

THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

FILED
OCT 29 2010

CLERK OF CIRCUIT COURT #11
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

HOLIDAY SHORES SANITARY DISTRICT, et. al.,

Vs.

04-L-710

SYNGENTA CROP PROTECTION, INC. and
GROWMARK, INC.

ORDER

This cause came before the Court on Syngenta Crop Protection, Inc.'s (Syngenta) Motion to Allow Interlocutory Appeal, the Heartland Institute's Motion to Allow its 308 Interlocutory Appeal, Motions for Clarification of the September 22, 2010 order, and requests to stay discovery on the subpoenas issued to non-parties while the appeal is being sought.

This court entered an order on September 22, 2010, sustaining the objections of nonparties to production of some of the information sought by plaintiffs based on First Amendment arguments raised by the non parties. The court ruled, and continues to hold, that the non-parties could assert First Amendment rights with respect to their other members' identities and information without providing a privilege log. This court overruled any objection with respect to records the non-parties may have regarding Syngenta (an actual party to this litigation) and allowed those records in the possession of the non-parties that are covered by the subpoenas to be submitted pursuant to a protective order. The court certainly did not rule on any other claimed exemptions or privileges other than the First Amendment associational rights being asserted with respect to any other documents in the possession of the non-parties. Statutory and common law privileges cannot be asserted without a privilege log and were not raised to this court. If there are other claimed privileges, a privilege log will have to be submitted to plaintiffs and then to the judge who will next be presiding over this long running dispute. The court made this clarification along with clarifying that any items described in the subpoenas that are in the possession of the nonparties are discoverable regarding Syngenta notwithstanding the First Amendment claims. This court reviewed the cases cited carefully and made its findings and rulings accordingly.

The court has been asked to certify questions pursuant to Supreme Court Rule 308.

The first issue is whether non-party Heartland has standing to seek certified question under Rule 308. The court finds Heartland has standing for its request so both the request from Syngenta and from Heartland are appropriately before the court. Nothing in Supreme Court Rule 308 prohibits a non-party that has been subjected to orders entered by the court from seeking certified questions to attempt to appeal an interlocutory order. (See, *Thomas v. Page*, 361 Ill.App.3d 484, 837 N.E.2d 483, 297 Ill.Dec. 400 (2d dist. 2005).

Supreme Court Rule 308 allows a court to certify questions when an interlocutory order involves a question of law about which there is substantial ground for difference of opinion and when an immediate appeal from the order may materially advance the ultimate termination of the litigation.

There is a substantial ground for difference of opinion regarding whether the First Amendment privilege serves to bar any discovery from lobbying groups, trade associations, or non-profit educational organizations regarding instructions, communications, and donations or other financial payments or in-kind support regarding one of their members when the court has determined the information is relevant to a lawsuit in which the member is a party. The court's order limited discovery to records regarding only the defendant and directed their production pursuant to a protective order. Illinois and Federal law recognize First Amendment privileges but there is a substantial ground for difference of opinion as to the scope of discovery that may be allowed.

Whether the determination of the scope of the First Amendment privilege as to the non-parties that received subpoenas will materially advance the termination of the litigation is less certain. The underlying lawsuit will and should continue. However, there is no question that if the First Amendment privilege bars any discovery from these non-parties then their participation in the litigation will be terminated. This court believes that the possibility that the non-parties could be relieved of any requirement to respond to the subpoenas warrants the granting of the motions for certified questions. The court therefore grants the Motions to Allow Interlocutory Appeal.

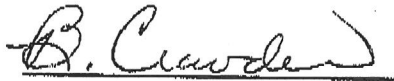
The court therefore certifies the following questions for interlocutory appeal to the Illinois Fifth District Appellate Court:

1. Does the First Amendment privilege bar discovery of a defendant's instructions, communications, and donations or other financial payments or in-kind support between and to a trade association of which it is a member?
2. Does the First Amendment privilege bar discovery of a defendant's instructions, communication, and donations or other financial payments or in-kind support between and to a lobbyist or lobbying organization?
3. Does the First Amendment privilege bar discovery of a defendant's instructions, communications, and donations or other financial payments or in-kind support between and to a non-profit educational organization?

Additionally, this court further orders that discovery on the issues dealing with the lobbying organizations (Chemical Industry Council of Illinois and Illinois Fertilizer and Chemical Association), trade associations (Illinois Farm Bureau) and non-profit educational organizations (Heartland Institute) that are the subject of the order entered on September 22, 2010 and of this order shall be stayed pending the resolution of any appeal.

The Clerk is to send a copy of this order to counsel of record.

Entered October 29, 2010.



Judge



OFFICE OF THE CHIEF JUDGE

State of Illinois
Third Judicial Circuit
Madison & Bond Counties

ANN CALLIS
CHIEF JUDGE

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Number of page(s) to follow 3

COMMENTS: _____

