

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

**FILED**

JUN 22 2011

CLERK OF CIRCUIT COURT #74  
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 TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER**

**COMES NOW** Defendant Syngenta Crop Protection, LLC ("Syngenta"), by and through its attorneys, and for its Response to Plaintiffs' Motion for a Protective Order states as follows:

**BACKGROUND**

On June 28, 2010, Dr. Don Coursey was served with a subpoena by Plaintiffs. *See* Subpoena *Duces Tecum* to Dr. Don Coursey, attached as Exhibit A and incorporated by reference. Plaintiffs sought numerous categories of documents from Dr. Coursey, including all correspondence between Dr. Coursey and Syngenta, all studies related to atrazine conducted by Dr. Coursey and all documents related to presentations made by Dr. Coursey concerning atrazine or Syngenta. In addition, Plaintiffs served similar subpoenas on Dr. Coursey's employer, The University of Chicago, and numerous trade and industry groups.

Dr. Coursey and Syngenta moved to quash the subpoena issued to Dr. Coursey on numerous grounds, including that Dr. Coursey had been retained by Syngenta as a litigation

consultant. *See* Supplemental Memorandum in Support of Motion to Quash, attached as Exhibit B and incorporated by reference.

On September 22, 2010, this Court entered an Order encompassing the objections and motions filed concerning the third parties receiving subpoenas, and the general objections from all entities receiving deposition notices and subpoenas. *See* Order date September 22, 2010, attached as Exhibit C and incorporated by reference. That Order provided, "Any information that would cover the time period before [Dr. Coursey's retention date] is clearly discoverable." Further, the September 22, 2010 Order provided, "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." The Court went on to clarify that the litigation consultant "privilege extends only to his work performed in that role, not his studies that led to published work."

On January 24, 2011 and January 27, 2011, counsel for Plaintiffs requested Dr. Coursey and/or Syngenta to "produce any letter or other writings documenting Dr. Coursey's retention as a consulting expert for Syngenta." *See* letters dated January 24, 2011 and January 27, 2011, attached as Exhibits D and E and incorporated by reference. Counsel for Plaintiffs went on to state that such a letter "is routinely requested by the courts to verify a consultant's retention when a factual challenge is made to a claim of consulting privilege." *Id.* On February 16, 2011 counsel for Plaintiffs asserted that "[a]s time goes by without a response, I am left to conclude that you have no such documentation and that your statements that Dr. Coursey was retained as a consulting expert by [Syngenta] were false." *See* letter dated February 16, 2011, attached as Exhibit F and incorporated by reference.

Pursuant to this Court's Order, Dr. Coursey submitted materials on March 30, 2011 for *in camera* review to determine whether the documents submitted were privileged or subject to disclosure. Dr. Coursey objected, based on the consulting expert privilege, to Subpoena Request 4, "All communications regarding Dr. Coursey's retention date" and Subpoena Request 5, "All communications concerning the subpoena *duces tecum* served upon either Don Coursey or the University of Chicago and document requests therein." On April 20, 2011, this Court entered an Order regarding the materials submitted for *in camera* review. See Order dated April 20, 2011, attached as Exhibit G and incorporated by reference. In response to Dr. Coursey's objection based on the consulting expert privilege, this Court ordered "[a]ny documents or communications that are being sought by Plaintiffs in Requests 4 and 5 that are being withheld based upon the consulting expert privilege shall be disclosed within 14 days." *Id.*

Dr. Coursey has now made two productions to Plaintiffs, the first on February 23, 2011 and the second on May 4, 2011. Included within those productions are all requested materials dated prior to Dr. Coursey's retention date and copies of detailed billing statements. See ICR001712, ICR003933, ICR002088, ICR001020, ICR002337, ICR001058, ICR002774, ICR001383, ICR003475 and ICR003562.

On May 13, 2011, Syngenta served a subpoena for deposition for purposes of copying records on Dr. Frank Ackerman and on May 18, 2011, Syngenta served a subpoena for the production of business records on Dr. Paul Rosenfeld. By letter dated May 31, 2011, counsel for Plaintiffs informed counsel for Syngenta that both Dr. Ackerman and Dr. Rosenfeld had been retained as litigation consultants and requested that the scope of the subpoenas be limited. See Letter dated May 31, 2011, attached as Exhibit H and incorporated by reference.

On June 1, 2011, counsel for Syngenta agreed to limit the scope of the subpoenas to “the same information you have sought and received regarding Dr. Don Coursey.” *See* Letter dated June 1, 2011, attached as Exhibit I and incorporated by reference. Counsel for Syngenta outlined the requested materials as, “Copies of contracts, correspondence, e-mails, or other documentation regarding the dates of his retention...Copies of any and all correspondence or exchanges with Plaintiffs’ counsel or any of the putative class members in either of the above cases prior to the date of retention; Any and all documents that precede the date of retention which relate to either the HSSD or Greenville litigation, atrazine, any of his work related to atrazine, Syngenta or either of the lawsuits, anything relied upon or considered by him with respect thereto; Copies of his billings for any work done by him for Plaintiffs’ counsel in either case or on behalf of Plaintiffs; Any and all documents, including, but not limited to, ‘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 [Plaintiffs] prepare for trial’ (9/22/10 Order, p. 4), any and all ‘studies that led to published work’ (Id. at p.5), as well as all documents, data, studies, articles, papers or other sources relied upon, considered or related to said documents; All documents or other information requested in the document rider attached to his subpoena; and, All documents that post-date retention should go on a privilege log (pursuant to the Court’s Order of September 22, 2010) with appropriate privileges or grounds for withholding production stated in compliance with Rule 201(n).” *Id.*

In response, counsel for Plaintiffs claimed that “Plaintiffs have never received documentation regarding the tasks that Dr. Coursey was asked to perform as a litigation consultant, nor have Plaintiffs received copies of his billings for any work done in his role as a litigation consultant.” *See* Letter dated June 1, 2011, attached as Exhibit J and incorporated by

reference. Further, Plaintiffs asserted that the “additional documents that you request in your letter do not conform with Illinois Supreme Court Rule 214.” *Id.*

### **ARGUMENT**

1. **Pursuant to Illinois Supreme Court Rule 201(b)(3), Rule 201(n) and prior Orders entered by this Court, Dr. Frank Ackerman and Dr. Paul Rosenfeld are required to produce all requested materials and provide a privilege log for any materials withheld.**

Illinois Supreme Court Rule 201(b)(3) provides: “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.” Therefore, a litigation consultant, as this Court has previously outlined in its September 22, 2010 Order, may only withhold from discovery those materials specifically created in the role of helping a litigant prepare for trial. Any materials produced prior to the consultant’s engagement as a litigation consultant and any materials that led to published work or to remarks made at public forums are not subject to the privilege and must be disclosed.

Pursuant to Illinois Supreme Court Rule 201(n), when 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 of the nature of the documents, communications or things not produced or disclosed and the exact privilege which is being claimed. Therefore, the proponent of a litigation consultant privilege, a privilege created by statute, must provide a privilege log for any materials withheld from production due to a claimed litigation consultant privilege.

In this case, Syngenta is not seeking any materials from Dr. Ackerman or Dr. Rosenfeld that are protected from production under Illinois law. Clearly, under Rule 201(b)(3) and this Court's prior orders, the litigation consultant privilege protects only the work product and opinions of the consultant that are developed solely for the purposes of assisting litigation. Syngenta has expressly agreed that materials in Dr. Rosenfeld's and Dr. Ackerman's possession that deals exclusively with their roles as consultants "are not discoverable at this point." *See* Exhibit I. Further, Syngenta is not seeking any materials from either of Plaintiffs' litigation consultants in excess of those which Plaintiffs have sought and received from Syngenta's litigation consultants.

As shown above, Plaintiffs made repeated requests for information related to the retention date of Dr. Coursey. *See* Exhibits D, E and F. Counsel for Plaintiffs described these requests as "routine." *See* Exhibit E. Syngenta seeks only the production of these same "routine" materials from Dr. Ackerman and Dr. Rosenfeld. Plaintiffs may assert that their requests regarding information related to the retention date of Dr. Coursey were the result of an amending of the date of retention of Dr. Coursey. However, any such attempts to divert this Court's attention from the issue of Dr. Ackerman and Dr. Rosenfeld's retention date should be ignored. The precise reasons for Plaintiffs' requests for information related to Dr. Coursey's retention date are not germane, as Plaintiffs' themselves have described such requests as "routine" and their attempts to re-characterize an identical request should be seen for what it is, an inconsistent stand taken solely for the purpose of conflating an otherwise "routine" request into a matter that absorbs this Court's precious time.

Further, Plaintiffs have received detailed billing statements regarding the activities of Dr. Coursey in his role as a consulting expert for Syngenta. *See* ICR001712, ICR003933,

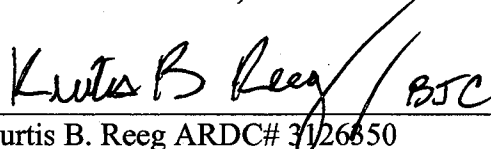
ICR002088, ICR001020, ICR002337, ICR001058, ICR002774, ICR001383, ICR003475 and ICR003562. Again, Syngenta merely requests this same information, which this Court has previously deemed discoverable from another consulting expert in this same matter. Plaintiffs' attempts to withhold this material through their Motion for Protective Order are nothing more than gamesmanship and accordingly, should be given no weight by this Court.

WHEREFORE, based on the foregoing reasons, Defendant Syngenta Crop Protection, LLC, respectfully requests that this Court deny in full Plaintiff's Motion for a Protective Order, enter an Order requiring Dr. Paul Rosenfeld and Dr. Frank Ackerman to produce all relevant, discoverable and responsive materials and to produce a privilege log for all materials withheld on a statutory or common law privilege and grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

**REEG LAWYERS, LLC**

By:

  
Kurtis B. Reeg ARDC# 3126550  
1 N. Brentwood Blvd.  
Suite 950  
St. Louis, Missouri 63105  
Telephone: (314) 446-3350  
Facsimile: (314) 446-3360  
[kreeg@reeglawfirm.com](mailto: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 22<sup>th</sup> 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 7<sup>th</sup> Street, Suite 3600  
St. Louis, MO 63101

**Attorneys for Plaintiffs**

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

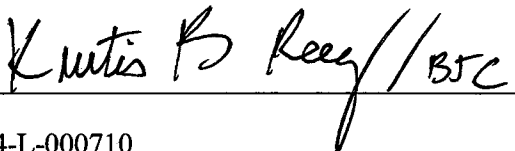
Robert H. Shultz, Jr.  
Heyl, Royster, Voelker & Allen  
105 W. Vandalia Street, Suite 100  
Edwardsville, Illinois 62025  
(618) 656-4646

Anne G. Kimball  
WILDMAN, HARROLD, ALLEN & DIXON LLP  
225 West Wacker Drive, Suite 3000  
Chicago, IL 60606  
(312) 201-2000

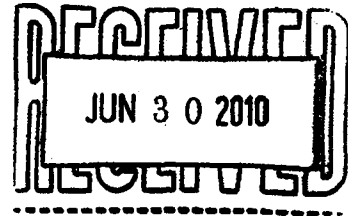
**Attorneys for Defendant Growmark, Inc.**

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

**Attorneys for Plaintiffs**

  
Kurtis B. Reay/BSC





SUBPOENA DUCES TECUM

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

STATE OF ILLINOIS, )  
 )ss.  
COUNTY OF MADISON )

THE PEOPLE OF THE STATE OF ILLINOIS  
to the Sheriff of said County--GREETING

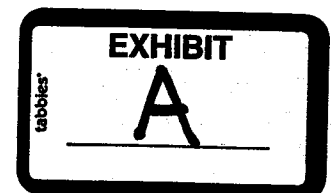
WE COMMAND YOU TO SUMMON Don Coursey, Ameritech Professor of Public Policy Studies, University of Chicago, The Harris School, 1155 E. 60<sup>th</sup> Street, Suite 175, Chicago, IL 60637 if s/he shall be found in your County, personally to be and appear on the 16th day of July, A.D. 2010 before a notary public, Korein Tillery, LLC, 205 North Michigan Avenue, Suite 1940, Chicago, Illinois 60601 and to bring with him/her and produce at the time and place aforesaid, to be used as evidence true and complete copies of any and all documents and tangible things sought in ATTACHED EXHIBIT A, then and there to testify, and the truth to speak, concerning all and singular those things of which s/he may have knowledge, or the said instrument of writing doth import of, and concerning certain suit now pending and undetermined in the said Third Judicial Circuit, Madison County, Illinois Court wherein HOLIDAY SHORES SANITARY DISTRICT, individually and on behalf of all others similarly situated, are Plaintiffs and SYNGENTA CROP PROTECTION, INC., and GROWMARK, INC. are Defendants, in the plea of Plaintiffs on the part of the said Third Judicial Circuit Court and this s/he shall in nowise omit, under penalty of what the law directs; and have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.



