

**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS**

CITY OF GREENVILLE, ILLINOIS, <i>et al.</i> ,)	
)	
Plaintiffs,)	Case No. _____
)	
v.)	Case Pending in the US District
)	Court for the Southern District of IL
SYNGENTA CROP PROTECTION, INC., and)	Civ. Act. No. 10-188-JPG-PMF
SYNGENTA AG,)	
)	
Defendants.)	

**MEMORANDUM IN SUPPORT OF THIRD PARTY RESPONDENT
PRAIRIE RIVERS NETWORK’S MOTION TO QUASH SUBPOENA**

Defendant Syngenta Crop Protection, LLC (“Syngenta”) has served subpoenas in the Northern District and the Central District of Illinois, respectively, on Prairie Rivers Network (“Prairie Rivers”) and the Environmental Law & Policy Center (“ELPC”), which have moved to intervene in *City of Greenville v. Syngenta Crop Protection, Inc.*, Case No. 10-cv-188-JPG-PMF pending before Judge Gilbert in the U.S. District Court for the Southern District of Illinois. Prairie Rivers and ELPC are intervening “for the limited purpose of seeking to assert the right of public access and unseal certain documents that have been filed with the court.” Motion to Intervene, Exhibit C, at 1. “It is beyond dispute that most documents filed in court are presumptively open to the public” *Bond v. Utreras*, 585 F.3d 1061, 1073 (7th Cir. 2009); *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000).

In *City of Greenville*, the Plaintiffs are municipalities and public water districts who claim that the Defendants’ production, marketing and distribution of the herbicide atrazine has contaminated drinking water supplies, thereby causing health harms and remediation costs. Prairie Rivers and ELPC have not engaged on the merits of this case.

The subpoena directed to Prairie Rivers should be quashed by this court under Federal Rule of Civil Procedure 45(c)(3), and the subpoena directed to ELPC should be quashed by the court in the Northern District. The “presumptive right to access discovery materials . . . kick[s] in when material produced during discovery is filed with the court.” *Bond*, 585 F.3d at 1073-75. The subpoena demands are not relevant to the merits of the *City of Greenville* case. Moreover, Prairie Rivers and ELPC had no role in the discovery documents that were filed with the court, and the subpoena demands are not relevant to the legal requirement that “most documents filed in court [be] presumptively open to the public” *Bond*, 585 F.3d at 1073. The Defendant is apparently attempting to retaliate against and harass Prairie Rivers and ELPC for raising the public’s right of access.

As discussed below, the Motion to Quash should be granted because the subpoenas:

(1) Seek no information that is relevant to the merits, and the subpoenas are not relevant to the court’s obligation to provide public access to records;

(2) Demand materials subject to privilege;

(3) Appear designed to chill the First Amendment rights and harass these two not-for-profit environmental organizations for having raised the public’s right of access to judicial records; and

(4) Fail to provide Prairie Rivers and ELPC with sufficient time to comply and thus create undue burdens.

The Defendant’s subpoenas for the taking of depositions and production of documents are attached hereto as Exhibit A (Prairie Rivers) and Exhibit B (ELPC). This Court should quash the subpoena directed at Prairie Rivers, and the Court in the Northern District should quash the subpoena directed at ELPC.

Factual Background

In *City of Greenville*, the plaintiff municipalities and public water districts contend that Defendants Syngenta and Syngenta AG are liable for negligence, trespass, public nuisance, and strict liability-defective product due to, among other things, their production of, failure to test, and sale of the herbicide atrazine. Defendant Syngenta AG argues that personal jurisdiction is lacking and has moved to dismiss. Plaintiffs opposed that motion and have filed numerous supporting documents under seal pursuant to a protective order entered by the Southern District.

Prairie Rivers is an Illinois-based not-for-profit organization concerned with river conservation and improving water quality and environmental health throughout the state. ELPC is a Midwest-based not-for-profit public interest organization working to improve environmental quality and public health, protect natural resources and enhance the quality of life for people in Illinois and the region. On March 31, 2011, Prairie Rivers and ELPC filed a Motion to Intervene in *City of Greenville* for the limited purpose of seeking to unseal certain documents that were filed with the court and to vacate the protective order. Exhibit C. On April 4, 2011, Prairie Rivers and ELPC then filed a Motion to Vacate the Protective Order and Unseal Documents in the Judicial Record. Exhibit D. These motions are pending.

