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 THE CONTENTS OF ITS PRIVILEGE LOG

COMES NOW Syngenta Crop Protection, LLC ("SCP, LLC"), by and through its attorneys, and for its Response Memorandum of Law in Support of the Contents of Its Privilege Log, states as follows:

Plaintiffs complain about SCP LLC's privilege log. The standards for privilege logs in Illinois are clear. Illinois Supreme Court Rule 201(n) articulates the rule governing formal claims of privilege and provides that:

> [w]hen information or documents are withheld from disclosure or discovery on a claim that they are privileged pursuant to a common law or statutory privilege, any such claim shall be made expressly and shall be supported by a description on the nature of the documents, communications or things not produced or disclosed and the exact privilege which is being claimed."

The purpose of the Rule 201(n) is to enable the court to evaluate the applicability of the asserted privilege and to determine the need for an *in camera* inspection of documents while also minimizing any disputes between the parties regarding those matters. *Thomas v. Page*, 837 N.E.2d 483, 496 (Ill. App. 2 Dist. 2005).

However, Rule 201(n) does not even require a party to prepare and submit to the opposing party a document-by-document privilege log. Rule 201(n) is satisfied if: (1) a party discloses the particular persons who authored, sent, or received the withheld documents; and (2) sufficiently describes the nature of the documents by category such that the court can determine whether the documents in question fall within the scope of the claimed privilege and are protected from disclosure. *Id.* at 495. Additionally, documents for which a party claims a privilege that derives neither from the common law or a statute, including but not limited to a Constitutional privilege, need not be included on a party's privilege log. *See* Orders of this Court dated September 22 and October 29, 2010, attached as Exhibit A.

In *Western States Ins. Co. v. O'Hara*, 828 N.E.2d 842, 845 (Ill. App. 4 Dist. 2005), the trial court had found that simple descriptions of documents such as ""regarding coverage claim," "regarding claim status," "regarding setting reserve," and "regarding coverage opinion" were inadequate and lacking the necessary specificity required by Rule 201(n) regarding the description of the nature of documents. However, SCP LLC has given extensive and/or clear descriptions of its documents at issue, and Plaintiff's have not articulated how such descriptions should be changed.

In like fashion, federal courts in Illinois require a party to include similar information on its privilege log so that the court can determine whether the proponent of privileged status has satisfied its burden of establishing the privilege. *See Allendale Mutual Ins. Co. v. Bull Data Systems, Inc.*, 145 F.R.D. 84 (N.D. Ill. 1992). The federal courts have required parties to disclose the document's (1) date, (2) author and all recipients (and their capacities), (3) subject matter, (4) purpose for its production, and (5) a specific explanation for why it is privileged. *Id.* at 88. The fifth requirement merely means that overly simple document descriptions such as

"letter re claim," "analysis of claim," and "report in anticipation of litigation" will not suffice. *Id.* SCP LLC has given much more specific descriptions and met this federal standard as well.

In *Midwesco-Paschen Joint Venture for Viking Projects v. Imo Industries, Inc.*, 638 N.E.2d 322, 332 (Ill. App. 1 Dist. 1994), the court stated that "[w]hile sanctions may not be imposed simply to inflict punishment, neither should they be imposed automatically just to provide a party with an appealable order." A significant fact that the court should consider in determining the appropriateness of sanctions is "whether the party refusing a discovery order has made at least a colorable claim of privilege..." *Id.* Contrary to Plaintiffs' assertion, the court in *Midwesco-Paschen* did not contemplate severe sanctions to be available for inadequate descriptions of documents on a privilege log.

In fact, courts in Illinois have refused to uphold sanctions and contempt orders entered against a party where that party is found to have made a good faith claim of privilege, even if it is ultimately overruled by the court. *See Sakosko v. Memorial Hosp.,* 522 N.E.2d 273, 277 (Ill. App. 5 Dist. 1988) (sanctions and contempt order vacated when party acted in good faith to secure interpretation of two privileges); *Rounds v. Jackson Park Hosp. and Medical Center*, 745 N.E.2d 561, 569 (Ill. App. 1 Dist. 2001) (contempt order vacated where privilege claim made in good faith and was not contemptuous of court's authority); *Puterbaugh v. Puterbaugh*, 764 N.E.2d 582, 586 (Ill. App. 3 Dist. 2002) (sanctions and contempt order vacated where refusal to comply with discovery order was based on a good faith assertion of privilege); *Chicago Trust Co. v. Cook County Hosp.*, 698 N.E.2d 641, 651 (Ill. App. 1 Dist. 1998) (contempt order vacated where assertion of privilege made in good faith); *People ex rel. Birkett v. City of Chicago*, 686 N.E.2d 66, 74 (Ill. App. 2 Dist. 1997) (contempt order vacated where assertion of privilege was

made in good faith and party was not contemptuous such that court "was held in disdain or subjected to scorn").

Likewise, federal courts in the Seventh Circuit also agree that severe sanctions are inappropriate for deficient privilege claims and logs absent a showing of willfulness, bad faith, or fault. *See Am. Nat'l Bank & Trust Co. of Chicago v. Equitable Life Assurance Society of U.S.*, 406 F.3d 867, 877 (7th Cir. 2005); *Sajda v. Brewton*, 265 F.R.D. 334, 339 (N.D. Ind. 2009). In most cases where a court finds a privilege log to suffer from technical deficiencies, the court will typically order a party to amend its log to comply with the appropriate standards. *See Naik v. Boehringer-Ingelheim Pharmaceuticals, Inc.*, 2008 WL 4866015 (N.D. Ill., June 19, 2008).

Thus, in Illinois, good faith is the central determination regarding designations of privilege, even if Plaintiff or the court disagrees. In the instant case, SCP LLC certainly has made good faith bases to assert privileged status over the documents listed on its privilege log.

Based on the foregoing reasons and authorities, Defendant Syngenta Crop Protection, LLC respectfully requests that the privileged status of the documents listed on its privilege log be sustained, and Plaintiffs' objections thereto be 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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THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

FILED
SEP 22 2010
CLERK OF CIRCUIT COURT #66
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

HOLIDAY SHORES SANITARY DISTRICT; CITY OF CARLINVILLE, ILLINOIS; CITY OF FLORA, ILLINOIS; CITY OF FAIRFIELD, ILLINOIS, CITY OF HILLSBORO, ILLINOIS; AND CITY OF MATTOON, ILLINOIS; individually and On behalf of all others similarly situated,

V

04-L-710

SYNGENTA CROP PROTECTION, INC., and GROWMARK, INC.

Order

This cause came before the court on the objections by defendant Syngenta and from the following parties who received subpoenas from plaintiff: Illinois Fertilizer Chemical Association, Chemical Industries Council of Illinois, University of Chicago, Heartland Institute, Dr. Dan Coursey, and v-Fluence. The court took the objections and motions to quash under advisement. Initially, some counsel sought additional time to try to resolve these discovery issues among themselves and, if not, to file additional responses with the court. Affidavits were thereafter filed with the court by some of the groups served with discovery.

The court heard another round of objections argued on August 25th. Those objections stemmed from plaintiffs' attempt to take the depositions of those who filed affidavits concerning the content of the affidavits.

This order encompasses the objections and motions filed dealing with the prior protective order, the First Amendment claims raised by defendants who are trade associations, and the general objections from all those who received deposition notices and subpoenas. The court is well aware, and specifically notes, that this is not the first set of discovery disputes to be raised in this litigation and understands that additional discovery disputes have already been raised that will be heard by the judge next assigned to this case and its companion actions.

The court does not intend by this ruling to be resolving all the objections raised. Some of the objections in the hearings that this order encompasses were vague and

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general. Following these rulings and the time for counsel to again confer pursuant to Supreme Court Rules, remaining disputes between these parties and non-parties will join the other already filed disputes that are to be heard with Judge Stack pursuant to the assignment order.

On October 26, 2009, this court denied a request by Syngenta for a protective order that would bar plaintiffs from asking for membership information in industry groups and for lobbying information "as to the names of industry groups of which defendant is a member and to the identity of any lobbyists." Syngenta thereafter disclosed the names of its trade group memberships and lobbyists.

Plaintiffs instituted additional discovery directed to those groups, leading to the current dispute. One general objection is raised by all of the groups who received subpoenas. They argue that the First Amendment protects against disclosure of confidential membership lists and financial contributor information. The first question the court must address is the relevance of the requests to the non-parties in the context of this litigation against Syngenta. The First Amendment protects individuals in private lawsuits and applies in discovery where the information sought may impact an individual or group's ability to associate for speech, political, religious, or economic ends.

No objectors filed privilege logs with the court. Plaintiff argues that a privilege log is a prerequisite to a claim and the court therefore should not consider their objections. The court finds that a privilege log is not required unless the privilege being asserted is that of work product, attorney-client, or some other statutory privilege. To require those who received subpoenas to disclose that information which they assert is protected by the First Amendment to the U.S. Constitution will not be required by this court. A claim of First Amendment privilege covers the general categories of information sought here.

Membership in associations and advocacy for laws and regulations that affect the use of atrazine is a type of political and economic association that is generally protected by the First Amendment. Whether specific information that deals with the communications and actions between Syngenta and all of any of those who received subpoenas can be compelled to be produced must be weighed against the freedoms of association and speech.

Syngenta objects to plaintiffs' discovery directed to trade associations and to lobbyists and claims a First Amendment privilege. For the objections by Syngenta who is a party in this litigation, the court must look at the allowed uses of First Amendment

privileges. As noted by Michael Graham, Cleary and Graham's Handbook of Illinois Evidence, (9th ed. 2009), at page 290,

> "The purpose of the ordinary rules of evidence is to promote the ascertainment of the truth. Another group of rules, however, is designed to permit the exclusion of evidence for reasons wholly unconnected with the quality of the evidence or the credibility of the witness. These reasons are found in the desire to protect an interest or relationship. The term *privilege* is used broadly herein to describe these latter rules of exclusion.
>
> Since the effect of a privilege is to suppress the truth, privilege should be recognized only if the interest or relationship is of outstanding importance and would, beyond question, be harmed by denying the protection of privilege. (Citations omitted)."

Illinois Fertilizer Chemical Association and the Chemical Industries Council of Illinois

The objections to discovery by and from these two lobbying firms are First Amendment privilege and those of relevance and of being unduly burdensome because of the form of the requests. Employees of both of these firms lobby to the Illinois legislature and advocate to agencies for both agricultural and petroleum clients. The lobbyists claim that it will have a chilling effect on their clientele if discovery is permitted. The court agrees and sustains the objections at this time other than for specific instructions or communications between Syngenta and these firms, but not including other clients of the lobbyists. The disclosures are relevant as they may lead to discoverable information. The disclosures are subject to the protective orders entered in this action, meaning that the disclosures are to be restricted to information dealing with Syngenta and are to be used only for this litigation. As to the claims dealing with unreasonable burden on the lobbying firms as they are small, the court does not have enough information to specifically narrow the requests beyond this ruling. Counsel are to confer and if unable to reach an accord, then specific issues may be presented to the judge then presiding over this litigation.

Heartland Institute

Heartland Institute is a non-profit educational association. It was created for public education and information, not as a traditional educational institution and not a trade association or lobbying group. Heartland maintains a website and has placed articles relating to atrazine on its website. It objects that the First

Amendment protects it from having to disclose its members. Heartland further objects that the requests are overbroad, burdensome and irrelevant. Further, Heartland believes much of its information as to Syngenta is available from Syngenta. Apparently Syngenta donates to Heartland. The court finds that the information concerning Syngenta and its relationship to Heartland, including donations, instructions, and other communications, is relevant and discoverable, subject to the protective order. Information as to its other members is denied at this time.

Dr. Don Coursey

Syngenta objects to the additional discovery related to its consultant Dr. Don Coursey as being violative of Supreme Court Rules regarding consultants Syngenta objects to any subpoenas or discovery to Dr. Don Coursey after he was hired as a consultant. He was retained as a consultant by Syngenta in June 2006, after this action was filed. Dr. Coursey is a professor at the University of Chicago and has published articles about atrazine while in their employ. Dr. Coursey is listed as a consulting expert and Supreme Court Rules deal specifically with consulting experts. Supreme Court Rule 201 (b)(3) states: "A consultant is a person who has been retained or specially employed in anticipation of litigation or preparation for trial but who is not to be called at trial. The identity, opinions, and work product of a consultant are discoverable only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject matter by other means."

Counsel for Dr. Coursey indicates he is currently a consultant for Syngenta and that at such time as Dr. Coursey is identified as a controlled expert witness under Supreme Court Rule 213 (f), then appropriate disclosures would be made. Counsel indicates an expectation that Dr. Coursey will be converted from a consulting expert to a controlled expert.

Any information from Dr. Coursey that would cover the time period before June 2006 is clearly discoverable. The remainder that has to deal exclusively with his work on this litigation will have to wait until he is disclosed as a controlled expert. Published articles, research and studies that are the bases of published articles and remarks made at public forums, and other activities that are not those performed in the role of helping Syngenta prepare for trial are discoverable now. Material in his possession that deals exclusively with his role as a consultant for Syngenta are not discoverable at this point. The court would add one caveat

to that restriction, particularly if Dr. Coursey never moves from consulting expert to controlled expert. Syngenta may have retained Dr. Coursey in anticipation of litigation but the privilege extends only to his work performed in that role, not his studies that led to published work. Further disputes over the scope may have to be resolved by the successor judge and *in camera* inspections. At this point, the Motion to Quash is denied except as to those items specifically covered in the role as a consultant as defined by Supreme Court Rules.

University of Chicago

The University of Chicago is Dr. Coursey's employer and permits him to use university facilities to do outside work such as he does for Syngenta. The University received an identical subpoena to the one issued to Dr. Coursey. Dr. Coursey and Syngenta object to that subpoena, also, as Dr. Coursey is their consultant. The University first objects because any information on its system is actually the property of Dr. Coursey, not the university. In addition, the University claims the requests to be unduly burdensome and overly broad. The court disagrees that information in the University of Chicago's computer files or other files is not discoverable, any more than a bank may object to answering a subpoena about information on accounts, loan applications, or other information it holds. However, since Dr. Coursey holds a dual status of consultant and public speaker about atrazine, the information retrieved, if any, must be reviewed by Dr. Coursey and his counsel in the event any of it deals exclusively with consulting work for Syngenta and is thus not currently discoverable. The court's goal is to avoid duplicative discovery. Since Dr. Coursey and the University have identical subpoenas and the same sources to be searched, it makes sense that Dr. Coursey first respond. Further, ways to restrict the queries so that the information requested is not simply duplicated or the inquiry unduly burdensome should be explored (limiting computer queries to specific terms, etc). The court otherwise denies the motion to quash.

V-Fluence

Mr. Tillery withdrew his motion against v-Fluence so that counsel could negotiate the concerns that the requests were overly burdensome. Syngenta objected to discovery requests to v-Fluence because it is a "consultant." A PR firm is not a consulting expert immune from production unless its work is trial preparation. The court was not given any information that such a limitation existed here. If v-Fluence is working for Syngenta in the public relations area, the information is discoverable. Syngenta's objection that any discovery to v-

Fluence cannot be produced as it is a consultant is overruled. No other order is entered regarding v-Fluence.

Illinois Farm Bureau

The Illinois Farm Bureau objects that the subpoena is overbroad and unduly burdensome and also that it has First Amendment privileges. The Farm Bureau has thousands of members and vast stores of documents. The First Amendment privileges protect information as to its members and documents other than those relating to Syngenta at this time. Whether the scope remains overbroad following that restriction is not clear and counsel will need to confer.

It also has reporters. Whether any items written by a Farm Bureau reporter include information from an unnamed source is not known. Clearly, if an article includes a source by name, plaintiffs will just contact that individual for information. Otherwise, a special showing must be made to get at a reporter's notes requiring some level of specificity. The court also sustains the motion to quash and the objections by the Illinois Farm Bureau for any request that would seek the source any reporter used.

Conclusion

Again, this court is well aware that discovery disputes may continue and be ongoing. The discovery allowed here may lead to other information that counsel may need to seek. This lawsuit is five counts and the court has attempted to balance the need for discovery with the First Amendment rights of the non-parties looking at the specific counts. This order is not intended to be a final and definitive statement as to any future discovery issue. This cause joins all the other atrazine files that are now all assigned to Judge Stack.

Clerk to transmit copies of this order to attorneys: Steve Tillery, Kurt Reeg, Ed Dwyer, Ray Bell, Chris Byron, and Barney Schultz.

Entered September 22, 2010.

B Cunn

Judge

THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

HOLIDAY SHORES SANITARY DISTRICT, et. al.,

Vs.

04-L-710

SYNGENTA CROP PROTECTION, INC. and
GROWMARK, INC.

