

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

THE SHERWIN-WILLIAMS COMPANY,
Petitioner,

v.

ARCH CHEMICALS, INC.,
Patent Owner

Case: IPR2019-01498
U.S. Patent No: 9,723,842

**PETITIONER’S MOTION TO SEAL AND ENTER PROTECTIVE ORDER
UNDER 37 C.F.R. § 42.54**

Table of Exhibits

Attachment	Document Name
A	Protective Order
B	Redline of District Court Protective Order

**MOTION TO SEAL AND ENTER
PROTECTIVE ORDER**

In conjunction with its Petition for *Inter Partes* Review of U.S. Patent No. 9,723,842 (“Petition”), and pursuant to 37 C.F.R. § 42.54, Petitioner The Sherwin-Williams Company (“Petitioner”) submits this Motion to Seal and to Enter Protective Order. Pursuant to the terms of the Protective Order, filed herewith as Attachment A, Petitioner moves to seal an exhibit filed in connection with its Petition. Specifically, Petitioner requests to file Exhibit 1120 under seal. As detailed herein, the exhibit contains highly confidential and sensitive proprietary information relating to Petitioner’s formulations for its paint products.

Petitioner notes that it has not yet conferred with counsel for the Patent Owner, as this motion is being filed in conjunction with its Petition. As a result, Petitioner is unaware of the actual identity of counsel for Patent Owner. After counsel for Patent Owner files a Power of Attorney, Petitioner certifies that it will confer in good faith concerning the Motion to Seal and the Protective Order.

I. Good Cause Exists for Sealing Certain Confidential Information

In determining whether to grant a Motion to Seal, the Board must find “good cause” and “strike a balance between the public’s interest in maintaining a complete and understandable file history and the parties’ interest in protecting truly sensitive information.” 77 Fed. Reg. 48,756, 48,760 (Aug. 14, 2012); *see also* 37 C.F.R. § 42.54(a). The *Office Patent Trial Practice Guide* provides that the Board identifies confidential information in a manner “consistent with Federal Rule of Civil Procedure 26(c)(1)(G), which provides for protective orders for trade secret or other confidential

research, development, or commercial information.” *Id.* (citing 37 C.F.R. § 42.54).

Public disclosure of Petitioner’s highly confidential information that it seeks to designate as HIGHLY CONFIDENTIAL ATTORNEYS EYES ONLY would significantly harm Petitioner’s competitive and strategic position in the marketplace, as it would permit the public, including direct competitors, to have access to Petitioner’s sensitive and proprietary formulations for its paint products.

The public interest will not be harmed by the entry of the Protective Order or the filing of Exhibit 1120 under seal as HIGHLY CONFIDENTIAL ATTORNEYS EYES ONLY. Furthermore, the Patent Owner’s ability to raise its claims or defenses will not be impacted by the filing of the identified document under seal.

Because Petitioner’s confidential and highly sensitive information likely will only tangentially be relied upon by the Board, good cause exists for entry of the Protective Order. The entry of the Protective Order would achieve a balance between the public’s interest in access to information and Petitioner’s interest in protecting truly sensitive information. *Office Trial Practice Guide*, 77 Fed. Reg. 48,756, 48,760 (Aug. 14, 2012).

- A. Exhibit 1120: Plaintiff Arch Chemical’s Initial Claim Chart, dated August 9, 2019, and served in Arch Chemicals, Inc. v. The Sherwin Williams Company et al., Case No. 18-2037-LPS (D. Del.)

Petitioner has designated Exhibit 1120 as HIGHLY CONFIDENTIAL ATTORNEYS EYES ONLY. There is good cause to seal Exhibit 1120 as it consists entirely of “trade secret or other confidential research, development, or commercial information” information that falls under 37 C.F.R. § 42.54(a)(7). Exhibit 1120 is a

Plaintiff Arch Chemicals, Inc.'s Initial Claim Chart in Case No. 18-2037-LPS (D. Del.), dated August 9, 2019. Exhibit 1120 was designated Highly Confidential Attorneys Eyes Only under the protective order entered in the parallel district court proceeding by the parties. Exhibit 1120 contains technical information concerning Petitioner's formulations for Petitioner's paint products, including detailed component information and amounts. Specifically, Exhibit 1120 includes confidential information in the form of an identification of individual paint components and component amounts. The confidential information in Exhibit 1120 was the result of substantial research and development efforts and is highly sensitive technical information. Public disclosure of the information contained in Exhibit 1120 would provide current and potential competitors with sensitive competitive intelligence related to Petitioner's current and past formulations for its products. Accordingly, good cause exists to seal Exhibit 1120.

II. Certification of Non-Publication

To the best of Petitioner's knowledge, the documents sought to be protected have not been made publicly available.

III. Certification of Conference with Opposing Party Pursuant to 37 C.F.R. § 42.54

As noted above, Petitioner has not yet conferred with counsel for the Patent Owner, as this motion to seal is filed in conjunction with the Petition. After counsel for Patent Owner files a Power of Attorney, Petitioner certifies that it will confer in good faith concerning the Motion to Seal and the Protective Order.

IV. Protective Order

The subject matter of this proceeding involves the same subject matter and parties as a parallel federal district court proceeding. The parallel proceeding is *Arch Chemicals, Inc. v. The Sherwin Williams Company et al.*, Case No. 18-2037-LPS (D. Del.). The court in the parallel proceeding has entered a protective order. Exhibit 1120 was designated “Highly Confidential Attorneys-Eyes Only” under the protective order in the parallel district court proceeding.

In accordance with the Board’s Protective Order Guidelines in the July 2019 Trial Practice Guide Update, Petitioner proposes that the Board adopt a modified version of the protective order entered in the parallel district court proceeding. *See* 2019 Trial Practice Guide Update, App’x B at (i) (“When a proceeding before the Board involves the same parties and subject matter as a parallel district court proceeding, parties may propose that a protective order entered by the district court be adopted by the Board.”). The proposed protective order is attached as Exhibit 1120 to this Motion.

Per the Board’s Protective Order Guidelines in the July 2019 Trial Practice Guide, the proposed protective order is a modified version of the protective order entered in the district court proceeding. 2019 Trial Practice Guide Update, App’x B at (i) (“The Board may enter such a proposed protective order especially if certain provisions that are unnecessary or inappropriate in proceedings before the Board [such as a patent prosecution bar and district court-specific filing procedures] are removed before submitting the proposed protective order.”). As compared to the district court protective order, Petitioner’s proposed protective order omits the

prosecution bar and modifies the provisions relating to the filing of confidential information to match the Board's procedures in the Board's default protective order. A redline version showing the changes of the protective order proposed here as compared to the protective order entered by the district court is attached as Exhibit 1120.

Accordingly, Petitioner respectfully request entry of the attached Protective Order. Upon entry of the Protective Order, Petitioner designates Exhibit 1120 as "HIGHLY CONFIDENTIAL ATTORNEYS EYES ONLY."

V. Conclusion

For the reasons stated above, Petitioner requests that the Board seal and protect Petitioner's confidential information contained in Exhibit 1120 for at least the duration of this proceeding. Petitioner further requests that the Board seal and protect the confidential information in Exhibit 1120 until such time as it receives and rules on this Motion.

Dated: August 15, 2019

Respectfully submitted,

/Ryan M. Schultz/

Ryan M. Schultz

Registration No. 44,954

ROBINS KAPLAN LLP

800 LaSalle Avenue,

2800 LaSalle Plaza

Minneapolis, MN 55402-2015

Attorney for Petitioner

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e)(4) and 42.205(a), the undersigned certifies that on August 15, 2019, a copy of MOTION TO SEAL AND ENTER PROTECTIVE ORDER UNDER 37 C.F.R. § 42.54, and accompanying exhibits, were served in its entirety by U.S. Priority Mail on Patent Owner:

Anand Patel
Dority & Manning, P.A.
Post Office Box 1449
Greenville, SC 29602-1449

Courtesy copies were also sent to counsel for Patent Owner at the following address:

Anne Li
Crowell and Moring
590 Madison Avenue, 20th Floor
New York, NY 10022-2544
ali@crowell.com

Dated: August 15, 2019

Respectfully Submitted,

/Ryan M. Schultz/

Ryan M. Schultz
Registration No. 65,134
Robins Kaplan LLP
RSchultz@robinskaplan.com

Attorney for Petitioner

ATTACHMENT A PROPOSED PROTECTIVE ORDER

Paper No. _____

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

THE SHERWIN-WILLIAMS COMPANY,
Petitioner,

v.

ARCH CHEMICALS, INC.,
Patent Owner

Patent No. 9,723,842

Issued: August 8, 2017

Filed: May 24, 2007

Inventors: Nicholas Edward Thompson, Malcolm Greenhalgh, Fitzgerald Clark

Title: Isothiazoline Biocides Enhanced By Zinc Ions

Inter Partes Review No. _____

PROPOSED PROTECTIVE ORDER

Petitioner The Sherwin-Williams Company (“Sherwin-Williams”) and Patent Owner Arch Chemicals, Inc. (“Patent Owner”) assert that they possess confidential information in the form of trade secrets or other confidential business, personal, and/or technical information related to the subject matter of this Action, Inter Parties Review of U.S. Patent No. 9,723,842 (Patent Trial and Appeal Board). The Action concerns a patent dispute relating to U.S. Patent No. 9,723,842 (“’842 patent”). The parties recognize that it may be necessary to disclose certain of the asserted confidential information during the course of this Action. As a result, the parties desire to limit disclosure and prevent use of such information for purposes other than the prosecution and defense of this Action. In addition, the parties contemplate that non-parties may produce confidential information. Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure and the Board’s Trial Practice Guide, and to facilitate the production and receipt of information in this Action, the parties, by and through their respective undersigned counsel, hereby stipulate and agree to the request for, and entry of, the following Protective Order (hereinafter, “Order”).

