

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: Syngenta AG MIR162)	
Corn Litigation)	MDL No: 2591
)	
)	Case No. 14-md-2591-JWL-JPO
(This Document Relates to All Cases))	
)	

PRESERVATION ORDER

As contemplated by Scheduling Order No. 1 (ECF doc. 123), the parties have filed a Joint Motion for an Order Regarding the Preservation of Communications, Documents, Electronic Data and other Tangible Items (ECF doc. 365). The parties agree on all the provisions of a proposed preservation order, except parts of Sections III(C) and V(B)(2). The undersigned U.S. Magistrate Judge, James P. O’Hara, has reviewed the parties’ proposed order and hereby grants their joint motion for approval of same.

Upon careful consideration of the parties’ separate memoranda addressing the disputed part of Section III(C), the undersigned finds that, while a close call, the language suggested by Defendants represents a more proportional, nuanced, and cost-efficient approach than that suggested by Plaintiffs. That is, the undersigned agrees with Defendants that a general preservation cutoff date of December 31, 2014 (more than three months after these suits began), with the understanding that the preservation obligation for *some* categories would be ongoing, is most appropriate in this particular litigation. And, as relates to Section V(B)(2), although this case is mostly about genetically-modified *corn*, the undersigned is wholly unpersuaded by the Non-Producer Plaintiffs’ argument that they should be relieved of any obligation to preserve certain *soybean* documents while the same sort of documents are sought from Defendants under Section IV(A)(17).

This Agreed Order Regarding Preservation of Communications, Documents, Electronic Data, and Other Tangible Items (“Order”) governs the Parties in the above-captioned MDL Proceedings, including individual cases during their pendency in MDL No. 2591 (the “Action”). Pursuant to the Court’s duty to supervise pretrial proceedings in this Action, including discovery, and pursuant to the Court’s inherent powers, the Court hereby issues the following agreed Preservation Order. This Order shall continue in full force and effect until further Order of this Court.

The Parties agree that these Guidelines define the scope of their preservation obligations for the purposes of this Action.

I. DEFINITIONS

For the purposes of this Order, the following definitions shall apply. Consistent with the District’s Guidelines for Cases Involving Electronically Stored Information, all other terms shall have the meaning defined in The Sedona Conference Glossary.

A. The terms “**Communication**” or “**Communications**” mean the transmission, sending, or receipt of information of any kind (in the form of facts, ideas, inquiries, or otherwise), by computer electronics of any kind (including e-mail), magnetic tape, videotape, photographs, graphs, symbols, signs, magnetic or optical disks, floppy disks, hard drives, compact discs, CD-ROM discs, other removable or transportable media, telecommunication, telephone, teletype, facsimile, telegram, microfilm, microfiche, photographic film of all types, or other media of any kind.

B. The terms “**Document**” and “**Documents**” are synonymous and equal in scope to usage of this term in Fed. R. Civ. P. 34 and to the terms “[w]ritings and recordings,” “photographs,” “original” and “duplicate” defined in Fed. R. Evid. 1001.

C. The terms “**Electronic Data**” or “**Data**” mean the original (or identical duplicate

when the original is not available), and any non-identical copies (whether non-identical because of notes made on copies or attached comments, annotations, marks, transmission notations, or highlighting of any kind) of writings of every kind and description whether inscribed by mechanical, facsimile, electronic, magnetic, digital, or other means.

D. The term “**Syngenta Corn Seed**” refers to Syngenta’s genetically modified corn seed containing the MIR162 genetic trait and/or Event 5307, including those marketed as Viptera and Duracade, and any Corn crops containing any of those traits.

E. The term “**Potentially Relevant Information**” means a Document, Electronic Data, Communication or any tangible things containing information within the scope of the categories set forth below.

