IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT OF ILLINOIS
MADISON COUNTY

HOLIDAY SHORES SANITARY DISTRICT, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	NO. 04-L-710
vs.	)	
SYNGENTA CROP PROTECTION, INC., et al.,	)	
Defendants.	)	

GROWMARK'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS BASED ON PRIOR PENDING ACTIONS

Plaintiff filed six identical amended complaints against Growmark, Inc. ("Growmark") in this court alleging that Growmark contaminated plaintiff's water with atrazine. Plaintiff argues that it should be allowed to maintain six duplicative actions against Growmark solely because the co-defendant is different in each action. Plaintiff, however, fails to point out to the Court that: 1) the allegations against Growmark are word-for-word identical in each of the six cases; 2) there are no allegations in this amended complaint of *any connection*, by way of sales or otherwise, between Growmark and Syngenta Crop Protection, Inc. ("Syngenta"); and 3) plaintiff does not limit its damages in this case to products allegedly distributed by Growmark and manufactured by Syngenta, thus making Growmark potentially liable for all its sales of atrazine in each of the six cases plaintiff has filed. It is just this kind of potential unfair and duplicative liability that 735 ILCS 2-619(a)(3) is intended to avoid.

ARGUMENT

In support of its position that each lawsuit is different, plaintiff argues that because the co-defendant varies, section 2-619(a)(3) does not apply. Plaintiff's Resp. 3. Specifically, plaintiff argues that it is only seeking damages in this case for Syngenta products distributed by Growmark. *Id.* However, no such allegation appears in this amended complaint, nor has plaintiff directed the Court to anything in its amended complaint which shows anything other than a stand-alone claim against Growmark. No allegations that Growmark collaborated with Syngenta, or had any commercial relationship with Syngenta are to be found in the amended complaint. From a purely factual standpoint, plaintiff's excuse that since there are different co-defendants in each of these suits they are entitled to duplicate pleadings against Growmark must fail.

The "other co-defendant" argument also fails as a legal matter. Illinois law is clear that the presence of additional parties present in one suit but not the other does not defeat a section 2-619(a)(3) motion. *Kapoor v. Fujisawa Pharmaceutical Co., Ltd.*, 298 Ill. App. 3d 780, 789 (1st Dist. 1998); *International Games v. Sims*, 111 Ill. App. 3d 922, 924 (3d Dist. 1982).

In *Kapoor*, litigation was pending in federal court between a corporation (Fujisawa) and the former president and CEO of a company Fujisawa purchased (Kapoor). *Kapoor*, 298 Ill. App. 3d at 783-84. While the federal case was pending, Kapoor filed an additional action in state court against both Fujisawa and a number of its directors. *Id.* Fujisawa sought to dismiss the state court action based on the existence of a prior pending action. *Id.* In response, Kapoor argued that the presence of additional co-defendants in the state lawsuit defeated the "same parties" requirement of section 2-619(a)(3). *Id.* at 788-89. Both the trial and appellate courts rejected that

argument; the prior pending action motion was granted and affirmed on appeal. The appellate court explained that "[t]he fact that the individual defendants...are not parties to the federal action does not change the result....the litigants' interests in both actions are substantially similar to satisfy the 'same parties' requirement." *Id.* at 789 (internal citations omitted).

Similarly, in *Sims* litigation arose between a corporation and one of its former minority shareholders. *Sims*, 111 Ill. App. 3d at 923-24. The shareholder brought a shareholder derivative lawsuit in federal court against both the company and its majority shareholder (who was also the company's president and CEO). *Id.* The company (but not its president) then sued the minority shareholder in state court over conduct at issue in one of the counts in the federal suit. *Id.* The minority shareholder brought a prior pending action motion seeking to dismiss the state court suit. *Id.* In response, the company argued that since the president was a party to the federal suit—but not the state action—and the relevant count in the federal suit was only brought against him, the "same parties" requirement was not met. *Id.* at 924. The court rejected that argument and granted the motion. *Id.* The appellate court affirmed. *Id.*

This action presents an even more compelling case that the "same parties" requirement was met than either *Kapoor* or *Sims*; at least in those suits, interactions among the co-defendants were at issue. Here, Growmark is sued only for its own alleged actions in six identical lawsuits. As noted in Growmark's opening brief, each amended complaint contains identical paragraphs 1, 4-13, and 16-73, including the same five legal claims (set forth in identical language) and identical prayers for relief. Growmark Opening Br. 3-4. Of the remaining four paragraphs in each amended complaint (Am. Compl. ¶¶ 2-3 and 14-15), three do not refer either explicitly or implicitly to Growmark.

Id. Paragraphs 2 and 3 of each amended complaint identify the co-defendant and contain plaintiff's jurisdictional allegations against that co-defendant. *Id.* Paragraph 14 of each amended complaint attributes certain statements to the co-defendant. *Id.* The remaining paragraph (Am. Compl. ¶ 15) relates only to the co-defendants and other unnamed suppliers, and does not refer to Growmark. *Id.*

Just as clearly, the "same cause" requirement is satisfied here. A reading of plaintiff's amended complaint illustrates the simple fact that Growmark is being sued because it allegedly distributes products containing atrazine in Illinois, *see, e.g.,* Am. Compl. ¶ 4, not because it distributed products manufactured by any one defendant. Plaintiff can have only one satisfaction for its injuries allegedly caused by Growmark, regardless of whether multiple theories of recovery are sought. *Dial v. O'Fallon*, 81 Ill. 2d 548 (1980); *Kipnis v. Meltzer*, 253 Ill. App. 3d 67, 68 (5th Dist. 1993). The amended complaint contains no language limiting the scope of Growmark's liability to certain products; it doesn't even identify which of its products were allegedly manufactured by Syngenta.

Furthermore, plaintiff incorrectly states in its response that Growmark has filed a 735 ILCS 5/2-619(a)(3) motion to dismiss in all six cases. Plaintiff's Resp. 1. Plaintiff is wrong. In fact, Growmark filed this motion in five cases—every case except *Holiday Shores Sanitary District v. Sipcam Agro USA, Inc. and Growmark, Inc.*, No. 2004-L-000708—the first filed case. *Sipcam* is the first filed action. Any claims against Growmark surviving a ruling on Growmark's substantive motion to dismiss should proceed in the *Sipcam* case.

CONCLUSION

This is duplicative litigation at its most basic. Holiday Shores has filed six identical lawsuits against Growmark. Only the first filed can survive. For the foregoing reasons, Growmark respectfully requests that this court dismiss Growmark from this action pursuant to 735 ILCS 5/2-619(a)(3).

DATED: July 20, 2005

Respectfully submitted,

GROWMARK, INC.

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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause by enclosing the same in an envelope, with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Box in Edwardsville, Illinois, on July 20, 2005

By _____
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