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

CITY OF GREENVILLE, ILLINOIS, et al. Plaintiffs, v. SYNGENTA CROP PROTECTION, LLC, and SYNGENTA AG, Defendants.	)	Case No. 3:10-cv-188-JPG

DEFENDANTS' MOTION FOR ENTRY OF A PROTECTIVE ORDER

On December 15, 2011, Plaintiffs served discovery requests on Syngenta AG that far exceed the scope of permissible discovery, and would require Syngenta AG to violate Swiss law, exposing its officers and directors to criminal penalties and/or civil sanctions. In addition, Plaintiffs have requested the depositions of 14 witnesses who are not officers or directors of either Syngenta AG or Syngenta Crop Protection, LLC. Syngenta AG request that the Court enter a protective order pursuant to Federal Rule of Civil Procedure 26(c)(1) to prevent Plaintiffs from harassing Syngenta AG with overbroad and burdensome discovery requests having no reasonable connection to the manufacture or sale of atrazine in the United States. In addition, Syngenta AG requests that the Court enter a protective order to prevent Plaintiffs from seeking discovery that would require Syngenta AG to violate Swiss law. Finally, Defendants request that the Court enter a protective order to prevent Plaintiffs from issuing Notices of Deposition for witnesses who are not officers or employees of Syngenta Crop Protection, LLC or Syngenta AG.

I. FACTUAL BACKGROUND

On March 8, 2010, Plaintiffs filed this products liability putative class action against Defendants Syngenta Crop Protection, LLC, a U.S.-based manufacturer of atrazine, and Syngenta AG, a Swiss holding company. Plaintiffs allege in their complaint (which they

amended on March 24, 2010 and September 14, 2011) that Defendants are responsible for the costs Plaintiffs incur to filter atrazine (and other contaminants) from their raw water sources in six states (Illinois, Indiana, Iowa, Kansas, Missouri, and Ohio).

On May 18, 2010, Syngenta AG filed a motion to dismiss for lack of personal jurisdiction. In response to Syngenta AG's motion to dismiss, Plaintiffs were granted leave to conduct limited jurisdictional discovery. After serving discovery requests that far exceeded the limited leave granted to Plaintiffs, and would have required Syngenta AG to violate Swiss law, this Court granted, in part, Defendants motion for protective order, limiting Plaintiffs' pursuit of discovery to Syngenta Crop Protection, LLC, and non-party Syngenta AG subsidiaries in the United States. (Doc. Nos. 77-78.)

On November 23, 2011 this Court entered an order denying Syngenta AG's motion to dismiss for lack of personal jurisdiction. (Doc. No. 255.) On December 15, 2011, Plaintiffs served document requests on Syngenta AG seeking, among other things, all agendas and minutes of the Syngenta Executive Committee, the Syngenta AG Board of Directors, and six other non-party boards, committees or teams. (Attached as Exhibit A.) As set forth in detail below, it is the unwarranted breadth of these requests, not merely that Plaintiffs seek information from entities beyond Syngenta AG and Syngenta Crop Protection, LLC, to which Syngenta AG objects. In addition, on December 16, 2011, Plaintiffs requested the depositions of 14 witnesses. (Dec. 16, 2011 Letter, attached as Exhibit B.) None of the requested witnesses are employees or officers of Syngenta Crop Protection, LLC or Syngenta AG.

On February 10, 2012, the parties conferred regarding Plaintiffs' document requests. In addition, throughout the course of this litigation, including in response to Plaintiffs' December 15, 2011 requests for production, counsel for Syngenta AG offered to cooperate with Plaintiffs'

counsel to seek production of the requested documents through the procedures set forth in the 1970 Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters ("Hague Convention"). Plaintiffs have refused to narrow their requests or participate in any efforts to seek discovery under the Hague Convention. In a letter dated January 17, 2012, Counsel for Syngenta AG also informed Plaintiffs' counsel that Defendants would not voluntarily produce non-employee witnesses for their depositions. (Jan. 17, 2012 Letter, attached as Exhibit C.)

