TTAB

James A. Zellinger
Trademark Counsel

Syngenta Crop Protection, Inc.
410 Swing Road
Greensboro, NC 27409

Tel 336-632-7835
Fax 336-632-2012
e-mail:
jim.zellinger@syngenta.com

syngenta

April 1, 2005

U.S. Patent and Trademark Office
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

Re: LEXUS, Serial No. 78/145,546; Opposition No. 157,206
LEXXUS, Serial No. 78/185,538

Dear Sir or Madam:

Please find enclosed APPLICANT'S MOTION FOR PROTECTIVE ORDER. Please file in conjunction with the above.

Thank you for your assistance with this matter.

Very Truly Yours,

James A. Zellinger
Trademark Counsel

JAZ/sk
encl.

[redacted]

04-04-2005
U.S. Patent & TMOfc/TM Mail Rcpt Dt. #32

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

TOYOTA JIDOSHA KABUSHIKI KAISHA d/b/a TOYOTA MOTOR CORPORATION, and TOYOTA MOTOR SALES, U.S.A., INC.	)	Opposition No. 157, 206 Serial No. 78/145,546 Mark: Lexus
Opposers	)	CONSOLIDATED OPPOSITION
v.	)	Serial No.: 78/185,538 Filed: Nov. 15, 2002 Mark: LEXXUS
SYNGENTA PARTICIPATIONS AG Applicant.	)	

APPLICANT'S MOTION FOR PROTECTIVE ORDER

Applicant, Syngenta Participations AG, would move this Board, pursuant to the Board's Order of March 11, 2005 for entry of a protective order regarding the exchange of confidential materials. In said Order, attached hereto as Exhibit 1, the parties were given twenty days from the date of the Order to agree upon a joint protective order and confidentiality agreement. The deadline set by the Board has passed and the parties have been unable to agree.

I. Opposers' Refusal

On March 31, 2005, counsel for the parties conducted brief telephone discussions

concerning the different draft protective orders proposed by the parties or the Board. Counsel were unable to agree on the language of Opposers' proposed order. Applicant's counsel then recited the Board's Order (Ex.1) that the parties would be bound by the Board's "own protective agreement that is set in the appendix to the Board's manual of procedure". Applicant's counsel offered to prepare said agreement (Ex 2). However, counsel for Opposers refused to agree to accept the Board's agreement and refused to agree to execute. In fact, Opposers indicated that they would be "filing a short motion" to compel Applicant to execute Opposers' proposed order despite the Board's Order refusing to so compel.

II Dilatory Tactics

Despite the Board's Order and Applicants' agreement to and execution of the Board's own preferred agreement, Opposers have indicated that they will continue to contest this issue and refuse to comply with the Board's Order. This is a continuation of the early employed dilatory and obstructionitic tactics by Opposers. Applicant has accepted the Board's preferred agreement. Pursuant to the Board's Order (Ex.1), the parties have no option but to comply as the deadline to agree has passed. Yet Opposers have indicated that they will contest the Board's Order to further delay and obstruct these proceedings (Ex.3).

Wherefore, it is respectfully requested that the Board recognize the dilatory tactics being employed by Opposers and enforce its Order of March 11, 2005. Applicant would move this Board, pursuant to its Order, for entry of the protective order and agreement (Ex.2).

SYNGENTA PARTICIPATIONS AG

By:_____
James A. Zellinger

Syngenta Crop Protection, Inc.
410 Swing Road
Greensboro, North Carolina 27409
Tele. 336-632-7835
Fax. 336-632-2012

CERTIFICATE OF SERVICE

I, JAMES A. ZELLINGER, do hereby certify that I have mailed a copy of the above and foregoing Applicant's Motion For Entry of Protective Order to Opposer's attorney of record as listed below by placing a copy of same in the U. S. Mail, properly addressed and postage prepaid, to:

David J. Kera
Oblon, Spivak, McClelland, Maier & Neustadt, P.C.
1940 Duke Street
Alexandria, VA 22314

on this the 1 day of April, 2005.

James A. Zellinger

EXHIBIT 1

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

MAR 17 2005

Mailed: March 11, 2005

Opposition Nos. 91157206
91159578

Toyota Jidosha Kabushiki Kaisha, t/a Toyota Motor Corporation, and Toyota Motor Sales, U.S.A., Inc.

v.

