

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

MARK MONTET and ATHENE MONTET

PLAINTIFFS

VS.

CAUSE NUMBER: 1:08CV498-LTS-RHW

STATE FARM FIRE & CASUALTY COMPANY

DEFENDANT

**PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION FOR PROTECTIVE ORDER**

COME NOW Plaintiffs, Mark Montet and Athene Montet (“Plaintiffs”), by and through undersigned counsel, and in response to Defendant’s Motion for Protective Order hereby file this Response in Opposition. Plaintiffs’ position is that the Defendant has not met its burden to demonstrate that the documents and information at issue in “II. Privilege Log” [Doc. 31] should be deemed confidential and protected, therefore any protective order at this time would be premature. Alternatively, should this Court find that such burden is met, Plaintiffs request that this Court conduct an *in camera* inspection to allow for the least restrictive limitations as it balances the potential harm to the Defendant’s interests against the plaintiffs’ right to obtain relevant information and the public’s right to obtain information concerning judicial proceedings.

In support of their opposition, Plaintiffs show the following, to-wit:

I. INTRODUCTION

Defendant filed a Motion for Protective Order on or about July 14, 2009, seeking protection of certain alleged proprietary, confidential and trade secret documents requested by Plaintiffs in this case. Defendant is withholding discoverable documents responsive to Plaintiffs’ request and proposes to release these responsive documents only

pursuant to a “blanket” protective order, which unreasonably restricts the use of non-privileged, non-protected material, much of which is already in the public domain. Defendant’s proposed protective order also unreasonably limits or restricts access to discovery conducted by other parties in collateral or similarly situated litigation.

Confidentiality agreements are routinely agreed to by many plaintiffs and corporate defendants in the often mistaken belief that such agreement will make the free flow of discovery much easier. However, many of these stipulated agreements are inherently subject to challenge and modification and have been overturned for not being in compliance with the Federal Rules of Civil Procedure. Many of these stipulated agreements have been entered into without the proper determination that the material stipulated to qualifies as confidential information that deserves protection in accordance with the required “for good cause shown.” See *AETNA Casualty Ins. Co. v. George Hyman Const. Co.*, 155 F.R.D. 113, 115-16 (D.C. Pa. 1994)(Proposed stipulation which would allow each party to designate documents as “confidential” did not meet requisite good cause standard of the discovery rule; parties failed to show with specificity that disclosure would cause defined and serious injury upon a party or that there was a need to protect a party or third persons from annoyance, embarrassment, or oppression; and the method by which documents were to be afforded protection, i.e. each party self selecting documents resulted in judicial discretion yielding to private judgment).

The Sixth Circuit Court of Appeals has held that a blanket protective order granting confidentiality to all documents that the parties deemed confidential was improper. *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996). In that case, the Sixth Circuit noted that the district court could not properly abdicate its

responsibility to oversee the discovery process. See also *Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999)(District court went too far in accepting the parties' stipulation that all materials they deemed confidential should be filed under seal. District judge has responsibility to make a good cause determination about such protection under its order); *Cumberland Packing Corp. v. Monsanto Co.*, 184 F.R.D. 504, 505-06 (D.C. N.Y. 1999)(Proposed stipulated protective order failed to adequately protect the public's interest in accessing judicial documents and monitoring the federal courts. As a result, good cause did not exist to approve such an order. The proposed order would have covered all discovery material or trial testimony and evidence. It would have permitted sealing so long as the party believed "in good faith" that it contained proprietary information.)

The issuance of a protective order such as the one proposed by Defendant that allows the defendant to designate as confidential information "**all documents, testimony, business records, information** on magnetic media, computer tapes, computer disks, hard copies or printouts derived from computer tapes or computer disks, or individual portions thereof, of **other information** which is **produced, disclosed, or otherwise given by State Farm Fire & Casualty Company**, a party to this action, **or by any of its employees, agents, or servants, and responses** to any subpoena, documentary request, deposition question, witness examination, **or other request** made by any other party or attorney in this action" (*see* Doc. 31-2, Paragraph 1) is more than overly broad, it is "blanket" protection of all documents and information produced by Defendant or its employees, agents, or servants, without the need to show the required "good cause" for the Court's protection.

