

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

**In re: PARAQUAT PRODUCTS
LIABILITY LITIGATION**

Case No.: 3:21-md-3004-NJR

MDL No. 3004

This Document Relates to All Cases

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DESIGNATIONS FOR
CERTAIN DEPOSITION TESTIMONY AND EXHIBITS**

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INTRODUCTION

Exponent, Inc. (“Exponent”) is a scientific consulting firm that serves companies involved in or anticipating litigation related to their products.¹ Exponent was retained by Syngenta to perform work related to paraquat. In addition to the expert services Exponent has performed for Syngenta, it received funding to draft scientific publications that disclaim exactly the causation claims at issue in this case—and of significant public concern.²

In connection with this litigation, Plaintiffs served Exponent with a subpoena duces tecum and took a deposition of its corporate representative, Renee Kalmes on January 18, 2024. The overwhelming majority—if not all—documents produced by Exponent, including those that are publicly available online, were designated confidential. *See* Ex. C, Disputed Designation Chart. Following the 30(b)(6) deposition of Exponent’s corporate representative, Exponent designated large portions of Ms. Kalmes’ testimony confidential. *See id.*

Pursuant to Section VI of the Protective Order, Plaintiffs notified Exponent and Syngenta on August 23, 2024 that Plaintiffs disputed the confidentiality designations of testimony and exhibits from Exponent’s 30(b)(6) deposition. Exponent responded twenty-one days later on the final day of the meet and confer period; Syngenta did not respond at all. Fourteen days later Exponent filed the instant Motion, which Syngenta did not join. The Court should deny Exponent’s Motion because Exponent failed to show good cause to maintain the designations for both exhibits and testimony from the Exponent 30(b)(6) deposition.

¹Exponent, Inc. Form 10-K (2022), <https://www.sec.gov/Archives/edgar/data/851520/000095017023004401/expo-20221230.htm>

² *See, e.g.,* Charles Breckenridge, et al. *Association Between Parkinson’s Disease and Cigarette Smoking, Rural Living, Well-Water Consumption, Farming and Pesticide Use: Systematic Review and Meta Analysis*, PLOS One (April 7, 2016); Ellen Chang, et al., *Validity of Geographically Modeled Environmental Exposure Estimates*, Critical Rev. in Tox. (Mar. 3, 2014); Jack Mandel, et al., *Paraquat and Parkinson’s Disease: An Overview of the Epidemiology and Two Recent Studies*, Reg. Tox. & Pharmacol. (Mar. 2012).

LEGAL STANDARD

“[A]s a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings.” *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994) (quoting *Am. Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978), *cert denied*, 440 U.S. 971 (1979)). Thus, the entry of a protective order requires “good cause.” Fed. R. Civ. P. 26(c)(1). Even so, “[o]nce a protective order is entered, a party must continue to show good cause for confidentiality when challenged.” *In re Bank One Sec. Litig.*, 222 F.R.D. 582, 586 (N.D. Ill. 2004).

To establish good cause, the designating party must “present ‘a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.’” *Id.* (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 (1981)). Exponent invokes a “less demanding” version of the good cause standard, which it claims is applicable to only third parties. [ECF 5415 at 4 (citing *Global Mat. Techs. Inc. v. Dazheng. Metal Fibre Co. Ltd.*, 133 F.3d 1079, 1089 (N.D. Ill. 2015).] However, the “less demanding” version of the “good cause” standard Exponent cites is unique to the “showing it must make in defense of is AEO [“attorneys’ eyes only”] designation.” *Global Mat. Techs.*, 133 F.3d at 1089 (using less demanding standard to conclude that AEO, rather than “confidential” was proper designation for non-party’s documents). In any event, the Seventh Circuit requires that the district court make an “independent determination” that good cause exists even where the designating party is not a party to the litigation. *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 859 (7th Cir. 1994); *see also Bank One*, 222 F.R.D. at 586. Here, the Court specifically defines Confidential information consistent with Fed. R. Civ. P. 26(c). Protective Order § II(1) [ECF 218.]

ARGUMENT

I. Exponent Failed to Timely Designate Deposition Testimony as Confidential

The Protective Order provides that:

For testimony given in a deposition or other pretrial proceedings, in the event that a Producing Party designates some or all of a witness's deposition or other testimony as "Confidential – Paraquat Litigation" or "Confidential – Attorney Eyes Only," the specific page and line designations over which confidentiality is claimed *must be provided to the Receiving Party within thirty (30) days of the final transcript*, provided however, that the Receiving Party will consider reasonable requests for an extension of the deadline.

