

U.S. DISTRICT COURT  
DISTRICT OF VERMONT  
FILED

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UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

ALICE H. ALLEN and LAURENCE E. ALLEN, )  
d/b/a Al-lens Farm, and GARRET SITTS and )  
RALPH SITTS, on behalf of themselves and all )  
others similarly situated, )

Plaintiffs, )

v. )

DAIRY FARMERS OF AMERICA, INC., )  
DAIRY MARKETING SERVICES, LLC, )  
DEAN FOODS COMPANY, and )  
HP HOOD LLC, )

Defendants. )

Case No. 2:09-cv-00230

Judge Christina Reiss

**PROTECTIVE ORDER**

The Court hereby enters the following Protective Order (the "Protective Order") to prevent the inappropriate dissemination of documents and information produced in the course of discovery, which may include competitively sensitive and confidential information about pricing, budgets, forecasts, strategic plans, cost of production, inventory and other confidential commercial information. Good cause appearing, it is hereby ORDERED as follows:

1. **Scope of Order.** This Protective Order governs the use and handling of documents, electronic information in any form, testimony, interrogatory responses and other information, including all copies, excerpts and summaries thereof (collectively, the "Material") produced or given by any defendant, plaintiff, or other individual or entity (the "Producing Party") in pre-trial proceedings in this Litigation. Material produced in this Litigation, including without limitation Material designated as "Confidential" or "Highly Confidential" under the provisions of this Protective Order, and information derived therefrom, shall be used only for the

purpose of this Litigation and any related appellate proceeding, and not for any other business, competitive, personal, private, public, or other purpose whatsoever.

2. **Designation of Confidential Material.** The Producing Party may designate as “Confidential” any Material that it produces in this Litigation which it believes constitutes, contains, reflects or discloses confidential, non-public research and analysis, development or commercial information, or other information for which a good faith claim of need of protection from disclosure can be made under the Federal Rules of Civil Procedure and/or other applicable law (“Confidential Material”). The designations will be made reasonably and in good faith.

3. **Designation of Highly Confidential Material.** The Producing Party may designate as “Highly Confidential” (a) any non-public personal information or (b) any Confidential Material that a Producing Party reasonably and in good faith believes to be extremely sensitive confidential and/or proprietary information, the disclosure of which, even if limited to the disclosure of Confidential Material permitted under this Order, would compromise and/or jeopardize the Producing Party’s business interests (“Highly Confidential Material”).

4. **Production of Documents and Other Material Containing Confidential or Highly Confidential Material.** The designation of Confidential Material or Highly Confidential Material for the purposes of this Protective Order shall be made in the following manner:

(a) In the case of documents produced in discovery (including electronic documents produced in TIFF or PDF form), by marking each page containing any Confidential Material with the word “Confidential” and by marking each page containing any Highly Confidential Material with the words “Highly Confidential.”

(b) In the case of written discovery responses, by marking with the appropriate designation both (i) the first or cover page and (ii) each page containing Confidential or Highly Confidential Material.

(c) In the case of electronically stored information in any form ("Electronic Data"), by designating the Electronic Data as Confidential or Highly Confidential in a cover letter accompanying the production of the Electronic Data. Where feasible, counsel for the Producing Party will also mark the disk, tape or other electronic media on which the Electronic Data is produced with the appropriate designation. If a Party reduces Confidential or Highly Confidential Electronic Data to hardcopy form, it shall mark the hardcopy with the appropriate designation. Whenever any Confidential or Highly Confidential Electronic Data is copied, all copies shall be marked with the appropriate designation.

(d) In the case of depositions or other pretrial testimony: (i) by a statement on the record, by counsel, at the time of such disclosure, or (ii) by written notice sent to all counsel of record for the Parties within fifteen business days after receipt of the transcript of the deposition unless the parties agree to an extension of this time period for designation. All transcripts shall be considered Highly Confidential and subject to this Protective Order until expiration of that fifteen day period. Any testimony designated Confidential or Highly Confidential shall be marked and treated in the same manner as documents covered by this Protective Order. All videotapes of depositions shall be clearly labeled Confidential or Highly Confidential, as appropriate pursuant to this Protective Order.