The parties are unable to reach agreement regarding: (1) the scope of Plaintiffs' document requests; (2) whether the document requests must be issued in accordance with Swiss law and the Hague Convention; and (3) whether Defendants are required to produce non-employees for depositions. For these reasons, Syngenta AG is compelled to seek intervention from the Court and request that the Court enter a protective order.[1]

II. ARGUMENT

This Court has broad discretion to regulate discovery between the parties. *See, e.g., In re Yasmin*, 2011 U.S. Dist. LEXIS 96263 (S.D. Ill. Aug. 18, 2011) (citing cases). Under Federal Rule of Civil Procedure 26(c)(1), the Court "may, for good cause shown, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters." Fed. R. Civ. Proc. 26(c)(1)(D). A protective order limiting the scope of discovery should be entered here because Plaintiffs are seeking documents that far exceed the scope of permissible discovery, the production of the requested documents

[1] In accordance with the requirements of Federal Rule of Civil Procedure 26(c)(1), Defendants have attached a certification stating that they have conferred in good faith with Plaintiffs to resolve the dispute without court intervention.

would violate Swiss law, and the parties cannot be compelled to produce non-employees for depositions.

A. Plaintiffs' Discovery Requests are Overly Broad and Unduly Burdensome

The Supreme Court has admonished trial courts to give special attention to the burden traditional discovery methods can impose upon foreign litigants, and instructed that "American courts….should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position." *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 546 (1987). "Objections to 'abusive' discovery that foreign litigants advance should therefore receive the most careful consideration." *Id.* Indeed, this Court is already cognizant of these considerations, and has warned Plaintiffs regarding the breadth of their discovery requests. (Doc. 82 at 23 ("I don't think the Swiss are too likely to declare war over this. But, you know, my biggest concern is always in these things is the economy of it."); 11/22/11 Trans. at 22, attached as Exhibit D ("Because a lot of your - - I mean, a lot of your requests, the plaintiffs' request are exceptionally broad.")). Despite these instructions and admonitions, Plaintiffs have served document requests on Syngenta AG that extend well beyond the dangerous, unnecessary and unduly burdensome threshold the Supreme Court warns courts to protect foreign litigants against.

Plaintiffs are suing Defendants for the costs of removing atrazine from the water supply of municipal water districts in six states. Plaintiffs document requests, however, are not limited or otherwise tailored to the issues in this case. Most notably, Plaintiffs request all agendas and minutes of the Syngenta Executive Committee, the Syngenta AG Board of Directors, and six non-party boards, committees or teams, without any limitation whatsoever in time or, more importantly, to whether any issues related to the manufacture or sale of atrazine in the United

States were even discussed.[2] (*See* Ex. A, Requests 1-3, 10.) In addition, Plaintiffs seek corporate organizational records not only from Syngenta AG, but also non-party affiliates Syngenta International AG, Syngenta Crop Protection AG, Seeds J.V. CV, and Syngenta Ltd. (*See* Ex. A, Requests 4-7, 14.) Finally, Plaintiffs seek documents with no obvious or explained connection to the manufacture or sale of atrazine in the United States, including: human resources regulations and policies; disclosure, reputational management and global media relations policies; and an otherwise unidentified "White Book" and "White Paper." (*See* Ex. A, Requests 8-9, 11-13.)

In addition to their breadth, several of Plaintiffs' requests are duplicative of requests served on Syngenta Crop Protection, LLC, for which responsive documents have already been produced. For example, Plaintiffs have received thousands of pages of meeting minutes from the Crop Protection Leadership Team, Syngenta Development Committee, and Crop Protection Marketing Leadership Team, as well as documents related to human resources regulations and policies. (*See* Discovery Correspondence from Syngenta Counsel to Plaintiffs' Counsel dated Nov. 3, 2010, Nov. 4, 2010, Nov. 5, 2010, Nov. 19, 2010, and Nov. 30, 2010, attached as Exhibit E.)