Protective Order § IV(32)(d) [ECF 218] (emphasis added). The deposition of Exponent's 30(b)(6) corporate representative, Renee Kalmes, was held on January 18, 2024 and the final transcript was received on January 30, 2024. Mot. Seal Ex. 6, Jan. 30, 2024 Exponent 30(b)(6) Dep. Tr. Excerpts ("Dep. Tr."). Exponent's confidentiality designations for deposition testimony were due thirty days later on February 29, 2024. Exponent failed to request any extension. Exponent did not provide Plaintiffs with its confidentiality designations for testimony until March 4, 2024. Ex., March 4, 2024 Letter from Edward Johnson. Therefore, Exponent's confidentiality designations were untimely. The Court should decline to maintain Exponent's confidentiality designations for the 30(b)(6) deposition testimony because, in addition to their substantive deficiencies, *see infra*, they were untimely.

II. The Court Should Remove Disputed Confidentiality Designations For Disputed Designations Neither Exponent Nor Syngenta Moved to Maintain as Confidential by October 3, 2024

The Protective Order established a procedure to challenge confidentiality designations:

The Challenging Party shall object to the propriety of the designation of specific material as "Confidential - Paraquat Litigation" or "Confidential - Attorney Eyes Only" by providing written notice to the Designating Party ... The parties shall

thereafter, within twenty-one (21) days or as otherwise agreed, meet and confer in an effort to resolve any disagreements. At the conclusion of that twenty-one day period, the Challenging Party shall provide a list of the designations that remain at issue (“Disputed Designations”). Counsel may agree to reasonable extensions.

Within fourteen (14) days of receipt of the Disputed Designations, the Designating Party shall file a motion with the Court seeking relief

Protective Order § VI(35)–(36) [ECF 218.] The following Syngenta-produced documents, used as exhibits in the Exponent 30(b)(6) deposition, were designated by Syngenta as confidential:

- SYNG-PQ-03728292–03728295, Ex. 12 to Exponent 30(b)(6) Deposition
- SYNG-PQ-12844959–12844960, Ex. 27 to Exponent 30(b)(6) Deposition
- SYNG-PQ-21854311–21854312, Ex. 28 to Exponent 30(b)(6) Deposition
- SYNG-PQ-28503787, Ex. 29 to Exponent 30(b)(6) Deposition

See Ex. B, Aug. 23, 2024 Correspondence from Sam Hoefs to Priya Desai and Grace Brier. Exponent’s stated basis for maintaining the confidentiality of those exhibits was that they had been designated as confidential by Syngenta. *See* Ex. C, Disputed Designations Chart. On August 23, 2024, Plaintiffs notified both Exponent and Syngenta that Plaintiffs were challenging the confidentiality of the exhibits used in the Exponent 30(b)(6) deposition, identifying them by their Bates numbers. Ex. B. Under the Protective Order, Syngenta had twenty-one days to meet and confer with Plaintiffs regarding the confidentiality challenges and then respond. Protective Order § VI(35)–(36) [ECF 218.] Syngenta did neither and did not request an extension. At the conclusion of the meet and confer period, Syngenta thereafter had fourteen days to file a motion to maintain the confidentiality designations. *Id.* Syngenta failed to do so. Therefore, the Syngenta-produced documents used as exhibits in the Exponent 30(b)(6) deposition should be de-designated. Further, to the extent Exponent’s assertion that deposition testimony should be maintained as confidential depends solely on its reference to a Syngenta-produced document that Syngenta designated as confidential (i.e., Exhibit 12, 27, 28, or 29 to the Exponent 30(b)(6) Deposition), that testimony should be de-designated.

Similarly, Plaintiffs identified the confidentiality designations for the following exhibits to the Exponent 30(b)(6) deposition as “disputed designations,” *see* Ex. B, Aug. 23, 2024 Letter from Sam Hoefs to Priya Desai and Grace Brier, but Exponent did not move to seal them:³

- EXP_032449, Exhibit 8 to the Exponent 30(b)(6) Deposition
- EXP_056539-056555, Exhibit 24 to the Exponent 30(b)(6) Deposition
- EXP_032384-032385, Exhibit 25 to the Exponent 30(b)(6) Deposition

Therefore, Exponent’s Motion should be denied as to these Exhibits, for the additional reason that Exponent failed to timely move to seal. *See* Fed. R. Civ. P. 26(c); Protective Order, § VI(35)–(36) [ECF 218].

