UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ILLINOIS

HOLIDAY SHORES SANITARY DISTRICT, individually and on behalf of all others similarly situated,	*	**CASE NO. 3:04-cv-00688-MJR**
Plaintiff	*	
v.	*	**JUDGE: MICHAEL J. REAGAN**
SYNGENTA CROP PROTECTION, INC.; and GROWMARK, INC.	*	**JUDGE CLIFFORD J. PROUD**
	*	**MAGISTRATE**
Defendants		
	*	**JURY TRIAL DEMANDED BY DEFENDANTS**
* * * * * * * *		

DEFENDANT'S MEMORANDUM IN OPPOSITION TO MOTION TO REMAND

NOW INTO COURT, through undersigned counsel, comes defendant, Syngenta Crop Protection, Inc. ("Syngenta"), and respectfully submits its Memorandum in Opposition to plaintiff's, Holiday Shores Sanitary District's ("Holiday"), Motion to Remand.

I. Considering the True Gravamen of Holiday's Complaint and First Amended Complaint, the Statutory Scheme Set Forth in the SDWA and Interpretive Jurisprudence, This Court Has Federal Question Jurisdiction.

A. Summary of the Argument

Holiday's heading at section II.A. of its Memorandum in Support of Motion to Remand reveals the heart of the present dispute. Holiday asserts that "Plaintiff Does Not Seek to Challenge EPA Regulations." *Id.* at pg. 2. An examination of Holiday's Complaint and First Amended Complaint, however, belies this contention. Contrary to Holiday's self-serving statements in its Motion to Remand, its Complaint and First Amended Complaint request on six separate occasions a declaratory judgment that would de facto reverse an EPA regulation. The

statutory scheme of the Safe Drinking Water Act ("SDWA") reflects the Congressional intent and "substantial federal interest"[1] to vest the EPA with exclusive authority to regulate public drinking water through issuance of national standards. Holiday's requested challenges go to the heart of the uniform system that Congress established for drinking water standards, which is why Congress requires that such challenges be heard in federal court.

B. Holiday's Complaint and First Amended Complaint Facially Challenge the Validity of the EPA's MCL for atrazine.

The SDWA was adopted with the objective "to assure that water supply systems serving the public meet…*national standards* for protection of public health." *City of Evansville, Inc. v. Kentucky Liquid Recycling,* 604 F.2d 1008, 1016 n. 25 (7th Cir. 1979) (emphasis added); *Hudson River Fisherman's Association v. City of New York,* 751 F.Supp. 1088, 1100 (S.D.N.Y. 1990) (quoting 1974 U.S. Code Cong. Admin. News 6454). The SDWA requires that the EPA adopt "public maximum contaminant level goals and promulgate national primary drinking water standards." 42 U.S.C. § 300g-1(b)(1). The maximum contaminant level ("MCL") is to be set "as close as feasible" to a level at which "no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety." 42 U.S.C.A. § 300g-1(b)(4)(A) & (B) (emphasis added).

"The regulatory scheme established under the SDWA evinces a clear congressional intention to entrust the regulation of public drinking water systems to an expert regulatory agency rather than the courts." *Mattoon v. City of Pittsfield*, 980 F.2d 1, 4 (1st Cir. 1992) (emphasis added). *Mattoon* further explained, "provided the EPA has the statutory authority to regulate contaminants in the public drinking water supply, it is within the province of the agency

[1] When "adjudication of [plaintiff's] claim implicates a substantial federal interest, …[the] action arises under federal law within the meaning of 28 U.S.C. § 1331." *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 807 (4th Cir. 1996)

not the courts, to determine which contaminants will be regulated." *Id.*, 980 F.2d at 5 (emphasis added). To avoid needless delays in the implementation of this important national program and ensure uniformity in decisions concerning issues that are more than purely local or regional in impact, Congress has expressly limited the timing, method and manner by which any person may judicially challenge EPA administrative actions pertaining to the establishment of national primary drinking water standards, including maximum contaminant levels under the SDWA. Such a challenge "may be filed only in the United States Circuit Court of Appeals for the District of Columbia circuit." 42 U.S.C. § 300j-7. Importantly, in section 42 U.S.C. § 300j-8(e) of the SDWA, Congress prohibited any "judicial review of regulations or orders of the Administrator…except as provided in section 300j-7 of this title."

