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

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| **HOLIDAY SHORES SANITARY DISTRICT, individually and on behalf of all others similarly situated,** | ) | |
| **Plaintiff,** | ) | |
| **vs.** | ) | **CIVIL NO. 04-689-MJR** |
| **UNITED AGRI PRODUCTS, INC., D/B/A UAP LOVELAND PRODUCTS, INC.; and GROWMARK, INC.,** | ) | |
| **Defendants.** | ) | |

# MEMORANDUM AND ORDER

**REAGAN, District Judge:**

Before the Court is Plaintiff's Motion to Remand (Doc. 15), filed October 25, 2004. Plaintiff moves the Court to enter an Order remanding this case and other cases filed by Holiday Shores Sanitary District ("HSSD") which have the same or a similar fact pattern, in which HSSD has filed motions to remand, and which are pending before the undersigned judge: *Holiday Shores Sanitary District v. Makhteshim-Agan of North America, Inc.*, 04-687-MJR; *Holiday Shores Sanitary District v. Syngenta Crop Protection, Inc.*, 04-688-MJR; *Holiday Shores Sanitary District v. Sipcam Agro USA, Inc.* 04-690-MJR; *Holiday Shores Sanitary District v. Dow AgroSciences, LLC*, 04-691-MJR; and *Holiday Shores Sanitary District v. Drexel Chemical Co.*, 04-692-MJR. A hearing was held on this matter on December 13, 2004.

Plaintiff asserts that these cases should be remanded for the following reasons: (1) the Court does not have original jurisdiction 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"; and (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.

Defendant, United Agri Products, d/b/a UAP Loveland Products, Inc. ("UAP"), responds that federal jurisdiction is proper for the following reasons: (1) HSSD'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 ("SDWA"); (2) because the SDWA requires such challenges to be brought in federal court, removal is proper; (3) federal agent removal pursuant to 28 U.S.C. § 1442(a) provides an independently sufficient basis for removal; and (4) this Court has diversity jurisdiction over this case pursuant to 28 U.S.C. § 1332 because HSSD fraudulently joined Defendant Growmark.

**Background**

On July 2, 2004, this action was commenced in the Circuit Court, Third Judicial Circuit of Illinois, Madison County. Defendant UAP was not served with the July 2, 2004, Complaint. On August 5, 2004, HSSD filed First Amended Class Action Complaint, which was served on UAP on August 27, 2004. On September 24, 2004, Defendant UAP timely filed Notice of Removal in the U. S. District Court for the Southern District of Illinois. Defendant Growmark consented to removal.

In its Complaint, Plaintiff HSSD states that it operates a plant that provides water to the Holiday Shores community in Madison County, Illinois. HSSD asserts that it draws water from a lake that has been contaminated by atrazine, a chemical found in herbicides applied to the

agricultural land surrounding the lake. HSSD states that it is undisputed that the Defendants manufacture and/or sell atrazine and atrazine-containing products for use in Illinois. HSSD states claims for nuisance, trespass, negligence, strict liability and violations of state environmental laws. HSSD seeks damages for remediation costs associated with atrazine contamination of its water supplies.

## Standard of Review on Remand Motions

As the party seeking to remove a state court action has the burden of demonstrating the propriety of removal, UAP bears the burden of demonstrating that this Court has subject matter jurisdiction over this matter. ***Collins v. Ralston Purina Co.*, 147 F.3d 592, 602 n.1 (7th Cir. 1998) ("The party seeking removal has the burden of establishing the jurisdiction of the district court."); *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 607 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998); *County Collector v. O'Brien*, 96 F.3d 890, 895 (7th Cir. 1996); *Wellness Community-National v. Wellness House*, 70 F.3d 46, 49 (7th Cir. 1995).** If the Court has any doubt regarding removal, jurisdiction should be resolved in favor of the state court. ***Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993).** This is the standard by which the Court will be guided in reviewing the parties' submissions and in determining whether the Court has jurisdiction over this cause of action.

## Analysis

### I. Whether the Court has original jurisdiction pursuant to 28 U.S.C. § 1331.

It is fundamental that "[f]ederal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." ***Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986)**.