Syngenta Participations AG[1]

Linda Skoro, Interlocutory Attorney

This case now comes up on the parties' motion for entry of a protective order, filed October 1, 2004, by opposer and filed November 19, 2004, by applicant[2]. As the dispute continues, opposer filed another motion on March 1, 2005.

The parties are unable to agree to one specific provision in an otherwise complete protective agreement. The controversial sentence appears to be: "Material in evidence in this proceeding only upon consent of the other party or party not creating said deletions." Applicant

---

[1] Applicant is advised that it needs to include the opposition proceeding numbers in its caption to avoid delay in having its papers associated with the file.

[2] Opposers' motion to strike applicant's surreply, filed December 17, 2004, is hereby granted and applicant's motion to add exhibits to its surreply, filed December 17, 2004, is hereby denied as moot.

wants this language added to the sentence that reads: "Deletions made from any material in accordance with the terms of this protective order shall not affect the admissibility of any such material in evidence in this proceeding." Applicant is concerned that without this controversial sentence, admissibility of confidential material will be affected, in that applicant may be forced to waive its rights to object to the admissibility of materials produced by opposers. Applicant requests either complete deletion of the entire paragraph or inclusion of its controversial sentence.

Opposers' position is that "if a party offers in evidence only part of a confidential document produced by an adverse party, the remedy is not to object to admissibility, but to offer the entire document." The Board agrees.

The Federal Rules of Civil Procedure and Trademark Rule 2.122 govern admissibility of evidence. In similar matters, namely non-confidential evidence, the rules allow a party to enter any other portion of an admitted document if it believes that the partial admission, by its opponent, has been unfairly redacted. *See* 37 CFR § 2.120(j)(4)& (5). In such a circumstance, the appropriate response is submission of additional material, in this case as confidential, and not an objection to its admissibility, or its designation as

confidential. Any objection to admissibility is decided at final hearing. *See* TBMP § 702.02(c) (2d ed. rev. 2004).

Accordingly, applicant's controversial sentence is unnecessary. The parties have TWENTY days to put in place a protective agreement, or the Board will impose its own protective agreement that is set out in the appendix to the Board's manual of procedure and on the Board's website.

The Board now turns to opposers' most recent filing involving the continued request by applicant for opposers to produce copies of third-party litigation documents. Such information is discoverable. However, the only information which must be provided with respect to a legal proceeding is the names of the parties thereto, the jurisdiction, the proceeding number, the outcome of the proceeding, and the citation of the decision (if published). *See Interbank Card Ass'n v. United States National Bank of Oregon,* 197 USPQ 127, 128 (TTAB 1975) and *Johnson & Johnson v. Rexall Dug Co.*, 186 USPQ 167, 172 (TTAB 1975). Accordingly, opposers' motion is granted to the extent it does not have to produce copies of documents, but need only identify relevant litigation.

The trial dates are reset, including discovery, to accommodate the parties' supplementing of their responses

after the protective agreement is in place[3]. The trial dates are reset as follows:

Discovery period to close:	**5/15/2005**
30-day testimony period for party in position of plaintiff to close:	**8/13/2005**
30-day testimony period for party in position of defendant to close:	**10/12/2005**
15-day rebuttal testimony period to close:	**11/26/2005**

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

.oOo.

[3] While applicant objected to the extension of the discovery period, claiming it was a dilatory tactic on the part of opposer, it states that there are still many outstanding discovery responses.

EXHIBIT 2

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

TOYOTA JIDOSHA KABUSHIKI KAISHA d/b/a TOYOTA MOTOR CORPORATION,	)	Opposition No. 157, 206 Serial No. 78/145,546 Mark: Lexus
and TOYOTA MOTOR SALES, U.S.A., INC.	)	
Opposers	)	CONSOLIDATED OPPOSITION
v.	)	Serial No.: 78/185,538 Filed: Nov. 15, 2002 Mark: LEXXUS
SYNGENTA PARTICIPATIONS AG	)	
Applicant.	)	

STIPULATED PROTECTIVE ORDER

In accordance with the Federal Rules of Civil Procedure and the Trademark Rules of Practice, Opposers, and Applicant, Syngenta Participations, Inc. (hereinafter "Applicant" or "Syngenta"), hereby agree to this Stipulated Protective Order.

Information disclosed by any party or non-party witness during this proceeding may be considered confidential, a trade secret, or commercially sensitive by a party or witness. To preserve the confidentiality of the information so disclosed, the parties have agreed to be bound by the terms of this order. As used in this order, the term "information" covers both oral testimony and documentary material. The parties may subsequently agree in writing to make modifications or additions to this protective order.

