IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

HOLIDAY SHORES SANITARY DISTRICT, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	Cause No. 04-L-710
SYNGENTA CROP PROTECTION, INC., and GROWMARK, INC.,	)	
Defendants.	)	

MEMORANDUM IN OPPOSITION TO DEFENDANT GROWMARK'S MOTION TO DISMISS BASED ON PRIOR PENDING ACTION

Plaintiff Holiday Shores Sanitary District filed this complaint against Defendants Syngenta Crop Protection, Inc., and Growmark, Inc. As Defendant Growmark, Inc. correctly states, Holiday Shores Sanitary District has also filed actions seeking damages for remediation costs associated with Atrazine contamination of its water supplies against other manufactures of atrazine. In those suits, Plaintiff has also sued Growmark as the distributor of those manufacturers' atrazine and atrazine-containing products for use in Illinois. Defendant Growmark, Inc. has moved to dismiss this suit (as well as all of the other suits) alleging that dismissal is warranted based on a "prior pending action." 735 ILCS 5/2-619(a)(3) provides that dismissal of an action maybe appropriate if "there is another action pending between the same parties for the same cause." The purpose of 735 ILCS 5/2-619(a)(3) "is to avoid duplicative litigation." *A. E. Staley Mfg. Co. v. Swift & Company*, 84 Ill.2d 245, 419 N.E.2d 23, 27, 50 Ill.Dec. 156, 160 (1980).

The factors that the Court should consider in ruling on such a motion are "comity; the prevention of multiplicity, vexation, and harassment; the likelihood of obtaining complete relief in the foreign jurisdiction; and the *res judicata* effect of a foreign judgment in a local forum." *Kellerman v. MCI Telecommunications*, 112 Ill.2d 418, 493 N.E.2d 1045, 1053, 98 Ill.Dec. 24, 32 (1986); *see also, Crain v. Lucent Technologies, Inc.*, 317 Ill.App.3d 486, 739 N.E.2d 639, 647, 250 Ill.Dec. 876, 884 (5th Dist. 2000). In order to prevail on a 735 ILCS 5/2-619(a)(3) motion, the movant must show "by clear and convincing evidence that the two actions involve the same parties and the same cause." *Northbrook Property and Cas. Ins. Co. v. GEO International Corp.*, 317 Ill.App.3d 78, 739 N.E.2d 47, 49, 250 Ill.Dec. 586, 588 (1st Dist. 2000). The decision whether to allow or deny a motion to dismiss based upon a prior pending action is within the sound discretion of the trial court, and such a decision should not be reversed unless the trial court abused its discretion. *Kellerman v. MCI Telecommunications Corp.*, 112 Ill.2d 428, 493 N.E.2d 1045, 1053, 87UIllDec. 24, 32 (1986); *May v. SmithKline Beecham Clinical Laboratories, Inc.*, 304 Il.App.3d 242, 710 N.E.2d 460, 463, 237 Ill.Dec. 830, 833 (5th Dist. 1999). Assuming *arguendo* that there was a prior pending action (which Plaintiff disputes), a motion to dismiss or stay need not automatically be granted. *Id.*, 710 N.E.2d at 464, 237 Ill.Dec. at 834.

A preliminary analysis clearly demonstrates that a dismissal of this case based no "prior pending action" would be erroneous, insofar as there is no other action pending either with the "same parties" or for the "same cause." Growmark fails to demonstrate with any evidence, much less with the required "clear and convincing" evidence, that the other actions involve the same parties or the same cause. Growmark merely makes the conclusory statement that "[t]he 'same parties' and 'same cause' requirements are satisfied here. Each case arises out of the same transaction or occurrence."

Defendant Growmark, Inc.'s Motion To Dismiss Growmark, Inc. Based on Prior Pending Actions, paragraph 7. However, these complaints involve neither the same parties nor the same cause.

In order for the "same parties" requirement of the statute to be satisfied, "the litigants' interests [must be] sufficiently similar." *Hapag-Lloyd (America), Inc. v. Home Ins. Co.*, 312 Ill.App.3d 1087, 729 N.E.2d 36, 40, 246 Ill.Dec. 36, 40 (1st Dist. 2000). Although Syngenta Crop Protection, Inc. faces *issues* in this litigation similar to those issues faced by Sipcam Agro USA, Inc.; Drexel Chemical Company; United AgriProducts, Inc.; Dow AgroSciences, LLC; and Makhteshim-Agan of North America, Inc., they do not share sufficient *interests* in this particular lawsuit. The fact is, each of these entities are separate manufacturers of a product which Growmark, Inc. distributes; dismissing Growmark, Inc. from this lawsuit would result in Growmark, Inc. being relieved from any liability involving Syngenta Crop Protection, Inc.'s atrazine products. Thus, Plaintiff would be precluded from receiving relief from Growmark, Inc. with regard to its distribution of Syngenta Crop Protection, Inc.'s atrazine-containing products.

The "same cause" requirement of the statute is satisfied when the actions arise from "substantially the same facts." *Philips Electronics, N.V. v. New Hampshire Ins. Co.*, 295 Ill.App.3d 895, 692 N.E.2d 1268, 1277, 230 Ill.Dec. 102, 110 (1st Dist. 1998); The critical question is "whether the two actions arise out of the same transaction or occurrence, not whether the legal theory, issues, burden of proof or relief sough materially differ between the two actions." *Village of Mapleton v. Cathy's Tap Inc.*, 313 Ill.App. 264, 729 N.E.2d 854, 856, 232 Ill.Dec. 203, 205 (3rd Dist. 2000). This is clearly not the case here, insofar as part of the occurrence involves the actions of Syngenta Crop Protection, Inc. and the atrazine manufactured and/or sold by Syngenta Crop Protection, Inc. and distributed by Growmark, Inc. That is specific only to this case. The other actions involve the

atrazine manufactured and/or sold by the other manufacturers, and distributed by Growmark. To dismiss Growmark from this case would relieve it of its liability with regard to the distribution of Syngenta Crop Protection's atrazine and/or atrazine-containing products. Dismissing Growmark from this case would mean that all the parties would not be able to obtain complete relief. Such a dismissal is an abuse of discretion. *Hapag-Lloyd (America) Investments*, 729 N.E.2d at 44-45, 246 Ill.Dec. at 44-45.

Clearly, if this motion were granted, Plaintiff would be severely prejudiced. Thus, this motion should be denied. *See Crain v. Lucent Technologies, Inc.*, 317 Ill.App.3d 486, 739 N.E.2d 639, 250 Ill.Dec. 876 (5th Dist. 2000) (in considering a motion to dismiss based on prior pending actions, the Court must "weigh the prejudice to the non-movant, if the motion is granted, against the policy of avoiding duplicative litigation.")

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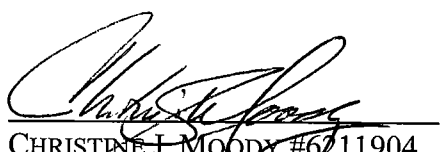
CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of Plaintiff's Memorandum in Opposition to Defendant Growmark's Motion to Dismiss Based on Prior Pending Action was served upon the attorneys of record for the defendants in this cause by enclosing said copy in an envelope addressed to said attorney at his address as disclosed by the pleadings on file in this cause and by depositing said envelope in a U.S. Post Office mailbox at 5:00 p.m. on this 11th day of July, 2005.

KOREIN TILLERY



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