

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT OF ILLINOIS
MADISON COUNTY

FILED

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CLERK OF CIRCUIT COURT #68
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

HOLIDAY SHORES SANITARY DISTRICT,)
et al., Individually and on behalf of all others)
similarly situated,)

Plaintiffs,)

v.)

SYNGENTA CROP PROTECTION LLC., et al)

Defendants.)

Case No. 2004-L-000710

**DEFENDANT SYNGENTA CROP PROTECTION, LLC'S RESPONSE TO
PLAINTIFFS' MOTION FOR SANCTIONS REGARDING DOCUMENTS IN
POSSESSION OF SYNGENTA CROP PROTECTION, LLC'S
FOREIGN PARENT AND AFFILIATE COMPANIES**

COMES NOW Defendant Syngenta Crop Protection, LLC ("SCP, LLC"), by and through its attorneys, and for its Response to Plaintiffs' Motion for Sanctions (the sixth such Motion brought by Plaintiffs' in this case to date) Regarding Documents in Possession of SCP, LLC's Foreign Parent and Affiliate Companies, states as follows:

BACKGROUND

Plaintiffs' Discovery Requests as to Swiss Documents

On or about May 26, 2009, Plaintiffs served on SCP, LLC its First Requests for Production and First Interrogatories directed to SCP, LLC. On June 18, 2009, SCP, LLC filed its Motion for Protective Order seeking, in part, to limit various aspects of Plaintiffs' broad discovery requests to activities that occurred within and issues relating to the State of Illinois. See Motion for Protective Order, attached as Exhibit A. Notwithstanding its Motion for Protective Order, SCP, LLC served its objections to Plaintiffs' discovery requests on June 26,

2009, including an objection to any request related to discovery of documents from entities “located in or organized or existing under the laws of the nation of Switzerland.” *See* SCP, LLC’s Objections to Plaintiffs’ First Requests for Production, attached as Exhibit B.

At the hearing on its Motion for Protective Order on August 31, 2009, SCP, LLC’s counsel Kurtis B. Reeg made clear to Plaintiffs and the Court that “[i]f [Plaintiffs’ counsel] wants to try to take discovery [in Switzerland] and it is an issue, we’ll deal with that when it comes up.” Mr. Reeg further assured the Court and Plaintiffs that

“I can also tell you that to the extent—and I have told counsel this—to the extent that we have in our possession any documents from any of our affiliated companies subject to privilege, they’ll get them. So if my client does have documents from Switzerland and in our possession, yes, they get them.”

See Transcript of August 31, 2009 Hearing at p. 66, attached as Exhibit C. At this same hearing, Plaintiffs expressed their concern that SCP, LLC and its ultimate parent corporation maintained a type of central database whereby “all [SCP, LLC employees] need to do is go over here on this side of the keyboard and hit that key and out pops a whole bunch of stuff that is located physically, the papers, in Switzerland.” *See* Transcript of August 31, 2009 Hearing at p. 57, attached as Exhibit D.

Subsequently, on October 26, 2009, the Court entered an order granting in part and denying in part SCP, LLC’s Motion for Protective Order. *See* Order dated October 26, 2009, attached as Exhibit E. However, upon Plaintiffs’ counsel’s request, the Court later agreed to clarify its Order as to “what information a subsidiary corporation such as [SCP, LLC] may be asked to produce **from the parent corporation** which is overseas.” *See* Court’s Order dated November 24, 2009, attached as Exhibit F (emphasis added). After considering case law regarding the extent to which a subsidiary company must produce documents possessed by its

ultimate parent company, the Court stated that a “party who has the ability to obtain documents is expected to disclose them regardless of whether the party has actual physical possession.”