As if that blanket request was not enough, Defendant seeks to pull the wool over the eyes of the Court by including in its Proposed Protective Order (Doc. 31-2) protection for documents beyond its request in its motion to the Court. Defendant seeks to slip in additional language and expand the scope of the Federal Rules of Civil Procedure to include protection of not only alleged trade secrets, but documents that include “matters affecting the privacy interests of persons not a party to this lawsuit.” (*See* Doc. 31-2, Paragraph 1). This broadened scope is neither defined, nor has the Defendant shown “good cause” for an expansion that exceeds its request in its motion and the scope of the Federal Rules of Civil Procedure.

This type of blanket protective order proposed by Defendant is much like the ones in *Citizens* and *Cumberland* that improperly abdicated the Court’s responsibility to oversee the discovery process and did not adequately protect the public’s interest in accessing judicial documents and monitoring the federal courts, and therefore rejected. (*See* 178 F.3d 943, 944 (7th Cir. 1999) and 184 F.R.D. 504, 505-06 (D.C. N.Y. 1999). Moreover, this type of blanket protective order means that other litigants and courts will not have the benefit of the discovery conducted in this particular case.

It is often the case, that when a judge agrees to issue a protective order or seals evidence, the next court will, or this court will again, in response to the Hurricane Katrina litigation, have to duplicate many months of work, conduct numerous hearings and review hundreds of pages of discovery materials, which amounts to time and resources already expended by another this or another judge.

Also, it is only in comparing documents and evidence produced in discovery that plaintiffs can adequately prepare their cases. In the absence of the ability to compare

discovery, it is very common for corporate defendants to deny that they have access to various documents and the plaintiffs have no means to prove otherwise. For these reasons, courts favor allowing access to discovery conducted by other parties in collateral or similar litigation and the drafting of very narrowly defined protective orders. It makes the administration of justice more efficient and is in keeping with the spirit of the Federal Rules of Civil Procedure to foster the just, speedy, and inexpensive determination of every civil action.

II. LEGAL STANDARDS

A. Relevancy

Relevancy of the documents at issue is not disputed in Defendant's Motion for Protective Order. The scope of discovery is governed by Federal Rules of Civil Procedure Rule 26(b)(1) which states in pertinent part that "Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense...." Plaintiffs submit that they have established that the disclosure of the requested information, whether proprietary or trade secret, is relevant to the issues defined in their Complaint. The relevancy required in discovery is of the broadest terms, and is not limited to admissible evidence, but any matter that may reasonably lead to the discovery of admissible evidence. See *Cash Today of Texas, Inc., et al. v. Jerome N. Greenberg, et al.* 2002 U.S. Dist. LEXIS 20694,*6 (D. Del. 2002) (citing *Coca Cola Bottling Co. v. The Coca Cola Co.*, 107 F.R.D. 288, 293 (D. Del. 1985)). (Relevance is established, as discussed above, when the sought information is relevant, in broad terms, to the subject matter of the litigation. Disclosure of the evidence is considered necessary when the

information is required for the movant to prepare its case for trial, which includes proving its theories and rebutting its opponent's theories.)

Plaintiffs have filed numerous claims, including claims for Breach of Contract, Policy Reformation, Promissory Estoppel, Agent Negligence and Bad Faith. The information requested in their First Set of Interrogatories and Request for Production is necessary for the Plaintiffs to prepare for litigating these claims. “If relevancy and need have been established, the court must balance the need for the information with the harm that would be caused if disclosure is ordered.” *Id.* “This balance tilts in favor of disclosure.” *Id.* “Indeed, “discovery is virtually always ordered once the movant has established that the secret information is relevant and necessary.”” *Id.* (citing *Coca Cola Bottling Co. v. The Coca Cola Co.*, 107 F.R.D. 288, 293 (D. Del. 1985) (citing a survey of relevant case law)).

