IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT OF ILLINOIS
MADISON COUNTY

HOLIDAY SHORES SANITARY DISTRICT, et al., Individually and on behalf of all others similarly situated, Plaintiffs, v. SYNGENTA CROP PROTECTION LLC., et al Defendants.	Case No. 2004-L-000710 **CERTAIN EXHIBITS FILED UNDER SEAL**

DEFENDANT SYNGENTA CROP PROTECTION, LLC'S RESPONSE TO PLAINTIFFS' MOTION FOR SANCTIONS REGARDING DISCOVERY AS TO ATRAZINE MARKET SHARE

COMES NOW Defendant Syngenta Crop Protection, LLC ("Syngenta"), by and through its attorneys, and for its Response to Plaintiffs' Motion for Sanctions Regarding Discovery as to Atrazine Market Share, states as follows:

BACKGROUND

Plaintiffs' Discovery Requests Regarding Market Share Information

On May 22, 2009, Plaintiffs served on Syngenta their First Requests for Production and First Interrogatories. Plaintiffs sought to discover documents and information on a wide range of topics, including Syngenta's share of the atrazine market in the State of Illinois. On June 18, 2009, Syngenta filed its Motion for Protective Order seeking, in part, to limit various aspects of Plaintiffs' broad discovery requests to activities that occurred within and issues relating to the State of Illinois. *See* Motion for Protective Order, attached as Exhibit A.

In addition, Syngenta served its objections to Plaintiffs' discovery requests on June 26, 2009. *See* Syngenta's Objections to Plaintiffs' First Requests for Production and Interrogatories,

attached as Exhibit B. These objections included objections to Request for Production No. 46 and Interrogatories Nos. 6 and 20 regarding market share information.

Syngenta argued its position regarding the discovery of market share information at an August 31, 2009, hearing and it reasserted its objections. On October, 26, 2009, the Court granted in part Syngenta's Motion for Protective Order in overruling discovery as to atrazine sales outside of the State of Illinois. *See* Order dated October 26, 2009, attached as Exhibit C. The Order, however, made no specific mention to the discoverability of market share information. Thereafter, Syngenta **produced** numerous documents to Plaintiffs regarding **its sales of atrazine products in Illinois** in compliance with the Court's Order.

On December 28, 2009, Syngenta served Plaintiffs with its First Amended Answers to Interrogatories in which it maintained its objections to the discovery of market share information. *See* Syngenta's First Amended Answers to Interrogatories, attached as Exhibit D - CONFIDENTIAL AND FILED UNDER SEAL. Syngenta stated in its response its desire to obtain a specific ruling regarding market share information prior to providing a further response to Plaintiffs.

Plaintiffs themselves also sought clarification on the Court's order at a further January 7, 2010, hearing regarding such discovery. While Syngenta had produced to Plaintiffs relevant information it had on atrazine sales in the State of Illinois, Plaintiffs asserted that they "need to be able to establish what [Defendants'] contributions are ***in terms of the sales in the State of Illinois***" (emphasis added). *See* Transcript of January 7, 2010 Hearing at p. 18, attached as Exhibit E. The Court stated that if Syngenta possessed market share information for the State of Illinois "then [it] should tell Mr. Tillery what it is" ***only "if you have got it,"*** but assured Syngenta that ***if it did not "keep the numbers" on a state-by-state basis, then it would not have***

to perform any calculations to respond to Plaintiffs' request. *See* Transcript of January 7, 2010 Hearing at p. 32, attached as Exhibit F.

Pursuant to the Court's instructions, Syngenta's counsel sent Plaintiffs' counsel a letter on January 25, 2010, confirming that Syngenta had no documentation regarding Illinois-specific market share information. *See* Mr. Reeg's letter to Mr. Tillery dated January 25, 2010, attached as Exhibit G. It should also be noted that the four (4) other registrants who are parties to the companion atrazine litigation, and who attended the January 7 hearing, indicated that they too did not keep state-specific market share data. *See* Transcript of January 7, 2010 Hearing at p. 20, attached as Exhibit H.

At yet another hearing on discovery matters held on January 26, 2010, the Court ordered that Syngenta "provide information it has concerning its or other manufacturers' share of the market of atrazine or atrazine products in the State of Illinois." *See* Order dated January 26, 2010, attached as Exhibit I. After having reviewed its documentation, Syngenta again represented to the Court that it did not possess any Illinois-specific market share nor was it aware of any outside publication or service that could provide the Illinois-specific market share information that Plaintiffs sought. *See* Transcript of January 26, 2010 Hearing at p. 29, attached as Exhibit J.

