

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re Syngenta AG MIR162 Corn Litigation,
(D. Kan. No. 2:14-md-02591-JWL-JPO);
DeLong Co., Inc. v. Syngenta AG,
(D. Kan. No. 2:17-cv-02614-JWL-JPO)

File No. 20-mc-064 (ECT/ECW)

Randal Giroux,

Movant,

OPINION AND ORDER

v.

Syngenta AG; Syngenta Biotechnology, Inc.;
Syngenta Corporation; Syngenta Crop
Protection AG; Syngenta Crop Protection,
LLC; Syngenta Seeds, LLC,

Defendants.

Kathryn N. Hibbard, Robert J. Gilbertson, and X. Kevin Zhao, Greene Espel PLLP, Minneapolis, MN, for Nonparty Movant Randal Giroux.

David I. Horowitz, Kirkland & Ellis LLP, Los Angeles, CA, Edwin U., Kirkland & Ellis LLP, Washington, D.C., Steven L. Schleicher and Erica Holzer, Maslon LLP, Minneapolis, MN, for Defendants.

This subpoena-enforcement matter arises from a complex multidistrict litigation (“MDL”) consolidated in the United States District Court for the District of Kansas. Syngenta¹—the defendant there—served a subpoena for deposition on nonparty Randal Giroux after an MDL plaintiff designated him as a non-retained expert witness. The MDL plaintiff, The DeLong Company, Inc., seeks to introduce Giroux’s earlier deposition

¹ Defendants will be referred to collectively as “Syngenta.”

testimony to support its case. Giroux, a Minnesota resident, has filed a motion to quash the subpoena. Syngenta opposes Giroux's motion to quash and has moved to transfer this dispute to the District of Kansas for a decision by one of the assigned MDL judges. Because exceptional circumstances warrant transferring Giroux's motion to quash to the MDL Court, Syngenta's transfer motion will be granted, and a decision on Giroux's motion to quash left for the MDL Court.

I

Giroux is the "Vice President – Global Regulatory Leader at Cargill, Incorporated," where he has worked for twenty years. Giroux Decl. ¶ 1 [ECF No. 4]. His connection to Cargill explains his involvement in this matter. In 2014, Cargill sued Syngenta, alleging it had harmed the American agricultural market by prematurely commercializing a type of genetically modified corn seed before it was approved for import by China (a major export market). *See Cargill, Inc. v. Syngenta, AG*, No. 67061 (Louisiana's 40th Jud. Dist. Ct., Parish of St. John the Baptist); Hibbard Decl. ¶ 2 [ECF No. 5]. Thousands of similar lawsuits were brought in federal and state courts throughout the country. The Judicial Panel on Multidistrict Litigation ordered the transfer and consolidation of all related federal cases in the District of Kansas, now pending before District Judge John W. Lungstrum and Magistrate Judge James P. O'Hara. *See In re: Syngenta AG MIR162 Corn Litig.*, MDL No. 2591, 65 F. Supp. 3d 1401 (J.P.M.L. Dec. 11, 2014). The MDL now includes hundreds of lawsuits filed against Syngenta by corn farmers and others in the American corn industry. *See In re: Syngenta AG MIR162 Corn Litig.*, No. 2:14-md-02591-JWL-JPO (D. Kan.). Like Cargill, MDL plaintiffs typically "allege that genetically-modified corn was

commingled in the United States corn supply, that China rejected imports of all corn from the United States because of the presence of the trait, and that such rejection caused corn prices to drop in the United States.” Hibbard Decl. Ex. 9 (“DeLong Disc. Order”) at 1–2 [ECF No. 5-1 at 83–84].

Given the large number of similar state-court cases, the MDL Court issued an order granting state courts the option to coordinate discovery with the MDL. *See* Horowitz Decl. Ex. Q (“Coordination Order”) [ECF No. 15-1 at 162–81]. Among the state actions adopting the Coordination Order was Cargill’s lawsuit in Louisiana state court. Hibbard Decl. Ex. 1 [ECF No. 5-1 at 2]. Throughout discovery in Cargill’s lawsuit, the MDL, and litigation in the other coordinated proceedings, Giroux has testified six times in various capacities:

- (1) May 2016: Giroux was deposed as Cargill’s corporate representative in a deposition taken pursuant to Section B.4 of the Coordination Order in the MDL and coordinated proceedings.
- (2) June 2016: Giroux was deposed in his individual capacity as a fact witness in a deposition taken pursuant to Section B.4 of the Coordination Order in the MDL and coordinated proceedings in Minnesota state court.
- (3) November 2016: Giroux was deposed as an expert for the bellwether plaintiffs in the MDL and coordinated proceedings in Minnesota state court.
- (4) June 2017: Giroux testified during an MDL bellwether trial.
- (5) September 2017: Giroux testified during a coordinated class-action trial in Minnesota state court.