B. Protective Orders

Unfortunately, the type of “blanket” protective order proposed by Defendant is common in litigation involving large corporations. Defendant seeks protection of alleged trade secrets without meeting the particularized showing necessary for such an order.

The Federal Rules of Civil Procedure 26 (c) governs the Protective Orders in this case and states in pertinent part that “upon a motion by a party or by the person from whom discovery is sought....and for good cause shown....the court....may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(G) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way....”

Fed. R. Civ. P. 26(c)(G).

There are numerous cases interpreting this language of the Federal Rules of Civil Procedure. Uniformly, courts hold that protective orders should be granted only if the moving party first establishes that *specific* information to be covered by the order falls within protected categories and then demonstrates that disclosure will be harmful. *Iowa Beef Processors, Inc. v. Bagely*, 601 F.2d 949, 952 n.5 (8th Cir. 1979); *Centurion Industries, Inc. v. Warren Steurer & Assoc.*, 665 F.2d 323, 325 (10th Cir. 1981).

Also, in *General Dynamics* the Eighth Circuit Court of Appeals stated “Fed. R. Civ. P. 26(c) requires that “good cause” be shown for a protective order to be issued. The burden is therefore upon the movant to show the necessity of its issuance, which contemplates “a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements....” *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973), citing Wright and Miller, Federal Practice and Procedure Civ. §2035, 264-65.

Those who seek to avoid disclosure of commercial information by a protective order bear a heavy burden of demonstrating that disclosure will work a clearly defined and very serious injury. *Citicorp v. Interbank Card Assoc.*, 478 F. Supp 756, 765 (D.C. N.Y. 1979). A protective order inhibiting liberal discovery must issue only on a specific showing that the information is such that its disclosure should be restricted and that the party disclosing it will be harmed by disclosure. *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405, 409 (D.C. N.Y. 1973). For instance, courts have held that an attorney’s affidavit that merely alleges that discovery will reveal a secret formula or trade secrets is

insufficient to warrant a protective order. *Rosenblatt v. Northwest Airlines, Inc.*, 54 F.R.D. 21, 23 (D.C. N.Y. 1971).

C. Trade Secrets

The Mississippi Code Annotated sets forth the elements to determine whether information, including a formula, pattern, compilation, program, device, method, technique or process is considered a "trade secret" under Mississippi law.

As used in this chapter, unless the context requires otherwise:

(d) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique or process, that:

(i) 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

(ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Miss. Code Ann. 75-26-3 Definitions.

Once it is determined that the information seeking protection is in fact a "trade secret" then the Mississippi statute provides that a court "shall preserve the secrecy by reasonable means...."

In an action under this chapter, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

Miss. Code Ann. 75-26-11 Protection of Trade Secrets During Action.

However, the burden of persuasion to prove the information deserves protection rests upon the party seeking to withhold the information requested. Defendant should be required to prove the validity of the protection sought by addressing each element as

identified in the Mississippi Code and then upon a showing of “good cause” seek an order from this Court.

III. DEFENDANT’S PRIVILEGE LOG IS INADEQUATE

Defendant seeks to obtain a blanket protective order for 46 documents allegedly containing trade secret information. Defendant lists these 46 documents which it believes are responsive to Plaintiff’s requests in its privileged log¹ accompanied by non-specific, vague and general descriptions.

The Uniform Local Rule 26.1(A)(1)(c) requires that “a party withholding information claimed privileged or otherwise protected shall submit a privilege log that contains **at least the following information**: name of the document; description of the document; date; author(s); recipient(s); and nature of the privilege. To withhold materials without such notice subjects the withholding party to sanctions under FED. R. CIV. P. 37 and may be viewed as a waiver of the privilege or protection.”

