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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

APTUS USA, LLC and DUTCH
GARDEN SUPPLIES INT LLC,

Plaintiffs,

vs.

ROBERT SCHNEIDER, PLANT
SCIENCE CONCEPTS, INC., DONNY
NUNEZ, and DOES 1 to 20,

Defendants.

Case No. 8:16-cv-00413-DOC-DFM

PROTECTIVE ORDER

[Discovery Document: Referred to
Magistrate Judge Douglas F. McCormick]

GOOD CAUSE STATEMENT

The Court finds that good cause exists for issuance of this Protective Order (“Order”) pursuant to Rule 26(c) of the Federal Rules of Civil Procedure to establish a procedure for use and/or disclosure of Confidential Information and to govern the inadvertent production of Privileged Information, as those terms are defined herein, and that entry of this Order is appropriate. In particular, the Court’s finding of good cause is based on the following good cause statements by the parties:

Plaintiff’s Good Cause Statement

Plaintiffs Aptus USA, LLC (“Aptus”) and Dutch Garden Supplies Int LLC (“DGSI”; collectively with Aptus, “Plaintiffs”) anticipate that in the course of discovery they may be required to produce documents that would reveal information

1 regarding the development and formulation of their FaSilitor product, which is a
2 silicon-based solution used in hydroponics. The formula for FaSilitor was
3 developed through many years of research and development and the investment of
4 substantial resources. The secrecy of this information provides Plaintiffs with a
5 competitive advantage over other companies selling silicon-based solutions. If
6 information regarding the development and formulation of FaSilitor was publicly
7 disclosed, third parties would be able to develop a competing product, or Plaintiffs'
8 competitors would be able to improve their existing competing product, without
9 incurring the substantial time and expense that Plaintiffs incurred in research and
10 development to create FaSilitor.

11 Plaintiffs further anticipate they may be required to produce documents in
12 discovery that disclose non-public information concerning Plaintiffs' customers,
13 including their order history, volumes, pricing and sales. Plaintiffs invested
14 substantial time and expense developing a customer list from the thousands of
15 hydroponics retailers and commercial growers in the United States in order to
16 identify the approximately four hundred retail and commercial grower customers
17 interested in silicon-based solutions such as FaSilitor, as well as learning each of
18 their specific requirements. Disclosure of such information would allow Plaintiffs'
19 competitors to undercut Plaintiffs in their sales efforts.

20 Finally, Plaintiffs anticipate they may be required to disclose non-public
21 information in discovery concerning their employees. Plaintiffs have an obligation
22 not to publicly disclose private information concerning their employees.

23 Plaintiffs respectfully submit that there is good cause to permit Plaintiffs to
24 designate as "CONFIDENTIAL" documents produced in the course of discovery
25 that (1) relate to or would disclose Plaintiffs' confidential information relating to the
26 development and formulation of the FaSilitor product; (2) relate to or would disclose
27 Plaintiffs' confidential information relating to sales of FaSilitor, including the
28 identity of certain customers and their order history, volumes, pricing and sales; and

1 (3) relate to our would disclose Plaintiffs’ confidential information relating to
2 human resources and personnel issues.

3 Plaintiffs acknowledge that their ability to designate documents as
4 “CONFIDENTIAL” when produced in discovery is without prejudice to
5 Defendants’ ability to challenge any such designation and is not alone determinative
6 of whether such documents should remain under seal if filed with the Court. *See,*
7 *e.g., Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) (“[P]retrial depositions
8 and interrogatories are not public components of a civil trial Much of the
9 information that surfaces during pretrial discovery may be unrelated, or only
10 tangentially related, to the underlying cause of action. Therefore, restraints placed
11 on discovered, but not yet admitted, information are not a restriction on a
12 traditionally public source of information.”); *Kamakana v. Honolulu*, 447 F.3d
13 1172, 1179-80 (9th Cir. 2006) (applying different standards to “sealed discovery
14 document[s] [attached] to a non-dispositive motion” and discovery documents
15 attached to dispositive motions because “[t]he public policies that support the right
16 of access to dispositive motions, and related motions, do not apply with equal force
17 to non-dispositive materials”); *Bond v. Utreras*, 585 F.3d 1061, 1066 (7th Cir. 2009)
18 (“Unfiled discovery is private, not public.”).