WITNES: [Signature]  
Clerk of our Said Third Judicial Circuit  
Court, and the Seal thereof.

At Edwardsville this 28 day of  
June, AD 2010.

[Signature] Clerk



**EXHIBIT "A"**  
**INSTRUCTIONS AND DEFINITIONS**

**Request.** Pursuant to Supreme Court Rule 204(a)(4), Don Coursey is requested to produce the documents specified in this Exhibit "A" that are in the possession or control of Don Coursey.

**Responsibility for production of documents.** This request for documents is addressed to Don Coursey, University of Chicago, Professor of Public Policy Studies. For purposes of document production, documents in the possession of The Don Coursey's agents, employees, attorneys, experts, and consultants are considered to be in the control of Don Coursey and shall be produced. If the requested documents are known by Don Coursey to exist, but are not in the possession or control of Don Coursey, Don Coursey shall produce documents or information calculated to lead to the discovery of the whereabouts of the requested documents.

**"Document" defined.** "Document" is to be interpreted broadly to include, but not be limited to, writings, records, files, correspondence, reports, memoranda, calendars, diaries, minutes, notes, research material, electronic messages, voicemail, e-mail, telephone message records or logs, computer and network activity logs, hard drives, backup data, removable computer storage media such as USB devices, hard drives, CD/DVD media, and memory storage devices, Web pages, databases, presentations, spreadsheets, software, books, ledgers and journals, orders, invoices, bills, drawings, images, photographs, video, and digital recordings. Information that serves to identify, locate, or link such material, such as file inventories, file folders, indices, and metadata, is also included in this definition.

**"Syngenta" defined.** "Syngenta" means Syngenta Crop Protection, Inc. and any of its merged, consolidated, or acquired predecessors, divisions, subdivisions, foreign subsidiaries, foreign subsidiaries of predecessors, domestic or foreign corporate parents, and/or affiliates including, but not limited to J.R. Geigy Limited, Ciba Crop Protection, Zeneca Agrochemicals, Ciba-Geigy Limited, and Novartis Agribusiness. This definition includes present or former officers, directors, agents, representatives, employees, and all other persons acting or purporting to act on behalf of Syngenta Crop Protection, Inc., or its predecessors, subsidiaries, and/or affiliates. "Predecessors" means any business firm, whether or not incorporated, which had all or some of its assets purchased or acquired by Syngenta Crop Protection, Inc., whether by merger, consolidation, or otherwise. "Subsidiaries"

further means any business firm, whether or not incorporated, which is or was in any way owned or controlled, in whole or in part, by Syngenta Crop Protection, Inc., or its predecessors. Representative means any partner, agent, employee, consultant, attorney, accountant, or anyone else acting or purporting to act for, at the direction of, or on behalf of another.

**"Atrazine" defined.** "Atrazine" should be understood to mean Atrazine, Atrazine-containing products, and any of their degradants. Degradants should be understood to refer to any of the chemicals into which Atrazine or Atrazine-containing products breaks down. Degradants include, but are not limited to, chlorotriazines and hydroxyl triazines. Chlorotriazines include, but are not limited to, deethylAtrazine, deisopropylAtrazine and diaminoAtrazine. Hydroxyl triazine breakdown products, include, but not limited to, ammeline, ammelide, cyanuric acid, hydroxyAtrazine, hydroxydeisopropylAtrazine, and hydroxydeethylAtrazine. Degradants also include, but are not limited to, chemical compounds formed from reactions between Atrazine and chemicals commonly found in water resources, such as N-nitrosoAtrazine. Degradants also include any other compounds formed by the transformation of Atrazine by chemical, photochemical, or biological reactions.

## **EXHIBIT "A"**

1. All correspondence to and from Don Coursey concerning Syngenta and/or Atrazine.
2. All emails to, from, copying, or blind copying Don Coursey concerning Syngenta and/or Atrazine.
3. All internal memoranda and notes concerning Syngenta and/or Atrazine.
4. All studies relating to Atrazine conducted, authorized, sponsored, or supervised by Don Coursey.
5. Any raw data of the Atrazine studies identified in Request No. 4.
6. All notes, reports, analyses, or other documents relating to the Atrazine studies identified in Request No. 4.
7. Any source information or other documents relied upon by Don Coursey in the studies identified in Request No. 4.
8. Any surveys received from growers and/or farmers regarding their Atrazine or Atrazine containing product use on land in Illinois.
9. All reports, articles, or other documents written by Don Coursey concerning Atrazine or Syngenta.
10. Any source information or other documents relied upon by Don Coursey in the documents identified Request No. 9.
11. All documents related to presentations made by Don Coursey concerning Atrazine or Syngenta.
12. All documents related to persons present at any presentation made by Don Coursey concerning Atrazine or Syngenta.
13. Any documents evidencing monetary contributions or compensation made to Don Coursey by Syngenta.

14. Any documents relating training offered to Don Coursey by Syngenta.
15. All phone logs, notes, or other documents reflecting phone conversations between Don Coursey and Syngenta or concerning Atrazine.
16. All calendar entries reflecting meetings with Syngenta concerning Atrazine.
17. All documents related to the Triazine Network, The Kansas Corn Growers Association, The Kansas Grain Sorghum Producers Association, and Crop Life America.

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

HOLIDAY SHORES SANITARY DISTRICT, )  
individually and on behalf of all others )  
similarly situated, )  
)

Plaintiff, )

Cause No. 04-L-710

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

Defendants. )

**NOTICE OF EVIDENTIARY DEPOSITION  
DUCES TECUM**

<u>Date</u>	<u>Time</u>	<u>Deponent</u>	<u>Location</u>
7/16/10	10:00 a.m.	Don Coursey	Korein Tillery, LLC 205 N. Michigan Plaza Suite 1950 Chicago, IL 60601 Phone: 312-641-9750 Fax: 312-641-9751

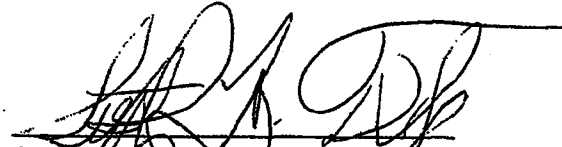
Pursuant to Illinois Supreme Court Rule 206(a)(1), please produce Don Coursey to testify on information about Syngenta and Atrazine, as defined in Exhibit A, including but not limited to the topics referenced in paragraphs 1 through 17 in Exhibit A attached to the accompanying Subpoena Duces Tecum.

**Your appearance will be excused, and no deposition will be taken should Don Coursey comply with the attached Subpoena Duces Tecum by delivering copies of the items to be produced in Exhibit A to the attorney whose name appears on this Notice of Evidentiary Deposition Duces Tecum on or before July 12, 2010.**

You may condition the preparation of the copies upon the payment in advance of the reasonable cost of preparation.

You are subpoenaed to appear by the Circuit Court for the Judicial Circuit of Illinois, Madison County, Edwardsville, Illinois, and unless excused from this Subpoena by this attorney or the Court, you shall respond to this subpoena as directed.

**KOREIN TILLERY, LLC.**



STEPHEN M. TILLERY # 2834995  
CHRISTINE J. MOODY # 6211904  
STEPHEN SWEDLOW # 6234550  
CHRISTIE R. DEATON # 6276456  
505 North 7th Street, Suite 3600  
St. Louis, MO 63101  
Phone: 314.241.4844  
Fax: 314.241.3525

**BARON & BUDD, PC**

SCOTT SUMMY, *pro hac vice*  
CARLA BURKE, *pro hac vice*  
CELESTE EVANGELISTI, *pro hac vice*  
CARY MCDUGAL, *pro hac vice*  
3102 Oak Lawn Avenue, Suite 1100  
Dallas, TX 75129-3605  
Phone: 214.521.3605  
Fax: 214.520.1181

***Attorneys for the Plaintiffs***

IN THE CIRCUIT COURT  
THIRD JUDICIAL CIRCUIT  
MADISON COUNTY, ILLINOIS

HOLIDAY SHORES SANITARY DISTRICT, )  
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS )  
SIMILARLY SITUATED, )

Plaintiff, )

Cause No. 04-L-710

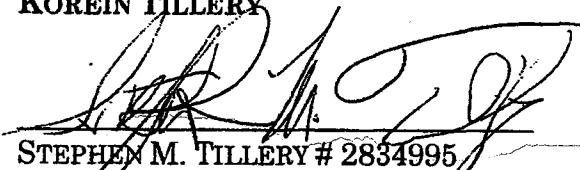
SYNGENTA CROP PROTECTION, INC., )  
and GROWMARK, INC., )

Defendants. )

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true copy of Notice of Evidentiary Deposition was served upon the attorneys of record for the defendants in this cause by enclosing said copy in an envelope addressed to said attorney at his/her address as disclosed by the pleadings on file in this cause, Certified Mail, and by depositing said envelope in a U.S. Post Office mailbox at 5:00 p.m. on this 29<sup>th</sup> day of June, 2010.

KOREIN TILLERY

  
STEPHEN M. TILLERY # 2834995  
505 North 7th Street, Suite 3600  
St. Louis, MO 63101  
Telephone: 314/241-4844  
Facsimile: 314/241-3525

*Attorneys for the Plaintiffs*

cc:

Robert H. Shultz, Jr.  
HEYL, ROYSTER, VOELKER & ALLEN  
Mark Twain Plaza II, Suite 100  
105 West Vandalia Street  
Edwardsville, IL 62025



[rshultz@heylroyster.com](mailto:rshultz@heylroyster.com)

Anne G. Kimball  
WILDMAN HARROLD ALLEN & DIXON, LLP  
225 West Wacker Drive, Suite 2800  
Chicago, IL 60606  
[Kimball@wildman.com](mailto:Kimball@wildman.com)

Kurtis B. Reeg  
Hollie R. Birkholz  
REEG LAWYERS, LLC  
1 North Brentwood, Suite 950  
St. Louis, MO 63105  
[kreeg@reeglawfirm.com](mailto:kreeg@reeglawfirm.com)

Mark C. Surprenant  
ADAMS & REESE  
4500 One Shell Square  
New Orleans, LA 70139  
[Mark.suprenant@arlaw.com](mailto:Mark.suprenant@arlaw.com)

Michael A. Pope  
Christopher M. Murphy  
Todd R. Wiener  
Jocelyn D. Francoeur  
McDERMOTT WILL & EMERY LLP  
227 West Monroe Street  
Chicago, IL 60606  
[mpope@mwe.com](mailto:mpope@mwe.com)  
[cmurphy@mwe.com](mailto:cmurphy@mwe.com)  
[twiener@mwe.com](mailto:twiener@mwe.com)  
[jfrancoeur@mwe.com](mailto:jfrancoeur@mwe.com)

**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. )  
SYNGENTA CROP PROTECTION, INC., and )  
GROWMARK, INC., )  
Defendants. )

Case No. 2004-L-000710

**DEFENDANT SYNGENTA CROP PROTECTION, INC.'S SUPPLEMENTAL BRIEF IN  
SUPPORT OF ITS EMERGENCY COMBINED MOTION TO QUASH, MOTION FOR  
ENTRY OF PROTECTIVE ORDER AND/OR MOTION FOR STAY OF DISCOVERY**

In an Order dated October 26, 2009, this Court granted in part Defendant Syngenta Crop Protection, Inc.'s motion for a protective order seeking to bar Plaintiffs from taking discovery of Syngenta's participation in various trade association activities which were protected by the First Amendment. (Exhibit A, p. 3). The Court ordered Syngenta to produce only the names of industry groups of which it is a member and the identity of any of its lobbyists.