On April 7, 2011, Syngenta served subpoenas on Prairie Rivers and ELPC demanding that they each produce documents and be available for a scheduled deposition within just seven days (April 14, 2011), apparently in order to investigate the two environmental organizations' motives and reasons for intervening and for having requested that the court provide public access to sealed documents in the judicial record. Syngenta has not responded to Prairie Rivers' and ELPC's motions in the Southern District.

ARGUMENT

I. SYNGENTA’S SUBPOENAS DO NOT SEEK RELEVANT EVIDENCE.

Syngenta’s subpoenas should be quashed because the information demanded is irrelevant to the merits of the case, and Prairie Rivers and ELPC have not moved to intervene to address the merits. Discovery may be obtained only as to “any nonprivileged matter that is relevant to any party’s claim or defense. . . ,” and is proper only if it is “reasonably calculated to lead to the discovery of admissible evidence.” F.R.C.P. 26(b)(1). A subpoena should be quashed where the information sought would not “assist[] in the exploration of a material issue” in the case. *CSC Holdings, Inc. v. Redisi*, 309 F.3d 988, 993 (7th Cir. 2002); *Israel Travel Advisory Serv., Inc., v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1254 (7th Cir. 1995); *see also Ligas v. Maram*, No. 05 C 4331, 2007 U.S. Dist. Lexis 87853, *12 (N.D. Ill. Nov. 27, 2007) (“The Court will quash subpoenas [when] the materials sought are unlikely to lead to relevant information”).

City of Greenville involves Plaintiffs’ tort claims related to the Defendants’ production of, failure to test and sale of the herbicide atrazine in public water district areas, and, then, Defendant Syngenta AG’s defense arguing lack of personal jurisdiction. However, Syngenta’s subpoenas directed to Prairie Rivers and ELPC seek no information relevant either to Plaintiffs’ claims or to Syngenta AG’s defense. Instead, Syngenta demands to depose a Prairie Rivers representative on the issues of:

“(1) [Prairie Rivers’] decision to seek to intervene in the case captioned *City of Greenville et al. v. Syngenta Crop Protection, et al.*, Case No. 10-CV-188-JPG-PMF;

(2) All communications between [Prairie Rivers] and Korein Tillery, Baron and Budd, P.C., or any other person who is not an employee of [Prairie Rivers] regarding the case captioned *City of Greenville et al. v. Syngenta Crop Protection, et al.*, Case No. 10-CV-188-JPG-PMF;

(3) Other lawsuits in which you have sought to intervene for the purposes of seeking access to documents filed with a court under seal.”

Exhibit A.

Syngenta further demands production of: (1) “All documents related to [Prairie Rivers’] decision to seek to intervene in the case captioned *City of Greenville et al. v. Syngenta Crop Protection, et al.*, Case No. 10-CV-188-JPG-PMF,” and (2) “All documents relating to communications between [Prairie Rivers] and Korein Tillery, Baron and Budd, P.C., or any other person who is not an employee of [Prairie Rivers] regarding . . . *City of Greenville et al. v. Syngenta Crop Protection, et al.*,” *Id.*

None of the information that Syngenta demands will “assist[] in the exploration of a material issue” in the case. *CSC Holdings, Inc.* 309 F.3d at 993. Neither Prairie Rivers’ decision to intervene for the limited purpose of seeking public access to judicial record documents, nor whether Prairie Rivers has intervened in any similar circumstances in the past, nor any communications between Prairie Rivers and anyone concerning *City of Greenville* has any bearing on whether Defendants Syngenta or Syngenta AG are liable for negligence, trespass, public nuisance, and strict liability-defective product due to their production of, failure to test, and sale of the herbicide atrazine in the Plaintiffs’ water districts. The information that Syngenta’s subpoenas demand also has no relevance to Syngenta AG’s defense of lack of personal jurisdiction.

Moreover, the information that Syngenta’s subpoenas demand is irrelevant to the very limited issue on which Prairie Rivers has sought intervention in *City of Greenville*: whether documents should be unsealed pursuant to the right of public access to judicial record documents. Exhibits C and D. The motive of persons seeking to vindicate the right to public access of judicial documents “has no effect” on a court’s evaluation of whether documents are

subject to that right. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (2d Cir. 2006) (“[W]hat the Newspapers seek to do with the documents has no effect on our consideration”); *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d. Cir. 1995) (“Although the presumption of access is based on the need for the public monitoring of federal courts, those who seek access to particular information may want it for entirely different reasons. However, we believe motive generally to be irrelevant to defining the weight accorded the presumption of access.”) Thus, Syngenta’s demands for information about Prairie Rivers’ motive to intervene in *City of Greenville* and for any communications between Prairie Rivers and other persons concerning the case will not lead to relevant evidence.