For this reason, district courts must "interpret the removal statute narrowly," and any doubt regarding jurisdiction should be resolved in favor of remand to state court. ***Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993)**. As the party seeking to invoke the Court's jurisdiction, UAP bears the burden of proving the existence of federal subject matter jurisdiction by "competent proof," ***NLFC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231, 237 (7th Cir. 1995)**, which means "proof to a reasonable probability that jurisdiction exists." ***Target Market Publishing, Inc. v. ADVO, Inc.*, 136 F.3d 1139, 1142 (7th Cir. 1998)**.

The Supreme Court has admonished that "federal question jurisdiction arises only when the complaint standing alone 'establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" ***Minor v. Prudential Securities, Inc.*, 94 F.3d 1103, 1105 (7th Cir. 1996) (quoting *Franchise Tax Bd. of State of Cal. v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 27-28 (1983))**. This concept, known as the "well-pleaded complaint rule," is the basic principle marking the boundaries of federal question jurisdiction. ***Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987) (citing *Franchise Tax*, 463 U.S. at 9-12)**. It traces back to early decisions of the United States Supreme Court holding that a cause of action arises under federal law only when the plaintiff's complaint itself raises issues of federal law. ***Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908); *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109 (1936)**.

There is, however, an important exception to the well-pleaded complaint rule: the doctrine of "complete preemption." The complete preemption doctrine provides that "to the extent that Congress has displaced a plaintiff's state law claim, that intent informs the well-pleaded

complaint rule, and a plaintiff's attempt to utilize the displaced state law is properly 'recharacterized' as a complaint arising under federal law." ***Rice v. Panchal*, 65 F.3d 637, 640 n.2 (7th Cir. 1995)**. Of course, a statute may have preemptive force even in the absence of complete preemption - but in that case there is only ordinary or "conflict" preemption, and the statute provides a defense to the merits of a claim and not a basis for federal question jurisdiction. ***See Adkins v. Illinois Central R.R. Co.*, 326 F.3d 828, 834-35 (7th Cir. 2003)**.

The Seventh Circuit has only found complete preemption (sometimes referred to in the Seventh Circuit as "field preemption") to exist where "Congress has so completely preempted a particular area that no room remains for any state regulation and the complaint would be 'necessarily federal in character.'" ***Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 986 (7th Cir. 2000) (quoting *Metropolitan Life*, 481 U.S. at 63-64)**. In other words, the Seventh Circuit finds complete preemption "where there is a 'congressional intent in the enactment of a federal statute not just to provide a federal defense to a state created cause of action but to grant a defendant the ability to remove the adjudication of the cause of action to a federal court *by transforming the state cause of action into a federal cause of action*.'" ***Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 788 (7th Cir. 2002) (quoting 14B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3722.1 (3d ed. 1998 & Supp. 2002)) (emphasis added)**.

In the Seventh Circuit, "complete preemption would not be appropriate if a federal remedy did not exist in the alternative." ***Rogers*, 308 F.3d at 788**. Thus, "'unless the federal law has created a federal remedy - no matter how limited - the federal law, of necessity, will only arise as a defense to a state law action' and will thus not give rise to the federal question jurisdiction

underlying complete preemption." ***Id.*** **(quoting *Rice*, 65 F.3d at 641)**.

In 1974, Congress enacted the SDWA, **42 U.S.C. § 300f, *et seq*.**, to assure the safety of water supplies for human consumption. The SDWA prohibits states from enacting drinking water laws less stringent than those established by the EPA. **42 U.S.C. § 300g**. "[A]lthough the primary responsibility for enforcement remains with the States, the Administrator is empowered to enforce State compliance." **42 U.S.C. §§ 300g-2, 300g-3**. The SDWA requires the EPA to promulgate standards to protect public health, by setting either (1) maximum contaminant levels for pollutants in a public water supply, or (2) a treatment technique to reduce the pollutants to an acceptable level if the maximum contaminant level is not economically or technologically attainable. Maximum contaminant levels are to be established at a level having no known or adverse human health effect, with an adequate margin for safety. **42 U.S.C. § 300g-1(b)(1)(B)**.

