IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

HOLIDAY SHORES SANITARY DISTRICT, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	Civil Action No. 04-cv-688-MJR
vs.	)	
SYNGENTA CROP PROTECTION, INC. AND GROWMARK, INC.	)	
Defendant.	)	

MEMORANDUM IN SUPPORT
OF PLAINTIFF'S MOTION FOR REMAND

I. INTRODUCTION

Plaintiff Holiday Shores Sanitary District (HSSD) operates a plant that provides water to the Holiday Shores community in Madison County, Illinois. HSSD draws water from a lake that has been contaminated by atrazine, a chemical found in herbicides applied to the agricultural land surrounding the lake. It is undisputed that Defendants manufacture and sell atrazine and atrazine-containing products for use in Illinois. Seeking damages for remediation costs associated with atrazine contamination of its water supplies, HSSD sued Defendants in Illinois state courts, stating claims for nuisance, trespass, negligence, strict liability, and violations of state environmental laws. Defendants removed the cases to federal court, claiming that federal subject matter jurisdiction is proper for a number of reasons.

Plaintiff files this Motion to Remand and asks this Court to remand the cases to their respective state courts for the following reasons:

(1) The Court does not have original jurisdiction over this case pursuant to 28 U.S.C. § 1331 because the case is neither controlled by federal law nor raises a federal question.

(2) The Court lacks subject matter jurisdiction pursuant to 28 U.S.C. § 1442(a)(1) because Defendants are not "federal officers."

(3) The Court does not have original jurisdiction over this case pursuant to 28 U.S.C. § 1332 because Growmark, an Illinois corporation, was not "fraudulently joined" to defeat diversity.

II. PLAINTIFF'S STATE LAW CLAIMS DO NOT SUPPORT FEDERAL QUESTION JURISDICTION.

A. Plaintiff Does Not Seek to Challenge EPA Regulations.

Defendants first assert that federal subject matter jurisdiction is proper because Plaintiff's state law claims constitute a "challenge" to the water quality standards set by the United States Environmental Protection Agency (EPA) — specifically to the EPA's established Maximum Contaminant Level (MCL) for atrazine. But Plaintiff's state law claims challenge neither the EPA's authority to regulate atrazine levels in water supplies nor any EPA decision to grant any Defendant a federal registration to market atrazine. Whether or not Defendants violated federal regulations, they may be liable under state law for their actions that affected the quality of the water supply. Rather, Plaintiff asserts its rights to "relief under state tort law, and EPA's licensing and regulatory authority has no bearing on those state law rights." *Pioneer Southern, Inc. v. Dow Agrosciences L.L.C.*, No. 03-cv-23-MJR (S.D.Ill. August 20, 2003), attached as Exhibit A; *City of Tulsa v. Tyson Foods, Inc*., 258 F.Supp.2d 1263, 1297 (N.D.Okla. 2003) (vacated by settlement).

The United States District Court for the Southern District of Illinois recently rejected an identical argument to the one raised here in another case involving Dow. In *Pioneer Southern, Inc. v. Dow Agrosciences L.L.C.*, the Honorable Michael J. Reagan remanded a similar case where a class of commercial composting corporations filed a class action against Dow, alleging harm caused by the use of Dow's herbicide clopyralid. No. 03-cv-23-MJR (Ex.A). The Court flatly rejected Dow's effort to recharacterize the plaintiffs' state-law claims as challenges to the EPA's regulatory authority. *Id*. at 3. Dow's previously failed argument has not grown more persuasive with age. The Southern District rejected this basis for removal in *Pioneer Southern*, and it should do so again here.

B. Raising a Preemption Defense Does Not Support Federal Jurisdiction.

1. The Federal Insecticide Fungicide and Rodenticide Act does not completely preempt Plaintiff's state-law claims.

Although Plaintiff's Complaint alleges only state-law causes of action arising from the manufacture and sale of atrazine, Defendants nonetheless claim that a "federal question" exists because the registration, use, sale,

and labeling of atrazine is regulated by the Federal Insecticide Fungicide and Rodenticide Act (FIFRA), which preempts state-law claims disputing the adequacy of warnings on regulated products. While Defendants recognize that "FIFRA preemption may not be independently sufficient to confer removal on the basis of a federal question," they contend nevertheless that "the existence of FIFRA preemption . . . supports the existence of substantial federal questions that require resolution in a federal forum." Notice at 16.

Here again, the Southern District rejected this exact argument in *Pioneer Southern*, explaining that "FIFRA does not grant this Court subject matter jurisdiction over complaints that include only state law causes of action." No. 03-cv-23-MJR at 3 (Ex. A). That opinion follows numerous other federal and state courts that have found that assertion of a FIFRA preemption defense does not raise a "federal question" sufficient to confer federal jurisdiction. According to long-standing rule, a defendant's assertion of federal defenses, such as preemption, is insufficient to create federal removal jurisdiction. *Murray v. Commonwealth Edison*, 905 F.Supp. 512, 513 (N.D.Ill. 1995) (citing *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42 (1908). Federal question jurisdiction must be clear on the face of the complaint before the case can be removed to federal court. *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 63, 107 S.Ct. 1542 (1987) (*citing Gully v. First National Bank*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936)); *Burda v. M. Ecker Co.*, 954 F.2d 434, 438 (7th Cir. 1992) ("A case may not be removed to federal court on the basis of a federal defense the defendant might raise to defeat the plaintiff's claim."); *Dickman v. E.I. Du Pont de Nemours & Co*., 278 Ill.App.3d 776,780, 663 N.E.2d 507, 510 (Ill.App. 3 Dist. 1996) ("Federal courts cannot entertain State law claims which involve FIFRA preemption.").