19 Defendants’ Good Cause Statement

20
21 **THEREFORE, IT IS HEREBY ORDERED THAT:**

22 Certain materials, information, Documents (as defined in paragraph 1 below)
23 or testimony (collectively “Discovery Materials”) produced or given by the parties
24 or non-parties in the course of pre-trial discovery or used or produced at trial in this
25 action will involve disclosure of confidential, proprietary, financial, technical,
26 scientific, personnel, and business information (“Confidential Information”).
27 Moreover, despite the reasonable precautions taken by the parties, Confidential
28 Information and/or documents protected by the attorney-client privilege, attorney

1 work product or any other privilege (“Privileged Information”) may be inadvertently
2 disclosed. Accordingly, the parties agree that the following provisions shall govern
3 disclosure and use of all such Discovery Materials containing Confidential
4 Information and the return of inadvertently disclosed Privileged Information.

5 1. As used herein, “Documents” shall include data (including electronic
6 data) and any other material (and their contents) produced through discovery by the
7 parties, as well as any portion of a transcript of a deposition or other proceeding,
8 exhibit, affidavit, declaration, answers to interrogatories, or responses to requests for
9 admission.

10 2. Confidential Information may be found in, but not limited to, all or any
11 of the following specifically designated “Confidential” or “Confidential –
12 Attorney’s Eyes Only” Documents and the content thereof: (a) Documents,
13 depositions or testimony, responses to written discovery, and any other information
14 or material produced or otherwise made available to the parties in this action; (b)
15 copies, extracts, reports, studies, notes, complete or partial summaries and other
16 Documents or materials made or prepared from Confidential Information except that
17 it shall exclude attorney work product; and (c) transcripts, exhibits and other
18 pleadings or writings that summarize or otherwise disclose Confidential
19 Information.

20 3. This Order covers Documents and/or information or material
21 designated by the disclosing party or non-party (hereinafter, the “Source”) as
22 containing or consisting of Confidential Information. Any Source may, in good
23 faith, designate any such materials or portions thereof as being subject to the
24 provisions of this Order by means of a stamp or other designation on the Document
25 of the word “Confidential” or “Confidential – Attorney’s Eyes Only.” The parties
26 must undertake a good faith effort to make confidentiality designations on a
27 document-by-document basis. Confidentiality must be assessed with respect to each
28 individual document, and no category of documents is entitled to a presumption of

1 confidentiality, other than as provided by law.

2 4. The parties shall apply the designation “Confidential” to information or
3 materials that the Source in good faith believes to constitute proprietary business
4 information, private personnel information and/or data, and/or any information that
5 implicates or may implicate the privacy rights of the Source and/or a third party, and
6 that is not otherwise publicly available (unless such information or materials were
7 placed in the public domain as a result of a violation of any duty, law, or agreement,
8 in which case the “Confidential” designation may still apply).

9 5. The parties shall apply the designation “Confidential – Attorney’s Eyes
10 Only” only to a limited amount of Confidential Information that the Source is
11 obligated, by agreement or statutory obligation or the privacy rights of any third-
12 party, to keep confidential in a manner consistent with that designation, or that the
13 Source believes to be a trade secret so sensitive that disclosure to employees of the
14 receiving party would cause irreparable damage to the Source, such that the
15 producing party has a reasonable basis for concluding that the protections afforded
16 to documents designated “Confidential” would not be adequate.

17 6. In designating materials, Documents or portions thereof as
18 “Confidential” or “Confidential – Attorney’s Eyes Only” the Source shall mark
19 every page and/or significant component, which contains Confidential Information
20 with the appropriate “Confidential” or “Confidential – Attorney’s Eyes Only”
21 stamp. Transcripts of deposition or other testimony shall be designated by reference
22 to the page and lines being designated. Designation shall be made at the time such
23 materials are produced or given, except that: (a) in the case of testimony upon
24 deposition or hearing, such designations shall be made within twenty (20) business
25 days after the transcript of such deposition or hearing is available; (b) any such
26 transcript of a deposition or hearing shall provisionally be treated as “Confidential –
27 Attorney’s Eyes Only” until the twenty (20) business day period for serving
28 confidentiality designations has expired; and (c) a reasonable extension of any

1 applicable time period hereunder may be agreed to in writing among counsel for the
2 respective parties. Designations may be withdrawn by the Source at any time.

3 7. Unless otherwise ordered by the Court, any Document or material
4 designated by any source as containing Confidential Information shall be
5 safeguarded and shall not be disclosed by non-designating counsel, except, subject
6 to the provision of this Order, to:

7 a. the named Plaintiffs and Defendants, including but not limited to
8 their inside counsel, including paralegals, clerical or other support staff or
9 services and any officers, directors, managers, supervisors or human
10 resources personnel with responsibilities related to the subject matter of this
11 litigation unless the Confidential Information has been designated
12 “Confidential – Attorney’s Eyes Only.” If the Confidential Information in
13 question has been so designated, this subparagraph shall not authorize its
14 disclosure to such party.