III. Exponent Failed to Show Good Cause for Maintaining the Confidentiality of the Consulting Agreement Between Exponent and Syngenta (the “Agreement”)

Exponent designated the consulting agreement between it and Syngenta (the “Agreement”), as well as all 30(b)(6) testimony referencing the Agreement in any way as “Confidential.” (Motion to Seal Ex. 2, EXP_052663-668.)⁴ Exponent suggests that, for contracts, there is yet another standard to determine whether confidentiality designations should remain in place. [ECF 5415 at 5.] That is, Exponent inaccurately represents the standard for whether to treat an agreement and references thereto as “confidential” as based on “the circumstances of the parties’ relationship.” [ECF 5415 (citing *Nilssen v. Motorola, Inc.*, 963 F. Supp. 664, 679 (N.D. Ill. 1997).] In fact, the standard on which Exponent relies is the standard for ascertaining the existence of a confidential relationship (regardless of whether an agreement exists) for purposes of a statutory claim. *Nilssen*, 963 F. Supp. at 679. This is *not* the standard to evaluate whether an

³ In addition to certain specified testimony, Exponent moved to seal deposition exhibits 5, 9, 10, and 11. [ECF 5415 at 2.]

⁴ *See also* Exponent 30(b)(6) Dep. Tr. at 83:22-84:1, 84:20-21, 85:1-3, 85:5-13, 86:2-4, 88:10-14, 88:19-89:1, 89:12-14, 90:6-7, 90:10-11, 90:15, 90:18-19, 91:2-6, 91:9-10, 91:13-15, 92:21, 92:23-24, 93:4-5, 93:13-14, 93:17-19, 96:21-97:3, 97:6-10, 97:14-17, 98:17-19, 103:4-5, 103:11-12, 103:16-18, 153:23-25, 154:2-8, 154:19-20, 154:22-23, 155:4-5, 155:9, 159:7-10, 159:16; 160:1-2.

agreement should be designated confidential under Rule 26; instead, the applicable standard remains the “good cause” standard established by the Federal Rules and incorporated into the Protective Order. Fed. R. Civ. P. 26(c)(1); *see also* Protective Order § II(1) [ECF 218] (citing Fed. R. Civ. P. 26(c)). The mere fact that a document contains business-related information does not make it confidential; courts in the Southern District of Illinois have removed confidentiality designations for contracts *with Syngenta* where, as here, a showing of competitive harm cannot be made. *See, e.g., City of Greenville v. Syngenta Crop Prot., Inc.*, 2013 WL 1164788, at *3 (S.D. Ill. Mar. 19, 2013); *City of Greenville, Ill. v. Syngenta Crop Prot., Inc.*, 2012 WL 6023849, at *10 (S.D. Ill. Dec. 4, 2012).

As set forth in the Protective Order, “Confidential Information or Things” are those “that qualify for protection under Federal Rule of Civil Procedure 26(c) or other federal or state laws, rules, or regulations” Protective Order § II(10). The Protective Order identifies certain categories of information this “*may include,*” such as personally identifiable information or certain business information “which, if disclosed would result in competitive harm to the disclosing party.” Protective Order § II(10) (emphasis added). Consistent with Rule 26, “harm” in this context must be specifically alleged and not based on conclusory allegations. *In re Bank One Sec. Litig.*, 222 F.R.D. 582, 586 (N.D. Ill. 2004). Regardless of whether information meets these definitions, however, the Protective Order provides that “Confidential information *shall not include*” any “information that is in the public domain at the time of disclosure to a Receiving Party” or any “information known to the Receiving Party prior to the disclosure or lawfully obtained by the Receiving Party after the disclosure.” *Id.* (emphasis added). Exponent has not established “good cause” to maintain the confidentiality of the Agreement within the meaning of Rule 26 because

there is no risk of competitive harm where the conditions in the Agreement (and related testimony) were already publicly disclosed outside of this litigation.