The existence of a potential defense of FIFRA preemption is not among the extremely limited circumstances giving rise to federal question jurisdiction even when no federal question has been raised on the face of Plaintiff's well-pleaded complaint. Preemption provides federal question jurisdiction only "in limited instances where a federal statute's preemptive force is so powerful that in addition to preempting state law causes of action, it also provides federal question jurisdiction." *Murray*, 905 F.Supp. at 514. Such jurisdiction has been found only in cases arising under the Labor Management Relations Act (LMRA) and the Employment

Retirement Income Security Act (ERISA), each of which contains a section expressly granting jurisdiction over civil enforcement claims to the federal courts. *Id*. at 513-514.

By contrast with these statutes, FIFRA was never intended to occupy the field of pesticide regulation and contains no express grant of federal subject matter jurisdiction. As the Supreme Court has explained:

> FIFRA . . . leaves substantial portions of the field vacant . . . . Whatever else FIFRA may supplant, it does not occupy the field of pesticide regulation in general. Rather, **it acts to ensure that the States could continue to regulate use and sales** even where, such as with regard to the banning of mislabeled products, a narrow pre-emptive overlap might occur.

Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 614, 111 S.Ct. 2476, 2487 (1991) (emphasis added). The vast majority of federal courts have followed suit, concluding that the Act does not completely preempt state law and thus a "FIFRA defense" is insufficient to establish federal question jurisdiction. *Feikema v. Texaco, Inc*., 16 F.3d 1408, 1417 (4th Cir. 1994); *Hurt v. Dow Chemical Co.*, 963 F.2d 1142 (8th Cir. 1992); *Pioneer Southern, Inc. v. Dow Agrosciences L.L.C.*, No. 03-cv-23-MJR at 2-3 (S.D.Ill. 2003); *Ell v. S.E.T. Landscape Design, Inc*., 34 F.Supp.2d 188, 192 (S.D.N.Y. 1999); *see also Thigpen v. Cheminova*, 992 F.Supp. 864 (S.D.Miss. 1997); *Martinez v. Dow Chemical Co.*, Nos. 95-3212, 95-3214, 1996 WL 502461 (E.D.La. Sept 4., 1996); *Murray v. Commonwealth Edison*, 905 F.Supp. 512 (N.D.Ill. 1995); *DerGazarian v. Dow Chemical Co.*, 836 F.Supp. 1429 (W.D.Ark. 1993).

2. The Safe Drinking Water Act does not completely preempt Plaintiff's state-law claims.

Defendants similarly argue that Plaintiff's Complaint implicates the Safe Drinking Water Act (SDWA) by disputing the "substantial federal question of law as to whether the EPA's regulation that 3 ppb of atrazine is a safe and acceptable level in drinking water." Notice at 8. As discussed above, however, the possibility that a federal statute may preempt certain state-law claims is not a basis for "federal question" jurisdiction under 28 U.S.C. § 1331. *Metropolitan Life Insurance Co.*, 481 U.S. at 63; *Murray*, 905 F.Supp. at 513.

First, Defendants cannot even colorably argue that the SDWA completely preempts the field of water regulation, as would be necessary to invoke federal jurisdiction. Congress has specifically preserved in the SDWA "the rights of the states to legislate in these areas and right of individuals to pursue state remedies."

Batton v. Georgia Gulf, 261 F.Supp.2d 575, 598 (M.D.La. 2003). And the SDWA includes an express savings clause providing that "nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any requirement prescribed by or under this subchapter or to seek any other relief." 42 U.S.C. § 300j-8(e); *Batton*, 261 F.Supp.2d. at 597.

Second, Defendants cannot even demonstrate a conflict between Plaintiff's claims and the Act, which contemplates that states will continue to regulate water and may enforce water standards that are more stringent than the federal standards. 42 U.S.C. § 300g-2(a)(1) (implying that a state with primary enforcement responsibility for public water systems may adopt water standards that are more stringent than the national primary drinking water regulations); *Id*. at § 300g-3 (e) ("Nothing in this subchapter shall diminish any authority of a State or political subdivision to adopt or enforce any law or regulation respecting drinking water regulations or public water systems, but no such law or regulation shall relieve any person of any requirement otherwise applicable under this subchapter."). Accordingly, federal courts have routinely rejected conflict preemption

arguments premised on the Safe Drinking Water Act. *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 497 (9th Cir. 1984); *City of Tulsa v. Tyson Foods, Inc.*, 258 F.Supp.2d 1263, 1297 (N.D.Okla. 2003) (vacated by settlement) (whether the SDWA standards were exceeded was not relevant to plaintiffs' state-law claims); *see also City of Evansville, Ind. v. Kentucky Liquid Recycling, Inc*., 604 F.2d 1008, 1017 n.25 (7th Cir. 1979), *cert. denied, Louisville and Jefferson County Metropolitan Sewer Dist. v. City of Evansville, Ind.*, 444 U.S. 1025, 100 S.Ct. 689 (1980) (quoting H.R.Rep.No.93-1185, reprinted in (1974) U.S.Code Cong. & Admin.News at 6454).

