

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>AFP ADVANCED FOOD PRODUCTS LLC, Plaintiff</b>	:	
	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	<b>NO. 05-3006</b>
	:	
<b>SNYDER'S of HANOVER MANUFACTURING, INC Defendant</b>	:	

**MEMORANDUM**

**STENGEL, J.** **January** , **2006**

Defendant Snyder's of Hanover Manufacturing, Inc., (“Synder’s”) filed for a protective order pursuant to Fed. R. Civ. P. 26(c) seeking, among other things, an order preventing the plaintiff’s attorneys litigating this case from prosecuting new patents for the plaintiff regarding similar art. Both Snyder’s and the plaintiff, AFP Advanced Foods Products (“AFP”) agree on the necessity of a protective order generally, but disagree over two specific provisions.

**I. BACKGROUND of CASE**

AFP brings this patent infringement case seeking a temporary injunction against Snyder's. AFP avers that Snyder’s is willfully infringing upon their valid patent (#6,873,675 filed on May 17, 2005 and named “Acidified Imitation Cheese Sauce and Pudding Compositions and Method for Producing Such Compositions”) through its production and sale of “Eatsmart Salsa Con Queso.” Snyder’s counterclaims requesting a declaratory judgment that the AFP patent (“675”) is invalid and unenforceable.

## II. STANDARD for PROTECTIVE ORDERS

“Under Federal Rule of Civil Procedure 26(c), a court “for good cause shown” may, in certain circumstances, enter a protective order in the context of discovery.”

Shingara v. Skiles, 420 F.3d 301, 305-06 (3d Cir. 2005). Fed. R. Civ. P. 26(c) places the burden of persuasion on the party seeking the protective order to prove the good cause.

Cipollone v. Liggett Group, 785 F.2d 1108, 1114 (3d Cir. 1986). The party seeking the protective order must show that disclosure of the information sought to be protected

would result in a “clearly defined, specific and serious injury.” Shingara at 306 (citing

Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786-87 (3d Cir. 1994)). “Broad

allegations of harm are not specific to establish good cause.” Id. Generally a Court will

balance the interests of seven, non-exclusive, factors before issuing a protective order. Id.

Those factors include:

- 1) whether disclosure will violate any privacy interests;
- 2) whether the information is being sought for a legitimate purpose or for an improper purpose;
- 3) whether disclosure of the information will cause a party embarrassment;
- 4) whether confidentiality is being sought over information important to public health and safety;
- 5) whether the sharing of information among litigants will promote fairness and efficiency;
- 6) whether a party benefitting from the order of confidentiality is a public entity or official; and
- 7) whether the case involves issues important to the public.

Id. (citing Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995), and Pansy, 23 F.3d 787-91).

### III. DISCUSSION

#### A. Contested Language

The language at issue in this motion for protective order appears in section 1. (f) and section 3. of Snyder's proposed order. Under section 1. (f) Snyder's defines "CONFIDENTIAL-ATTORNEY'S EYES ONLY" as "personnel information or sensitive CONFIDENTIAL information that the Designating Party in good faith believes will harm its competitive position if the information becomes known to a party other than the Designating Party." (Underlines added to highlight the contested language.) While section 3 states:

Information designated "CONFIDENTIAL-ATTORNEYS' EYES ONLY" may only be used for purposes of this litigation, and may only be disclosed to persons falling within the categories specified in Paragraphs 2(a), (b), (c) and (d)(ii)-(vi) of this Order, who are not currently engaged and shall not engage during the course of this litigation and for a period of two (2) years following final disposition of this litigation (whether by judgment including exhaustion of all appeals, settlement, or otherwise) in the preparation or prosecution of patent application(s) related to low protein containing products, including but not limited to, cheese dips, including direct supervision or assistance thereof, on behalf of any party or any of their corporate parents, predecessors in interest, successors in interest, subsidiaries, joint ventures, affiliates, or any other entities partially or wholly under their control or ownership, and only in accordance with the procedures established under this court.

The remaining language in the proposed order is uncontested by the parties.

B. Should the Two-Year Ban be Granted?

Through its motion for protective order, Snyder's is seeking to prevent AFP's attorneys from using information they will acquire during discovery of this case in their subsequent legal practice. Snyder's is not alleging any ethical violations of established rules of confidentiality, but is worried about the inadvertent use of discovered material. AFP argues that the entire underlined language in section three (3) should be stricken.