The EPA has set the MCL for atrazine at 3 parts per billion ("ppb"). 56 Fed. Reg. 3526 (Jan. 30, 1991). The 3 ppb MCL was set at a level that is statutorily required to have "no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety." 42 U.S.C.A. § 300g-1(b)(4)(A) (emphasis added).[2] Despite Holiday's recent self-serving declaration that it is not challenging the EPA's MCL regulation on atrazine, it requests six separate times a declaratory judgment from an Illinois state court that "Atrazine is harmful to humans as consumed through dietary water at a level of less than three parts per billion." *See* Am. Compl. at pgs. 12-27 (emphasis added).[3] This request for relief directly

[2] Pursuant to the SDWA, the EPA is required to establish non-regulatory Maximum Contaminant Level Goals ("MCLG") for all regulated contaminants at "the level at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety." 42 U.S.C. § 300g-1(b)(4)(A). "The MCLG is somewhat aspirational." *Chlorine Chemistry Council v. Environmental Protection Agency*, 206 F.3d 1286, 1287 (D.C. Cir. 2000). SDWA regulations are expressed as Maximum Contaminant Levels ("MCL"), which take practical considerations into account while remaining "as close to the MCLG as feasible." 42 U.S.C. § 300g-1(b)(4)(B). However, for atrazine, the MCL is also 3 ppb – precisely the same as the stringent MCLG. 40 C.F.R. § 141.61(c).

[3] Holiday's Complaint and First Amended Complaint explicitly refer to the 3 ppb MCL several other times. In ¶ 10, Holiday alleges that various damages may result from the presence of atrazine in the water and that "all of

challenges the EPA's regulatory determination that atrazine up to a level of 3 ppb in drinking water has no known or anticipated adverse human health effects. Because Holiday truly seeks a determination that the 3 ppb standard fails to comply with Congress's mandate for the MCL - which is at the very heart of Holiday's Complaint and Amended Complaint - the appropriate forum for it to do so is "in the United States Circuit Court of Appeals for the District of Columbia circuit." 42 U.S.C. § 300j-7. As a result, removal pursuant to 28 U.S.C. §1441(a) is appropriate for that issue *and* the remainder of the case, even if other claims or causes of action in the case might otherwise be considered independent. *See* 28 U.S.C. §§ 1441(a), (c).

Holiday argues that this Court's decision in *Pioneer Southern, Inc. v. Dow Agrosciences, LLC*, No. 03-cv-23-MJR (S.D. Ill. August 20, 2003) supports its motion to remand. Memo. at pg. 2. Holiday is incorrect. In *Pioneer*, the plaintiff claimed that an EPA-registered herbicide had unintended negative effects, and was therefore defectively designed. The defendant claimed that the case was removable under FIFRA. This court disagreed, and while noting that FIFRA broadly preempts state law tort claims, held that it does not by itself supply a basis for removal in garden-variety products liability cases like *Pioneer*. Unlike this case, the *Pioneer* plaintiff was not challenging an MCL.[4] Whereas a state court may have jurisdiction over a run-of-the-mill products case, a frontal attack on a federally mandated MCL can only be judicially addressed by the one federal court Congress authorized to hear such a challenge, the D.C. Circuit Court of Appeals.

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these adverse effects can occur at levels lower than the three parts per billion." Am. Compl. at ¶ 10 (emphasis added). In addition, in ¶ 19, Holiday avers that there is a "harmful nature of atrazine at levels below three parts per billion." Am. Compl. at ¶ 19 (emphasis added).

[4] Holiday's other authority is also easily distinguishable. Memo p. 2. *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1297 (N.D. Okla. 2003) involved summary judgment motions on the issues causation in a CERCLA clean up case.

C. The Savings Clause of the SDWA Does Not Eliminate the Workings of Conflict Preemption or the Exclusive Judicial Review of EPA Regulations by the Federal Courts.

In order to divert attention from its facial challenge to the MCL, Holiday cites the savings clause of the SDWA and *City of Tulsa v. Tyson Foods, Inc.*, 258 F.Supp.2d 1263 (N.D. Okla. 2003); *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 497 (9th Cir. 1984) and *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979) for the proposition that "federal courts have routinely rejected conflict preemption arguments premised on the Safe Drinking Water Act." *See* Memo. at pg. 5. Holiday's argument, however, misses the mark.[5]

In *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000) the United States Supreme Court examined a typical savings clause found in a federal statute and concluded that "the savings clause…does *not* bar the ordinary working of conflict pre-emption principles." *Id.* at 869 (emphasis in original). The Court noted that "nothing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations." *Id.* Importantly, the United States Supreme Court "has repeatedly decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Id*. at 870 (emphasis added). As *Mattoon* explained, "we have little hesitation in concluding that Congress occupied the field of public drinking water regulation with its enactment of the SDWA." *Mattoon*, 980 F.2d at 4. "Where Congress intends to occupy a field, state law in that field is preempted." *Bell v. Illinois Central Railroad Co.*, 236 F.Supp.2d 882, 888 (N.D. Ill. 2001).

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[5] As an initial matter, Holiday's cited cases do not address a state court challenge by declaratory judgment to the appropriateness of an EPA issued MCL under the SDWA. To the contrary, *City of Tulsa* simply noted in *dicta* that "plaintiffs are not required to show defendants created a health hazard," to state a claim for common law nuisance under Arkansas law. *City of Tulsa* at 1310, n.26. *Chevron* addressed the Ports and Tanker Safety Act and *City of Evansville* found that a plaintiff's federal court claim premised on the SDWA did not even allege a colorable violation of the Act, therefore the claim was dismissed.

