

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

MDG INTERNATIONAL, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 1:07-cv-1096-SEB-TAB
	)	
AUSTRALIAN GOLD, INC.,	)	
	)	
Defendant.	)	

**PROPOSED AGREED PROTECTIVE ORDER**

The parties consider certain information in their possession to be commercially proprietary or otherwise confidential and thus seek a Protective Order limiting disclosure thereof pursuant to *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins.*, 178 F.3d 943 (7<sup>th</sup> Cir. 1999), and its progeny. See, e.g., *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562 (7<sup>th</sup> Cir. 2000); *Baxter Int'l v. Abbott Lab.*, 297 F.3d 544 (7<sup>th</sup> Cir. 2002). Accordingly, the parties named below, by their respective counsel, stipulate and agree, subject to the Court's approval and pursuant to Federal Rule of Civil Procedure 26(c)(7), that the following provisions of this proposed Agreed Protective Order ("Order") shall govern the handling of such confidential information and documents in this proceeding.

1. As used herein, the term "Party" or "Parties" shall refer to Plaintiff MDG International, Inc. and Defendant Australian Gold, Inc.

2. As used herein, the term "Confidential Information" means trade secrets and other information that is non-public, proprietary and confidential information, the value of which arises from its secrecy, and the disclosure of which (whether separately or in conjunction with other information being produced) is believed in good faith by the

producing Party to have the potential for causing competitive harm to it or giving a competitive advantage to others. FED. R. CIV. P. 26(c)(7).

3. As used in this Order, “trade secret” means information that:
  - (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
  - (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

IND. CODE § 24-2-3-2.

4. Therefore, the Parties submit that the following categories of information are likely to be relevant in this case, may qualify as trade secrets or confidential information, and may be designated as Confidential Information, regardless of the form such information may take, including but not limited to documents, interrogatory answers, deposition testimony, responses to other discovery demands, as well as all notes, extracts and summaries of such information:

- (a) Customers, partners or collaborators in the distribution chain. See *Star Scientific, Inc. v. Carter*, 204 F.R.D. 410, 414-15 (S.D. Ind. 2001); *Titus v. Rheitone*, 758 N.E.2d 85, 95 (Ind. Ct. App. 2001); *Hydraulic Exch. & Repair, Inc. v. KM Specialty Pumps, Inc.*, 690 N.E.2d 782, 786 (Ind. Ct. App. 1998); *Woodward Ins., Inc. v. White*, 437 N.E.2d 59, 67 (Ind. 1982).
- (b) Financial data. See *Am. Standard, Inc. v. Pfizer, Inc.*, 828 F.2d 734, 741 (Fed. Cir. 1987), *cert. denied* 396 U.S. 820 (1996).  
Confidential financial data can include, but is not limited to,

development and manufacturing costs, *Am. Standard*, 828 F.2d at 741, and overhead and labor rates, *Hydraulic Exch.*, 690 N.E.2d at 786.

- (c) Market data and market entry decisions. See *Am. Standard*, 828 F.2d at 740-41.
- (d) Pricing and financial information, including prices, sales, profits, overhead, labor rates, balance sheets, financial statements, and other financial information. See *Ackerman v. Kimball Int'l Inc.*, 652 N.E.2d 507, 509 (Ind. 1995); *Hydraulic Exch.*, 690 N.E.2d at 786.
- (e) Product ingredients and formulas. See *Michels v. Dyna-Kote Indus., Inc.*, 497 N.E.2d 586, 588-89 (Ind. Ct. App. 1986); *KFC Corp. v. Marion-Kay Co., Inc.*, 620 F. Supp. 1160, 1172 (S.D. Ind. 1985); *Mangren Research & Dev. Corp. v. Nat'l Chem. Co., Inc.*, 1995 W.L. 33102, \*2-3 (N.D. Ill. Jan. 26, 1995).

5. Nothing shall be regarded as Confidential Information if it is information that either:

- (a) Is in the public domain at the time of disclosure;
- (b) Becomes a part of the public domain through no fault of the other party;
- (c) The receiving party can show was in its rightful and lawful possession at the time of disclosure; or

- (d) The receiving party lawfully received from a third party without restriction as to disclosure, provided such third party had the right to make the disclosure to the receiving party.

6. The term "Designated Confidential Information" means any Confidential Information designated in the manner set out in paragraph 13 below so as to make such Confidential Information subject to the restrictions set out in this Order. With respect to any information designated as Designated Confidential Information:

- (a) The term "Designating Party" means the party, parties, or non-party who designated the information; and
- (b) The term "Receiving Party" means the party or parties to whom such information was produced or otherwise disclosed.

