

STATE OF NORTH CAROLINA  
GASTON COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
13 CVS 1686

DSM DYNEEMA, LLC,  
Plaintiff,

v.

JAMES THAGARD, Ph.D.;  
HONEYWELL SPECIALTY  
MATERIALS, LLC; HONEYWELL  
ADVANCED COMPOSITES, INC.; and  
HONEYWELL INTERNATIONAL, INC.,  
Defendants.

**ORDER ON PLAINTIFF'S  
MOTION TO COMPEL  
[REVISED]**

1. **THIS MATTER** is before the Court upon Plaintiff DSM Dyneema, LLC's ("Plaintiff") Motion to Compel Responses to Requests for Production of Documents and Things from Defendants Honeywell Specialty Materials, LLC, Honeywell Advanced Composites, Inc., and Honeywell International, Inc. (collectively, "Honeywell") (the "Motion") in the above-captioned case.
2. Plaintiff filed the Motion on July 2, 2015, and briefing was completed on August 10, 2015. The Court held a hearing on Plaintiff's Motion on August 24, 2015 (the "Hearing") at which all parties were represented by counsel.
3. Plaintiff seeks production of certain physical materials from Honeywell for inspection and testing. It is undisputed that the materials Plaintiff requests "constitute[] Honeywell's proprietary materials and information." (Pl.'s Br. Supp. Mot. to Compel 9.) Plaintiff's proposed testing protocols contemplate that Plaintiff will perform destructive testing to samples of Honeywell's proprietary materials. Plaintiff has agreed that Honeywell's experts may be present for the proposed testing. (Pl.'s Br. Supp. Mot. to Compel 6, 9.) Plaintiff seeks costs and sanctions against Honeywell for causing Plaintiff to file this Motion.

4. In Honeywell’s brief opposing Plaintiff’s Motion, and again at the Hearing, Honeywell advanced four arguments for denial of Plaintiff’s Motion: (i) the Motion was procedurally improper; (ii) Plaintiff failed to provide a chain of custody protocol; (iii) Plaintiff failed to establish the relevance of the proposed testing to the allegations in the case; and (iv) Plaintiff’s expert, Dr. S. Leigh Phoenix (“Dr. Phoenix”) is not an independent expert and therefore should not be permitted to perform the requested testing.

5. Having considered the Motion, the parties’ briefs in opposition and support of the Motion, the supporting evidence of record, and the arguments of counsel at the Hearing, the Court memorializes its oral rulings at the Hearing and concludes as follows:

A. Procedural Sufficiency of the Motion.

6. Under Rule 37(a)(2), a party moving for an order compelling discovery is required to “include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.” N.C. R. Civ. P. 37(a)(2) (2014). Upon review of the Motion, the Court is satisfied that the Motion provides the proper certification.

7. Rule 18.6(a) of the General Rules of Practice and Procedure for the North Carolina Business Court also provides that “[t]he Court will not consider motions and objections relating to discovery unless moving counsel files a certificate that, after personal consultation and diligent attempts to resolve differences, the parties are unable to reach an accord. The certificate shall set forth the date of the conference, the names of the participating attorneys, and the specific results achieved.” BCR 18.6(a) (2006). The Court is also satisfied that the Motion complies with BCR 18.6(a) for the purposes of this Order.

B. Chain of Custody Protocol.

8. In its reply brief to Honeywell’s opposition to the Motion, Plaintiff asserts that a chain of custody protocol should not be required prior to Honeywell’s production of the requested materials. At the Hearing, however, counsel for Plaintiff abandoned this argument and indicated that Plaintiff did not object to having a chain of custody protocol in place before Honeywell is required to produce the requested materials. The Court therefore concludes that the parties should negotiate and have in place a mutually-agreeable chain of custody protocol before Honeywell should be required to produce the requested materials.

C. Testing Protocols.

9. Based on the record currently before the Court, the Court is not satisfied that Plaintiff has shown that the specific testing of Honeywell’s materials that Plaintiff has proposed is relevant to its allegations that Defendants have misappropriated Plaintiff’s trade secrets. The Court therefore concludes that resolution of this aspect of the Motion requires that Plaintiff submit supplemental briefing and evidence supporting Plaintiff’s contention that the proposed testing Plaintiff wishes to conduct is relevant to Plaintiff’s allegations that Defendants have misappropriated the trade secrets Plaintiff has specifically identified in Exhibit A to Plaintiff’s Supplemental Response to Defendant Honeywell’s Interrogatory Number 1, (*see* Pl.’s Supplemental Resp. to Honeywell Interrog. No. 1 Ex. A).

10. In particular, while the Court recognizes the “broad parameters of relevancy in discovery” under N.C. R. Civ. P. 26,<sup>1</sup> *Evans v. United Services Auto. Ass’n*, 142 N.C. App 18, 34, 541 S.E.2d 782, 792 (2001), the Court specifically directs Plaintiff to explain how the results of each proposed test will have “any tendency to make the existence of any fact that is of

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<sup>1</sup> N.C. R. Civ. P 26(b)(1) states generally that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . .” N.C. R. Civ. P 26(b)(1) (2014).

consequence to the determination of the action more probable or less probable than it would be without the evidence,” N.C. R. Evid. 401, as well as how the “degree to which the proposed inspection [and testing] will aid in the search for truth against the burdens and dangers created by the inspection [and testing].” *Ramos v. Carter Express, Inc.*, 292 F.R.D. 406, 408 (S.D. Tex. 2013); *see, e.g., Hunley v. Glencore Ltd., Inc.*, 2013 U.S. Dist. LEXIS 54259, at \*7 (E.D. Tenn. 2013); *Scruggs v. Int’l Paper Co.*, 278 F.R.D. 698, 700 (S.D. Ga. 2012).

