resolved and the opposing party informs the Designating Party in writing that the parties are at an impasse and specifies the designated documents that remain in dispute, the Designating Party shall, within fifteen (15) days of the receipt of the letter from the opposing party, file and serve a motion to resolve the dispute over the designation of the documents and shall bear the burden of proof on the issue. If no such motion is filed within the stated time period, the material will be redesignated as appropriate. If a motion is filed, information subject to dispute shall, until further order of the Court, be treated consistently with its designation. With respect to any material which is re-designated or ceases to be subject to the protection of this Protective Order, the Designating Party shall, at its expense, provide to each party which so requests additional copies thereof from which all confidentiality

legends affixed hereunder have been adjusted to reflect the re-designation or removed as appropriate.

13. Inadvertent failure to designate any information as a Confidential Document pursuant to this Protective Order shall not constitute a waiver of any otherwise valid claim for protection, so long as such claim and the basis for it is asserted within thirty (30) days of the discovery of the inadvertent failure. At such time, arrangements shall be made for the return, sequestration, or destruction of all copies of the inadvertently misdesignated comments and for the substitution, where appropriate, of properly labeled copies or for the prompt presentation of the information to the court under seal for a determination of the claim. In the case of inadvertently produced privileged and/or work product documents, Fed. R. Civ. P. 26(b)(5)(B) shall apply.

14. Upon any challenge to the designation of any document(s) as Confidential, the Designating Party shall always bear the burden of establishing that the document(s) is Confidential under the terms of this Protective Order. In the event the Court determines a lack of good faith in the designation of any document as Confidential, the Court may award attorneys fees and costs to opposing counsel in connection with such designation.

15. Nothing in this Protective Order shall be deemed to restrict in any manner the use by any Designating Party of any information in its own documents and materials.

16. If counsel for any party receives notices of any subpoena or other compulsory process commanding production of Confidential Information that a party has obtained under the terms of this Protective Order, counsel for such party shall, if there are fewer than ten (10) days to comply, within two (2), or if more than ten (10) days, at least seven (7) business days prior to the due date of compliance, notify the Designating Party in writing, and shall not produce the

Confidential Information until the Designating Party has had reasonable time to take appropriate steps to protect the material. It shall be the responsibility of the Designating Party to obtain relief from the subpoena or order prior to the due date of compliance, and, to give the Designating Party an opportunity to obtain such relief, the party from whom such information is sought shall not make the disclosure before the actual due date of compliance set forth in the subpoena or order.

17. This Protective Order shall not prevent any of the parties from moving this Court for an order that Confidential Information may be disclosed other than in accordance with this Protective Order. This Protective Order is without prejudice to the right of any party to seek modification of it from the Court. It shall remain in effect until such time as it is modified, amended or rescinded by the Court. This Protective Order does not affect any party's rights to object to discovery on any grounds other than an objection based solely on the ground that the information sought is Confidential in nature.

18. This Protective Order is not intended to govern the use of Confidential Information at any trial of this action. Questions of the protection of Confidential Information during trial will be presented to the Court and the Designating Party prior to or during trial as each party deems appropriate.

19. This Court shall have continuing jurisdiction to modify, enforce, interpret or rescind this Protective Order, notwithstanding the termination of this action.

20. Within one hundred twenty (120) days after conclusion of this action, including the exhaustion of all appeals, all Confidential Information produced in this litigation (other than those documents filed with the court or used as deposition exhibits) shall be returned to the Designating Party or shall be destroyed. However, documents or materials that contain

Confidential Information of a Designating Party and the work product of the party in possession of the documents or materials need not be given to the Designating Party but shall be destroyed within the same time frame. Counsel for any party or third party receiving Confidential Information shall make written certification of compliance with this provision and shall deliver the same to counsel for each Designating Party within one hundred twenty (120) days after the conclusion of this action.

SO ORDERED this _____ day of September, 2010.

