STATE OF NORTH CAROLINA WAYNE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 20 CVS 1430
MAXWELL FOODS, LLC, Plaintiff, v. SMITHFIELD FOODS, INC., Defendant.	**ORDER ON AEO DESIGNATIONS**

1. Months ago, the parties tangled over the terms of a blanket protective order to govern the use of confidential material produced in discovery. They agreed on most terms but not whether to allow heightened, attorneys' eyes only ("AEO") protection for trade secrets and other highly confidential information. Smithfield Foods, Inc. advocated an AEO provision; Maxwell Foods, LLC opposed it. For reasons stated elsewhere, the Court entered a protective order that allows each side (and third parties) to designate material as AEO. (*See* Protective Order ¶¶ 2, 4, ECF No. 33; Order on BCR 10.9 Submission Regarding AEO Designations, ECF No. 35.)

2. This is the sequel to that dispute. A party's AEO designations are, of course, open to challenge, and at the time the protective order was entered, it was a sure bet that Maxwell would question some or all of Smithfield's designations as discovery progressed. Hoping to avoid piecemeal resolution, the Court paired the protective order with a scheduling order to deal with those challenges. (*See* ECF No. 35.) As expected, Maxwell has timely—and broadly—objected to Smithfield's AEO designations for documents produced so far. Briefing is now complete, and counsel argued the matter at a hearing on 1 November 2021.

3. Courts have wide discretion to order that confidential information "be disclosed only in a designated way." N.C. R. Civ. P. 26(c)(vii). In most cases, it is enough to instruct the parties to keep the information secret, to use it only for case-related purposes, and to destroy it once litigation is over. Especially sensitive information—a trade secret is the obvious example—may call for tighter controls. Indeed, this Court and others have observed that "[t]he disclosure of confidential information on an attorneys' eyes only basis is a routine feature of civil litigation involving trade secrets." *Addison Whitney, LLC v. Cashion*, 2020 NCBC LEXIS 72, at *37 (N.C. Super. Ct. June 10, 2020) (quoting *Paycom Payroll, LLC v. Richison*, 758 F.3d 1198, 1202 (10th Cir. 2014)).

4. But routine does not mean favored. AEO designations by one party "pose a significant handicap" on the other: "It is difficult, and perhaps impossible, for an attorney to counsel a client to compromise or even abandon a case on the basis of information kept secret from the client." *Arvco Container Corp. v. Weyerhaeuser Co.*, 2009 U.S. Dist. LEXIS 9264, at *15–16 (W.D. Mich. Feb. 9, 2009). Partial access to the evidence "leaves the litigant in a difficult position to assess whether the arguments put forward on its behalf are meritorious." *Global Materials Techs., Inc. v. Dazheng Metal Fiber Co.*, 133 F. Supp. 3d 1079, 1084 (N.D. Ill. 2015). These are serious costs, tolerable only when the costs of less restrictive disclosure are higher.

5. The upshot is that AEO designations "should only be used on a relatively small and select number of documents where a genuine threat of competitive or other injury dictates such extreme measures." *Id.* at 1083–84 (citation and quotation

marks omitted). And the designating party—here, Smithfield—has the burden to show that the material is confidential and that its need for protection outweighs the harm its opponent will suffer from being kept in the dark. *See Computer Design & Integration, LLC v. Brown*, 2017 NCBC LEXIS 230, at *3–4 (N.C. Super. Ct. Mar. 23, 2017) (citing cases); *see also, e.g.*, *Alarmax Distribs., Inc. v. Honeywell Int'l, Inc.*, 2015 U.S. Dist. LEXIS 179636, at *3–4 (W.D. Pa. Oct. 28, 2015); *DeFazio v. Hollister, Inc.*, 2007 U.S. Dist. LEXIS 98147, at *6 (E.D. Cal. Sept. 5, 2007).

6. Three categories of documents are at issue. These include Smithfield's active contracts with its hog suppliers, information showing the prices that Smithfield has paid and the number of hogs that it has bought under those contracts, and the same pricing and volume information going back to 2017 for contracts that are now expired. Maxwell seeks only to remove the AEO designations from these documents; it does not object to a lesser, non-AEO designation under the protective order. After careful consideration, the Court agrees with Maxwell.

