**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF ILLINOIS**

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| CITY OF GREENVILLE, ILLINOIS, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| v. | ) | Case No. 10-cv-188-JPG-PMF |
| | ) | |
| SYNGENTA CROP PROTECTION, LLC f/n/a SYNGENTA CROP PROTECTION, INC., and SYNGENTA AG, | ) | |
| | ) | |
| Defendants. | ) | |

**DEFENDANT SYNGENTA CROP PROTECTION, LLC'S BRIEF**
**IN OPPOSITION TO MOTION FOR LEAVE TO INTERVENE**

The joint Motion for Leave to Intervene ("Motion") filed by the Environmental Law & Policy Center and Prairie Rivers Network ("ELPC/PRN") should be denied. ELPC/PRN seek intervention in this case to unseal documents in the court file which were designated as confidential by Defendant Syngenta Crop Protection, LLC ("Syngenta") during discovery and later filed under seal by Plaintiffs. Intervention should be denied because the issue of whether the documents should be unsealed was already squarely before the parties and this Court long before ELPC/PRN sought intervention. Further, ELPC/PRN have not provided sufficient facts to justify their intervention on behalf of their "members who use water in Illinois" and who have an interest in learning about "the potential effects of atrazine on those waters," especially when facts in the record raise serious doubts about their true purposes for seeking intervention. If Syngenta's confidential documents should not have been filed in the public record in the first place, then it would be unduly prejudiced by intervention.

## I. ELPC/PRN Have Not Satisfied the Standards for Intervention.

The federal permissive joinder rule, F.R.C.P. 24(b)(1), states, in part, that "the court *may* permit anyone to intervene." (emphasis added). By the rule's self-limiting terms, not every

party remotely interested in any of the issues involved in a lawsuit should be allowed to intervene. "While Rule 24 promotes judicial economy by facilitating, where constitutionally permissible, the participation of interested parties in others' lawsuits, the fact remains that a federal case is a limited affair, and not everyone with an opinion is invited to attend." *Mausolf v. Babbitt*, 85 F.3d 1295, 1301 (8th Cir. 1996). Even if a party meets the threshold criteria for permissive intervention, the court must still engage in a balancing test of the parties' interests and exercise its discretion in determining whether or not to grant the intervention. *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 255 F.R.D. 308, 315 (D. Conn. 2009). At best, ELPC/PRN are casual observers who have not established any basis to permit their intervention.

Intervention should be denied where, as here, the motion to intervene seeks resolution of issues which have already been raised by the parties to the litigation. "Where the proposed intervenor merely underlines issues of law already raised by the primary parties, permissive intervention is rarely appropriate…. Therefore, courts decline to allow full-scale intervention which will inevitably bring about delay, repetition and the clouding of issues involved in the original cause of action. *U. S. v. Am. Inst. of Real Estate Appraisers of Nat. Ass'n of Realtors*, 442 F. Supp. 1072, 1083 (N.D. Ill. 1977) (emphasis added). See also *Zemaitis v. DuPage County Bd. of Elections Com'rs.*, 88 C 6301, 1988 WL 89954 (N.D. Ill. Aug. 23, 1988).

Similarly, in *Carlock v. Williamson*, No. 08-3075, 2011 WL 285626 (C.D. Ill. Jan. 26, 2011), the court denied a third party's motion to intervene where the parties before the court were already litigating the issue of whether documents should be sealed in the public record. The court stated that "[a] right of public access can be most crucial in cases where the original parties are not motivated to fully litigate a particular issue, such as when parties provide the court

with an agreed upon protective order. Here, the original parties are thoroughly litigating whether the documents at issue should be sealed. . . " *Id*. at *5.