Hon. J. Phil Gilbert

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

CITY OF GREENVILLE, ILLINOIS, <i>et al.</i> ,)	
)	
Individually and on behalf of all)	
others similarly situated,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 10-188-JPG
)	
SYNGENTA CORP PROTECTION, INC.,)	
and SYNGENTA AG,)	
)	
Defendants.)	

CONFIDENTIALITY ACKNOWLEDGMENT A

I, _____, being duly sworn on oath, state the following:

1. I have read and understand the Protective Order to which this Exhibit A is annexed and I attest to my understanding that access to information designated Confidential may be provided to me and that such access is pursuant to the terms, conditions and restrictions of the Protective Order. I agree to be bound by the terms of the Protective Order. I hereby submit to the jurisdiction of this Court for the purpose of enforcement of this Confidentiality Acknowledgment and the Protective Order.

2. I shall not use or disclose to others, except in accordance with the Protective Order, any Confidential Information. If I fail to abide by the terms of this Confidentiality Acknowledgment or the Protective Order, I understand that I may be subject to sanctions under the contempt power of this Court.

Dated: _____

Signature

Printed Name

Address

Individual or Entity Represented

Subscribed and sworn to before me this ____ of _____, 2010.

Notary Public

My commission expires: _____

Citizens First Nat. Bank of Princeton v. Cincinnati Ins. Co., 178 F.3d 943 (1999)

51 U.S.P.Q.2d 1218

178 F.3d 943
United States Court of Appeals,
Seventh Circuit.

CITIZENS FIRST NATIONAL BANK OF
PRINCETON, Plaintiff-Appellee, Cross-Appellant,
v.

CINCINNATI INSURANCE COMPANY,
Defendant-Appellant, Cross-Appellee.

Nos. 98-3534, 98-3535 and 98-3957. Submitted Feb. 23,
1999. Decided May 28, 1999.

In connection with appeals from the United States District Court for the Northern District of Illinois, [Harry D. Leinenweber](#), J., party sought permission to file appendix under seal. The Court of Appeals, [Posner](#), Chief Judge, held that: (1) remand was required to permit district court to advise Court of Appeals as to whether good cause existed for allowing appendix to be filed under seal, and (2) protective order allowing parties to designate as confidential any document believed to contain trade secrets or other confidential or governmental information was invalid.

Remanded.

West Headnotes (6)

1 [Records](#) Court Records

Remand was required to permit district court to advise Court of Appeals as to whether good cause existed for allowing appendix to be filed under seal on appeal when protective order upon which party relied in seeking to file appendix under seal was almost two years old and Court of Appeals lacked sufficient knowledge about case to assess order's current validity.

[18 Cases that cite this headnote](#)

2 [Records](#) Court Records

District court could not delegate to parties the authority to determine whether good cause existed to justify the sealing of documents forming part of the record, and therefore protective order allowing parties to designate as

confidential any document believed to contain trade secrets or other confidential or governmental information was invalid. [Fed.Rules Civ.Proc.Rule 26\(c\)](#), 28 U.S.C.A.

[113 Cases that cite this headnote](#)

3 [Records](#) Court Records

While the interest of the public at large in what goes on at all stages of a judicial proceeding does not always trump the property and privacy interests of the litigants, it can be overridden only if the latter interests predominate in the particular case, that is, only if there is good cause for sealing a part or the whole of the record in that case. [Fed.Rules Civ.Proc.Rule 26\(c\)](#), 28 U.S.C.A.

[38 Cases that cite this headnote](#)

4 [Records](#) Court Records

As the primary representative of the public interest in the judicial process, the trial judge is duty-bound to review any request to seal the record, or part of it, and may not rubber stamp a stipulation to seal the record. [Fed.Rules Civ.Proc.Rule 26\(c\)](#), 28 U.S.C.A.

[40 Cases that cite this headnote](#)

5 [Records](#) Court Records

Protective order that was not limited to pretrial discovery, and thus permitted sealing of portions of the record even after affected documents were introduced at trial, was invalid.