The SDWA does not create a federal private right of action for HSSD's claims. ***See Middlesex County Sewerage Authority v. National Sea Clammers Ass'n.*, 453 U.S. 1, 17-18, 101 S.Ct. 2615, 2625 (1981)**. On this basis alone, the Seventh Circuit would find that the SDWA does not completely preempt the claims. ***Rogers*, 308 F.3d at 788; *see also Batton v. Georgia Gulf*, 261 F.Supp.2d 575 (M.D.La. 2003)** (remanding, holding that the SDWA, which sets the acceptable arsenic level for drinking water, did not preempt plaintiffs' state law claims based not on the Act, but on breach of duties allegedly imposed by Louisiana state law, where the Act did not provide a private right of action, nor prevent plaintiffs from pursuing state law remedies).

The Court has carefully considered ***Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000)**, cited by UAP for the proposition that the SDWA savings clause does not suggest "...an intent to save state-law tort actions that conflict with federal regulations." ***Geier*, 520 U.S.**

**at 869**. While the clauses from ***Geier*** quoted by UAP appear to support UAP's position, when read in context, they lend little credence to UAP's assertions. A fair reading of ***Geier*** provides a sound basis for HSSD's position that the saving clause in the SDWA "...assumes that there are some significant number of common-law liability cases to save." ***Id.* at 868.**

The National Traffic and Motor Vehicle Safety Act at issue in ***Geier*** contained an *express* preemption provision[1]. ***Id.* at 867 (emphasis added)**. The Court opined that, "...a reading of the express pre-emption provision that excludes common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate - for example, where federal law creates only a floor, *i.e.*, a minimum safety standard. ***Id.* at 868.** As the Court explained, "...the saving provision still makes clear that the express pre-emption provision does not of its own force pre-empt common-law tort actions. And it thereby preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." ***Id.* at 870**. "We have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions, in such circumstances." ***Id.* at 868.**

Congress did not expressly preempt state law in enacting the SDWA; yet, based on ***Geier***, even an express provision coupled with a saving clause allows room for state tort law to operate. In the instant case, where the SDWA creates a floor, a maximum contaminant level, adequate room remains for state tort law to operate.

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[1] "Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." **15 U.S.C. § 1392(d) (1988 ed.)**.

. The Court also considered ***Mattoon v. City of Pittsfield,* 980 F.2d 1 (1st Cir. 1992)**, which UAP cites for its assertion "...that Congress occupied the field of public drinking water regulation with its enactment of the SDWA." ***Mattoon,* F.2d at 4.** While ***Mattoon*** has no precedential value for this Court, the Court looked to its reasoning to determine if it was persuasive.

The Court finds that the holding in ***Mattoon*** is much narrower than is suggested by UAP. The Court, in ***Mattoon***, found that the federal SDWA preempts federal common law nuisance actions and bars relief under **42 U.S.C. § 1983**. ***Id. at* 6**. ***Mattoon*** does not hold that state common law is preempted. ***See also U. S. v. Hooker Chemical & Plastics Corp.,* 607 F.Supp. 1052, 1055, fn. 3 (W.D.N.Y. 1985).** The Court noted that the primary responsibility for implementation and enforcement of the SDWA standards remained with the States, and the States were allowed to set stricter standards than those of the federal government. ***Id***. Moreover, Congress does not require uniformity and consistency in drinking water standards; rather, Congress requires that the states adopt and enforce laws or regulations respecting drinking water that do not exceed the maximum contaminant levels established by the EPA.

UAP's reliance on **42 U.S.C. 300j-7,** for the proposition that the only appropriate forum for this action is the United States Court of Appeals for the District of Columbia circuit is also misplaced. Only actions pertaining to the establishment of primary regulations must be filed in the United States Court of Appeal for the District of Columbia**. 42 U.S.C. §300j-7(a)(1)**. The instant action does not pertain to the establishment of primary regulations, nor does it challenge those regulations. HSSD seeks damages for various state-law tort claims and seeks to hold Defendants liable, whether or not Defendants violated federal regulations, for actions that affected the quality of HSSD's water supply. ***See Pioneer Southern, Inc. v. Dow Agrosciences, L.L.C.,* No.**

**03-cv-23-MJR, 2-3 (S.D. Ill. August 20, 2003) (Where plaintiff asserts its rights to "relief under state tort law,...EPA's licensing and regulatory authority has no bearing on those state law rights.")**.

