

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DISTRICT

IN RE GENETICALLY
MODIFIED RICE LITIGATION

MASTER CASE NO. 4:06-MD-1811CDP
MDL DOCKET NO. 1811

This document relates to:

PETE CRYMES d/b/a PETE CRYMES FARMS

PLAINTIFF

V.

CASE NO. 4:11-cv-00257-CDP

RICELAND FOODS, INC.; BAYER A.G.;
BAYER CROPSCIENCE; AND
BAYER CROPSCIENCE ARKANSAS LP

DEFENDANTS

**BAYER CROPSCIENCE LP'S
RESPONSE TO PLAINTIFF'S MOTION TO REMAND**

**I.
Introduction**

Plaintiff fraudulently joined Riceland Foods, Inc. ("Riceland"), an Arkansas corporation, to defeat diversity jurisdiction because plaintiff's claims against Riceland were time-barred when plaintiff filed his complaint in state court. Without actually addressing the issue of whether his claims are time-barred, plaintiff seeks remand to state court. But Arkansas case law establishes plainly that plaintiff's claims against Riceland accrued when he first suffered damages in August 2006 and had lapsed at the time he filed his complaint in state court. Naming a defendant against whom all claims have lapsed is fraudulent joinder. The Court should therefore deny the motion to remand and permit this case to proceed in federal court.

II.
Allegations in the Complaint

“In making a determination on application of statute of limitations, the court looks to the complaint itself.” *Goldsby v. Fairley*, 309 Ark. 380, 384, 831 S.W.2d 142 (1992). Here, plaintiff alleges in his December 3, 2010, complaint that Bayer CropScience LP conducted testing and research on genetically-modified rice from 1998 to 2001 from which some genetically modified material made it into the commercial rice supply. (Comp. at ¶¶ 10, 18).

Riceland’s involvement came later, when the contamination first came to light. Plaintiff alleges that Riceland learned about the contamination in January 2006, but suppressed the information from plaintiff, who is a member of Riceland. (*Id.* at ¶ 21). Riceland collected samples and tested them in May 2006, with the test results being positive for genetically-modified rice. (*Id.*) Plaintiff alleges that Bayer reported the positive tests to the United States Department of Agriculture (“USDA”) in July 2006. (*Id.*) The USDA announced the contamination to the public on August 18, 2006. (*Id.* at ¶ 18). Riceland made an announcement the same day. (*Id.* at ¶ 19).

According to plaintiff’s complaint, he began to suffer damages immediately upon the USDA announcement:

Announcement of the contamination of the United States rice supply by Bayer had immediate effects. In trading at the Chicago Board of Trade, the price of rough rice contracts have dropped significantly due to the news of the contamination and resulting in banks and/or new testing protocols by the European Union and Japan. After news of the commingling was first release [sic], the market price of rice at the Chicago Board of Trade fell approximately 14%

(*Id.* at ¶ 22). Other damages followed immediately as well—Japan stopped imports of U.S. rice, the European Union restricted imports, and the largest Swiss supermarket chain stopped selling U.S. long-grain rice. (*Id.* at ¶¶ 23–25). Ultimately, the “news of the LLRICE 601 and 604

contamination severely restricted and depressed the market for Arkansas-grown and USA-grown long-grain rice, resulting in a significant price drop.” (*Id.* at ¶ 26).

Plaintiff claims this “significant price drop” as a measure of damages in his complaint. (*Id.* at ¶ 50). Specifically, plaintiff claims to be “economically damaged because the price for its 2007 harvest of long-grain rice was much lower than the price would have been if the LLRICE 601 and 604 contamination had not occurred.” (*Id.* at ¶ 50). This market damage began upon the USDA announcement on August 18, 2006. (*Id.* at ¶¶ 22–25).

III. Argument

A. Bayer CropScience LP was not required to obtain Riceland’s consent to the removal because Riceland was fraudulently joined.

Plaintiff argues that Bayer CropScience LP acted improperly by not obtaining Riceland’s consent to removal. (Doc. No. 4064, Motion to Remand, at ¶ 4). While the general rule is that all defendants must join a notice of removal, that rule does not apply when the defendant who does not consent to removal was fraudulently joined. *See Rico v. Flores*, 481 F.3d 234, 239 (5th Cir. 2007) (holding that “a removing party need not obtain the consent of a co-defendant that the removing party contends is improperly joined” because “such a requirement would be ‘nonsensical, as removal in those cases is based on the contention that no other proper defendant exists’”) (quoting *Jernigan v. Ashland Oil Inc.*, 989 F.2d 812, 815 (5th Cir. 1993)); *Balazik v. County of Dauphin*, 44 F.3d 209, 213 n.4 (3d Cir. 1995) (stating that removing defendants need not obtain the consent of a defendant they assert to have been fraudulently joined).

