No. 111881

ON PETITION TO THE SUPREME COURT OF ILLINOIS

HOLIDAY SHORES SANITARY DISTRICT; CITY OF FLORA, ILLINOIS; CITY OF FAIRFIELD, ILLINOIS; CITY OF HILLSBORO, ILLINOIS; CITY OF MATTOON, ILLINOIS; CITY OF LITCHFIELD, ILLINOIS; and CITY OF MOUNT OLIVE, ILLINOIS, individually and on behalf of all others similarly situated,

Plaintiffs-Respondents,

vs.

SYNGENTA CROP PROTECTION, INC., AND GROWMARK, INC.,

Defendants-Petitioners.

Petition for Leave to Appeal from the Fifth District Appellate Court

There Heard on Application for Leave to Appeal Under Rule 308 from the Third Judicial Circuit Madison County, Illinois No. 04-L-710

The Honorable Barbara Crowder, Judge Presiding.

RESPONSE TO SYNGENTA'S PETITION FOR LEAVE TO SUBMIT ADDITIONAL AUTHORITY IN SUPPORT OF ITS PETITION FOR LEAVE TO APPEAL

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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 facia* 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 of 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 association ties." *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 sufficent 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 Syngetna'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 Sygenta'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.

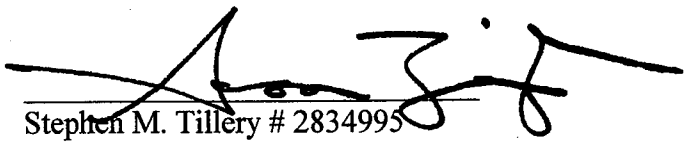
CONCLUSION

As Plaintiffs explained in their Answer, Syngenta's Petition does not warrant this Court's attention. The Petition seeks review of the entirely proper denial of Syngenta'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 Syngenta's Petition fails to justify the Court's involvment 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



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