
IN THE SUPREME COURT OF ILLINOIS

| | | |
|---|---|---------------------------------------|
| HOLIDAY SHORES SANITARY |) | |
| DISTRICT, Individually and |) | |
| on behalf of all others similarly situated, |) | Petition for Leave to Appeal |
| |) | From the Appellate Court of Illinois, |
| |) | Fifth Judicial District |
| Plaintiffs-Respondents. |) | |
| |) | |
| vs. |) | Case No. 2004-L-000710 |
| |) | |
| SYNGENTA CROP PROTECTION, |) | Circuit Court of Madison County |
| INC., et al., |) | Honorable Barbara Crowder, |
| |) | Judge Presiding |
| Defendant-Petitioner. |) | |

RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO CITE ADDITIONAL
AUTHORITY BY DEFENDANT-PETITIONER SYNGENTA CROP PROTECTION, INC.

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Syngenta Crop Protection, Inc.

This matter is before this Court on a Petition for Leave to Appeal pursuant to Rule 315 by Defendant-Petitioner Syngenta Crop Protection, Inc., n/k/a Syngenta Crop Protection, LLC (“Syngenta”). Enumerated within Rule 315 are several bases that indicate the character of reasons which will be considered by this Court in determining whether to grant leave to appeal. First among those listed is “the general importance of the question presented.” Thus, it is clear from the language of Rule 315, that this Court should provide serious consideration to issues that are increasing in visibility and importance in litigation within Illinois and its sister states in determining whether to grant leave to appeal.

This Court has now received motions to cite additional authority from Plaintiffs, third party The Heartland Institute and Syngenta. The motions direct this Court’s attention to two recent decisions, one from the Northern District of Illinois and one from the Tenth Circuit Court of Appeals, involving the scope of the First Amendment associational privilege and the proper foundation necessary to withhold documents from production. The scope of and the proper foundation necessary for a litigant to assert the First Amendment associational privilege is the central issue contained within Syngenta’s Petition for Leave to Appeal. These motions highlight the increasing importance of the First Amendment privilege within litigation nationwide. As noted in Syngenta’s Petition for Leave to Appeal, the number of reported decisions involving the scope and necessary foundation for the First Amendment associational privilege is rapidly escalating. Not surprisingly, this morass of decisions has resulted in a cacophony of standards, causing litigants in jurisdictions with no published opinion to be mired in a bog of contradictory and perplexing non-binding authority. *See In re Motor Fuels*, 2011 WL 1998367 (10th Cir. May 24, 2011); *In re Heartland Inst.*, 2011 WL 1839482 (N.D. Ill. May 13, 2011); *In re Motor Fuels*, 2010 WL 786583 (D. Kan. March 4, 2010); *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir.

2010); *In re Motor Fuel Temperature Sales Practices Litigation*, 2009 WL 1504744 (D.Kan. May 28, 2009); *Heartland Surgical Specialty Hospital, LLC, v. Midwest Division, Inc.*, 2007 WL 852521 (D.Kan. March 16, 2007); *In re GlaxoSmithKline plc*, 732 N.W.2d 257 (Minn. 2007); *Wyoming v. USDA*, 208 F.R.D. 449 (D.D.C.2002). Currently, litigants in Illinois state courts find themselves in this unenviable position. There are currently no published Illinois state court decisions regarding the scope of allowable discovery when a litigant seeks the production of relevant materials that are subject to the First Amendment associational privilege in a case that does not contain a conspiracy claim. Accordingly, this Court should grant Syngenta's Petition for Leave to Appeal as it clearly involves an issue of substantial importance which has been the subject of numerous recent published opinions in other jurisdictions.

Further, Plaintiffs' discussion of *In re Motor Fuel Temperature Sales Practices Litig.*, 2011 WL 1998367 (10th Cir. May 24, 2011) in their Motion for Leave to File Additional Authority fails to recognize significant differences between the evidence presented to support the claims of First Amendment privilege in that case and the evidence by affidavit Syngenta, The Heartland Institute and the other third parties have presented in this case to support their First Amendment privilege claims.

In *In re Motor Fuel*, the proponents of the First Amendment privilege offered a single unsworn statement to establish a prima facie case of privilege. *Id.* at *14. The Tenth Circuit Court of Appeals held that in order to meet its burden to establish a chilling effect, the proponent must offer affidavits which describe the resulting reluctance of members to associate with the group or groups. *Id.*

Syngenta and the third parties, specifically The Heartland Institute, have provided sworn statements or affidavits outlining their reluctance to associate freely if their communications are

subject to disclosure. This is exactly the kind of evidentiary support sufficient to sustain a claim of First Amendment infringement. *See Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010).