(e) No confidentiality designations need be made for documents made available for inspection and copying. If the inspecting Party selects any documents for copying, the Producing Party shall, as appropriate, mark the copies as Confidential or Highly Confidential in the manner set forth in subparagraph (a) before producing them to the inspecting Party. During the time between the initial inspection and the production of copies of specified documents, all files and records subject to the inspection shall be treated as if they had been designated Highly Confidential pursuant to the terms of this Protective Order. Only persons who may access Highly Confidential Material, as identified in Paragraph 7, may participate in an initial inspection.

**5. Inadvertent Failure to Designate Material as Confidential or Highly Confidential.** The inadvertent failure to designate Material as Confidential or Highly Confidential shall not be deemed a waiver of a claim of confidentiality. Within ten (10) days of discovery of an inadvertent failure to designate Material as Confidential or Highly Confidential, the Producing Party shall provide written notification to all other parties to the Litigation of the appropriate designations and shall produce replacement copies of the Material with the appropriate designations, consistent with the requirements of Paragraph 4 of this Order (governing the manner of marking information designated under this Order). Regardless of whether replacement copies are provided, from receipt of written notification of the appropriate designations, all Parties shall treat the Material in accordance with those designations.

**6. Persons Who May Access Confidential Material.** Absent written consent from the Producing Party or unless otherwise directed by the Court, or as provided in Paragraph 10, Confidential Material may be disclosed only to the following persons:

(a) Outside counsel of record for the Parties;

(b) In-house counsel for the Parties who are actively involved in assisting with the prosecution or defense of this Litigation;

(c) One designated representative of each Party to the Litigation (i.e., each named plaintiff may designate one person and each named defendant may designate one person) who is actively participating in assisting with the prosecution or defense of this Litigation; *Said designated person shall not be modified during the course of*

(d) Fact witnesses who are currently employed by the Producing Party, who were employed by the Producing Party at the time the Material was created, or who created or received the Material outside the context of this Litigation;

*the  
litigation  
except for  
good cause.  
CR*

(e) Outside experts or consultants who are not regular employees of a Party but are retained on behalf of any of the Parties to assist in the preparation of this case;

(f) Outside photocopying, graphic production services or litigation support services employed by the Parties or their counsel to assist in this Litigation, and computer service personnel performing duties in relation to a computerized litigation system;

(g) The Court in this action or any court hearing an appeal from a judgment or order rendered by the Court in this action;

(h) Court reporters, videographers, stenographers, and court personnel; and

(i) The direct staff of, and any contract support personnel employed or retained by, any of the foregoing persons, provided that such persons are actively involved in assisting with the prosecution or defense of this Litigation.

*(j) witnesses at the time of deposition and trial provided the\**

7. **Persons Who May Access Highly Confidential Material.** Absent written

consent from the Producing Party or unless otherwise directed by the Court, or as provided in

Paragraph 10, Highly Confidential Material may be disclosed only to the following persons:

*\* party disclosing such document has a good faith basis for its use. The absence of a good faith basis shall be grounds for an award of sanctions. CR*

- (a) Outside counsel of record for the Parties;
- (b) Fact witnesses who are currently employed by the Producing Party, who were employed by the Producing Party at the time the Material was created, or who created or received the Material outside the context of this Litigation;
- (c) Outside experts or consultants who are not regular employees of a Party but are retained on behalf of any of the Parties to assist in the preparation of this case;
- (d) Outside photocopying, graphic production services or litigation support services employed by the Parties or their counsel to assist in this Litigation, and computer service personnel performing duties in relation to a computerized litigation system;
- (e) The Court in this action or any court hearing an appeal from a judgment or order rendered by the Court in this action;
- (f) Court reporters, videographers, stenographers, and court personnel; and
- (g) The direct staff of, and any contract support personnel employed or retained by, any of the foregoing persons, provided that such persons are actively involved in assisting with the prosecution or defense of this Litigation.