When Plaintiffs later sought the same privileged information from the non-party trade associations (as well as from The Heartland Institute, which is an educational organization, not a trade association) that it had been barred from obtaining from Syngenta, many of those non-parties moved to quash the subpoenas and Syngenta filed its Emergency Combined Motion to Quash, Motion for Entry of Protective Order and/or Motion for Stay of Discovery on Third Parties ("Emergency Motion to Quash"). During the July 19, 2010 hearing on the Emergency Motion to Quash, Plaintiffs argued vehemently that this Court should order the full disclosure of the subpoenaed documents because Magistrate Judge O'Hara's decision in *In re Motor Fuel Temperature Sales Practices Litigation* ("In re Motor Fuels"), 2009 WL 1504744 (D. Kan. May



28, 2009), which Syngenta relied upon in its motion for a protective order, had subsequently been reversed by the District Court Judge, Judge Vratil. *In re Motor Fuels*, 2010 WL 786583 (D. Kan. March 26, 2010).<sup>1</sup> Plaintiffs' counsel explained that he had intimate knowledge of the proceedings before Judge Vratil because he serves as co-counsel for the plaintiffs in that case. At the time of that impassioned argument, however, HSSD failed to inform this Court that Judge Vratil's ruling had already been stayed by both the magistrate judge (Exhibit B) and the United States Court of Appeals for the Tenth Circuit (Exhibit C) while the matter is on appeal to the Tenth Circuit. Plaintiffs also failed to advise the Court that many of the documents they were using to support their arguments had been inadvertently produced by Syngenta and that Syngenta had previously written a "clawback" letter to Plaintiffs' counsel requesting the return of those documents and objecting to any future use of the documents in this litigation. As discussed below, this Court should grant Syngenta's Emergency Motion to Quash. Plaintiffs can file a motion for reconsideration if and when the Tenth Circuit affirms Judge Vratil's ruling in the *In re Motor Fuels* case.<sup>2</sup>

### **BACKGROUND**

On May 22, 2009, Plaintiffs served broad discovery on Syngenta seeking documents and information relating to Syngenta's participation in various trade associations, industry advocacy groups and educational organizations, as well as communications among those associations and groups and their lobbying efforts, if any. On June 18, 2009, Syngenta filed a Motion for Protective Order on the grounds that the information was protected from disclosure by the First Amendment. The matter was heard on August 31, 2009. In this Court's Order dated October 26,

---

<sup>1</sup> Syngenta brought Judge Vratil's reversal of the magistrate judge's decision to the attention of this Court prior to the July 19 hearing in its Supplemental Authority Regarding Its Objection and Emergency Motion.

<sup>2</sup> The appeal was expedited and briefing was completed by July 15, 2010.

2009, the Court granted in part Syngenta's Motion for Protective Order. (Exhibit A, p. 3). The Court ordered Syngenta to produce only the names of industry groups of which it is a member and the identity of any of its lobbyists. (*Id.*)

Accordingly, Syngenta supplemented its discovery responses to provide these two additional pieces of information. (Exhibit D at pp. 24-27 (Answer to Interrogatory No. 5) and pp. 34-36 (Answer to Interrogatory No. 10)). In both responses, Syngenta specifically stated: "The Court's Order of October 26, 2009, ruled that Syngenta must only disclose trade associations of which it is a member and the identity of its lobbyists." Plaintiffs did not raise any objection with Syngenta's interpretation of the Court's Order.

On June 29, 2010, Plaintiffs served on Syngenta copies of subpoenas *duces tecum* and corresponding Notices of Evidentiary Depositions of the Corporate Representatives of several non-party trade associations, industry advocacy groups and educational organizations. These non-parties included the Illinois Fertilizer & Chemical Association, the Chemical Industry Council of Illinois, The Heartland Institute, the Illinois Farm Bureau, and the Illinois Corn Growers Association (the "Associations"). The documents sought from the Associations were similar to the documents sought from Syngenta that were the subject of Syngenta's Motion for Protective Order, which was granted in part by the Court's Order dated October 26, 2009.

On July 12, 2010, Syngenta filed its Emergency Motion to Quash. Syngenta objected to, *inter alia*, Plaintiffs' attempt to do an end-run around this Court's Order dated October 26, 2009 by seeking discovery from non-parties that it could not obtain directly from Syngenta.

The Court conducted a hearing on Syngenta's Emergency Motion to Quash on July 19, 2010. Plaintiffs argued that Syngenta's citation to Magistrate Judge O'Hara's decision in *In re Motor Fuels* was misplaced because the District Court had reversed the magistrate's ruling that a

"presumptive" privilege applies to internal trade association communications and held that the defendants failed to establish a *prima facie* showing that the documents were protected by the First Amendment. Syngenta argued that the Magistrate Judge's ruling had been reversed only in part, and Syngenta and the non-party witnesses requested and were granted leave to submit supplemental briefs by August 9, 2010.<sup>3</sup>

## ARGUMENT

### **I. COMPELLING PRODUCTION OF DOCUMENTS IN RESPONSE TO THE ASSOCIATION SUBPOENAS WOULD INFRINGE SYNGENTA'S FIRST AMENDMENT RIGHTS.**

#### **A. The First Amendment Protects the Right to Pursue Associational Activities with Privacy.**

In relevant parts, the First Amendment provides: "Congress shall make no law...prohibiting...or abridging...the right of the people peaceably to assemble and to petition the Government for a redress of grievances." U.S. Const. amend. I. The Freedom of Association is deeply embedded in the First Amendment. *See, e.g., NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association ...."); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1159 (9th Cir. 2010) (same) (quoting *NAACP*); *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) ("Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas ....") This right of association is a critical part of the First Amendment because it facilitates the other First Amendment rights, including political and other speech. As the Supreme Court explained,

---

<sup>3</sup> Plaintiffs do not dispute that Syngenta has standing to object to the subpoenas. *See, e.g., Minnesota School Bd. Ass'n Ins. Trust v. Employers Ins. Co. of Wausau*, 183 F.R.D. 627, 629 (N.D. Ill. 1999) (a party has standing to object to a subpoena directed at a non-party, via a motion to quash, when the party claims a "personal right or privilege" regarding the documents sought).

“the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

Further, the Supreme Court has recognized that the right to privacy is a “vital” part of the Freedom of Association. *NAACP*, 357 U.S. at 462. Therefore, the First Amendment creates a *privilege* against disclosure of an association’s confidential documents. *See Buckley*, 424 U.S. at 64 (“[C]ompelled disclosure, in itself, can seriously infringe on privacy of association ....”).

**B. Courts Apply a Two-Step Analysis When Determining Whether a Party’s First Amendment Privilege Prohibits Production Pursuant to A Discovery Request.**

To enforce this privacy interest, some courts apply a “burden-shifting” framework. First, the party asserting the privilege must make a *prima facie* showing that the privilege applies. *See Perry*, 591 F.3d at 1160. The burden then shifts to the party seeking disclosure to demonstrate a compelling need for the information. *Id.* at 1160. Finally, these courts apply a balancing test to determine whether disclosure is justified. *Id.* at 1161.

At times, however, the Supreme Court has presumed that a request for information can implicate the First Amendment based on the face of the request itself:

*The substantiality of appellant’s First Amendment claim can best be seen by considering what he was asked to do.... The Attorney General further sought to have him disclose information relating to his political associations of an earlier day, the meetings he attended, and the views expressed and ideas advocated at any such gatherings.*

*DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825, 828 (1966) (emphasis added); *see also Wyoming v. USDA*, 239 F. Supp. 2d 1219, 1237 (D. Wyo. 2002), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005) (“[I]f a discovery request seeks disclosure of internal associational activity, federal courts assume, sometimes implicitly, that the party seeking protection has made

his *prima facie* showing ....") (emphasis added) (citing *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987)).

Citing *DeGregory*, many courts have held that discovery seeking information about "past political activities ... will not be allowed." *Int'l Action Ctr. v. United States*, 207 F.R.D. 1, 3 (D.D.C. 2002). According to *Wyoming*, "[f]ederal courts have consistently held that disclosure of internal associational activities (*i.e.*, membership lists, volunteer lists, financial contributor lists, and past political activities of members) satisfy this *prima facie* showing ...." 239 F. Supp. 2d at 1237 (emphasis added) (citing *NAACP*); *see also Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 2007 WL 852521, at \*5 (D. Kan. Mar. 16, 2007) (quoting *Wyoming*).<sup>4</sup>

This presumption does not distort the First Amendment analysis, because it is not a "conclusive presumption." Rather, the presumption merely requires the District Court to reach the *merits* of the First Amendment claim—by applying the balancing test. Thus, the presumption that Syngenta seeks is merely that it meets the *prima facie* test.<sup>5</sup>

**1. Syngenta Has Established a *Prima Facie* Showing of "Arguable First Amendment Infringement."**

---

<sup>4</sup> Many other courts have applied a presumption of privilege to communications like those at issue here. *See Heartland*, 2007 WL 852521, at \*5; *Wyoming*, 208 F.R.D. at 451-52, 454-55; *Austl./E. U.S.E. Shipping Conf. v. United States*, 537 F. Supp. 807, 810-12 (D.D.C. 1982) ("some harm to first amendment values ... can be presumed"), *vacated as moot*, 1986 WL 1165605 (D.C. Cir. Aug. 27, 1986); *see also Britt v. Superior Court of San Diego*, 574 P.2d 766, 772-73 (Cal. 1978) (based on review of discovery requests alone, court found that compelled disclosure of political activities would be "likely to pose a substantial restraint upon the exercise of First Amendment rights," and such activities "are presumptively immune from inquisition") (citations omitted); *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 21 P.3d 1157, 1163-64 (Wash. Ct. App. 2001) (citizens' groups "presented no specific evidence" of probable First Amendment infringement, but court applied "commonsense approach," concluding that disclosure of meeting minutes, newsletters, membership and financial information, and correspondence among citizens' groups fits within "class of cases where we can assume a potential chilling effect.").

<sup>5</sup> In fact, the term "*prima facie*" means: "At first sight, on first appearance but subject to further evidence or information; sufficient to establish a fact or raise a presumption unless disproved or rebutted." BLACK'S LAW DICTIONARY 1310 (9th ed. 2009).

A party asserting the First Amendment privilege can make a “a *prima facie* showing of arguable [F]irst [A]mendment infringement” by “demonstrating consequences which objectively suggest an impact on, or ‘chilling’ of ... associational rights.” *Perry*, 591 F.3d at 1163.

In *Heartland*, *supra*, the court acknowledged the general principle that an “attempt to require production of [a trade organization’s] ‘evaluations of possible legislation and legislative strategy’ is the type of action that would appear to interfere with [the organization’s] internal organization and with lobbying activities and would therefore have a ‘chilling effect’ on the organization and its members.” *Heartland*, 2007 WL 852521, at \*4. Thus, the court in *Heartland* presumed a *prima facie* showing of arguable infringement.

Similarly, in *In re Motor Fuels*, *supra*, Magistrate O’Hara cited *Heartland* in concluding that the court could presume a *prima facie* case. “Courts have applied a presumption of privilege to information that goes to the core of a group’s associational activities, finding that disclosure of such information would very likely chill freedom of association. . . . As in *Heartland I*, the trade associations’ internal communications and evaluations about advocacy of their members’ positions on contested political issues, as well as their actual lobbying on such issues, would appear to be a type of political or economic association that would be protected by the First Amendment privilege.” *In re Motor Fuels*, 2009 WL 1504744, at \*3-4 (D. Kan. May 28, 2009).

In the present case, Plaintiffs seek, among other things, discovery of the same core associational activities sought in *Heartland* and *In re Motor Fuels*. Accordingly, this Court should presume that Syngenta has established its *prima facie* case of infringement.