II. MEET AND CONFER REGARDING SEARCH METHODOLOGIES

A. The Parties’ ESI Liaisons are as follows:

1. For Plaintiffs’ Lead and Liaison Counsel:

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2. For the Cargill Plaintiffs:

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3. For the ADM Plaintiff:

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4. For Defendants' Lead and Liaison Counsel:

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B. Unless the Parties mutually agree on another date and time, on May 1, 2015 beginning at 1:30 p.m. Central, the Parties, through their ESI Liaisons, will meet and confer regarding the preservation, collection and production of Electronic Data in this litigation. During this call, the Parties shall come prepared to discuss where they store or maintain Potentially Responsive Information from the relevant time.

C. At least two business days in advance of this meet and confer conference, the Parties shall exchange:

1. An explanation of the processes by which the Party intends to search for Potentially Responsive Information.
2. For any Party that at this time intends to use search terms to collect Potentially Responsive Information, a list of potential Custodians and, for only those individuals not listed in either the Party's Rule 26 Disclosures or the Plaintiff's Fact Sheet, a brief description of each such identified individual's job title and responsibilities.
3. If any Party maintains that it has or may have any Potentially Responsive Information that is inaccessible or only of limited accessibility, the Party shall set forth:
 - a. the general nature of such information (e.g., correspondence, budget, financial planning, etc.);
 - b. the reason(s) why the information is considered inaccessible or of only limited accessibility;

- c. information sufficient to identify the type of backup systems and disaster recovery media used and the number of backup tapes involved, or if applicable, the identity and version of applicable legacy software or systems, and when such software or systems achieved legacy status by the party; and
 - d. proposed capture and retrieval protocol necessary for identification and recovery of the information deemed inaccessible (including cost estimates if readily available).
4. A description of any problems reasonably anticipated to arise in connection with the collection and production of Potentially Relevant Information.

III. GENERAL PRESERVATION OBLIGATIONS

A. The fact that a particular document or tangible object may or may not be included in the scope of this Order is not intended to, and does not, establish or suggest that the document is or is not discoverable, relevant to, subject to privilege or work product protection or admissible in this matter. Each party reserves any and all objections to the collection and/or production of documents or information that may fall within the scope of this Order, including to the time frames specified in the Sections IV and V.

B. The Parties shall take commercially reasonable steps to ensure that Communications, Documents, Electronic Data and other tangible objects that are subject to this Order are not destroyed, removed, mutilated, altered, concealed, deleted or otherwise disposed of.

C. The preservation obligations set forth in this Order apply to currently existing Communications, Documents, Electronic Data, and other tangible objects within the Parties' possession, custody, or control. This Order is not intended to, and shall not be construed by a Party to, require any Party to alter its day-to-day business practices regarding the creation or modification of documents, except to ensure that Potentially Responsive Information in Sections IV and V is adequately preserved. Accordingly, unless a category of Potentially Responsive

Information indicates that the preservation obligation extends to the present, the preservation obligation extends to December 31, 2014. Furthermore, persons may generate new business documents without preserving dictation, drafts, interim versions or other temporary compilations of information if such documents would not have been preserved in the ordinary course of business. Similarly, any Party may delete or recycle data electronically stored on servers or hard drives reasonably likely to contain Potentially Responsive Information after the Party has made and secured a copy of the files which contain information within the scope of this Order contained on said data storage device.

D. Absent a showing of good cause by the requesting Party, the categories of ESI identified below need not be preserved by any Party:

1. Any cellular or mobile data (including any text messages) and no Party shall be required to request that any service providers preserve such data;
2. Any telephone or VOIP message system data (including voicemail messages) on a system-wide, central or enterprise basis, or on an individual level and no Party shall be required to request that service providers for any Party preserve such data;
3. Any instant messaging systems (including but not limited to Skype, AIM, Yahoo Messenger, Microsoft Lync, or any equivalent) and no Party shall be required to request that any service providers preserve such data;
4. Deleted, slack, fragmented, or other data only accessible by use of computer forensics;
5. Random access memory (RAM), temporary files, or other ephemeral data that are difficult to preserve without disabling the operating system;
6. On-line access or internet searching data such as temporary internet files, browser history, file or memory cache, cookies, and the like; and
7. Operating system files, executable files, server, system or network logs.