15 b. counsel of record for the party to whom such Documents or
16 materials are produced or given, including co-counsel of record and the legal
17 associates, paralegals, clerical or other support staff or services of such
18 counsel or co-counsel assigned to assist such counsel in the preparation of this
19 litigation;

20 c. the Court, including any Court personnel, stenographers or other
21 persons involved in taking or transcribing court or deposition testimony in
22 this action, and members of the jury, provided that any Confidential
23 Information submitted or filed with the Court shall be accompanied by an
24 Application and Order to Seal seeking to have the Confidential Information
25 filed under seal pursuant to Local Rule 79-5 and the provisions of Paragraphs
26 14 and 15 below;

27 d. any court reporter (including audio and video) involved in this
28 action;

1 e. independent experts or consultants who have been consulted or
2 retained by counsel in this action to furnish technical or expert services or to
3 give technical or expert testimony in the trial of this action, provided that such
4 expert or consultant signs the Undertaking attached to this Order as Exhibit A,
5 acknowledging that he or she has read a copy of this Order and agrees to be
6 bound by its terms;

7 f. copying, imaging, computer services and/or litigation support
8 services provided that all Confidential Information and/or Documents,
9 including copies thereof whether in hard copy or electronic form, are
10 retrieved by the furnishing party upon completion of any such copying,
11 imaging and computer services;

12 g. special masters or mediators;

13 h. the direct staff of persons designated in paragraphs 7 (e), (f) and
14 (g), subject to any conditions enumerated therein;

15 i. any deposition witness, subject to the terms of paragraph 10
16 below;

17 j. any other Person upon written consent from counsel for the party
18 which produced or gave such Document(s), provided that such person signs
19 the Undertaking in the form attached to this Order as Exhibit A,
20 acknowledging that he or she has read a copy of this Order and agrees to be
21 bound by its terms.

22 8. Confidential Information designated “Confidential – Attorney’s Eyes
23 Only” may be disclosed only to persons described in ¶ 7, subparagraphs b, c, d, e, f,
24 g, and h and to deposition witnesses only as provided in paragraph 10 below.

25 9. Nothing in this Order shall prevent any party from producing any
26 Document or information in his, her or its possession in response to a lawful
27 subpoena or other compulsory process, provided that written notice shall be given to
28 all other parties at least ten (10) business days prior to the return date of the

1 subpoena or other compulsory process seeking discovery of the designated
2 materials.

3 10. Subject to the terms of this Order any party may utilize Confidential
4 Information designated as “Confidential” in the course of a deposition provided that,
5 prior to his or her examination, the witness is furnished a copy of this Order and has
6 executed the Undertaking attached to this Order as Exhibit A. Any party may utilize
7 Confidential Information designated as “Confidential – Attorney’s Eyes Only” in
8 the course of a deposition provided that the deponent either prepared or reviewed
9 the “Confidential – Attorney’s Eyes Only” document prior to its production and
10 prior to his or her examination, the witness is furnished a copy of this Order and has
11 executed the Undertaking attached to this Order as Exhibit A. If a deponent refuses
12 to sign the Undertaking, disclosure of such information to the witness during the
13 deposition shall not be a waiver of confidentiality and shall not prevent examination
14 of the witness on Documents or other information containing Confidential
15 Information. Such witness shall not be allowed to retain copies of either the
16 Confidential Information or any portions of their deposition transcript containing
17 Confidential Information. If disclosure of Confidential Information is opposed,
18 nothing in this Paragraph 10 shall preclude a party from continuing the deposition
19 until the matter can be raised before and ruled upon by the Court.

20 11. The parties agree to take reasonable precautions to prevent disclosure
21 of Confidential Information without the “Confidential” or “Confidential –
22 Attorney’s Eyes Only” designation provided for in this Order. However, it is
23 possible that inadvertent or mistaken disclosures will still be made, despite all
24 reasonable precautions. If Documents containing Confidential Information are
25 inadvertently or mistakenly disclosed, the parties agree that the Source may request
26 the return of such Documents or materials within ten (10) business days after the
27 discovery of their inadvertent or mistaken disclosure to allow the designation of the
28 Documents or materials as Confidential Information consistent with the provisions

1 of this Order. If the receiving party fails to return such Documents or materials, the
2 Source may move the Court for an Order compelling their return.