In the present case, this Court *sua sponte* raised the issue of whether the documents should remain under seal in the form of an order to show cause why the documents should not be unsealed long before ELPC/PRN sought to intervene. (Dkt. 119). In Plaintiffs' response to this Court's show cause order, Plaintiffs argued that "court records are presumptively open to the public and should remain open to the public. . ." (Dkt. 120, p. 3). Plaintiffs further argued that "Defendants . . .should have to show cause why Plaintiffs' pleadings and their exhibits should remain sealed." (*Id*.) On April 19, 2011, this Court agreed with Plaintiffs' suggestion and ordered Syngenta to explain why every document filed in this case should not be unsealed and separately justify the seal for each document previously filed under seal. (Dkt. 170, p. 4). This Court also permitted Plaintiffs to file a brief in response to Syngenta's justifications for each document under seal. (*Id*.) Accordingly, to the extent ELPC/PRN's Motion is not rendered moot by this Court's April 19 Order, there still is no reason to permit intervention by third parties where the issues are already being squarely addressed by the parties before the Court. ELPC/PRN are free to assist Plaintiffs behind the scenes in the preparation of Plaintiffs' response brief, but they do not need to file additional briefs or have their names appear in a caption along with Plaintiffs, which will only "bring about delay, repetition and the clouding of issues". *Am. Inst. of Real Estate Appraisers*, 442 F. Supp. at 1083.

ELPC/PRN attempt to justify their superfluous role in this litigation by stating that their "members . . .have an interest in learning about, studying and commenting upon the potential effects of atrazine . . . and . . . are interested in learning about facts considered by this and other courts." (Motion, Dkt. No. 159 at 5). In support of this assertion, they cite the declarations of

two "members of the public." (*Id*.) These "members," however, are really officials of ELPC and PRN. Declarant Sarah Wochos is employed by ELPC as a "policy advocate" of ELPC. (Dkt. No. 160-1). Declarant Glynnis Collins claims that she is a "member" of PRN, but she neglects to tell the Court that she is actually the **Executive Director** of PRN (Dkt. No. 160-2; gcollins@prairierivers.org.; www.prairierivers.orgabout//staff.). ELPC/PRN have presented no facts whatsoever that any member of the public, as opposed to these two specific environmental groups, has any interest in this litigation.

**II. Intervention Would Unduly Prejudice Syngenta.**

In *Carlock v. Williamson*, No. 08-3075, 2011 WL 285626 (C.D. Ill. Jan. 26, 2011), the plaintiffs filed a motion in which they attached documents produced by defendants during discovery which defendants claimed were privileged. The court temporarily sealed the documents, and a third party publisher filed a motion to intervene for the limited purpose of opposing the sealing of judicial records. Id. at *1. The court held that it "would aggravate the injury to Defendants' rights to allow [the proposed intervenor] to intervene to seek unsealing of documents that should not have been publicly filed in the first place." *Id*. at *4. The court denied the motion to intervene, concluding that such a situation constitutes undue prejudice to defendants under Rule 24(b)(3). *Id*. at *4-5.

Here, there is the possibility that the proposed intervenors are not acting on behalf of the public interest, as they assert, but as a shill for Plaintiffs. Syngenta's concerns regarding potential collusion between ELPC/PRN and Plaintiffs are justified. First, ELPC/PRN filed their Motion on March 31, 2011, the very same day that this Court denied Plaintiffs' similar motion to unseal certain documents in the record. (Dkt. 163, denying Plaintiffs' Motion to De-Designate (Dkt. 152)). Second, the documents ELPC/PRN seek to unseal are documents filed by Plaintiffs

in support of Plaintiffs' responses to Defendant Syngenta AG's motion to dismiss for lack of jurisdiction. (Dkt. 160, p. 3; Dkt. 165, p. 1). Neither ELPC/PRN nor any other innocent third party would have any reason to believe that the sealed exhibits to briefs which address whether Syngenta's Swiss parent company has sufficient contacts with Illinois would contain information relating to atrazine effects on water. Third, there are significant issues as to why Syngenta's confidential documents were filed in the public record in the first place by Plaintiffs. Plaintiffs attached 365 exhibits to their response to Syngenta AG's motion to dismiss for lack of jurisdiction. (Dkt. 112). The sheer number of exhibits in support of the brief alone should raise a red flag as to whether they were filed to support of Plaintiffs' opposition brief or simply to put Syngenta's confidential documents in the public record. Further, and more importantly, 242 of the 365 exhibits, or two-thirds of the exhibits, were not cited anywhere in Plaintiffs' brief.[1] Fourth, and most importantly, ELPC/PRN is only seeking to unseal documents that Plaintiffs filed under seal, not any of the documents that Defendants filed under seal in this case. If ELPC/PRN were acting independently rather than at the direction of Plaintiffs' counsel, one would think they would want all of the sealed documents, not just the ones placed in the file by Plaintiffs. Because intervention would aggravate the injury to Syngenta, intervention should be denied.