7. The term "Qualified Persons" means:

- (a) Attorneys for a party (in-house or outside counsel) who are working for a party and who are working directly on this litigation, and the law clerks, paralegals, clerical, secretarial or administrative staff of the attorneys to whom it is appropriate that the material be shown for purposes of this litigation;
- (b) The Court, personnel of the Court (including personnel in the Clerk's office), deposition stenographers, and deposition videographers;
- (c) The Parties, including their agents and employees, only if they are assisting their attorneys in the litigation and have signed a document in the form of **Exhibit A**;

- (d) Independent technical experts or consultants, who are working with or assisting counsel for a party in this litigation, who have signed a document in the form of **Exhibit A**, and returned the signed form to the Receiving Party before Confidential Information is disclosed to that person;
- (e) Authors, addressees, and recipients of copies of documents containing Designated Confidential Information with respect to only those documents for which they are authors, addressees or recipients;
- (f) Witnesses and deponents who are being questioned concerning Designated Confidential Information, subject to the requirements of paragraph 28 of this Order;
- (g) Such other persons as may be designated by written agreement of the Parties to this proceeding; and
- (h) Any other person(s) designated as a "Qualified Person" by Order of this Court, after notice to all parties.

**Restrictions on Disclosure and Use of Designated Confidential Information**

8. Designated Confidential Information produced or exchanged in the course of this litigation shall be used solely for the purpose of preparation and trial of this litigation and related settlement negotiations, and for no other purpose whatsoever, including without limitation any commercial use, and shall not be disclosed to any person except in accordance with the terms of this Order. No recipient of Designated Confidential Information may use any Designated Confidential Information for any

purpose outside of this litigation without the written consent of the party designating the material as Confidential.

9. Designated Confidential Information shall not be disclosed or made available by the Receiving Party to persons other than Qualified Persons. Any circulation of Designated Confidential Information shall be restricted to Qualified Persons. If any person having access to the Designated Confidential Information violates this Order, he or she will be subject to sanctions by the Court.

10. Any person in possession of Confidential Information shall exercise reasonably appropriate care with regard to storage, custody, or use of such Confidential Information in order to ensure that its confidentiality is maintained.

11. Nothing in this Order shall prevent disclosure beyond the terms of this Order if the Designating Party consents to such disclosure, or if the Court, after notice to all affected parties, orders such disclosure.

12. As governed by paragraphs 26 through 30, nothing in this Order shall prevent any counsel of record from utilizing Designated Confidential Information during a deposition or a hearing in the direct or cross examination of: (a) any person who is indicated on the document as being an author, source of, or recipient of the Designated Confidential Information, irrespective of which party produced such information; or (b) a past or present officer, director, employee, or agent of the party or that party's predecessor who generated or produced the Designated Confidential Information.

#### **Designation Procedure**

13. Confidential Information should be designated as such by marking the document or response "CONFIDENTIAL" prior to or at the time the document or response is produced. This language, or similar language, shall be placed on each

such page or portion of the Confidential Information designated for protection or, in the case of electronic information, on any storage media (such as diskette or CD) on which a copy of the information is produced. If copies of documents are not to be provided initially to the inspecting Party, and the documents are to be produced for inspection, then the producing Party may advise counsel inspecting the documents of their confidential status without marking the documents as provided herein. If copies are later made, they shall be marked as provided herein to indicate their confidential status. In lieu of marking the original of a document, if the original is not produced, the designating Party may mark the copies that are exchanged or produced. Tangible objects may be designated as subject to this Protective Order by affixing to the object or its container the legend "CONFIDENTIAL".

14. Confidential Information contained in responses to interrogatories, requests for admission, in other written disclosures shall be designated as such by marking the relevant pages or portions "CONFIDENTIAL" as described in paragraph 13 above.

15. Any party may designate Confidential Information disclosed in a deposition as Designated Confidential Information by indicating on the record at the deposition that the testimony is Confidential Information and is subject to the provisions of this Order.

16. Each deposition transcript in this action shall be provisionally deemed Designated Confidential Information for a period ("Provisional Designation Period") from the date of the deposition through thirty (30) days after all parties have received the transcript. The Provisional Designation Period for any deposition transcript may be

lengthened or shortened by agreement of the parties or by order of the Court for good cause shown.

17. Prior to the end of the Provisional Designation Period, any party may designate Confidential Information disclosed in a deposition as Designated Confidential Information by notifying all of the parties, in writing, of the specific pages and lines of the transcript that contain the Confidential Information. If such a designation is made, the parties shall attach a copy of such written notice or notices to the face of the transcript and each copy of the transcript in their possession, custody or control and shall mark the designated pages of the transcript and copies as provided in Paragraph 13 above.