The exclusive grant of jurisdiction to the federal courts for review of national MCLs, reflecting a substantial federal interest in the uniformity of judicial review for the EPA's regulations, forms the basis for this Court's jurisdiction. Holiday's interpretation of the SDWA savings provision as a means to allow a state court to usurp from the D.C. Circuit the ability to make judicial findings on the validity of an MCL, "reads into a particular federal law [the SDWA in this instance] toleration of a conflict that those principles would otherwise forbid." *Id.* Thus, if Holiday's impermissible broad interpretation of the savings clause was correct, the exclusive grant of jurisdiction to the D.C. Circuit to judicially review EPA MCLs would be dead letter and the statute would have effectively "destroy[ed] itself." *Id.*

Alternatively, a declaration by an Illinois state court that the 3 ppb MCL does not represent a safe level for atrazine would not only undermine the uniformity and consistency that Congress requires, but would also conflict with the "clear congressional intention *to entrust the regulation of public drinking water systems to an expert regulatory agency rather than the courts*." *Mattoon,* 980 F.2d at 4 (emphasis added). Indeed, the Congressional enactment of "a comprehensive regulatory program" such as the MCLs promulgated pursuant to the SDWA, "clearly indicates that Congress meant to reserve the governance of public drinking water standards to federal administrative regulation rather than to the 'often vague and indeterminate nuisance concepts and maxims of equity jurisprudence[,]'" which are precisely what Holiday relies upon in seeking a declaratory judgment. *Id.* (internal citation omitted).

Moreover, if one were able to challenge EPA regulations in any state court it chose, such would make totally meaningless the Congressional intent that all challenges must be made in the Court of Appeals for the D.C. Circuit.[6] While the SDWA envisions a state adopting more

[6] Realignment of the parties demonstrates this point as well. If Syngenta sought a declaratory judgment from the state court by way of a counterclaim in the present litigation that 21 ppb or greater of atrazine in drinking water

stringent requirements by ordinary administrative procedures (*see* 42 U.S.C. § 300g-3(e)), the SDWA explicitly states that the only judicial review of EPA MCLs promulgated under the Act must take place in federal court. 42 U.S.C. § 300j-7(a) & 42 U.S.C. § 300j-8(e).[7]

II. This Court Has Federal Officer Jurisdiction.

Holiday argues that the recent analysis of federal agent removal in *In re: MTBE Products Liability Litigation*, 2004 WL 515535 (S.D.N.Y. March 16, 2004) should not apply to this litigation, arguing "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." Memo. at pg. 9. This argument directly contradicts the holding of *MTBE*, which stated that "Defendants do not seek removal simply because gasoline is subject to regulation," and "removal pursuant to section 1442(a)(1) is premised not on defendants' participation in a regulated industry." *Id.* at *8.[8]

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is a safe MCL with no known adverse effects, that too would constitute a facial challenge to the national minimum standard promulgated by the EPA.

[7] Holiday suggests that because the SDWA envisions some level of cooperation between the federal government and the states, conflict preemption cannot exist. Memo at 5. While the SDWA does leave a place for states to implement the federal program, it does so in a very particular way that precludes *ad hoc* judicial rulings regarding the safe level for contaminants in drinking water. The very sections of the SDWA that Holiday cites demonstrate the point. In order to obtain primary enforcement authority of the federal drinking water program, a state must demonstrate that it has: (a) adopted drinking water *regulations* that are no less stringent than the national drinking standards codified under the SDWA; and (b) adopted and is implementing adequate procedures to enforce those *regulations*. 42 U.S.C. § 300g-2; 40 C.F.R. § 142.10. The reservation of rights for a state to enforce standards that exceed the minimum is expressly limited to the adoption or enforcement of a "law or regulation[,]" not regulation by judicial fiat. 42 U.S.C. § 300g-3; 40 C.F.R. § 142.4. Illinois enjoys primary enforcement authority to enforce the federal drinking water act (44 Fed. Reg. 50649 (Aug. 29, 1979) (granting the Illinois EPA primary enforcement responsibility for public water systems in the SDWA)), but only by virtue of its laws and regulations as administered by the Illinois EPA and the Illinois Pollution Control Board, and the standards that the Illinois Pollution Control Board has promulgated are identical in substance to the federal standards. See 35 Ill. Admin. Code 611.100. Most importantly the atrazine standard promulgated by the Illinois Pollution Control Board is identical to the federal MCL. Regardless, the only manner in which judicial review of the MCLs may occur is in federal court. 42 U.S.C. § 300j-7(a) & 42 U.S.C. § 300j-8(e).

[8] *MTBE* is particularly instructive for this Court because it analyzed and allowed removal pursuant to 1442(a)(1) for claims arising pursuant to a federal environmental statute, namely, the Clean Air Act. Holiday's attempt to discredit *MTBE* falls short given that *MTBE* is the most analogous case to the matter *sub judice* and *MTBE* cited and distinguished many of the cases upon which Holiday now relies.

With this law in mind, a defendant may meet the first requirement of "action under the direction of a federal agency or officer" by "showing that the acts that form the basis for the state civil suit were performed pursuant to …comprehensive and detailed regulations." *Id.* (quoting *Ryan v. Dow Chemical Co.,* 781 F.Supp. 934 (E.D.N.Y. 1992)). With regard to regulations, courts generally consider whether "the particular conduct being sued upon is closely linked to detailed and specific regulations." *Ryan v. Dow Chemical Co.,* 781 F.Supp. 934, 947 (E.D.N.Y. 1992); *see also Gurda Farm Inc. v. Monroe County Legal Assistance Corp.,* 358 F.Supp. 841, 845 (S.D.N.Y. 1973) (allowing removal in light of "exceedingly complex regulations, guidelines, and evaluations schemes" of federal government). Although there is no precise standard for the extent of control necessary to bring an individual within the "acting under" clause, (*Gurda Farms Inc. v. Monroe*, 358 F.Supp. 841 (S.D.N.Y. 1973)), "a cursory survey of application of section 1442 reveals it has been construed broadly, and its 'persons acting under' provision particularly so." *MTBE*, quoting *Gurda Farms*. As *MTBE* explained, "the rule that appears to emerge from the case law is one of '**regulation plus**.'" *MTBE* at *6 (quoting *Bakalis v. Crossland Sav. Bank*, 781 F.Supp. 140, 145 (E.D.N.Y. 1991) (emphasis added)).

In this instance, the EPA's involvement or control over the regulation of products containing atrazine clearly rises above what would be considered ordinary governmental regulation. In actuality, in May 2004, Syngenta, among the other registrants of products containing atrazine, entered into a Memorandum of Agreement with the EPA concerning the labeling, marketing, monitoring, use and/or prohibition of products containing atrazine – strongly indicating the EPA's "regulation plus…" required for federal agency removal. *See* Memorandum of Agreement, attached at Exhibit 3 to Syngenta's Notice of Removal. Indeed, most regulated private corporations do not enter into binding regulatory contracts with a

government agency – to that extent, therefore, the cited cases of *Pioneer Southern, Inc. v. Dow Agrosciences, L.L.C.*, No. 03-cv-23-MJR (S.D. Ill. August 20, 2003); *Tellez v. Dole Food Co., Inc*., No. CV 04-03216 PA (C.D. Cal. June 18, 2004); and *Collora v. R.J. Reynolds Tobacco Co.*, No. 4:04CV0052 HEA (E.D. Mo. Sept. 30, 2004) are easily distinguishable. The present case is not an instance in which a private corporation seeks federal agent removal simply by virtue of its participation in a regulated industry. Instead, because a federal agency has negotiated in a Memorandum of Agreement a specific set of "comprehensive and detailed regulations" which govern labeling, sale, registration, use, prohibition, and water monitoring under the SDWA for Syngenta as an atrazine registrant, a Complaint implicating what Syngenta "knew" when it "manufactured" and "sold" its products squarely implicates issues negotiated and mandated by the EPA in the Memorandum of Agreement with Syngenta. For these reasons, Syngenta was "acting under the direction of a federal agency" and is entitled to federal officer removal.

Holiday also argues that Syngenta is unable to raise a "colorable federal defense" to the claims in this case. Since Syngenta's Notice of Removal was filed, the Southern District of New York has issued a supplemental opinion, *In re: MTBE Products Liability Litigation*, 2004 WL 2454053 (S.D.N.Y., Nov. 3, 2004), which explicitly held "that preemption is a colorable federal defense for purposes of the federal officer removal statute." *See id*. at *6 & n. 42. Holiday then avers that FIFRA preemption would not apply to various state law causes of action it has alleged, including, negligent testing, manufacture and formulating, and breach of express warranty. *See* Memo. at pg. 10. Importantly, Holiday's Complaint does not appear to specifically allege these causes of action, but even if it did, the effect on FIFRA preemption is minimal. It is well-settled that FIFRA preemption does not turn upon the name a plaintiff gives to his or her cause of action. *Granier v. Vermont Log Buildings*, Inc., 96 F.3d 559, 564 (1st Cir. 1996); *Traube v.*

Freund, 775 N.E.2d 212, 217 (Ill. App. 5th Dist. 2002). Holiday's state tort law attack against Syngenta in essence argues that the FIFRA approved labeling of Syngenta's products does not adequately warn that the products, when used in a certain fashion, could create allegedly dangerous levels of atrazine. Indeed, Holiday's original Class Action Complaint explicitly included a "failure to warn" and "failure to properly label their products" allegations to support its various cases of action. Though Holiday's First Amended Class Action Complaint artfully eliminated these direct allegations, the true FIFRA preempted nature of its claims still remains.[9]

III. This Court Has Diversity Jurisdiction Over This Case Because Holiday Fraudulently Joined Growmark.

A plaintiff cannot join an in-state defendant solely for the purpose of defeating federal diversity jurisdiction. *Schawrtz v. State Farm Mutual Auto Ins.*, 174 F.3d 875, 878 (7th Cir. 1999). Joinder "is considered fraudulent, and therefore disregarded, if the out-of-state defendant can show there exists no 'reasonable possibility that a state court would rule against the [in-state] defendant.'" *Schwartz*, 174 F.3d at 878 (citing *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 (7th Cir. 1992)). This is just such a case, and for the reasons set forth in Syngenta's Notice of Removal, this Court should disregard Growmark as a defendant because it has been fraudulently joined.[10]

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[9] The remaining discussion of federal officer removal found at ¶¶ 45-52 of Syngenta's Notice of Removal is hereby incorporated by reference into this Memorandum as supplemented by the previous four paragraphs of this section.

[10] Contrary to Holiday's assertion, this court has subject matter jurisdiction over this case. Holiday has the authority to seek the recovery of injunctive relief or mandamus under the enabling statute that permitted its creation, 70 ILCS 2805/27(d). Holiday does not have the power to recover some of the relief it is requesting. In instances such as this, where plaintiff has authority to seek recovery on some claims but not on others, remand is not required. *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 391-92, 118 S. Ct. 2047 (1998) (district court may not remand a cause in its entirety where there is subject matter jurisdiction over some portion of it); *Lee v. American Nat'l Ins. Co.*, 260 F.3d 997 (9th Cir. 2001) (denying motion to remand and finding that plaintiff had Article III standing over some claims but all claims).

Ignoring well settled Seventh Circuit law, Holiday asks this Court to adopt a new "common defense" rule recently created by a divided *en banc* panel in *Smallwood v. Illinois Central R.R. Co.*, 385 F.3d 568 (5th Cir. 2004) (*en banc*). In *Smallwood*, a bare majority of judges broke from the Fifth Circuit's traditional joinder analysis, which, like the Seventh Circuit test, focuses on whether there is a reasonable possibility of recovery against the in-state defendant. The court instead endorsed a more expansive review of the entirety of the case to determine whether the defense to liability against the in-state party also precludes liability as to the diverse defendant. If so, the court inexplicably ruled that there could never be a fraudulent joinder because the common defense would go to the merits of the case, not to the joinder. *Smallwood*, 385 F.3d at 575.

There are a number of reasons why the Court should reject this "newly concocted" rule (*Smallwood*, 385 F.3d at 587 (Smith, J., dissenting)), not the least of which is that it has no precedential value in this circuit. *See U.S. v. Glaser*, 14 F.3d 1213, 1216 (7th Cir. 1994) ("nothing [another] circuit decides is binding on the district courts outside its territory…. A district court in [this circuit] must follow our decisions, but it owes no more than respectful consideration to the views of other courts.") (*citing Colby v. J.C. Penney Co*., 811 F.2d 1119, 1123 (7th Cir. 1987)). But even giving *Smallwood* "respectful consideration," nothing warrants breaking the Seventh Circuit's long-standing fraudulent joinder rules, especially because the *Smallwood* Court's bizarre ruling is based entirely on a misreading of *Chesapeake & Ohio Railway Co. v. Cockrell*, 232 U.S. 146 (1914).[11]

[11] Seven judges dissented from the *Smallwood* majority. 385 F.3d at 577. Judge Jolly, writing for the dissenters, summed up the majority's position thusly: "the majority, in accepting the plaintiff's briefing and 'new insights,' misreads the Supreme Court decision, disregards established precedent, designs a troubling and unnecessary 'common defense' rule to amend a long established and fairer rule, offers meaningless reasoning to support its decision and creates confusion for the district courts." *See also* 385 F.3d. at 588 (Clement, J., dissenting) ("*Cockrell* does not intimate the common-defense rule the majority sets forth.").

Here, Syngenta is not merely "traversing" the allegations in the complaint. Nor is Syngenta's liability derivative of Growmark's, although Holiday has sued both defendants under identical theories. Rather, Syngenta claims that even if the allegations against Growmark are accepted as true, Holiday cannot prevail against Growmark in state court; on their face, Holiday's claims are not viable causes of action under Illinois law as pled. That is sufficient to establish fraudulent joinder under Seventh Circuit precedent.

A. FIFRA Preempts Holiday's Claims

In its Notice, Syngenta showed in great detail that FIFRA preempts Holiday's claims, notwithstanding Holiday's attempt to circumvent that result by artfully pleading state law claims. *See* Notice at ¶¶ 62-70. Though Syngenta went on to describe other reasons why Holiday's individual counts fail to state a claim, FIFRA preempts the entire case against Growmark.

In *Traube v. Fruend*, 333 Ill. App.3d 198, 775 N.E.2d 212 (5th Dist. 2002), for example, the Illinois Appellate Court affirmed dismissal of state law trespass, nuisance and negligence claims arising from the same facts as alleged in this case: contamination of a lake by herbicide run off. The court found that plaintiff's claims were preempted by FIFRA, even though they were couched in state common law terms. Hence, there can be no doubt that the Illinois courts would reject Holiday's claims on the same grounds. Likewise, the federal courts in this and other circuits have consistently rejected product liability claims like those advanced by Holiday. *See, e.g., Kuiper v. American Cyanimide Co.*, 131 F.3d 656, 662 (7th Cir. 1997) (rejecting product liability claims against herbicide manufacturer) (collecting cases); *Brierton v. Vermont Log Buildings, Inc*. No. 98-C-1486, 1998 WL 611447 (N.D. Ill. Sept. 8, 1998) (rejecting negligence and strict liability claims); *see also* Notice at 20 (citing and discussing numerous cases rejecting varied claims).

Although Holiday takes great pains to argue that FIFRA does not "completely preempt" state law claims when courts analyze removal under *federal question jurisdiction*, Holiday completely ignores this controlling FIFRA preemption law when it comes to fraudulent joinder. In light of this abundant FIFRA preemption precedent, Holiday's case against Growmark would fail, and the case would properly stay in federal court on diversity grounds, *even if* Holiday were right about federal question jurisdiction, which it is not.

B. Holiday's Individual Claims Against Growmark Fail

Although the proper application of FIFRA preemption disposes of this case against Growmark and makes removal appropriate, Syngenta's Notice also showed that each of Holiday's individual claims against Growmark fails to state a claim. In other words, there is more than one way to show that Growmark was fraudulently joined.

1. Holiday fails to distinguish *Traube* and *City of Bloomington*.

Syngenta's Notice showed that Holiday's nuisance, negligence and trespass claims fail as a matter of law because there can be no such common law liability against a party who merely distributes a particular chemical but has no other control over its use (or misuse) after the point of sale. *See* Notice at ¶¶ 76-78. This is not to say that a manufacturer could never be liable under Illinois' product liability laws, as Holiday misleadingly suggests.[12] Rather, the rule expresses the common sense view that a chemical retailer cannot be held liable for someone else's use (or misuse) of a chemical which later causes a nuisance, trespass or other tortious injury, absent evidence that the seller actually contributed significantly to causing the harm after the point of sale. But sellers of atrazine like Growmark cannot control how individual farmers use (or misuse) atrazine, just like the manufacturers could not control how the farmers used (or

[12] Syngenta cited *City of Bloomington* and *Traube* for the proposition that post-sale lack of control generally precludes liability for subsequent trespass, nuisance and negligence, *not* for claims based on product liability.

misused) the herbicide in *Traube and* Monsanto could not control how Westinghouse used (or misused) the PCBs in *City of Bloomington*. Indeed, the Illinois Supreme Court recently affirmed "the general rule that when a defendant is blameless for the subsequent misuse of its product, it bears no legal responsibility for a nuisance subsequently created by those who have purchased the product." *City of Chicago v. Beretta U.S.A. Corp.*, No. 95243, et al, slip op. at 36 (Nov. 18, 2004) (citing *Traube v. Freund*, 333 Ill. App.3d 198, 201-02 (2002)) (attached hereto as Ex. 1).

Holiday's principal response to Syngenta's argument is to rely on *Young v. Bryco Arms*, 327 Ill. App.3d 948, 765 N.E.2d 1 (1st Dist. 2001) in which the Appellate Court found that the plaintiffs had stated a claim for public nuisance against gun manufacturers based on allegations that the gun manufacturers intentionally manipulated the gun market in the Chicago area and created and maintained an underground market for handguns used by criminals. *Young*, 327 Ill. App.3d at 961, 765 N.E.2d at 11. *Young* does not support plaintiff's contention that a seller's "knowledge of property damage caused by their products can be adequate to impose liability for nuisance," (Memo. at 16), however, as the Illinois Supreme Court recently reversed the Appellate Court, remanding the case to the circuit court with instructions to dismiss the claim for failure to state a cause of action. *Young v. Bryco Arms*, No. 93678, et al., slip op. (Nov. 18, 2004) (attached hereto as Ex. 2). *Young* and *Beretta* confirm that a seller's knowledge of the potential harm of a particular product is insufficient to state a tort claim against the seller, even where, as in *Young*, the seller allegedly took active steps to encourage the misuse of its product – allegations which are not even present in this case.