On April 14, 2010, Mr. Reeg informed Mr. Tillery that by mid-June of that year the Swiss documents at issue “will be collected, at which time counsel will make an initial assessment of said documents **and assist in addressing any required follow-up**”. See Mr. Reeg’s letter to Mr. Tillery dated April 14, 2010, attached as Exhibit G (emphasis added). Mr. Reeg further stated that once these documents were collected, they would be reviewed for **possible production** following counsel’s visit to the ultimate parent corporation Syngenta AG’s facility in Basel, Switzerland.

Upon SCP, LLC’s counsel’s return from the Swiss site visit, SCP, LLC’s counsel Michael A. Pope sent a letter to Plaintiffs’ counsel Christie Deaton regarding various discovery issues pertaining to the parallel litigation pending in the United States District Court for the Southern District of Illinois, *City of Greenville, Illinois, et al., v. Syngenta Crop Protection, LLC, et al.*, Cause no. 3:10-cv-00188-JPG-PMF (“*Greenville*”). See Mr. Pope’s letter to Ms. Deaton dated July 14, 2010, attached as Exhibit H. In this letter, Mr. Pope again addressed the Swiss document issue and advised Ms. Deaton that “Swiss law contains criminal penalties for anyone who provides documents without following the proper procedures,” but assured her that SCP, LLC would “work with [her] to invoke the proper procedure” to facilitate the production of such documents. Based on these considerations, SCP, LLC moved for a Protective Order in the *Greenville* litigation to prevent the plaintiff water providers in that case from seeking discovery of documents located in Switzerland. See Defendants’ Motion for Entry of a Protective Order and Memorandum in Support in *Greenville* litigation, attached as Exhibit I. The court in that case consequently sustained SCP, LLC’s Motion by ordering Plaintiffs to restrict their discovery

requests to documents in the possession of SCP, LLC, and permitting Plaintiffs to direct subpoenas to SCP, LLC's U.S. based affiliates. *See* Order in *Greenville* litigation dated July 27, 2010, attached as Exhibit J.

SCP, LLC's counsel subsequently sent Plaintiffs' counsel Stephen M. Tillery a letter on October 19, 2010, further explaining that:

“[u]nder the Madison County Court's Order, Swiss law, and upon advice of Swiss counsel, [SCP, LLC] does not have the ability to legally obtain or take physical possession of the documents it identified because the release to [SCP, LLC] of such documents by a Swiss-based company could subject it and others involved to criminal penalties and other civil sanctions.”

See Mr. Reeg's letter to Mr. Tillery dated October 19, 2010, attached as Exhibit K. Mr. Reeg's letter directed Plaintiffs to three specific Swiss laws that prevented the disclosure of Swiss documents: (1) Article 271 of the Swiss Penal Code (“SPC”); (2) Article 273 of the SPC; and (3) the Federal Act on Data Protection (“FADP”), and its accompanying Ordinance to the Federal Act on Data Protection (“OFADP”). He further stated that SCP, LLC is “willing to work together with [Plaintiffs] to move the process along,” including enlisting the assistance of Swiss counsel and drafting an order to present to a Swiss court to obtain permission to produce relevant, responsive documents located in Switzerland.

At a February 23, 2011, hearing, Plaintiffs again represented that all employees of SCP, LLC and its ultimate parent corporation “work off of a central extranet that controls documents worldwide...all they have to do is go in and hit a button and download them from anywhere here.” *See* Transcript from February 23, 2011 Hearing at p. 44 – 45, 58, attached as Exhibit L. Plaintiffs also represented that the Swiss documents are “all on a massive database that they all have access to, and they can just load that stuff off the database.” Without pointing to any evidence in support of such claim, Plaintiffs postulated that they would be unable to obtain

documents based in Switzerland because (1) “it takes forever” and (2) the “Swiss courts and the Swiss’ whole system is openly hostile to civil litigation outside Switzerland.”

