

STATE OF MICHIGAN  
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

DAVID SAMRICK; and THE MILL  
STEEL COMPANY,

Plaintiffs,

vs.

PAUL MADDEN, *et al.*,

Defendants.

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Case No. 18-10187-CBB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER ENFORCING STIPULATED PROTECTIVE ORDER

This contentious case exists in such a state of uncertainty that the Court does not even know how to caption this opinion. Plaintiffs David Samrick and The Mill Steel Company (“Mill Steel”) chose to file a preemptive action seeking declaratory relief aimed at preventing the defendants, who comprise a large group of trade creditors of Blue Star Automation, LLC (“Blue Star”), from making use of documents disclosed by Mercantile Bank (“Mercantile”) under a protective order in an earlier case. The trade creditors responded with counterclaims against David Samrick and Mill Steel, third-party claims against Blue Star, Mercantile, and members of Samrick’s family, and a motion seeking summary disposition. That volley prompted competing motions for summary disposition, which the Court resolved on February 20, 2019. Then the Court turned to the issue raised by David Samrick and Mill Steel – whether the trade creditors may use documents that Mercantile disclosed pursuant to a protective order entered in the earlier litigation. The protective order unequivocally forbids any use of the documents by the trade creditors in this case or any other case, but the trade creditors must be permitted to pursue claims without the benefit of those documents.

In 2017, Blue Star filed a lawsuit against Hoek Properties, LLC, and others that came to be known as the “Hoek litigation.” On January 10, 2018, the attorneys involved in that case provided to the Court a proposed protective order, which the Court signed and entered on January 12, 2018.<sup>1</sup> After the Court entered that protective order, Mercantile furnished hundreds of pages of documents to the Hoek defendants as part of the third-party discovery conducted by the Hoek defendants. The documents apparently were Bates-stamped, so each page of Mercantile’s disclosure can be identified by a Bates number. When the Hoek litigation ended, each party apparently kept all of the materials that had been exchanged during the discovery process.

The documents supplied by Mercantile during the Hoek litigation resurfaced in the hands of the trade creditors,<sup>2</sup> who pressed David Samrick and Mill Steel for an out-of-court resolution of the outstanding debts of Blue Star. David Samrick and Mill Steel not only balked at that suggestion, but also filed this lawsuit in an effort to bar the trade creditors from using the documents obtained during discovery in the Hoek litigation. In support of their request for relief, David Samrick and Mill Steel – joined by Mercantile – contend that section 5 of the protective order in the Hoek litigation prohibits the trade creditors from using the documents obtained through discovery in the Hoek litigation. The Court agrees. Section 5 of the protective order makes clear that “[d]ocuments produced in discovery in the [Hoek litigation] shall be used exclusively for the purposes of prosecuting or defending the claims in the” Hoek litigation. See Appendix A. That language unmistakably prohibits any use of the documents outside the context of the Hoek litigation.

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<sup>1</sup> A copy of that protective order is attached to this opinion as Appendix A.

<sup>2</sup> Although the trade creditors did not participate in the Hoek litigation, their attorneys served as counsel for the Hoek defendants, so the attorneys came into possession of the documents through legitimate means, *i.e.*, by obtaining the documents during discovery in the Hoek litigation.

As far as the Court can tell, Michigan courts have never before confronted a dispute like the one presented here by David Samrick and Mill Steel. But the Supreme Court of Iowa has discussed the issue in circumstances strikingly similar to the instant case, reasoning as follows:

The protective order imposed a blanket requirement that confidential documents not be used or disclosed. The order limits authorized use and disclosure to a specific purpose – this litigation – and does not lift this limitation after termination of the litigation. The limitation on use of these documents to the “preparation for and the conducting of this proceeding” would be meaningless were the protective order to expire upon dismissal or judgment. To the contrary, there is no permissive use for the documents after dismissal.

Reis v Iowa District Court for Polk County, 787 NW2d 61, 67 (Iowa 2010). The Court adopts this reasoning, which applies with equal force in the instant case. But the Court does not believe that the sanction of contempt is appropriate. Instead, the Court concludes that specific performance of the protective order constitutes the appropriate remedy.<sup>3</sup> After all, this action initiated by David Samrick and Mill Steel is just getting off the ground, and the trade creditors have not yet shifted from defense to offense. As a result, the Court has the ability to shape the litigation by restricting from the outset the use of documents that Mercantile disclosed in the Hoek litigation under the protective order.