18. If a party discovers that it has inadvertently disclosed Confidential Information to another party without designating it as Designated Confidential Information, the producing party shall promptly notify the receiving party in writing, specifically identifying the information at issue and shall provide to the receiving party replacement documents marked as required in this Order to designate the Confidential Information at issue as Designated Confidential Information. The receiving party shall return or destroy all originals and copies of the materials containing the inadvertently disclosed Confidential Information, treat the inadvertently disclosed Confidential Information as Designated Confidential Information, and promptly notify any non-Qualified Persons who may have reviewed the inadvertently disclosed Confidential Information before the notice was received that such information shall be treated as Designated Confidential Information.

19. The inadvertent production of any document or information during discovery in the litigation shall be without prejudice to any claim that such material is



privileged under the attorney-client privilege or other privilege, or protected from discovery as work product. No party or entity shall be held to have waived any rights by such inadvertent production so long as the Receiving Party is notified within five (5) days of the discovery that there has been such an inadvertent production. Upon written request by the inadvertently producing party, the Receiving Party shall (even if the Receiving Party disagrees that the document is privileged) return all copies of the document and not use the information in the document for any purpose until further order of the Court.

20. A non-party responding to a subpoena in this cause shall be entitled, but is not required, to designate deposition testimony or documents as "Designated Confidential Information" pursuant to this Order, with the same protection and obligations under this Order as if such non-party were a party in the cause, provided that the non-party first executes, files and serves in this cause a "Certificate of Consent by Non-Party to Be Bound by Protective Order" which states that the non-party agrees to be bound by the terms and conditions of this Order, has a copy of it, and has read and understands its terms and conditions.

#### **Challenges to the Designation of Information as Designated Confidential Information**

21. A Receiving Party may object to the designation of information as Designated Confidential Information at any time. In the event that a Receiving Party disagrees at any stage of these proceedings with the designation ("Disputed Designation") of any information as Designated Confidential Information, the Receiving Party and the Designating Party shall first try to resolve such dispute in good faith on an informal basis pursuant to S.D. Ind. L.R. 37.1. The Receiving Party shall provide written

notice to the Designating Party and state the grounds for the objection. If the dispute remains unresolved after fifteen (15) days, the Receiving Party may move the Court to revoke the Disputed Designation. The Designating Party carries the burden of establishing the confidential or secret nature of the information. Unless and until the objection is resolved, the information or document shall continue to be treated as Designated Confidential Information.

22. Nothing in this Order shall prohibit an interested member of the public from challenging the confidentiality of any document filed under seal with this Court. If an interested member of the public makes such a challenge, the Party who designated the material as Confidential Information shall be allowed to oppose any such challenge.

23. Any party may seek an order of this Court modifying this Order.

24. Receipt by a Party of information designated as Confidential Information in accordance with this Protective Order shall not (a) constitute a concession that such Confidential Information in fact is or includes confidential or privileged information, or (b) constitute agreement or admission with respect to the competency, relevancy or materiality of any such Confidential Information.

25. Neither the taking of, nor the failure to take, any action to enforce the provisions of this Protective Order, nor the failure to object to any designation, shall constitute a waiver of any Party's claim or defense in this action or any other action including, but not limited to, the claim or defense that any information is or is not confidential, is or is not entitled to particular protection, or embodies or does not embody Confidential Information.

**Usage of Designated Confidential Information in Court**

26. The Clerk of this Court is directed to maintain under seal all Designated Confidential Information that is filed in Court in this litigation.

27. In the event that a party wishes to use any Designated Confidential Information in any affidavits, briefs, memoranda of law, or other papers filed in Court in this litigation, such Designated Confidential Information shall be filed in a sealed envelope bearing the following designation and shall otherwise comply with Local Rule 5.3 of the United States District Court, Southern District of Indiana:

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

IN ACCORDANCE WITH THE PROTECTIVE ORDER OF THE COURT, THE CONTENTS OF THIS ENVELOPE SHALL BE TREATED AS CONFIDENTIAL AND MUST NOT BE SHOWN TO A PERSON OTHER THAN COURT PERSONNEL AND COUNSEL OF RECORD IN THIS ACTION.

The sealed envelope containing the Designated Confidential Information shall be maintained under seal by the Court.

28. Whenever Designated Confidential Information is introduced or used at a deposition, hearing, or other proceeding, excluding trial, the portions of the proceeding that concern such Designated Confidential Information shall be conducted under circumstances to ensure that only those persons duly authorized by this Order to have access to such Designated Confidential Information shall be present. Upon the request of any party, the portions of the transcript of any such proceeding, along with associated exhibits, that concern Designated Confidential Information shall be sealed and kept confidential pursuant to the provisions of this Order.