Bayer CropScience LP thus did not have to obtain Riceland’s consent to remove this case because the removal is premised on the assertion that Riceland has been fraudulently joined. The only issue for the Court to decide is that of fraudulent joinder, not the procedural issue of the rule of unanimity.

B. Joining a defendant against whom a plaintiff has time-barred claims is fraudulent joinder.

Fraudulent joinder of a non-diverse party does not prevent removal based upon diversity jurisdiction. *BP Chemicals Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677, 685 (8th Cir.2002) (holding that a defendant's right of removal based on diversity of citizenship may not be defeated by fraudulently joining a non-diverse party). The joinder of a non-diverse defendant is “fraudulent and removal is proper when there exists no reasonable basis in fact and law” to support a claim against the non-diverse defendant. *Id.* (quoting *Wiles v. Capitol Indem., Corp.*, 280 F.3d 868, 871 (8th Cir.2002)).

Joining a defendant against whom the plaintiff has a time-barred claim is fraudulent joinder. *See Kohl v. American Home Products Corp.*, 78 F.Supp.2d 885, 898 (W.D. Ark. 1999) (finding fraudulent joinder where the plaintiff joined non-diverse pharmacists in a pharmaceutical products liability case because the plaintiff’s medical malpractice claims against the pharmacists were time-barred); *Hamilton v. Wyeth*, 2003 WL 24281166, *2 (E.D. Ark. June 17, 2003) (finding fraudulent joinder where the plaintiff joined a non-diverse prescribing physician in a pharmaceutical products liability case because the plaintiff’s medical malpractice claims against the physician were time-barred); *see also In re Briscoe*, 448 F.3d 201, 219 (3d Cir. 2006) (holding that “[i]f a district court can discern, as a matter of law, that a cause of action is time-barred under state law, it follows that the cause fails to present even a colorable claim against the non-diverse defendant”); *LeBlang Motors, Ltd. v. Subaru of Am., Inc.*, 148 F.3d 680, 690 (7th Cir. 1998) (holding that “[i]f the time to bring the cause of action had expired, then the district court was correct in dismissing [non-diverse defendants] as fraudulently joined”); *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318-20 (9th Cir. 1998) (holding that the plaintiff failed to state a claim against the non-diverse defendants because the claims were time-barred, making the

non-diverse defendants “sham defendants” who were fraudulently joined); *Casper v. Mony Life Ins. Co. of Am.*, 2005 U.S. Dist. LEXIS 40343 (E.D. Mo. Dec. 19, 2005) (stating that “where the facts as alleged in the Complaint clearly show that a claim is time-barred, that no question of fact concerning application of the statute of limitations exists, a court may properly consider a statute of limitations defense in determining fraudulent joinder”).

C. Plaintiff’s claims against Riceland are time-barred, so Riceland was fraudulently joined.

Plaintiff’s claims against Riceland for fraud and negligence are tort claims for which Arkansas law imposes a three-year statute of limitations. Ark. Code Ann. § 16-56-105. A “cause of action accrues the moment the right to commence an action comes into existence, and the statute of limitations commences to run from that time.” *Shelnutt v. Laird*, 359 Ark. 516, 520, 199 S.W.3d 65, 67–68 (2004) (citing *Courtney v. First Nat’l Bank*, 300 Ark. 498, 780 S.W.2d 536 (1989)). The statute of limitations thus “begins to run when there is a complete and present cause of action, and, in the absence of concealment of the wrong, when the injury occurs, not when it is discovered.” *Chalmers v. Toyota Motor Sales*, 326 Ark. 895, 901, 935 S.W.2d 258, 261 (1996) (internal citations omitted, emphasis added).

The Court must analyze plaintiff’s complaint under this rule to determine when plaintiff first had a complete cause of action against Riceland. Plaintiff asserts claims against Riceland for failing to disclose the GM rice contamination, which occurred before August 18, 2006, when the information became public. Plaintiff had a complete cause of action when he suffered damages, which, according to plaintiff’s complaint, occurred no later than August 18, 2006, when he and other rice farmers began to feel the “immediate effects” of the announcement of the release of genetically-modified rice into the commercial supply. (Comp. at ¶ 22). Plaintiff’s causes of action against Riceland therefore accrued on August 18, 2006, the date on which his

causes of action became complete because he suffered damages resulting from Riceland's alleged failure to disclose the GM rice contamination.