On March 21, 2011, SCP, LLC filed with this Court a Supplemental Response to Plaintiffs’ Renewed Motion to Compel (“Supplemental Response”). *See* Supplemental Response to Motion to Compel filed March 21, 2011, attached as Exhibit M. In this Supplemental Response, SCP, LLC again identified for Plaintiffs these three provisions of Swiss law and further detailed how the same prevented SCP, LLC from producing various documents housed in Switzerland. To date, Plaintiffs have flatly refused to even address, much less argue any inapplicability of various Swiss laws to their discovery requests in this litigation. Instead, on March 29, 2011, consistent with their line drawn in the sand, Plaintiffs filed a Motion for Sanctions Regarding Documents in Possession of SCP, LLC’s Foreign Parent and Affiliate Companies.

Swiss Law Applicable to Plaintiffs’ Requests

As explained in SCP, LLC’s Supplemental Response, Article 271(1) of the SPC provides that “[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* Article 271 of SPC, attached as Exhibit N. Article 271(1) strives 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 1970 Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters (“1970 Hague Convention”). Although at present production of Swiss documents would constitute a violation of Article 271(1), Plaintiffs nevertheless remain free to utilize the provisions of the 1970 Hague Convention to obtain the

judicial assistance necessary to obtain such documents. They have simply failed to utilize this well-known international procedural mechanism which is open to them.

Article 273 of the Swiss Penal Code also bars SCP, LLC's production of information and documents located in Switzerland. It provides that:

“[w]hoever seeks out a manufacturing or business secret in order to make it accessible to a foreign official agency, a foreign organization, a private enterprise, or their agents,

whoever makes a manufacturing or business secret accessible to a foreign official agency, a foreign organization, a private enterprise, or their agents,

shall be punished with imprisonment for up to three years or a monetary penalty...”

See Article 273 of SPC, attached as Exhibit O. This provision of Swiss law bars one from either seeking out or making available a “manufacturing or business secret” that has some type of connection to Switzerland, including, for example, the domicile of the subject business in Switzerland. However, the collection and disclosure of such secrets would not violate this provision of the Swiss Penal Code if a competent Swiss authority orders disclosure.

As SCP, LLC has pointed out on numerous occasions, Plaintiffs could apply to this Madison County Circuit Court for an order directed to the Swiss authorities to request international judicial assistance from the competent Swiss authority to authorize the release of the requested information and documents. SCP LLC, and its counsel, have offered to assist Plaintiffs in the preparation of the Order this Court would need to enter, and has further agreed to assist Plaintiffs in presenting said Order to the appropriate Swiss authorities to be entered. *See* Mr. Reeg's letter to Mr. Tillery dated October 19, 2010, attached as Exhibit K. Plaintiffs have never engaged in these procedures, nor have they taken up SCP, LLC's offer of assistance to secure the same.

Finally, the Swiss FADP provides for the protection of “personal data,” which includes “all information relating to an identified person or identifiable persons.” *See* FADP and OFADP, attached as Exhibit P. Under the FADP, “personal data” typically may not be transferred abroad in the absence of sufficient data protection laws. A party is subject to civil, and in some cases criminal, liability for the losses incurred if “personal data” is disclosed without justification under the FADP. SCP, LLC is presently without justification to disclose such “personal data” under the FADP without incurring civil and/or criminal liability.

Access to Documents on SharePoint System

SCP, LLC and its ultimate parent corporation, along with foreign affiliates, maintain a worldwide file sharing system designed to facilitate and enhance collaboration among employees of various entities *on a project-by-project basis only*. *See* Plaintiffs’ Exhibit 28 at p. 60, ln. 11 – p. 61, ln. 1; *see also* Plaintiffs Exhibit 29 at pp. 94 – 97 – CONFIDENTIAL AND FILED UNDER SEAL BY PLAINTIFFS. Employees have access to a “SharePoint” system based on the particular project on which that employee is working or the “team” to which that employee is currently assigned. Certain Syngenta affiliated companies have created and currently maintain numerous individual “SharePoints” that house various documents and information to which limited segments of SCP, LLC employees have access and/or control based on their project or team assignment.

