

D-1-GN-16-003255

CAUSE NO. \_\_\_\_\_

BASF CORPORATION,

v.

KEN PAXTON, IN HIS OFFICIAL  
CAPACITY AS ATTORNEY GENERAL OF  
THE STATE OF TEXAS; AND THE  
OFFICE OF THE GOVERNOR

§  
§  
§  
§  
§  
§  
§  
§  
§

IN THE DISTRICT COURT

OF TRAVIS COUNTY, TEXAS

345TH

\_\_\_\_ JUDICIAL DISTRICT

**PLAINTIFF'S ORIGINAL VERIFIED PETITION AND APPLICATION FOR  
INJUNCTIVE RELIEF AND TEMPORARY RESTRAINING ORDER**

Plaintiff, BASF Corporation ("BASF") hereby files its Original Verified Petition and Application for Injunctive Relief and Temporary Restraining Order:

**I. DISCOVERY PLAN**

1. Discovery is intended to be conducted under Level 2 pursuant to Rule 190 of the Texas Rule of Civil Procedure.

**II. PARTIES**

1. Plaintiff BASF is a Delaware Corporation with its principal place of business at 100 Park Avenue, Florham Park, New Jersey 07932.

2. Defendant Ken Paxton is Texas Attorney General and may be served with process at 300 West 15th Street, Austin, Travis County, Texas 78701. This action is brought against Ken Paxton in his official capacity as Attorney General of the State of Texas.

3. Defendant Office of the Governor is a state agency, and may be served with process at 1100 San Jacinto, Austin, Texas 78701.

4. Jim Malewitz ("Malewitz") is a reporter for the Texas Tribune. Malewitz, in his capacity as a reporter for the Texas Tribune, is the party requesting documents from the Office of Governor Greg Abbott pursuant to the Texas Public Information Act. The Texas Tribune is located at 823 Congress Avenue, Suite 1400, Austin, Travis County, Texas 78701. Malewitz is not a party to this lawsuit, however, pursuant to Tex. Gov't Code § 552.325(b), BASF is providing Malewitz and the Texas Tribune with notice of this lawsuit.

### III. JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this matter pursuant to TEX. GOV'T CODE § 552.001, *et seq.*, and its inherent power to regulate ultra vires acts of governmental agencies as this is an action for declaratory and injunctive relief to prevent the wrongful disclosure of information under the Texas Public Information Act ("TPIA"). BASF has standing to assert its claims because it has unique, particularized interest in maintaining the confidentiality of the documents at issue in this case and pursuant to TEX. GOV'T CODE § 552.325. See *Boeing v. Paxton*, 466 S.W.3d 831 (Tex. 2015) (**Exhibit 3**).

6. Venue is proper in Travis County, Texas pursuant to TEX. CIV. PRAC. & REM. CODE § 15.002 because a substantial part of the acts and/or omissions giving rise to this action occurred in Travis County, Texas, and defendants reside in Travis County, Texas.

### IV. FACTS

7. This case is an action to prevent the Office of the Governor from disclosing BASF's applications and contracts relating to its application to the Texas Enterprise Fund pursuant to an open records request made by Malewitz in his capacity as a reporter for the Texas Tribune.

8. BASF is the North American affiliate of BASF SE. BASF is involved in the production of chemicals, a variety of plastics, agriculture, biotechnology, as well as many other fields.

9. The research and production of chemicals is an incredibly competitive environment, with multiple international corporations vying for the same market that BASF occupies. As such, BASF has spent many years and millions of dollars developing proprietary processes and technology. This information is vital to BASF's market strategy, and is only distributed to select individuals within BASF.

10. As part of its Texas Enterprise Fund Application to the Governor's office, BASF submitted confidential trade secret and financial information on April 9, 2013. This information was submitted with the application under the expectation that it would remain confidential. On July 18, 2013, the Office of the Governor approved the grant to BASF. In addition, on October 15, 2015, BASF entered into an Economic Development Grant Contract with the Governor's office.

11. The confidential information contained in BASF's application would be exceedingly valuable to its competitors, as BASF's competitive advantage in its industry is the result of the company's investment of time and money in analyzing and developing the technology to use in its projects. The information contained in BASF's application about these technological investments would provide competitors with insight into BASF's proprietary process that creates its competitive advantages.

**B. Malewitz's Information Request**

12. On April 8, 2016, the Office of the Governor received a request for information from Malewitz in his capacity as a reporter for the Texas Tribune for all Texas Enterprise Fund grants from October 1, 2014, through the request date.

13. The Office of the Governor officially submitted the information at issue to the Office of the Attorney General, Open Records Division on April 25, 2016, seeking a decision regarding an exception to disclosure of BASF's confidential information.

14. Also on April 25, 2016, BASF's Tax Department received notice that the Office of the Governor had received Malewitz's open records request that included documents including BASF's proprietary information. This was BASF's first notice of Malewitz's information request.