1. DEFINITIONS

(a) *Designated Material*: The term “Designated Material” shall mean any Discovery Material designated by a Producing Party as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY, as more specifically set forth below:

(i) *HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY*: The term “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY” shall mean information that is of such a sensitive nature that it supports a good faith belief that dissemination to an employee, consultant, or officer of a competitor, or to an opposing party would result in a competitive disadvantage to the Producing Party or a third party, that is not publicly known and that the Producing Party would not normally disclose to the Receiving Party, including but not limited to the Producing Party’s or a third party’s technical information (e.g.,

inventions in progress, unpublished patent applications and their prosecution histories (foreign and domestic)), product formulation and composition information, commercial information (including, for example, business plans, business strategies, negotiations, and license agreements), research and development information, trade secret information, financial information (including, for example, budgeting, accounting, sales figures, and advertising expenditures), business relationship information (including, for example, information pertaining to potential and/or existing customers, competitors, suppliers, distributors, affiliates, subsidiaries, and parents), and personnel information (including, for example, compensation, evaluations, and other employment information). Designated Material that is designated HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY may be disclosed only to the individuals identified in Paragraph 5(a), below.

(ii) *CONFIDENTIAL*: The term “CONFIDENTIAL” shall mean and include information of the Producing Party or a third party that is not publicly known and which the Producing Party would not normally reveal to third parties or, if disclosed, would require such third parties to maintain in confidence. Designated Material that is designated CONFIDENTIAL may be disclosed only to the individuals identified in Paragraph 5(b) below.

(b) *Discovery Material*: The term “Discovery Material” shall mean any Document (as defined below), material, item, testimony, or thing filed with or presented to the Office, or produced or served during the discovery process, including, for example, produced Documents, exhibits, answers to interrogatories, responses to requests for admissions, responses to requests for production, subpoenas and responses thereto, declarations, affidavits, deposition testimony or transcripts, and all copies, extracts, summaries, compilations, designations, and portions thereof.

(c) *Document*: The term “Document” shall mean every means of recording any form of communication or representation upon any tangible thing, including letters, numbers, words, pictures, sounds, or symbols, or combinations thereof, whether recorded by handwriting, printing, photostatic, or photographic means, magnetic impulse, tape, computer disk, CD-ROM, or any other form of electronically stored information, and all other tangible things which come within the meaning of “writing” contained in Rule 1001 of the Federal Rules of Evidence, or within the meaning of “document” or “tangible thing” contained in Rule 34 of the Federal Rules of Civil Procedure.

(d) *Producing Party*: The term “Producing Party” shall mean any party to this Action or any third party who produces any Discovery Material in this Action, including its counsel, retained experts and consultants, third party testing laboratories, directors, officers, employees, or agents.

(e) *Receiving Party*: The term “Receiving Party” shall mean any party to this Action, or individual or entity who receives any Discovery Material in this Action, including the party’s counsel, retained experts and consultants, third party testing laboratories, directors, officers, employees, or agents.

(f) *Scope*: The scope of this Order shall be understood to encompass not only Designated Material which is expressly designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY but also any information derived therefrom, including all copies, extracts, summaries, compilations, designations, and portions thereof, whether partial or complete, as well as testimony and oral conversations which reveal all or part of that information.

2. PROCEDURE FOR MARKING DESIGNATED MATERIAL

Any Producing Party, or any person or entity not a party to this Action from whom discovery is sought in this Action may designate Discovery Material as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY based on a good faith belief that the Discovery Material satisfies the definition of CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY.

Marking Designated Material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY” shall be made by the Producing Party in the following manner:

(a) In the case of Documents or any other tangible thing produced, designation shall be made by placing the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY” on each page of the Document or on the cover or in a prominent place on any other tangible thing prior to production of the Document or tangible thing;

(b) In producing original files and records for inspection, no marking need be made by the Producing Party in advance of the inspection. For the purposes of the inspection, all Documents produced for inspection shall initially be considered as marked “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY.” Thereafter, upon selection of specified Documents for copying by the Receiving Party, the Producing Party shall mark Designated Material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY” as appropriate;

(c) In the case of testimony at a deposition, designation may be made as follows:

(i) by the Producing Party on the record during the deposition, specifying the testimony designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’

EYES ONLY, in which case the portion or entirety of the transcript of the designated testimony shall be bound in a separate volume and marked “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY” by the reporter; (ii) when it is impractical to identify separately each portion of testimony that is designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY, or substantial portions of the testimony concern information designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY, the Producing Party may, within twenty-one (21) days after the reporter sends written notice to the deponent or the deponent’s counsel that the transcript is available for review, provide written notice to the reporter and all counsel of record identifying specific portions of the transcript designated CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY, in which case only those portions of transcript that are appropriately designated CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY within the twenty-one (21) days shall be treated accordingly under the provisions of this Order; or (iii) a Producing Party may specify on the record during the deposition, or by written notice to the reporter and all counsel of record within twenty-one (21) days after the reporter sends written notice to the deponent or deponent’s counsel that the transcript is available for review that the entire transcript is designated CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY. Pending expiration of the twenty-one (21) days, all parties and, if applicable, any third party witnesses or attorneys, shall treat any deposition transcript as if it had been designated as HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY. Any transcript that contains testimony designated CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY shall be marked with an obvious legend on the title page

identifying the highest level of Designated Material contained therein. Outside counsel of record to a party shall give outside counsel of record to other parties reasonable advance notice if they expect a deposition to include information designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY. No person shall attend the portions of such depositions designated CONFIDENTIAL unless such person is an authorized recipient of CONFIDENTIAL information under the terms of this Order, or the parties agree in writing to such person’s attendance. No person shall attend the portions of such depositions designated HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY unless such person is an authorized recipient of material designated HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY under the terms of this Order, or the parties agree in writing to such person’s attendance. The Producing Party is entitled to exclude from any portion of a deposition designated CONFIDENTIAL any individual who does not qualify to receive CONFIDENTIAL information under the terms of this Order, unless the parties agree in writing to such person’s attendance. The Producing Party is entitled to exclude from any portion of a deposition designated HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY any individual who does not qualify to receive HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY information, unless the parties agree in writing to such person’s attendance; and

(d) In the case of testimony at a Board proceeding, designation shall be made by the Producing Party on the record during the Board proceeding, specifying the testimony designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY, in which case the portion or entirety of the transcript of the designated testimony shall be bound in a separate volume and marked “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –

OUTSIDE ATTORNEYS' EYES ONLY" by the court reporter. Subject to further order or instruction of the Board, no person shall attend the portions of such board proceedings designated CONFIDENTIAL unless such person is an authorized recipient of CONFIDENTIAL information under the terms of this Order, or the parties agree in writing to such person's attendance. Subject to further order or instruction of the Board, no person shall attend the portions of such Board proceedings designated HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY unless such person is an authorized recipient of material designated HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY under the terms of this Order, or the parties agree in writing to such person's attendance.

3. CONTESTING THE DESIGNATION

(a) No party to this Action shall be obligated to challenge the propriety of any designation by any Producing Party, and a failure to do so shall not constitute a waiver or in any way preclude a subsequent challenge in this Action or any other action to the propriety of such designation.

(b) Any party may contest a claim of confidentiality. Any party objecting to the designation of any Discovery Material as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY must give outside counsel of record for the Producing Party written notice of its reasons for the objection. Failing resolution after service of the written notice of its reasons for the objection, the party objecting may seek an order changing or removing the designation. In the resolution of such matter, the burden of establishing confidentiality shall be on the party who made the claim of confidentiality, i.e., the Producing Party, but information designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY shall remain subject to the restrictions of such

designation until such time as the matter is resolved by written agreement of the parties or order of the Board.

4. RESTRICTION ON DISCLOSURE AND USE

(a) *Confidentiality.* Designated Material and the information derived from such Designated Material (i) shall be kept confidential and used only for the limited purpose of prosecuting, defending, or attempting to settle this Action and not used in any other proceeding in this or any other jurisdiction or before any government or regulatory body, including the U.S. Patent and Trademark Office (“PTO”), and (ii) shall not be given, shown, made available, discussed, or otherwise communicated in any manner, to any person not authorized to receive the information under the terms of this Order, unless and to the extent that this Order is otherwise modified by Board order. Designated Material shall not be used for any business, commercial, regulatory, competitive, personal, or other purpose. In particular, Designated Material disclosed in this Action shall not be submitted to or used to prepare submissions to any foreign or domestic regulatory agency, and/or to draft or prosecute any patents or patent applications. Designated Material disclosed in this Action shall not be used in any case other than this Action. Any copies, extracts, summaries, compilations, designations, notes, memoranda, analyses, electronic images, or databases containing Designated Material, or portions thereof, whether partial or complete, shall be subject to the terms of this Order to the same extent as the material or information from which such summaries, compilations, designations, notes, memoranda, analyses, electronic images, or databases are derived.

(b) In the event that Designated Material is used in any open proceeding in connection with this Action, the parties will take all steps reasonably required to seal such Designated Material from public disclosure and to protect their confidentiality during use.

(c) *Maintenance of Designated Material.* Designated Material shall be maintained by the Receiving Party at a location and under circumstances to ensure that access is limited to those persons entitled to have access under this Order and with the same care with respect to the storage, custody, and dissemination of the Designated Material as the Producing Party would afford to its own Designated Material.

(d) No Designated Material or information derived therefrom, including all copies, extracts, summaries, compilations, designations, and portions thereof, whether partial or complete, as well as testimony and oral conversations which reveal all or part of that information may be disclosed to, or used with, any representative, agent, attorney, or employee of the Receiving Party, except as provided in Paragraphs 5(a) and 5(b) of this Order.

(e) Nothing in this Order shall be construed to limit a Producing Party from disseminating and using its own Designated Material in any way.