Exponent states that it has never publicly disseminated *this specific* Agreement between Exponent and Syngenta. [ECF 5415 at 6.] However, the relevant terms of the Agreement are already publicly accessible and lawfully known and Exponent cannot establish a real risk of competitive harm. Exponent argues that “[c]onditions for disclosing work-product and confidential information” and “[o]wnership of work product and intellectual property ownership” in addition to length of agreement and termination conditions are “particularly sensitive” contract terms that cannot be publicly disclosed at the risk of competitive harm to Exponent. [ECF 5415 at 6.] Exponent does not explain how disclosure of standard contract terms such as contract length and termination risk competitive harm. On its face, the Agreement is not unique when compared to other standard form contracts with respect to these terms. *See* Mot. Seal Ex. 2. As for the disclosure and ownership conditions, these conditions *exactly match* the terms of the standard consulting agreement which were disseminated to the news media years ago. *See* Myron Levin and Paul Feldman, *Big Companies in Legal Scrapes Turn to Science-for-Hire Giant Exponent*, Business Ethics (Dec. 13, 2016) (“Clients who fund research often own the data that is generated and must approve the publication of results, said Roger L. McCarthy, a former Exponent CEO and chairman.”); *see also* John Branch, *The Deflategate Scientists Unlock Their Lab*, The New York Times (Sept. 21, 2016) (“It says that it is just as likely that its research runs counter to its clients’ hopes, but that research then gets tucked away, never to see the light of day.”).⁵

⁵ Available at <https://business-ethics.com/2016/12/13/1724-big-companies-in-legal-scrapes-turn-to-science-for-hire-giant-exponent/> (last accessed Oct. 10, 2024); <https://www.nytimes.com/2016/09/25/sports/football/deflategate-new-england-patriots-nfl-science.html> (last accessed Oct. 10, 2024).

Indeed, Exponent’s assertion that its “practice is to protect these kinds of terms with all clients, not just Syngenta, because of the competitive risk that arises” is belied by the fact that its own former Chairman disclosed the standard terms of Exponent’s contracts—which appear in this same Agreement. Should any of Exponent’s competitors seek to determine how long Exponent’s consulting agreements run, how they may be terminated, which disclosure obligations do or do not exist, and the extent, if any, of Exponent’s ownership in work product need only perform a simple Google search. For example, Exponent’s prior contract with tobacco company Philip Morris is available online and includes the same conditions at issue here, including that the client (there Philip Morris) “shall be the exclusive owner” of Exponent’s work. *See* Consulting Agreement Between Exponent Failure Analysis Associates and Philip Morris Incorporated.⁶ As stated in the Protective Order, information that is publicly accessible or lawfully available is, by definition, *not* confidential. Protective Order § II(10) [ECF 218.].

Further, Exponent failed to meet its burden of establishing a “particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.” *In re Bank One Sec. Litig.*, 222 F.R.D. at 586 (quotations omitted). While Exponent suggests that its competitors could offer similar agreements, or its clients could ask for similar terms, based on the Agreement with Syngenta, any client could request (or any competitor could replicate) such terms based on the *already available* information about these terms. That the Agreement in this case conforms with those conditions is of critical public importance. At the same time, Exponent will

⁶ Available at <https://www.industrydocuments.ucsf.edu/tobacco/docs/#id=mqjd0218> (last accessed Oct. 16, 2024); *see also supra* note 5 (describing general terms of Exponent contracts.); Exponent, Authorized Federal Supply Schedule Catalog/Price List, https://www.gsaadvantage.gov/ref_text/47QSMA18D0007/0XKPCM.3TB28E_47QSMA18D0007_47QSMA18D007GSACATALOGEXPONENT2022.PDF (last accessed Oct. 16, 2024) (listing prices for Exponent consultants); Exponent, Consulting Services Schedule of Rates and Charges, <https://www.industrydocuments.ucsf.edu/tobacco/docs/#id=gplm0218> (last accessed Oct. 16, 2024).

not be harmed by disclosure of the conditions in the Agreement because substantially similar conditions have already been disclosed—including by Exponent itself. *See also City of Greenville*, 2013 WL 1164788, at *3 (permitting de-designation of contracts).⁷ Exponent has not met the burden of showing “good cause” to maintain the confidentiality designation for this Agreement.

IV. Exponent Failed to Show Good Cause for Maintaining Invoices or References to Invoices as Confidential

Financial and business information is not automatically confidential; there must be a specific showing of harm. *In re Bank One Sec. Litig.*, 222 F.R.D. 582, 586 (N.D. Ill. 2004). Exponent makes no such showing. Instead, Exponent inaccurately claims that courts in the Southern District have allowed “nonpublic financial information” to remain confidential.” [ECF 5415 at 7 (citing *City of Greenville, Ill. v. Syngenta Crop Prot., Inc.*, 2012 WL 6023849, at *10 (S.D. Ill. Dec. 4, 2012).] In fact, the quotation on which Exponent relies is merely Syngenta’s proposed justification to the Court from *City of Greenville*—which the Court rejected. 2012 WL 6023849, at *10–11.⁸ Again and again, the Court continued to reject similar arguments as motion practice concerning the confidentiality designations of financial designations came before the court. *See, e.g., City of Greenville v. Syngenta Crop Prot., Inc.*, 2013 WL 1164788, at *3 (S.D. Ill. Mar. 19, 2013) (rejecting argument that documents reflecting approvals of “capital expenditures,” “financial thresholds for certain corporate actions,” “amounts of dividend payments” among other payments were confidential business or strategy