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<sup>3</sup> In choosing this approach, the Court considered but rejected the request by David Samrick and Mill Steel to dismiss with prejudice the trade creditors’ claims as a sanction for their attorneys’ violation of the protective order. To be sure, MCR 2.313(B)(2)(c) and MCR 2.504(B) empower the Court to dismiss all claims in response to a failure to comply with a discovery order, Dawoud v State Farm Mutual Auto Ins Co, 317 Mich App 517, 523-524 (2016), but “[d]ismissal is a drastic step that should be taken cautiously.” Vicencio v Jaime Ramirez, MD, PC, 211 Mich App 501, 506 (1995). As our Supreme Court put it in a unanimous decision reversing the dismissal of a case as a discovery sanction:

The authority of the circuit judge to take the most drastic step of dismissal of plaintiff’s complaint with prejudice is clear. However, we believe that such measures should be exercised cautiously.

MacArthur Patton Christian Ass’n v Farm Bureau Ins Group, 403 Mich 474, 477 (1978). The Court has chosen to follow that advice by taking a measured approach in the instant case.

All that remains is the task of defining what constitutes impermissible use of the documents. David Samrick and Mill Steel have advocated for an expansive reading of that word, contending that even the memories of the attorneys for the trade creditors cannot provide the basis for claims in this case. In contrast, the trade creditors contend that they have every right to obtain the documents from other sources and then use those documents in this litigation. Neither proposal accurately reflects the language and purpose of the protective order. To faithfully apply the preclusive language of the protective order, the Court shall prohibit the trade creditors (and every other party to this litigation) from using – as an attachment to a motion, as an exhibit at a hearing or trial, or for impeachment – any document that bears a Bates number from the Hoek litigation. Thus, the trade creditors are free to develop claims as they see fit, but the Court shall flatly prohibit them from supporting their claims with any documents that Mercantile or anyone else surrendered during discovery under the protective order in the Hoek litigation.

IT IS SO ORDERED.

Dated: May 6, 2019



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HON. CHRISTOPHER P. YATES (P41017)  
Kent County Circuit Court Judge

## Appendix A: Protective Order

STATE OF MICHIGAN  
IN THE 17TH JUDICIAL CIRCUIT COURT  
FOR THE COUNTY OF KENT

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BLUE STAR AUTOMATION, LLC,  
a Michigan Limited Liability Company,

Plaintiff/Counter-Defendant,

Case No. 17-07041-CBB

v

Hon. Christopher P. Yates

HOEK PROPERTIES, LLC, a  
Michigan Limited Liability Company,

Defendant,

and

ROSS HOEK, an individual, and  
IMPRES ENGINEERING SERVICES, LLC,  
a Michigan Limited Liability Company,

Defendants/Counter-Plaintiffs/Third-Party Plaintiffs,

v

BLUE STAR FAMILY HOLDINGS, LLC,  
and ANDREW SAMRICK,

Third-Party Defendants.

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Thomas V. Hubbard (P60575)  
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**STIPULATED PROTECTIVE ORDER**

At a session of said Court held in the City  
of Grand Rapids, County of Kent, State of Michigan  
on \_\_\_\_\_, 2018

PRESENT: Honorable Christopher P. Yates  
Circuit Court Judge

This matter having come before the Court on the stipulation of the parties, and the Court being duly advised in the premises;

IT IS HEREBY ORDERED that:

1. This Stipulated Order provides for the confidential treatment of certain documents produced by parties and by non-parties (the "Producing Parties") in *Blue Star Automation, LLC v Hoek Properties, LLC, et al*, Case No. 17-07041-CBB (the "Action"), voluntarily or pursuant to a request for the production of documents or a subpoena.

2. For purposes of this Order, "Confidential Material" shall mean information that implicates proprietary information, confidential business and financial information and records related to the parties' businesses, and other confidential information that by law must be kept confidential and shall refer to documents, information or other materials produced by the parties that meets this definition and is designated conspicuously as "Confidential" (by marking each page thereof with an appropriate and conspicuous legend), including any copies of any documents or materials so designated. Confidential Material shall not include: (1) information that is or hereafter becomes publicly available (other than via a disclosure prohibited under this Order); (2) information obtained through means other than the discovery in this action, so long as its procurement did not violate any other agreement or court order; or (3) information as to which the person or entity producing such information consents or acquiesces to its public disclosure.