5. ACCESS TO DESIGNATED MATERIAL

(a) Access – “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY.” Designated Material marked “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY” shall be accessible only to the following persons, subject to the terms of Paragraph 6:

(i) Outside counsel of record to any party in connection with this Action and other attorneys within the same firm as outside counsel of record, and outside counsel of record’s employees working under direct supervision of such outside counsel of record, whose duties and responsibilities require access to materials designated HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY;

(ii) The Board and its personnel, including Judges, law clerks, and clerical personnel of the Board before which this Action is pending, and qualified court reporters;

(iii) Consultants or experts and their staffs, who are not employees, directors, or officers of any party and who are retained by outside counsel of record specifically to consult or testify in this Action, subject to the terms of Paragraph 6(a);

(iv) Any person who authored or was an identified recipient of the Designated Material prior to the commencement of this Action, or during this Action; or is the Producing Party's current employee and who has, in the ordinary course of business, seen such Designated Material; or who is a Federal Rule of Civil Procedure 30(b)(6) designee of the Producing Party. In the case of former employees or consultants of the Producing Party permitted access under this provision, the Designated Material may be disclosed only during a deposition of the former employees or consultants of the Producing Party in this Action; and

(v) Independent litigation support vendors and their employees retained by a party for purposes of providing services in this Action, including persons or entities working for or as court reporters; persons or entities providing graphics or design services, jury or trial consulting services, document management or copying services, translation services or interpretation from one language to another; and mock jurors, excluding individuals who are or were officers, directors, or employees of a named party, or owners of more than a two-percent interest in a named party;

(vi) Third party testing laboratories and their staffs retained by any of the parties or their counsel for purposes of this Action, subject to the requirements of Paragraph 6(b), provided that test results or reports produced by such third party testing laboratories that are derived from or are directly in consideration of HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY information, or are generated at the direction of or in consultation with, individuals who have received HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS'

EYES ONLY information, shall also be designated HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY. Notwithstanding the foregoing, test results or reports of third party testing laboratories approved under Paragraph 6(b) on publicly available materials for purposes of this Action shall be designated CONFIDENTIAL to the extent such results or reports do not disclose information designated as HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY; and

(vii) Any other person authorized to receive HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY Designated Material by order of the Board or by written agreement of the parties.

(b) Access – “*CONFIDENTIAL*.” Designated Material marked “CONFIDENTIAL” shall be accessible only to the following persons subject to the terms of Paragraph 6:

(i) The persons described in Paragraphs 5(a)(i) through 5(a)(vii) above; and

(ii) For each party to this Action, two (2) in-house counsel admitted to practice in any jurisdiction of the United States or Switzerland. In the event that one or more of the below identified designated in-house counsel ceases to have responsibilities relating to this Action, a party may designate another in-house counsel to replace such person upon giving written notice of such change to the opposing party. The designated in-house counsel are:

For Petitioner: (1) _____; and (2) _____;

For Patent Owner: (1) _____; and (2) _____; and

(iii) Any other person authorized to receive CONFIDENTIAL Designated Material by order of the Board or by written agreement of the parties.

6. CONDITIONS ON ACCESS TO DESIGNATED MATERIAL

(a) *Consultants and Experts.* Prior to a Receiving Party giving, showing, disclosing, making available, or communicating Designated Material to any expert or consultant under Paragraphs 5(a)(iii) and 5(b)(i) above, the party shall:

(i) Serve a notice on the Producing Party, identifying the expert or consultant and the expert's or consultant's business address; business telephone number; present employer and position (along with a job description); job history; and a list of prior consulting relationships for companies involved in the development, manufacturing, marketing, or sale of isothiazolinone-containing antimicrobial compositions or water-based paints or coatings for the past five (5) years; by name and number of the case and location of the court any litigation in connection with which the expert or consultant has offered expert testimony, including through a declaration, report, or testimony at a deposition or trial, during the preceding five (5) years; and past or present relationship, if any, with the Receiving Party. Furthermore, if available or reasonably obtainable, the most recent curriculum vitae or resume of the expert or consultant shall be provided under this section. If the most recent curriculum vitae or resume of the expert or consultant provides the information required under this Paragraph, then the information need not be separately provided.

(ii) Include with such notice, a copy of the Acknowledgment of Protective Order, attached as Exhibit A, signed by the expert or consultant and including all the information to be completed therein.

(iii) The Producing Party shall be entitled to object to such disclosure to the expert or consultant within seven (7) business days after receipt of the information required in Paragraph 6(a)(i) and signed Acknowledgment of Protective Order by stating specifically in writing the reasons why such expert or consultant should not receive the Designated Material.

(iv) If the parties are unable to agree on the disclosure to the expert or consultant, the party objecting to such expert or consultant may apply to the Board for an order that disclosure is improper within ten (10) business days of its objection. The burden of establishing the validity of such written objections rests with the objecting party. If the objecting party does not apply to the Board within the prescribed period, the objection shall be deemed withdrawn.

(v) No disclosure of the Designated Material shall be made to the proposed expert or consultant until the time for serving objections to that expert or consultant has passed, or, in the event that a written objection is timely served and a submission to prevent disclosure is filed, until such time as the Board has made a ruling thereon, and then, only in accordance with such ruling.

(vi) The filing and pendency of objections shall not limit, delay, or defer any disclosures of Designated Material to persons and/or third party testing laboratories as to whom no such objection has been made, nor shall it delay or defer any other pending discovery unless the level of confidentiality bears directly on the objecting party's ability to conduct such discovery.

(b) *Third Party Testing Laboratories.* Counsel may use the services of third party testing laboratories to perform tests and analyses for this Action on Designated Material marked "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY." Prior to a Receiving Party giving, showing, disclosing, making available, or communicating Designated Material to any third party testing laboratory under Paragraphs 5(a)(vi) and 5(b)(i), above, the party shall:

(i) Serve a notice on the Producing Party, identifying the third party testing laboratory and the third party testing laboratory's business address, business telephone number, any past or present relationship, if any, with the Receiving Party, and any past or present relationship, if any, with the Producing Party during the preceding five (5) years.

(ii) Include with such notice, a copy of the Acknowledgment of Protective Order, attached as Exhibit A, signed by a representative of the third party testing laboratory and including all the information to be completed therein.

(iii) The Producing Party shall be entitled to object to such disclosure to the third party testing laboratory within seven (7) business days after receipt of the information required in Paragraph 6(b)(ii) and signed Acknowledgment of Protective Order by stating specifically in writing the reasons why such third party testing laboratory should not receive the Designated Material.

(iv) If the parties are unable to agree on the disclosure to the third party testing laboratory, the party objecting to such third party testing laboratory may apply to the Board for an order that disclosure is improper within ten (10) business days of its objection. The burden of establishing the validity of such written objections rests with the objecting party. If the objecting party does not apply to the Board within the prescribed period, the objection shall be deemed withdrawn.

(v) No disclosure of the Designated Material shall be made to the proposed third party testing laboratory until the time for serving objections to that third party testing laboratory has passed, or, in the event that a written objection is timely served and a submission to prevent disclosure is filed, until such time as the Board has made a ruling thereon, and then, only in accordance with such ruling.

(vi) The filing and pendency of objections shall not limit, delay, or defer any disclosures of Designated Material to persons and/or third party testing laboratories as to whom no such objection has been made, nor shall it delay or defer any other pending discovery unless the level of confidentiality bears directly on the objecting party's ability to conduct such discovery.

(c) *Authorization and Acknowledgment.* Each person to whom Designated Material is to be given, shown, disclosed, made available or communicated in any way in accordance with this Order (excluding the Board and its personnel (e.g., Judges, law clerks, qualified court reporters, and clerical personnel of the Board before which this Action is pending), and outside counsel of record to any party in connection with this Action and other attorneys within the same firm as outside counsel of record, and outside counsel of record's employees working under direct supervision of such outside counsel of record, whose duties and responsibilities require access to materials designated CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY), shall first execute an Acknowledgment of Protective Order, attached as Exhibit A. Counsel for the Receiving Party shall keep in their files an original of each such executed Acknowledgment of Protective Order until sixty (60) calendar days after the final termination of this Action.

7. PROCEDURES FOR FILING DESIGNATED MATERIAL

Designated Material may be included with, or referred to in, papers filed with the Board where this Action is now pending only in accordance with the following procedures:

(a) A party may file documents or information with the Board along with a Motion to Seal. The Motion to Seal should provide a non-confidential description of the nature of the confidential information that is under seal, and set forth the reasons why the information is confidential and should not be made available to the public. A party may challenge the

confidentiality of the information by opposing the Motion to Seal. The submission shall be treated as Highly Confidential Attorneys Eyes Only and remain under seal, unless the Board determines that the documents or information do not qualify for confidential treatment. The information shall remain under seal unless the Board determines that some or all of the information does not qualify for confidential treatment.

(b) Where confidentiality is alleged as to some but not all of the information submitted to the Board, the submitting party shall file confidential and non-confidential versions of its submission, together with a Motion to Seal the confidential version setting forth the reasons why the information redacted from the non-confidential version is confidential and should not be made available to the public. A party may challenge the confidentiality of the information by opposing the Motion to Seal. The non-confidential version of the submission shall clearly indicate the locations of information that has been redacted. The confidential version of the submission shall be filed under seal. The redacted information shall remain under seal unless the Board determines that some or all of the redacted information does not qualify for confidential treatment.

