

md
9

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

FILED
MAR 08 2012
CLERK OF CIRCUIT COURT #77
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

HOLIDAY SHORES, ET AL,]
Plaintiffs,]
-vs-]
SYNGENTA, ET AL,]
Defendants.]

No. 04-L-710

ORDER

The matter before the court is Plaintiff's motion for a protective order concerning the confidential designations Defendant Syngenta has made to certain portions of the deposition testimony of Sherry Ford and some of the exhibits utilized therein, and the court, after considering the submissions and arguments of counsel, and being fully advised in the premises, finds and orders as follows:

The protective order previously entered by Judge Crowder on August 31, 2009, which was negotiated by the parties, governs the use and dissemination of all information, documents or materials that are produced in discovery in this action and designated as "Confidential." Its purpose is to protect "Trade Secrets" from public disclosure by a party to the action. Trade Secret is defined in paragraph 3 of the order. The order also provides the procedure for the parties to follow when one wishes to designate information, documents and materials as "Confidential Information." It further directs how depositions may be designated as confidential.

Trade Secret is defined in the protective order to include (a) information, documents or materials not in the public domain that are so proprietary or competitively sensitive that their public disclosure is very likely to cause competitive injury, (b) matters that constitute or contain trade secrets pursuant to the applicable law of the State of Illinois, or (c) information, documents or materials that are prohibited or barred from publication/release to the public by any state or federal law.

The protective order also provides that "any party ... who produces or supplies information, documents, or other materials used in this action 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 order instructs that each page so designated must be affixed with a label that states "**CONFIDENTIAL INFORMATION - SUBJECT TO PROTECTIVE ORDER IN ATRAZINE LITIGATION.**"

Pursuant to the order depositions may be designated as 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 the 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.”**

According to the Illinois Trade Secrets Act, a "trade secret" is defined as: information, including but not limited to, technical or non-technical data, a formula, pattern, compilation, program, device, method, technique, drawing, process, financial data, or list of actual or potential customers or suppliers, that: (1) is sufficiently secret to derive economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy or confidentiality. 765 ILCS §1065/2 (d)(1) - (2).

Illinois courts have considered six factors in determining whether given information constitutes a trade secret: (1) the extent to which the information is known outside of one's business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information, and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *ILG Industries, Inc. v. Scott*, 273 N.E.2d 393, 396 (Ill. 1971); *System Development Services, Inc. v. Haarmann*, 907 N.E.2d 63, 73 (Ill. App. 5 Dist. 2009).

Sherry Ford Deposition Testimony

The parties previously reached an agreement as to the confidentiality of deposition testimony of Sherry Ford as reflected in this court's order of October 20, 2011, and as such the court does not enter further order with regard to said testimony. In the event portions remain in dispute, the parties are encouraged to bring such excerpts to the court's attention for a ruling.

Sherry Ford Deposition Exhibits

The court had been under the impression that the agreed order of October 20, 2011 resolved most if not all the issues concerning the deposition exhibits, but to the extent that it does not, or that there is lingering confusion between the parties as to what they agreed upon, the court finds and orders as follows:

As stated in *Culinary Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297 (1993), the issues of discovery and protection are two different things. Protective orders only relate to documents which must be produced. If a document is in fact privileged, the document is not subject to discovery and therefore need not be protected by a protective order.

A privilege is forever destroyed by the production of the privileged information. *Novak v. Rathnam*, 106 Ill. 2d 478, 484, 478 N.E.2d 1334, 1337 (Ill. 1985) "If there is a disclosure of confidential information by the individual for whose benefit the privilege exists, or if he permits such a disclosure, the privilege is waived and cannot be reasserted." The disclosure of a privileged document to a party in litigation is a waiver of that privilege. A privilege, which excuses disclosure to anyone in the litigation, should not be confused with materials subject to the protective order, which merely protects a party from competitive harm by the *public disclosure* of competitively sensitive documents. The protective order entered in this case was

negotiated by the parties to protect only trade secret documents, not documents which can readily be dealt with through other discovery means including privilege logs and *in camera* review.