Plaintiffs have refused to limit these requests or explain how they are relevant to any issues in this case. Syngenta AG therefore asks the Court to enter a protective order prohibiting Plaintiffs from seeking unnecessary, duplicative and unduly burdensome discovery from Syngenta AG, and requiring Plaintiffs to withdraw these document requests.

[2] These non-party boards, committees and teams include the Syngenta Crop Protection AG Board of Directors, the Syngenta Crop Protection Leadership Team, the Syngenta Development Committee, the Crop Protection Marketing Leadership Team, the Crop Protection Marketing Management Team, and Global Sales and Operations Planning.

B. Swiss Law Prohibits the Production of the Requested Materials

As detailed in Defendants' Motion for Entry of a Protective Order Regarding Jurisdictional Discovery, Syngenta AG's officers and directors could be subject to criminal penalties and/or civil sanctions under Swiss law if they produce discovery in this matter without prior authorization from Swiss authorities. (Doc. No. 69.)

Under Article 271 of the Swiss Penal Code, "[w]hoever, without being authorized, performs acts for a foreign state on Swiss territory that are reserved to an authority or an official…" or "whoever aids and abets such acts, shall be punished with imprisonment for up to three years. (*See* Declaration of Dr. Georg Naegeli at ¶ 5, attached as Exhibit F; Supplemental Declaration of Dr. Georg Naegeli at ¶¶ 4-5, attached as Exhibit G.)[3] Article 271 seeks to prevent foreign countries from circumventing international conventions on judicial assistance that are designed to facilitate the collection and production of evidence located in foreign countries, including the Hague Convention. (Ex. F, Naegeli Decl. at ¶¶ 2-6.) In addition, Article 273 of the Swiss Penal Code bars the production of a "manufacturing or business secret" that has some type of connection to Switzerland, including, for example the domicile of the subject business in Switzerland. (Ex. F, Naegeli Decl. at ¶¶ 7-9; Ex. G, Naegeli Supp. Decl. at ¶ 6.) Non-compliance with Articles 271 and 273 of the Swiss Penal Code, which includes producing documents located in Switzerland outside the prescribed procedures set forth under Swiss law,

[3] Dr. Naegeli's July 9, 2010 Declaration was initially submitted in support of Defendants' Motion for Entry of a Protective Order Regarding Jurisdictional Discovery. (Doc. No. 69.) The issues here are identical, and indeed many of Plaintiffs' requests are duplicates of, or seek similar information as, the requests for production served on Syngenta AG during jurisdictional discovery. (*See e.g.*, Requests for Production to Defendant Syngenta AG on the Issue of Personal Jurisdiction Nos. 3, 4, 5, 15, attached hereto as Exhibits H and I.) Accordingly, Dr. Naegeli's July 9, 2010 Declaration is equally applicable.

would expose Syngenta AG's directors and officers to the risk of criminal prosecution. (Ex. F, Naegeli Decl. at ¶¶ 6, 10; Ex. G, Naegeli Supp. Decl. at ¶¶ 4, 7-8.)[4]

Finally, the Swiss Federal Act on Data Protection ("FADP") provides for the protection of "personal data," which includes "all information relating to an identified person or identifiable persons." (*See* FADP, attached as Exhibit J; Ex. G, Naegeli Supp. Decl. at ¶ 10.) Under the FADP, "personal data" may not be transferred abroad in the absence of sufficient data protection laws. A party is subject to civil liability for the loss incurred if "personal data" is disclosed without justification under the FADP. (*See* Ex. J, FADP Art. 15; Ex. G, Naegeli Supp. Decl. at ¶ 12.) Furthermore, an unjustified and intentional disclosure of such information may expose a party to criminal prosecution under this Swiss law. (*See* Ex. J, FADP Art. 35; Ex. G, Naegeli Supp. Decl. at ¶ 12.)