If this Court does not apply the presumption in favor of Syngenta, Syngenta has still satisfied its *prima facie* case by the submission of the declaration attached here as Exhibit E and incorporating by reference the affidavits filed simultaneously herewith by the Illinois Fertilizer &



Chemical Association, the Chemical Industry Council of Illinois, The Heartland Institute and the Illinois Farm Bureau. In *Perry, supra*, the plaintiffs challenged the constitutionality of a ballot-initiative which amended the California Constitution to ban same-sex marriage. 591 F.3d at 1152. During discovery, the plaintiffs sought materials from third-party proponents of the ballot initiative ("Proponents"), which included the Proponents' internal campaign communications relating to campaign strategy and advertising. *Id.* The Ninth Circuit held that the Proponents "made a *prima facie* showing of arguable [F]irst [A]mendment infringement" by presenting affidavits of several individuals who attested to "the impact compelled disclosure would have on participation and formulation of strategy." *Id.* at 1163. The court held that the affidavits "creat[ed] a reasonable inference that disclosure would have the practical effects of discouraging political association and inhibiting internal campaign communications that are essential to effective association and expression." *Id.* (citing *Dole v. Serv. Employees Union, AFL-CIO, Local 280*, 950 F.2d 1456, 1459-61 (9th Cir. 1991) (holding that the union satisfied its *prima facie* burden by submitting the declarations of two members who said they would no longer participate in union membership meetings if the disclosure of the minutes of the meeting were permitted)).

In the present case, Syngenta has submitted the Declaration of Dennis Kelly, the State Registration and State Government Team Lead of Syngenta Crop Protection, Inc. In addition, the Illinois Fertilizer & Chemical Association, the Chemical Industry Council of Illinois, The Heartland Institute and the Illinois Farm Bureau have submitted Declarations in support of both Syngenta's Emergency Motion to Quash and their own motions to quash (collectively, with the Syngenta affidavit, the "Declarations"). The Kelly Declaration establishes key facts relevant to Syngenta's *prima facie* showing of "arguable First Amendment infringement."

First, the Declaration establishes that disclosure of the documents and information sought from the Associations will undoubtedly deter Syngenta and individual members from participating in the activities of the Associations – especially the Associations’ legislative advocacy activities. (Id. at ¶2-3).

Second, the Declaration establishes that disclosure of the information will have a lasting, detrimental effect on the Associations’ ability to attract and retain members, as well as its ability to solicit financial support. Syngenta employees and potential members will be reluctant to join these organizations for fear that any information they share with the organization could be disseminated publicly in the event any party to a lawsuit requests the information. (Id. at ¶4).

The Kelly Declaration plus those of the third-party recipients of subpoenas in this case simply and collectively are sufficient to “create a reasonable inference that disclosure would have the practical effect of discouraging” the trade and education associations and their members from exercising their First Amendment “freedom of expressive association.” *Wyoming*, 208 F.R.D. at 454. Therefore, Syngenta has established a *prima facie* showing of “arguable First Amendment infringement.”<sup>6</sup>

**2. The Burden Shifts to the Plaintiffs to Demonstrate a Sufficient Need for the Requested Materials.**

“If [the party asserting the privilege] can make the necessary *prima facie* showing, the evidentiary burden will then shift to the [party seeking discovery to] demonstrate that the information sought through the [discovery request] is rationally related to a compelling...interest.” *Perry*, 591 F.3d at 1161. The Court must “balance the burdens imposed

---

<sup>6</sup> Again, Syngenta contends that such affidavits are unnecessary. The affidavits in *Perry* were merely illustrative of “the self-evident conclusion that important First Amendment interests are implicated by the plaintiffs’ discovery request.” *Perry*, 591 F.3d at 1163 (emphasis added.) Contrary to the District Court’s ruling in *In re Motor Fuels*, there is no principled justification for requiring affidavits to state self-evident propositions.

on individuals and associations against the significance of the...interest in disclosure to determine whether the 'interest in disclosure...outweighs the harm.'" *Id.* (citation omitted); see also *In re GlaxoSmithKline*, 732 N.W.2d 257, 270-274 (Minn. 2007) (applying similar two-step analysis). Courts that apply this balancing test consider the following factors: "(1) the relevance of the evidence; (2) the necessity of receiving the information sought; (3) whether the information is available from other sources; and (4) the nature of the information." *Heartland*, 2007 WL 852521, at \*3(citing *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987)); see also *Anderson v. Hale*, No. 00 C 2021, 2001 U.S. Dist. LEXIS 6127, at \*11-12 (N.D. Ill May 10, 2001) (applying a substantially similar "compelling interest/substantial relation inquiry"). Plaintiffs cannot carry their burden.

a. **The Information Sought Does Not Satisfy the Heightened Relevance Standard for Materials Subject to the First Amendment Privilege.**

Where a party invokes the First Amendment privilege, a court must apply a "more demanding heightened relevance standard." *Perry*, 591 F.3d at 1164. Under this "heightened relevance" test, Plaintiffs must "show that the information sought is so relevant that it goes to the 'heart of the matter,'" and that the information is "crucial to the [Plaintiffs'] case." *Anderson*, 2001 U.S. Dist. LEXIS 6127, at \*12, \*24 (holding that where the showing of relevance is so minimal the Court need not even consider the remaining factors); *Grandbouche*, 825 F.2d at 1467 (information sought must be "essential" to a fair resolution of the lawsuit). Thus, in both *Perry* and *Heartland*, the courts held that the plaintiffs failed to carry their burden with respect to the relevance inquiry. *Perry*, 591 F.3d at 1165; *Heartland*, 2007 WL 852521, at \*5-6.

In this case, the documents which the Plaintiffs seek from the non-party trade and education associations are truly tangential. Plaintiffs' claim is that Syngenta's atrazine

trespassed on their properties and that any detectable level of atrazine causes them economic harm in the form of the costs of removing the atrazine. No documents from the Associations regarding their internal communications, or legislative or lobbying activities, on the safety of atrazine or efforts to limit or ban the sale of atrazine are necessary for Plaintiffs to establish the facts for their legal claims in this case. On the contrary, Plaintiffs repeatedly claim that it is irrelevant whether atrazine is safe because any trespass of any detectable level of atrazine causes them economic injury.

**b. The Information Sought is Not Necessary For Plaintiff's Claims.**

In addition to heightened relevancy, the requesting party must demonstrate a "truly compelling need for the information" to outweigh the First Amendment interests. *Heartland*, 2007 WL 852521, at \*6. *See also DeGregory*, 383 U.S. at 829-30. In *In re Motor Fuels*, the District Court held that the plaintiffs established such a compelling need because plaintiffs needed the discovery to "determine what occurred within the trade associations with regard to the alleged conspiracy." *In re Motor Fuels*, 2010 WL 786583, at \*11. There is no civil conspiracy claim in the present case and thus no similarly compelling need for the Associations' documents. In fact, the sole purpose of such discovery appears to be to stifle the free speech of any association that speaks out in support of atrazine.<sup>7</sup>

**c. The Information is Available From Other Sources.**

Plaintiffs have failed to show that some of the information they seek is not available from other publicly available sources. However, even if the Plaintiffs are not able to obtain the

---

<sup>7</sup> Despite Plaintiffs' claim that the subpoenaed deponents are "fact witnesses," it should be clear that they really are simply individuals in organizations which might have written or spoken publicly about the benefits of atrazine. Plaintiffs' true intentions may be to chill public debate on this important national issue, since the fear of being served with a subpoena may give pause to anyone considering exercising his or her right to speak out on this topic.

information from other non-privileged sources, the other factors weigh so heavily in favor of protecting the information that the information is not subject to disclosure. *Heartland*, 2007 WL 852521, at \*7.

**d. The Nature of the Information Plaintiffs Seek is Core Associational Activities.**

Finally, some courts consider the nature of the information sought when weighing the competing interests. *See, e.g., Heartland*, 2007 WL 852521, \*5. In this case, the information sought goes to the core of the Associations' legislative and lobbying activities. The Declarations establish that the information sought is confidential and, if made discoverable, will have a substantial chilling effect on the First Amendment associational rights of Syngenta and the Associations. The nature of this information weighs heavily in favor of non-disclosure.

**C. Plaintiffs' Reliance on *In re Motor Fuels* and *Dukes* Is Misplaced.**

Plaintiffs argued during the hearing on July 19, 2010 that Syngenta's motion should be denied, relying exclusively on Judge Vratil's ruling in *In re Motor Fuels*, 2010 WL 786583 (D. Kan. March 4, 2010), and *Dukes v. Pneumo Abex Corp.*, 386 Ill. App. 3d 425, 900 N.E.2d 1128 (4th Dist. 2008). Plaintiffs' reliance on both of these cases is misplaced.

The District Court's decision in *In re Motor Fuels* is inapposite for several reasons. First, the District Court itself even recognized that the First Amendment would at the very least protect trade association membership lists and financial contribution information. *In re Motor Fuels*, 2010 WL 786583, at \*4. In the present case, Plaintiffs' requests for similar information from the Associations are barred by the very case upon which they rely. *See, e.g.,* Exhibit F, Request No. 13 (seeking "[a]ny documents evidencing monetary contributions or compensation made to [witness] by Syngenta.")

Second, the District Court concluded that the plaintiffs established a compelling need for the information because they asserted a civil conspiracy claim in their complaint. Specifically, defendants allegedly conspired to oppose a temperature-compensated standard for fuel sales through trade associations, who advocated against the adoption of rules permitting the use of automatic temperature compensation ("ATC") equipment, which would measure fuel in temperature-compensated units rather than volumetric units (i.e., gallons). Thus, the plaintiffs could not prove their conspiracy claim without documents relating to the association's internal activities. *In re Motor Fuels*, 2010 WL 786583, at \*10. In the present case, there is no conspiracy claim. No trade and education association is even mentioned in the complaint.

Third, the District Court specifically held that it might not have permitted the discovery if the defendants themselves had not asserted a defense of the impossibility of ATC, which was a subject of the trade association activities. "Indeed, if defendants did not assert a defense that ATC is impossible, impractical or illegal, the Court might decline to order the requested discovery." *Id.* at 11. Syngenta has not raised any defense that invokes the internal activities of the Associations.

Fourth, the District Court reversed Magistrate Judge O'Hara's ruling because it held that Judge O'Hara erred in finding a presumptive privilege. Even if this Court concludes that there is no presumptive privilege for core associational activities, Syngenta has established its *prima facie* case by attaching its own affidavit and incorporating by reference the Declarations from the Associations stating that any compelled disclosure would have a chilling effect on the Associations' core activities.

Fifth, the viability of the District Court's ruling in *In re Motor Fuels* is in question. As noted above, the Tenth Circuit has stayed execution of the District Court's ruling pending a

decision on the appeal. A ruling is expected any day. At the very least, this Court should affirm its prior ruling unless and until the Tenth Circuit affirms the District Court.

As in *In re Motor Fuels*, the court in *Dukes* ruled that plaintiffs had a compelling need for the trade association documents because the plaintiffs alleged a conspiracy claim involving the association. 386 Ill. App. 3d at 442, 900 N.E.2d at 1142. In fact, in *Dukes*, the association itself had already been convicted of a conspiracy to fix prices. 386 Ill. App. 3d at 443, 900 N.E.2d at 1142. No such claim or finding exists in the instant case.

Plaintiffs' two cases represent the viewpoint of a small minority. Compare *NAACP v. Alabama*, 357 U.S. 449 (1958) (documents privileged under First Amendment); *Perry*, 591 F.3d 1147 (same); *Heartland*, 2007 WL 852521 (same); *Wyoming*, 208 F.R.D. 449 (same), *Anderson*, 2001 U.S. Dist. LEXIS 6127 (same); *Int'l Action Center v. U.S.*, 207 F.R.D. 1 (D.D.C. 2002) (same); *Britt v. Superior Court of San Diego*, 574 P.2d 766 (Cal. 1978) (same). The present case is far more akin to *Perry*, in which the court held that the information sought might be relevant, but that plaintiffs failed to establish the "heightened relevance" or "compelling need" to justify the deterrent effect on the internal exchange of ideas and exercise of free speech.

## **II. PERMITTING PLAINTIFFS TO RELY ON INADVERTANTLY PRODUCED DOCUMENTS WOULD CONTRAVENE ORDERS OF THIS COURT AND ILLINOIS LAW.**

In support of its argument in response to Syngenta's Emergency Motion to Quash, Plaintiffs provided this Court and Syngenta with a binder of exhibits partially comprised of numerous documents inadvertently produced by Syngenta. These documents generally relate to Syngenta's privileged and confidential communications with numerous consultants, including various industry lobbyists, trade and/or education associations, and media/communications consultants. See Exhibit F. Plaintiffs have argued that the information conveyed in these

documents entitles them to conduct further discovery into the interactions between Syngenta and the consultants. Namely, Plaintiff claims these documents justify the Third Party Deposition Notices and Subpoenas *Duces Tecum* originally served on the same consultants on June 29 – 30, 2010. See Exhibit G.

However, Plaintiffs' use of these documents in support of its argument ignores both the Orders of this Court governing discovery as well as laws governing the inadvertent production of privileged and work product materials. Essentially, Plaintiffs are attempting to parlay discovery they should not have into further discovery to which they are not entitled.

In the Protective Order entered in this case on August 31, 2009, this Court stated that any inadvertently produced documents subject to a claim of privilege or any other valid basis for protection must be immediately returned upon the request of the producing party. ¶ 13 Protective Order, dated August 31, 2009. The Order further established that in addition to returning such documents themselves, the recipient party must also return any notes or copies made thereof. This "claw back" provision prevents a recipient party from using or otherwise benefiting from erroneously produced documents that may be protected by privilege or work product immunity.

Furthermore, a similar "claw back" provision has even been codified in the Federal Rules of Civil Procedure ("FRCP") to deal with a situation of inadvertent production of protected information. Under FRCP 26(b)(5)(B), when an inadvertently produced document is subject to a claim of privilege or work product immunity, the recipient party must return the document upon being notified of the claim and is prohibited from otherwise using or disclosing that document until the claim is resolved. The duty to return and not otherwise use such a document runs to the recipient party regardless of whether the subject document is ultimately adjudged to be protected



or not. See *Piasa Commercial Interiors, Inc. v. J.P. Murray Co.*, 2010 WL 1241563 (S.D. Ill. March 23, 2010).

In this case, the documents relied upon by Plaintiffs in their binder of exhibits are protected from discovery by the work product doctrine and were inadvertently produced. Under Illinois Supreme Court Rule 201(a)(3), a "consultant" is a person who has been retained or specially employed in anticipation of litigation or in preparation for trial. Various courts have recognized that privilege and work product immunity can extend to communications with consultants hired within the context of ongoing litigation. See *In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994) (finding communications with third party to be privileged where the consultants are the "functional equivalent" of the client's employees). See also *In re Grand Jury Subpoenas*, 265 F.Supp.2d 321 (S.D. N.Y.); *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213 (S.D. N.Y. 2001). Moreover, claims of privilege and other valid bases for protection are typically not waived by an inadvertent production, particularly where a court had previously entered a protective order specifically restricting discovery of such documents. See *Brostron v. Warmann*, 546 N.E.2d 3 (Ill. App. 3 Dist. 1989) (no waiver following inadvertent production of documents where protective order already restricted access to such documents); see also *Dalen v. Ozite Corp.*, 594 N.E.2d 1365, 1371 (Ill. App. 2 Dist. 1992) (noting that courts should balance numerous factors in assessing whether privilege was waived by inadvertent production); *Mendenhall v. Barber-Greene Co.* 531 F. Supp. 951, 954 (N.D. Ill. 1982) (finding mere inadvertent production does not waive privilege).

In June, 2010, Syngenta discovered that numerous documents had been inadvertently and erroneously produced in response to Plaintiffs' Request for Production 56 regarding trade association and lobbyist information (among others). Pursuant to the "claw back" provision of

the Protective Order, Syngenta's counsel, Kurtis B. Reeg, e-mailed and mailed Plaintiffs' counsel a letter immediately after learning of the inadvertent production, detailing the situation and the applicability of the Protective Order thereto. *See* claw back letter, attached as Exhibit H. Plaintiffs never responded to, objected to or otherwise addressed Syngenta's claw back letter. However, upon receipt of said letter, Plaintiffs were under an obligation not to use or disclose in any fashion these documents along with any copies or related notes. Plaintiffs refused to abide by the clear terms of the Protective Order, ignored Syngenta's claw back letter, and instead chose not to respond but to use these documents as the basis for their arguments in opposition to Syngenta's Emergency Motion to Quash.

While they should be denied the benefit of documents that should no longer even be in their possession, Plaintiffs should also be denied the opportunity to rely on such documents because they are subject to valid claims for protection. The disputed documents are those included in Plaintiffs' exhibit binder that relate to Syngenta's correspondence with various education and trade associations and communication and litigation consultants, including The Heartland Institute, the Illinois Fertilizer and Chemical Association, v-Fluence, Jayne Thompson & Associates, and Don Coursey. *See* Exhibit F. As Syngenta confers with or utilizes most of them on an ongoing basis with respect to its communications and other strategies regarding this litigation, the work product and opinions of these consultants would be protected under Rule 201(a)(3). And, based on the explicit mandate of the August 31, 2009, Protective Order, as well as the weight of applicable law, this claimed protection would not have been waived merely by the inadvertent production of these documents to Plaintiffs.

Syngenta additionally points out that its privilege claims with respect to these documents are further supported by Plaintiffs themselves. In their response to Syngenta's Request for

Production No. 34 seeking production of Plaintiff Holiday Shores Sanitary District's communications with third party organizations and lobbyists, including the American Water Works Association, the National Resource Defense Council, the Environmental Working Group and others, Plaintiffs object to the request claiming "it seeks information governed by the work product doctrine or relating to and/or developed by consultants retained by Plaintiff for purposes of litigation." See Plaintiff's Third Amended Objections and Responses to Defendant Syngenta Crop Protection, Inc.'s First Set of Requests for Production on the Class Certification Issues, attached as Exhibit I. This claim for protection appears to be the essentially the same as that which Syngenta is asserting with respect to these disputed documents. Thus, Plaintiffs want to enforce their claim of work product protection as to the communications of their own consultants, but not afford Syngenta the same right. Common sense, fundamental fairness and justice dictate that the Court enforce its prior orders and grant Syngenta's Emergency Motion to Quash.

### **CONCLUSION**

The First Amendment associational privilege ensures that organizations and their members may engage in collective political activity and legislative and lobbying efforts and other activities without undue intrusion into the organization's internal deliberation and disclosure of the associations' confidential communications. Syngenta and the Associations have provided evidence, in the form of affidavits, that the disclosures sought by the Plaintiffs will have a significant and real "chilling effect" on their First Amendment rights. Plaintiffs have failed to offer any compelling reason for disclosure which would outweigh Syngenta's constitutional privilege. Refusing to apply the widely-recognized First Amendment privilege in

this case would effectively silence these organizations and infringe upon their members' First Amendment associational rights.

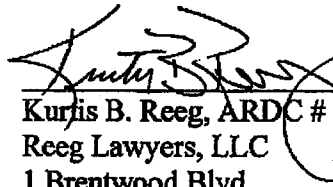
Additionally, this Court has previously barred discovery of the type Plaintiff now wishes to pursue against third parties. Syngenta's inadvertent disclosure of certain documents does not negate those prior rulings. Plaintiff should not be permitted to reject their own litigation position or ignore this Court's prior Protective Order, discovery order, or legitimate claw back demand by Syngenta.

Based on all the foregoing reasons and authorities, Syngenta's motion should be granted.

Dated: August 9, 2010

Respectfully submitted,

**SYNGENTA CROP PROTECTION, INC.**

  
Kurtis B. Reeg, ARDC # 3126350  
Reeg Lawyers, LLC  
1 Brentwood Blvd.  
Suite 950  
St. Louis, Missouri 63105  
Telephone: (314) 446-3351

Mark C. Surprenant  
Adams and Reese LLP  
4500 One Shell Square  
New Orleans, Louisiana 70139  
Telephone: (504) 585-0213

Michael A. Pope  
Christopher M. Murphy  
McDermott Will & Emery LLP  
227 West Monroe Street  
Chicago, Illinois 60606  
Tel: (312) 372-2000

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 9<sup>th</sup> day of August, 2010, I caused to be served the attached United States mail, properly addressed and postage paid, upon the following counsel:

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

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

Ms. Denise Lazar  
Wildman, Harrold, Allen & Dixon LLP  
225 West Wacker Drive, Suite 3000  
Chicago, IL 60606-1229

Attorneys for Plaintiff  
HOLIDAY SHORES SANITARY DISTRICT

Sarah L. Suedkamp

DM\_US 26288031-3.086764.0011

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 25<sup>th</sup>. 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

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, (9<sup>th</sup> 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.

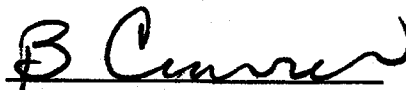
It also has reporters. Whether any items written by a Farm Bureau reporter include information from an unnamed source is not known. Clearly, if an article includes a source by name, plaintiffs will just contact that individual for information. Otherwise, a special showing must be made to get at a reporter's 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.



Judge



## KOREIN TILLERY

*Attorneys at Law*

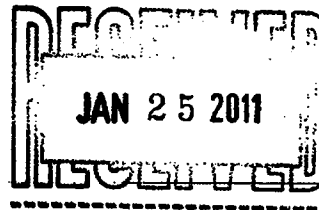
One US Bank Plaza  
505 North 7<sup>th</sup> Street, Suite 3600  
St. Louis, Missouri 63101  
www.koreintillery.com

STEPHEN M. TILLERY

stillery@koreintillery.com

p: 314.241.4844

f: 314.241.3525



SANDOR KOREIN  
STEPHEN M. TILLERY  
STEVEN A. KATZ  
DOUGLAS R. SPRONG  
CHRISTINE J. MOODY  
STEPHEN A. SWEDLOW  
\*GEORGE A. ZELCS  
JOHN W. HOFFMAN  
PETER H. RACHMAN  
AARON M. ZIGLER  
ROBERT L. KING  
\*KLINT L. BRUNO

DIANE MOORE HEITMAN  
CHRISTIE R. DEATON  
JOHN A. LIBRA  
ALEXIS C. TILLERY  
\*MAXIMILIAN C. GIBBONS  
CHRISTOPHER A. HOFFMAN  
\*\*AIDAN M. MCNAMARA  
\*MATTHEW C. DAVIES  
MICHAEL E. KLENOV  
\*\*JOSEPH A. PEREZ-MALTES  
\*\*ROSEMARIE FIORILLO  
JOHN C. CRAIG  
\*\*MICHAEL FORREST  
\*\*JAMIE S. STEINMETZ

\*Not Licensed in Missouri  
\*\*Not Licensed in Illinois

January 24, 2011

*via Email and regular mail*

Mr. Kurtis B. Reeg  
REEG LAWYERS, LLC  
1 North Brentwood, Suite 950  
St. Louis, MO 63105

Mr. C. Raymond Bell  
Foley & Mansfield  
1001 Highlands Plaza Drive West, Suite 400  
St. Louis, MO 63110

Re: *Holiday Shores Sanitary District, et al. v. Syngenta Crop Protection, Inc., et al. - Madison County Cause No. 04-L-710*

Dear Messrs. Reeg and Bell:

We are in receipt of Dr. Don Coursey's Motion to Modify the Court's September 22, 2010 Order, wherein you seek to modify Dr. Coursey's retention date from June 2006 to February 14, 2006 by Defendant Syngenta Crop Protection, Inc.