Defendant lists only three of those categories in its privilege log: 1) Document, 2) Description, and 3) Privilege. Defendant identifies 46 documents in its privilege log that it claims qualifies for protection as trade secrets. However, the description of those 46 documents is vague and general. Defendant cannot meet its burden to make a “specific showing” that the document or information withheld qualifies for protection by beginning each description with the word “Specific.” (*See* Doc. 31, page 2-5).

For example, entry number three on Defendant’s privilege log lists the document “Catastrophe Certification Flood Study Guides.” The description for this entry is “Specific Instructions/Training Related to Handling of Flood Claims.” The privilege

¹Defendant’s Privilege Log has been incorporated into its Motion for Protective Order, Doc. 31, page 2.

claimed is “Trade Secret.” Without the other Local Rule 26.1(A)(1)(c) required categories of date, author, and recipient, it cannot be determined whether the alleged claim of trade secret is legitimate. If the author of the document is FEMA and this is a document disseminated through the National Flood Insurance Program, then Defendant has no claim of privilege based upon trade secret. Without the required information, neither the Court, nor Plaintiffs can determine whether there is a legitimate claim for protection of trade secret.

Also, entry number 44, lists the document “Depreciation Guide, Printed 01/12/2006.” The description of this document is “Specific Materials Related to Adjuster Training.” The privilege claimed is “Trade Secret.” Here too, without the authorship and recipients, it is unknown whether this is a guide created by Defendant for its sole use or wide dissemination, or a guide created by an entity in the construction or insurance industry. Without this required information, neither the Court, nor Plaintiffs can determine whether there is a legitimate claim for protection of trade secret.

Further, entry number 45 lists “Lansing Vargo’s Working File Related to Hurricane Katrina.” The description is “Specific Issues Related to Handling of Hurricane Claims.” Again, Plaintiffs, or the Court for that matter, is left without sufficient information to determine whether the alleged document(s) withheld qualify as trade secret information, which should be protected. Further, it is unclear whether these “Issues” contain more than one document, or whether Defendant’s blanket proposed protective order would also possibly seal information, such as reports, files, communications, and other relevant, discoverable, non-privileged, and non-protected

material, as having been derived from, or possibly containing information from within these “Issues.”

Defendant cites *Andrew Corporation v Rossi*, 180 F.R.D. 338, 340 (N.D. Ill. 1998) in support of protective orders for trade secrets. However, Defendant failed to accept that in the *Andrew* case it cited, that the Court found that “Without more than Andrew’s self-serving statements, this Court cannot determine whether such assertions are legitimate or merely due to an overdeveloped sense of self-importance. Such situations are exactly why Rule 26(c)(7) has its second requirement: “good cause.”” *Andrew Corporation v. Rossi*, 180 F.R.D. 338, 341; 1998 U.S. Dist. Lexis 11910 (N.D. Ill. 1998).

The *Andrew* Court found that “good cause” was determined by “specific examples of articulated reasoning.” *Id.* (To establish good cause under rule 26(c), the courts generally required “specific examples of articulated reasoning.” *Cipollone*, 785 F.2d at 1121, as opposed to “stereotyped and conclusory statements.” *United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (Fifth Cir. 1978).

The *Andrew* Court went on to state that “with respect to the claim of confidential business information, this standard demands that the company prove that disclosure will result in a “clearly defined and very serious injury” to its business. *Id.* (citing *Culinary Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297, 300 n.1 (N.D. Ill. 1993) (quoting *U.S. v. IBM*, 67 F.R.D. 40, 46 (S.D. N.Y. 1975)).

