STATE OF SOUTH DAKOTA

THIRD JUDICIAL CIRCUIT COURT

PATRICK T. PARDY
Circuit Judge
200 E. Center Street
Madison, SD 57042
605-256-5035
605-256-5012

COUNTIES
Beadle, Brookings, Clark
Codington, Deuel, Grant
Hamlin, Hand, Jerauld
Kingsbury, Lake, Miner
Moody and Sanborn

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December 28, 2022

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RE: *Patricia K. Deeg Trust v. SCS Carbon Transport LLC & Betty Jean Strom Trust, Rita Brown, Craig & Lisa Basler Family Trust v. SCS Carbon Transport LLC*; 02CIV22-129 & 39CIV22-64 Consolidated

These consolidated cases are currently before the Court on Defendant SCS Carbon Transport LLC's ("SCS") Motion for Entry of Protective Order following a Motion to Compel

Discovery brought by Plaintiff Landowners ("Landowners"). For the reasons set forth below, the Court grants SCS's motion, designating the Offtake Agreements as "Highly Confidential—Attorney's Eyes Only" with SCS's proposed redactions.

APPLICABLE LAW

Pursuant to SDCL § 15-6-26(c), a court may issue a protective order upon a showing of good cause to protect a person "from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way[.]" SDCL § 15-6-26(c). "The burden of showing good cause initially rests on the party seeking a protective order to show that the information sought is not discoverable and harmful to the party's interest." *Matter of Est. of Jones*, 2022 S.D. 9, ¶ 28, 970 N.W.2d 520, 530 (citing *Bertelsen v. Allstate Ins. Co.*, 2011 S.D. 13, ¶ 59, 796 N.W.2d 685, 704-05). Once that burden is met, it "then shifts to the party seeking discovery to show that the information is relevant to the subject matter of the lawsuit and is necessary." *Id.* ¶ 59, 796 N.W.2d at 705. "If the party seeking discovery shows both relevance and need, a court must weigh the injury that disclosure might cause against the need for information." *Id.* "The court may then issue a protective order to safeguard the rights of the parties." *Id.* To establish good cause, a party must show with specificity that disclosure of the information sought "will work a clearly defined and serious injury." *Id.* ¶ 29, 970 N.W.2d 520, 530 (quoting *Bertelsen*, ¶ 57, 796 N.W.2d at 704).

ANALYSIS

From the declarations of Lee Blank, CEO of Summit Carbon Solutions, LLC, ("Summit Carbon") the parent of SCS, and James Pirolli, CCO of Summit Carbon, SCS has demonstrated the following clearly defined and serious injuries it would suffer without a protective order: SCS

is currently in competition with other potential carbon dioxide pipeline companies for the business of ethanol plants and other carbon dioxide emitters in South Dakota and throughout the Midwest. SCS has also been met with opponents who have openly discussed best practices for frustrating and delaying the construction and development of the pipeline. These competitors and opponents could frustrate, undermine, and tortuously interfere with SCS's business relationships if granted access to the Offtake Agreements. Additionally, the Offtake Agreements contain time sensitive conditions, restrictions, and obligations that could be used by competitors or opponents to tactically delay the pipeline project.

After an in-camera review of the Offtake Agreements, it is apparent to this Court that the entirety of the documents contain highly confidential information that SCS and Summit Carbon have taken measures to protect in the regular course of business apart from this litigation. If permitted to be discoverable without a protective order, this information could be used to place Summit Carbon at a competitive disadvantage against even those ethanol plants it is currently in negotiations with. Based on these findings, SCS has established good cause of specific injuries that could result from unprotected disclosure of the Offtake Agreements, and these injuries outweigh the need for disclosure without a protective order. As such, SCS's Motion for Entry of Protective Order and proposed redactions are granted.

Landowners allege 1) that carbon dioxide is not a commodity "because it is not being 'bought and sold' but rather transferred as a waste product in exchange for a federal tax credit;" and 2) that SCS does not intend to transfer carbon dioxide "for hire," arguing that SCS is not shipping ethanol plants' carbon dioxide for a fee. According to Black's Law Dictionary, a commodity is defined as "an article of trade or commerce" or "an economic good, esp. a raw material or an agricultural product." *Commodity*, Black's Law Dictionary (11th ed. 2019). Given

this plain definition, the Court finds that carbon dioxide is a commodity regardless of the form of compensation, terms of payment, or transfer of value. In addition, the redacted Offtake Agreements establish that SCS is shipping carbon dioxide, belonging to the ethanol plants, for a fee. The simplest definition of a fee is "a charge or payment for labor or services[.]" *Fee*, Black's Law Dictionary (11th ed. 2019). The Court finds that the nature of the payment or transfer of value is not relevant or determinative of the fact that a fee exists.

The Court further finds that the Offtake Agreements are not relevant to any of the other remaining, and what the Court considers primary, issues in this case, which are: 1) that SDCL § 21-35-31 is facially unconstitutional; 2) that SDCL § 21-35-31 amounts to an unconstitutional taking as applied; and 3) that SDCL § 21-35-31 violates procedural due process.

CONCLUSION

Based upon the foregoing analysis, Defendant SCS's Motion for Entry of Protective Order along with SCS's proposed redactions of the Offtake Agreements are GRANTED. The Court further approves SCS's proposed protective order and will sign the same once submitted in Odyssey as a proposed order.

Hon. Patrick T. Pardy
Circuit Court Judge
Third Judicial Circuit

Attest:
McHenry, Marilyn
Clerk/Deputy

Filed on: 12/28/2022 Beadle County, South Dakota 02CIV22-000129