⁷ In the alternative, if the Court finds that certain portions of the Agreement should remain confidential, it does not follow that the entire document—or all references to the document—are confidential. *Methodist Hosps., Inc. v. Sullivan*, 91 F.3d 1026, 1032 (1996). Redaction is an available solution.

⁸ Contrary to Exponent’s claim that the Court allowed so-called “nonpublic” financial information to remain confidential, the Court rejected that characterization for twenty (of twenty) exhibits including “financial estimates” for “stakeholders,” “price information for what may be competing companies”; “upcoming budget matters”; “profit margins for contracts with agrichemical partners”; “a potential supply agreement”; emails relating to a “supply arrangement” including recommendations for price strategy”; “financial information about planned funding for projects”; and emails related to a “product development budget.” *Id.* at *10–11. These documents were unsealed. *Id.* at *19.

information). This is exactly the type of information contained in the documents and deposition testimony at issue here: information about the amounts paid for services. *See* Ex. B, Aug. 23, 2024 Letter from Sam Hoefs to Priya Desai and Grace Brier; Ex. C, Disputed Designation Chart.

In addition, the documents and testimony at issue concern the amount Exponent invoiced Syngenta for services between 2011 and 2023. Mot. Seal Ex. 1. Exponent asserts that invoices from 2013–2022 detail “Exponent’s historical *and ongoing* pricing patterns, discounts, and service structures.” [ECF 5415 at 7 (emphasis added).] On their face, invoices from 2013–2022 do not *and cannot* reflect pricing patterns, discounts, and service structures going forward but can only reflect the historical pricing patterns, discounts, and service structures. (*See* Mot. Seal Ex. 1.) Likewise, none of the testimony referencing these invoices is forward-looking; Plaintiffs did not inquire as to the pricing patterns, discounts, or service structures after 2023. *See* Mot. Seal. Ex. 1.⁹

The sole exception is the per-project funding structure, which Exponent publicly discloses in its federal filings¹⁰ and which cannot therefore be construed as confidential. Certainly, while Syngenta may still be Exponent’s client, there is no basis to conclude that Exponent’s historical pricing structure and fees remain in place today, unadjusted for the current economic reality. As the Court in *City of Greenville* explained, documents and communications about business strategies and financial information from several years prior could not be deemed “confidential” for purposes of Rule 26. 2013 WL 1164788, at *3.

V. Exponent Failed to Show Good Cause for Maintaining the Confidentiality of Scientific Analysis/Discussions Relating to Since Published Scientific Research

The Court need not credit Exponent’s claim that documents and communications

⁹ *See* Exponent 30(b)(6) Dep. Tr. at 48:5–11 (years 2011–2017); Exponent 30(b)(6) Dep. Tr. at 50:11 (total reflected in Exponent 30(b)(6) Dep. Ex. 5); 61:12 (same); 62:16–17 (discussion of 2011 invoice);

¹⁰ *See, e.g.,* Exponent, Inc. Form 10-K (2022), <https://www.sec.gov/Archives/edgar/data/851520/000095017023004401/expo-20221230.htm>.

“regarding the process of developing scientific literature is highly sensitive.” [ECF 5415 at 8.] In making this argument, Exponent equates academic researchers who have no connection to a litigation with a Defendant’s scientific consultant, and it conflates the “integrity of the peer review process” with any work connected to “scientific or academic research” generally. [See *id.* at 8–9 (citing *In Re Paraquat Prods. Liab. Litig.*, 2023 WL 8372819, at *3 (S.D. Ill. Dec. 4, 2023); *In re: Bextra & Celebrex Mktg. Sales Pracs. & Prod. Liab. Litig.*, 2008 WL 4345158, at *3 (N.D. Ill. Mar. 14, 2008).] Exponent relies heavily on two decisions concerning subpoenas for “peer review” information, stretching the language of these decisions in an attempt to make them fit the work Exponent performed on behalf of its client, Syngenta. [See *id.*]