Furthermore, whether Prairie Rivers has previously sought to intervene in any cases for the purpose of unsealing documents also has no bearing on whether the documents at issue in this case should be unsealed. *Florida ex rel. Butterworth v. Jones Chemical, Inc.*, No. 90-875-Civ-J-10, 1993 U.S. Dist. Lexis 10348, *11-13 (M.D. Fla. Mar. 4, 1993) (defendants did not make “a sufficient showing to warrant the discovery [into possible violation of a protective order]” where defendants “offer the barest of suspicions to justify conducting a deposition of and a rather extensive. . . production of documents by [the alleged violator]. Absent stronger evidence of a violation. . . , the Court cannot countenance such discovery. . . .”). For these reasons, alone, Prairie Rivers’ Motion to Quash the Subpoena should be granted.

II. SYNGENTA’S SUBPOENAS SEEK TO CHILL PRAIRIE RIVERS’ FIRST AMENDMENT RIGHTS.

The subpoenas should also be quashed because allowing Syngenta to carry out its demands could impermissibly chill Prairie Rivers’ and ELPC’s exercise of their First

Amendment rights.¹ The U.S. Supreme Court has long recognized public interest litigation falls within the rights of freedom of association and expression, both of which are guaranteed and protected by the First Amendment. *In re Primus*, 436 U.S. 412, 438 n. 32 (1978) (“[C]ertain forms of ‘cooperative, organizational activity,’ . . . including litigation, are part of the ‘freedom to engage in association for the advancement of beliefs and ideas,’ [and] this freedom is an implicit guarantee of the First Amendment.”) (internal citations omitted); *NAACP v. Button*, 371 U.S. 415, 429 (1963) (“[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy. . . . Litigation is . . . thus a form of political expression”). The timing and “fishing expedition” intrusion of Syngenta’s subpoenas appears directed to retaliate against, harass and deter Prairie Rivers and ELPC from exercising their protected First Amendment rights and common-law right of public access to judicial record documents.

III. THE INFORMATION DEMANDED BY SYNGENTA’S SUBPOENAS IS PROTECTED BY ATTORNEY-CLIENT AND WORK PRODUCT DOCTRINE PRIVILEGES OR INVOLVE TRIAL PREPARATION MATERIAL.

Syngenta’s subpoenas should also be quashed because the vast majority of the information sought from Prairie Rivers is covered by the attorney-client privilege or the work-product privilege or is trial-preparation material, and thus – *even if* relevant – is protected from discovery under F.R.C.P. 45(c)(3)(A)(iii) and 45(d)(2). “On timely motion, the issuing court must quash or modify a subpoena that . . . requires disclosure of privileged or other protected matter, if no exception or waiver applies.” F.R.C.P. 45(c)(3)(A)(iii); *Northwestern Mem’l Hosp.*

¹ Although Syngenta is a private party and not a state actor, the subpoena constitutes state action for the purposes of the First Amendment. “A court order, even when issued at the request of a private party in a civil lawsuit, constitutes state action and as such is subject to constitutional limitations.” *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1091-92 (W.D. Wash. 2001) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

v. Ashcroft, 362 F.3d 923, 935 (7th Cir. 2004). “In order for the attorney-client privilege to attach, the communication in question must be made: (1) in confidence; (2) in connection with the provision of legal services; (3) to an attorney; and (4) in the context of an attorney-client relationship.” *U.S. v. BDO Seidman, LLP*, 492 F.3d 806 (7th Cir. 2007). The work-product doctrine “shields documents and tangible things ‘prepared in anticipation of litigation or for trial by and for another party or by or for that other party’s representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent)’” *Trepanier v. Chamness*, No. 00 C 2393, 2005 U.S. Dist. Lexis 23293, *5-6 (N.D. Ill. Oct. 12, 2005) (citing F.R.C.P. 26(b)(3)(A)).

By seeking information concerning Prairie Rivers’ “decision to seek to intervene in the case captioned *City of Greenville et al. v. Syngenta Crop Protection, et al.*, Case No. 10-CV-188-JPG-PMF” and demanding “[a]ll documents related to [Prairie Rivers’] decision to seek to intervene in the case captioned *City of Greenville et al. v. Syngenta Crop Protection, et al.*, Case No. 10-CV-188-JPG-PMF,” Syngenta is seeking to gain access to the sphere of documents and discussions that took place between and among Prairie Rivers and its attorneys, as well as the work product of its attorneys. Virtually every document and communication responsive to those demands would be covered by the attorney-client and work product privileges, and may also include trial-preparation materials. Because intrusion into those protected privileged areas is not permissible, the subpoenas should be quashed for this reason as well.