UAP asserts that ***Pioneer Southern*** is distinguishable from the instant matter because the ***Pioneer*** plaintiff was not challenging an MCL. To the contrary, the Court's reasoning in ***Pioneer*** is on point. In ***Pioneer***, plaintiffs sought legal and equitable relief under state law asserting that the EPA's licensing and regulatory authority had no bearing on their state law claims. Here, HSSD has alleged only state law causes of action. In ***Pioneer***, this Court agreed that FIFRA does not grant the Court subject matter jurisdiction over complaints that include only state law causes of action. ***Pioneer Southern, Inc.,*** **at 3 (citations omitted)**.

While FIFRA is a comprehensive regulatory statute, "...the resulting scheme was not 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" ***Wisconsin Public Intervenor v. Mortier,*** **501 U.S. 597, 111 S.Ct. 2476 (1991) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947)) ("...the statute leaves ample room for States and localities to supplement federal efforts even absent the express regulatory authorization....")**. As FIFRA leaves ample room for state action, the Court concludes that this basis for remand must be rejected.

Accordingly, for the aforestated reasons, the Court concludes that it does not have original jurisdiction over this matter pursuant to **28 U.S.C. § 1331**.

**II. Whether the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1442(a)(1).**

**Section 1442(a) of 28 U.S.C.** provides as follows:

> A civil action ... commenced in State court against any of the following may be removed ... to the district court of the United States for the district and division embracing the place wherein it is pending:
> (1)The United States or any agency thereof or any officer (or any person acting under that officer) ... sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

While the primary beneficiaries of **Section 1442(a)(1)** are federal officers and agencies, a private party defendant may also invoke **Section 1442(a)(1)** but to do so must: (1) assert a colorable defense based on federal law in the notice of removal; (2) establish that it was acting under the direction of a federal officer when it engaged in the actions on which the plaintiff's claims are based; and (3) demonstrate that a causal nexus exists between its actions and the federal officer's use of his governmental office. ***See Jefferson County, Ala. v. Acker*, 527 U.S. 423, 431 (1991).** Additionally, a defendant seeking removal must also be a "person" within the meaning of **Section 1442(a)(1)**. Therefore, for UAP to invoke **Section 1442(a)(1)**, it must be a "person" under the section and demonstrate all three elements; if the Court finds that UAP has not proven any one of the elements nor is a person within the meaning of the statute, then removal is improper

HSSD does not dispute that UAP, a corporation, is a "person" within the meaning of **Section 1442(a)(1)**. ***See U.S. v. Amedy*, 11 Wheat 392, 412 (1826) ("That corporations are, in law, for civil purposes, deemed persons, is unquestionable.")**. HSSD argues that removal is improper because (1) UAP did not act at the direction of the federal government in formulating, manufacturing and marketing atrazine-containing products; (2) UAP cannot demonstrate a causal nexus between HSSD's claims and the acts allegedly performed under federal direction; and (3)

UAP cannot raise a colorable federal defense to all of HSSD's claims.

Whether or not a party can remove a claim under the federal officer removal statute often turns on the second and third requirements of **Section 1442(a)(1)**. The Court notes that the "person acting under" element and the causal nexus element usually converge into one issue: whether the actions that form the basis of the state complaint were performed pursuant to comprehensive and detailed federal regulation. ***See Ryan v. Dow Chemical Co.*, 781 F.Supp. 934, 945-46 (E.D.N.Y.,1992).** Hence, UAP must prove the existence of a "federal nexus" between the actions for which they are being sued and the directives of federal officers. ***Id.*** This provision protects federal officers, federal agencies, and those acting under their direction "against interference in the course of their duties by hostile state court." ***Willingham v. Morgan*, 395 U.S. 402, 405 (1969).** The provision carries out its purpose "...by allowing those whose federal activity may be inhibited by state court actions to remove to the presumably less biased forum of federal court." ***Ryan*, 781 F. Supp. at 939.**