IV. DEFENDANTS' PRESERVATION OBLIGATIONS

A. **Potentially Relevant Information:** To the extent such Documents, Electronic Data, and other tangible objects exist, Defendants shall take reasonable steps to ensure the preservation of the following Potentially Relevant Information:

1. Field trials and field testing of Syngenta Corn Seed, including controls during the field trials and testing, post-testing destruction, monitoring of field trials and testing, audit and inspection of field trials and testing, contracts for field trials and testing, and containment and channeling efforts during field trials and testing, and communications regarding the same;
2. Syngenta's communications with governmental or administrative bodies regarding Syngenta Corn Seed, and other communications relating thereto;
3. Syngenta's efforts to obtain U.S. and Chinese regulatory approval for Syngenta Corn Seed and the export of Syngenta Corn Seed, and other communications relating thereto;
4. Syngenta's efforts to deregulate Syngenta Corn Seed and other communications relating thereto;
5. Stewardship Agreements and Stewardship Guides regarding Syngenta Corn Seed;
6. Any efforts or statements by Syngenta regarding channeling of Syngenta Corn Seed or other efforts and communication undertaken, proposed or considered to maintain segregation of Syngenta Corn Seed from other corn;
7. From 2010 to the present, documents sufficient to show the quarterly and yearly sales of and profits from Syngenta Corn Seed, to the extent such information is maintained on that basis;
8. Syngenta's decision to sell and/or commercialize Syngenta Corn Seed and the impact of that decision on U.S. corn prices and any potential impact on farmers and exporters;
9. The MIR162 genetic trait and/or Event 5307 traces found in corn produced in or exported from the United States;
10. From 2010 to the present, documents sufficient to show the sale, booking, listing, transfer or resale of Syngenta Corn Seed in each county and/or by zip code, to the extent such information is maintained on that basis, each month, to the extent such information is maintained on that basis;

11. Until December 31, 2014, the marketing and advertising of Syngenta Corn, including Defendants' Internet, Intranet (as that term is defined in the Sedona Conference Glossary) and Social Media sites referencing Syngenta Corn;
12. From 2005 to the present, Defendants' involvement with industry organizations regarding stewardship standards or practices for genetically modified crops or plants, biotechnology issues involving identity preservation, segregation and/or tracing of genetically modified crops or plants, and asynchronous approval of genetically modified crops or plants;
13. Syngenta's involvement in and communications with industry members, trade associations, or government officials regarding Syngenta Corn Seed after January 1, 2010;
14. From 2010 to the present, documents sufficient to show exports of U.S. corn and China's imports of U.S. corn;
15. From 2007 to the present, the actual or possible effect of Syngenta Corn Seed on the market for U.S. corn exports and the importance or significance of the Chinese market for U.S. corn;
16. From 2007 to the present, documents sufficient to show the price for U.S. corn; and
17. Syngenta's efforts or statements regarding the channeling or segregation of other genetically-modified corn or soybean seed products that Syngenta commercialized in the United States before obtaining Chinese regulatory approval, covering the time period from 2005 to the date of such Chinese approval; and
18. Defendants' affirmative defenses.