SCP, LLC has produced and is continually producing on a rolling monthly basis each document that the custodians identified in Mr. Reeg’s two previously filed affidavits have collected and obtained via SharePoint. These documents and information include those originating and maintained in the United States, as well as those originating and maintained abroad. Moreover, these documents are *the only documents* that these SCP, LLC employees

have the ability to obtain, given the limitations of the SharePoint system. Neither SCP, LLC nor its ultimate parent corporation maintain a “central extranet that controls documents worldwide” under which SCP, LLC would somehow have the ability to simply “go in and hit a button and download [documents] from anywhere” in the United States, as contended by Plaintiffs.

ARGUMENT

Plaintiffs continue to beat the sanctions drum to no avail. Their first Motion for Sanctions was filed on August 3, 2009—they did not prevail. *See* Plaintiffs Motion dated August 3, 2009 and the Court’s Order dated January 7, 2010, attached as Exhibit Q. Their second sanctions motion was filed on January 4, 2010—again they did not prevail. *See* Plaintiffs’ Renewed Motion dated January 4, 2010 and Transcript from January 26, 2010 Hearing at p. 33, attached as Exhibit R. Undeterred, the Plaintiffs’ third Motion for Sanctions was filed on April 12, 2010—yet again they came up empty. *See* Plaintiffs’ Renewed Motion dated April 12, 2010 and Transcript from June 10, 2010 Hearing at p. 75, attached as Exhibit S. The fourth Motion for Sanctions was filed on August 11, 2010—again no sanctions were awarded. *See* Plaintiffs’ Motion dated August 11, 2010 and Transcript of August 25, 2010 Hearing at p. 5, attached as Exhibit T. The fifth Motion for Sanctions was filed on September 17, 2010—Plaintiffs once more won no sanctions. *See* Plaintiffs’ Renewed Motion dated September 17, 2010 and emails dated September 23, 2010 between Mr. Reeg and Mr. Tillery canceling hearing, attached as Exhibit U.

Obviously undeterred by their past failed efforts, Plaintiffs filed three Motions for Sanctions which are set for hearing on May 6, 2011. In the present Motion, Plaintiffs contend that SCP, LLC’s conduct is so reprehensible that it should be sanctioned under Supreme Court Rule 137, as if that claim somehow puts them over the top this time around.

Plaintiffs' Motion for Sanctions should be not be evaluated under Illinois Supreme Court Rule 137 because courts have repeatedly found that the Rule is not properly used to sanction conduct, such as discovery violations, where other more specific rules may apply. *See In re Marriage of Adler*, 648 N.E.2d 953, 957 (Ill. App. 1 Dist. 1995); *see also Wadden v. Village of Woodridge*, 549 N.E.2d 1280, 1287 (Ill App. 2 Dist. 1990) (sanctions for alleged discovery violations are more properly imposed pursuant to provisions dealing with discovery rather than Rule 137). As the instant motion deals only with alleged discovery violations, Plaintiffs' Motion should instead be evaluated under Rule 219(c).

When imposing sanctions under Rule 219, the court's purpose is to compel compliance with discovery rules and orders, and *not* to punish the allegedly dilatory party (emphasis added). *Shimanovsky v. Gen. Motors Corp.*, 692 N.E.2d 286, 291 (Ill. 1998). Under Rule 219(c), a sanction is "just" only to the extent that it ensures both discovery and a trial on the merits. *Id.* In determining whether the imposition of a sanction is "just" under the circumstances, courts "must consider the conduct that gave rise to the sanction order and the effect of that conduct on the parties." *H & H Sand & Gravel Haulers Co. v. Coyne Cylinder Co.*, 632 N.E.2d 697, 701 (Ill. App. 2 Dist. 1994). Sanctions should be imposed under Rule 219 *only* when a party's non-compliance with discovery rules and orders is unreasonable. *White v. Henrotin Hosp. Corp.*, 398 N.E.2d 24, 26 (Ill. App. 1 Dist. 1979). Based on the potentially extreme consequences inevitably flowing from an imposition of sanctions, severe sanctions should only be imposed in the most extraordinary cases as a last resort to enforce discovery rules. *In re Vanessa C.*, 736 N.E.2d 593, 599 (Ill. App. 2 Dist. 2000).