29. If counsel for any party believes that it is reasonably necessary for trial preparation to disclose or otherwise reveal any Designated Confidential Information to any person other than those authorized to receive such Designated Confidential Information under Paragraph 7 of this Order, such counsel shall submit a written request for disclosure to counsel for the Designating Party. The written request for disclosure shall (a) identify each person to whom disclosure is desired, (b) identify with particularity the document, discovery response or deposition testimony to be disclosed, and (c) state the reasons why counsel believes the disclosure to be necessary. Counsel for the Designating Party shall respond in writing to the written request for additional disclosures within five (5) business days after receipt of the written request. Failure to respond to the request within five (5) business days shall be considered agreement to the requested disclosure. If counsel for the parties do not agree that disclosure may be made, the party seeking the additional disclosure may seek an order from this Court to permit the disclosure.

30. Subject to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, Confidential Information may be offered in evidence at any Court hearing or trial, provided that the proponent of the evidence gives advance notice to counsel for the Party or Non-Party producing the document or information. Any Party or Non-Party may move the Court for an order that the evidence be received *in camera* or under other conditions to prevent unnecessary disclosure. The Court will then determine whether the proffered evidence should continue to be treated as Confidential Information and, if so, what protection, if any, may be afforded to such information at the hearing or trial.

31. Nothing in this Protective Order shall be construed as a waiver by a Party of any objections that might be raised as to discoverability or to admissibility at trial of any evidentiary materials.

32. Any person who receives Confidential Information in connection with this Action and is served with a subpoena or other notice compelling the production of Confidential Information shall give prompt written notice to the producing party as far in advance of the requested production date as possible, and, if possible, no less than fourteen (14) days prior to production.

**Handling of Designated Confidential Information after Conclusion of This Action**

33. Except as hereinafter provided or as agreed to by the Parties, within sixty (60) days after the conclusion of this litigation, all originals and all copies of all documents constituting or containing Confidential Information shall be returned to the producing Party or shall be destroyed by the receiving Party. Counsel for each Party may, however, retain (subject to the provisions of this Order) one copy of any papers filed with the Court, any deposition and trial transcripts, any deposition and trial exhibits, any written discovery requests or responses, its correspondence file, its consultant and expert witness files, and any attorneys' notes, memoranda or other work product.

34. Insofar as the provisions of this Order restrict the disclosure and use of information produced, this Order shall continue to be binding after the conclusion of this litigation except that (a) there shall be no restriction on documents that are admitted as exhibits in Court on a non-confidential basis, and (b) a Party may seek the written permission of the producing Party or further Order of this Court with respect to dissolution or modification of this Protective Order.

35. Nothing in this Order shall bar or otherwise restrict any qualified attorney in this case from rendering advice to his client with respect to this litigation and, in the course thereof, relying upon his or her examination of Confidential Information, provided that such advice does not entail disclosure to anyone other than to "Qualified Persons" of the substance of any such Confidential Information.

36. Nothing in this Order shall preclude any Party from applying to the Court for modification of the terms of this Order as may be appropriate; provided, however, that prior to any such application, the Parties shall confer and make a good faith effort to resolve the matter by agreement.

37. Nothing in this Order shall preclude any Party from applying to the Court for a Protective Order pursuant to Fed. R. Civ. P. 26(c) regarding the production of specific information or documents not otherwise subject to the provisions of this Order.

**FINDINGS:**

38. The Court is satisfied, and therefore finds, that the Parties understand what a trade secret is, and are acting in good faith in deciding which documents or information are trade secrets or confidential information.

39. The Court further finds that there is good cause for the Parties to treat as confidential the documents and/or information which is confidential, as provided in this Order. Further, the Court finds that the Parties are familiar with the provisions of Local Rule 5.3 governing the sealing of documents filed with the Court.

SO ORDERED:

Date: 02/27/2008



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Tim A. Baker  
United States Magistrate Judge  
Southern District of Indiana

APPROVED AS TO FORM AND SUBSTANCE:

Distribution to:



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SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

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	)	
Defendant.	)	

**CONFIDENTIALITY AGREEMENT**

I hereby acknowledge that I have read the Agreed Protective Order executed by the attorneys of record for the parties and entered by the Court in the above-captioned action, understand the terms of the Agreed Protective Order, and agree to be bound by such terms.

I will hold in confidence and not disclose to anyone not authorized under the Agreed Protective Order any materials containing Confidential Information disclosed to me. I further agree that neither I nor anyone assisting me will use or rely on Confidential Information disclosed to me for any purpose, including any commercial use, not authorized under the Agreed Protective Order. Without limiting the generality of this paragraph, I understand that it would be improper to use or rely on Confidential Information in communicating in any way with any person not authorized under the Agreed Protective Order.

At the conclusion of this case, I will return all materials containing Confidential Information which came into my possession, and documents or things which I have

prepared relating thereto, to counsel for the party who provided such Confidential Information to me.

I hereby submit to the jurisdiction of this Court for the purpose of enforcement of the Protective Order in this case.

DATED: \_\_\_\_\_

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name