[27 Cases that cite this headnote](#)

6 [Records](#) Court Records

In case involving large numbers of documents, district court may enter protective order that allows the parties to keep their trade secrets, or some other properly demarcated category of legitimately confidential information, out of the public record, provided the judge (1) satisfies

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himself that the parties know what a trade secret is and are acting in good faith in deciding which parts of the record are trade secrets, and (2) makes explicit that either party and any interested member of the public can challenge the secreting of particular documents. *Fed.Rules Civ.Proc.Rule 26(c)*, 28 U.S.C.A.

114 Cases that cite this headnote

Attorneys and Law Firms

*944 Barry S. Alberts (submitted on briefs), Schiff, Hardin & Waite, Chicago, IL, for Plaintiff-Appellee. Victor C. Peters, Hanson & Peters, Chicago, IL, for Defendant-Appellant.

Before POSNER, Chief Judge, and BAUER and EASTERBROOK, Circuit Judges.

Opinion

POSNER, Chief Judge.

1 In the course of the litigation from which these appeals arise, the district judge, in accordance with a stipulation by the parties, issued an order authorizing either party to designate as confidential, and thus keep out of the public record of the litigation, any document "believed to contain trade secrets or other confidential or governmental information, including information held in a fiduciary capacity." One of the parties has now asked us to permit it to file an appendix under seal. In support of this motion it submits the protective order just described that the district judge issued. That order was issued in March of 1997, however, two years ago, and we do not know enough about the case to be able to assess the order's current validity without the advice of the district judge, to whom, therefore, we remand the case for the limited purpose of enabling him to advise us whether in his view good cause exists for our allowing the appendix to be filed under seal. *Caterpillar, Inc. v. NLRB*, 138 F.3d 1105 (7th Cir.1998) (chambers opinion), and cases cited there. See also *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 898-99 (7th Cir.1994).

2 There is a deeper issue of confidentiality in this case than the currency of the protective order, and we must address it in order to make clear the judge's duty on remand. That issue is the judge's failure to make a determination, as the law requires, *Fed.R.Civ.P. 26(c)*; *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984); *Jepson, Inc. v. Makita*

Electric Works, Ltd., 30 F.3d 854, 858 (7th Cir.1994); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785-87 (3d Cir.1994), of good cause to seal any part of the record of a case. Instead of doing that he granted a virtual carte blanche to either party to seal whatever portions of the record the party wanted to seal. This delegation was improper. The parties to a lawsuit are not the only people who have a legitimate interest in the record compiled in a legal proceeding.

3 4 It is true that pretrial discovery, unlike the trial itself, is usually conducted in private. *Seattle Times Co. v. Rhinehart*, *945 *supra*, 467 U.S. at 33, 104 S.Ct. 2199. But in the first place the protective order that was entered in this case is not limited to the pretrial stage of the litigation, and in the second place the public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding. *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, *supra*, 24 F.3d at 897; *Littlejohn v. BIC Corp.*, 851 F.2d 673, 677-78 (3d Cir.1988); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 593, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (concurring opinion); cf. *Pepsico, Inc. v. Redmond*, 46 F.3d 29 (7th Cir.1995) (chambers opinion). That interest does not always trump the property and privacy interests of the litigants, but it can be overridden only if the latter interests predominate in the particular case, that is, only if there is good cause for sealing a part or the whole of the record in that case. *American Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 596 (7th Cir.1978) (per curiam); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 787-91 (1st Cir.1988); *In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139, 144-46 (2d Cir.1987). The determination of good cause cannot be elided by allowing the parties to seal whatever they want, for then the interest in publicity will go unprotected unless the media are interested in the case and move to unseal. The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it). See Arthur R. Miller, "Confidentiality, Protective Orders, and Public Access to the Courts," 105 *Harv. L.Rev.* 427, 492 (1991). He may not rubber stamp a stipulation to seal the record. *In re Krynicki*, 983 F.2d 74 (7th Cir.1992) (chambers opinion).