Defendants claim 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. However, mere participation in a regulated industry is not action at the direction of a federal officer. ***See, e. g., Tremblay v. Phillip Morris, Inc*., 231 F.Supp.2d 411, 418 (D.N.H. 2002) (stating that although defendant participates in a regulated industry, "this is not enough to demonstrate that it acted under the direction of a federal officer when it designed its light cigarettes and elected to market them as low in tar and nicotine."); *Ryan v. Dow Chemical Co.*, 781 F.Supp. 934, 946 (E.D.N.Y.1992) ("If the corporation establishes 'only that the relevant acts occurred under the general auspices of' a federal officer, such as being a participant in a regulated industry, they**

**are not entitled to § 1442(a)(1) removal."); *Jamison v. Purdue Pharma Co.*, 251 F.Supp.2d 1315 (S.D.Miss. 2003) (denying remand, holding that physician and pharmaceutical company defendants, while participants in highly regulated industry, were not federal officers or government contractors and were not acting under direction of the government, but rather on their own initiative).**

**"**A majority of courts have held that the federal official must have "direct and detailed control" over the defendant." ***See Ryan*, 781 F. Supp. at 947*; *Good v. Armstrong World Industries, Inc*., 914 F. Supp. 1125, 1128 (E.D. Pa. 1996); *Winters v. Diamond Shamrock Chemical Co.*, 901 F. Supp. 1195, 1200 (E.D. Tex. 1995); *Guillory v. Ree's Contract Service, Inc*., 872 F. Supp. 344, 347 (S.D. Miss. 1994); *Pack v. AC and S, Inc*., 838 F. Supp. 1099, 1103 (D. Md. 1993); *Fung v. Abex Corp*., 816 F. Supp. 569, 572-73 (N.D. Cal. 1992); *Bahrs v. Hughes Aircraft Co.*, 795 F. Supp. 965, 969 (D.Ariz. 1992).** "Direct and detailed control" is not satisfied by "establishing only that the relevant acts occurred under the general auspices of a federal office or officer." ***Ryan*, 781 F. Supp. at 947**. Therefore, simple participation in an industry which is regulated by the federal government does not entitle a defendant to remove under **28 U.S.C. § 1442(a)(1)**. ***Id.; Bakalis v. Crossland Sav. Bank*, 781 F. Supp. 140, 145 (E.D.N.Y. 1991)**.

While the manufacture and sale of atrazine and atrazine-containing products is a regulated industry, UAP cannot establish "express direction" in this case. The federal government did not mandate the use of atrazine in herbicides; that choice was made by UAP.

UAP relies on ***In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 342 F.Supp.2d 147 (S.D.N.Y. 2004)** in support of its argument that federal agent removal should apply to this litigation. Based on ***MTBE***, UAP asserts that "...the rule that appears to emerge from case

law is one of 'regulation plus.'" ***MTBE* at 154 (quoting *Bakalis*, 781 F.Supp. at 145)**. UAP states that the EPA negotiated in a Memorandum of Agreement specific regulations governing the labeling, sale, registration, use, prohibition and water monitoring under the SDWA of atrazine.

In ***MTBE***, the court held that **§ 1442(a)** removal was proper where defendants had a colorable federal preemption defense to plaintiffs' state tort claims. **342 F.Supp.2d at 158**. The court's holding was narrow: it premised removal pursuant to **§ 1442(a)(1)** "...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.*** Thus, consistent with other case law, mere participation in a regulated industry was found to be an insufficient basis for federal agent removal.

The Court finds its reasoning in ***Pioneer Southern*** to be dispositive of this issue. In ***Pioneer Southern***, where Defendant Dow Agrosciences, L.L.C.,, argued that it was entitled to federal jurisdiction because it was subject to extensive regulation under FIFRA, this Court found, "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." ***Pioneer Southern*, 03-23-MJR at 2-3**. That the labeling, sale, registration, use, prohibition and water monitoring under the SDWA of atrazine are governed by federal regulations is not beyond the scope of what might be expected when a company participates in an industry which is extensively regulated by the federal government. The government did not expressly direct the formulation, mandate the use of atrazine nor control how atrazine-containing products were to be marketed. Consistent with its opinion in ***Pioneer Southern***, the Court finds that UAP is not entitled to subject matter jurisdiction pursuant

to **28 U.S.C. § 1442(a)(1)**.