Many courts have addressed similar issues. See Mikohn Gaming Corp. v. Acres Gaming, Inc., 50 U.S.P.Q.2d 1783 (D. Nev. 1998), Interactive Coupon Marketing Group, Inc. v. H.O.T.! Coupons, LLC, 1999 U.S. Dist. LEXIS 12437, No. 98 C 7408, 1999 WL 618969, at \*2 (N.D. Ill. Aug. 9, 1999), Motorola, Inc. v. Interdigital Technology Corp., No. 03-488-LON, 1994 U.S. Dist. LEXIS 20714 (D. Del. Dec. 19, 1994), Commissariat A L'Energie Atomique v. Dell Computer Corp., 2004 U.S. Dist. LEXIS 12782 (D. Del. May 25, 2004), In re Papst Licensing, 2000 U.S. Dist. LEXIS 6374, \*11 (E.D. La. May 4, 2000), and Chan v. Intuit, Inc., 218 F.R.D. 659 (N.D. Ca. 2003). None of their decisions is precedential nor has any applied the Third Circuit's standard for issuing a protective order in Shingara.

The threat of inadvertently using information obtained through discovery is not to be taken lightly.

Inadvertence, like the thief-in-the-night, is no respecter of its victims. Inadvertent or accidental disclosure may or may not be predictable. To the extent that it may be predicted, and

cannot be adequately forestalled in the design of a protective order, it may be a factor in the access decision.

U.S. Steel Corp. v. United States, 730 F.2d 1465, 1468 (Fed. Cir. 1984) (deciding whether in-house patent attorneys should be given access to confidential information through discovery in patent infringement cases). However, that threat, standing alone, under Shingara and U.S. Steel, is not enough to justify a protective order barring AFP's attorneys from prosecuting similar patents for two years. As further explained in U.S. Steel, the decision to deny access to discovered materials shall be done on a case-by-case, and lawyer-by-lawyer basis. Id. In this case, there is no reason for the court to believe that AFP's attorneys will not strictly follow the adopted order and refrain from using, either inadvertently or intentionally, Confidential Attorney's Eyes Only information for the sole purpose of this litigation. Barring AFP's attorneys from prosecuting similar patents for two years following this suit, without some tangible reason or good cause other than the general threat of inadvertent misuse of discovered materials, is the exact type of overly broad and generalized fear rejected in Shingara, U.S. Steel, and In re Sibia Neurosciences, Inc., Doc. No. 525, 1997 U.S. App. Lexis 31828 (Fed. Cir. Oct. 22, 1997) (unpublished). If, however, the misuse of discovered material becomes an issue during the course of this litigation, the protective order, pursuant to section 17, may be amended accordingly.

C. Should the Language in Section 1. (f) be Altered?

To the extent that it remains pertinent after this Court's ruling on the language above, I will adopt Snyder's original language regarding section 1. (f). The language suggested by AFP, "it or its employees or agents" instead of Snyder's proposed "its competitive position," appears overly broad. Limiting the distinction to the Designating Parties' competitive position, at this point in the litigation, is more in line with Snyder's showing of good cause that its competitive position is what's at stake, not the more broad "it or its employees or agents."

**IV. CONCLUSION**

Based upon the Third Circuit's strict requirement on the moving party to show good cause before a protective order is issued, and given that the basis of Snyder's perceived threat is the possible inadvertent use of information, I believe the two-year ban is burdensome and unnecessary. At this point in the litigation, there is no reason for the Court to believe that the information sought through discovery is for anything other than the specific and legitimate purpose of litigating this case. An appropriate order adopting Snyder's proposed protective order without the two-year ban follows.

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	:	
<b>SNYDER'S of HANOVER MANUFACTURING, INC</b>	:	
<b>Defendant</b>	:	

**ORDER**

**AND NOW**, this                      day of January, 2006, upon consideration of the defendant's motion for a protective order (Docket # 14) and the plaintiff's objections (Docket # 16), it is hereby **ORDERED** that the motion is granted in part and denied in part. The request for a protective order is granted; AFP's objections are granted as well and portions of Snyder's of Hanover's proposed protective order will be removed. The protective order approved by the Court will be ordered today as a separate docket entry.

BY THE COURT:

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LAWRENCE F. STENGEL, J.