5 The order that the district judge issued in this case is not quite so broad as "seal whatever you want," but it is far too broad to demarcate a set of documents clearly entitled without further inquiry to confidential status. The order is not limited to trade secrets, or even to documents "believed to contain trade secrets," which anyway is too broad both because "believed" is a fudge and because a document that contains trade secrets may also contain material that is not a trade secret, in which case all that would be required to protect a party's interest in trade secrecy would be redaction of portions of the document. Also much too broad is "other confidential ...

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information,” not further specified, and all “governmental information,” a category absurdly overbroad. The order is so loose that it amounts, as we suggested at the outset, to giving each party carte blanche to decide what portions of the record shall be kept secret. Such an order is invalid. E.g., *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir.1996); *Pepsico, Inc. v. Redmond*, *supra*, 46 F.3d at 31; *City of Hartford v. Chase*, 942 F.2d 130, 135-36 (2d Cir.1991). The order in this case is invalid for the additional reason that it is not limited to pretrial discovery; it seals the documents covered by it even after they are introduced at trial. *Seattle Times Co. v. Rhinehart*, *supra*, 467 U.S. at 36-37, 104 S.Ct. 2199; *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir.1993); *Littlejohn v. BIC Corp.*, *supra*, 851 F.2d at 677-78, 680-81.

We are mindful of the school of thought that blanket protective orders (“umbrella orders”), entered by stipulation of the parties without judicial review and allowing each litigant to seal *all* documents that it produces in pretrial discovery, are unproblematic aids to the expeditious processing of complex commercial litigation because there is no tradition of public access to discovery materials. E.g., *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 355-57 (11th Cir.1987) (per curiam); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir.1986); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1118-23 (3d Cir.1986); *Manual for Complex Litigation* § 21.432 (3d ed.1995); Richard L. Marcus, “The Discovery Confidentiality Controversy,” 1991 *U. Ill. L.Rev.* 457; Marcus, “Myth *946 and Reality in Protective Order Litigation,” 69 *Cornell L.Rev.* 1 (1983). The weight of authority, however, is to the contrary. Most cases endorse a presumption of public access to discovery materials, e.g., *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, *supra*, 24 F.3d at 897; *Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d 470, 475-76 (9th Cir.1992); *Public Citizen v. Liggett Group, Inc.*, *supra*, 858 F.2d at 788-90; *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 162-64 (6th Cir.1987); *In re “Agent Orange” Product Liability Litigation*, *supra*, 821 F.2d at 145-46, and therefore require the district court to make a determination of good cause before he may

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enter the order. E.g., *EEOC v. National Children’s Center, Inc.*, 98 F.3d 1406, 1411 (D.C.Cir.1996); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 484-85 (3d Cir.1995); *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 165-67 (3d Cir.1993); *In re Remington Arms Co.*, 952 F.2d 1029, 1032 (8th Cir.1991); *City of Hartford v. Chase*, *supra*, 942 F.2d at 135-37; *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir.1985). Rule 26(c) would appear to require no less. And we note that both the First and Third Circuits, which used to endorse broad umbrella orders (e.g., *Cryovac*, *Cipollone*), have moved away from that position (*Public Citizen*, *Glenmede*, *Pansy*, *Leucadia*).

6 We do not suggest that all determinations of good cause must be made on a document-by-document basis. In a case with thousands of documents, such a requirement might impose an excessive burden on the district judge or magistrate judge. There is no objection to an order that allows the parties to keep their trade secrets (or some other properly demarcated category of legitimately confidential information) out of the public record, provided the judge (1) satisfies himself that the parties know what a trade secret is and are acting in good faith in deciding which parts of the record are trade secrets and (2) makes explicit that either party and any interested member of the public can challenge the secreting of particular documents. Such an order would be a far cry from the standardless, stipulated, permanent, frozen, overbroad blanket order that we have here.

Thus it will not be enough for the district judge on remand to point to the protective order as authority for allowing a portion of the appellate record to be filed under seal in this court. He must determine what parts of the appendix contain material that ought, upon a neutral balancing of the relevant interests, be kept out of the public record.

Parallel Citations

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