**III. Whether the Court has original jurisdiction over this case pursuant to 28 U.S.C. § 1332 because Growmark, an Illinois corporation, was fraudulently joined to defeat diversity.**

If UAP can show that the joinder of Defendant Growmark was fraudulent, then removal is appropriate. ***Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 (7th Cir. 1992) (citing *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97, 42 S.Ct. 35, 37 (1921)**. "Fraudulent joinder occurs either when there is no possibility that a plaintiff can state a cause of action against nondiverse defendants in state court, or where there has been outright fraud in plaintiff's pleading of jurisdictional facts." ***Gottlieb v. Westin Hotel Co.*, 990 F.2d 323, 327 (7th Cir. 1993)**.

In this case, UAP contends that HSSD can state no cause of action against Growmark, a corporation with its principal place of business in Bloomington, Illinois, which participates in the ownership and operation of cooperatives in the State of Illinois for the purpose of selling agricultural products, including those products containing atrazine for use in Illinois. Defendants bear a heavy burden to establish fraudulent joinder and must show, after resolving all issues of fact and law in favor of HSSD, that HSSD cannot establish a cause of action against Growmark. ***See Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 (7th Cir. 1992); *see also Crowe v. Coleman*, 113 F.3d 1536, 1538 (11th Cir. 1997) ("When considering a motion for remand [of a case removed on the basis of fraudulent joinder], federal courts are not to weigh the merits of a plaintiff's claim beyond determining whether it is an arguable one under state law.")**.

After resolving all issues of fact and law in HSSD's favor, the Court finds that there is a reasonable possibility that a state court would rule against Growmark. ***See Poulos*, 959 F.2d at 73; *see also Crowe*, 113 F.3d at 1538 ("If there is even a possibility that a state court would**

**find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court.") (citation omitted)**. In other words, UAP has failed to satisfy its heavy burden to establish fraudulent joinder and, ultimately, subject matter jurisdiction because Plaintiff HSSD and Defendant Growmark are citizens of the same State, and Defendant Growmark is a citizen of the State in which this action was brought. ***See* 28 U.S.C. § 1441**.

More specifically, there is a reasonable possibility that a state court would find that HSSD's complaint states a cause of action, in that it is undisputed that Defendant Growmark marketed, sold and supplied atrazine at the time that HSSD was allegedly injured. Whether HSSD can prevail on its claims is irrelevant to the issue of fraudulent joinder.

As to the issue of standing, UAP's allegation that HSSD has standing to seek only "injunctive relief or mandamus" misses the mark because HSSD prays for injunctive relief against Growmark. Moreover, pursuant to **28 U.S.C. § 1447(c)**, "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Therefore, if the Court were to determine that HSSD lacks standing, the Court must remand the case.

HSSD adequately alleges a claim of both private and public nuisance in its Complaint. As to HSSD's claim of private nuisance, in Illinois, "[i]t has long been established that, in order to be actionable as a private nuisance, an invasion of another's interest in the use and enjoyment of his land must exist. It must be substantial and it must be either negligent or intentional and unreasonable." ***Woods v. Khan,* 95 Ill.App.3d 1087, 1089, 420 N.E.2d 1028, 1030 (Ill.App. 5th Dist.1981)**. As to HSSD's claim of public nuisance, "[w]hen the plaintiff's theory of liability is public nuisance, the pleading requirements are not exacting because the 'concept of common law

public nuisance ... elude[s] precise definition.'" ***Young v. Bryco Arms*, 213 Ill.2d 433, 441, 821 N.E.2d 1078, 1083 (Ill. 2004) (*quoting City of Chicago v. Festival Theatre Corp*., 91 Ill.2d 295, 306, 438 N.E.2d 159 (1982)**. "A sufficient pleading in a cause of action for public nuisance will allege a right common to the general public, the transgression of that right by the defendants, and resulting injury." ***Id*. (citation omitted)**.

Here, HSSD alleges that Growmark was substantially certain that atrazine would migrate into public drinking water. Complaint, ¶¶ 15-19, 31-35. HSSD alleges that Growmark knew that atrazine did not readily bind to soil, had limited solubility in water and was not easily broken down. Complaint, ¶ 31. Thus, according to HSSD, Growmark knew that these characteristics gave atrazine great potential for run-off into surface water, including community water sources. *Id*. Further, HSSD alleges that, as a result of Growmark's intentional and/or negligent actions, its atrazine products have invaded the use and enjoyment of HSSD's property by HSSD as well as by the public because HSSD supplies water to residents of the Holiday Shores community. Complaint, ¶ 41. Thus, HSSD's Complaint adequately states a cause of action, in that it alleges Growmark's participation in creating a nuisance consisting of a substantial and unreasonable invasion of HSSD's interest in the use and enjoyment of its property.