Document Production by University of Chicago on Behalf of Dr. Don Coursey

On June 30, 2010, Plaintiffs served deposition notices and subpoenas *duces tecum* on non-parties Dr. Don Coursey ("Dr. Coursey") and the University of Chicago, his employer. In response to the subpoena *duces tecum* served by Plaintiffs, on February 23, 2011, non-party University of Chicago produced various documents requested by Plaintiffs in the possession of Dr. Coursey, its Ameritech Professor of Public Policy Studies and also a litigation consultant

retained by Syngenta in this case. Among these documents were various spreadsheets of survey data compiled by GfK kynetec, f/k/a Doane's AgroTrak, relating to corn acreage as well as Atrazine use and application in the State of Illinois that Syngenta had provided to Dr. Coursey. This survey data was used by Dr. Coursey to perform economic analyses on the use of atrazine in Illinois, and the economic loss to the State of Illinois if atrazine were to be banned.

None of the documents produced by the University of Chicago contained Illinois-specific market share information. In fact, Syngenta had already produced to Plaintiffs some of the documents disclosed by the University of Chicago during its rolling monthly productions of documents. *See, e.g.,* SYN02946654 (Coursey003668) and SYN04425016 (Coursey004331), attached as Exhibit K – CONFIDENTIAL AND FILED UNDER SEAL. At no time following receipt of these documents did Plaintiffs complain or represent to Syngenta or the Court their belief that such documents constituted the state-specific market share information they had sought in discovery.

However, at a hearing on Plaintiffs' Motion for Evidentiary Hearing on February 23, 2011, Plaintiffs' counsel waved in front of the Court several documents produced by the University of Chicago that he claimed constitute state-specific market share information. *See* Transcript of February 23, 2011 Hearing at p. 38, attached as Exhibit L. Plaintiffs' counsel even referenced a document in which purported Illinois-specific market share data was sent to Dr. Coursey by Syngenta personnel on August 31, 2008 [sic]. Presumably, Plaintiffs intended to refer to a document dated August 31, 2006, which is an email communication whereby SCP, LLC provided certain Doane/GfK kynetec data on atrazine use and application in Illinois to their litigation consultant, Dr. Don Coursey. *See* Emails dated August 31, 2006 (Coursey000089), attached as Exhibit M - CONFIDENTIAL AND FILED UNDER SEAL.

Plaintiffs clearly do not understand the data available through Doane/GfK. This private organization compiles **use and application data** which is available on its **Agro**Trak™ system.

> This study has been developed through the continued support of the industry and the long-standing relationships GfK Kynetec has built with the respondents who provide the data inputs.
>
> Unlike other quantitative studies of the U.S. crop protection product market, the **Agro**Trak™ study averages more than 20,000 farmgate-level interviews per year. At the country level, as well as lower geographic levels, **Agro**Trak is specifically designed to address the U.S. market questions most often asked by agrochemical and biotech senior executives, marketing and product managers. www.gfk-kynetec.com

While GfK describes its **Agro**Trak program as one of its "MarketShare Tracking Studies," the surveys ("farmgate interviews") are conducted of a select group of growers/farmers: GfK "represent[s] the confidential voice of the commercial grower, processor, supermarket buyer, non-crop professional and end user...." www.gfk-kynetec.com. GfK makes specific inquiries of each grower in its pre-selected group (data inputs), and then extrapolates and estimates those categories of information across larger or total number of growers, products and acres across states, regions or the entire country. GfK's survey collects data not on sales but on growers' use of products on certain crops, estimating where a given product actually goes in terms of the crops to which it is applied (pounds on the ground) and the location(s) of such applications.

GfK survey data is subject to well-known limitations of any kind of survey data; if the individual grower being surveyed errs in her/his recollection, then such errors are magnified and multiplied as GfK extrapolates its use and application numbers across larger populations, products and acres. Even GfK recognizes the limitations of its own survey data as it has catch-all categories in its data reports such as "various" and "other." Thus, there is no exactitude in this survey data. **Agro**Trak provides important data points, estimates and trends that are helpful to multiple sectors of the agricultural and agrochemical industries, but the use and application

information available from it does not provide sales-based or state-specific market shares of the kind Judge Crowder addressed in her Order.

Moreover, while SCP, LLC can tell where its atrazine was shipped to authorized distributors/retailers, it cannot tell where its products go beyond that point. Simply because a product was sold to a distributor in Illinois does not mean that it was bought by an Illinois grower, it was applied in Illinois or it was applied that same year. And while GfK apparently maintains certain invoice data of what products growers purchased, i.e., actual retail sales to growers, that program is not broken down to the state level.

