

The Honorable Barbara Crowder,
Judge Presiding.

**RESPONSE TO HEARTLAND'S MOTION FOR LEAVE TO SUBMIT SUPPLEMEN-
TAL AUTHORITY IN SUPPORT OF ITS PETITION FOR LEAVE TO APPEAL**

Scott Summy
Carla Burke
Celeste Evangelisti
Cary McDougal
3102 Oak Lawn Ave., Suite 1100
Dallas, Texas 75129-3605
Telephone: (214) 521-3605
Facsimile: (214) 520-1181

Attorneys for Plaintiffs-Respondents

The Northern District of Illinois court's order in *In re The Heartland Institute* is irrelevant to the matter before this Court. The issue before this Court is not the standard to be applied to justify application of a First Amendment privilege. The standard is a matter of federal law. *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001) (per curiam) ("a State ... may not impose ... greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them."). Instead, the issue before this Court is whether the Illinois Appellate Court properly declined to review the parties' discovery dispute under Rule 308 – a discovery dispute that is still not ripe for appeal. *Mueller Indus. v. Berkman*, 399 Ill. App. 3d 456, 479, *appeal denied*, 237 Ill. 2d 561 (2010). *See also, Reda v. Advoc. Health Care*, 199 Ill. 2d 47, 54 (2002) ("[I]t is well settled that a contempt proceeding is an appropriate method for testing the correctness of a discovery order."). This issue is both fully addressed in the parties' briefs and one for which the Northern District of Illinois court's order provides no guidance.

Moreover, the *In Re Heartland* order is neither correctly reasoned nor sufficiently final to merit consideration. The Greenville Plaintiffs intend to seek reconsideration of the Northern District of Illinois ruling on the motion to quash as it is erroneous in numerous ways. First, the order is legally infirm as it fails to follow, and in fact directly conflicts with, binding authority on the issues presented.

To demonstrate the "chilling effect" necessary to establish a *prima facie* entitlement to assert a First Amendment privilege, the proponent must show " 'a reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either government officials or private parties.' " *John Doe*

No. 1 v. Reed, ___ U.S. ___, 130 S. Ct. 2811, 2820 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam)).

To meet this burden, the proponent can offer a wide array of evidence including “ ‘specific evidence of past or present harassment of [group] members,’ ‘harassment directed against the organization itself,’ or a ‘pattern of threats or specific manifestations of public hostility.’ ” *Reed*, 130 S.Ct. at 2823 (Alito, J., concurring) (quoting *Buckley*).

Heartland, however, showed none of these things. The only evidence presented made no attempt to show that members will face retribution if their membership is revealed much less “specific evidence of past or present harassment of members due to their associations.” *Buckley v. Valeo*, 424 U.S. 1, 74 (1976).

The Northern District court nevertheless found that the declaration of Heartland’s President Joe Bast which simply claims that Heartland’s credibility would be impugned and it would lose future donations, (Bast Aff., N.D. Ill. ECF No. 1-1 at ¶¶ 11, 13), was sufficient to meet its burden of showing a chilling effect on its speech. In so doing, the court wrote that “Bast, who is in the best position to know the effects of disclosure based on past experience and his position as Heartland’s president since 1984, indicates that ‘Heartland would lose at least half of its current funding if Heartland is required to disclose donor identities.’ ” *In re Heartland* at *10.

However, binding authority rejects nearly identical evidence as insufficient. In *Master Printers*, plaintiff offered testimony “that where membership has been publicized, employers have discontinued their contributions to [plaintiff] and have considered withdrawing[.]” The U.S. Court of Appeals found that this testimony was not based on a careful documentation of the association’s recent membership statistics, but rather rested on a

casual reference by the association's general counsel. As a result, it had not established the type of record evidence of encroachment required to establish a "deterrent effect" under *Buckley* and *NAACP v. Alabama. Master Printers of Am. v. Donovan*, 751 F.2d 700, 704-05 (4th Cir. 1984). *See also Nat'l Org. for Marriage v. McKee*, 723 F. Supp. 2d 236, 241-42 (D. Me. 2010).