The fact that plaintiff might have suffered damages arising from the same acts later does not effect the accrual of his claim. The Arkansas Supreme Court has expressly rejected this sort of "continuing tort" theory under which a new cause of action arises each time new damages result from the defendant's actions. *Quality Optical of Jonesboro, Inc. v. Trusty Optical, L.L.C.*, 365 Ark. 106, 110, 225 S.W.3d 369, 372 (2006). In *Quality Optical*, the plaintiff argued that its claims for intentional interference with a business expectancy and misappropriation of trade secrets were timely because some of the customers it lost as a result of the defendant's acts defected within three years of the date it filed its complaint. *Id.* The Arkansas Supreme Court rejected this argument, holding that the causes of action accrued when the first customer defected to the defendant and that a new cause of action did not accrue with each successive time the plaintiff was damaged. *Id.* In other words, the occurrence rule applied, and the plaintiff's causes of action against the defendant accrued when it first incurred damages.

Quality Optical dictates that the Court should disregard allegations in the complaint of damages occurring in 2007 and beyond. The allegations in plaintiff's complaint demonstrate that his cause of action against Riceland accrued on August 18, 2006, when he first suffered damages in the form of falling rice prices. Plaintiff filed his complaint December 3, 2010, more than four years after his causes of action accrued and more than one year after the statute of limitations had lapsed.

Though plaintiff's brief does not directly address the statute of limitations issue set forth in Bayer CropScience LP' notice of removal, plaintiff appears to rely on the *American Pipe* class

action tolling doctrine.¹ (See Doc. No. 4064 at ¶ 5). Plaintiff misunderstands this doctrine, however, asserting that it resets the statute of limitations to begin running from the date of dismissal of the class action. *American Pipe* does not reset the statute of limitations—instead, it establishes simply that “the filing of a class action tolls the applicable statute of limitations, and thus permits all members of the putative class to file individual actions in the event that class certification is denied, **provided, of course, that those actions are instituted within the time that remains on the limitations period.**” *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 346-347 (1983) (emphasis added). Accordingly, the statute of limitations began running before the filing of the class action, was suspended during the pendency of the class action, and continued running once the class action was dismissed.

The effect, then, is to add the number of days that the class action was pending to the statute of limitations period. The genetically-modified rice class action was filed July 2, 2008, and ultimately dismissed September 28, 2009. The class action was therefore pending 453 days. If *American Pipe* applies, then, plaintiff had three years plus 453 days from the date his claims accrued to file his claims regarding genetically modified rice.

Plaintiff’s claims against Riceland accrued August 18, 2006, when plaintiff first suffered damages. Without any tolling, the three-year statute of limitations period would have expired August 18, 2009. Adding 453 days—i.e., the number of days the class action was pending—

¹ The *American Pipe* tolling doctrine has never been adopted in Arkansas, and Eighth Circuit case law suggests that the Arkansas savings statute, which tolls the statute of limitations by providing a plaintiff one year to file previously dismissed claims, should apply. See *Great Plains Trust Co. v. Union Pacific R.R. Co.*, 492 F.3d 986, 992 (8th Cir. 2007) (holding that Kansas’s savings statute applied, requiring the plaintiff to refile its claim within six months of the dismissal of a previously filed class action). Under the Arkansas savings statute, plaintiff’s claims were barred one year after the GM rice class action was dismissed on September 28, 2009. Plaintiff filed his claims against Riceland in this case December 3, 2010, more than one year after dismissal of the class action. Plaintiff’s claims are time-barred under either approach.

results in a new deadline of November 14, 2010. Plaintiff filed his claims against Riceland December 3, 2010, nineteen days *after* the tolled statute of limitations expired. Because plaintiff's claims against Riceland are time-barred, Riceland has been fraudulently joined, and the Court should deny plaintiff's motion to remand.

**IV.
Conclusion**

Under even the most generous interpretation of the statute of limitations as applied to the allegations in plaintiff's complaint, his claims against Riceland were time-barred when he filed them on December 3, 2010. Because plaintiff's claims against Riceland are time-barred, plaintiff fraudulently joined Riceland, the only non-diverse defendant in this case, to defeat diversity jurisdiction. The Court should therefore deny plaintiff's motion to remand and permit this case to remain in federal court.

Respectfully submitted, this the 10th day of March, 2011.

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CERTIFICATE OF SERVICE

This is to certify that I have this 10th day of March, 2011, electronically filed a copy of the foregoing with the Clerk of Court to be served by operation of the Court's electronic filing system upon the parties of record.

s/ Lindy D. Brown

Lindy D. Brown