To support its claim of First Amendment privilege, Syngenta submitted the sworn statement of Dennis Kelly, the State Affairs Team Lead for Syngenta, detailing the anticipated effects of the disclosure of the documents on Syngenta. *See Declaration of Dennis Kelly*, attached as Exhibit 1 and incorporated by reference.

In the sworn statement, Mr. Kelly provides significant details regarding the chilling effects that would result if certain information and documents were found not to be privileged. Specifically, the sworn statement provides that if the communications were to be disclosed through discovery, Syngenta would “limit the topics on which they are willing to speak out or limit to whom they are willing to speak or with whom they are willing to associate,” “will avoid certain candid associational speech, particularly candid speech about legislative and lobbying activities,” “may terminate their membership” in trade organizations, “be less likely to participate in association activities” and “may reduce their contributions or stop contributing altogether.” *Id.*

To support its claim of First Amendment privilege, The Heartland Institute provided a sworn declaration of Joseph Bast, the president of The Heartland Institute, detailing the chilling effect that the production of the requested documents would have on the group’s communications, membership, contributions, recruitment and other associational activities. *See Declaration of Joseph Bast*, attached as Exhibit 2 and incorporated by reference.

In the sworn statement, Mr. Bast outlines the chilling effects which would result from the disclosure of the documents. Mr. Bast states that if the documents were to be disclosed, “Heartland would lose at least half of its current funding if Heartland is required to disclose

donor identities” and Heartland’s “freedom of speech under the First Amendment will be chilled because its freedom of expression will be impaired and the credibility of its work will be impugned.”

The sworn statements of Dennis Kelly and Joseph Bast clearly meet the burden of proof the Tenth Circuit elaborated in *In re Motor Fuel*. Further, Plaintiffs have not offered any evidence, only argument, to refute the sworn statements.

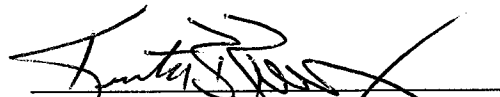
CONCLUSION

WHEREFORE, based on all the foregoing reasons and authorities, Defendant-Petitioner Syngenta Crop Protection, Inc. prays that this Honorable Court grant it’s Petition for Leave to Appeal, and grant such other and further relief as this Court deems just and proper.

Dated: June 13, 2011

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT-PETITIONER
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CERTIFICATION


I, Kurtis B. Reeg, being duly sworn upon my oath, depose and state as follows:

1. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

2. Each of the statements made in the foregoing motion is true and correct.

3. Each of the documents attached to this declaration are true and accurate copies of those documents.

Dated: June 13, 2011



Kurtis B. Reeg
Attorney for Defendant-Petitioner
Syngenta Crop Protection, Inc.

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| |) | Judge Presiding |
| Defendant-Petitioner. |) | |

NOTICE OF FILING AND CERTIFICATE OF SERVICE AND MAILING

PLEASE TAKE NOTICE that on June 13, 2011, I, Philip Sholtz, an attorney, certify that I caused the original and three copies of the Defendant-Petitioner Syngenta Crop Protection, Inc.'s Response to Plaintiffs' Motion to Cite Additional Authority to be filed with the Clerk of the Supreme Court of Illinois by depositing said copies for delivery within three business days, at the UPS Store located at 6614 Clayton Road, Richmond Heights, Missouri 63117 with postage fully prepaid, to:

The Honorable Lloyd A. Karmeier
Justice of the Illinois Supreme Court
1100 South Mill St.
Nashville, IL 62263

Hon. Carolyn Taft Grosboll
Clerk of the Illinois Supreme Court
Supreme Court Building
200 E. Capitol Avenue
Springfield, IL 62701-1720

The undersigned hereby also certifies that three copies of the foregoing Response to Plaintiffs' Motion to Cite Additional Authority were served on counsel of record on June 13, 2011 by depositing in a U.S. Mailbox in Clayton, Missouri, with postage fully prepaid, and addressed to:

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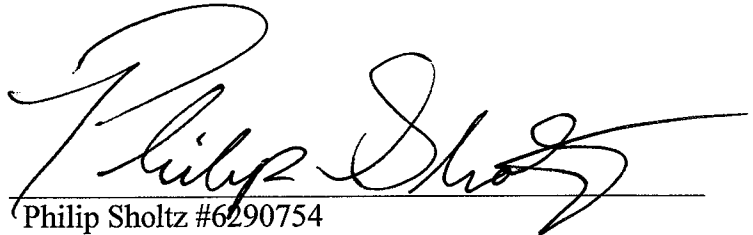
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DATED: June 13, 2011



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