In determining whether to impose sanctions on a party, the court must consider: (1) the surprise to the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3)

the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party's objection to the testimony or evidence; and (6) the good faith of the party offering the testimony or evidence. *Shimanovsky*, 692 N.E.2d at 291.

Contrary to the hyperbolic representations made by Plaintiffs, SCP, LLC does not maintain a "globally-shared intranet system" through which all electronic documents originating from or maintained by its Swiss ultimate parent corporation or other foreign affiliates are made accessible to SCP, LLC through the push of a button. SCP, LLC maintains a SharePoint system that grants certain SCP, LLC employees *limited access* to documents originating or maintained in Switzerland or other foreign countries based on the project or "team" to which that individual employee is assigned.

Plaintiffs clearly misstate the function of SCP, LLC's SharePoint system in their Motion. Plaintiffs rely on emails vaguely referencing a "global shared area," "shared drive," "intranet site," and the like to hypothesize the alleged existence of a central database that SCP, LLC can easily access to procure every document ever generated by any foreign affiliate anywhere. Plaintiffs, in an exercise of form over substance, have multiplied the proceedings and buried the Court with extensive deposition testimony in which various personnel of SCP, LLC and its foreign affiliates explained various aspects of the SharePoint system, including the limitations based on an employee's particular project or "team." Taken as a whole, these documents and testimony detail a limited-access SharePoint system that SCP, LLC describes in this Response, rather than the unlimited access portal suggested by Plaintiffs.

Neither SCP, LLC nor its ultimate parent corporation possess any type of "central extranet that controls documents worldwide" or that grants an SCP, LLC employee "push-

button” access to all documents created by any of its affiliates. The only foreign documents that an SCP, LLC employee has the “ability to obtain,” within the meaning of the Court’s November 24, 2009, Order, are those that relate to the employee’s project or “team” assignment. SCP, LLC has produced and will continue to produce on a rolling basis each document to which its custodian employees have access via the SharePoint system, including those originating from or sent to foreign affiliates. SCP, LLC has at all times acted reasonably in complying with the Court’s order to produce documents it has the “ability to obtain,” and Plaintiffs have heretofore received or will receive through the ongoing rolling production each document that SCP, LLC has the “ability to obtain.”

SCP, LLC has also been continuously candid and open with Plaintiffs and the Court not only about the issues created by these Swiss laws but also about its willingness to facilitate the process through which such documents may be produced in accordance with applicable law. Counsel for SCP, LLC has made clear that it will “work together with [Plaintiffs] to move the process along.” SCP, LLC has explained to Plaintiffs and to the Court how Plaintiffs can legally obtain these documents, and it has even volunteered the assistance of its Swiss counsel in obtaining an order from a competent Swiss Court allowing such production. Indeed, SCP, LLC alerted Plaintiffs’ counsel to these issues in the *Greenville* litigation as well, and the court in that case ordered that the plaintiffs restrict their document requests to those documents in the possession of U.S.-based SCP, LLC. The Plaintiffs here are attempting to obtain discovery of documents already denied them by the court in *Greenville*. Despite SCP, LLC’s good faith efforts to furnish Plaintiffs with the documents they seek, Plaintiffs have nevertheless refused to engage any of these procedures, instead seeking to shift the burden to this Court to provide relief

through this baseless Motion. Thus, any prejudice ostensibly suffered by Plaintiffs has been caused by their own obstinate refusal to comply with procedures established by international law.