*(h) One designated representative as set forth in paragraph 6(c)*

**8. Application of this Protective Order to Persons With Access to Confidential or Highly Confidential Material.**

(a) Each person given access to Confidential Material or Highly Confidential Material shall be advised that the Confidential Material or Highly Confidential Material is being disclosed pursuant to and subject to the terms of this Protective Order and may not be disclosed or used other than as set forth in this Protective Order.

(b) All persons allowed access to Confidential or Highly Confidential Material under this Protective Order shall take all necessary steps to insure that access to

*(i) witnesses at the time of deposition & trial provided the party seeking to use the document at deposition or trial provide ten(10) days written notice to the producing party & has a good faith basis for its use. The absence of a good faith basis shall be grounds for an award of sanctions.   
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such Material is restricted to those persons who, by the terms of this Protective Order, are allowed access to the Material. To the extent that a person allowed access to Confidential or Highly Confidential Material creates, develops, establishes, or otherwise maintains, on any computer, network, disk, tape, or other digital or analog machine-readable device, any information, files, databases or programs that contain Confidential Material or Highly Confidential Material, such person shall take all necessary steps to insure that access to any Confidential Material or Highly Confidential Material is restricted to those persons who, by the terms of this Protective Order, are allowed access to the Material.

(c) Before any person described above in Paragraphs 6(e) or 7(c) is given access to Confidential Material or Highly Confidential Material, that person must read and agree in writing, by signing an acknowledgment in the form attached hereto as Exhibit A, to be bound by the provisions of this Protective Order.

(d) Before any other person described in Paragraphs 6 or 7 is shown any Confidential Material or Highly Confidential Material, that person must be shown a copy of this Protective Order and instructed that he or she is bound by its provisions. This requirement does not apply to outside counsel of record for the Parties or to the Court in this action or any court hearing an appeal from a judgment or order rendered by the Court in this action.

**9. Filing Documents Containing Confidential or Highly Confidential Material.**

(a) Any pleading or document filed with the Court in this litigation which contains, or makes reference to, material or information designated Confidential or Highly Confidential pursuant to this Protective Order shall be filed under seal, and may be accepted by the Clerk for filing under seal without the necessity of a motion to seal if

designated "FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER," and endorsed with the caption of this Litigation.

(b) Within seven (7) calendar days of the filing of such pleading or document, the party filing the pleading or document (the "filing party") shall file, for public view, a redacted version of the pleading or document, redacting only documents or material designated Confidential or Highly confidential, or references thereto.

(c) Within ten (10) business days after the filing of the redacted pleading or document, any person may object to the redaction by giving written notice to the Producing Party that it objects to the redaction. Such notice shall specifically identify the Material at issue and state the reasons for challenging the redaction. Within ten (10) business days after such notice, the objecting person and the Producing Party shall confer in good faith to attempt to resolve any dispute. If the objecting person and the Producing Party fail to resolve the dispute, the objecting person may apply to the Court, under seal, seeking a determination that specified material does not warrant protection from disclosure under this Order. The Producing Party may respond, under seal, within ten (10) business days, and shall have the burden of establishing that the challenged material is entitled to protection from disclosure. No reply brief shall be permitted. Until the Court rules on the motion, the material shall remain redacted and the information shall be treated as Confidential or Highly Confidential, as originally designated.

**10. Use of Confidential or Highly Confidential Material at Depositions.** Counsel for any Party wishing to use Confidential or Highly Confidential Material to examine at deposition fact witnesses who are not currently employed by the Producing Party, who were not employed by the Producing Party at the time the Material was created, or who did not create or

receive the Material in the ordinary course outside of the Litigation may do so only if the lawyer has a good faith basis to believe that the witness has previously seen the document, or upon the consent of the Producing Party or order of the Court upon a showing of good cause, provided further that the fact witness acknowledges, by signing the form attached hereto as Exhibit B, that the witness has reviewed the Protective Order, agrees to be bound by its provisions, understands that breach of this Protective Order could subject the witness to sanctions or damages, and consents to the jurisdiction of this Court for purposes of any action instituted for the breach of this Protective Order.