**C. BASF's Third Party Objection to Disclosure**

15. As a result of learning of Malewitz's information request, BASF filed a third party objection requesting that certain information not be released to Malewitz. On May 5, 2016, BASF timely filed its Third-Party Objection to the disclosure of its proprietary and confidential information with the Office of the Attorney General of Texas, Open Records Division. A true and correct copy of the Objection is attached as **Exhibit 1** (without exhibits thereto). According to the deadline laid out in Tex. Gov't Code § 552.305(d)(2)(B), BASF's Third-Party Objection was timely submitted as it was within ten business days after BASF first received notice of Malewitz's information request.

16. In its Third-Party Objection, BASF described the confidential, proprietary, and sensitive nature of the documents it submitted to the Office of the Governor as part of its Texas Enterprise Fund application, and was now potentially subject to disclosure as

a result of Malewitz's open records request. BASF further discussed the consequences it would suffer from disclosing its confidential information. The confidential information at issue (further described in Exhibit 1, p. 5) includes the following highly sensitive information:

- Descriptions of the technology that BASF planned to utilize in its project and the costs associated with that project;
- Descriptions of the Capital Investment that BASF was making, as well as breakdowns and descriptions of the categories of capital investments;
- Details of existing jobs at BASF and what new jobs BASF would create pursuant to the Texas Enterprise Fund grant, as well as the buildings, machinery, and tools that BASF would incorporate into its project; and
- The primary competition for the project as well as the total estimated value of the incentives.

17. In addition to BASF requesting that certain information not be released pursuant to Malewitz's information request, BASF offered to release redacted copies of the documents if the documents had to be released.

18. Further, BASF advanced its separate position that its documents and Texas Enterprise Fund application was not included within the parameters of Malewitz's request. Malewitz's information request asked only for the records related to Texas Enterprise Fund grants from October 1, 2014, through April 8, 2016. BASF's Texas Enterprise Fund Application, however, was submitted to the Office of the Governor on April 15, 2013. The Office of the Governor approved the grant to BASF on July 18, 2013. Consequently, BASF's information and documents are not related to Texas Enterprise Fund grants from

October 1, 2014 through April 8, 2016. BASF information and documents, therefore, should not be included in those documents turned over to Malewitz.

19. BASF objected to the disclosure of this information because it constitutes trade secrets, and is commercial and financial information, which BASF keeps as confidential. See Exhibit 1. The information at issue gives BASF “an opportunity to obtain an advantage over competitors who do not know or use it.” *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). As such, BASF’s information is exempt from disclosure under Tex. Gov’t Code §§ 552.110(a) & (b).

**D. The Office of the Attorney General Ruling Letter**

20. In response to Office of the Governor’s request, the Office of the Attorney General, Open Records Division issued an Open Records Ruling Letter, OR2016-14633, to Ms. Jessica Vu, Assistant General Counsel, Office of Governor Greg Abbott on June 28, 2016 (the “Ruling Letter”). A true and correct copy of the Letter is attached as **Exhibit 2**.

21. In the Letter, the Office of the Attorney General never addressed BASF’s claims that its application was outside the time range listed in Malewitz’s request. However, the Office of the Attorney General noted that the Office of the Governor determined that the information is responsive to the request and ruled that the information must be disclosed, rejecting BASF’s objection. The Office of the Attorney General determined that BASF did not establish the information at issue are trade secrets.

22. Exhibit 1 did establish a prima facie case that the information is a trade secret. See Exhibit 1, pp. 3-4.

23. In addition, the Letter claimed that BASF's pricing information could not be a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business." As a result, the Office of the Attorney General claimed that BASF failed to meet the requirements of Tex. Gov't Code § 552.110(a) to protect its proprietary information.

24. Further, the Letter also stated that BASF did not establish its commercial and financial information "would cause the company substantial competitive harm" as stated in Tex. Gov't Code § 552.110(b). The Letter arrived at this conclusion despite BASF's argument to the contrary that disclosure of this information would easily facilitate competitors ability to replicate BASF's investments and reverse-engineer BASF's confidential and proprietary process.

#### **V. CLAIM FOR DECLARATORY RELIEF**

25. Pursuant to Tex. Gov't Code § 552.325 and the Texas Declaratory Judgment Act, BASF seeks a declaration that the information sought by Malewitz's information request is not subject to disclosure because the information is statutorily excepted from disclosure.

26. Under Tex. Gov't Code § 552.101, confidential information is "excepted from the requirements of [Tex. Gov't Code] Section 552.021 if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision.

27. The information included in BASF's Texas Enterprise Fund application is excepted from disclosure because it provides sensitive, proprietary information regarding BASF's means, methods, and costs of creating and manufacturing its products. The information, therefore, falls within the purview of Tex. Gov't Code § 552.104. If the

information at issue was disclosed, it would undoubtedly “give an advantage to a competitor or bidder.” Tex. Gov’t Code § 552.104.