7. To start, Smithfield hasn't shown that the disputed contracts are unusually sensitive. With one exception, the contracts lack confidentiality clauses, meaning that the suppliers have no obligation to keep their terms secret. This includes Smithfield's contract with Maxwell (one of its largest suppliers), which remains active and has been filed publicly in this case without objection. (*See* Pike Aff. ¶¶ 14, 15, ECF No. 82.) Smithfield says that it protects the contracts in other ways—namely, by conveying "its expectation" that suppliers will treat them as confidential. (Horsley Aff. ¶ 16, ECF No. 75.1.) But nonbinding expectations mean little unless suppliers

follow through on them. There is no evidence that the suppliers do. *See McDonald Apiary, LLC v. Starrh Bees, Inc.*, 2016 U.S. Dist. LEXIS 8270, at *10–11 (D. Neb. Jan. 25, 2016) (denying AEO designation when party had not shown that "its contracts with . . . business partners contained any sort of confidentiality clause or were otherwise closely guarded").

8. Arguably, the sole contract with a confidentiality clause stands apart from those without. But Smithfield has given no reason to treat that contract differently, instead lumping it together with the others as a group. It is not the Court's burden to make fine distinctions when the designating party chooses a categorical approach in lieu of justifying its designations on a document-by-document basis. In any event, nothing in the record suggests that any unique harm would result from allowing Maxwell's counsel to discuss that contract with their client.

9. So too for the disputed pricing and volume information: how much Smithfield pays and how much it buys are artifacts of the supplier contracts, both active and expired. Smithfield regards the pricing and volume information as sensitive chiefly on the ground that a competitor could use the raw data to reconstruct the terms of the contracts. In other words, this information is only as sensitive as the contracts themselves. Again, with one exception, there is no evidence that suppliers are bound to hold such information in confidence or that they actually do so. Moreover, for many years, Smithfield regularly distributed detailed information about its hog purchases—including headcount, total weight, base price, and price adjustments—to Maxwell and other major suppliers. (*See* Pike Aff. ¶¶ 8, 11–13.)

Although these distributions ended at some point, they show just how unlikely it is that disclosure of the same kinds of information to Maxwell in this case would create a genuine risk of competitive injury.

10. Little else needs to be said. A strong showing of confidentiality and risk of harm is essential. Without that, Smithfield has no good cause for these AEO designations. Even if the documents at issue do contain some confidential information, the risk of harm from disclosure is low. Maxwell has agreed to treat the documents as "Confidential Discovery Material" under the protective order and to abide by all the applicable restrictions on use and dissemination. Smithfield hasn't carried its burden to show that these restrictions—enforceable through the Court's contempt power—are inadequate to protect its interests.

11. Finally, although Maxwell reiterates its view that AEO designations should never be allowed, the Court sees no reason to modify the protective order. The reasons for including an AEO provision haven't changed. Modern discovery is liberal by design, and the test of relevance is broad. Even though Maxwell's plans to close its business make direct competition less and less likely, Smithfield has stated reasonable concerns about putting competitively sensitive information into the hands of those who may find new employment elsewhere in the hog industry. If future discovery requests call for disclosure of that sort of information, an AEO designation may be appropriate. Yes, Smithfield has overreached, but the Court is not convinced that misuse amounts to abuse. Going forward, the Court expects Smithfield to reserve the AEO designation for the rare document that truly deserves it.

12. For these reasons, the Court **ORDERS** as follows:

a. Smithfield has not shown good cause to limit disclosure of the disputed contracts, pricing information, and volume information to Maxwell's attorneys. The Court therefore **GRANTS** Maxwell's request to remove the AEO designations for these categories of documents and to redesignate them as "Confidential Discovery Material" under the protective order.

b. The Court **DENIES** Maxwell's request to modify the protective order to eliminate the AEO category.

SO ORDERED, this the 23rd day of November, 2021.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases