IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

HOLIDAY SHORES SANITARY DISTRICT, Individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	Case No. 2004-L-000710
SYNGENTA CROP PROTECTION, LLC, f/n/a SYNGENTA CROP PROTECTION, INC., and GROWMARK, INC.,	)	
Defendants.	)	

DEFENDANT SYNGENTA CROP PROTECTION, LLC'S RESPONSE
MEMORANDUM OF LAW IN SUPPORT OF WORK PRODUCT DOCTRINE CLAIMS

COMES NOW Syngenta Crop Protection, LLC ("SCP, LLC"), by and through its attorneys, and for its Response Memorandum of Law in Support of Work Product Doctrine Claims, states as follows:

Rule & General Information

Under the Illinois Supreme Court Rules, "Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney." Ill. Sup. Ct. R. 201(b)(2).

The work product doctrine is broader than the attorney-client privilege and protects the right of an attorney to prepare his case and precludes the less diligent attorney from taking undue advantage of his opponent's preparation. *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 189 Ill. 2d 579, 591, 727 N.E.2d 240, 246 (2000); *Hayes v. Burlington N. & Santa Fe Ry. Co.*, 323 Ill. App. 3d 474, 478, 752 N.E.2d 470, 474 (Ill. App. Ct. 2001). While the attorney-client

privilege protects confidential communications between a client and its attorney, the work product doctrine extends to protect all material prepared by or for a party in preparation for trial.

However, as Holiday Shores Sanitary Districts ("HSSD") has pointed out, the Illinois Supreme Court has explicitly stated that "Illinois has taken a narrow approach to the discovery of attorney work product," citing as overriding considerations the "ascertainment of the truth and expedited disposition of the lawsuit." *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 196, 579 N.E.2d 322, 329 (1991) (citing *Monier v. Chamberlain,* 35 Ill.2d at 361, 221 N.E.2d 410). Thus, while the work product doctrine fundamentally provides broader protection than the attorney-client privilege in terms of scope, Illinois has taken steps to limit its application in the interest of a pro-discovery policy in legal actions. *Allianz Ins. Co. v. Guidant Corp.*, 869 N.E.2d 1042, 1063 (Ill. App. 2 Dist. 2007). Although HSSD simply relies on quoting authority for this proposition instead of making an actual argument, it does, nevertheless, appear to be true that Illinois courts generally wish to narrow the work product doctrine. *See Monier v. Chamberlain*, 35 Ill.2d 351, 221 N.E.2d 410 (1966); *Kilpatrick v. First Church of the Nazarene*, 182 Ill.App.3d 461, 130 Ill.Dec. 925, 538 N.E.2d 136 (4th Dist.1989); *Sherman v. Ryan*, 2009 WL 1444699 (Ill. App. Ct. 1st Dist. 2009); *Western States Ins. Co. v. O'Hara*, 357 Ill.App.3d 509, 293 Ill.Dec. 532, 828 N.E.2d 842 (4th Dist.2005).

"Ordinary work product" is defined as any relevant material generated in preparation for trial which does not disclose "conceptual data" and is freely discoverable. *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 196, 579 N.E.2d 322, 329-30 (1991) (citing *Monier,* 35 Ill.2d at 360, 221 N.E.2d 410).

"Opinion or 'core' work product" consists of materials generated in preparation for litigation which reveal the mental impressions, opinions, or trial strategy of an attorney, and it is

subject to discovery only upon a showing of impossibility of securing similar information from other sources. *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 196, 579 N.E.2d 322, 329-30 (1991) (citing *Monier,* 35 Ill.2d at 360, 221 N.E.2d 410). Work product does not include verbatim statements of witnesses or other such documents prepared by an attorney that do not disclose such conceptual data, but that may contain relevant and material evidentiary details. *Monier*, 35 Ill.2d at 360. HSSD downplays the "showing of impossibility" as a narrow exception, which is apparently the favored interpretation in light of *Monier.*

The Illinois courts generally reject the federal good-cause doctrine, instead choosing a much narrower and more limited exception where "an attorney's notes or memoranda are discoverable only if the party seeking disclosure conclusively demonstrates the absolute impossibility of securing similar information from other sources." *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 109-11, 432 N.E.2d 250, 253 (1982). The reason behind limiting this exception is that the courts do not want to impose on the trial courts "the burden of reviewing voluminous material and sifting from the material what is discoverable and what is not discoverable." *Mlynarski v. Rush Presbyterian-St. Luke's Med. Ctr.*, 213 Ill. App. 3d 427, 432, 572 N.E.2d 1025, 1029 (Ill. App. Ct. 1991).

Some cases serve to highlight how this narrow exception has played out across the Illinois courts. In *Kilpatrick v. First Church of the Nazarene*, 182 Ill.App.3d 461, 130 Ill.Dec. 925, 538 N.E.2d 136 (4th Dist.1989), the court held that a plaintiff's deposition of the defendant's counsel to determine her reasons for canceling the second day of a two-day physical examination of the plaintiff was improper because the reason was protected by the work product privilege. However, in *Akers v. Atchison, Topeka & Santa Fe Ry. Co.*, 187 Ill.App.3d 950, 135 Ill.Dec. 371, 543 N.E.2d 939 (1st Dist.1989), an expert witness who was originally hired by the plaintiff

was allowed to testify for the defendant over the plaintiff's objection that the witness disclosed the attorney's work product to the defendant when he testified. The court noted that the plaintiff had failed to identify any work product material that he had communicated to the expert, and ruled that the advice of an expert concerning technical matters or interpretations does not constitute work product.

Further, in *Sakosko v. Memorial Hospital*, 167 Ill.App.3d 842, 118 Ill.Dec. 818, 522 N.E.2d 273 (5th Dist.1988), letters from the defendant hospital's risk management consultant to the risk management manager are not protected work product because they do not contain or disclose the theories, mental impressions or litigation plans required. Also, in *Sherman v. Ryan*, 2009 WL 1444699 (Ill. App. Ct. 1st Dist. 2009), the court found that documents shared with outside auditors and financial advisors did not constitute waiver of the work product doctrine.

Although it does not actually matter all too much, HSSD cites a 1964 Illinois Appellate Court case that seems to invoke the federal "good cause" exception to the work-product doctrine: "Where it appears as here that one party has exclusive control over the circumstances surrounding an event and has exclusive and superior opportunity to know or ascertain the facts, we believe that *good cause* exists to require that party to disclose such portions of any report that might contain the statements of potential witnesses or facts personally observed by them." *Day v. Illinois Power Co.*, 50 Ill. App. 2d 52, 61, 199 N.E.2d 802, 807 (Ill. App. Ct. 1964) (emphasis added). This quote appears to mirror the federal exception more than the Illinois one. In the *Monier* case in 1966, the Illinois Supreme Court essentially dropped the federal "good cause" exception for the narrower one employed today. Again, this is essentially a moot point, but HSSD does seem to be applying outdated law.

Materials Covered Under "In Preparation for Trial"

The Supreme Court of Illinois has pointed to the importance of the words "in preparation for trial," and has stated "... [O]nly those memoranda, reports or documents which reflect the employment of the attorney's legal expertise, those 'which reveal the shaping process by which the attorney has arranged the available evidence for use in trial as dictated by his training and experience,' may properly be said to be 'made in preparation for trial.'" *Monier v. Chamberlain*, 35 Ill. 2d 351, 359-60, 221 N.E.2d 410, 416 (1966) (citing Miller, Recent Discovery, 1963 U. of Ill.L.F. 666, 673). Again, this reflects the Illinois courts efforts to narrow the application of the work product doctrine.

Examples of documents prepared "in preparation for trial" include: memoranda made by counsel of his or her impression of a prospective witness, trial briefs, and documents revealing a particular marshalling of the evidentiary facts for presentation at the trial. *Western States Ins. Co. v. O'Hara*, 357 Ill. App. 3d 509, 828 N.E.2d 842 (Ill. App. Ct. 2005). Confidential communications made to representatives of the attorney such as paralegals, secretaries, file clerks, or investigators employed by the attorney are also covered by the privilege. *Boettcher v. Fournie Farms, Inc.*, 243 Ill.App.3d 940, 945 (Ill. App. Ct. 1993). The work product doctrine also applies to documents prepared by the attorney's agent or investigator. For example, a memorandum written by the coordinator of a hospital's risk management office to the hospital's corporate counsel was protected from discovery in medical malpractice action by the work product doctrine. *Mlynarski v. Rush Presbyterian-St. Luke's Med. Ctr.*, 213 Ill. App. 3d 427, 572 N.E.2d 1025 (Ill. App. Ct. 1991).

HSSD claims that documents made in the regular course of business often necessarily include many documents prepared by the client when litigation is anticipated. HSSD goes on to argue that these "special reports" should not "fall under the umbrella of documents prepared in

anticipation of litigation" because it would "'insulate so much material from the truth-seeking processes that justice would no longer be served." *Rounds v. Jackson Park Hosp. & Med. Ctr.*, 319 Ill. App. 3d 280, 287, 745 N.E.2d 561, 568 (Ill. App. Ct. 2001). This case appears to deal solely with the attorney-client privilege, and the court does not discuss or apply the work product doctrine. However, the principal cited by Holiday Shores is likely still valid in light of the Illinois courts limiting of the work product doctrine.

Scope of the Work Product Doctrine in Other Matters Beyond Present Litigation

The Eighth Circuit has expressed a desire to extend the scope of the work product doctrine "beyond the termination of the litigation for which the documents were prepared." *In re Murphy*, 560 F.2d 326, 334 (8th Cir. 1977). The rationale for this being: "If work product is protected in related, but not unrelated future cases, an attorney would be hesitant to assemble extensive work product materials because of the concern that the materials will not be protected in later, unrelated litigation." *Id.* at 335. The Illinois courts have adopted this view, agreeing "with the rationale expressed in *Murphy*" and concluding "that the work product privilege extends to all subsequent litigation. *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 189 Ill. 2d 579, 591-92, 727 N.E.2d 240, 246-47 (2000).