III. COMPLIANCE WITH FEDERAL REGULATIONS DOES NOT MAKE DEFENDANTS "FEDERAL OFFICERS" ENTITLED TO FEDERAL JURISDICTION.

Defendants cannot show the required elements to remove an action pursuant to section 1442(a)(1). To remove under this statute, Defendants must (1) have acted at the direction of a federal officer; (2) demonstrate a causal nexus between Plaintiff's claims and the acts performed under federal direction; and (3) raise a colorable federal defense to Plaintiff's claims. *Mesa v. California*, 489 U.S. 121, 124-25 (1989). Here, Defendants cannot carry their burden, and the cases must be remanded to state court.

Defendants in these cases are private corporations that manufacture and sell atrazine and atrazine-containing products for use in agricultural applications. None of the Defendants is a military or government contractor, none is an agent of the federal government, and none acted under the direct control of the federal government in designing and marketing its atrazine-containing products. Yet Defendants maintain that they are entitled to remove these cases under 28 U.S.C. § 1442(a)(1), which allows for removal by "federal officers." Because Defendants cannot be considered "federal officers" without stretching section 1442(a)(1) well beyond its intended bounds, this Court cannot exercise subject matter jurisdiction on this basis and should remand the cases to state court.

A. Defendants Did Not Act at the Direction of the Federal Government in Formulating, Manufacturing, and Marketing Atrazine-containing Products.

Defendants claim here that they acted "at the direction of a federal officer" because they complied with federal regulations applicable to the registration, sale, and use of atrazine. Courts have consistently rejected this argument, reiterating that mere participation in a regulated industry is not action "at the direction of a federal officer." *Bakalis v. Crossland Savings Bank*, 781 F.Supp. 140, 145 (E.D.N.Y. 1991); *Fung v. Abex Corp*., 816 F.Supp. 569, 572 (N.D.Cal. 1992). Rather, Defendants must show that the federal government exercised control over or manipulated the design, manufacture, or sales of atrazine. *Collora v. R.J. Reynolds Tobacco Co.*, No. 4:04CV0052 HEA (E.D.Mo. September 30, 2004) (not reported), attached as Exhibit B. Compliance with FIFRA and EPA regulations does not show the type of federal control that supports federal subject matter jurisdiction in this case.

Mere participation in a regulated industry — and adherence to federal regulations — does not entitle a corporation to section 1442(a)(1) removal. *Fung v. Abex Corp*., 816 F.Supp. 569, 572 (N.D.Cal. 1992); *Ryan v. Dow Chemical Co.*, 781 F.Supp. 934, 950 (E.D.N.Y. 1992); *Bakalis*, 781 F.Supp. 140, 144- 45. A majority of courts have held that a federal official must have "direct and detailed control" over the defendant. *Fung*, 816 F.Supp. at 572; *Ryan*, 781 F.Supp. at 947.

The District Court for the Southern District of Illinois has rejected the very argument that Defendants try here. In *Pioneer Southern*, Dow argued that it was entitled to federal jurisdiction because it is subject to

extensive federal regulation under FIFRA. No. 03-cv-23-MJR at 2-3 (S.D.Ill. August 20, 2003) (Ex. A). Judge Reagan was not persuaded that Dow was cloaked in the official robes of government when it developed and sold the herbicide that contaminated the plaintiffs' compost:

> In this case, Dow cannot demonstrate that it was acting under the direction of a federal officer with respect to the conduct that forms the basis for Plaintiff's claims. The grant of an EPA registration does not constitute direction from the federal government to formulate the product in a certain way or to continue to sell the product for certain uses. **Dow's actions with regard to its EPA registrations were determined by Dow.**

Id. at 5. Dow, and the other Defendants, raise the same argument in this case, and it must fail here, too.

A federal district court in California also rejected this argument recently, holding that compliance with FIFRA labeling requirements does not confer "federal officer" status on the manufacturer of a pesticide. *Tellez v. Dole Food Co., Inc.*, No. CV 04-03216 PA (C.D.Cal. June 18, 2004) (not reported), attached as Exhibit C. The court found the theory "simply too broad" and "beyond the Congressional mandate of 28 U.S.C. § 1442(a)(1)." *Id*. The plaintiffs sued Dow in state court, claiming that their exposure to DBCP, a soil fumigant used on banana crops, had caused their personal injuries. *Id*. at 1. Dow removed the case, arguing that because it sold DBCP in conformity with FIFRA, it qualified as a "federal officer." *Id.* at 2. The district court disagreed, stating flatly that

> **Dow is not an officer or agency of the United States, nor was Dow's sale of DBCP made pursuant to the direction of such an officer or agency.** Dow did nothing more than use an EPA-approved sticker on the containers of DBCP it shipped off to the Nicaraguan banana farms. ... **But Dow acted no more at the direction of a federal agency in including these warnings** than it did in receiving approval of its own initial registration.

Id. at 6 (emphasis added).

Just last month, the district court for the Eastern District of Missouri reached the same result with respect to claims based on misrepresentations in cigarette advertising and packaging. In *Collora v. R.J. Reynolds Tobacco Co.*, the court dismissed the tobacco company's argument that it acted under the direction and control of the Federal Trade Commission in selling and marketing "light" and "low tar" cigarettes. No. 4:04CV0052 HEA (E.D.Mo. September 30, 2004) (not reported), (Ex. B). Although the "tobacco industry is highly regulated and such regulation encompasses cigarette advertising and testing of tar and nicotine content,"

the court observed that "Defendants have failed to show how the FTC required or directed them to market their cigarettes as "lights" or "low tar" or otherwise controlled or manipulated the design or production of low tar cigarettes." *Id*. at 5-6. Thus, the court concluded, "Defendant's disclosure of the tar and nicotine levels of its products . . . does not transform their design, manufacture, or sales practices into actions conducted under the direction of a federal officer or agency." *Id*. at 6.

Logic demands the same finding here. Defendants' manufacture and sale of atrazine-containing products was not ordered by the federal government. Defendants here are not actual officers or agencies of the United States, nor was Defendants' production and sale of atrazine made pursuant to the direction of such an officer or agency. Defendants did nothing more than use an EPA-approved label on their products, and like Dow in *Pioneer Southern* and *Tellez*, Defendants "acted no more at the direction of a federal agency in including these warnings than it did in receiving approval of its own initial registration." *Tellez*, No. CV 04-03216 PA at 6 (Ex. C).

To find federal officer status, the clear majority of courts have always required that a defendant show some sort of agency relationship with the United States — *i.e*., that the defendant is a direct employee of the United States, is an agency or enterprise of its creation, or acts as its privy under a government contract. *See, e.g., Bakalis*, 781 F.Supp. at 145 (section 1442(a)(1) "allows private corporations to remove only when the corporation is so intimately involved with government functions as to occupy essentially the position of an employee of the government."); *Little v. Purdue Pharma LP*, 227 F.Supp.2d 838, 860-61 (S.D.Ohio 2002) (corporate "drug manufacturers do not take governmental orders"); *In re Agent Orange Product Liability Litigation*, 2004 WL 231187 (E.D.N.Y. 2004); *Guckin v. Nagle*, 259 F.Supp.2d 406, 416-17 (E.D.Pa. 2003); *Jamison v. Purdue Pharma, LP*, 251 F.Supp.2d 1315, 1326 (S.D.Miss. 2003); *Tremblay v. Philip Morris, Inc*., 231 F.Supp.2d 411 (D.N.H. 2002); *Lowe v. Norfolk & W. Ry. Co.*, 529 F.Supp. 491 (S.D.Ill. 1982); *Northern Colorado Water Conservancy Dist. v. Board of County Commissioners*, 482 F.Supp. 1115, 1118 (D.Colo. 1980); *see also Brown v. Philip Morris, Inc*., 250 F.3d 789, 801 (3d Cir. 2001).

Indeed, only one reported decision has ever found a product manufacturer, not under government

contract, to be a federal officer entitled to remove a case under section 1442(a)(1). *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, 2004 WL 515535, *7 (S.D.N.Y. 2004), attached as Exhibit D. Defendants' reliance on *In re MTBE* is a mistake. First, the court's extremely broad interpretation of section 1442(a)(1) is so far-reaching that it threatens to encompass every person or corporation that complies with some federal regulations. Second, the result reached in *In re MTBE* was based on a specific set of legal and factual circumstances that are completely absent here.

In *In re MTBE*, the oil refiner defendants alleged that they acted as "federal officers" when they added MTBE to gasoline. *Id.* To support this argument, the defendants asserted that when the Clean Air Act was amended to require oxygenates be used in gasoline and to approve of seven oxygenates including MTBE, both Congress and the EPA were aware that defendants would, as a practical matter, have to use MTBE in order to comply with the Act's requirements. *Id*. Based on that factual record, the court found that the defendants sufficiently alleged that because MTBE was the only practical choice of the seven possible oxygenates, the refiners were effectively required to add MTBE to gasoline at the direction of the EPA. *Id*. Notably, the court did not decide to exercise federal jurisdiction merely because gasoline is subject to regulation:

> **removal** pursuant to section 1442(a)(1) **is premised not on defendants' participation in a regulated industry**, but rather the fact that defendants took actions at the **express direction** of the federal government, and those actions are the basis for the complaints.

Id. at *8 (emphasis added).

Defendants cannot establish such "express direction" in this case. Unlike the oil refiner defendants in *In re MTBE*, none of the Defendants in this case has even alleged that federal regulations somehow "required" them to use atrazine in their products. The federal government did not *mandate* that atrazine be used in herbicides but, rather, *allowed* it to be used, if Defendants so chose. Such permission rises in no way to the level of "express direction."

B. Defendants Cannot Demonstrate a Causal Nexus Between Plaintiff's Claims and the Acts Allegedly Performed under Federal Direction.

Even if Defendants could establish that they acted at the direction of the federal government, they cannot show a nexus between the government-mandated acts and Plaintiff's claims. The "causal nexus"

requires evidence of intimate government involvement in the design decisions or production of the product causally related to the alleged tort. *In re "Agent Orange" Product Liability Litigation*, 304 F.Supp.2d at 448 (citing *Anderson v. Avondale Indus., Inc*., 1994 WL 679827, *4 (E.D.La. 1994)). That level of involvement is not present here. It is undisputed that the federal government did not control how Defendants' were to formulate their products, did not mandate that atrazine be used in those products, did not specify the uses for which atrazine should be marketed, and did not control how the atrazine-containing products were sold and distributed.

C. Defendants Cannot Raise a Colorable Federal Defense to All of Plaintiff's Claims.

Finally, Defendants cannot show the final requirement for "federal officer" jurisdiction under section 1442(a)(1) — that they have a colorable federal defense to Plaintiff's claims. As discussed above, *see* Section II.B. of this Motion, FIFRA does not completely preempt the field of pesticide regulation. *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 613-614, 111 S.Ct. 2476, 2487 (1991). The Supreme Court recognized that states can continue to regulate use and sales. *Id*. Federal courts nationwide have agreed, holding that the Act does not completely preempt state law. *Hurt v. Dow Chemical Co.*, 963 F.2d 1142 (8th Cir. 1992); *Pioneer Southern, Inc. v. Dow Agrosciences L.L.C.*, No. 03-cv-23-MJR at 2-3 (S.D.Ill. 2003).

Plaintiff's Complaints set out state-law claims other than failure-to-warn allegations that might be preempted. Such claims — for negligent testing, manufacturing, and formulating — are not preempted by FIFRA if they are based solely on a manufacturer's testing and research practices and are not related to advertising or promotion. *Taylor Ag Industries v. Pure-Gro*, 54 F .3d 555, 561 (9th Cir.1995); *Worm v. American Cyanamid Co.*, 5 F.3d 744, 747-48 (4th Cir.1993); *Patton v. Country Place Condominium Ass'n*, 2000 WL 33728374, *3 (Ill.App. 4 Dist. 2000) (not reported). Nor does FIFRA preempt actions based on express warranty claims or voluntary representations that do not merely repeat label warnings. *See Prather v. Ciba-Geigy Corp*., 852 F.Supp. 530, 532 (W.D.La.1994); *Casper v. E.I. Du Pont De Nemours & Co.*, 806 F.Supp. 903, 909 (E.D.Wash.1992); *Diehl v. Polo Co-op. Ass'n*, 328 Ill.App.3d 576, 580, 766 N.E.2d 317, 321 (Ill.App. 2 Dist. 2002).

IV. THIS COURT LACKS DIVERSITY JURISDICTION BECAUSE GROWMARK IS LEGITIMATELY BEFORE THE COURT AND WAS NOT "FRAUDULENTLY JOINED."

Defendants "must clear a high hurdle to demonstrate fraudulent joinder." *Simmons ex rel. Estate of Simmons v. Norfolk Southern Ry. Co.*, 324 F.Supp.2d 914, 915 (S.D.Ill. 2004). In the Seventh Circuit, an out-of-state defendant who wants to remove must show either outright fraud in plaintiff's pleading of jurisdictional facts, *Gottlieb v. Westin Hotel Co.*, 990 F.2d 323, 327 (7th Cir.1993), or that, after resolving all issues of fact and law in favor of the plaintiff, the plaintiff cannot establish a cause of action against the in-state defendant. *Poulos v. Naas Foods, Inc*., 959 F.2d 69, 73 (7th Cir. 1992). Defendants have not alleged actual fraud in the Plaintiff's Complaint but have charged that "there is no reasonable possibility that a state court could find Growmark liable on any of the claims asserted." Notice at 31. Defendants contend that Plaintiff's claims are vulnerable to dismissal based on FIFRA preemption, Illinois state procedural rules, and various requirements for Plaintiff's state-law claims. By attacking the merits of Plaintiff's state-law claims, Defendants attempt to distract the Court from "the proper focus of a fraudulent joinder claim [which] is whether the joinder of the local parties was fraudulent, a simple concept that is too easily obscured." *Smallwood v. Illinois Central R. Co.*, 352 F.3d 220, 222 (5th Cir. 2003).