8. UNINTENTIONAL FAILURE TO DESIGNATE

If, through inadvertence, a Producing Party provides any Designated Material in this Action without designating and marking the Designated Material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY,” the Producing Party may subsequently inform the Receiving Party of the confidential nature of the disclosed Designated Material, and the Receiving Party shall treat the disclosed Designated Material as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY upon receipt of written notice from the Producing Party, to the extent the Receiving Party has not disclosed this Designated Material. Disclosure of such Designated Material to persons not

authorized to receive that material prior to receipt of the confidentiality designation shall not be deemed a violation of this Order. However, in the event the material has been distributed in a manner inconsistent with the categorical designation, the Receiving Party promptly will take the steps reasonably necessary to conform distribution to the designation, i.e., by retrieving or destroying all copies of the Designated Material, or notes or extracts thereof, in the possession of the persons not authorized under this Order to possess such Designated Material and advising the persons to whom disclosure was made that the material is CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY and should be treated as provided in the Order, and to confirm to the Producing Party in writing such retrieval or destruction. In the event the Receiving Party believes it has been prejudiced by any such inadvertent failure to designate, the Receiving Party may contest the designation as set forth in Paragraph 3.

9. UNINTENTIONAL DISCLOSURE OF PRIVILEGED INFORMATION

Counsel shall exert their best efforts to identify Documents or material protected by the attorney-client privilege, the attorney work-product doctrine, the common-interest doctrine, or any other privilege or immunity prior to the disclosure of any such Documents or material. If, however, a party unintentionally discloses Discovery Material that is privileged or otherwise immune from discovery, the party shall, promptly upon discovery of the disclosure, so advise the Receiving Party in writing, request the Documents or material be returned, and attach a privilege log entry pertaining to the Documents or material that is privileged or otherwise immune from discovery. If that request is made and the privilege log provided, no party to this Action shall thereafter assert that the disclosure waived any privilege or immunity. It is further agreed that the Receiving Party will return or destroy the inadvertently produced Documents or material, and all copies and derivations (including any notes or work product made therefrom), within five (5) business days of the Receiving Party’s receipt of a written request for the return of the

Documents or material. The Receiving Party having returned or destroyed the inadvertently produced documents or material may thereafter seek production of the documents or material in accordance with the Federal Rules of Civil Procedure, but cannot assert that the privilege has been waived due to the unintentional disclosure. These procedures are not intended to in any way limit the right of a party to argue under Federal Rule of Evidence 502 or Federal Rule of Civil Procedure 26(b)(5)(B) or any other law that any inadvertent production did not constitute a waiver.

10. INFORMATION NOT COVERED BY THIS ORDER

The restrictions set forth in this Order shall not apply to information which is in the possession of or otherwise known to the Receiving Party or the public before the date of its transmission to the Receiving Party, or which lawfully comes into the possession of or becomes known to the Receiving Party, or lawfully comes into the possession of or otherwise becomes known to the public after the date of its transmission to the Receiving Party, provided that such information does not become publicly known by any act or omission of the Receiving Party that would be in violation of this Order.

11. RESPONSIBILITY OF ATTORNEYS

Outside counsel of record shall be responsible for providing a copy of this Order to all persons entitled access to Designated Material under Paragraph 5 and to employ reasonable measures to control duplication of, access to, and distribution of copies of Designated Material. All copies, extracts, and translations, whether partial or complete, must be appropriately marked and are subject to Paragraph 14 of this Order.

12. FINAL DISPOSITION

Upon termination, settlement, or final judgment of the Action, including exhaustion of all appeals, the originals and all copies of Designated Material shall be either destroyed or turned

over to the Producing Party, or to their respective outside counsel, within sixty (60) calendar days. However, counsel may retain filings; trial, deposition, and hearing transcripts; correspondence; expert reports; attorney and consultant work product; and deposition and trial exhibits for archival purposes. If Designated Material is destroyed pursuant to this Paragraph, outside counsel for the Receiving Party shall provide to outside counsel for the Producing Party a certification that the destruction was performed. The provisions of this Order insofar as it restricts the disclosure, communication of, and use of Designated Material produced hereunder shall continue to be binding after the conclusion of the Action.

13. NO LIMITATION OF OTHER RIGHTS

This Order shall be without prejudice to the right of any party to oppose production of any information on any and all grounds other than confidentiality.

14. RELEASE FROM OR MODIFICATION OF THIS ORDER

This Order is entered without prejudice to the right of any party to apply to the Board at any time for additional protection; or to release, rescind, or modify the restrictions of this Order; to determine whether a particular person shall be entitled to receive any particular information; or to seek relief from inadvertent disclosure of privileged or work-product information. This Order does not preclude all of the parties to this Order from entering into any stipulation (in writing or on the record) constituting a modification of this Order. On any application seeking disclosures beyond those authorized by this Order, the burden will be on the Receiving Party to justify the disclosure.

15. OTHER PROCEEDINGS

By entering this Order and limiting the disclosure of information in this Action, the Board does not intend to preclude another court from finding that information may be relevant and subject to disclosure in another case. Any person or party subject to this order who becomes

subject to a motion to disclose another party's information designated CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY pursuant to this Order in another case shall promptly notify that party of the motion so that the party may have an opportunity to appear and be heard on whether that information should be disclosed.

16. DISCOVERY FROM THIRD PARTIES

If discovery is sought of a person not a party to this Action ("third party") requiring disclosure of such third party's Designated Material, the Designated Material disclosed by any such third party will be afforded the same protection as the parties' Designated Material, and will be subject to the same procedures as those governing disclosure of the parties' Designated Material pursuant to this Order. Any third party may seek relief from the Board to enforce the provisions of this Order as if they were a party.

17. ADMISSIBILITY

Nothing herein shall be construed to affect in any way the evidentiary admissibility of any document, testimony, or other matter at any court proceeding related to this Action. The marking of Designated Material as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY" pursuant to this Order shall not, for that reason alone, bar its introduction or use at any court proceeding related to this Action pursuant to such terms and conditions as the Board may deem appropriate, consistent with the need for a complete and accurate record of the proceedings, provided, however, that every effort shall be made, through the use of procedures agreed upon by the parties or otherwise, to preserve the confidentiality of Designated Material marked as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY."

18. NON-PARTY REQUEST/SUBPOENA OF DESIGNATED MATERIAL

If a Receiving Party receives a subpoena or other compulsory process from a non-party to this Order seeking production or other disclosure of a Producing Party's Designated Material, that Receiving Party shall give written notice to outside counsel of record for the Producing Party within ten (10) business days after receipt of the subpoena or other compulsory process identifying the specific Designated Material sought and enclosing a copy of the subpoena or other compulsory process, and shall cooperate with respect to all reasonable procedures sought to be pursued by the party or third party whose information may be affected. If the Producing Party timely seeks a protective order, the Receiving Party to whom the subpoena or other compulsory process was issued or served shall not produce the Designated Material requested prior to receiving a court order or consent of the Producing Party. In the event that Designated Material is produced to the non-party, such material shall be treated as Designated Material pursuant to this Order.

19. UNINTENTIONAL DISCLOSURE OF DESIGNATED MATERIAL

If Designated Material, or any portion thereof, is disclosed by the Receiving Party, through inadvertence or otherwise, to any person or party not authorized under this Protective Order, then the Receiving Party shall use its best efforts to retrieve immediately all copies of such Designated Material, and to bind such person to the terms of this Order. In such event, the Receiving Party shall also (a) promptly inform such person of all the provisions of this Order; (b) identify such person immediately to the Producing Party; and (c) request such person to execute the Acknowledgment of Protective Order, attached as Exhibit A, and confirm destruction or return of such material and all copies and derivations thereof (including any notes or work product made therefrom).

20. COUNSEL'S RIGHT TO PROVIDE ADVICE

Nothing in this Order shall bar or otherwise restrict any counsel herein from rendering advice to the counsel's party-client with respect to this Action, and in the course thereof, relying upon an examination of Designated Material, provided, however, that in rendering such advice and in otherwise communicating with the party-client, the counsel shall not disclose any Designated Material to anyone not authorized to receive such Designated Material pursuant to the terms of this Order.

21. NO CONTRACT

To the extent that the parties have agreed on the terms of this Order, such stipulation is for the Board's consideration and approval as an Order. The parties' stipulation shall not be construed to create a contract between the parties or between the parties and their respective counsel.

22. EFFECTIVE DATE

This Order shall be effective on the date of its execution, provided that all material previously produced shall be deemed HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY unless and until they are redesignated by the Producing Party or by further order of the Court.

23. ADDITIONAL RELIEF

This Order is entered without prejudice to the ability of any party or person or entity not a party to this Action from whom discovery is sought in this Action to apply to the Board for further protection or relief from this Order.

24. NO ADMISSIONS BY DESIGNATION

The designation of any Document, deposition exhibit, deposition transcript, answer to interrogatory, answer to request to produce, answer to request for admission, and/or subpoena or

response thereto as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY is intended solely to facilitate the production and receipt of information in discovery in this Action, and treatment in conformity with such designation by the Receiving Party will not be construed in any way as an admission or agreement that the Designated Material contains any trade secret or confidential information in contemplation of law.

25. NO WAIVER OF OBJECTIONS

This Order is not to be construed as waiving any right to assert a claim of privilege, relevance, overbreadth, disproportionality to the needs of the Action, or other grounds for not producing material called for, and access to the material will be only as otherwise provided by the Board’s Trial Practice Guide and any other applicable laws.

26. TERMINATION

The termination of the Action shall not automatically terminate the effectiveness of this Order and persons subject to this Order shall be bound by the confidentiality obligations of this Order until the Producing Party agrees otherwise in writing or this Board (or any other court or competent jurisdiction) orders otherwise.

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ARCH CHEMICALS, INC.

Plaintiff,

v.

)
)
)
)
)
)

C.A. No. 18-2037-LPS

THE SHERWIN-WILLIAMS COMPANY)
and THE VALSPAR CORPORATION,)
)
Defendants.)

ACKNOWLEDGMENT OF PROTECTIVE ORDER

I, _____ state that:

My residence address is _____

My business address is _____

My present employer and job description are _____

My relationship to the parties to this Action is as follows _____

I have read and reviewed in its entirety the annexed Stipulated Protective Order (“Protective Order”) that has been signed and entered in this Action.