## III. Intervenors Do Not Have the Right to View Documents Sealed by Protective Order.

A protective order is an important device to encourage the "just, speedy, and inexpensive determination of civil disputes ... by encouraging full disclosure of all evidence that might

[1] Syngenta's concern that Plaintiffs may have filed hundreds of documents in the public record for the purpose of obtaining an order unsealing them is not unprecedented. In *Walker v. Gore*, 2008 WL 4649091 (S.D. Ind. Oct. 20, 2008), plaintiffs attached confidential contracts to their complaint which they filed under seal but informed the court that they were not interested in keeping the contracts under seal. The defendants responded by arguing that plaintiffs "should not be able to avoid the effects of the confidentiality agreement by filing the lawsuit in a public court…." *Id.* at 1. The court recognized that the plaintiffs may have wanted the documents unsealed by court order because they "wanted to use the prospect of public disclosure to put pressure on defendants, but wanted to reduce the risk of damages for breaching the confidentiality promises." *Id.* at 2.

conceivably be relevant." *S.E.C. v. TheStreet.Com*, 273 F.3d 222, 229 (2d Cir. 2001) (citing *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir.1979)). "Both litigants and judges may protect properly confidential matters by using sealed appendices to briefs and opinions." *Union Oil Co. of California v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000). Allowing access to protected, confidential materials would have a chilling effect on the judicial system. "[I]f previously-entered protective orders have no presumptive entitlement to remain in force, parties would resort less often to the judicial system for fear that such orders would be readily set aside in the future." *TheStreet.Com*, 273 F.3d at 229-30.

The Court has already deliberated and entered its protective order finding that in this particular case the protection of Syngenta's confidential information and documents outweigh any countervailing interests of making certain documents public. (Dkt. 90). Because the parties could not agree on the definition of "confidentiality" under the protective order, the Court directed the parties to submit competing protective orders to the Court, and the Court entered its own protective order. (Dkt. 89, 90). The protective order provides a specific procedure for the disputing of documents designated as confidential. (Dkt. 90 at ¶ 12). Intervenors' attempt to unseal certain documents in the record contravenes both the protective order's provision that documents can be filed under seal, except for dispositive motions and documents used at trial (Dkt. 90 at ¶¶ 9, 18), and the provision which sets for the procedure for objecting to specific confidentiality designations (*Id*. at ¶ 12).

Plaintiffs attached certain protected materials to their filings with the Court. However, attaching or filing confidential materials with the court does not invalidate their nature or designation as confidential. The "mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of access." *S.E.C. v.*

*TheStreet.Com*, 273 F.3d 222, 231 (2d Cir. 2001). "While this court relied on the exhibits in rendering its decision . . . that reliance alone does not negate their confidentiality." *Trading Technologies Int'l, Inc. v. eSpeed, Inc.*, 04-C-5312, 2008 WL 4542921 (N.D. Ill. May 23, 2008).[2]

## CONCLUSION

Based on the foregoing reasons and authorities, the Environmental Law & Policy Center's and the Prairie Rivers Network's Motion for Leave to Intervene in this case should be denied.

Respectfully submitted,
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[2] ELPC/PRN's reliance on *In re Specht*, 622 F.3d 697, 701 (7th Cir. 2010), is misplaced. In *Specht*, no party contended that there any were trade secrets or confidential material at issue. In this case, trade secrets and other sensitive business information are considered "Confidential" under the Protective Order approved and entered by the Court, and Syngenta designated certain documents as confidential thereunder.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system, this 21st day of April, 2011, to:

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