First, Exponent points to the Court’s December 2023 decision denying Syngenta’s motion to enforce compliance with a subpoena to Dr. Earl Ray Dorsey, and a 2008 decision by the Northern District of Illinois, denying a motion to enforce compliance with a subpoena to a medical journal. [ECF 5415 at 9 (citing *In re Paraquat Prods.*, 2023 WL 8372819, at *3; *In re Bextra*, 2008 WL 4345158, at *3.)] Exponent’s reliance on these decisions is misplaced. As an initial matter, those decisions concerned whether subpoenas to produce documents should be enforced while the issue before the court here is whether documents already produced—and used in depositions—should continue to be kept confidential. The standard is therefore the Rule 26(c) good cause standard. *In re Bank One Sec. Litig.*, 222 F.R.D. 582, 586 (N.D. Ill. 2004).

Second, Exponent’s expectation of privacy, as a consultant to corporations involved in litigation, is certainly different than that of unaffiliated medical professionals. As the Court explained, Dr. Dorsey’s “sole connection to the MDL is his article that captivated the parties’ attention.” *In re Paraquat Prods.*, 2023 WL 8372819, at *3. The medical journal, JAMA, similarly had no connection to the *Bextra* MDL itself. *In re Bextra*, 2008 WL 4345158, at *3. By contrast,

Exponent’s long-running business relationship with Syngenta cannot be disputed—and is publicly documented.¹¹ In fact, many of the documents Exponent characterizes as “regarding the process of developing scientific literature” [ECF 5415 at 8] are communications between Exponent and Syngenta and therefore show Syngenta’s influence on its consultant’s work product, communications between Exponent employees about Syngenta, or communications between Exponent employees about Syngenta’s interest in their work.¹² This represents a fundamentally different set of circumstances than the peer review process for Dr. Dorsey’s article or the JAMA medical journal. MDL courts have permitted de-designation of the underlying study materials for scientists who *are* affiliated with a party to the litigation, and this Court should do so here as well. *See In re Zofran (Ondansetron) Prods. Liab. Litig.*, 2020 WL 1550563*3–4 (D. Mass. April 1, 2020) (de-designating study protocol, unpublished analyses, draft studies, and research brief).¹³

Third, Exponent suggests that as long as a communication is related to the “development” of scientific research, it is confidential. Conveniently, this can be construed to encompass everything that a scientific consulting company like Exponent does—regardless of whether the communications at issue are the types of communications traditionally kept confidential, such as the identities of peer reviewers or raw data.¹⁴ *See In re: Bextra*, 2008 WL 4345158, at *3. The

¹¹ *See supra* note 2.

¹² *See* Mot. Seal Ex. 3 (September 2016 email chain between Exponent employees describing contents of since-published article); Exponent 30(b)(6) Dep. Tr. 153:23–25, 154:2–8, 153:19–20, 153:22–23 (inquiry about contents of disclosure statement in published article); Exponent 30(b)(6) Dep. Tr. 172:1–13 (notification by Exponent of research grant where final work product was published in 2012); Exponent 30(b)(6) Dep. Tr. 172:22–23, 173:5–9, 173:12–14, 173:16–18, 173:23–25 (testimony about scheduling teleconference).

¹³ This is particularly important where there are concerns that there may be “potentially material omissions from [the] public study.” *Id.* at *3. Here, as in *In re Zofran*, Exponent’s behind-the-scenes communications with and about Syngenta are necessary to put its published work in context.

¹⁴ The court in *Bextra* explained that confidentiality is important to the peer review process because recruiting peer reviewers is often dependent on assuring their anonymity such that disclosing their identities was alleged to have a chilling effect. 2008 WL 4345158, at *3. In *In re Paraquat Prods.*, the subpoena requested not only information implicating the “integrity of the peer review process” but also Dr. Dorsey’s raw data. 2023 WL 8372819, at *3. Critically, the documents and communications that are the subject of this Motion do *not* contain Exponent’s raw data, only decisions about what to do with it, and do not contain information about peer reviewers.

decisions on which Exponent relies both emphasize that confidentiality in the scientific research context is critical to the “integrity of the peer review process.” *In Re Paraquat Prods.*, 2023 WL 8372819, at *3; *In re: Bextra*; 2008 WL 4345158, at *3 (describing need to preserve identities of peer reviewers to ensure continued interest among the scientific community in serving as peer reviewers). Indeed, even communications related to peer review are not *per se* confidential. *See Univ. of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 200 (1990) (noting “confidentiality is not the norm in all peer review systems” and affirming enforcement of subpoena for peer review information). Here, the documents and communications Exponent claims must remain confidential are not communications about the identities of peer reviewers or even their feedback but, rather, communications between Exponent and its client, Syngenta or internal communications about how data should be presented and handled. But no court has held that everything a scientist says or does prior to (or after) publication of scientific literature must be preserved as confidential.