*or has personal knowledge relevant to its contents CR*

**11. Use of Confidential or Highly Confidential Material at Trial or Hearing.** The restrictions, if any, that will govern the use of Confidential Material or Highly Confidential Material at trial or hearings will be determined at a later date by the Court, in consultation with the Parties.

**12. No Waiver of Privilege.** If information subject to a claim of attorney-client privilege, work product protection, or any other privilege or immunity is inadvertently produced, such production shall in no way prejudice or otherwise constitute a waiver of, or estoppel as to, any claim of privilege, work product protection or other ground for withholding production to which any Producing Party would otherwise be entitled. Any inadvertently produced materials shall be returned promptly to the Producing Party upon request and all copies destroyed.

**13. Removal of Confidential or Highly Confidential Designation.** Any Party may object to the designation of any Material as Confidential or Highly Confidential by giving written notice to the Producing Party (or to the Producing Party directly if no counsel has appeared on its behalf) that it objects to the designation. Such notice shall specifically identify the Material at issue and state the reasons for questioning the confidentiality designation. Within

ten (10) business days after such notice, the Objecting and Producing Party shall confer in good faith to attempt to resolve any such dispute. If the Parties are unable to resolve the dispute, the Objecting Party may apply to the Court for a ruling that the Material is not appropriately designated, giving notice to the Producing Party. If such a motion is made, the Producing Party will have the burden to establish that the designation is proper. Until the Court rules on the motion, the documents shall be treated as Confidential or Highly Confidential, as originally designated.

**14. Modification of the Protective Order.** This Protective Order shall not prevent a Party from applying to the Court for relief therefrom, or from applying to the Court for further or additional Protective Orders.

**15. Copy of Protective Order Must Be Served With Any Subpoena.** When serving any subpoena in this Litigation on a non-party to the Litigation, a copy of this Protective Order shall be included with the subpoena.

**16. Third Party Requests for Confidential or Highly Confidential Material.** If any person receiving Material covered by this Protective Order is subpoenaed in another action or proceeding, served with a document demand, or otherwise requested to provide Material covered by this Protective Order, and such subpoena, document demand, or request seeks Material which was produced or designated as Confidential Material or Highly Confidential Material by any Producing Party, counsel to the person receiving the subpoena, document demand, or request shall give written notice within two (2) business days of said counsel receiving notice of service of the subpoena to counsel for the Producing Party and shall, to the extent permitted by law, withhold production of the Material until any dispute relating to the production of such Material is resolved, and in any event no Material of a Producing Party shall

be produced earlier than five (5) business days after delivering written notice to counsel for the Producing Party of an intent to produce.

**17. Intentional or Inadvertent Unauthorized Disclosure of Confidential or Highly Confidential Material.** If any person subject to this Protective Order becomes aware that he or any other person has, either intentionally or inadvertently, disclosed Confidential Material or Highly Confidential Material to someone not authorized to receive such Material under this Protective Order, counsel of record for the Party involved shall immediately inform the Producing Party's counsel of record about the unauthorized disclosure, and also shall use his or her best efforts to obtain the return of all improperly disseminated copies of the Confidential Material or Highly Confidential Material and to prevent any further improper dissemination of the same.

**18. Court Retains Jurisdiction.** This Protective Order shall survive the termination of this litigation. This Court expressly retains jurisdiction over this action for enforcement of the provisions of this Protective Order following the final resolution of this Litigation.

**19. Return or Destruction of Confidential and Highly Confidential Material.** Within sixty (60) days of the termination of this action, including the exhaustion of all appeals, all Confidential Material or Highly Confidential Material supplied by any Producing Party, including any copies thereof, as well as any summaries, notes, extracts, compilations, drawings, or other documents containing Confidential or Highly Confidential Material, shall be returned to the Producing Party or shall be destroyed and their destruction certified in writing unless otherwise agreed in writing by the parties. A copy of the written certification shall be provided to the Producing Party.

**20. Parties May Use Their Own Confidential and Highly Confidential**

**Documents.** Nothing in this Order shall affect a Party's use or disclosure of its own documents in any way.

SO ORDERED this 27<sup>th</sup> day of April, 2010.

  
Christine Reiss  
U.S. District Court Judge