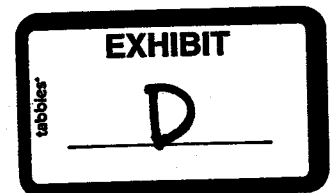
In order to allow us to properly respond, please forward a copy of Dr. Coursey's retention letter reflecting his date of retention or any writings that document his date of retention.

Sincerely,

STEPHEN M. TILLERY

SMT:cam

cc: Mr. Michael Pope  
Mr. Jason K. Winslow



205 North Michigan, Suite 1950  
Chicago, Illinois 60601-4269  
Tel: 312.641.9750 Fax: 312.641.9751



# KOREIN TILLERY

*Attorneys at Law*

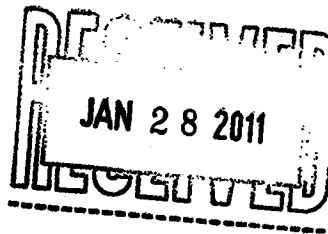
One US Bank Plaza  
505 North 7th Street, Suite 3600  
St. Louis, Missouri 63101  
www.koreintillery.com

STEPHEN M. TILLERY

stillery@koreintillery.com

p: 314.241.4844

f: 314.241.3525



January 27, 2011

*Via Email and regular mail*

Mr. Kurtis B. Reeg  
REEG LAWYERS, LLC  
1 North Brentwood, Suite 950  
St. Louis, MO 63105

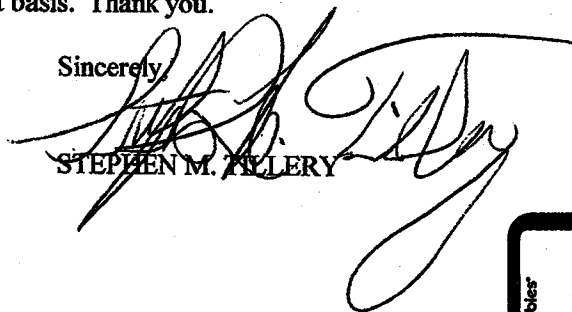
Mr. C. Raymond Bell  
Foley & Mansfield  
1001 Highlands Plaza Drive West, Suite 400  
St. Louis, MO 63110

Re: *Holiday Shores Sanitary District, et al. v. Syngenta Crop Protection, Inc., et al. – Madison County Cause No. 04-L-710*

Counsel:

On January 24, 2011 I wrote you asking that you to produce any letter or other writings documenting Dr. Coursey's retention as a consulting expert for Syngenta Crop Protection, Inc. Such a letter is routinely requested by the courts to verify a consultant's retention when a factual challenge is made to a claim of consultant privilege. Plaintiffs dispute his role as a consultant. Now that Dr. Coursey has filed papers with the court seeking to modify the Court's Order based upon an earlier retention date, documents verifying his retention are even more important. Such documents might obviate our issues regarding communications between Syngenta and Dr. Coursey and may materially advance this litigation. As a result, once more I ask that you forward documents verifying both his role and the exact date of Dr. Coursey's retention as a consulting expert. If no such document exists, I ask you, as Officers of the Court, to withdraw any claim that Dr. Coursey is a consulting expert and immediately turn over all documents which are being withheld on that basis. Thank you.

Sincerely,



STEPHEN M. TILLERY

SMT:cam

cc: Mr. Michael Pope  
Mr. Jason K. Winslow  
Mr. Mark Surprenant

SANDOR KOREIN  
STEPHEN M. TILLERY  
STEVEN A. KATZ  
DOUGLAS R. SPRONG  
CHRISTINE J. MOODY  
\*STEPHEN A. SWEDLOW  
\*GEORGE A. ZELCS  
JOHN W. HOFFMAN  
PETER H. RACHMAN  
AARON M. ZIGLER  
ROBERT L. KING  
\*KLINT L. BRUNO

DIANE MOORE HEITMAN  
CHRISTIE R. DEATON  
JOHN A. LIBRA  
ALEXIS C. TILLERY  
\*MAXIMILIAN C. GIBBONS  
CHRISTOPHER A. HOFFMAN  
\*\*AIDAN M. MCNAMARA  
\*MATTHEW C. DAVIES  
MICHAEL E. KLENOV  
\*\*JOSEPH A. PEREZ-MALTES  
\*\*\*ROSEMARIE FIORILLO  
JOHN C. CRAIG  
\*\*MICHAEL FORREST  
\*\*JAMIE S. STEINMETZ

\*Not Licensed in Missouri  
\*\*Not Licensed in Illinois

EXHIBIT

E

205 North Michigan, Suite 1950  
Chicago, Illinois 60601-4269  
Tel: 312.641.9750 Fax: 312.641.9751



# KOREIN TILLERY

*Attorneys at Law*

One US Bank Plaza  
505 North 7th Street, Suite 3600  
St. Louis, Missouri 63101  
www.koreintillery.com

February 16, 2011

*Via Email and regular mail*

Mr. Kurtis B. Reeg  
REEG LAWYERS, LLC  
1 North Brentwood, Suite 950  
St. Louis, MO 63105

Mr. C. Raymond Bell  
Foley & Mansfield  
1001 Highland Plaza Drive West, Suite 400  
St. Louis, MO 63110

RE: *Holiday Shores Sanitary District, et al. v. Syngenta Crop Protection, Inc.,  
et al. - Madison County Cause No. 04-L-710*

Dear Messrs Reeg and Bell:

On two prior occasions, January 24 and January 27, 2011, I wrote to you asking for verification of your claim that Dr. Coursey has been retained as a consulting expert by Syngenta Crop Protection, Inc. (SCPI). I attach those two letters for your reference. To date neither of you have seen fit to respond to either of my letters.

As time goes by without response, I am left to conclude that you have no such documentation and that your statements that Dr. Coursey was retained as a consulting expert by SCPI were false. Please be advised that I will seek an evidentiary hearing from the trial judge next week to get to the bottom of these claims. Please also be advised that if the claims which have been made about Dr. Coursey are false, we will pursue every available avenue against all responsible parties.

Sincerely,

STEPHEN M. TILLERY

SMT:cam

Encl.

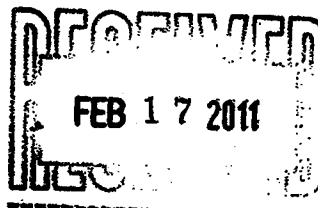
cc: Mr. Michael Pope  
Mr. Jason K. Winslow  
Mr. Mark Surprenant

STEPHEN M. TILLERY

stillery@koreintillery.com

p: 314.241.4844

f: 314.241.3525



SANDOR KOREIN  
STEPHEN M. TILLERY  
STEVEN A. KATZ  
DOUGLAS R. SPRONG  
CHRISTINE J. MOODY  
\*STEPHEN A. SWEDLOW  
\*GEORGE A. ZELCS  
JOHN W. HOFFMAN  
PETER H. RACHMAN  
AARON M. ZIGLER  
ROBERT L. KING  
\*KLINT L. BRUNO

DIANE MOORE HEITMAN  
CHRISTIE R. DEATON  
JOHN A. LIBRA  
ALEXIS C. TILLERY  
\*MAXIMILIAN C. GIBBONS  
CHRISTOPHER A. HOFFMAN  
\*\*AIDAN M. MCNAMARA  
\*MATTHEW C. DAVIES  
MICHAEL E. KLENOV  
\*\*JOSEPH A. PEREZ-MALTES  
\*\*ROSEMARIE FIORILLO  
JOHN C. CRAIG  
\*\*MICHAEL FORREST  
\*\*JAMIE S. STEINMETZ

\*Not Licensed in Missouri  
\*\*Not Licensed in Illinois



205 North Michigan, Suite 1950  
Chicago, Illinois 60601-4269  
Tel: 312.641.9750 Fax: 312.641.9751



# KOREIN TILLERY

*Attorneys at Law*  
One US Bank Plaza  
505 North 7<sup>th</sup> Street, Suite 3600  
St. Louis, Missouri 63101  
www.koreintillery.com

January 24, 2011

*via Email and regular mail*

Mr. Kurtis B. Reeg  
REEG LAWYERS, LLC  
1 North Brentwood, Suite 950  
St. Louis, MO 63105

Mr. C. Raymond Bell  
Foley & Mansfield  
1001 Highlands Plaza Drive West, Suite 400  
St. Louis, MO 63110

*Re: Holiday Shores Sanitary District, et al. v. Syngenta Crop Protection, Inc., et al. - Madison County Cause No. 04-L-710*

Dear Messrs. Reeg and Bell:

We are in receipt of Dr. Don Coursey's Motion to Modify the Court's September 22, 2010 Order, wherein you seek to modify Dr. Coursey's retention date from June 2006 to February 14, 2006 by Defendant Syngenta Crop Protection, Inc.

In order to allow us to properly respond, please forward a copy of Dr. Coursey's retention letter reflecting his date of retention or any writings that document his date of retention.

Sincerely,

STEPHEN M. TILLERY

SMT:cam

cc: Mr. Michael Pope  
Mr. Jason K. Winslow

# STEPHEN M. TILLERY

stillery@koreintillery.com  
p: 314.241.4844  
f: 314.241.3525

SANDOR KOREIN  
STEPHEN M. TILLERY  
STEVEN A. KATZ  
DOUGLAS R. SPRONG  
CHRISTINE J. MOODY  
\*STEPHEN A. SWEDLOW  
\*GEORGE A. ZELUS  
JOHN W. HOFFMAN  
PETER H. RACHMAN  
AARON M. ZIGLER  
ROBERT L. KING  
\*KLINT L. BRUNO

DIANE MOORE HEITMAN  
CHRISTIE R. DEATON  
JOHN A. LIBRA  
ALEXIS C. TILLERY  
\*MAXIMILIAN C. GIBSON  
CHRISTOPHER A. HOFFMAN  
\*\*AIDAN M. MCNAMARA  
\*MATTHEW C. DAVIES  
MICHAEL E. KLENOV  
\*\*JOSEPH A. PEREZ-MALTES  
\*\*\*ROSEMARIE FIORILLO  
JOHN C. CRAIG  
\*\*MICHAEL FORREST  
\*\*JAMIE S. STEINMETZ

\*Not Licensed in Missouri  
\*\*Not Licensed in Illinois

205 North Michigan, Suite 1950  
Chicago, Illinois 60601-4269  
Tel: 312.641.9750 Fax: 312.641.9751



## KOREIN TILLERY

*Attorneys at Law*

One US Bank Plaza  
505 North 7<sup>th</sup> Street, Suite 3600  
St. Louis, Missouri 63101  
www.koreintillery.com

STEPHEN M. TILLERY

stillery@koreintillery.com

p: 314.241.4844

f: 314.241.3525

January 27, 2011

*Via Email and regular mail*

Mr. Kurtis B. Reeg  
REEG LAWYERS, LLC  
1 North Brentwood, Suite 950  
St. Louis, MO 63105

Mr. C. Raymond Bell  
Foley & Mansfield  
1001 Highlands Plaza Drive West, Suite 400  
St. Louis, MO 63110

Re: *Holiday Shores Sanitary District, et al. v. Syngenta Crop Protection, Inc., et al. - Madison County Cause No. 04-L-710*

Counsel:

On January 24, 2011 I wrote you asking that you to produce any letter or other writings documenting Dr. Coursey's retention as a consulting expert for Syngenta Crop Protection, Inc. Such a letter is routinely requested by the courts to verify a consultant's retention when a factual challenge is made to a claim of consultant privilege. Plaintiffs dispute his role as a consultant. Now that Dr. Coursey has filed papers with the court seeking to modify the Court's Order based upon an earlier retention date, documents verifying his retention are even more important. Such documents might obviate our issues regarding communications between Syngenta and Dr. Coursey and may materially advance this litigation. As a result, once more I ask that you forward documents verifying both his role and the exact date of Dr. Coursey's retention as a consulting expert. If no such document exists, I ask you, as Officers of the Court, to withdraw any claim that Dr. Coursey is a consulting expert and immediately turn over all documents which are being withheld on that basis. Thank you.