IV. SYNGENTA’S SUBPOENAS DO NOT ALLOW REASONABLE TIME FOR PRAIRIE RIVERS AND ELPC TO COMPLY.

Syngenta’s subpoenas should be quashed because they do not allow Prairie Rivers and ELPC a reasonable time to comply. F.R.C.P. 45(c)(3)(A) states that “the issuing court must

quash or modify a subpoena that: (i) fails to allow a reasonable time to comply.” F.R.C.P. 30(b)(1) further requires that a “party who wants to depose a person by oral questions must give reasonable written notice to every other party” As Syngenta, itself, highlighted in the motion to quash that it filed in *City of Greenville*, federal courts have “particularly stressed that in order to avoid scheduling conflicts, a party seeking to schedule a deposition should confer with opposing counsel regarding a mutually agreeable date before serving a notice of deposition. *Seabrook Medical Systems, Inc. v. Baxter Healthcare Corp.*, 164 F.R.D. 232, 233 (S.D. Oh. 1995); *Lamar Advertising of South Dakota, Inc. v. Kay*, 2010 WL 455119, at *1 (D.S.D. Feb. 2, 2010).” Defendant’s Memorandum in Support of its Motion to Quash Deposition Notices of Dr. Donald Coursey, Joseph Bast with Heartland Institute, Jayne Thompson, and Custodian of Records for Jayne Thompson and Associates, and For Entry of a Protective Order, Exhibit E, at 6. Syngenta further emphasized that simply “allowing an opposing party’s counsel the physical opportunity to attend does not *ipso facto* make a notice of deposition ‘reasonable,’ as mere physical opportunity does not override such counsel’s entitlement to a deposition date that did not conflict with other obligations” and would allow sufficient time to prepare for the deposition. *Id.* (citing *C & F Packing Co., Inc. v. Doskocil Companies, Inc.*, 126 F.R.D. 662, 679-80 (N.D. Ill. 1989)).

In that motion, Syngenta argued that notices of deposition providing ten days of notice before scheduling depositions were “inadequate and unreasonable.” Exhibit E at 7. Here, without consulting with Prairie Rivers’ counsel, Syngenta served two subpoenas that scheduled two depositions just seven days from the date of subpoena service: one for a representative of Prairie Rivers (for which ELPC is the legal counsel), scheduled to take place in Champaign, Illinois, and another for a representative of ELPC, scheduled to take place just four hours earlier

in Chicago. Exhibit A and Exhibit B. Moreover, the subpoenas demand document production on the same day – just seven days from service. This unilateral scheduling, which provides only seven days to prepare both document production and for depositions, falls far short of providing Prairie Rivers and ELPC the “reasonable notice” required by F.R.C.P. 30(b)(1) and 45(c)(3)(A). Syngenta’s subpoenas should be quashed.

For the foregoing reasons, Prairie Rivers Network respectfully requests that this Court grant the Motion to Quash the subpoena issued by Syngenta.

Dated: April 13, 2011

Respectfully submitted,



Albert Ettinger, IL Bar #3125045
53 West Jackson Blvd., #1664
Chicago, IL 60604
(773) 818-4825
Ettinger.Albert@gmail.com
LEAD ATTORNEY

Howard A. Learner, IL Bar #3127346
Jennifer L. Cassel, IL Bar #6296047
Environmental Law and Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
(312) 673-6500
(312) 795-3730 (facsimile)
HLearner@elpc.org
jcassel@elpc.org

Attorneys for Prairie Rivers Network

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2011, I served a true and correct copy of the foregoing

by first-class, United States Mail mail upon the following parties:

Christopher M. Murphy
Michael A. Pope
McDermott, Will & Emery, LLP
227 West Monroe Street
Chicago, IL 60606-5096

Mark C. Surprenant
Adams and Reese LLP
4500 One Shell Square
New Orleans, LA 70139

Kurtis B. Reeg
Reeg Lawyers, LLC
1 North Brentwood Blvd. Suite 950
St. Louis, MO 63105

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

Stephen M. Tillery
Christie R. Deaton
Christine J. Moody
Michael E. Klenov
Korein Tillery, L.L.C.
U.S. Bank Plaza
505 North 7th Street, Suite 3600
St. Louis, MO 63101

Patricia Murphy
Murphy Law Office
P.O. Box 220
Energy, IL 62933-0020



Albert Ettinger
Attorney at Law
53 West Jackson Blvd., #1664
Chicago, IL 60604
Ph. 773-818-4825