I hereby agree to be bound by and comply with the terms of the Protective Order, and not to disseminate or disclose any information subject to the Protective Order that I review or about which I am told, to any person, entity, party, or agency for any reason, except in accordance with the terms of the Protective Order.

I understand that contempt sanctions may be entered for violation of this Protective Order and further agree to submit to the jurisdiction of the United States District Court for the District of Delaware for the purposes of enforcement of the terms of this Protective Order.

DATED this _____ day of _____, 20_____.

(Signature)

(Typed or Printed Name)

ATTACHMENT B REDLINE OF DISTRICT COURT PROTECTIVE ORDER

Paper No. _____

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

THE SHERWIN-WILLIAMS COMPANY,
Petitioner,

v.

ARCH CHEMICALS, INC.,
Patent Owner

Patent No. 9,723,842

Issued: August 8, 2017

Filed: May 24, 2007

Inventors: Nicholas Edward Thompson, Malcolm Greenhalgh, Fitzgerald Clark

Title: Isothiazoline Biocides Enhanced By Zinc Ions

Inter Partes Review No. _____

PROPOSED PROTECTIVE ORDER

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ARCH CHEMICALS, INC.

Plaintiff,

v.

THE SHERWIN-WILLIAMS COMPANY
and THE VALSPAR CORPORATION,

Defendants.

C.A. No. 18-2037-LPS

[PROPOSED] STIPULATED PROTECTIVE ORDER

Petitioner The Sherwin-Williams Company (“Sherwin-Williams”) and Patent Owner Arch Chemicals, Inc. (“Patent Owner”) Plaintiff Arch Chemicals, Inc. (“Plaintiff” or “Arch”) and Defendants The Sherwin-Williams Company (“Sherwin-Williams”), on behalf of itself and as successor to The Valspar Corporation (“Valspar”) (collectively, “Defendants”), assert that they possess confidential information in the form of trade secrets or other confidential business, personal, and/or technical information related to the subject matter of this Action ~~litigation~~, Inter Parties Review of U.S. Patent No. 9,723,842 (Patent Trial and Appeal Board) ~~Arch Chemicals, Inc. v. The Sherwin-Williams Company and The Valspar Corporation, 18-cv-2037-LPS (D. Del.)~~ ~~(the “Action”)~~. The Action concerns a patent dispute relating to U.S. Patent No. 9,723,842 (“’842 patent”). The parties recognize that it may be necessary to disclose certain of the asserted confidential information during the course of this Action. As a result, the parties desire to limit disclosure and prevent use of such information for purposes other than the prosecution and defense of this Action. In addition, the parties contemplate that non-parties may produce confidential information. Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure and the Board’s Trial Practice Guide, and to facilitate the production and receipt of information ~~in~~ ~~discovery~~ in this Action, the parties, by and through their respective undersigned counsel, hereby

stipulate and agree to the request for, and entry of, the following Protective Order (hereinafter, “Order”).

1. DEFINITIONS

(a) *Designated Material*: The term “Designated Material” shall mean any Discovery Material designated by a Producing Party as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY, as more specifically set forth below:

(i) *HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY*: The term “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY” shall mean information that is of such a sensitive nature that it supports a good faith belief that dissemination to an employee, consultant, or officer of a competitor, or to an opposing party would result in a competitive disadvantage to the Producing Party or a third party, that is not publicly known and that the Producing Party would not normally disclose to the Receiving Party, including but not limited to the Producing Party’s or a third party’s technical information (e.g., inventions in progress, unpublished patent applications and their prosecution histories (foreign and domestic)), product formulation and composition information, commercial information (including, for example, business plans, business strategies, negotiations, and license agreements), research and development information, trade secret information, financial information (including, for example, budgeting, accounting, sales figures, and advertising expenditures), business relationship information (including, for example, information pertaining to potential and/or existing customers, competitors, suppliers, distributors, affiliates, subsidiaries, and parents), and personnel information (including, for example, compensation, evaluations, and other employment information). Designated Material that is designated HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY may be disclosed only to the individuals identified in Paragraph 5(a), below.

(ii) *CONFIDENTIAL*: The term “CONFIDENTIAL” shall mean and include information of the Producing Party or a third party that is not publicly known and which the Producing Party would not normally reveal to third parties or, if disclosed, would require such third parties to maintain in confidence. Designated Material that is designated CONFIDENTIAL may be disclosed only to the individuals identified in Paragraph 5(b) below.

(b) *Discovery Material*: The term “Discovery Material” shall mean any Document (as defined below), material, item, testimony, or thing filed with or presented to the CourtOffice, or produced or served during the discovery process, including, for example, produced Documents, exhibits, answers to interrogatories, responses to requests for admissions, responses to requests for production, subpoenas and responses thereto, declarations, affidavits, deposition testimony or transcripts, and all copies, extracts, summaries, compilations, designations, and portions thereof.

(c) *Document*: The term “Document” shall mean every means of recording any form of communication or representation upon any tangible thing, including letters, numbers, words, pictures, sounds, or symbols, or combinations thereof, whether recorded by handwriting, printing, photostatic, or photographic means, magnetic impulse, tape, computer disk, CD-ROM, or any other form of electronically stored information, and all other tangible things which come within the meaning of “writing” contained in Rule 1001 of the Federal Rules of Evidence, or within the meaning of “document” or “tangible thing” contained in Rule 34 of the Federal Rules of Civil Procedure.

(d) *Producing Party*: The term “Producing Party” shall mean any party to this Action or any third party who produces any Discovery Material in this Action, including its counsel, retained experts and consultants, third party testing laboratories, directors, officers, employees, or agents.

|

(e) *Receiving Party*: The term “Receiving Party” shall mean any party to this Action, or individual or entity who receives any Discovery Material in this Action, including the party’s counsel, retained experts and consultants, third party testing laboratories, directors, officers, employees, or agents.

(f) *Scope*: The scope of this Order shall be understood to encompass not only Designated Material which is expressly designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY but also any information derived therefrom, including all copies, extracts, summaries, compilations, designations, and portions thereof, whether partial or complete, as well as testimony and oral conversations which reveal all or part of that information.

2. PROCEDURE FOR MARKING DESIGNATED MATERIAL

Any Producing Party, or any person or entity not a party to this Action from whom discovery is sought in this Action may designate Discovery Material as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY based on a good faith belief that the Discovery Material satisfies the definition of CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY.

Marking Designated Material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY” shall be made by the Producing Party in the following manner:

(a) In the case of Documents or any other tangible thing produced, designation shall be made by placing the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY” on each page of the Document or on the cover or in a prominent place on any other tangible thing prior to production of the Document or tangible thing;

|

(b) In producing original files and records for inspection, no marking need be made by the Producing Party in advance of the inspection. For the purposes of the inspection, all Documents produced for inspection shall initially be considered as marked “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY.” Thereafter, upon selection of specified Documents for copying by the Receiving Party, the Producing Party shall mark Designated Material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY” as appropriate;

(c) In the case of testimony at a deposition, designation may be made as follows:

(i) by the Producing Party on the record during the deposition, specifying the testimony designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY, in which case the portion or entirety of the transcript of the designated testimony shall be bound in a separate volume and marked “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY” by the reporter; (ii) when it is impractical to identify separately each portion of testimony that is designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY, or substantial portions of the testimony concern information designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY, the Producing Party may, within twenty-one (21) days after the reporter sends written notice to the deponent or the deponent’s counsel that the transcript is available for review, provide written notice to the reporter and all counsel of record identifying specific portions of the transcript designated CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY, in which case only those portions of transcript that are appropriately designated CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY within the twenty-

one (21) days shall be treated accordingly under the provisions of this Order; or (iii) a Producing Party may specify on the record during the deposition, or by written notice to the reporter and all counsel of record within twenty-one (21) days after the reporter sends written notice to the deponent or deponent's counsel that the transcript is available for review that the entire transcript is designated CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY. Pending expiration of the twenty-one (21) days, all parties and, if applicable, any third party witnesses or attorneys, shall treat any deposition transcript as if it had been designated as HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY. Any transcript that contains testimony designated CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY shall be marked with an obvious legend on the title page identifying the highest level of Designated Material contained therein. Outside counsel of record to a party shall give outside counsel of record to other parties reasonable advance notice if they expect a deposition to include information designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY. No person shall attend the portions of such depositions designated CONFIDENTIAL unless such person is an authorized recipient of CONFIDENTIAL information under the terms of this Order, or the parties agree in writing to such person's attendance. No person shall attend the portions of such depositions designated HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY unless such person is an authorized recipient of material designated HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY under the terms of this Order, or the parties agree in writing to such person's attendance. The Producing Party is entitled to exclude from any portion of a deposition designated CONFIDENTIAL any individual who does not qualify to receive CONFIDENTIAL information under the terms of this Order, unless the parties agree in writing

to such person's attendance. The Producing Party is entitled to exclude from any portion of a deposition designated HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY any individual who does not qualify to receive HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY information, unless the parties agree in writing to such person's attendance; and

(d) In the case of testimony at a ~~court~~Board proceeding, designation shall be made by the Producing Party on the record during the ~~court~~Board proceeding, specifying the testimony designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY, in which case the portion or entirety of the transcript of the designated testimony shall be bound in a separate volume and marked "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY" by the court reporter. Subject to further order or instruction of the ~~Court~~Board, no person shall attend the portions of such ~~court~~board proceedings designated CONFIDENTIAL unless such person is an authorized recipient of CONFIDENTIAL information under the terms of this Order, or the parties agree in writing to such person's attendance. Subject to further order or instruction of the ~~Court~~Board, no person shall attend the portions of such ~~court~~Board proceedings designated HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY unless such person is an authorized recipient of material designated HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY under the terms of this Order, or the parties agree in writing to such person's attendance.