Defendant attempts to rely on its vague and general descriptions of the documents and information that it alleges qualifies as trade secrets deserving of protection from this Court. Defendant further relies upon its conclusory statements that the documents in

question are “unique creations of the company and are among its most valuable competitive assets;” “discovery of the material...would permit [a competitor] to appropriate State Farm’s trade [sic] secrets by duplication or reconstructing its claims handling procedures;” and that “State Farm maintains stringent safeguards to prevent public dissemination of its claims handling materials, as seen by the fact that its policy requires that the documents are maintained in locked file cabinets and/or in areas not open to the public in locations protected by locks and/or burglar alarms.” (*See* Defendant’s Motion for Protective Order, Doc. 31, page 7). Defendant’s self-serving statements in its motion are an attempt to address the reasonable efforts that it makes to maintain secrecy of these alleged trade secrets. However, even these statements fail to establish that this policy is anything more than the general procedure for all documents and assets of Defendant.

Plaintiffs submit that the vague and general descriptions in Defendant’s deficient privilege log and the conclusory statements made in its motion for protective order fall terribly short of establishing Defendant’s burden to demonstrate that the documents alleged as trade secrets by Defendant are in fact trade secrets according to the requirements of the Mississippi Code and the Federal Rules of Civil Procedure.

These types of broad assertions and vague descriptions should not be protected. To allow protection of such broad categories without the proper determination of whether there is a valid trade secret that needs protection would be detrimental to Plaintiffs’ case and the public’s right to access information and would cause undue delay as a result of the inherent need to challenge or modify such a protective order issued without the proper designation and required showing of good cause.

For the above stated reasons, Plaintiffs maintain the position that a “blanket” protective order such as the one sought by Defendant would be premature, overly broad and unreasonably restrictive of material that is relevant, discoverable, non-privileged, and non-protected to the detriment of Plaintiffs’ case and the public’s access to information, as well as, to the detriment of this court, other courts and other plaintiffs similarly situated. Therefore, Plaintiffs request that Defendant’s proposed protective order be denied.

Plaintiff submit that even if, the Defendant has met its burden of establishing the 46 documents in its Privilege Log qualify as trade secrets, Defendant has not met its burden to demonstrate “good cause shown” to justify the strict restraint to be placed upon the dissemination of the information proposed by Defendant’s proposed protective order.

IV. CONCLUSION

Other than conclusory statements submitted by Defendant in its motion for protective order, there is nothing further to support the Defendant’s claim that this information for which it seeks protection cannot be produced absent an unreasonably restrictive protective order such as proposed by Defendant. It is Plaintiffs’ position that in the absence of any other compelling reason provided by the Defendant, Defendant has not met the necessary burden to demonstrate the need for a “blanket” protective order.

Several years ago, a Federal District Court Judge observed:

District Courts are today being bombarded by an ever increasing number of requests for protective orders. Some of the increase may be attributed to legitimate attempts by litigants to stem the increasing use of abusive discovery tactics. Much of the increase, though, must be attributed to a practice among some attorneys to automatically seek protective orders in every case where any potential for embarrassment or harm, no matter how slight, exists.

Ericson v. Ford Motor Co., 107 F.R.D. 92, 94 (E.D. Ark. 1985)

Many courts have come to recognize a defendant's true objective in seeking restrictive confidentiality orders, and in objecting to production of internal documents. *See, e.g., Wilson v. American Motors Corp.* 759 F. 2d 1568, 1571 (11th Cir. 1985)(Discussing harm to a defendant's reputation); *Earl v. Gulf & Western Mfg. Co.*, 366 N.W. 2d 160, 164-65 (Wis. Ct. App. 1985)(Discussing a defendant's concern that the plaintiff might pass discovery information along to other plaintiffs involved in similar litigation, and explaining that this rationale does not constitute good cause for a protective order).

A number of legal scholars have recognized that the true motivation behind the tactics utilized by large defendants, in seeking to cloak information with the robe of secrecy, is to deny the plaintiff the benefit of coordinating discovery efforts, and to otherwise prevent the disclosure of potentially embarrassing internal information: "Frivolous claims of confidentiality have been asserted to cause delay and disruption, to drive up discovery expenses, and make it difficult for opposing counsels to simply understand the information being sought." Martin I. Kaminsky, *Proposed Federal Discovery Rules for Complex Civil Litigation*, 48 Fordham L. Rev. 907, 929 (1990).