Agreement of the parties is indicated by the signatures of the parties' attorneys and/or the parties themselves at the conclusion of the order. Imposition of the terms by the Board is indicated by signature of a Board attorney or Administrative Trademark Judge at the conclusion of the order. By signing, the parties intend to create a contract on the terms herein. The terms are binding from the date the parties or their attorneys sign the order, regardless of whether the Board enters the Order.

TERMS OF ORDER

1) Classes of Protected Information.

The Rules of Practice in Trademark Cases provide that all inter parties proceeding files, as well as the involved registration and application files, are open to public inspection. The terms of this order are not to be used to undermine public access to files. When appropriate, however, a party or witness, on its own or through its attorney, may seek to protect the confidentiality of information by employing one of the following designations.

Confidential—Material to be shielded by the Board from public access.

Highly Confidential—Material to be shielded by the Board from public access and subject to agreed restrictions on access even as to the parties and/or their attorneys.

Trade Secret/Commercially Sensitive—Material to be shielded by the Board from public access, restricted from any access by the parties, and available for review by outside counsel for the parties and, subject to the provisions of paragraph 4 and 5, by independent experts or consultants for the parties.

2) Information Not to Be Designated as Protected.

Information may not be designated as subject to any form of protection if it (a) is, or becomes, public knowledge, as shown by publicly available writings, other than through violation of the terms of this document; (b) is acquired by a non-designating party or non-party witness from a third party lawfully possessing such information and having no obligation to the owner of the information; (c) was lawfully possessed by a non-designating party or non-party witness prior to the opening of discovery in this proceeding, and for which there is written evidence of the lawful possession; (d) is disclosed by a non-designating party or non-party witness legally compelled to disclose the information; or (e) is disclosed by a non-designating party with the approval of the designating party.

3) Access to Protected Information.

The provisions of this order regarding access to protected information are subject to modification by written agreement of the parties or their attorneys, or by motion filed with and approved by the Board.

Judges, attorneys, and other employees of the Board are bound to honor the parties' designations of information as protected but are not required to sign forms acknowledging the terms and existence of this order. Court reporters,

stenographers, video technicians or others who may be employed by the parties or their attorneys to perform services incidental to this proceeding will be bound only to the extent that the parties or their attorneys make it a condition of employment or obtain agreements from such individuals, in accordance with the provisions of paragraph 4.

- **Parties** are defined as including individuals, officers of corporations, partners of partnerships, and management employees of any type of business organization.

- **Attorneys** for parties are defined as including **in-house counsel** and **outside counsel**, including support staff operating under counsel's direction, such as paralegals or legal assistants, secretaries, and any other employees or independent contractors operating under counsel's instruction.

- **Independent experts or consultants** include individuals retained by a party for purposes related to prosecution or defense of the proceeding but who are not otherwise employees of either the party or its attorneys.

- **Non-party witnesses** include any individuals to be deposed during discovery or trial, whether willingly or under subpoena issued by a court of competent jurisdiction over the witness.

Parties and their **attorneys** shall have access to information designated as **confidential** or **highly confidential**, subject to any agreed exceptions.

Counsel, shall have access to information designated as **trade secret/commercially sensitive**.

Independent experts or consultants, **non-party witnesses**, and **any other individual** not otherwise specifically covered by the terms of this order may be afforded access to **confidential** or **highly confidential** information in accordance with the terms that follow in paragraph 4. Further, **independent experts or consultants** may have access to **trade secret/commercially sensitive** information if such access is agreed to by the parties or ordered by the Board, in accordance with the terms that follow in paragraph 4 and 5.

4) Disclosure to Any Individual.

Prior to disclosure of protected information by any party or its attorney to any individual not already provided access to such information by the terms of this order, the individual shall be informed of the existence of this order and provided with a copy to read. The individual will then be required to certify in writing that the order has been read and understood and that the terms shall be binding on the individual. No individual shall receive any protected information until the party or attorney proposing to disclose the information has received the signed

certification from the individual. The party or attorney receiving the completed form shall retain the original.

5) Disclosure to Independent Experts or Consultants.

In addition to meeting the requirements of paragraph 4, any party or attorney proposing to share disclosed information with an independent expert or consultant must also notify the party which designated the information as protected. Notification must be personally served or forwarded by certified mail, return receipt requested, and shall provide notice of the name, address, occupation and professional background of the expert or independent consultant.