A. Defendants' Fraudulent Joinder Claim is Barred by the Common Defense Rule.

Defendants' claim of fraudulent joinder is barred by the "common defense rule" recognized in *Chesapeake & O. R. Co. v. Cockrell*, 232 U.S. 146, 34 S.Ct. 278 (1914). Under the common defense rule, a defendant cannot claim fraudulent joinder based on a defense that is common to all defendants because such an assertion "does not show that the non-diverse defendants were 'wrongfully brought into a controversy which did not concern them.'" *Id*. In this case, the various defenses and arguments are not unique to Growmark but are common to all Defendants. The Supreme Court has made clear that a showing that the plaintiff's case is barred as to all defendants is not sufficient to carry the burden of proving that the joinder of the local party was fraudulent. *Chesapeake & O.R. Co.*, 232 U.S. 146, 34 S.Ct. 278. The Fifth Circuit recently agreed, holding that a common preemption defense could not support a finding of fraudulent joinder:

> When the only proffered justification for fraudulent joinder is that there is no reasonable basis for predicting recovery against the in-state defendant and that showing is equally dispositive of all defendants rather than to the in-state defendants alone, the requisite showing has not been made.

Smallwood v. Illinois Central R. Co., --- F.3d ---, 2004 WL 2047314, *4 (5th Cir. 2004) (en banc) (slip opinion). While Defendants would no doubt prefer a more expansive view of fraudulent joinder, courts have interpreted *Cockrell* to "keep[] the doctrine of fraudulent joinder within narrow limits and thus reduce[] the ability of defendants to escape from state courts. It is important to remember . . . that the doctrine of fraudulent joinder is a judicially-created exception to the complete diversity rule. It is both prudent and appropriate to keep the doctrine within narrow limits rather than to expand it." *In re New England Mut. Life Ins. Co. Sales Practices Litig.*, 2004 WL 1567871 (D. Mass. 2004).

Even assuming that Defendants could convince this Court to take a more liberal view of fraudulent joinder, Defendants have not met their burden of proof under any standard. Claims of fraudulent joinder should be upheld only in cases in which the pleadings or undisputed facts negate liability on the part of the resident defendant. In *Mills v. Allegiance Healthcare Corp*., 178 F.Supp.2d 1 (D. Mass. 2001), the court upheld a claim of fraudulent joinder based on uncontroverted evidence that the resident defendant did not begin to distribute the defective products until after the plaintiff was injured, making it impossible for that defendant to be held liable. *See id.* at 7. In this case, Defendants do not dispute that Growmark did in fact market, sell, and supply atrazine during the time that the Plaintiff was injured.

B. Plaintiff Can Establish Causes of Action Against Growmark Under Applicable State Law.

Plaintiff alleged state-law causes of action against Growmark as a seller and supplier of atrazine products. Whether Plaintiff will ultimately prevail on those claims is irrelevant for determining whether diversity exists. All Plaintiff must do, at this point, is to state a cause of action under state law. *Simmons ex rel. Estate of Simmons v. Norfolk Southern Ry. Co.*, 324 F.Supp.2d 914, 917 (S.D.Ill. 2004). Plaintiff need not have a winning case against the allegedly fraudulent defendant; if there is a possibility that Plaintiff has stated a cause of action, the joinder is not fraudulent, and the case should be remanded. *Chappell v. SCA Services, Inc*., 540

F.Supp. 1087, 1091 (D.C.Ill. 1982). Moreover, in determining whether Plaintiff has the possibility of stating a valid cause of action, the Court is to resolve all disputed questions of fact, and any ambiguities in the controlling state law, in favor of Plaintiff. *Poulos*, 959 F.2d at 69, n. 3; *Katonah v. USAir, Inc.*, 868 F.Supp. 1031, 1034 (N.D.Ill. 1994); *Kocot v. Alliance Mach. Co.*, 651 F.Supp. 226, 227 (S.D.Ill. 1986).

Plaintiff must show here only that its state-law claims are not "wholly unsubstantial and frivolous." *Batoff v. State Farm Insurance Co.*, 977 F.2d 848, 853 (3d Cir. 1992). In *Batoff*, the court observed that "the inquiry into the validity of a complaint triggered by a motion to dismiss under Rule 12(b)(6) is more searching than that permissible when a party makes a claim of fraudulent joinder" and made clear that "it is possible that a party is not fraudulently joined, but that the claim against that party ultimately is dismissed for failure to state a claim upon which relief may be granted." *Id*. at 852. This Court should not "purport to decide whether the pleadings are sufficient to survive a motion to dismiss under the heightened fact-pleading standards employed by the Illinois courts." *Momans v. St. John's Northwestern Military Academy, Inc*., 2000 WL 33976543, *9 (N.D.Ill. 2000) (not reported).

1. Although Plaintiff has standing to bring its claims, the lack of standing Defendants allege would require remand to state court.

Defendant's argument that Plaintiff Holiday Shores lacks standing to sue provides no basis for its fraudulent joinder claim. Even if HSSD has standing to seek only "injunctive relief or mandamus" pursuant to 70 ILCS 2805/27(d), as Defendants allege, Plaintiff's complaint clearly prays for injunctive relief. *See* First Amended Class Action Complaint, Prayer for Relief at ¶¶ d, e, k, m. But the actual question of Plaintiff's standing must be resolved by the state courts. Where a plaintiff may not have standing, the district court lacks subject matter jurisdiction and the case **"shall be remanded**." 28 U.S.C. § 1447(c) (emphasis added); *see also Gossmeyer v. McDonald*, 128 F.3d 481, 488 (7th Cir. 1997) (discussing *Smith v. Wisconsin Dept. of Agriculture, Trade and Consumer Protection*, 23 F.3d 1134, 1142 (7th Cir. 1994) (district court was required to remand claim that was not yet ripe so that state court could determine whether standing and ripeness were satisfied)); *Maine Ass'n of Interdependent Neighborhoods v. Maine Dep't of Human Servs.*, 876 F.2d 1051 (1st Cir. 1989) (plaintiff's lack of standing to challenge state and federal regulations meant that district court lacked

subject matter jurisdiction over plaintiff's claim, and district court should have remanded action to state court); *Langford v. Gates*, 610 F.Supp. 120, 122-23 (D.C.Cal. 1985) (lack of standing is a jurisdictional defect, and "the proper course is remand" under § 1447(c), "not dismissal"). Defendants' attempt to allege fraudulent joinder based on a lack of standing fails, and this case must be remanded to state court.

2. Plaintiff's Complaint adequately states nuisance, negligence, and trespass claims.

Defendants have not met their burden here of showing that Plaintiff has no "possibility of stating a valid cause of action" for nuisance, negligence, and trespass. Defendants argue that under Illinois law, a manufacturer who does not control its product after the sale cannot be held liable in nuisance, negligence, or trespass. For support, Defendants rely on an oversimplified analysis of *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1989). In *City of Bloomington*, the city brought nuisance claims against Monsanto and Westinghouse, alleging that polychlorinated biphenyls (PCBs) manufactured by Monsanto and discharged by Westinghouse contaminated the city's landfill, sewer system, and sewage treatment plant. Monsanto argued that it could not be liable because it did not "control" the PCBs after their sale to Westinghouse. In assessing Monsanto's liability, the court's inquiry did not stop once it found that Monsanto did not control the product after the sale but turned to the question of Monsanto's "participation" in the nuisance. *Id.* at 614. Because there were no allegations to support the notion that Monsanto participated in carrying on the nuisance, the court dismissed the claims. *Id.*

Later Illinois cases recognize that a manufacturer's knowledge of the property damage caused by their products *can* be adequate to impose liability for nuisance, distinguishing *City of Bloomington*. *See, e.g., Bubalo v. Navegar, Inc.*, 1998 WL 142359, *4 (N.D.Ill. 1998) (slip opinion) (Monsanto could have been liable if it had not taken steps to warn customers of the risks of the product, or if it had intentionally marketed the product to customers who it knew or should have known would dispose of PCBs in a manner that would harm the environment); *Young v. Bryco Arms*, 327 Ill.App.3d 948,965, 765 N.E.2d 1, 14 (Ill.App. 1 Dist. 2001) (complaint stated a claim for nuisance by alleging facts showing gun manufacturers' participation in creating the nuisance). Plaintiff's Complaint alleges just this level of "participation" and, therefore, adequately states a

cause of action for nuisance. *See* First Amended Class Action Complaint at ¶¶ 15-19; 39-43.

Moreover, Plaintiff has properly alleged claims for trespass and negligence. In *City of Bloomington*, the Seventh Circuit found Monsanto lacked the requisite intent to be held liable for trespass under Indiana law because Monsanto neither deposited PCB wastes on city property nor instructed Westinghouse to do so. 891 F.2d at 615. The court did not announce a blanket rule that manufacturers can *never* be held liable for the harm caused by their products once the product leaves their control as Defendant suggested.[1] Indeed, in Illinois, "it is not necessary that he act for the purpose of entering. **It is enough that he knows that his conduct will result in such an entry**, inevitably or to a substantial certainty." Restatement (Second) of Torts § 163 cmt. c. (1965) (emphasis added); *see Dial v. City of O'Fallon,* 81 Ill.2d 548, 556-59, 411 N.E.2d 217 (1980). Plaintiff's Complaint alleges that Defendants were substantially certain that atrazine would migrate into public drinking water. *See* First Amended Class Action Complaint at ¶¶ 15-19; 31-35. These allegations support a claim for trespass under Illinois law.

Finally, Defendant relies on *Traube* to establish that one a product leaves the control of a manufacturer, they will *generally* not be liable for a nuisance or negligence claim. Defendant fails to note that the *Traube* court specifically stated, "[a]bsent from the complaint are any allegations that American Cyanamid engaged in any negligent or intentional conduct giving rise to any nuisance" and "[t]he failure to plead sufficient facts to state a cause of action supports the dismissal of plaintiff's claim." *Traube*, 333 Ill. App.3d at 202, 775 N.E.2d at 216. Here, Plaintiff has alleged specific negligent and intentional acts performed by Growmark.