3. CONTESTING THE DESIGNATION

(a) No party to this Action shall be obligated to challenge the propriety of any designation by any Producing Party, and a failure to do so shall not constitute a waiver or in any

way preclude a subsequent challenge in this Action or any other action to the propriety of such designation.

(b) Any party may contest a claim of confidentiality. Any party objecting to the designation of any Discovery Material as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY must give outside counsel of record for the Producing Party written notice of its reasons for the objection. Failing resolution after service of the written notice of its reasons for the objection, the party objecting may seek an order changing or removing the designation. In the resolution of such matter, the burden of establishing confidentiality shall be on the party who made the claim of confidentiality, i.e., the Producing Party, but information designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY shall remain subject to the restrictions of such designation until such time as the matter is resolved by written agreement of the parties or order of the ~~Court~~Board.

4. RESTRICTION ON DISCLOSURE AND USE

(a) *Confidentiality.* Designated Material and the information derived from such Designated Material (i) shall be kept confidential and used only for the limited purpose of prosecuting, defending, or attempting to settle this Action and not used in any other proceeding in this or any other jurisdiction or before any government or regulatory body, including the U.S. Patent and Trademark Office (“PTO”), and (ii) shall not be given, shown, made available, discussed, or otherwise communicated in any manner, to any person not authorized to receive the information under the terms of this Order, unless and to the extent that this Order is otherwise modified by ~~court~~Board order. Designated Material shall not be used for any business, commercial, regulatory, competitive, personal, or other purpose. In particular, Designated Material disclosed in this Action shall not be submitted to or used to prepare submissions to any

foreign or domestic regulatory agency, and/or to draft or prosecute any patents or patent applications. Designated Material disclosed in this Action shall not be used in any case other than this Action. Any copies, extracts, summaries, compilations, designations, notes, memoranda, analyses, electronic images, or databases containing Designated Material, or portions thereof, whether partial or complete, shall be subject to the terms of this Order to the same extent as the material or information from which such summaries, compilations, designations, notes, memoranda, analyses, electronic images, or databases are derived.

(b) In the event that Designated Material is used in any open ~~court~~ proceeding in connection with this Action, the parties will take all steps reasonably required to seal such Designated Material from public disclosure and to protect their confidentiality during use.

(c) *Maintenance of Designated Material.* Designated Material shall be maintained by the Receiving Party at a location and under circumstances to ensure that access is limited to those persons entitled to have access under this Order and with the same care with respect to the storage, custody, and dissemination of the Designated Material as the Producing Party would afford to its own Designated Material.

(d) No Designated Material or information derived therefrom, including all copies, extracts, summaries, compilations, designations, and portions thereof, whether partial or complete, as well as testimony and oral conversations which reveal all or part of that information may be disclosed to, or used with, any representative, agent, attorney, or employee of the Receiving Party, except as provided in Paragraphs 5(a) and 5(b) of this Order.

(e) Nothing in this Order shall be construed to limit a Producing Party from disseminating and using its own Designated Material in any way.

5. ACCESS TO DESIGNATED MATERIAL

(a) Access – “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY.” Designated Material marked “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY” shall be accessible only to the following persons, subject to the terms of Paragraph 6:

(i) Outside counsel of record to any party in connection with this Action and other attorneys within the same firm as outside counsel of record, and outside counsel of record’s employees working under direct supervision of such outside counsel of record, whose duties and responsibilities require access to materials designated HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY;

(ii) The ~~Court~~ Board and its personnel, including Judges, ~~Magistrate Judges~~, law clerks, and clerical personnel of the ~~Court~~ Board before which this Action is pending, and qualified court reporters;

(iii) Consultants or experts and their staffs, who are not employees, directors, or officers of any party and who are retained by outside counsel of record specifically to consult or testify in this Action, subject to the terms of Paragraph 6(a);

(iv) Any person who authored or was an identified recipient of the Designated Material prior to the commencement of this Action, or during this Action; or is the Producing Party’s current employee and who has, in the ordinary course of business, seen such Designated Material; or who is a Federal Rule of Civil Procedure 30(b)(6) designee of the Producing Party. In the case of former employees or consultants of the Producing Party permitted access under this provision, the Designated Material may be disclosed only during a deposition of the former employees or consultants of the Producing Party in this Action; and

(v) Independent litigation support vendors and their employees retained by a party for purposes of providing services in this Action, including persons or entities working for or as court reporters; persons or entities providing graphics or design services, jury or trial consulting services, document management or copying services, translation services or interpretation from one language to another; and mock jurors, excluding individuals who are or were officers, directors, or employees of a named party, or owners of more than a two-percent interest in a named party;

(vi) Third party testing laboratories and their staffs retained by any of the parties or their counsel for purposes of this Action, subject to the requirements of Paragraph 6(b), provided that test results or reports produced by such third party testing laboratories that are derived from or are directly in consideration of HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY information, or are generated at the direction of or in consultation with, individuals who have received HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY information, shall also be designated HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY. Notwithstanding the foregoing, test results or reports of third party testing laboratories approved under Paragraph 6(b) on publicly available materials for purposes of this Action shall be designated CONFIDENTIAL to the extent such results or reports do not disclose information designated as HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY; and

(vii) Any other person authorized to receive HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY Designated Material by order of the ~~Court~~Board or by written agreement of the parties.

(b) Access – “*CONFIDENTIAL*.” Designated Material marked “*CONFIDENTIAL*” shall be accessible only to the following persons subject to the terms of Paragraph 6:

- (i) The persons described in Paragraphs 5(a)(i) through 5(a)(vii) above; and
- (ii) For each party to this Action, two (2) in-house counsel admitted to practice in any jurisdiction of the United States or Switzerland. In the event that one or more of the below identified designated in-house counsel ceases to have responsibilities relating to this Action, a party may designate another in-house counsel to replace such person upon giving written notice of such change to the opposing party. The designated in-house counsel are:

For ~~Plaintiff~~Petitioner: (1) _____; and (2) _____;

For ~~Sherwin-Williams~~Patent Owner: (1) _____; and (2) _____;

- (iii) Any other person authorized to receive *CONFIDENTIAL* Designated Material by order of the ~~Court~~Board or by written agreement of the parties.

6. CONDITIONS ON ACCESS TO DESIGNATED MATERIAL

(a) *Consultants and Experts*. Prior to a Receiving Party giving, showing, disclosing, making available, or communicating Designated Material to any expert or consultant under Paragraphs 5(a)(iii) and 5(b)(i) above, the party shall:

- (i) Serve a notice on the Producing Party, identifying the expert or consultant and the expert’s or consultant’s business address; business telephone number; present employer and position (along with a job description); job history; and a list of prior consulting relationships for companies involved in the development, manufacturing, marketing, or sale of isothiazolinone-containing antimicrobial compositions or water-based paints or coatings for the past five (5) years; by name and number of the case and location of the court any litigation in connection with which the expert or consultant has offered expert testimony, including through a

declaration, report, or testimony at a deposition or trial, during the preceding five (5) years; and past or present relationship, if any, with the Receiving Party. Furthermore, if available or reasonably obtainable, the most recent curriculum vitae or resume of the expert or consultant shall be provided under this section. If the most recent curriculum vitae or resume of the expert or consultant provides the information required under this Paragraph, then the information need not be separately provided.

(ii) Include with such notice, a copy of the Acknowledgment of Protective Order, attached as Exhibit A, signed by the expert or consultant and including all the information to be completed therein.

(iii) The Producing Party shall be entitled to object to such disclosure to the expert or consultant within seven (7) business days after receipt of the information required in Paragraph 6(a)(i) and signed Acknowledgment of Protective Order by stating specifically in writing the reasons why such expert or consultant should not receive the Designated Material.

(iv) If the parties are unable to agree on the disclosure to the expert or consultant, the party objecting to such expert or consultant may apply to the ~~Court~~Board for an order that disclosure is improper within ten (10) business days of its objection. The burden of establishing the validity of such written objections rests with the objecting party. If the objecting party does not apply to the ~~Court~~Board within the prescribed period, the objection shall be deemed withdrawn.

(v) No disclosure of the Designated Material shall be made to the proposed expert or consultant until the time for serving objections to that expert or consultant has passed, or, in the event that a written objection is timely served and a submission to prevent disclosure is

filed, until such time as the ~~Court~~ Board has made a ruling thereon, and then, only in accordance with such ruling.

(vi) The filing and pendency of objections shall not limit, delay, or defer any disclosures of Designated Material to persons and/or third party testing laboratories as to whom no such objection has been made, nor shall it delay or defer any other pending discovery unless the level of confidentiality bears directly on the objecting party's ability to conduct such discovery.

(b) *Third Party Testing Laboratories.* Counsel may use the services of third party testing laboratories to perform tests and analyses for this Action on Designated Material marked "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY." Prior to a Receiving Party giving, showing, disclosing, making available, or communicating Designated Material to any third party testing laboratory under Paragraphs 5(a)(vi) and 5(b)(i), above, the party shall:

(i) Serve a notice on the Producing Party, identifying the third party testing laboratory and the third party testing laboratory's business address, business telephone number, any past or present relationship, if any, with the Receiving Party, and any past or present relationship, if any, with the Producing Party during the preceding five (5) years.

(ii) Include with such notice, a copy of the Acknowledgment of Protective Order, attached as Exhibit A, signed by a representative of the third party testing laboratory and including all the information to be completed therein.

(iii) The Producing Party shall be entitled to object to such disclosure to the third party testing laboratory within seven (7) business days after receipt of the information required in Paragraph 6(b)(ii) and signed Acknowledgment of Protective Order by stating

specifically in writing the reasons why such third party testing laboratory should not receive the Designated Material.