Likewise, in *National Association of Manufacturers v. Taylor* the U.S. Court of Appeals rejected a lobbying trade association's First Amendment challenge to the disclosure of the identity of its members and their lobbying efforts, finding it failed to provide the objective evidence required by this test. *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 9-22 (D.C. Cir. 2009). Even though the trade association presented an uncontested affidavit that provided that it "regularly lobbies on a variety of hot-button issues," "that may lead to adverse consequences for members identified as "actively participa[ting]" in such efforts," including "mob violence," "becoming litigation targets," "boycotts, shareholder suits, demands for political contributions or support, and other forms of harassment," the court still concluded that the case was indistinguishable from *Buckley* in that the trade association "has tendered no 'record evidence of the sort proffered in *NAACP v. Alabama*.'" *Id.* at 22. The court found that the risks the trade association claimed it would face if forced to disclose its members and lobbying efforts "are no different from those suffered by any organization that employs or hires lobbyists itself, and little different from those suffered by any individual who contributes to a candidate or political party" and accordingly were insufficient to justify application of the First Amendment privilege. *Id.* The Northern District's order in *In Re Heartland* directly conflicts with each of these cases yet the order fails to justify or even mention these conflicts.

In addition, while accepting the Heartland's speculation as to the effects of complying with the Greenville Plaintiffs' discovery, the Northern District of Illinois court completely discounted trial counsel's belief as to what the requested discovery would reveal. However, recent production from Syngenta's public relations firm only supports counsel's beliefs that Syngenta, through third-parties, was directing The Heartland's Institute's efforts as part of its defense to this matter.

These documents show that Syngenta's legal department sought assistance from public relations firms to target "potential jurors," "University researchers" and state and federal legislators and regulators with up-to \$500,000 a year in funding to "protect and promote" Atrazine from the risks of this case. (Ex. A to Deaton Decl. at 1-2, 5). One of Syngenta's requirements for this project was the ability to recruit, cultivate and manage relationships with a network of civic and opinion leaders, community-based organizations, non-profits, and advocacy groups that could speak when Syngenta could not. (Ex. A to Deaton Decl. at 2).

In specific response to this litigation, Syngenta's public relations firm recommended recruiting support from, among others, The Illinois Farm bureau, Illinois Corn Grower Association, Illinois Chemical Association, Madison County Record, and The Heartland Institute to "inform and temper the public debate." (Ex. B to Deaton Decl. at 7-8).

A detailed "Campaign Overview" proposed the creation of a purportedly independent coalition of interested third-parties (including The Illinois Farm Bureau, Illinois Corn growers Association, Illinois Fertilizer & Chemical Association, Madison County Record and The Heartland Institute) to write and speak on behalf of atrazine. (Ex. C to Deaton Decl. at 1, 5-7). This independent coalition was to be administrated by Syngenta's public

relations firm “as a part of its existing contract with Syngenta” with the coalition’s costs to be billed back to Syngenta as “expenses.” (*Id.* at 11).

Shortly thereafter, as a result of Syngenta’s public relations firm’s efforts, the “Science Director” for the Heartland Institute began writing editorials supporting atrazine. (Ex. D to Deaton Decl. at 1). Syngenta found the editorials “great” because they are from someone who “comes off sounding like an unbiased expert,” “do not sound like they came from Syngenta” and (presumably because they were arranged by Syngenta’s public relations firm) Syngenta “can readily say that it has given no money to Heartland.” (Ex. E to Deaton Decl. at 1). As late as 2009, Heartland was described by Syngenta’s public relations firm as a “resource.” (Ex. F to Deaton Decl. at 1). Syngenta’s use of Heartland to manipulate the public debate concerning atrazine is not speculation, it is provable fact. Clearly, the facts concerning the parties’ discovery dispute are yet to be fully resolved. This is not the time and this is not the case for this Court to begin refereeing interlocutory discovery rulings.

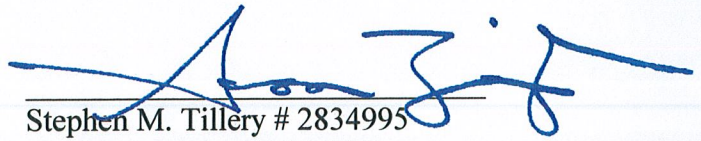
CONCLUSION

As Plaintiffs explained in their Answer, Heartland’s Petition does not warrant this Court’s attention. The Petition seeks review of the entirely proper denial of Heartland’s attempt to use Rule 308 to review an interlocutory discovery order applying settled federal law to particular facts; something the Rule was never meant to do. *Thomas v. Page*, 361 Ill. App. 3d 484, 494 (2d Dist. 2005). As a result Heartland’s Petition fails to justify the Court’s involvement at this stage of the proceedings. The Northern District’s order in *In Re Heartland* adds nothing to this analysis. The Petition should be denied.