The party or its attorney receiving the notice shall have ten (10) business days to object to disclosure to the expert or independent consultant. If objection is made, then the parties must negotiate the issue before raising the issue before the Board. If the parties are unable to settle their dispute, then it shall be the obligation of the party or attorney proposing disclosure to bring the matter before the Board with an explanation of the need for disclosure and a report on the efforts the parties have made to settle their dispute. The party objecting to disclosure will be expected to respond with its arguments against disclosure or its objections will be deemed waived.

6) Responses to Written Discovery.

Responses to interrogatories under Federal Rule 33 and requests for admissions under Federal Rule 36, and which the responding party reasonably believes to contain protected information shall be prominently stamped or marked with the appropriate designation from paragraph 1. Any inadvertent disclosure without appropriate designation shall be remedied as soon as the disclosing party learns of its error, by informing all adverse parties, in writing, of the error. The parties should inform the Board only if necessary because of the filing of protected information not in accordance with the provisions of paragraph 12.

7) Production of Documents.

If a party responds to requests for production under Federal Rule 34 by making copies and forwarding the copies to the inquiring party, then the copies shall be prominently stamped or marked, as necessary, with the appropriate designation from paragraph 1. If the responding party makes documents available for inspection and copying by the inquiring party, all documents shall be considered protected during the course of inspection. After the inquiring party informs the responding party what documents are to be copied, the responding party will be responsible for prominently stamping or marking the copies with the appropriate designation from paragraph 1. Any inadvertent disclosure without appropriate designation shall be remedied as soon as the disclosing party learns of its error, by informing all adverse parties, in writing, of the error. The parties should inform

the Board only if necessary because of the filing of protected information not in accordance with the provisions of paragraph 12.

8) Depositions.

Protected documents produced during a discovery deposition, or offered into evidence during a testimony deposition shall be orally noted as such by the producing or offering party at the outset of any discussion of the document or information contained in the document. In addition, the documents must be prominently stamped or marked with the appropriate designation.

During discussion of any non-documentary protected information, the interested party shall make oral note of the protected nature of the information.

The transcript of any deposition and all exhibits or attachments shall be considered protected for 30 days following the date of service of the transcript by the party that took the deposition. During that 30-day period, either party may designate the portions of the transcript, and any specific exhibits or attachments, that are to be treated as protected, by electing the appropriate designation from paragraph 1. Appropriate stampings or markings should be made during this time. If no such designations are made, then the entire transcript and exhibits will be considered unprotected.

9) Filing Notices of Reliance.

When a party or its attorney files a notice of reliance during the party's testimony period, the party or attorney is bound to honor designations made by the adverse party or attorney, or non-party witness, who disclosed the information, so as to maintain the protected status of the information.

10) Briefs.

When filing briefs, memoranda, or declarations in support of a motion, or briefs at final hearing, the portions of these filings that discuss protected information, whether information of the filing party, or any adverse party, or any non-party witness, should be redacted. The rule of reasonableness for redaction is discussed in paragraph 12 of this order.

11) Handling of Protected Information.

Disclosure of information protected under the terms of this order is intended only to facilitate the prosecution or defense of this case. The recipient of any protected information disclosed in accordance with the terms of this order is obligated to maintain the confidentiality of the information and shall exercise reasonable care in handling, storing, using or disseminating the information.

12) Redaction; Filing Material With the Board.

When a party or attorney must file protected information with the Board, or a brief that discusses such information, the protected information or portion of the brief discussing the same should be redacted from the remainder. A rule of reasonableness should dictate how redaction is effected.

Redaction can entail merely covering a portion of a page of material when it is copied in anticipation of filing but can also entail the more extreme measure of simply filing the entire page under seal as one that contains primarily confidential material. If only a sentence or short paragraph of a page of material is confidential, covering that material when the page is copied would be appropriate. In contrast, if most of the material on the page is confidential, then filing the entire page under seal would be more reasonable, even if some small quantity of non-confidential material is then withheld from the public record. Likewise, when a multi-page document is in issue, reasonableness would dictate that redaction of the portions or pages containing confidential material be affected when only some small number of pages contains such material. In contrast, if almost every page of the document contains some confidential material, it may be more reasonable to simply submit the entire document under seal. **Occasions when a whole document or brief must be submitted under seal should be very rare**.