The FADP also provides that personal data must not be disclosed abroad if the privacy of the persons concerned is seriously put at risk. (Ex. G, Naegeli Supp. Decl. at ¶ 11.) Such risk is presumed by virtue of law if the country of the destination lacks comparable data protection. (*Id.*) The United States is deemed by Switzerland to have an insufficient level of data protection. (*Id.*) Accordingly, Swiss authorities only accept a sufficient level of data protection where a U.S. data processor has undertaken to comply with the principles of the "U.S.-Swiss Safe Harbor Framework," and have been certified by the U.S. Department of Commerce. (*See* Commissioner's note on "Transborder data transfers briefly explained,", attached as Exhibit K; Ex. G, Naegeli Supp. Decl. at ¶ 11.)

[4] Articles 271 and 273 of the Swiss Penal Code are rigorously enforced by the Attorney General of Switzerland, and exemptions are not granted when, as here, the foreign state can submit a Letter of Request under the 1970 Hague Convention. (Ex. G, Naegeli Supp. Decl. at ¶ 9.)

In the absence of a certified recipient, personal data may be disclosed to U.S. entities only if one of the grounds of justification listed in FADP Art. 6(2)(a)-(g) applies, which is not the case here. In particular, no overriding public interest justifies the data export because the data can be obtained through the judicial assistance procedures set forth in the 1970 Hague Convention. (*See* Ex. G, Naegeli Supp. Decl. at ¶ 13.) In the absence of a justifying ground, the export of personal data to the United States for use in this proceeding would be a breach of privacy rights and a violation of the FADP, exposing Syngenta AG's officers and directors to civil and/or criminal liability. (Ex. G, Naegeli Supp. Decl. at ¶ 12.)

It is likely that the employee lists and organizational charts requested by Plaintiffs would contain the "personal data" of employees of Syngenta AG's Swiss-domiciled subsidiaries Syngenta Crop Protection AG and Syngenta International AG. (*See* Ex. A, Request 14.) In addition, it is possible that the agendas and meeting minutes of the eight boards, committees and teams that Plaintiffs have requested contain the "personal data" of employees of Syngenta AG's subsidiaries (*See* Ex. A, Requests 1-3, 10.) The FADP does not apply, however, to materials that are produced pursuant to the judicial assistance provisions of the Hague Convention. (*See* Ex. J, FADP Art. 2(2)(c); Ex. G, Naegeli Supp. Decl. at ¶ 13.)

Based on the foregoing, Syngenta AG cannot comply with Plaintiffs' requests for production of documents located in Switzerland based on Articles 271 and 273 of the Swiss Penal Code, and the Swiss Federal Act on Data Protection.[5] Defendants have informed Plaintiffs of the reasons it cannot provide documents located in Switzerland, and Defendants have on

[5] Plaintiffs have also requested an "employee list and organizational chart" from Syngetna Ltd., a U.K. entity. (Req. 14.) The U.K. has enacted the Data Protection Act of 1998 which, like the FADP, prevents the transfer of personal data outside of the European economic area where there is not adequate protection for such data. The United States is not deemed to provide adequate protection. Accordingly Syngenta Limited cannot produce the requested employee list and organizational chart without running afoul of the U.K.'s Data Protection Act.

numerous occasions offered to work with Plaintiffs to produce documents pursuant to the procedures outlined in the Hague Convention. Plaintiffs have ignored or rejected each of these offers.

C. Plaintiffs Cannot Satisfy the Requirements Necessary to Overcome Swiss Law Prohibiting the Production of Documents

Where, as here, two nations have jurisdiction to prescribe and enforce rules of law, the Supreme Court has held that issues related to compelling discovery from a foreign nation are to be determined on a case by case basis, in which "the exact line between reasonableness and unreasonableness in each case must be drawn by the trial court, based on its knowledge of the case and all of the claims and interests of the parties and the governments whose statutes and policies they invoke." *Societe Nationale*, 482 U.S. at 546.