3. Plaintiff's Complaint adequately states a claim under the Illinois Environmental Protection Act.

Defendants have not met their burden of showing that Plaintiff has no "possibility of stating a valid cause of action" under the Illinois Environmental Protection Act (IEPA). Although Defendants claim unequivocally that the IEPA does not permit a private right of action, the matter is far from clear. The IEPA does not expressly provide for private actions, but the Act's stated purpose is "to establish a unified, state-wide

[1] Were this over-broad statement a rule of law, it would vitiate much of the body of products liability law.

program **supplemented by private remedies**, to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." 415 ILCS § 5/1(b) (emphasis added). Some courts have found that an implied right of action exists, while others have disagreed. *Great Oak, L.L.C. v. Begley Co.*, 2003 WL 880994, *5 (N.D.Ill. 2003) (not reported). *Compare Krempel v. Martin Oil Mktg., Ltd.*, No. 95 C 1348, 1995 WL 733439 (N.D.Ill. 1995); *Midland Life Ins. Co. v. Regent Partners*, No. 96 C 3235, 1996 WL 604038 (N .D.Ill. 1996); *Singer v. Bulk Petroleum Corp* ., 9 F.Supp.2d 916 (N.D.Ill. 1998) *with Chrysler Realty Corp. v. Thomas Indus., Inc*., 97 F.Supp.2d 877 (N.D.Ill. 2000); *Norfolk Southern Railway, Co. v. GEE, Co.*, No. 98 C 1619, 2001 WL 710116 (N.D.Ill. 2001). This ambiguity in Illinois law regarding the availability of a private action must — in the fraudulent joinder context — be resolved in favor of Plaintiff. *Poulos*, 959 F.2d at n.3; *Katonah*, 868 F.Supp. at 1034.

4. Plaintiff's Complaint adequately states a claim under the Illinois Water Pollutant Discharge Act.

Defendants' sole attack on Plaintiff's count alleging a violation of the Illinois Water Pollutant Discharge Act is that "the amended complaint utterly fails to allege that Growmark owns or operates a 'facility' regulated by the statute." Notice at 44. Defendants cannot expect that this hypertechnical pleading issue would support their claim of "fraudulent joinder." They do not dispute that the Act provides Plaintiff a right of action, or that Growmark is actually a potentially liable owner or operator. Rather, they argue only that the pleadings insufficiently state certain facts– a defect that could be easily remedied by amending the Complaint. A mere pleading defect, if indeed it is one, cannot be transformed into the legal impossibility of recovery, which is what Defendants must show here to demonstrate fraudulent joinder.

Plaintiff's Complaint adequately pleads each of the above causes of action. A substantive attack on the merits of those claims is properly made not by removing the cases and arguing fraudulent joinder but by filing motions for summary judgment. Even assuming that the issues may be resolved in a summary proceeding, such a proceeding should be conducted by the state court. District courts disapprove of presenting summary judgment arguments in federal court "disguised as a fraudulent joinder claim." *Mill-Bern Associates, Inc. v.*

Dallas Semiconductor Corp., 69 F.Supp.2d 240, 246 (D. Mass. 1999). "Perhaps they should be given credit for their ingenuity, but it should not surprise them that a federal court, careful of the limits of its diversity jurisdiction, is, in the circumstances, unwilling to indulge the masquerade." *Id*.

C. Defendants Cannot Rely on Section 2-619(a)(3) of the Illinois Practice Act Because Federal Courts Do Not Apply State Procedural Statutes.

Having expressed their clear preference for federal court, Defendants cannot now rely on Illinois state rules of procedure as a basis for dismissing Plaintiff's claims. Defendants argue that the complaint against Growmark should be dismissed because 735 ILCS 5/2-619(a)(3) gives courts discretion to dismiss or stay cases where there is another suit pending between the same parties for the same cause. *See* Notice at 38; *Kapoor v. Fujisawa Pharmaceutical Co.*, 298 Ill. App.3d 780, 785 (1st Dist. 1998) ("Even if threshold 'same parties' and 'same cause' requirements are met, section 2-619(a)(3) relief is not mandatory."). Defendants relied solely on authority from *state court cases* applying the statute. Had defendants explored any relevant *federal case law*, they may have discovered that Section 2-619(a)(3) is not a basis for dismissal in federal court. *Zurich American Ins. Co. v. Pillsbury Co.*, 264 F. Supp.2d 710, 711 (N.D.Ill. 2003) (federal court applies federal procedural law and may not dismiss under 735 ILCS 5/2-619(a)(3)). Even if this Court had jurisdiction over this case, it cannot dismiss the Complaint against Defendant Growmark based on 735 ILCS 5/2-619(a)(3).

V. CONCLUSION

Defendants cannot support their claims to federal court jurisdiction based on 28 U.S.C. § 1331 because their possible federal preemption defense is insufficient to create subject matter jurisdiction. Nor can they stretch the bounds of 28 U.S.C. § 1442(a)(1) to allow federal officer jurisdiction here, where they did not act at the express direction of the federal government in choosing to produce, manufacture, market, and sell products containing atrazine. Defendants are also unable to prove their entitlement to diversity jurisdiction pursuant to 28 U.S.C. § 1332 because their claim of fraudulent joinder collapses under scrutiny. Plaintiff therefore respectfully asks the Court to grant its Motion for Remand and to remand Plaintiff's case back to state courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that service of the aforementioned instrument was made by means of the Notice of Electronic Filing on October 25, 2004, to the following counsel of record:

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