Sincerely

STEPHEN M. TILLERY

SMT:cam

cc: Mr. Michael Pope  
Mr. Jason K. Winslow  
Mr. Mark Surprenant

SANDOR KOREIN  
STEPHEN M. TILLERY  
STEVEN A. KATZ  
DOUGLAS R. SPRONG  
CHRISTINE J. MOODY  
\*STEPHEN A. SWEDLOW  
\*GEORGE A. ZELCS  
JOHN W. HOFFMAN  
PETER H. RACHMAN  
AARON M. ZIGLER  
ROBERT L. KING  
\*KUNT L. BRUNO

DIANE MOORE HEITMAN  
CHRISTIE R. DEATON  
JOHN A. LIBRA  
ALEXIS C. TILLERY  
\*MAXIMILIAN C. GIBBONS  
CHRISTOPHER A. HOFFMAN  
\*\*AIDAN M. MCNAMARA  
\*MATTHEW C. DAVIES  
MICHAEL E. KLENOV  
\*\*JOSEPH A. PEREZ-MALTES  
\*\*\*ROSEMARIE FIORILLO  
JOHN C. CRAIG  
\*\*MICHAEL FORREST  
\*\*JAMIE S. STEINMETZ

\*Not Licensed in Missouri  
\*\*Not Licensed in Illinois

205 North Michigan, Suite 1950  
Chicago, Illinois 60601-4269  
Tel: 312.641.9750 Fax: 312.641.9751



IN THE CIRCUIT COURT  
THIRD JUDICIAL CIRCUIT  
MADISON COUNTY, ILLINOIS

**FILED**  
APR 20 2011  
CLERK OF CIRCUIT COURT #77  
THIRD JUDICIAL CIRCUIT  
MADISON COUNTY, ILLINOIS

HOLIDAY SHORES, ET AL,

Plaintiffs,

-VS-

SYNGENTA, ET AL,

Defendants.

No. 04-L-710

**ORDER**

The matter before the Court concerns hundreds documents or communications received on March 30, 2011 for *in camera* review to determine whether the documents submitted are privileged or subject to disclosure to the Plaintiffs. Through counsel, the University of Chicago, Dr. Don Coursey and Defendant Syngenta Crop Protection, Inc. ("Syngenta") all produced materials for *in camera* review. The documents are being withheld on the basis that they are either consulting expert or attorney-client privileged materials, or both.

Supreme Court Rules 201(b)(2) and (3) provide an exception to the general rule that any relevant material is discoverable. It provides:

"All 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. 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....A consultant is a person who has been retained 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."

The Court, being fully advised in the premises, at this time finds and rules as to each party's submission as follows:

**The Coursey documents**

The Court is in possession of a substantial amount of material produced by attorney Ray Bell. No privilege log has been produced to the Court regarding the submission other than general consulting expert privilege assertions in response to the first three requests contained in plaintiff's subpoena duces tecum as follows:

**DOCUMENTS RESPONSIVE TO SUBPOENA REQUEST 1**

All payments made by Syngenta, or on Syngenta's behalf, to C. Raymond Bell and/or Foley & Mansfield since June 2010.

OBJECTION: This Request is irrelevant and harassing. Moreover, said documents are protected by the consulting expert privilege, as Dr. Don Coursey is a consultant to Syngenta. Thus, communications between those parties and their attorneys is privileged.

**DOCUMENTS RESPONSIVE TO SUBPOENA REQUEST 2**

All communications between Kurtis Reeg and Reeg Lawyers, L.L.C. and C. Raymond Bell and Foley & Mansfield.

OBJECTION: This Request is irrelevant and overbroad. Moreover, said documents are protected by the consulting expert privilege, as Dr. Don Coursey is a consultant to Syngenta, which extends to attorneys for those parties.

**DOCUMENTS RESPONSIVE TO SUBPOENA REQUEST 3**

All communications between attorneys of record for Syngenta Crop Protection, Inc.; attorneys of record for Don Coursey; attorneys of record for the University of Chicago; and, Don Coursey; regarding Don Coursey's retention date.

OBJECTION: Said documents are privileged by the consulting expert privilege, as Dr. Don Coursey is a consultant to Syngenta, which extends to attorneys for those parties. Thus, communications between attorneys for those parties, including University of Chicago (which is only involved because Dr. Coursey's work, communications, etc. are contained on the computer system utilized by Dr. Coursey for his work), are protected by consulting expert privilege.

Coursey's counsel objects to Requests 4 and 5 asserting both the consulting expert privilege and the attorney-client privilege as follows:

**DOCUMENTS RESPONSIVE TO SUBPOENA REQUEST 4**

All communications regarding Don Coursey's retention date.

OBJECTION: Said documents are protected by the consulting expert privilege, as Dr. Don Coursey is a consultant to Syngenta, which extends to attorneys for those parties. Thus, communications between attorneys for those parties, including University of Chicago (which is only involved because Dr. Coursey's work, communications, etc. are contained on the computer system utilized by Dr. Coursey for his work), are protected by consulting expert privilege. Moreover, communications between Dr. Coursey and his attorneys are further protected by the attorney/client privilege.

**DOCUMENTS RESPONSIVE TO SUBPOENA REQUEST 5**

All communications concerning the subpoena duces tecum served upon either Don Coursey or the University of Chicago and documents requests therein.

**OBJECTION:** Said documents are protected by the consulting expert privilege, as Dr. Don Coursey is a consultant to Syngenta, which extends to attorneys for those parties. Thus, communications between attorneys for those parties, including University of Chicago (which is only involved because Dr. Coursey's work, communications, etc. are contained on the computer system utilized by Dr. Coursey for his work), are protected by consulting expert privilege. Moreover, communications between Dr. Coursey and his attorneys are further protected by the attorney/client privilege.

**NOTE:** Documents attached hereto are solely communications between counsel for Dr. Coursey and persons other than Dr. Coursey.

**DOCUMENTS RESPONSIVE TO SUBPOENA REQUEST 5**

All communications concerning the subpoena duces tecum served upon either Don Coursey or the University of Chicago and documents requests therein.

**OBJECTION:** Said documents are protected by the consulting expert privilege, as Dr. Don Coursey is a consultant to Syngenta, which extends to attorneys for those parties. Thus, communications between attorneys for those parties, including University of Chicago (which is only involved because Dr. Coursey's work, communications, etc. are contained on the computer system utilized by Dr. Coursey for his work), are protected by consulting expert privilege. Moreover, communications between Dr. Coursey and his attorneys are further protected by the attorney/client privilege.

**NOTE:** Documents attached hereto are solely communications between Dr. Coursey and his counsel.

The Court estimates that approximately 750 combined pages of documents are attached to these objections, and for the most part they consist of email exchanges, and many are redundant. Many of the emails concern making arrangements for teleconferences, meetings and so forth. Some may include strategic decisions that may reveal mental impressions, opinions or trial strategy, but it is difficult for the Court to cull out from the voluminous documentation the communications that may fall within the attorney-client privilege.

Based on the multiple representations to this Court that Dr. Don Coursey was not retained as a consulting expert pursuant to Rule 201 until January 9, 2009, the Court Orders the production of all documents and communications requested by Plaintiffs in Requests 1, 2, and 3 up to that date, as the only objection being asserted by Mr. Bell is that Coursey's documents are protected by the consulting expert privilege.

In other words, any documents or communications dated prior to January 9, 2009 that have been withheld from Plaintiffs based upon the consulting expert privilege as asserted in response to the first three requests shall be disclosed within 14 days of the date of this Order.

Any documents or communications that are being sought by Plaintiffs in Requests 4 and 5 that are being withheld based upon the consulting expert privilege shall be disclosed within 14 days. Any documents or communications that are being sought by Plaintiffs in

Requests 4 and 5 that are being withheld based upon any other privilege, including the attorney-client privilege, must be properly identified pursuant to Rule 201(n) in the form of a privilege log, with an express claim of privilege and supported by a description of the nature of each such document or communication or things not produced or disclosed and the exact privilege which is being claimed. [To the extent that some of these documents may have already been produced by Syngenta, such documents should not be included in said privilege log.]

**The University of Chicago documents**

The Court also has approximately 744 documents for *in camera* review from the University of Chicago on a compact disc. The documents are in PDF and Excel formats and are identified as "ICR000001, ICR000002," and so forth. It appears some of these documents are emails, studies, communications and other writings to, from or authored by Dr. Don Coursey, presumably obtained from his university computer hard drive. In its motion to file these documents under seal, the University's attorneys advise that they do not have personal knowledge of the documents upon which Dr. Coursey relied in his role as a consultant-expert for Syngenta, and that counsel for Dr. Coursey has provided Plaintiffs with a privilege log regarding these documents concerning any claimed privileges asserted by Dr. Coursey and his attorney. Likewise it is difficult for the Court to cull out from this production the communications that may fall within the attorney-client privilege. Any documents or communications dated prior to January 9, 2009 that have been withheld from Plaintiffs based upon a "consulting expert privilege" shall be disclosed within 14 days of the date of this Order.

Any documents that are being sought by Plaintiffs that are being withheld based upon any other privilege, such as the attorney-client privilege, must be properly identified pursuant to Rule 201(n) in the form of a privilege log, with an express claim of privilege and supported by a description of the nature of each such document or communication or things not produced or disclosed and the exact privilege which is being claimed. [To the extent that some of these documents may have already been produced by Syngenta, such documents should not be included in said privilege log.]

**Syngenta's Jayne Thompson & Associates, Ltd., ("JTA") public relations document**

The Court also reviewed *in camera* the JTA public relations document withheld by Defendant Syngenta on the basis of a litigation consultant privilege. This document likewise shall be produced to Plaintiffs within 14 days of the date of this Order. The Court finds the argument and authorities cited by the Plaintiffs persuasive on this issue. See *Burke v. Lakin Law Firm, PC*, 2008 WL 117838 (S.D.Ill.) and *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53 (2000).

The document at issue is a 13 page proposal dated October 3, 2005 addressed to a senior communications manager at Syngenta and outlines a publicity effort proposed to be undertaken by a public relations firm, Jayne Thompson & Associates, Ltd., for Syngenta. It followed a September 27, 2005 confidentiality agreement that states that the sole purpose of making certain disclosures to JTA was "to assist Syngenta in developing a public relations proposal relating to the lawsuit." Syngenta and JTA also entered into a

"Consulting Services Agreement" at or near such time. The confidentiality and the consulting services agreements have previously been produced to Plaintiffs.

In a nutshell a major element of the October 2005 JTA proposal outlines a plan to tie the defense of this action into a negative public relations campaign that castigates the Madison County judicial system as a "judicial hellhole" and a source of "jackpot justice," and, in part, to undertake efforts to enhance the public's perception of Syngenta and the herbicide it manufactures at the expense of the Madison County judicial system. It encourages Syngenta to "selectively contact ... pro-business columnists ... in consultation with the company" who have coined those terms and make the case that it's now "Syngenta's turn in the Madison County Barrel."

Although the document utilizes the term "litigation support" on a couple of occasions, the proposal actually outlines an aggressive public relations strategy to build upon or create a hostile attitude toward the Madison County judicial system. While the proposal says "we are not suggesting that the company author any or all of these themes," several are, in fact, suggested in the document including, "Another Madison County class action case going amuck," and "Now Madison County is going after the family farmers," and so forth.

Included is a recommendation to recruit "supporters, including... the Illinois Civil Justice League, Illinois Chamber of Commerce, the Heartland Institute, Illinois Policy Institute and the *Madison-St. Claire [sic] Record*" in this effort. It has nothing to do with trial strategy or the preparation of this case for trial as contemplated by Rule 201(b) (3), but much to do with fostering a negative public perception of our judicial system.

In *Burke*, the district court ordered the production of documents regarding the public relations strategies for communicating with employees, clients and the media in an effort to try to divert negative publicity from litigation brought against a current and former partner of a law firm – rejecting the argument that the documents were made in anticipation of litigation and were protected work product. The reviewing court found that the documents did not involve preparation or legal strategies for conducting litigation itself, nor do they discuss how the defendants planned to defend the action. *Burke* at page 3. "Though the work product doctrine may protect documents that were prepared for one's defense in the court of law, it does not protect documents that were merely prepared for one's defense in the court of public opinion." *Burke* at page 3.