Protected information, and pleadings, briefs or memoranda that reproduce, discuss or paraphrase such information, shall be filed with the Board under seal. The envelopes or containers shall be prominently stamped or marked with a legend in substantially the following form:

CONFIDENTIAL

This envelope contains documents or information that are subject to a protective order or agreement. The confidentiality of the material is to be maintained and the envelope is not to be opened, or the contents revealed to any individual, except by order of the Board.

13) Acceptance of Information; Inadvertent Disclosure.

Acceptance by a party or its attorney of information disclosed under designation as protected shall not constitute an admission that the information is, in fact, entitled to protection. Inadvertent disclosure of information which the disclosing party intended to designate as protected shall not constitute waiver of any right to claim the information as protected upon discovery of the error.

14) Challenges to Designations of Information as Protected.

If the parties or their attorneys disagree as to whether certain information should be protected, they are obligated to negotiate in good faith within 20 days regarding the designation by the disclosing party. If the parties are unable to resolve their differences, the party challenging the designation may make a motion before the Board seeking a determination of the status of the information.

A challenge to the designation of information as protected must be made substantially contemporaneous with the designation or as soon as practicable after the basis for challenge is known. When a challenge is made long after a designation of information as protected, the challenging party will be expected to show why it could not have made the challenge at an earlier time.

The party designating information as protected will, when its designation is timely challenged, bear the ultimate burden of proving that the information should be protected.

15) Board's Jurisdiction; Handling of Materials After Termination.

The Board's jurisdiction over the parties and their attorneys ends when this proceeding is terminated. A proceeding is terminated only after a final order is entered and either all appellate proceedings have been resolved or the time for filing an appeal has passed without filing of any appeal.

The parties may agree that archival copies of evidence and briefs may be retained, subject to compliance with agreed safeguards. Otherwise, within 30 days after the final termination of this proceeding, the parties and their attorneys shall return to each disclosing party the protected information disclosed during the proceeding, and shall include any briefs, memoranda, summaries, and the like, which discuss or in any way refer to such information. In the alternative, the disclosing party or its attorney may make a written request that such materials be destroyed rather than returned.

16) Other Rights of the Parties and Attorneys.

This order shall not preclude the parties or their attorneys from making any applicable claims of privilege during discovery or at trial. Nor shall the order preclude the filing of any motion with the Board for relief from a particular provision of this order or for additional protections not provided by this order.

By Agreement of the Following:

By: _____

JAMES A. ZELLINGER
Attorney for Syngenta
Syngenta Crop Protection Corp.
410 Swing Rd.
Greensboro, N.C. 27409

Attorney for Applicant
(336) 632-7835

Date: 4/1/05

By: _____

David J. Kera
Oblon, Spivak, McClelland, Maier &
Neustadt, P.C.
1940 Duke Street
Alexandria, VA 22314

Attorneys for Opposers

Date: _____

By Order of the Board, effective on _____.

By: _____

Name: _____

Title: _____

EXHIBIT 3

James A. Zellinger
Trademark Counsel

Syngenta Crop Protection, Inc.
410 Swing Road
Greensboro, NC 27409

Tel 336-632-7835
Fax 336-632-2012
e-mail: jim.zellinger@syngenta.com

syngenta

April 1, 2005

David J. Kera
Oblon, Spivak, McClelland, Maier & Neustadt, P.C.
1940 Duke Street
Alexandria, VA 22314

Re: *Toyota Jidosha Kabushiki Kaisha d/b/a Toyota Motor Corp. v. Syngenta Participations A.G.*
Opposition No. 91159578 et al.

Dear Mr. Kera:

Please note that this letter will confirm my conversation of March 31, 2005 with your assistant, Ms. Cahill.

We were unable to agree to accept your proposed protective order/confidentiality agreement. I then recited to her the language of the Board's Order of March 11, 2005 requiring imposition of the TTAB's suggested format found in the TTAB's procedure manual.

However, Ms. Cahill indicated, despite the Board's Order, that this format would not be acceptable and refused to comply with the Board's Order.

I enclose an executed copy of the Protective Order which follows the TTAB's format. I would ask that you execute on behalf of Opposers so that it may be filed in conjunction with the above.

In light of the Board's Order and the execution of its protective order, I will expect immediate production of all of those documents previously withheld on the basis of confidentiality.

Very truly yours,

James A. Zellinger

JAZ/sk