When, as demonstrated above, the requested discovery conflicts with the law of the foreign party's domicile, the Supreme Court and the Seventh Circuit have adopted a multi-factor balancing test that courts must employ when determining whether to order discovery despite a foreign law impediment. *See Societe Nationale*, 482 U.S. at 544 n. 28; *Reinsurance Co. of Am., Inc. v. Adminstratia Asigurarilor de Stat*, 902 F.2d 1275, 1280 (7th Cir. 1990). The factors identified by the Supreme Court and Seventh Circuit are derived from the Restatement of Foreign Relations Law, and include: (1) the importance to the litigation of the information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interest of the United States or compliance with the request would undermine important interests of the country where the information is located." *Societe Nationale*, 482 U.S. at 544 (citing *Restatement of Foreign Relations Law of the United States (Revised)* § 437(1)(c) (tent. dft.1986), now § 442 of

Restatement (Third)); *Reinsurance Co.*, 902 F.2d at 1281-82 (citing *Restatement (Third) of Foreign Relations Law of the United States* § 442(1)(c) (1987)).

With respect to the first and second requirements, it is not apparent and Plaintiffs have not explained what importance their requests have to the litigation. Rather, these requests are unlimited in time and scope, and without any connection to the manufacture and sale of atrazine in the United States. Plaintiffs also fail to satisfy the third requirement because the requested information did not originate in the United States. Indeed, with respect to Plaintiffs' non-duplicative requests, had the information originated from the United States, Plaintiffs would have sought production of this information from Syngenta entities located in the United States pursuant to Rules 34 and 45 of the Federal Rules of Civil Procedure, as this Court previously instructed them to do. (*See* Doc. Nos. 77-78.) With respect to the fourth requirement, as detailed above, alternative means of securing the requested information are available because, at a minimum Syngenta Crop Protection, LLC, has already produced over 5 million pages of documents related to the manufacture and sale of atrazine in the United States. Finally, Plaintiffs cannot identify any interest of the United States that would be undermined by noncompliance with these requests. On the contrary, Switzerland's expressed interests in the preservation of the integrity of its laws, its sovereign independence, and the individual autonomy and economic privacy of its citizens would be significantly undermined if Syngenta AG were ordered to violate the laws of its home country. (*See* Ex. F, Naegeli Decl. at ¶ 2.)

Recently, Chief Judge Herndon, addressed similar issues in *In re Yasmin*, when he denied plaintiffs' request for foreign discovery, despite the likelihood of obtaining relevant information, on the grounds that, *inter alia*, compelling the discovery would violate Dutch law. 2011 U.S. Dist. LEXIS 96263, at *14-15 ("balancing the value of the information sought and the burden of

producing it, as well as the comity implications, the Court will not require the production of [the requested discovery]."); *see also Reinsurance Co.*, 902 F.2d at 1283 (affirmed the denial of plaintiff's motion to compel discovery responses when responding would have required the defendant to violate Romanian criminal secrecy laws).

The document requests served on Syngenta AG fail to satisfy the factors this Court must consider before ordering discovery in the face of the Swiss laws prohibiting production. Accordingly, Syngenta AG requests that the Court enter a protective order requiring Plaintiffs' to withdraw these document requests.[6]

D. Plaintiffs Cannot Compel the Depositions Non-Employee Witnesses

Plaintiffs seek to depose witnesses who are not employees or officers of either Syngenta Crop Protection, LLC or Syngenta AG. The Southern District of Illinois and several other courts have held that a party has no obligation to produce as fact witnesses for depositions individuals who are employees of its non-party subsidiaries. *See In re Yasmin*, 2011 U.S. Dist. LEXIS 96263, at *5 (S.D. Ill. Aug. 18, 2011) ("With regard to depositions of non-employees, the Court is not aware of any authority supporting the contention that a corporate defendant can be compelled to produce a non-employee for a deposition.") (citing *In re Ski Train Fire*, 2006 U.S. Dist. LEXIS 29987, at * 27 (S.D.N.Y. May 16, 2006) ("There is simply no authority for the proposition that a corporate party must produce for deposition fact witnesses who are not employed by, and do not speak for, that party.")).