3. The Producing Party shall mark Confidential Material, according to the procedures set forth below, with the following legend: "CONFIDENTIAL" or "ATTORNEY

EYES ONLY.” The confidentiality legend shall be placed on the face of each document and each page designated as being or containing Confidential Material. Counsel for any Producing Party may in good faith and reliance on the applicability of the definition set forth above, designate as Confidential Material any document produced by the Producing Party in the course of discovery. Documents that are made available for inspection in response to a request for production need not be marked with the confidentiality legend. The Producing Party shall, however, mark with the confidentiality legend those documents that are confidential and/or contain confidential information that are identified by any parties to this Stipulated Order for copying and then copied.

4. A party classifying materials as “ATTORNEY EYES ONLY” shall do so only upon good faith belief that the materials would be entitled to protection under MCR 2.302(c) and which it would not normally reveal to others or would cause others to maintain in confidence and that classification “CONFIDENTIAL” would, in its opinion, cause injury or damage to the party.

5. Documents produced in discovery in the Action shall be used exclusively for the purposes of prosecuting or defending the claims in the Action.

6. Any portion of any deposition transcript taken in this Action that references the content or text of Confidential Material, and any exhibits to such transcript containing Confidential Material, shall be treated as Confidential Material to the same extent protected herein and shall not be disclosed to any person or entity other than the persons identified below, under the procedures outlined therein.

7. Confidential Material marked “CONFIDENTIAL” may be provided, absent written consent from the Producing Party or unless otherwise directed by the Court, only to the following persons:



- a. Plaintiff/Counter-Defendant and Third-Party Defendants, and officers, directors and designated employee representatives of Plaintiff/Counter-Defendant and Third-Party Defendants;
- b. Defendants/Counter-Plaintiffs and Third-Party Plaintiffs, and officers, directors and designated employee representatives of Defendants/Counter-Plaintiffs and Third-Party Plaintiffs;
- c. Counsel of record to the parties in the above-captioned litigation and the legal associates, paralegal and clerical or other support staff who are employed by such counsel and are actually involved in assisting in the litigation;
- d. The author(s), recipient(s), addressee(s), and person(s) copied with respect to the particular Confidential Material, and their counsel;
- e. Bona fide experts and their staff employed by counsel for the parties to assist in the preparation of this Action;
- f. Persons noticed for depositions or designated as trial witnesses to the extent reasonably necessary in preparing to testify or in eliciting testimony;
- g. Court reporters, including stenographers and video technicians transcribing proceedings in this Action;
- h. Other persons to whom the Court specifically allows disclosure, after application by the party seeking such disclosure and an opportunity to reply by the Producing Party or Parties;
- i. Any court of competent jurisdiction before which the Action is pending;
- j. Any mediator agreed upon by the parties, and such mediator's employees and staff; and
- k. Outside copy and computer services personnel for purposes of copying, imaging, or indexing documents.

8. Confidential Material classified "ATTORNEY EYES ONLY" material may be disclosed only to those persons enumerated in paragraphs 7(c), 7(e) and 7(i) hereof, unless the prior written consent of the designating party, or an Order of this Court, is first obtained.

9. Confidential Material shall be disclosed to any person identified in paragraphs 7 and 8 only to the extent necessary for purposes of this Action, and each person described in subparagraph 7(e) shall, prior to such disclosure, first have signed the Confidentiality Agreement attached hereto as Exhibit A, acknowledging that he or she has read this Stipulated Order, has agreed to be bound by it, and will not disclose confidential documents or information to anyone else except as permitted herein, and will not use such material for any purpose other than trial preparation, trial, or appeal of this Action. Each such counterpart of Exhibit A shall be maintained by counsel making the disclosure to such person and shall be made available to Plaintiff's Counsel, Defendants' Counsel or the Producing Party upon request.

10. If any party to this Stipulated Order wishes to submit any Confidential Material to a court of competent jurisdiction pursuant to subparagraph 7(i) above, the party shall, unless directed by the court to do otherwise, attempt to submit such Confidential Material "under seal" by filing such Confidential Material in a sealed envelope or other appropriate sealed container, which envelope or container shall be marked "CONFIDENTIAL" or "ATTORNEY EYES ONLY."