Holiday's attempt to distinguish *Traube*, an almost identical factual scenario involving nuisance, negligence and trespass claims for alleged run-off of herbicides into a neighboring lake, is even less compelling than its attempt to find support in *Young*. Holiday notes that the

Traube court identified an additional defect in the complaint besides lack of control; namely, the lack of any allegation of negligent or intentional conduct on the part of the herbicide manufacturer. However, that *additional* defect does not detract from the court's alternate basis for dismissing plaintiff's claims—that "the absence of a manufacturer's control over a product at the time the nuisance is created generally is fatal to any nuisance or negligence claim." *Traube*, 333 Ill. App.3d at 202; 775 N.E.2d at 216; *see also Beretta*, slip op. at 36 (quoting *Traube* with approval).

In sum, controlling Illinois law dictates the dismissal of Holiday's nuisance, negligence and trespass claims against Growmark.

2. IEPA Count

In its Notice, Syngenta demonstrated that Holiday's claim for relief pursuant to the Illinois Environmental Protection Act ("IEPAct") cannot succeed because: (1) Holiday has not exhausted its administrative remedies by filing a complaint to enforce alleged violations of the IEPAct before the Illinois Pollution Control Board ("Board") before suing in the circuit court; and (2) Illinois law does not recognize an implied right of action for damages under the IEPAct.

Plaintiff's Motion conspicuously fails to respond to Syngenta's argument regarding exhaustion of administrative remedies. Such an argument would be fruitless because the statutory and judicial authorities that Syngenta cited are clear and binding upon the Madison County Circuit Court: because plaintiff has not filed an enforcement action before the Board, it cannot proceed at all in Illinois circuit court. *See* Notice at ¶ 80.

Even if Holiday had exhausted its administrative remedies and was permitted to sue in circuit court, it could not recover compensatory or punitive damages. In order for a court to imply such a right, four criteria must be satisfied: (1) the alleged violation of the statute

contravenes public policy; (2) the plaintiff is a member of the class the statute is designed to protect; (3) a private right of action is consistent with the underlying purpose of the statute; and (4) implying a private right of action is necessary to provide an adequate remedy for violations of the statute. *Fischer v. Lexington Health Care, Inc.*, 188 Ill. 2d 455, 460 (1999).[13] The final factor will only be met where the statute would be ineffective, as a practical matter, unless such an action were implied. *Id*. at 464. In light of *Fischer* and *Abbasi v. Paraskevoulakos*, 187 Ill. 2d 386 (1999), it is clear that, "for all practical purposes, implied rights of action have been abolished in Illinois." *Fischer*, 188 Ill. 2d at 469 (Harrison, M., dissenting).

Holiday's suggestion that the issue of whether an implied right of action exists under the IEPAct nonetheless remains open (Motion at 18) is wrong. The only Illinois appellate court to consider the issue expressly held that "*a private right of action under the [IEPAct] does not exist*…" *NBD Bank v. Krueger Ringier, Inc.*, 292 Ill. App. 3d 691 (1st Dist. 1997), app. denied, 176 Ill. 2d 576 (1998) (emphasis added). *NBD Bank* represents binding precedent that that Madison County Circuit Court must follow. *Sidwell v. Griggsville Cmty. Sch. Dist. 4*, 566 N.E.2d 838, 840 (4th Dist. 1991) ("in the absence of a supreme court decision directly in [sic] point, a circuit court should follow the precedent of the appellate court of its district, if such precedent exists. If not, it is to follow the precedent of other districts if there is such precedent. If that of other districts is in disagreement, the circuit court may then choose which precedent it considers to be most nearly correct.").

No case after *NBD Bank* and *Fischer* were decided has recognized an implied action under the IEPAct. In fact, in *Chrysler Realty Corp. v. Thomas Indus.*, 97 F. Supp. 2d 877 (N.D.

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13 In *Fischer*, the Illinois Supreme Court held that no implied private right of action existed under the Nursing Home Care Act in favor of nursing home employees who were allegedly retaliated against for reporting abuse. *Id*. at 468. Among other reasons, the court determined that implying a right of action was unnecessary in order to provide an adequate remedy under the statute, which provided a "multitude of sanctions to accomplish the [statute's] goal of protecting nursing home residents." *Id*. at 464.

Ill. 2000), the court held that it, in light of the absence of an Illinois Supreme Court decision on the issue, it too was bound to follow *NBD Bank*. 97 F. Supp. 2d at 880 (citing *West v. American Telephone and Telegraph*, 311 U.S. 223, 237 (1940)). The court went on to hold, in the alternative, that even if it "were not bound by *NBD Bank* . . . the court would reach the same result." 97 F. Supp. 2d at 880-81 (noting that no prior federal case finding an implied right of action "had the benefit of the *NBD Bank* decision and the *Fisher* decision"). Every federal case after *Chrysler Realty Corp*. has expressly followed it. *See, e.g.*, *Great Oak, L.L.C. v. Begley Co.*, 2003 WL 880994, * 5 (N.D. Ill. March 5, 2003); *Norfolk Southern Railway Co. v. Gee Co.*, 2001 WL 710116, * (N.D. Ill. June 25, 2001) (same). Accordingly, the law is well-settled that no private right of action may be implied under the IEPAct.