Waiver

The protection of the work product doctrine may be waived by disclosing the document to a person in an adverse position to the party claiming the privilege. In *Dalen v. Ozite Corp.*, 230 Ill. App. 3d 18, 594 N.E.2d 1365 (Ill. App. Ct. 1992), the Appellate Court of Illinois adopted a five point balancing test for whether disclosure of a work product document is sufficient to waive the privilege by considering these five factors: "(1) the reasonableness of the precautions taken to prevent the disclosure; (2) the time taken to rectify the error; (3) the scope of the

discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness." *Dalen v. Ozite Corp.*, 230 Ill. App. 3d 18, 29, 594 N.E.2d 1365, 1371 (Ill. App. Ct. 1992).

Holiday Shores also points out another very narrow situation where waiver can occur. Holiday Shores cites *Mlynarski*, 213 Ill.App.3d 427, 572, for a situation where a member of defendant's control group (Goldsberry) sent a memorandum he wrote to the corporation's general counsel containing summaries of statements of people that Goldsberry interviewed. This memorandum fell under both the attorney-client privilege and the work product doctrine, and it included summaries of interviews with nurses and doctors and the daughter and husband of the deceased. The key fact is that the daughter and husband were not named in the answers to interrogatories. Thus the court felt it would be "hard-pressed to conjure up a justification for the invocation of privilege" for the statements of these two witnesses. However, the court specifically noted that it did not feel empowered to create an exception to the broad holding of *Consolidation Coal*, and thereby essentially limited this holding to this case.

Discovery of Work Product Regarding Putative Class Members

Illinois courts have failed to provide clear guidance on the extent to which discovery is permitted into pre-filing work done by a party's attorney in anticipation of litigation. On one hand, an Illinois court has found that a memorandum prepared by a party's attorney analyzing issues in anticipation of other pending litigation constituted privileged attorney work product vis-à-vis the instant litigation, even though the document was drafted prior to the filing of the instant litigation. *Dalen v. Ozite Corp.*, 594 N.E.2d 1365, 1370 (Ill.App. 2 Dist. 1992). On the other hand, though, the same court has ruled that notes prepared by a witness prior to the filing of any litigation that were in the attorney's possession were not protected by either attorney work

product or attorney-client privileges and thus were discoverable. *Cangelosi v. Capasso*, 851 N.E.2d 954, 959 (Ill. App. 2 Dist. 2006).

Additionally, a federal court in Illinois has stated that the attorney-client privilege and attorney work product doctrine apply only to substantive matters and do not protect the structural framework of the attorney-client relationship. *Krause v. GE Mrtg. Services, Inc.*, 1998 WL 409395 at *3 (N.D. Ill. July 14, 1998). *See In re Grand Jury Proceeding, Cherney*, 898 F.2d 565, 567 (7th Cir. 1990). The court stated that the date of the class action authorization/fee agreement as well as the terms of the parties' engagement were exactly the type of "peripheral facts that are generally not protected." *Id.*

Based on the foregoing reasons and authorities, Defendant Syngenta Crop Protection, LLC respectfully requests that the assertions of the work product doctrine set forth on its privilege log be sustained, and Plaintiffs' objections thereto overruled.

Respectfully submitted,

REEG LAWYERS, LLC

By: _____

Kurtis B. Reeg ARDC# 3126350
1 N. Brentwood Blvd.
Suite 950
St. Louis, Missouri 63105
Telephone: (314) 446-3350
Facsimile: (314) 446-3360
kreeg@reeglawfirm.com
Mark C. Surprenant
Adams and Reese LLP
4500 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 585-0213

Michael A. Pope
McDermott Will & Emery
227 West Monroe Street
Chicago, IL 60606
Telephone: (312) 372-2000

ATTORNEYS FOR DEFENDANT
SYNGENTA CROP PROTECTION, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20th day of June, 2011, I caused to be served the attached via **hand delivery**, upon the following counsel:

TO: Stephen M. Tillery, Esq.
Christie Deaton, Esq.
Korein Tillery, L.L.C.
U.S. Bank Plaza
505 North 7th Street, Suite 3600
St. Louis, MO 63101,

with a copy sent via United States mail, properly addressed and postage paid, upon the following counsel:

Mr. Scott Summy
Ms. Celeste Evangelisti
Baron & Budd
3102 Oak Lawn Avenue, Suite 1100
Dallas, TX 75219

Attorneys for Plaintiffs

Ms. Anne Kimball
Wildman Harrold, LLP
225 West Wacker Drive, Suite 3000
Chicago, IL 60606

Mr. Robert Shultz
Heyl, Royster, Voelker, & Allen
Mark Twain Plaza III, Suite 100
105 West Vandalia Street
PO Box 467
Edwardsville, IL 62025

Attorneys for Growmark, Inc.