(iv) If the parties are unable to agree on the disclosure to the third party testing laboratory, the party objecting to such third party testing laboratory may apply to the ~~Court~~ Board for an order that disclosure is improper within ten (10) business days of its objection. The burden of establishing the validity of such written objections rests with the objecting party. If the objecting party does not apply to the ~~Court~~ Board within the prescribed period, the objection shall be deemed withdrawn.

(v) No disclosure of the Designated Material shall be made to the proposed third party testing laboratory until the time for serving objections to that third party testing laboratory has passed, or, in the event that a written objection is timely served and a submission to prevent disclosure is filed, until such time as the ~~Court~~ Board has made a ruling thereon, and then, only in accordance with such ruling.

(vi) The filing and pendency of objections shall not limit, delay, or defer any disclosures of Designated Material to persons and/or third party testing laboratories as to whom no such objection has been made, nor shall it delay or defer any other pending discovery unless the level of confidentiality bears directly on the objecting party's ability to conduct such discovery.

(c) *Authorization and Acknowledgment.* Each person to whom Designated Material is to be given, shown, disclosed, made available or communicated in any way in accordance with this Order (excluding the ~~Court~~ Board and its personnel (e.g., Judges, ~~Magistrate Judges~~, law clerks, qualified court reporters, and clerical personnel of the ~~Court~~ Board before which this Action is pending), and outside counsel of record to any party in connection with this Action and

other attorneys within the same firm as outside counsel of record, and outside counsel of record's employees working under direct supervision of such outside counsel of record, whose duties and responsibilities require access to materials designated CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY), shall first execute an Acknowledgment of Protective Order, attached as Exhibit A. Counsel for the Receiving Party shall keep in their files an original of each such executed Acknowledgment of Protective Order until sixty (60) calendar days after the final termination of this Action.

~~7. — PATENT PROSECUTION BAR~~

~~Absent written consent, (a) any person who receives Discovery Material designated HIGHLY CONFIDENTIAL — OUTSIDE ATTORNEYS' EYES ONLY, or (b) in the case of outside counsel of record to any party in connection with this Action and other attorneys within the same firm as outside counsel of record, and outside counsel of record's employees working under direct supervision of such outside counsel of record, whose duties and responsibilities require access to materials designated HIGHLY CONFIDENTIAL — OUTSIDE ATTORNEYS' EYES ONLY under Paragraph 5(a)(i), any such person who receives or is granted access to Discovery Material designated HIGHLY CONFIDENTIAL — OUTSIDE ATTORNEYS' EYES ONLY, shall not participate in Prosecution Activity (defined herein) with respect to the '842 patent, or any continuations, continuations-in-part, divisionals, or otherwise claiming priority thereto or to a common parent patent application, and/or any patent or patent application relating to isothiazolinone-containing antimicrobial compositions and/or water-based paint or coating compositions and additives therefor, from the time of receipt or being granted access to such HIGHLY CONFIDENTIAL — OUTSIDE ATTORNEYS' EYES ONLY information through and including a period of two (2) years following termination of a final non-appealable judgment or order of complete settlement of all claims in this Action. Prosecution Activity means~~

~~participation in, direct contribution to, or indirect contribution to drafting, amending, modifying, proposing, counseling, or advising regarding the drafting or amendment of patent claims in the PTO or any foreign patent office, on behalf of any person or entity. Nothing in this Paragraph shall prevent any person subject to this prosecution bar from participating in any post-grant patent proceeding (e.g., reexamination, inter partes review, post-grant review, and/or the transitional program for covered business method patents, and/or any contested proceeding in the PTO or any foreign patent office) that is instituted or sought to be instituted challenging the validity of the '842 patent, any patents within the same family as a patent in suit, or any patents to which a patent in suit claims priority; however, such person may not participate in, directly contribute to, or indirectly contribute to drafting, amending, modifying, proposing, counseling, or advising regarding substitution to the PTO or any foreign patent office patent claims in any such post-grant proceeding.~~

8.7. PROCEDURES FOR FILING DESIGNATED MATERIAL

Designated Material may be included with, or referred to in, papers filed with the ~~Court~~ Board where this Action is now pending only in accordance with the following procedures:

(a) A party may file documents or information with the Board along with a Motion to Seal. The Motion to Seal should provide a non-confidential description of the nature of the confidential information that is under seal, and set forth the reasons why the information is confidential and should not be made available to the public. A party may challenge the confidentiality of the information by opposing the Motion to Seal. The submission shall be treated as Highly Confidential Attorneys Eyes Only and remain under seal, unless the Board determines that the documents or information do not qualify for confidential treatment. The information shall remain under seal unless the Board determines that some or all of the information does not qualify for confidential treatment.

(a) ~~Where confidentiality is alleged as to some but not all of the information submitted to the Board, the submitting party shall file confidential and non-confidential versions of its submission, together with a Motion to Seal the confidential version setting forth the reasons why the information redacted from the non-confidential version is confidential and should not be made available to the public. A party may challenge the confidentiality of the information by opposing the Motion to Seal. The non-confidential version of the submission shall clearly indicate the locations of information that has been redacted. The confidential version of the submission shall be filed under seal. The redacted information shall remain under seal unless the Board determines that some or all of the redacted information does not qualify for confidential treatment.~~ The Designated Material must be filed under seal in accordance with the applicable procedures set forth in the Local Rules of Civil Practice and Procedure of the United States District Court for the District of Delaware, any orders of the Court, and the Administrative Procedures Governing Filing and Service by Electronic Means, Revised May 2019. Courtesy paper copies of sealed documents shall be filed with the Clerk's Office in sealed envelopes endorsed with the title of this Action, an indication of the contents of the envelope, the identity of the filing party, and the notation "CONFIDENTIAL—FILED UNDER SEAL" or "HIGHLY CONFIDENTIAL—OUTSIDE ATTORNEYS' EYES ONLY—FILED UNDER SEAL."

(b) ~~All papers filed with the Court, including but not limited to pleadings and memoranda of law, that include all or any portion of information set forth in Designated Material must be filed under seal in accordance with the terms and procedures set forth in this Order, including the procedures for filing materials set forth above in Paragraph 8(a). Counsel for the party filing papers with Designated Material shall be responsible for designating all papers filed with the Court as Designated Material and marked as "CONFIDENTIAL" or "HIGHLY~~

~~CONFIDENTIAL—OUTSIDE ATTORNEYS’ EYES ONLY” depending on the contents of the papers being filed. Such papers shall be subject to the terms of this Order.~~

~~(c) REDACTED FILINGS OF PAPERS WITH DESIGNATED MATERIAL~~

~~(d) Redacted versions of papers with Designated Material filed under seal may be filed with the Court in accordance with Section G(1) of the Administrative Procedures Governing Filing and Service by Electronic Means, Revised May 2019, and made publicly available provided that:~~

~~(e) All Designated Material set forth in the papers is deleted or obscured and all Designated Material is removed as exhibits; and~~

~~(f)(b) Redacted versions of the papers are clearly marked “REDACTED PUBLIC VERSION” or a similar legend. Redacted versions of the papers also must clearly identify each place where information or exhibits have been deleted.~~

9.8. UNINTENTIONAL FAILURE TO DESIGNATE

If, through inadvertence, a Producing Party provides any Designated Material in this Action without designating and marking the Designated Material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY,” the Producing Party may subsequently inform the Receiving Party of the confidential nature of the disclosed Designated Material, and the Receiving Party shall treat the disclosed Designated Material as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY upon receipt of written notice from the Producing Party, to the extent the Receiving Party has not disclosed this Designated Material. Disclosure of such Designated Material to persons not authorized to receive that material prior to receipt of the confidentiality designation shall not be deemed a violation of this Order. However, in the event the material has been distributed in a manner inconsistent with the categorical designation, the Receiving Party promptly will take the

steps reasonably necessary to conform distribution to the designation, i.e., by retrieving or destroying all copies of the Designated Material, or notes or extracts thereof, in the possession of the persons not authorized under this Order to possess such Designated Material and advising the persons to whom disclosure was made that the material is CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY and should be treated as provided in the Order, and to confirm to the Producing Party in writing such retrieval or destruction. In the event the Receiving Party believes it has been prejudiced by any such inadvertent failure to designate, the Receiving Party may contest the designation as set forth in Paragraph 3.

10.9. UNINTENTIONAL DISCLOSURE OF PRIVILEGED INFORMATION

Counsel shall exert their best efforts to identify Documents or material protected by the attorney-client privilege, the attorney work-product doctrine, the common-interest doctrine, or any other privilege or immunity prior to the disclosure of any such Documents or material. If, however, a party unintentionally discloses Discovery Material that is privileged or otherwise immune from discovery, the party shall, promptly upon discovery of the disclosure, so advise the Receiving Party in writing, request the Documents or material be returned, and attach a privilege log entry pertaining to the Documents or material that is privileged or otherwise immune from discovery. If that request is made and the privilege log provided, no party to this Action shall thereafter assert that the disclosure waived any privilege or immunity. It is further agreed that the Receiving Party will return or destroy the inadvertently produced Documents or material, and all copies and derivations (including any notes or work product made therefrom), within five (5) business days of the Receiving Party’s receipt of a written request for the return of the Documents or material. The Receiving Party having returned or destroyed the inadvertently produced documents or material may thereafter seek production of the documents or material in accordance with the Federal Rules of Civil Procedure, but cannot assert that the privilege has

been waived due to the unintentional disclosure. These procedures are not intended to in any way limit the right of a party to argue under Federal Rule of Evidence 502 or Federal Rule of Civil Procedure 26(b)(5)(B) or any other law that any inadvertent production did not constitute a waiver.

~~14.~~10. INFORMATION NOT COVERED BY THIS ORDER

The restrictions set forth in this Order shall not apply to information which is in the possession of or otherwise known to the Receiving Party or the public before the date of its transmission to the Receiving Party, or which lawfully comes into the possession of or becomes known to the Receiving Party, or lawfully comes into the possession of or otherwise becomes known to the public after the date of its transmission to the Receiving Party, provided that such information does not become publicly known by any act or omission of the Receiving Party that would be in violation of this Order.