28. If BASF’s competitors obtained this information it would allow them to more easily and more closely mimic BASF’s proprietary processes, detrimentally affecting BASF, its customers, and its market position. Competitor’s sales prices are already set based on BASF’s sales price because of BASF’s status as a market leader, and disclosing this information would erode BASF’s market position. Consequently, BASF’s information should not be disclosed pursuant to Tex. Gov’t Code § 552.104.

29. *Boeing v. Paxton*, 466 S.W.3d 831 (Tex. 2015) (**Exhibit 3**) is helpful precedent. The Texas Supreme Court ruled in favor of a party objecting to the release of information in a case involving Tex. Gov’t Code § 552.104. The Supreme Court agreed with an argument regarding competitively sensitive information that is similar to the argument BASF makes here. The Supreme Court also discusses the right of a party in the position of BASF to protect information through a district court suit.

30. In addition, BASF’s information at issue is also a trade secret and should be protected from disclosure under Tex. Gov’t Code §§ 552.110(a) & (b). This information would disclose to competitors the amounts and types of investments that BASF makes in order to maintain its position as one of the world’s largest chemical companies. Also included in this information is how BASF deploys its employees and what functions those employees perform. Disclosing this secret information would compromise BASF’s unique combination of investment and innovation that it does not even disclose to its own employees.



31. Finally, the Letter never addresses the fact that BASF's information and its Texas Enterprise Fund application is outside the parameters of Malewitz's request. Malewitz specifically requests information pertaining to "Texas Enterprise Fund grants from October 1, 2014 through [April 8, 2016]." BASF's application was submitted on April 9, 2013, and received unanimous approval on July 18, 2013. BASF's application and attached information, therefore, are outside the scope of this request and should not be included, even in the event that BASF's information is not protected under Tex. Gov't Code §§ 552.104, .110.

#### **VI. APPLICATION FOR INJUNCTIVE RELIEF**

32. As set forth above, the Office of the Attorney General's Ruling Letter regarding the information Malewitz requests threatens BASF with irreparable harm, for which there is no remedy at law.

33. BASF seeks a TRO, then a temporary injunction, and then a permanent injunction against the disclosure of the non-redacted version of its confidential information that accompanied its Texas Enterprise Fund application. This information is both confidential by statute, and outside the parameters of Malewitz's request. As such, this information is exempted from disclosure.

34. Neither Malewitz nor the Office of the Governor will be harmed if the Court grants the relief requested. Meanwhile, BASF will suffer irreparable harm if its confidential information is disclosed.

#### **VII. PRAYER FOR RELIEF**

WHEREFORE, for the reasons stated above, Plaintiff requests that:

1. The Defendants be cited to appear and answer;

2. The Court grant a temporary restraining order, then a temporary injunction, and then a permanent injunction prohibiting the Office of the Governor from disclosing BASF's un-redacted information that accompanied its Texas Enterprise Fund application, as disclosure without the requested redaction would irreparably harm BASF and its competitive position in the marketplace, while providing an advantage to all of its competitors;
3. The Court declare that the un-redacted information is not subject to disclosure and that the Office of the Governor shall not produce the un-redacted documents pursuant to Malewitz's request; and
4. BASF be awarded its costs and reasonable and necessary attorneys' fees; and
5. The Court grant BASF such other and further relief, at law and in equity, to which it may be justly entitled.

Respectfully submitted,

RYAN LAW FIRM, LLP  
100 Congress Avenue  
Suite 950  
Austin, Texas 78701  
512.459.6600 – Tel.  
512.459.6601 – Fax

By: \_\_\_\_\_



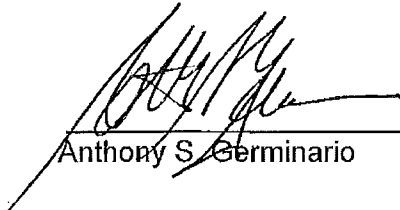
Doug Sigel  
State Bar No. 18347650  
doug.sigel@ryanlawllp.com

**ATTORNEYS FOR PLAINTIFF**

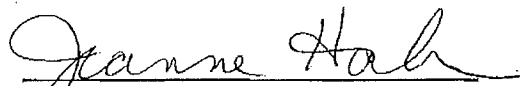
**VERIFICATION**

THE STATE OF NEW JERSEY       §  
   §  
COUNTY OF MORRIS               §

Anthony S. Germinario, having been duly sworn, testifies that he is the Assistant Corporate Secretary of BASF Corporation, Plaintiff herein, and is authorized to make this verification on its behalf; that he has read the foregoing Plaintiff's Verified Petition and Application for Injunctive Relief and Temporary Restraining Order, that the factual matters stated therein are within his personal knowledge and are true and correct.

  
\_\_\_\_\_  
Anthony S. Germinario

SUBSCRIBED TO AND SWORN BEFORE ME on this 22nd day of July, 2016.

  
\_\_\_\_\_  
Notary Public in and for  
The State of New Jersey

My commission expires: \_\_\_\_\_