ORDER

This cause came before the Court on Syngenta Crop Protection, Inc.'s (Syngenta) Motion to Allow Interlocutory Appeal, the Heartland Institute's Motion to Allow its 308 Interlocutory Appeal, Motions for Clarification of the September 22, 2010 order, and requests to stay discovery on the subpoenas issued to non-parties while the appeal is being sought.

This court entered an order on September 22, 2010, sustaining the objections of nonparties to production of some of the information sought by plaintiffs based on First Amendment arguments raised by the non parties. The court ruled, and continues to hold, that the non-parties could assert First Amendment rights with respect to their other members' identities and information without providing a privilege log. This court overruled any objection with respect to records the non-parties may have regarding Syngenta (an actual party to this litigation) and allowed those records in the possession of the non-parties that are covered by the subpoenas to be submitted pursuant to a protective order. The court certainly did not rule on any other claimed exemptions or privileges other than the First Amendment associational rights being asserted with respect to any other documents in the possession of the non-parties. Statutory and common law privileges cannot be asserted without a privilege log and were not raised to this court. If there are other claimed privileges, a privilege log will have to be submitted to plaintiffs and then to the judge who will next be presiding over this long running dispute. The court made this clarification along with clarifying that any items described in the subpoenas that are in the possession of the nonparties are discoverable regarding Syngenta notwithstanding the First Amendment claims. This court reviewed the cases cited carefully and made its findings and rulings accordingly.

The court has been asked to certify questions pursuant to Supreme Court Rule 308.

The first issue is whether non-party Heartland has standing to seek certified question under Rule 308. The court finds Heartland has standing for its request so both the request from Syngenta and from Heartland are appropriately before the court. Nothing in Supreme Court Rule 308 prohibits a non-party that has been subjected to orders entered by the court from seeking certified questions to attempt to appeal an interlocutory order. (See, *Thomas v. Page, 361 Ill.App.3d 484, 837 N.E.2d 483, 297 Ill.Dec. 400 (2d dist. 2005).*

Supreme Court Rule 308 allows a court to certify questions when an interlocutory order involves a question of law about which there is substantial ground for difference of opinion and when an immediate appeal from the order may materially advance the ultimate termination of the litigation.

There is a substantial ground for difference of opinion regarding whether the First Amendment privilege serves to bar any discovery from lobbying groups, trade associations, or non-profit educational organizations regarding instructions, communications, and donations or other financial payments or in-kind support regarding one of their members when the court has determined the information is relevant to a lawsuit in which the member is a party. The court's order limited discovery to records regarding only the defendant and directed their production pursuant to a protective order. Illinois and Federal law recognize First Amendment privileges but there is a substantial ground for difference of opinion as to the scope of discovery that may be allowed.

Whether the determination of the scope of the First Amendment privilege as to the non-parties that received subpoenas will materially advance the termination of the litigation is less certain. The underlying lawsuit will and should continue. However, there is no question that if the First Amendment privilege bars any discovery from these non-parties then their participation in the litigation will be terminated. This court believes that the possibility that the non-parties could be relieved of any requirement to respond to the subpoenas warrants the granting of the motions for certified questions. The court therefore grants the Motions to Allow Interlocutory Appeal.

The court therefore certifies the following questions for interlocutory appeal to the Illinois Fifth District Appellate Court:

1. Does the First Amendment privilege bar discovery of a defendant's instructions, communications, and donations or other financial payments or in-kind support between and to a trade association of which it is a member?

2. Does the First Amendment privilege bar discovery of a defendant's instructions, communication, and donations or other financial payments or in-kind support between and to a lobbyist or lobbying organization?

3. Does the First Amendment privilege bar discovery of a defendant's instructions, communications, and donations or other financial payments or in-kind support between and to a non-profit educational organization?

Additionally, this court further orders that discovery on the issues dealing with the lobbying organizations (Chemical Industry Council of Illinois and Illinois Fertilizer and Chemical Association), trade associations (Illinois Farm Bureau) and non-profit educational organizations (Heartland Institute) that are the subject of the order entered on September 22, 2010 and of this order shall be stayed pending the resolution of any appeal.

The Clerk is to send a copy of this order to counsel of record.

Entered October 29, 2010.

B. Crowder

Judge

OFFICE OF THE CHIEF JUDGE
State of Illinois
Third Judicial Circuit
Madison & Bond Counties

ANN CALLIS
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Number of page(s) to follow 3

COMMENTS: