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 ATTORNEY-CLIENT PRIVILEGE CLAIMS

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

Attorney-Client Privilege

Illinois Supreme Court Rule 201(b)(2) states that "[a]ll matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure." The Illinois Supreme Court has stated that the "purpose of the attorney-client privilege is to encourage and promote full and frank consultation between a client and legal advisor by removing the fear of compelled disclosure of information." *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 256 (Ill. 1982). The attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client." *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981).

Under the attorney-client privilege, when "legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence by the client, are protected from disclosure." *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.,* 727 N.E.2d 240, 243 (Ill. 2000). This privilege also extends to those confidential communications made to representatives of the attorney such as paralegals, secretaries, file clerks, or investigators employed by the attorney. *Boettcher v. Fournie Farms, Inc.*, 612 N.E.2d 969 (Ill. App. 5 Dist. 1993). In fact, communications do not require the direct involvement of an attorney to be subject to the attorney-client privilege. *See In re Sulfuric Acid Antitrust Litigation*, 235 F.R.D. 407, 433 (N.D. Ill. 2006) (finding it is enough that notes reveal, directly or indirectly, the substance of an attorney-client communication); *Muro v. Target Corp.* 2006 WL 3422181, at *4 (N.D. Ill. Nov. 28, 2006) (holding that the lack of participation by an attorney as either author or recipient does not necessarily undermine the applicability of the privilege). Additionally, there is no requirement that a lawsuit be filed before the attorney-client privilege attaches to a communication. *Midwesco-Paschen Joint Venture For Viking Projects v. Imo Industries, Inc.,* 638 N.E.2d 322, 328 (Ill. App. 1 Dist. 1994). In fact, under Illinois law, the attorney-client privilege protects communications between attorneys and their clients, even though legal advice contained in letters does not pertain to pending litigation, but rather relates to proceedings before a regulatory agency. *See Robertson v. Yamaha Motor Corporation,* 143 F.R.D. 194 (S.D. Ill. 1992).

Communications between an attorney and client are not *per se* protected. *Waste Management, Inc. v. Int'l Surplus Line Ins. Co.*, 579 N.E.2d 322, 326 – 27 (Ill. 1991), *citing Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 257 (Ill. 1982). Illinois courts have explained that to be entitled to the protection of the attorney-client privilege, a claimant

must make a threshold showing that (1) the statement originated in confidence that it would not be disclosed; (2) it was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services; and (3) it remained confidential. *Rounds v. Jackson Park Hosp. & Medical Center*, 745 N.E.2d 561, 566 (Ill. 2001); *Pierto v. Marriot Senior Living Services, Inc.*, 810 N.E.2d 217 (Ill. App. 4 Dist. 2004); *Hyams v. Evanston Hosp.*, 587 N.E.2d 1127, 1130 (Ill. 1992). Furthermore, the attorney client privilege belongs to, and can only be waived by, the client. *Hayes v. Burlington Northern and Santa Fe Ry. Co.*, 752 N.E.2d 470, 474 (Ill. App. 1 Dist. 2001).

The communication must be made to the attorney for the purpose of securing legal advice or other such services, and courts will not find every communication to and from an attorney to be *per se* privileged. For example, an Illinois court has ruled that a cover memo from a corporation's general counsel to a control group member, with an attached draft letter from the company to an outside entity discussing a settlement proposal, as well as negotiations between the two companies, was not protected, as there was no request for legal advice. *See Midwesco-Paschen,* 638 N.E.2d at 322. In that case, the document itself contained no specific statements to the control group member, but simply had a "to/from" cover sheet on the top of the draft letter indicating that counsel forwarded the draft letter to the control group employee. *Id.* at 328.

Moreover, the attorney-client privilege only applies if the communication is actually made in confidence and remains confidential. The presence of a third party during a communication between a party and his or her counsel destroys the privilege. *See People v. Diercks*, 411 N.E.2d 97 (Ill. App. 5 Dist. 1980); *Midwesco-Paschen*, 638 N.E.2d at 325; *Sterling Fin. Management, L.P. v. UBS PaineWebber, Inc.*, 782 N.E.2d 895, 905 (Ill. App. 1 Dist. 2002).