Based on Plaintiffs' assertion that Illinois-specific market share documents were provided by the University of Chicago, Syngenta's counsel requested that Plaintiffs specifically identify the documents on which they based their assertion. Plaintiffs declined to do so. *See* Mr. Reeg's letter to Mr. Tillery dated February 24, 2011, attached as Exhibit N; See Mr. Tillery's letter to Mr. Reeg dated February 24, 2011, attached as Exhibit O. Plaintiffs have also not included any references to specific documents they claim constitute market share information in the instant Motion, purportedly because of Dr. Coursey's designation of the documents as Confidential under the Protective Order. Plaintiffs are merely trying to hide the ball from the Court and Syngenta, as the Protective Order does not preclude Plaintiffs from identifying for the Court and Syngenta any document allegedly containing Illinois-specific market share information. It seems clear now that no such document exists.

ARGUMENT

Plaintiffs continue to beat their sanctions drum, contending that Syngenta's conduct is so reprehensible that it should be sanctioned under Supreme Court Rule 137. This position is both factually and legally incorrect because courts have repeatedly found that this Rule is not properly

used to sanction conduct, such as discovery violations, where other more specific rules may apply. *See In re Marriage of Adler*, 648 N.E.2d 953, 957 (Ill. App. 1 Dist. 1995); *see also Wadden v. Village of Woodridge*, 549 N.E.2d 1280, 1287 (Ill App. 2 Dist. 1990) (sanctions for alleged discovery violations are more properly imposed pursuant to provisions dealing with discovery rather than Rule 137). As the instant motion deals only with alleged discovery violations, Plaintiffs' Motion should instead be evaluated under Rule 219(c).

When imposing sanctions under Rule 219, the court's purpose is to compel compliance with discovery rules and orders, and ***not*** to punish the allegedly dilatory party (emphasis added). *Shimanovsky v. Gen. Motors Corp.*, 692 N.E.2d 286, 291 (Ill. 1998). Under Rule 219(c), a sanction is "just" only to the extent that it ensures both discovery and a trial on the merits. *Id.* In determining whether the imposition of a sanction is "just" under the circumstances, courts "must consider the conduct that gave rise to the sanction order and the effect of that conduct on the parties." *H & H Sand & Gravel Haulers Co. v. Coyne Cylinder Co.*, 632 N.E.2d 697, 701 (Ill. App. 2 Dist. 1994). Sanctions should be imposed under Rule 219 ***only*** when a party's non-compliance with discovery rules and orders is unreasonable. *White v. Henrotin Hosp. Corp.*, 398 N.E.2d 24, 26 (Ill. App. 1 Dist. 1979). Based on the potentially extreme consequences inevitably flowing from an imposition of sanctions, severe sanctions should only be imposed in the most extraordinary cases as a last resort to enforce discovery rules. *In re Vanessa C.*, 736 N.E.2d 593, 599 (Ill. App. 2 Dist. 2000).

In determining whether to impose sanctions on a party, the court must consider: (1) the surprise to the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking

discovery; (5) the timeliness of the adverse party's objection to the testimony or evidence; and (6) the good faith of the party offering testimony or evidence. *Shimanovsky*, 692 N.E.2d at 291.

Plaintiffs have failed to establish any basis for the imposition of sanctions under Rule 219(c) against Syngenta in these circumstances. The only basis the Court would have to impose sanctions here would be to compel compliance with the Court's previous Orders regarding the discovery of market share information. But Syngenta has already complied. Its response provided to Plaintiffs on January 25, 2010, remains as true today as it was then; Syngenta has searched for any **Illinois-specific** market share data regarding the sale of atrazine or atrazine products, and there are none. Based on Plaintiffs' serious accusations, Syngenta has thoroughly reviewed every document produced by the University of Chicago on February 22, 2011. Syngenta has still not located in this set of 700+ documents any documents containing Illinois-specific market share information. Syngenta has made no bones about the fact that it may have some market share-related data on a national basis, but that is not the information Plaintiffs seek or Judge Crowder ordered produced. She found that this was an Illinois only case and only **Illinois-specific** data was at issue when it came to sales and market share. Thus, having no such responsive information, and advising Plaintiffs of the same, Syngenta has complied with the Court's Orders, and no basis for sanctions exists here.

Perhaps most indicative of the weakness of Plaintiffs' argument is their failure to specifically reference a single document in support of their claims made in either their Motion or their argument before the Court on February 23, 2011. The only document that Plaintiffs vaguely addressed in their argument before the Court does not appear to exist. Although Plaintiffs likely meant to reference a document dated August 31, 2006, rather than August 31, 2008, Plaintiffs nevertheless have misrepresented to the Court the contents of such document.