HSSD also adequately alleges claims of trespass and negligence. HSSD alleges specific negligent and intentional acts performed by Growmark. It alleges that Growmark owed a duty to HSSD to prevent invasion of atrazine onto HSSD's property and to prevent the continuous contamination of HSSD's property and water supply. Complaint, ¶ 46. According to HSSD, Growmark breached its duty when it failed to conduct meaningful research into the potential health effects of atrazine and failed to abate or clean up contamination by atrazine despite its knowledge

that atrazine would run off and infiltrate surface waters, including public water supplies. *Id*. ¶ 47. HSSD alleges that despite Growmark's knowledge that atrazine products were used by farmers near surface water, including community water sources, and that the resultant run-off would contaminate these water sources, it distributed and sold its atrazine products for agricultural use. *Id.* ¶¶ 31, 32. The resultant invasion and trespass of atrazine caused HSSD to sustain severe and permanent damage to its property and the contamination of its surface waters. *Id*. ¶ ¶ 32-35.

As the Illinois Supreme Court stated in ***Dial v. City of O'Fallon*, 81 Ill.2d 548, 556-57, 411 N.E.2d 217, 222 (Ill. 1980)**, "...one can be liable under present-day trespass for causing a thing or a third person to enter the land of another either through a negligent act or an intentional act." The court relied on the **Restatement (Second) of Torts, § 158(a)** definition of a trespasser as one who intentionally enters land in the possession of another, or causes a thing or a third person to do so. **81 Ill.2d at 553-54, 411 N.E.2d 217**. Based on the above-cited allegations by HSSD and Illinois case law, the Court finds that HSSD has adequately pled a claim for trespass.

Given HSSD's allegations and the Court's determinations, as set forth above, the Court finds that UAP's arguments that HSSD has failed adequately to state a claim under the Illinois Environmental Protection Act and under the Illinois Water Pollutant Discharge Act are meritless as to the issue of fraudulent joinder. The Court cannot state on these facts that HSSD has no possibility of stating a valid cause of action under the IEPA or the IWDPA.

UAP's argument that Section 2-619(a)(3) of the Illinois Practice Act provides an independent basis for dismissing the instant case because there is another suit pending between the parties for the same cause is equally meritless. As the Seventh Circuit Court of Appeals stated in ***AXA Corporate Solutions v. Underwriters Reinsurance Corp.*, 347 F.3d 272, (7th Cir. 2003)**, "In our view, the

problem addressed by **§ 2-619(a)(3)** is closely akin to topics such as forum *non conveniens*, *lis pendens*, and venue statutes. Each of those areas addresses an organizational matter that is governed by the law of the sovereign that established the forum. In the case of a federal court, that sovereign is obviously the United States." **347 F.3d at 278**. In ***Basic v. Fitzroy Engineering, Ltd.*, 949 F.Supp. 1333 (N.D.Ill. 1996) (*aff'd by unpublished opinion,* 132 F.3d 36 (7th Cir. 1997**)), the Court stated, "Indeed, the Illinois Supreme Court considers it to be procedural in nature: the section exists "to foster orderly procedure by preventing a multiplicity of actions.... [T]he court finds Section 2-619(a)(3) to be a state procedural rule inapplicable to a federal court proceeding,..." **949 F.Supp. at 1336**. Given the procedural nature of the problem, the Court must apply federal procedural law, ***Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817 (1938)**, and must find that the state statute plays no role in the decision whether to remand this matter.

**Conclusion**

For these reasons, the motion to remand (Doc. 15) is **GRANTED**, and this action is **REMANDED** to the Circuit Court for the Third Judicial Circuit, Madison County, Illinois, pursuant to **28 U.S.C. § 1447(c)**.

**IT IS SO ORDERED.**

**DATED this 28th day of March, 2005**.

**s/Michael J. Reagan**
**MICHAEL J. REAGAN**
**United States District Judge**