Likewise in *Calvin Klein*, the district court found that such communications are not protected, advising that the purpose of such privileges is to provide a zone of privacy for strategizing about the conduct of litigation itself, and not for strategizing about the effects of the litigation on the party's customers, the media, or on the public generally." *Calvin Klein* at page 4.

This document does not contemplate legal strategy. They pertain to business decisions, not litigation decisions. Rule 201(b)(2) provides, "Material prepared by or for a party in

preparation for trial is subject to discovery only if it does not contain or disclose legal theories, mental impressions, or litigation plans of the party's attorney."

Rule 201(b)(3) defines a consultant as "a person who has been retained in anticipation of litigation or preparation for trial."

The Court finds that this public relations document does not disclose "legal theories, mental impressions, or litigation plans of the party's attorney" and was not "retained in anticipation of litigation or preparation for trial" within the meaning of the rule.

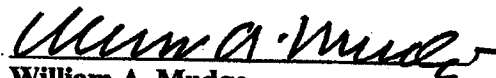
Syngenta has not cited any legal precedent that public relations proposals such as the one at issue qualify as either Rule 201 (b)(2) or (3) material. This document must be produced by Syngenta.

In light of the disclosures and privilege logs required by this Order, **the evidentiary hearing scheduled for May 6, 2011 is continued** and will be reset after such time as the Court has had an opportunity to review the anticipated privilege logs and documents relating thereto that remain undisclosed.

Once again, the Court admonishes the parties to continue to facilitate discovery and make reasonable attempts to resolve their differences over discovery pursuant to Supreme Court Rule 201(k) and consistent with this and previous rulings by this Court pertaining to discovery.

*Clerk to send copies of this Order to the parties of record.*

Enter: APR 20 2011

  
William A. Mudge  
Circuit Judge



**KOREIN TILLERY**

*Attorneys at Law*

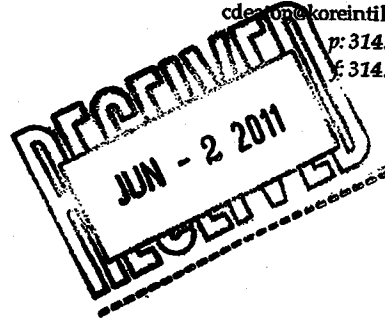
One US Bank Plaza  
505 North 7<sup>th</sup> Street, Suite 3600  
St. Louis, Missouri 63101  
www.koreintillery.com

CHRISTIE R. DEATON

cdeaton@koreintillery.com

p: 314.241.4844

f: 314.241.3525



May 31, 2011

*via electronic mail and first-class U.S. Mail*

Kurtis B. Reeg  
**REEG LAWYERS, LLC**  
1 North Brentwood Boulevard, Suite 950  
St. Louis, MO 63105

Marc J. Goldstein  
**BEVERIDGE & DIAMOND**  
15 Walnut Street, Suite 400  
Wellesley, MA 02481-2133

Mark C. Surprenant  
**ADAMS & REESE**  
4500 One Shell Square  
New Orleans, LA 70139

Ryan R. Tacorda  
**BEVERIDGE & DIAMOND, PC**  
456 Montgomery Street, Suite 1800  
San Francisco, CA 94104-1251

Michael A. Pope  
Christopher M. Murphy  
Todd R. Wiener  
Jocelyn D. Francoeur  
**McDERMOTT WILL & EMERY LLP**  
227 West Monroe Street  
Chicago, IL 60606

**Re: Holiday Shores Sanitary District, et al. v. Syngenta Crop Protection, Inc., et al.  
Madison County Cause No. 04-L-710**

Dear Counsel:

This letter is sent in compliance with Illinois Supreme Court Rule 201(k) concerning the subpoenas and proposed depositions of Dr. Frank Ackerman and Dr. Paul Rosenfeld.

205  
Ch  
Tel: 312



On May 9, 2011, a subpoena was issued in Massachusetts on behalf of Syngenta Crop Protection, Inc. ("SCP") for the production of particular documents in the possession of Dr. Frank Ackerman. Dr. Ackerman is a litigation consultant and potential testifying expert for Plaintiffs in the above-captioned case. Dr. Ackerman has been a litigation consultant for Plaintiffs since May 8, 2009.

Plaintiffs ask that you limit the subpoena and deposition of Dr. Ackerman in accordance with the Court's Order of September 22, 2010. Specifically, we ask that you limit the scope of the subpoenaed documents and deposition to include only those documents which are not related to Dr. Ackerman's role as a litigation consultant to Plaintiffs.

On May 17, 2011, a subpoena was issued in California on behalf of SCP for the production of particular documents in the possession of Dr. Paul Rosenfeld. Dr. Rosenfeld is a litigation consultant for Plaintiffs in the above-captioned case. He has been a litigation consultant in this case since July 29, 2003.

Plaintiffs ask that you limit the subpoena and deposition of Dr. Rosenfeld in accordance with the Court's Order of September 22, 2010. Specifically, we ask that you limit the scope of the subpoenaed documents and deposition to include only those documents which are not related to Dr. Rosenfeld's role as a litigation consultant to Plaintiffs.

Sincerely,



CHRISTIE R. DEATON

CRD/jfw

cc: Robert Shultz  
Anne Kimball  
Richard Sandman  
Paul Kiesel



# REEG LAWYERS, LLC

Attorneys and Counselors at Law

KURTIS B. REEG

President-Managing Partner

kreeg@reeglawfirm.com

ADMITTED IN MISSOURI, ILLINOIS, KANSAS & NEBRASKA

June 1, 2011

**VIA E-MAIL and US MAIL**

Mr. Steve Tillery  
Ms. Christie Deaton  
Korein Tillery  
One U.S. Bank Plaza  
505 N. 7<sup>th</sup> Street  
Suite 3600  
St. Louis, MO 63101

**Re: *Holiday Shores Sanitary District v. Syngenta Crop Protection, LLC, et al*  
Case No. 2004-L-000710  
*City of Greenville, Illinois, et al. v. Syngenta Crop Protection, LLC, et al.*  
U. S. District Court Case No. 10-cv-188**

Dear Steve and Christie:

In response to your correspondence of May 31, 2011, regarding the asserted retention by Plaintiffs of Dr. Paul Rosenfeld on July 29, 2003, we ask that you clarify your statement and position regarding Dr. Rosenfeld's status.

If Plaintiffs maintain that at present Dr. Rosenfeld is only a consulting expert, then we ask that you provide to us the same information you have sought and received regarding Dr. Don Coursey. In particular, we ask that you produce the following prior to the June 7, 2011, return date on his subpoena:

- Copies of contracts, correspondence, e-mails, or other documentation regarding the dates of his retention and the tasks he was asked to perform;
- Copies of any and all correspondence or exchanges with Plaintiffs' counsel or any of the putative class members in either of the above cases prior to the date of retention;
- Any and all documents that precede the date of retention which relate to either the *HSSD* or *Greenville* litigation, atrazine, any of his work related to atrazine, Syngenta or either of the lawsuits, anything relied upon or considered by him with respect thereto;
- Copies of his billings for any work done by him for Plaintiffs' counsel in either case or on behalf of Plaintiffs;
- Any and all documents, including, but not limited to, "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 [Plaintiffs] prepare for trial" (9/22/10 Order, p. 4), as well as any and all "studies that led to published work" (*Id.*

EXHIBIT

I

Mr. Steve Tillery  
Ms. Christie Deaton  
June 1, 2011  
Page 2 of 2

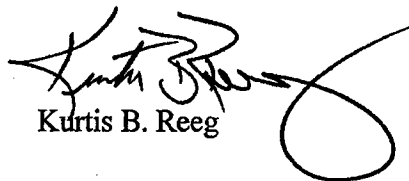
at p.5), all documents, data, studies, articles, papers or other sources relied upon, considered or related to said documents;

- All documents or other information requested in the document rider attached to his subpoena; and
- All documents that post-date retention should go on a privilege log (pursuant to the Court's Order of September 22, 2010) with appropriate privileges or grounds for withholding production stated in compliance with Rule 201(n).

To the extent that Dr. Rosenfeld is only a consultant, then at the present time, Syngenta will agree that "material in his possession that deals exclusively with his role as a consultant for [Plaintiffs] are not discoverable at this point." (*Id.* at p.4.)

I look forward to hearing from you. Thank you.

Yours very truly,

  
Kurtis B. Reeg



**KOREIN TILLERY**

*Attorneys at Law*

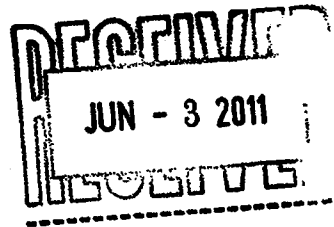
One US Bank Plaza  
505 North 7<sup>th</sup> Street, Suite 3600  
St. Louis, Missouri 63101  
www.koreintillery.com

**CHRISTIE R. DEATON**

cdeaton@koreintillery.com

p: 314.241.4844

f: 314.241.3525



June 1, 2011

*via electronic mail and first-class mail*

Kurtis B. Reeg  
**REEG LAWYERS, LLC**  
1 North Brentwood Boulevard, Suite 950  
St. Louis, MO 63105

**Re: *Holiday Shores Sanitary District, et al. v. Syngenta Crop Protection, Inc., et al.***  
***Madison County Cause No. 04-L-710***

Dear Kurt:

I received your letters earlier today concerning the subpoenas of Dr. Frank Ackerman and Dr. Paul Rosenfeld. To clarify, Dr. Ackerman and Dr. Rosenfeld were retained by Plaintiffs as litigation consultants as defined by Illinois Supreme Court Rule 201(b)(3) on the dates specified in my previous letter. While the subpoenas were issued only in the *Holiday Shores* litigation, I will clarify that Plaintiffs have made no decision to have Dr. Ackerman or Dr. Rosenfeld testify in either case.

To the best of my knowledge, Plaintiffs have not received any copy of contracts, correspondence, or other documentation regarding the dates of retention of Dr. Coursey as a litigation consultant as defined by Illinois law. Instead, on February 23, 2011, you stipulated in open court that Dr. Coursey was retained as a litigation consultant on January 9, 2009. To the best of my knowledge, Plaintiffs have never received documentation regarding the tasks that Dr. Coursey was asked to perform as a litigation consultant, nor have Plaintiffs received copies of his billings for any work done in his role as a litigation consultant.



Kurtis B. Reeg

June 1, 2011

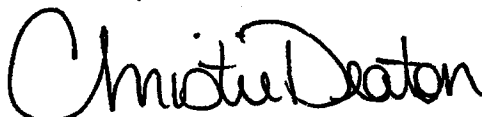
Page 2

As you know, Dr. Coursey was hired by Syngenta as a media consultant, not as a litigation consultant, in 2006. This date was misrepresented to the Court on numerous occasions as being the date of his retention as a litigation consultant under Illinois law. Plaintiffs did not question or otherwise request documentation concerning this date in response to Dr. Coursey's subpoena or motion to quash.

But after Dr. Coursey filed a motion to amend the Court's Order of September 22, 2010, Plaintiffs asked for (but did not receive) some kind of documentation showing the true retention date of Dr. Coursey as a litigation consultant. Plaintiffs asked for this information in order to respond to the unsubstantiated factual statements contained within the motion that Dr. Coursey filed. See Stephen Tillery's letter to you dated January 24, 2011. The same circumstances are not at issue with regards to Dr. Ackerman or Dr. Rosenfeld, as neither have been hired by Plaintiffs outside of their roles as litigation consultants as defined by Illinois law.

The additional documents that you request in your letter do not conform with Illinois Supreme Court Rule 214 or Fed. R. Civ. P. 26(b) (to the extent that your letters concerned the *Greenville* case). To the extent that they are responsive to requests that properly have been made to Plaintiffs in the course of discovery, I refer you to Plaintiffs' responses thereto.

Sincerely,



CHRISTIE R. DEATON

CRD/jfw

cc:

Mark Surprenant  
Michael Pope