Plaintiff Holiday Shores states in its Memorandum that "[t]here is a split among the Districts of the Appellate Court of Illinois as to whether this [privilege definition] precludes communications from an attorney to the client." However, Plaintiff notably fails to point out that the Fifth District Appellate Court has directly ruled on this issue and found that the privilege extends to all communications *between* an attorney and his or her client, which would encompass both those from the attorney to the client and those from the client to the attorney. *See In re Marriage of Granger*, 554 N.E.2d 586, 593 (Ill. App. 5 Dist. 1990); *see also* Graham, M., *Cleary and Graham's Handbook of Illinois Evidence*, 329 (9th Ed. 2009). The Illinois federal courts applying Illinois common law have similarly found that the attorney-client privilege applies to communications *between* an attorney and client as well. *See Robertson*, 143 F.R.D. at 197 – 98.

Consolidation Coal Control Group Test

When the privilege proponent is a corporate entity, there are two tiers of employees whose communications with corporate attorneys are protected from disclosure by the attorney-client privilege. *Midwesco-Paschen*, 638 N.E.2d at 325. The first tier of employees is the corporation's decisionmakers and other top management, *id.*, and in general the "only communications that are ordinarily held privileged...are those made by top management who have the ability to make a final decision," *Consolidation Coal*, 432 N.E.2d at 257. However, there is also a second tier of corporate employees whose communications with corporate counsel warrant application of the attorney-client privilege as well. In order to demonstrate the existence of a privilege in relation to this second tier of employees, the proponent must demonstrate that he or she is a member of the corporate entity's "control group."

In Illinois, an employee is a member of a corporation's "control group" where that person (1) serves in an advisory role to top management, such that the top management would not

normally make a decision in the employee's particular area of expertise without the employee's advice or opinion, and (2) that opinion does in fact form the basis of the final decision by those with actual authority." *Archer Daniels Midland Co. v. Koppers Co., Inc.*, 485 N.E.2d 1301, 1303 – 04 (Ill. 1985), *citing Consolidation Coal*, 432 N.E.2d at 257 – 58. Accordingly, while individuals who are relied upon merely for supplying information are not members of the control group, those individuals whose advice or opinions are relied upon and in fact form the basis of a final decision by top management fall within the control group. *Id.* at 258. Thus, the control group analysis centers on the status of the employee within the hierarchy of the specific corporation involved.

The burden of showing the facts necessary to establish the privilege under this test is on the proponent, here SCP LLC. *Id.* at 257. However, attorney-client communications are highly regarded and Illinois courts remain mindful that the policy behind the attorney-client privilege is to encourage full and frank attorney-client consultation and remove the client's fear that any information shared will have to be subsequently disclosed by the attorney. *Archer Daniels*, 485 N.E.2d at 1303.

The "control group test" attempts to "strike a reasonable balance by protecting consultations with counsel by those who are the decisionmakers or who substantially influence corporate decisions and by minimizing the amount of relevant factual material which is immune from discovery." *Consolidation Coal*, 432 N.E.2d at 257. The test provides a balance between privilege and discovery, and the focus of the Court in finding privilege is on "individual people who substantially affected decisions, not on facts that substantially affected decisions." *Claxton v. Thackston*, 559 N.E.2d 85, 89 (Ill App. 1 Dist. 1990).

This common sense approach adopted by the Illinois courts "better accommodates modern corporate realities and recognizes that decisionmaking within a corporation is a process rather than a final act." *Consolidation Coal*, 432 N.E.2d at 258, *citing* Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 Harv.L.Rev. 424, 430.

Plaintiffs point to one court's statement that "[t]he party claiming privilege must show that no final decision concerning the legal action would be made without consulting the member of the control group." *Knief v. Sotos*, 537 N.E.2d 832, 835 (Ill. App. 2 Dist. 1989). However, their reference to the court's analysis in this singular case ignores consideration of the "modern corporate realities" that the Supreme Court in *Consolidation Coal* emphasized as critical to the control group analysis.

In *Knief*, the court held that statements of the head waitress and head manager of a defendant ballroom/lounge were not privileged where the defendant presented no evidence under which the statements were given, the defendant had not presented any evidence that these persons were normally consulted as to what legal action the defendant should pursue, and the defendant presented no evidence of the job duties of these two individuals. *Id.* Plaintiffs' reliance on this ruling is misplaced. The court in *Knief* analyzed the control group membership of a "head manager" and a "head waitress" *vis-à-vis* a ballroom/lounge, which is inapposite to the instant case where the control group analysis pertains to large company that employs thousands of individuals in different parts of the country. Contrary to Plaintiffs' suggestion, the *Knief* court's analysis of the control group of a ballroom/lounge simply has no relevance to the analysis of the vastly different control group of SCP, LLC, and its privileged documents.

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

Respectfully submitted,

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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:

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