(6) December 2017: Giroux was deposed about his opinions in his capacity as an expert for Cargill in its pending lawsuit in Louisiana state court.

Giroux Decl. ¶ 2; Hibbard Decl. ¶ 5; Giroux Br. at 4 [ECF No. 3 at 9].

On July 17, 2020, MDL plaintiff DeLong served Syngenta with a Rule 26(a)(2) disclosure. Hibbard Decl. Ex. 5 (“Expert Disclosure”) [ECF No. 5-1 at 41–46]; *see also DeLong Co., Inc. v. Syngenta AG*, 2:17-cv-02614-JWL-JPO (D. Kan.). In the disclosure, DeLong designated Giroux as an expert under Federal Rule of Evidence 702 and stated its intention to offer at trial his “prior trial testimony in the Kansas farmer class trial, and potentially his trial testimony in the coordinated action pending in the state district court of Hennepin County, Minnesota.” Expert Disclosure at 2. Further, DeLong reserved the right to “rely on all other reports” issued by Giroux in relation to the MDL and to “use at trial [his] other deposition or trial testimony in the MDL, or in the referenced, coordinated proceeding.” *Id.* at 3. In response, Syngenta emailed DeLong to arrange a deposition for Giroux. Horowitz Decl. Ex. G [ECF No. 15-1 at 77]. But DeLong was not interested. DeLong had neither retained nor specially employed Giroux to provide expert testimony under Federal Rule of Civil Procedure 26(a)(2)(B); nor had Giroux otherwise consented or agreed to provide new testimony. Giroux Decl. ¶¶ 3–5; Horowitz Decl. Ex. H [ECF No. 15-1 at 81]. And according to DeLong, a deposition was unnecessary anyway, because Giroux had already been deposed and cross-examined on his opinions in the earlier lawsuits. Horowitz Decl. Ex. G [ECF No. 15-1 at 73, 76]. Regardless, said DeLong, because it had not retained Giroux as an expert, it did not have authority to procure his

attendance for a deposition. Hibbard Decl. Ex. 4 [ECF No. 5-1 at 38]. Syngenta took issue with this. According to Syngenta, if Giroux’s years-old expert testimony from another case was to be offered at trial, Syngenta should first have the opportunity to depose him about the application of those opinions to the DeLong case. Horowitz Decl. Ex. G [ECF No. 15-1 at 75].

On August 8, 2020, Syngenta emailed Cargill’s counsel a subpoena for deposition that it intended to serve on Giroux. Hubbard Decl. Ex. 4 [ECF. No. 5-1 at 39]. Upon learning that Giroux would move to quash the subpoena, however, Syngenta elected to withdraw it. *Id.* at 35–38. Syngenta then filed a motion with the MDL Court. The motion requested an order either requiring DeLong to procure Giroux’s deposition or striking Giroux’s testimony and precluding DeLong from relying on him as an expert at trial. Horowitz Decl. Ex. J (“Mot. to Compel”) at 1–2 [ECF No. 15-1 at 97–98]. In its motion, Syngenta stressed that the Coordination Order did not permit the use of deposition testimony from other coordinated proceedings save for impeachment, *id.* at 6; that, as an exporter of distiller’s dried grains with solubles, DeLong’s damages claims differed from those of earlier plaintiffs and were not considered by Giroux’s risk analyses, *id.* at 7; and that Syngenta should be permitted to test Giroux’s years-old opinions in light of intervening world events, *id.*² DeLong opposed the motion.

² Syngenta cited a “stunning revision” of China’s corn production, China’s failure to approve a single new biotech event between July 2017 and January 2019, and the U.S.-China trade war. *Id.*

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