None of the documents that Plaintiffs have proffered to the Court contradict SCP, LLC's limited ability to obtain foreign documents. In addition to wrongfully theorizing a mythical "globally-shared intranet system," Plaintiffs notably fail to address the substantive bases for SCP, LLC's position regarding its legal inability to produce Swiss-based documents. SCP, LLC currently does not have the "ability to obtain" documents located in Switzerland due to the likelihood of criminal and civil liability that would result from such production under SPC Articles 271 and 273 as well as the FADP. Apart from summarily referencing SCP, LLC's alleged "self-serving interpretation of Swiss law" and supposed assertion of "a Swiss law that has no application in this case," Plaintiffs fail to counter any of the specific bases that SCP, LLC has provided for its position with respect to these Swiss laws.

Plaintiffs contend that Swiss law does not preclude production of documents maintained by other non-Swiss affiliates. It should be noted, however, that the Court's Order of November 24, 2009, analyzed the discovery obligations of a subsidiary with respect to the documents of its ultimate parent corporation. While Syngenta AG, a holding company based in Switzerland, functions as the ultimate parent corporation of SCP, LLC, none of the other foreign affiliates enjoy a similar relationship with SCP, LLC. Nevertheless, pursuant to the November 24, 2009, Order, SCP, LLC custodians have collected and/or produced various documents from these foreign affiliates to the extent that SCP, LLC has the ability to obtain the same via SharePoint. Plaintiffs have not even made an argument regarding, much less carried their burden of showing, how documents in the possession of other non-Swiss entities affiliated with SCP, LLC, are relevant or discoverable, or how the incredible burden of investigating every office of any

affiliated company anywhere in the world is likely to lead to the discovery of admissible evidence at trial. By equating all Syngenta-related entities to the Swiss entity, Plaintiffs hope to slide one by the Court without any real analysis of how such an effort would advance the ultimate disposition of this case. They hope to do so, in part, because they want to avoid the inevitable discussion of the extraordinary costs associated with such a goose chase. The Court should reject such an obviously burdensome, oppressive and harassing venture.

SCP, LLC should not be subject to any sanctions in this case related to information and documents located in Switzerland or elsewhere because no discovery violation has occurred in these circumstances. At all relevant times, SCP, LLC has acted reasonably in attempting to comply with the Court's November 24, 2009, Order regarding the discoverability of documents based in Switzerland. Defense counsel traveled to Switzerland to search for and identify any potentially responsive documents. Plaintiffs' counsel was advised in advance and following the trip of that fact. *See* Exhibit G. Plaintiffs' counsel was advised of the legal bars forbidding the production of what SCP, LLC's counsel had found, but were also told of two (2) avenues to circumvent those legal obstacles. Nevertheless, in tantrum-like fashion, Plaintiffs have chanted their sanctions mantra and demanded that they want what they want when and how they want it and they refuse to consider multiple other reasonable alternatives. Similarly, SCP, LLC has collected and/or produced (through a continuing rolling production) what documents it has in its reasonable possession from related non-Swiss entities. This is not sanctionable conduct on SCP, LLC's part. This Court need not issue any sanction order under Rule 219(c) to coerce SCP, LLC's compliance with Plaintiffs' discovery requests. To enter sanctions against SCP, LLC under these circumstances would be contrary to the very purpose of Rule 219, and would punish

SCP, LLC for candidly and continuously working toward the resolution of discovery issues in an open and cooperative way.

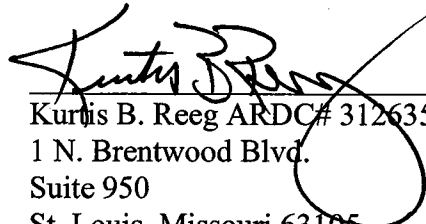
Based on the foregoing reasons and authorities, Syngenta Crop Protection, LLC respectfully requests that this Court deny Plaintiffs' Motion for Sanctions.

DATE: April 15, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of April, 2011, I caused to be served the attached via **hand delivery**, upon the following counsel:

TO: Stephen M. Tillery, Esq.
Christie Deaton, Esq.
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with a copy sent via United States mail, properly addressed and postage paid, upon the following counsel:

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