[6] Despite Plaintiffs' repeated refusals to cooperate, Syngenta AG is preparing a Motion for a Letter of Request, and Letter of Request under the procedures set forth in the Hague Convention seeking authorization from the relevant Swiss authority to produce relevant responsive documents without running afoul of Swiss law. To the extent these efforts are unsuccessful, and in accordance with the Court's prior orders regarding Defendants' inability to produce documents requested by Plaintiffs, Defendants will not use Syngenta AG's documents or the information contained therein for any pretrial or trial purpose. (*See, e.g.*, Doc. No. 105.)

Drawing a distinction between the obligation to produce documents under a party's control, pursuant to Fed. R. Civ. P. 34, these courts have held that "Rule 30…does not require a party to litigation to produce persons for deposition who are merely alleged to be in the party's control. Rather a party or any other person can be noticed for deposition and subpoenaed if necessary." *In re Ski Train Fire*, 2006 U.S. Dist. LEXIS 29987, at *26 (denying motion seeking the deposition of an employee of Siemens A.G.'s non-party subsidiary, Siemens Austria); *see also In re Yasmin*, 2011 U.S. Dist. LEXIS 96263, at *5 ("ordering an entity to produce a non-employee seems particularly problematic when the witness is not a U.S. citizen and is employed by a foreign entity that does not manufacture or sell its products in the United States."); *Ethypharm S.A. France v. Abbot Lab.*, 271 F.R.D. 82, 88-92 (D. Del. 2010) (denying motion to compel the deposition of an employee of the defendant's foreign subsidiary); *Newmarkets Partners, LLC v. Oppenheim*, 2009 U.S. Dist. LEXIS 43435, at *3-4 (S.D.N.Y May 22, 2009) (denying plaintiffs' motion to compel the deposition of an officer of the defendant's non-party corporate affiliate); *Honda Lease Trust v. Middlesex Mut. Assurance*, Co., 2008 U.S. Dist. LEXIS 60766, at *8 (D. Conn. Aug. 7, 2008) (holding that plaintiff "has no obligation to produce employees of its related companies for deposition.").

Accordingly, because none of the proposed deponents are officers or employees of Syngenta Crop Protection, LLC or Syngenta AG, Defendants request that the Court enter a protective order prohibiting Plaintiffs from issuing Notices of Deposition for witnesses who are not officers or employees of Syngenta Crop Protection, LLC or Syngenta AG.

III. CONCLUSION

For the reasons set forth above, Defendants Syngenta AG and Syngenta Crop Protection, LLC, respectfully request that the Court enter a protective order under Federal Rule of Civil Procedure 26(c)(1), prohibiting Plaintiffs from seeking duplicative and unduly burdensome

discovery from Syngenta AG that requires Syngenta AG to violate Swiss and/or U.K. law, and prohibiting Plaintiffs from issuing Notices of Deposition for witnesses who are not officers or employees of Syngenta Crop Protection, LLC or Syngenta AG.

Dated: February 10, 2012

Respectfully submitted,

s/ *Peter M. Schutzel*
By One of Its Attorneys

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RULE 26(C)(1) CERTIFICATION

I, Peter M. Schutzel, certify pursuant to Rule 26(c)(1) of the Federal Rules of Civil Procedure that I have in good faith conferred with Plaintiffs' counsel. My attempts to reach an accord as to the issues addressed by this Motion were unsuccessful.

s/ *Peter M. Schutzel*

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

CITY OF GREENVILLE, ILLINOIS, *et al.*,	)	
	)	
Plaintiffs,	)	Case No. 10-188-JPG-PMF
	)	
v.	)	The Honorable J. Phil Gilbert
	)	
SYNGENTA CROP PROTECTION, INC., and SYNGENTA AG,	)	
	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2012, I electronically filed the foregoing Defendants' Motion for Protective Order with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorneys of record.

Dated: February 10, 2012

s/ *Peter M. Schutzel*

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