D. Independence of Dr. Phoenix.

11. Based on the submissions and arguments of counsel, and cognizant that (i) Dr. Phoenix has never consulted with Plaintiff on helmets or Plaintiff’s Enhanced Combat Helmet (“ECH”) program, (Pl.’s Reply Br. Supp. Mot. to Compel Ex. B ¶ 7); (ii) Dr. Phoenix ceased all consulting contact with Plaintiff in June 2014 and has not received any compensation from Plaintiff for consulting services at any time since 2011 (Pl.’s Reply Br. Supp. Mot. to Compel Ex. B ¶ 14); and (iii) Dr. Phoenix has agreed not to consult on any ECH-related program with Plaintiff for the next five years, (Pl.’s Reply Br. Supp. Mot. to Compel Ex. B ¶ 18), the Court is satisfied that Dr. Phoenix is sufficiently independent of Plaintiff that he should be permitted to perform the testing of Honeywell’s materials proposed by Plaintiff. The Court reaches this conclusion, however, based on the current record and without prejudice to Honeywell’s right to renew its Motion concerning Dr. Phoenix’s disqualification in the event new evidence is developed that calls into question Dr. Phoenix’s independence from Plaintiff.

E. Costs and Sanctions.

12. When the Court grants a motion under Rule 37(a)(2), N.C. R. Civ. P. 37(a)(4) requires the Court to order “the party . . . whose conduct necessitated the motion . . . to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney’s fees, unless

the court finds that the opposition to the motion was substantially justified . . . .” N.C. R. Civ. P. 37(a)(4). The Court finds that Honeywell’s opposition to the Motion was substantially justified in the circumstances present here and therefore does not find an award of expenses or fees to Plaintiff warranted or appropriate.

13. The Court therefore **ORDERS** as follows:

a. As to Plaintiff’s proposed testing protocols:

- i. On or before September 8, 2015, Plaintiff shall file a supplemental brief with supporting materials in further support of its contention that Plaintiff’s proposed testing protocols are relevant to Plaintiff’s allegations that Defendants misappropriated Plaintiff’s identified trade secrets as set forth in paragraphs 9 and 10 of this Order.
- ii. Honeywell shall have fourteen (14) days from the date of filing of Plaintiff’s submissions to file a response brief with supporting materials in opposition.
- iii. Plaintiff shall have ten (10) days from the date of filing of Honeywell’s response to file a surreply.
- iv. Honeywell shall have ten (10) days from the date of filing of Plaintiff’s surreply to file a reply.
- v. Plaintiff’s supplemental brief (subparagraph i above) and Honeywell’s opposition (subparagraph ii above) shall be subject to the requirements set forth in Business Court Rule 15.8 for briefs in support of motions and responsive briefs.

- vi. Plaintiff's surreply (subparagraph iii above) and Honeywell's reply (subparagraph iv above) shall be subject to the requirements set forth in Business Court Rule 15.8 for reply briefs.
  - vii. The Court defers ruling on the testing protocols aspect of Plaintiff's Motion pending completion of the briefing requested above or such other time as the Court may determine.
- b. As to a chain of custody protocol:
- i. Plaintiff and Honeywell shall confer and attempt to develop a mutually-agreeable chain of custody protocol no later than September 8, 2015.
  - ii. If the parties disagree on any aspect of a proposed chain of custody protocol, they shall file a single proposed chain of custody protocol no later than September 8, 2015, such submission to reflect the terms on which the parties agree and the views of each party on any areas of disagreement, for the Court's review and determination.
  - iii. The Court will not require Honeywell to produce materials for testing until such time as the parties have agreed to a chain of custody protocol or such other time as the Court may determine.
- c. As to Dr. Phoenix's participation in Plaintiff's proposed testing:
- i. The Court orders that Dr. Phoenix may conduct testing of Honeywell's materials in the event the Court authorizes Plaintiff to conduct such testing. The Court's determination is without prejudice to Honeywell's right to file a renewed motion to disqualify Dr. Phoenix from such testing

should new evidence be developed that calls into question Dr. Phoenix's independence from Plaintiff.

- ii. The Court encourages Plaintiff to facilitate negotiations and agreement between Plaintiff, Honeywell and Dr. Phoenix regarding restrictions on Dr. Phoenix's ability to consult with Plaintiff in the future concerning matters potentially involving the disclosure and use of Honeywell's trade secrets, including ECH-related programs. Plaintiff and Honeywell shall report the status of such negotiations to the Court no later than September 25, 2015.
- d. Plaintiff's request under N.C. R. Civ. P. 37 to recover its reasonable expenses and attorney's fees incurred in bringing this Motion is **DENIED**.
- e. All other relief requested by Plaintiff is hereby **DENIED**.
- f. The parties shall tender to the Court a proposed modified Case Management Order on or before September 8, 2015.

**SO ORDERED**, this the 27th day of August, 2015.

/s/ Louis A. Bledsoe, III  
Louis A. Bledsoe, III  
Special Superior Court Judge  
for Complex Business Cases