That is, however, exactly what Exponent suggests in its Memorandum. [ECF 5415 at 8–9.] Yet, the testimony documents Exponent seeks to designate have little to do with the task of performing scientific research itself and instead constitute mostly administrative communications between Exponent employees or Exponent and Syngenta.¹⁵ By way of example, the testimony and documents Exponent claims are confidential components of the scientific process includes the names of Exponent and Syngenta employees and the employers with which they are affiliated,¹⁶ Syngenta’s funding of published articles, whether and how Exponent and Syngenta should have

¹⁵ *See supra* note 11.

¹⁶ The names of Exponent and Syngenta employees, and their respective employers, constitute information that is publicly accessible and therefore *not* confidential within the terms of the Protective Order. *See* Lewis Smith, LinkedIn, <https://uk.linkedin.com/in/lewis-smith-9a613543> (last accessed Oct. 10, 2024) (self-identifying as Syngenta employee); *see also* *Author Info for Association between Parkinson’s Disease and Cigarette Smoking, Rural Living, Well-Water Consumption, Farming and Pesticide Use: Systematic Review and Meta-Analysis*, PLOS One, <https://journals.plos.org/plosone/article/authors?id=10.1371/journal.pone.0151841> (last accessed Oct. 10, 2024) (identifying Charles Breckenridge as Syngenta employee, identifying Ellen Chang and Jack Mandel as Exponent employees, and identifying funding source for publication as Syngenta).

teleconferences about potential projects, and the submission of copyright forms.¹⁷ The subject matter of this testimony—in addition to being entirely unrelated to the substance of scientific inquiry—is also publicly accessible or lawfully known to Plaintiffs by virtue of simple online research.¹⁸ Accordingly, for this additional reason, these documents and testimony are definitionally *not* confidential within the meaning of the Protective Order. *See* Protective Order § II(10) [ECF 218].

Finally, the documents at issue pertain to studies that have been published for many years.¹⁹ While, for example, Dr. Dorsey’s article had just been published, the publications at issue here have already been published and are available in the public domain. There is no risk of “chilling” from the disclosure of information, years after publication. *See, e.g., City of Greenville v. Syngenta Crop Prot., Inc.*, 2013 WL 1164788, at *3 (S.D. Ill. Mar. 19, 2013); *City of Greenville, Ill. v. Syngenta Crop Prot., Inc.*, 2012 WL 6023849, at *10 (S.D. Ill. Dec. 4, 2012).

VI. Exponent Failed to Show Good Cause for Maintaining the Confidentiality of Communications with Other Clients That It Has *Already Shared* With Those Clients’ Competitors

Exponent argues that Exhibit 4 to the deposition and related testimony should be sealed because they pertain to work Exponent performed for another client due to Exponent’s “interest in protecting from disclosure the confidentiality of information that its [other] clients expect Exponent to protect.” [ECF 5415 at 9.] To be clear, the “other client” is Syngenta’s direct competitor. (*See* Mot. Seal Ex. 5.) Exponent here seeks to have its cake and eat it too: Exponent wants to be able to claim the benefit of the Protective Order to require Plaintiffs to treat its non-

¹⁷ *See supra* note 11.

¹⁸ *See supra* note 2; *see also* Department of Environment, Food, and Rural Affairs, *Mechanism of the association between pesticides and Parkinsons - PS2608*, <https://randd.defra.gov.uk/ProjectDetails?ProjectId=13385> (last accessed Oct. 10, 2024); PS2608 Final Report, *available at* <https://randd.defra.gov.uk/ProjectDetails?ProjectId=13385> (last accessed Oct. 10, 2024)

¹⁹ *See supra* note 2.

Syngenta clients' documents as confidential while Exponent may turn its non-Syngenta clients' documents over to their competitor at Syngenta. Exponent argues that disclosure of this information would "harm" Exponent; but reputational harm to Exponent because one client learns it failed to safekeep its information and produced it to direct competitor Syngenta is *not* the type of harm contemplated by the Protective Order. The time for Exponent to consider the interests of its non-Syngenta client have long passed, and Exponent already decided to disregard those interests. The Court should deny Exponent's request to retain the confidentiality of Exhibit 4 and related testimony.