~~12.~~11. RESPONSIBILITY OF ATTORNEYS

Outside counsel of record shall be responsible for providing a copy of this Order to all persons entitled access to Designated Material under Paragraph 5 and to employ reasonable measures to control duplication of, access to, and distribution of copies of Designated Material. All copies, extracts, and translations, whether partial or complete, must be appropriately marked and are subject to Paragraph 14 of this Order.

~~13.~~12. FINAL DISPOSITION

Upon termination, settlement, or final judgment of the Action, including exhaustion of all appeals, the originals and all copies of Designated Material shall be either destroyed or turned over to the Producing Party, or to their respective outside counsel, within sixty (60) calendar days. However, counsel may retain ~~court~~ filings; trial, deposition, and hearing transcripts; correspondence; expert reports; attorney and consultant work product; and deposition and trial

exhibits for archival purposes. If Designated Material is destroyed pursuant to this Paragraph, outside counsel for the Receiving Party shall provide to outside counsel for the Producing Party a certification that the destruction was performed. The provisions of this Order insofar as it restricts the disclosure, communication of, and use of Designated Material produced hereunder shall continue to be binding after the conclusion of the Action.

~~14.~~13. NO LIMITATION OF OTHER RIGHTS

This Order shall be without prejudice to the right of any party to oppose production of any information on any and all grounds other than confidentiality.

~~15.~~14. RELEASE FROM OR MODIFICATION OF THIS ORDER

This Order is entered without prejudice to the right of any party to apply to the ~~Court~~ Board at any time for additional protection; or to release, rescind, or modify the restrictions of this Order; to determine whether a particular person shall be entitled to receive any particular information; or to seek relief from inadvertent disclosure of privileged or work-product information. This Order does not preclude all of the parties to this Order from entering into any stipulation (in writing or on the record) constituting a modification of this Order. On any application seeking disclosures beyond those authorized by this Order, the burden will be on the Receiving Party to justify the disclosure.

~~16.~~15. OTHER PROCEEDINGS

By entering this Order and limiting the disclosure of information in this Action, the ~~Court~~ Board does not intend to preclude another court from finding that information may be relevant and subject to disclosure in another case. Any person or party subject to this order who becomes subject to a motion to disclose another party's information designated CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY pursuant to this Order

in another case shall promptly notify that party of the motion so that the party may have an opportunity to appear and be heard on whether that information should be disclosed.

~~17.~~16. DISCOVERY FROM THIRD PARTIES

If discovery is sought of a person not a party to this Action (“third party”) requiring disclosure of such third party’s Designated Material, the Designated Material disclosed by any such third party will be afforded the same protection as the parties’ Designated Material, and will be subject to the same procedures as those governing disclosure of the parties’ Designated Material pursuant to this Order. Any third party may seek relief from the ~~Court~~Board to enforce the provisions of this Order as if they were a party.

~~18.~~17. ADMISSIBILITY

Nothing herein shall be construed to affect in any way the evidentiary admissibility of any document, testimony, or other matter at any court proceeding related to this Action. The marking of Designated Material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY” pursuant to this Order shall not, for that reason alone, bar its introduction or use at any court proceeding related to this Action pursuant to such terms and conditions as the ~~Court~~Board may deem appropriate, consistent with the need for a complete and accurate record of the proceedings, provided, however, that every effort shall be made, through the use of procedures agreed upon by the parties or otherwise, to preserve the confidentiality of Designated Material marked as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY.”

~~19.~~18. NON-PARTY REQUEST/SUBPOENA OF DESIGNATED MATERIAL

If a Receiving Party receives a subpoena or other compulsory process from a non-party to this Order seeking production or other disclosure of a Producing Party’s Designated Material, that Receiving Party shall give written notice to outside counsel of record for the Producing

Party within ten (10) business days after receipt of the subpoena or other compulsory process identifying the specific Designated Material sought and enclosing a copy of the subpoena or other compulsory process, and shall cooperate with respect to all reasonable procedures sought to be pursued by the party or third party whose information may be affected. If the Producing Party timely seeks a protective order, the Receiving Party to whom the subpoena or other compulsory process was issued or served shall not produce the Designated Material requested prior to receiving a court order or consent of the Producing Party. In the event that Designated Material is produced to the non-party, such material shall be treated as Designated Material pursuant to this Order.

~~20.~~19. UNINTENTIONAL DISCLOSURE OF DESIGNATED MATERIAL

If Designated Material, or any portion thereof, is disclosed by the Receiving Party, through inadvertence or otherwise, to any person or party not authorized under this Protective Order, then the Receiving Party shall use its best efforts to retrieve immediately all copies of such Designated Material, and to bind such person to the terms of this Order. In such event, the Receiving Party shall also (a) promptly inform such person of all the provisions of this Order; (b) identify such person immediately to the Producing Party; and (c) request such person to execute the Acknowledgment of Protective Order, attached as Exhibit A, and confirm destruction or return of such material and all copies and derivations thereof (including any notes or work product made therefrom).

~~21.~~20. COUNSEL'S RIGHT TO PROVIDE ADVICE

Nothing in this Order shall bar or otherwise restrict any counsel herein from rendering advice to the counsel's party-client with respect to this Action, and in the course thereof, relying upon an examination of Designated Material, provided, however, that in rendering such advice and in otherwise communicating with the party-client, the counsel shall not disclose any

Designated Material to anyone not authorized to receive such Designated Material pursuant to the terms of this Order.

~~22.~~21. NO CONTRACT

To the extent that the parties have agreed on the terms of this Order, such stipulation is for the ~~Court's~~ Board's consideration and approval as an Order. The parties' stipulation shall not be construed to create a contract between the parties or between the parties and their respective counsel.

~~23.~~ ~~FORUM FOR INTERPRETATION AND ENFORCEMENT~~

~~The United States District Court for the District of Delaware shall be the sole forum for the interpretation and enforcement of this Order.~~

~~24.~~22. EFFECTIVE DATE

This Order shall be effective on the date of its execution, provided that all material previously produced shall be deemed HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY unless and until they are redesignated by the Producing Party or by further order of the Court.

~~25.~~23. ADDITIONAL RELIEF

This Order is entered without prejudice to the ability of any party or person or entity not a party to this Action from whom discovery is sought in this Action to apply to the ~~Court~~ Board for further protection or relief from this Order.

~~26.~~24. NO ADMISSIONS BY DESIGNATION

The designation of any Document, deposition exhibit, deposition transcript, answer to interrogatory, answer to request to produce, answer to request for admission, and/or subpoena or response thereto as CONFIDENTIAL or HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY is intended solely to facilitate the production and receipt of

information in discovery in this Action, and treatment in conformity with such designation by the Receiving Party will not be construed in any way as an admission or agreement that the Designated Material contains any trade secret or confidential information in contemplation of law.

~~27.~~25. NO WAIVER OF OBJECTIONS

This Order is not to be construed as waiving any right to assert a claim of privilege, relevance, overbreadth, disproportionality to the needs of the Action, or other grounds for not producing material called for, and access to the material will be only as otherwise provided by the ~~Federal Rules of Civil Procedure, Federal Rules of Evidence, U.S. District Court of the District of Delaware Local Civil Rules,~~ [Board's Trial Practice Guide](#), and any other applicable laws.

~~28.~~26. TERMINATION

The termination of the Action shall not automatically terminate the effectiveness of this Order and persons subject to this Order shall be bound by the confidentiality obligations of this Order until the Producing Party agrees otherwise in writing or this ~~Court~~[Board](#) (or any other court or competent jurisdiction) orders otherwise.

~~Executed on and Dated: July 31, 2019~~

~~RICHARDS, LAYTON & FINGER, P.A.~~

~~/s/ Draft~~

~~Chad M. Shandler (#3796)
Travis S. Hunter (#5350)
Renée M. Mosley (#6442)
One Rodney Square
920 North King Street
Wilmington, DE 19801
Telephone: 302-651-7700
shandler@rlf.com~~

~~YOUNG, CONAWAY, STARGATT &
TAYLOR LLP~~

~~/s/ Draft~~

~~Anne Shea Gaza (#4093)
Samantha G. Wilson (#5816)
Rodney Square
1000 North King Street
Wilmington, DE 19801
(302) 571-6600
agaza@yest.com
swilson@yest.com~~

hunter@rlf.com
mosley@rlf.com

*Attorneys for Plaintiff/Counterclaim-
Defendant Arch Chemicals, Inc.*

*Attorneys for Defendant/Counterclaim-
Plaintiff The Sherwin-Williams Company, on
behalf of itself and as successor to Defendant
The Valspar Corporation*

SO ORDERED this _____ day of _____, 201____.

United States District Court Judge

ARCH CHEMICALS, INC.

Plaintiff,

V.

THE SHERWIN-WILLIAMS COMPANY
and THE VALSPAR CORPORATION,

Defendants.

C.A. No. 18-2037-LPS

ACKNOWLEDGMENT OF PROTECTIVE ORDER

I, _____ state that:

My residence address is _____

My business address is _____

My present employer and job description are _____

My relationship to the parties to this Action is as follows _____

I have read and reviewed in its entirety the annexed Stipulated Protective Order (“Protective Order”) that has been signed and entered in this Action.

I hereby agree to be bound by and comply with the terms of the Protective Order, and not to disseminate or disclose any information subject to the Protective Order that I review or about which I am told, to any person, entity, party, or agency for any reason, except in accordance with the terms of the Protective Order.

I understand that contempt sanctions may be entered for violation of this Protective Order and further agree to submit to the jurisdiction of the United States District Court for the District of Delaware for the purposes of enforcement of the terms of this Protective Order.

DATED this _____ day of _____, 20_____.

(Signature)

(Typed or Printed Name)