11. Any party to this Stipulated Order that receives Confidential Material may request at any time permission to disclose such material to a person other than those permitted by paragraphs 7 or 8 above by serving a written request upon counsel for the Producing Party. This request shall state the information or material the party wishes to disclose and the person or entity to whom the party wishes to disclose the information or material. If consent is withheld, or if the requesting party and Producing Party are unable to agree on the terms and conditions of disclosure, the requesting party may seek judicial intervention to resolve the dispute.

12. If a party to this Stipulated Order receives a subpoena or other form of judicial process compelling disclosure of Confidential Material, the party shall, at least fourteen (14) days prior to the demanded disclosure, provide counsel for the Producing Party written notice by email or hand delivery of the subpoena or other form of judicial process calling for the disclosure of Confidential Material. If written notice cannot be provided at least fourteen (14) days prior to the time for production or other disclosure, the party shall, in addition, give notice to counsel for the Producing Party by telephone. In no event shall production or disclosure be made before reasonable notice is given to counsel for the Producing Party. The purpose of this paragraph is to give the Producing Party an opportunity to object to the production or disclosure of Confidential Material pursuant to compulsory process.

13. Any party to this Stipulated Order may object to the designation by a Producing Party of any information or material as Confidential Material by serving a written objection upon the other Producing Party and all parties to this Stipulated Order. The Producing Party and the parties to this Stipulated Order shall then attempt to resolve by agreement the question whether the document or information is entitled to confidential treatment. If the Producing Party and the parties to this Stipulated Order are unsuccessful at reaching an agreement, nothing in this Stipulated Order shall preclude a party from seeking judicial intervention to resolve the dispute.

14. Nothing in this Stipulated Order shall prevent any Producing Party from using or disclosing his, her or its own documents or information, or publicly-available information. In addition, nothing in this Stipulated Order shall be construed in any way to control the use by a party to this Stipulated Order of documents or information received at any time by that party outside the course of the discovery process in this litigation.

15. A party's compliance with the terms of this Stipulated Order shall not operate as an admission that any particular document or information is or is not: (i) confidential; or (ii) privileged.

16. In the event that any Confidential Material is used in any court proceeding in the Action or any appeal therefrom, it shall not lose its status as Confidential Material through such use, and the party using said information shall take all steps necessary to protect their confidentiality during such use, including, but not limited to, requesting the Court to hear counsel with respect to such information *in camera*.

17. Nothing herein shall prevent any party from seeking further greater or lesser protection with respect to the use of any Confidential Material in connection with any trial, hearing or other proceeding in this Action.

18. Nothing herein shall be construed to affect in any way the admissibility of any document, testimony or other evidence in trial of this action. Nothing herein shall be construed to limit in any way any Producing Party's use of its own Confidential Material.

19. All Confidential Material and copies thereof (other than copies of documents filed with the Court) shall be destroyed or returned to the Producing Party within forty-five (45) days of a final adjudication (including any appeals) or other termination of the Action with respect to all defendants.

20. In the event any party fails to comply with the terms of this Stipulated Order, the Producing Party may seek relief from the Court.

21. This Stipulated Order shall survive the termination of the Action and shall continue in full force and effect thereafter.

**IT IS SO ORDERED.**



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Hon. Christopher P. Yates  
Circuit Court Judge

**AGREED AND CONSENTED TO:**

**DREW, COOPER & ANDING, P.C.**  
Attorneys for Plaintiff/Counter-Defendant  
and Third-Party Defendants

Dated: January 10, 2018

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Dated: January 10, 2018

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**EXHIBIT A**

**CONFIDENTIALITY AGREEMENT**

I, \_\_\_\_\_, hereby acknowledge  
that:

1. I have received a copy of the Stipulated Protective Order (“Order”) entered in this  
Action by the Kent County Circuit Court, State of Michigan.

2. I have either read the Order and/or have had the terms of the Order explained to  
me by an attorney.

3. I understand the terms of the Order and agree to comply with and to be bound by  
such terms.

4. I may receive documents or information designated as confidential and  
understand that such documents and information are provided to me pursuant to the terms and  
conditions of the Order.

5. I agree to hold in confidence any documents and information disclosed to me  
pursuant to the terms of the Order.

Dated: \_\_\_\_\_

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Print Name)