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March 4, 2010

Honorable Barbara Crowder
Madison County Courthouse
155 North Main Street
Edwardsville, IL 62025

RE: Holiday Shores v. Syngenta Corporation and Growmark, Inc.
Cause No. 04-L-710

Dear Judge Crowder:

On March 2, 2010, Defendants filed a supplemental memorandum in support of their motions to transfer the claims of the newly added Plaintiffs. This letter addresses some of the matters raised in that memorandum.

In essence, Defendants ask this Court to ignore or rewrite the plain language of the Illinois Venue Statute. Defendants' approach violates the well-established principles of statutory construction. It is black-letter law that when the language of a statute is clear and unambiguous, a court must enforce it as written. *Hines v. Department of Public Aid*, 221 Ill.2d 222, 230, 850 N.E.2d 148, 153 (Ill. 2006). A court may not add new provisions, substitute different provisions, or read into the statute exceptions, limitations, or conditions which the legislature did not express. *People ex rel. Department of Professional Regulation v. Manos*, 202 Ill.2d 563, 568, 270 Ill.Dec. 43, 782 N.E.2d 237 (Ill. 2002) (quotations omitted). Moreover, the "enumeration of exceptions in a statute is construed as an exclusion of all other exceptions." *People ex rel. Sherman v. Cryns*, 203 Ill.2d 264, 286, 271 Ill.Dec. 881, 786 N.E.2d 139 (Ill. 2003). Thus, where a statute like the Illinois Venue Statute provides specific exceptions to a general rule, no exceptions other than those designated will be recognized. *In re Estate of Tilliski*, 390 Ill. 273, 283, 61 N.E.2d 24 (Ill. 1945).

Looking at the Illinois Venue Statute, it is clear that venue is proper in Madison County. The statute provides:

> **Except as otherwise provided in this Act**, every action **must be commenced** (1) in the county of residence of any defendant who is joined in good faith and with probable cause for the purpose of obtaining a judgment against him or her and not solely for the purpose of fixing venue in that county, or (2) in the county in which the transaction or some part thereof occurred out of which the cause of action arose.

735 ILCS 5/2-101 (emphasis added). The statute states that a corporation is a "resident of any county in which it . . . is doing business. 735 ILCS 5/2-102. The Illinois Venue Statute is not an "ambiguous" or "doubtful" modification of the common

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law as Defendants suggest, but rather it is to be "mandatorily applied to all venue questions, with the only exceptions being expressly provided by the Civil Practice Act." *Martin-Trigona v. Roderick*, 29 Ill.App.3d 553, 555, 331 N.E.2d 100 (Ill.App. 1st Dist. 1975). In this case, venue is appropriate in Madison County because Defendants have stipulated that Defendant Growmark was doing business in Madison County at all relevant times, and none of the statutory exceptions apply.

While it is true that certain actions that may directly affect real property must be brought in the county where the real property is situated, this case is not one of those actions. In fact, Section 2-103 of the Illinois Venue Statute explicitly sets forth the limited exceptions to the general venue provision. The only exception relating to real estate is Section 2-103(b), which states:

> Any action to quiet title to real estate, or to partition or recover possession thereof or to foreclose a mortgage or other lien thereon, must be brought in the county in which the real estate or some part of it is situated.

735 ILCS 5/2-103(b).

In short, the Illinois Venue Statute does away with the common law distinction between transitory and local actions and replaces it with the limited exception set forth in Section 2-103. Had the General Assembly wished to retain the distinction between transitory and local actions, it could have easily included a provision stating that "any action involving real estate must be brought in the county in which the real estate or some part of it is situated." But it did not. Instead, the General Assembly deliberately cut back the antiquated distinction between local and transitory actions to include only the narrow exceptions listed in the statute.