V. PLAINTIFFS' PRESERVATION OBLIGATIONS

A. **Potentially Relevant Information for Producer Plaintiffs:** To the extent such Documents, Electronic Data, and other tangible objects exist, each Plaintiff shall take reasonable steps to ensure the preservation of the following Potentially Relevant Information:

1. From 2010 to the present, documents sufficient to show the Plaintiff's total and corn acreage farmed;
2. From 2010 to the present, documents sufficient to show the Plaintiff's purchases of corn seed;
3. From 2010 to the present, the Plaintiff's sales or contracts for sale of corn,

corn by-products, and sorghum/milo (including hedging, option contracts, and futures contracts);

4. From 2010 to the present, testing for the presence of Viptera or Duracade and/or any efforts to remove Syngenta Corn Seed;
5. From 2010 to the present, for any plaintiff involved in livestock farming, documents sufficient to show whether any corn produced by the plaintiff was used to feed the plaintiff's livestock and/or any corn purchased to feed the livestock;
6. From 2010 to the present, documents sufficient to show whether the producer was part of an ethanol cooperative and, if so, any corn supplied by the producer to the ethanol cooperative;
7. From 2010 to the present, subsidies received by Plaintiffs relating to corn, including applications and claims made;
8. From 2010 to the present, Plaintiff's crop insurance for any corn crops, including applications, policies, claims made, and outcomes of claims;
9. From 2010 to the present, Plaintiffs' exposure to or reliance on statements made by Syngenta regarding Syngenta Corn Seed;
10. From 2010 to the present, documents sufficient to show the types of genetically-modified crops grown by Plaintiff and the dates when those crops were grown;
11. From 2010 to the present, Plaintiffs' involvement in and communications with trade associations or government officials regarding Syngenta Corn Seed;
12. From 2010 to the present, Plaintiffs' allegations;
13. From 2010 to the present, Plaintiffs' financials relating to the sale of corn or corn by products; and
14. Plaintiff's alleged damages, including losses from the changes in the price of corn.

B. Potentially Relevant Information for Non-Producer Plaintiffs: To the extent such Documents, Electronic Data, and other tangible objects exist, Plaintiffs shall take reasonable steps to ensure the preservation of the following Potentially Relevant Information:

1. Plaintiffs' efforts to segregate or decision not to segregate corn known or believed by Plaintiffs to be grown from Syngenta Corn Seed in their

facilities or elsewhere in the supply chain in the United States after January 1, 2010;

2. Plaintiffs' efforts or statements regarding the channeling or segregation of other genetically-modified corn or soybean products commercialized in the United States before Chinese regulatory approval was obtained, covering the time period from 2005 to the date of such Chinese approval;
3. Plaintiffs' contracts for the sale of corn and corn by-products with buyers of U.S. corn and corn by-products in China dated on or after January 1, 2010, including but not limited to option contracts or hedging or trading mechanisms;
4. Plaintiffs' efforts to mitigate damages related to China's rejection of U.S. corn after November 2013;
5. Plaintiffs' sales of, and efforts to sell or deliver, corn known or believed by Plaintiffs to be grown from or to have been mixed with Syngenta Corn Seed to China from countries other than the U.S. after January 1, 2010;
6. Plaintiffs' awareness of China's import approval status of Syngenta Corn Seed and communications with Chinese government officials regarding the same;
7. Plaintiffs' knowledge of or reliance on statements made by Syngenta regarding Syngenta Corn Seed;
8. From 2005 to the present, Plaintiffs' involvement with industry organizations regarding stewardship standards or practices for genetically modified crops or plants, biotechnology issues involving identity preservation, segregation and/or tracing of genetically modified crops and plants, and asynchronous approval of genetically modified crops or plants;
9. Plaintiffs' involvement in and communications with industry members, trade associations, or government officials regarding Syngenta Corn Seed after January 1, 2010;
10. From 2010 to the present, documents sufficient to show exports of U.S. corn and China's imports of U.S. corn;
11. From 2007 to the present, the actual or possible effect of Syngenta Corn Seed on the market for U.S. corn exports and the importance or significance of the Chinese market for U.S. corn exports;
12. From 2007 to the present, documents sufficient to show the price for U.S. corn;
13. Plaintiffs' allegations; and

14. Documents and information regarding Plaintiffs' alleged damages related to the litigation.

SO ORDERED.

Dated April 21, 2015, at Kansas City, Kansas.

/s James P. O'Hara
James P. O'Hara
U.S. Magistrate Judge