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MEMORANDUM

Via E-Mail

DATE: September 23, 2004

TO: Firm Clients and Friends

FROM: Bergeson & Campbell, P.C.

RE: SRM Chemical Challenges Appointment of Arbitrators in FIFRA Data Compensation Arbitration

On September 20, 2004, SRM Chemical Ltd Co. (SRM) issued a press release announcing that it has filed suit in the U.S. District Court for the District of Columbia against the Federal Mediation and Conciliation Service (FMCS) to overturn FMCS's decision to uphold a determination by the American Arbitration Association (AAA) to appoint three arbitrators in SRM's arbitration with Syngenta Crop Protection, Inc. (Syngenta). According to SRM, the rules governing Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) arbitrations establish a presumption in favor of appointing a single arbitrator to determine data compensation claims. SRM is challenging FMCS's decision to adopt and uphold AAA's decision that three arbitrators be appointed, and FMCS's refusal to review whether AAA's decision was "arbitrary, capricious, an abuse of its discretion and otherwise not in accordance with law." This is at least the third case addressing the number of arbitrators. In the November 2000 case *SePro Corporation v. Griffin, L.L.C.*,¹ FMCS upheld AAA's appointment of three arbitrators. In the January 2002 case *Aventis CropSciences v. Burlington Bio-Medical and Scientific Corp.*,² however, FMCS determined that the intent of the FIFRA arbitration rules seems to favor the appointment of one arbitrator.

According to SRM's August 26, 2004, Amended Complaint, on March 11, 2004, Syngenta filed a Demand for Arbitration. In its Demand, Syngenta requested that three arbitrators be appointed. On March 18, 2004, in its first communication to SRM, AAA

¹ *SePro Corp. v. Griffin, L.L.C.*, AAA Case No. 23 171 0003200 (Dec. 8, 2000) (*SePro*).

² *Aventis CropScience v. Burlington Bio-Medical and Scientific Corp.*, FIFRA Case No. 16 171 00407 01 (Jan. 4, 2002) (*Aventis CropScience*) (Opinion and Award).



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announced an *a priori, ex parte* decision to appoint three arbitrators. SRM replied on March 18, 2004, objecting to the appointment of three arbitrators. After several communications between SRM, Syngenta, and AAA, including specific arguments and an affidavit from SRM in support of its contention that it would be inappropriate to appoint three arbitrators, on June 8, 2004, AAA reiterated its original decision that three arbitrators be appointed. In its June 8, 2004, letter, AAA justified its decision to disregard what SRM believes is the regulatory presumption in favor of a single arbitrator on the basis of the AAA's Commercial Arbitration Rules, which provide for the appointment of three arbitrators for any claim exceeding \$1 million. On June 22, 2004, SRM filed with FMCS a Notice of Appeal. Both Syngenta and AAA filed briefs on the matter, and on July 20, 2004, the FMCS issued its decision to uphold and adopt AAA's determination that three arbitrators be appointed.

In its Amended Complaint, SRM alleges that all FIFRA data compensation arbitrations administered under the FIFRA Arbitration Rules, which are set forth at 29 C.F.R. Part 1440, have involved claims in excess of \$1 million, and argues that by relying on the Commercial Arbitration Rules, AAA has implemented a *de facto* rule requiring the appointment of three arbitrators for all FIFRA data compensation arbitrations. According to SRM, the FIFRA Arbitration Rules have a presumption in favor of a single arbitrator. SRM argues further that AAA's Commercial Arbitration Rules have "no legal force with respect to the FIFRA data compensation arbitrations, but rather apply by their own terms only to private disputes brought before the AAA by virtue of contractual agreements of the parties." SRM states that FMCS abused its discretion by expressly declining to review AAA's determination that three arbitrators be appointed, without addressing the substance and supporting facts of SRM's arguments. SRM also states that FMCS was "capricious, arbitrary, abused its discretion and acted not in accordance with law" by expressly declining to review AAA's determination that three arbitrators be appointed in reliance upon the "inapplicable" Commercial Arbitration Rules.

SRM has asked the court for the following relief:

- Declare the FMCS's determination to adopt and uphold AAA's decision to overcome the statutory and regulatory presumption in favor of a single arbitrator and instead appoint three arbitrators is arbitrary, capricious, and an abuse of discretion in violation of the Administrative Procedure Act (APA);
- Declare the FMCS's determination to adopt and uphold AAA's decision to overcome the statutory and regulatory presumption in favor of a single arbitrator and instead appoint three arbitrators is a denial of SRM's right to due process under the Fifth Amendment of the U.S. Constitution;



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- Declare that the FMCS's decision to adopt and uphold AAA's determination of uniform application that three arbitrators be appointed in all pesticide data disputes involving claims in excess of \$1 million, without notice and an opportunity for public comment, is a violation of the APA;
- Declare that FMCS's decision to adopt and uphold AAA's determination of uniform application that three arbitrators be appointed in all FIFRA data compensation arbitrations involving claims in excess of \$1 million, without notice and an opportunity for public comment, is a denial of SRM's right to due process under the Fifth Amendment of the U.S. Constitution; and
- Declare that a single arbitrator be appointed in the case.

There are two publicly available decisions regarding the number of arbitrators appointed to arbitration. In *SePro*, FMCS determined that a November 2000 AAA decision requiring a three-person arbitration panel in a dispute involving a claim in excess of \$250,000 was not "in error." *SePro* argued unsuccessfully that the wording of FIFRA mandates use of a single arbitrator unless the parties have determined otherwise. The FMCS concurred with the AAA decision that ". . . larger dollar cases are different in ways which often merit use of three arbitrator panels."³ FMCS stated: "Larger dollar cases often are litigated more fully than cases with less at stake. Larger dollar disputes typically involve larger factual records and more extensive discovery. The additional costs associated with three arbitrators, rather than a single arbitrator, is less significant given the greater amount at stake and the greater investment of both Parties in terms of case preparation and presentation. Additionally, the AAA may have found that, in larger dollar disputes, the quality of the decision making, as well as its acceptability by the Parties, is enhanced by having three arbitrators in lieu of a single arbitrator."⁴

More recently, in *Aventis CropScience* the same issue was considered. The arbitrator there determined that: "Based upon a collective reading of the statute, this Arbitrator must find that the drafters intended and reasonably set forth such legislation, which in effect was to designate only one arbitrator to review and resolve this pesticide compensation data

³ *SePro Corp.*

⁴ *Id.*



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proceedings.”⁵ The arbitrator stated: “[T]he FIFRA Arbitration Rules utilize the singular form of arbitrator in multiple contexts. It would seem that the intent of this statute is that one arbitrator should decide upon this pesticide data compensation claim.”⁶

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We hope this information is helpful. As always, please call if you have any questions.

⁵ *Aventis CropScience* at 5.

⁶ *Id.* at 4.