Respectfully submitted,

Dated: May 23, 2011

KOREIN TILLERY



Stephen M. Tillery # 2834995

Aaron M. Zigler # 6276907

Christie R. Deaton # 6276456

505 North 7th Street, Suite 3600

St. Louis, MO 63101

Telephone: (314) 241-4844

Facsimile: (314) 241-3525

BARON & BUDD, PC

Scott Summy

Carla Burke

Celeste Evangelisti

Cary Mcdougal

3102 Oak Lawn Avenue, Suite 1100

Dallas, TX 75129-3605

Telephone: (214) 521-3605

Facsimile: (214) 520-1181

Attorneys for Plaintiffs-Respondents

ON PETITION TO THE ILLINOIS SUPREME COURT

HOLIDAY SHORES SANITARY DIS-)	
TRICT; CITY OF FLORA, ILLINOIS;)	
CITY OF FAIRFIELD, ILLINOIS; CITY)	Petition for Leave to Appeal from the
OF HILLSBORO, ILLINOIS; CITY OF)	Fifth District Appellate Court
MATTOON, ILLINOIS; CITY OF LIT-)	
CHFIELD, ILLINOIS; and CITY OF)	There Heard on Application for Leave to
MOUNT OLIVE, ILLINOIS, individually)	Appeal Under Rule 308 from the
and on behalf of all others similarly situated,)	Third Judicial Circuit
)	Madison County, Illinois
Plaintiffs-Respondents,)	No. 04-L-710
)	
vs.)	The Honorable Barbara Crowder,
)	Judge Presiding.
SYNGENTA CORP PROTECTION, INC.,)	
AND GROWMARK, INC.,)	
)	
Defendants-Petitioners.)	
)	

NOTICE OF FILING AND CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document is being served on counsel of record via electronic mail and three copies of the forgoing document are being served on counsel of record on May 27, 2011 by depositing same in a U.S. Mail Box in St. Louis, MO, with postage fully prepaid, addressed to:

Daniel G. Donahue
C. Raymond Bell
FOLEY & MANSFIELD, PLLP
1001 HIGHLANDS PLAZA DR W,
STE 400
SAINT LOUIS, MO 63110-1337

Maureen Martin
THE MARTIN LAW FIRM
W3643 JUDY LN
GREEN LAKE, WI 54941-9655

Elizabeth Milnikel
INSTITUTE FOR JUSTICE
1111 E 60TH ST, Room K110
CHICAGO, IL 60637-2776

William H. Mellor
Paul M. Sherman
INSTITUTE FOR JUSTICE
901 N GLEBE RD STE 900
ARLINGTON, VA 22203-1854

Attorneys for The Institute of Justice

Attorneys for The Heartland Institute

Kurtis B. Reeg
REEG LAWYERS, LLC
1 N. BRENTWOOD BLVD, STE 950
SAINT LOUIS, MO 63105-3932

Michael A. Pope
Christopher M. Murphy
Todd R. Wiener
Jocelyn D. Francoeur
McDERMOTT WILL & EMERY LLP
227 W. MONROE ST, STE 4700
CHICAGO, IL 60606-5058

Mark C. Surprenant
ADAMS & REESE
One Shell Square
701 POYDRAS ST, STE 4500
NEW ORLEANS, LA 70139-4596

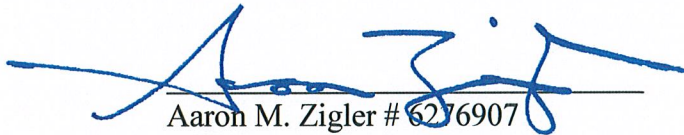
Attorneys for Syngenta Crop Protection

DATED: May 27, 2011

Robert H. Schultz, Jr.
Heyl, Royster, Voelker & Allen
Mark Twain Plaza III, Suite 100
105 W. VANDALIA ST, STE 100
EDWARDSVILLE, IL 62025-1977

Anne G. Kimball
Michael A. Pope
WILDMAN HARROLD ALLEN & DI-
XON LLP
225 W. WACKER DR STE 2600
CHICAGO, IL 60606-1349

Attorneys for Growmark



Aaron M. Zigler # 6276907
KOREIN TILLERY
505 N. 7th Street, Suite 3600
Saint Louis, Missouri 63101-1625
Telephone: (314) 241-4844
Facsimile: (314) 241-3525