The August 31, 2006 document to which Plaintiffs refer contains data on atrazine use and application in Illinois, but does not contain any state-specific market share information whatsoever. Plaintiffs attempt to hide behind Dr. Coursey's "confidentiality" designations under the Protective Order, coupled with a vague allegation that additional "market share" documents are housed at Jayne Thompson & Associates, as a basis for not identifying the documents that support their argument. However, the Protective Order does not preclude Plaintiffs from referencing, by Bates number or otherwise, or filing under seal, Confidential documents that purportedly establish a basis for their Motion. This Motion is clearly baseless, and Plaintiffs have no evidentiary basis to support it.

Syngenta already provided Plaintiffs with certain Doane/GfK documents, some of the same documents produced by the University of Chicago. *See, e.g.,* SYN02946654 (Coursey003668) and SYN04425016 (Coursey004331), attached as Exhibit K – CONFIDENTIAL AND FILED UNDER SEAL. One of these documents, SYN02946654, was produced to Plaintiffs back on August 27, 2010. Also as far back as August 27, 2010, Syngenta has produced numerous other documents containing similar survey data compiled by Doane/GfK kynetec detailing atrazine use and application in various states, including Illinois. *See* SYN03659236, SYN02946926, SYN03656367, SYN03388636, SYN03655618, SYN03655292, attached as Exhibit P – CONFIDENTIAL AND FILED UNDER SEAL. These documents previously produced to Plaintiffs include atrazine and atrazine product use, application, and treated crop acreage in the State of Illinois. Interestingly, although they have possessed them for some time (7 months), Plaintiffs never claimed that such documents constituted market share information until they were produced via a third party, the University of Chicago. It is curious to Syngenta that only now, having received the same types of documents again from a third party in

the midst of a highly contested expert retention date dispute, do Plaintiffs assert that such documents represent state-specific market share information. The Court should not be misled by Plaintiffs' histrionics regarding the Doane/GfK data.

Furthermore, based on these previous productions, Plaintiffs can claim no surprise at the existence of such documents or at the existence of GfK kynetec, f/k/a Doane's AgroTrak, since Plaintiffs have possessed this information for many months. Syngenta is nevertheless unaware of any Illinois-specific market share information in the Doane/GfK data that Plaintiffs seek. Also, as Plaintiffs well know, Syngenta is in the midst of rolling, monthly productions consisting of thousands of documents per production. That Syngenta has not yet produced every document in its possession (from GfK or otherwise) regarding atrazine sales, use, and application is well-known to Plaintiffs.

Although Plaintiffs did not include in their Motion any explanation as to how the information disclosed by the University of Chicago constitutes Illinois-specific market share information, Syngenta believes Plaintiffs may attempt to argue that such data can be combined, compiled, and/or otherwise used to calculate Illinois-specific market share data. While any such assertion would be clearly self-serving, it is apparent that the Court's January 26, 2010, Order only requires Syngenta to produce Illinois-specific market share information if it is already in existence. Syngenta is not required to go figure out its Illinois market share or perform any calculations to develop that information. Since Syngenta does not "keep the numbers" on a state-by-state basis, it has nothing to produce and thus has continuously acted in good faith and in compliance with the Court's Order.

Plaintiffs have further failed to demonstrate any prejudice that they have suffered under these circumstances and instead summarily state that they have "suffered substantial prejudice in

its [*sic*] ability to prepare for trial in this case on the issue of the purported economic benefits of Atrazine or costs of an Atrazine ban or restrictions...as well on issues related to causation and liability." Really? What prejudice? This case is still in the written discovery phase; not one single deposition has been taken. Plaintiffs previously knew about GfK from productions Syngenta made and they now have certain documents from GfK. Prior to the filing of this Motion, Plaintiffs had subpoenaed more documents from GfK. *See* Subpoena, attached as Exhibit Q. Plaintiffs have suffered no such prejudice. Syngenta has not deprived Plaintiffs of any information upon which they may rely in the preparation of their case for trial because Syngenta did not possess any Illinois-specific market share information. Syngenta has continuously and in good faith complied with the Court's Order of January 26, 2010, and this baseless Motion serves only to further delay the parties in moving this case forward.

Based on the foregoing reasons and authorities, Syngenta Crop Protection, LLC respectfully requests that this Court deny Plaintiffs' Motion for Sanctions.

DATE: April 15, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of April, 2011, I caused to be served the attached via **hand delivery**, upon the following counsel:

TO: Stephen M. Tillery, Esq.
Christie Deaton, Esq.
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