Defendants' failure to discuss or even mention this exception is telling. As leading commentators on Illinois law have noted, "the omission of torts involving land from ¶2-103(b) implies that torts involving land in Illinois may be brought in any county of proper venue under the general venue rules." Richard A. Michael & Michael J. Kaufman, *3 Ill. Prac., Civil Procedure Before Trial* §12.4 (2nd ed., West 2009); *see also Lawless v. Village of Park Forest South*, 108 Ill.App.3d 191, 438 N.E.2d 1299 (1st Dist. 1982). Here, Plaintiffs' claims do not fall within the limited exception of Section 2-103(b) because they do not affect the title to real property. As a result, venue is proper in Madison County.

Even if the distinction between local and transitory actions survived the enactment of the Illinois Venue Statute, Madison County would still be the proper venue for Plaintiffs' claims because they would be categorized as transitory actions. As the Illinois Supreme Court has noted, "actions of the type [listed in the statute] which directly affect the land itself, must be commenced in the county where the property is located. It does not follow, however, that all proceedings which may in some way affect title to land are local in nature." *Gordon v. Gordon*, 6 Ill.2d 572, 576, 129 N.E.2d 706, 708 (Ill. 1955).

In fact, the cases Defendants cite support the conclusion that Plaintiffs' claims are transitory, not local. For example, in *Musicus v. Safeway Stores, Inc.*, 743 F.2d 503 (7th Cir. 1984), the Seventh Circuit recognized that actions for money damages, like Plaintiffs' claims in this case, do not have to be brought where the real estate is located:

> Federal law and Illinois law thus agree that a wide variety of types of actions which affect lands, from the conveyance of real estate to the enforcement of lease provisions, are nonetheless considered transitory actions requiring only *in personam* jurisdiction over the defendant. The

> determinative element in defining a transitory action is whether the type of relief requested is of a "personal" nature so that the court, in acting upon the person or personal property of the defendant which is within its control, need not act directly upon the lands involved. Rather, as the Illinois Supreme Court stated in *Bevans v. Murray*, 251 Ill. at 625, 96 N.E. at 554, a court can act indirectly upon the lands by employing appropriate sanctions and otherwise "coercing" the defendant. Thus, while no Illinois or federal case provides a precise parallel, we are persuaded that an Illinois court would apply to the facts before us the rule that the relief requested determines the character of the action for venue purposes, even if real property were to be indirectly affected.

Musicus, 743 F.2d at 508-509.

Here, like in *Musicus*, the allegations of Plaintiffs' Second Amended Class Action Complaint are "clearly attempts to obtain a personal money judgment" against Defendants and are therefore "characterized as transitory under both Illinois and federal law." *Id.* at 509. Further, the Seventh Circuit also held that venue was proper in the Northern District of Illinois for the plaintiff's trespass claims, even though the properties at issue were located in Nebraska and Montana. *Id.* at 511 ("Although this action may have an indirect effect upon lands lying outside the jurisdiction of the district court, the action is transitory in nature and the court is required only to have *in personam* jurisdiction over the defendant.").

Unable to dispute that venue is proper in Madison County under the Illinois Venue Statute or the common law transitory vs. local analysis, Defendants instead attempt to divert the Court's attention by citing irrelevant case law and statutes. Defendants cite a number of cases for the completely unremarkable proposition that water systems and sewer systems are considered part of real property. *E.g. McPeak v. Thorell*, 148 Ill.App.3d 430 (Ill.App.3d Dist. 1986); *Tyrell Gravel Co. v. Carradus*, 250 Ill.App3d 817 (Ill.App.2d Dist. 1993). None of the cases cited by Defendants address the issue of venue, and as discussed above, the mere fact that a case involves real property does not control the question of venue unless it directly affects the title. *See* 735 ILCS 5/2-101, 103.

Finally, Defendants' discussion of Supreme Court Rule 384 is irrelevant. Rule 384 applies when "civil actions involving one or more common questions of fact or law are pending in different judicial circuits. . . ." Ill. S. Ct. R. 384. First, there are no and never were multiple actions relevant to this litigation pending in different judicial circuits. Second, Defendants' argument presumes that there is no basis for venue in Madison County, a position contrary to the stipulation of all defendants. Rule 384 simply does not apply when venue is proper.

Respectfully submitted,

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