Many courts, therefore, favor access to discovery conducted by other parties in collateral or similarly situated litigation. It makes the administration of justice more efficient. Any other result would require that "each litigant who wishes to ride a taxi to court must undertake the expense of inventing the wheel." *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982). *See also Wauchop v. Domino's Pizza, Inc.*, 138 F.R.D. 539, 546-47 (D. Ind. 1991) (Federal Rules of Civil Procedure should be construed to

foster the just, speedy, and inexpensive determination of every civil action....collaborative use of discovery material fosters that purpose.); *Baker v. Ligett Group, Inc.*, 132 F.R.D. 123, 126 (D. Mass 1990)(To routinely require every plaintiff to go through a comparable, prolonged and expensive discovery process would be inappropriate.); *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 154 (W.D. Tex. 1980)(The sharing of discovery information between plaintiffs may reduce time and money which must be expended in similar proceedings, and allows for effective, speedy, and efficient representation.); *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 87 (D. N.J. 1986)(Maintaining a high cost of litigation for future advisories is not a proper purpose under Rules 1 or 26.); *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1301 (7th Cir. 1980) (That the expense of litigation deters many from exercising that right is no reason to erect gratuitous road blocks in the path of a litigant who finds a trail blazed by another.); *U.S. v. Hooker Chemicals & Plastics Corp.*, 90 F.R.D. 421, 426 (W.D. N.Y. 1981) (Use of discovery fruits disclosed in one lawsuit in connection with other litigation and even in collaboration among plaintiffs attorneys, comes squarely within the purposes of Federal Rules of Civil Procedure.); *Foltz v. State Farm Mut. Ins. Co.*, 331 F.3d 1122, 1131 (9th Cir. 2003) (This court strongly favors access to discovery materials to meet the needs of parties in collateral litigation.”)

For the above stated reasons, Plaintiffs maintain the position that a “blanket” protective order such as the one sought by Defendant would be premature, overly broad and unreasonably restrictive of material that is relevant, discoverable, non-privileged, and non-protected and would be to the detriment of Plaintiffs’ case and the public’s access to

information, as well as, to the detriment of this court, other courts and other plaintiffs similarly situated.

WHEREFORE PREMISES CONSIDERED, Plaintiffs respectfully request that this Court DENY Defendant's motion for entry of a Protective Order which allows for a blanket protection of "all documents, testimony, business records, information on magnetic media, computer tapes, computer disks, hard copies or printouts derived from computer tapes or computer disks, or individual portions thereof, of other information which is produced, disclosed, or otherwise given by State Farm Fire & Casualty Company, a party to this action, or by any of its employees, agents, or servants, and responses to any subpoena, documentary request, deposition question, witness examination, or other request made by any other party or attorney in this action" and further expanded without request to the Court to include "any matters affecting the privacy interests of persons not a party to this lawsuit."

In the alternative, should this Court find that Defendant has met its burden to establish the existence of trade secrets for those 46 documents listed in Defendant's Privilege Log [Doc. 31, page 2], which for "good cause shown" should be protected, then Plaintiffs respectfully request that this Court conduct an *in camera* inspection of the 46 documents listed in Defendant's Privilege Log to allow for the least restrictive limitations in any protective order granted by this Court as it balances the potential harm to the defendant's interests against the plaintiffs' right to obtain relevant information and the public's right to obtain information concerning judicial proceedings.

RESPECTFULLY SUBMITTED, this 24th day of July, 2009.

MARK MONTET AND ATHENE MONTET, Plaintiffs

BY: /s/Deborah R. Trotter
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CERTIFICATE OF SERVICE

I, Deborah R. Trotter, do hereby certify that a copy of the preceding Response in Opposition has been served via electronic notification, to the following:

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This the 24th day of July, 2009.

s/Deborah R. Trotter
Deborah R. Trotter, MSB #101360