The protocol for any party, who reasonably and in good faith believes documents are subject to any privilege, is to withhold such documents and list them on a privilege log. A party who inadvertently discloses privileged material does not waive an otherwise valid claim of protection if "such claim is asserted within thirty (30) days of the discovery of the inadvertent failure." The court is unaware of any attempt by Syngenta to "claw back" the Sherry Ford documents as having been mistakenly produced.

Therefore, each exhibit will be addressed with regard to Syngenta's claim that such document discloses a Trade Secret as contemplated by the protective order, and as such, cannot be used beyond the restrictions as outlined in that order.

Exhibit 7 – Jayne Thompson & Associates Documents

These documents all bear the "Confidential Information – Subject to Protective Order in Atrazine Litigation" label. Syngenta asserts that this information is Trade Secret material. A review of the exhibit contents, however, discloses that it does not consist of information contemplated by the Illinois Trade Secret Act, such as technical or non-technical data, a formula, pattern, compilation, program, device, method, technique, drawing, process, financial data, or list of actual or potential customers or suppliers, or is material from which a competitor could derive economic value. Rather it is public relations material, strategies and other efforts aimed at shaping public opinion and influencing people about the safety of atrazine and the perceived consequences of this lawsuit.

It largely consists of public relations efforts aimed at the general public, farmers, environmentalists, the media, the EPA and potential parties to this suit, among others. These are communications that strategize about the effects of this litigation on these people or entities, and do not disclose a secret formula, process or data that would put Syngenta in a competitively disadvantageous position with its competitors as defined by our state legislature as a trade secret. Syngenta has not sustained its burden that this type of material is a trade secret.

Exhibit 8 – Heartland Institute Documents

These documents will be subject to a separate order.

Exhibit 9 – Achieva Document

This document is an invoice for services rendered by Achieva, a company that offers communications or public relations strategies to corporations. Their material involves the monitoring of public discussion of atrazine and public relations tactics in response to criticisms of atrazine products. The Defendant has not sustained its burden that this document or any other Achieva document is Trade Secret material, much like the material in exhibit 7.

Exhibit 10 – Alex Avery/Hudson Institute Documents

These documents likewise do not fit within the definition of "Trade Secrets" as defined in the protective order or under Illinois law. Though these documents disclose financial data, it is a list of individuals and entities that have received money from Syngenta for a variety of services

rendered that do not comprise technical or non-technical data, a formula, pattern, compilation, program, device, method, technique, drawing, process, financial data, or list of actual or potential customers or suppliers of the company as contemplated by the "Illinois Trade Secret Act." It does not appear to be a customer or supplier list and does not disclose what these people or entities did in return for these payments.

Exhibit 11 – v-Fluence Documents

Per their website, v-Fluence "is a public affairs, issues management and marketing support firm that helps our clients take advantage of the Internet and manage online risks." Syngenta has not met its burden that this material falls within the trade secret definitions.

Exhibit 12 – Gibbs & Soell Document

This document details an effort to establish a "Community Water System" focus group and identify from that group effective strategies to get community water systems to opt out of the class, or discourage any desire to opt in, and to otherwise educate them about atrazine and this lawsuit. The court does not deem this trade secret information either.

Exhibit 13 – White House Writers Group Documents

Syngenta has failed to meet its burden establishing these materials as trade secret material. This material is akin to the media relations and lobbying efforts that the Defendant apparently deemed necessary in light of this lawsuit and/or concerns raised about the safety of its product.

Exhibit 14 – Steve Milloy Documents

Syngenta has not met its burden that this material falls within the trade secret definitions.

Exhibits 15 – 20

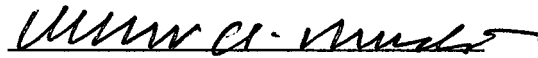
These exhibits were not specifically addressed in Syngenta's response to Plaintiff's motion for a protective order regarding Sherry Ford-related documents. The court will reserve ruling on these documents until the parties clarify if the designations are still in dispute.

WHEREFORE, for the foregoing reasons, the deposition exhibits addressed herein are not confidential trade secrets pursuant to the protective order. In the event exhibits not addressed herein remain in dispute, the parties are encouraged to bring them to the court's attention for a ruling.

Clerk to send copies of this order to the parties of record.

Entered:

MAR 08 2012


William A. Mudge, Presiding Judge