CONCLUSION

For the foregoing reasons, and pursuant to Section VI of the Protective Order, Plaintiffs respectfully request that the Court deny Exponent's Motion to maintain the confidentiality designations of the at-issue documents and order the designating party or non-party to reproduce the at-issue documents without confidentiality designations.

Dated: October 18, 2024

Respectfully submitted,

PLAINTIFFS' CO-LEAD COUNSEL

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send electronic notification of such filing to counsel of record.

/s/ Marlene Goldenberg

Marlene Goldenberg

EXHIBIT A



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March 4, 2024

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Re: *In re Paraquat Products Liability Litigation*, Case No. 3:21-md-3004-NJR
Blansett, et al. v. Syngenta Crop Protection, Case No. N23C-08-262 SKR
In re Paraquat Products Liability Litigation, Case No. 559
In re Paraquat Cases, Case No. JCCP 5031
Sorgenfrey v. Syngenta Crop Protection et al., Case No. 2021-L-005210

January 18, 2024 30(b)(6) Deposition of Renee Kalmes

Transcript Confidentiality Designations

Ms. Dibble:

I write in regard to Plaintiffs' January 18, 2024 30(b)(6) deposition of Renee Kalmes of nonparty Exponent, Inc. Pursuant to all relevant protective orders, Exponent designates the following portions of Ms. Kalmes' deposition transcript:

| Transcript Page | Line(s) | Designation |
|-----------------|---------|--------------|
| 8 | 21 | Confidential |
| 9 | 2 | Confidential |
| 9 | 5-10 | Confidential |
| 11 | 23 | Confidential |
| 12 | 4-5 | Confidential |
| 12 | 9 | Confidential |
| 12 | 13-15 | Confidential |
| 48 | 5-11 | Confidential |
| 50 | 11 | Confidential |
| 52 | 18-25 | Confidential |

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March 4, 2024
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| Transcript Page | Line(s) | Designation |
|------------------------|----------------|--------------------|
| 53 | 1-7 | Confidential |
| 53 | 14-25 | Confidential |
| 54 | 4-8 | Confidential |
| 56 | 2 | Confidential |
| 56 | 13-25 | Confidential |
| 57 | 1-11 | Confidential |
| 57 | 19-20 | Confidential |
| 59 | 21-23 | Confidential |
| 61 | 12 | Confidential |
| 62 | 6 | Confidential |
| 62 | 16-17 | Confidential |
| 62 | 21-23 | Confidential |
| 63 | 1-2 | Confidential |
| 63 | 5 | Confidential |
| 66 | 15 | Confidential |
| 66 | 18-19 | Confidential |
| 66 | 22 | Confidential |
| 67 | 2-5 | Confidential |
| 67 | 8-10 | Confidential |
| 67 | 12-15 | Confidential |
| 67 | 24-25 | Confidential |
| 68 | 1-4 | Confidential |
| 68 | 8-9 | Confidential |
| 69 | 7-9 | Confidential |
| 69 | 15 | Confidential |
| 83 | 3 | Confidential |
| 83 | 22-25 | Confidential |
| 84 | 1 | Confidential |
| 84 | 20-21 | Confidential |
| 85 | 1-3 | Confidential |
| 85 | 5-13 | Confidential |
| 86 | 2-4 | Confidential |
| 88 | 10-14 | Confidential |
| 88 | 19-25 | Confidential |
| 89 | 1 | Confidential |

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| 170 | 1-13 | Confidential |
| 171 | 1-2 | Confidential |
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| Transcript Page | Line(s) | Designation |
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| 172 | 1-13 | Confidential |
| 172 | 23-24 | Confidential |
| 173 | 5-9 | Confidential |
| 173 | 12-14 | Confidential |
| 173 | 16-18 | Confidential |
| 173 | 23-25 | Confidential |
| 174 | 19-20 | Confidential |

| Deposition Exhibit | Designation |
|--------------------|--------------|
| Ex. 8 | Confidential |
| Ex. 10 | Confidential |
| Ex. 11 | Confidential |
| Ex. 12 | Confidential |
| Ex. 25 | Confidential |
| Ex. 27 | Confidential |
| Ex. 28 | Confidential |
| Ex. 29 | Confidential |

Sincerely,

/s/ Edward D. Johnson

Edward D. Johnson

cc: Counsel for Plaintiff (*via email*)
Counsel for Syngenta (*via email*)
Counsel for Chevron (*via email*)

EXHIBIT B

FILED UNDER SEAL

EXHIBIT C

FILED UNDER SEAL