3 12. If Confidential Information is made an exhibit to or the subject of
4 examination during a deposition, arrangements shall be made (a) to bind separately
5 said exhibits, as well as confidential portions of the transcript or pleading and (b) to
6 place them in a sealed envelope appropriately marked.

7 13. Nothing in this Order shall prevent either party from using Documents
8 designated as “Confidential” or “Confidential – Attorney’s Eyes Only” or from
9 referring to or reciting any information contained in such materials, in connection
10 with the litigation in this matter including any hearing, motion, brief, trial, or other
11 proceeding in this action, provided the relevant portions of Paragraph 14 and 15
12 below are complied with in full.

13 14. Any party filing pleadings, motions, or other papers with the Court that
14 contain or make reference to Confidential Information shall file an Application and
15 Order to Seal seeking to have the Confidential Information filed under seal pursuant
16 to Local Rule 79-5 and following the procedures outlined therein, as well as any
17 applicable procedures of Magistrate Judge Douglas F. McCormick and the
18 Honorable David O. Carter.

19 15. Nothing herein shall prevent a receiving party from challenging any
20 designation of a Document as “Confidential” or “Confidential – Attorney’s Eyes
21 Only.” Any such challenge shall be raised through the procedures outlined in Local
22 Rule 37. Notwithstanding a challenge or application to the Court pursuant to
23 Paragraph 15, all Documents designated as “Confidential” or “Confidential –
24 Attorney’s Eyes Only” shall be subject to this Order until the Source withdraws the
25 designation or until the Court determines that the Document is not appropriately
26 designated as “Confidential” or “Confidential – Attorney’s Eyes Only.”

27 16. Within thirty (30) days after the final determination of this action (i.e.,
28 after all appellate rights have been exhausted), all Documents designated as

1 containing Confidential Information and all copies thereof shall, upon written
2 request, be returned to counsel for the Source who initially produced such
3 Documents, or shall be permanently discarded, in which case, counsel for the
4 receiving party shall certify in writing to counsel for the Source that such
5 Documents have been permanently discarded. Notwithstanding this provision,
6 Counsel are entitled to retain archival copies of all pleadings, motion papers,
7 transcripts, legal memoranda, correspondence or attorney work product, even if such
8 materials contain Confidential Information.

9 17. The parties further agree to take reasonable precautions to prevent the
10 inadvertent or mistaken disclosure of Documents containing Privileged Information.
11 The parties further agree that “reasonable precautions” shall include, by way of
12 example and not limitation, a multi-level review of documents for production,
13 including searching for and gathering documents from offices, businesses and other
14 locations where responsive information might be located and having lawyers or
15 paralegals carefully review the documents for Privileged Information, redacting
16 those portions of Documents where only a portion is protected and preparing
17 detailed privilege logs reflecting any withheld material.

18 Despite all reasonable precautions, the parties recognize that inadvertent or
19 mistaken disclosures of Privileged Information may still be made. If Documents
20 containing Privileged Information are inadvertently or mistakenly disclosed, the
21 parties agree that the following procedure shall govern:

22 a. The Source shall promptly advise the receiving party of the
23 disclosure and shall recall any such inadvertently disclosed Documents by
24 making a request of the receiving party for their return.

25 b. If a receiving party becomes aware that a Source inadvertently or
26 mistakenly disclosed Documents containing Privileged Information, the
27 receiving party shall promptly advise the Source in writing of the disclosure
28 and return the Documents and any and all copies to the Source.

1 For purposes of this Paragraph 17, the Parties agree that the return of
2 inadvertently or mistakenly disclosed Documents shall be reasonably prompt if
3 returned within fifteen (15) business days after the Source or receiving party learns
4 of the inadvertent or mistaken disclosure. If the receiving party fails to return such
5 Documents or materials, the Source may move the Court for an Order compelling
6 their return. Notwithstanding any such motion to the Court, all Documents
7 containing Privileged Information that are inadvertently or mistakenly disclosed
8 shall be subject to this Order until the Source withdraws its request for their return
9 or until the Court determines that the Document is not appropriately claimed as
10 Privileged Information.

11 18. This Order may be amended by written agreement between counsel for
12 the parties, subject to approval of the Court, or may be modified by motion to the
13 Court.

14 19. This Order shall survive the termination of this litigation. The Court
15 shall retain jurisdiction, even after the termination of this litigation, to enforce this
16 Order.

17 **FOR GOOD CAUSE SHOWN, IT IS SO ORDERED.**

18 Dated: November 8, 2016 _____



Honorable Douglas F. McCormick
United States Magistrate Judge

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