3. IWPDA Count

Holiday's only response to Syngenta's argument with respect to the Illinois Water Pollutant Discharge Act is that it could sufficiently re-plead this claim before an Illinois trial court. However, this is just an empty claim. By virtue of its business operations, there is no apparent factual basis upon which Holiday could allege, in compliance with Illinois Supreme Court Rule 137, specific facts to establish that Growmark owns or operates a "facility" from which atrazine was "discharged" into water and that Holiday was required to remove it. Holiday sued Growmark in this case as a distributor of atrazine. *See* Am. Compl. at ¶¶ 4, 17. Holiday does not allege facts regarding Growmark's hypothetical application of atrazine nor does this case concern the application of atrazine or a spill or other discharge of atrazine. Instead, it is a case against the manufacturers and one distributor of atrazine, trying to hold the atrazine industry liable for the selling and distributing of atrazine in compliance with various state and federal

statutes. If Holiday could have alleged facts to state a claim, it would have done so in the first instance. Its claim under the statute fails.

4. Section 2-619(a)(3) of the Illinois Civil Practice Act

Holiday concedes that 735 ILCS 5/2-619(a)(3) authorizes an Illinois circuit court to dismiss a case where there is another suit pending between the same parties for the same cause. Memo at 19. Nonetheless, Holiday chides Syngenta for allegedly failing to "explore" federal cases holding that Section 2-619(a)(3) does not provide a federal court with a basis "for dismissal in federal court." *Id.*, (citing *Zurich American Ins. Co. v. Pillsbury Co.*, 264 F. Supp. 2d 710, 711 (N.D. Ill. 2003)). Simply put, *Zurich* has no bearing on this case.

Zurich involved an insurance dispute between the Pillsbury Company ("Pillsbury") and Zurich American Insurance Company ("Zurich"). Pillsbury filed a declaratory judgment action in the United States District Court in Minnesota. Zurich filed a declaratory judgment action in the Circuit Court of Cook County, which Pillsbury removed to the United States District Court for the Northern District of Illinois. Pillsbury then filed a motion to dismiss in the Northern District, seeking dismissal pursuant to Section 2-619(a)(3) of the Illinois Civil Practice Act. Judge Bucklo rejected the argument because a federal court, sitting in diversity applies state substantive law, but federal procedural law, noting that "[t]here is no such thing as a motion to dismiss under 735 ILCS 5/2-619(a)(3) in this court; there are only motions to dismiss under Federal Rule 12(b)." 264 F. Supp. 2d at 711. The same reasoning would apply to this case *if* this Court denies Holiday's motion to remand and then entertains a motion to dismiss pursuant to Rule 12(b).

However, for purposes of its fraudulent joinder argument, Syngenta rightfully focused not on how *this* court would rule if faced with a motion to dismiss under the Federal Rules of

Civil Procedure, but rather how the Madison County Circuit Court would rule pursuant to the *Illinois* Code of Civil Procedure. See Notice at 22 ("the instant case against Growmark would necessarily be dismissed *by the Madison County Circuit Court*") (emphasis added). Holiday completely ignores the reality that the relevant factors in this case (*e.g.*, preventing multiplicity, vexation and harassment; the ability to obtain complete relief from the same court in which each of the six cases was filed) compel the conclusion that permitting Holiday to wage serial lawsuits against Growmark in the Madison County Circuit Court for the exact same cause of action constitutes an abuse of the discretion conferred pursuant to Section 2-619(a)(3). As a result, Holiday's claims against Growmark in this case have no chance of success.

IV. Conclusion

In conclusion, Holiday's complaint raises a substantial, disputed federal question regarding the validity, appropriateness and proper judicial review of EPA regulations promulgated pursuant to the Safe Drinking Water Act. Because the SDWA requires such challenges to be brought in federal court, removal is proper. Further, federal agent removal pursuant to 28 U.S.C. 1442(a) provides an independently sufficient basis for removal and Holiday's fraudulent joinder of non-diverse defendant Growmark provides diversity jurisdiction pursuant to 28 U.S.C. § 1332. For these reasons and the reasons set forth in this Memorandum in Opposition to Holiday's Motion and in Syngenta's Notice of Removal, Syngenta prays that this Court deny Holiday's Motion to Remand, and exercise proper jurisdiction over Holiday's Complaint.

Respectfully Submitted:

/s/ Kurtis B. Reeg
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CERTIFICATE OF SERVICE

I do hereby certify that on this on this 23rd day November, 2004, the foregoing pleading was filed electronically with the Clerk of Court for the Southern District of Illinois and notice has been given to all counsel for all parties to this proceeding.

/s/ Kurtis B. Reeg