

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

**In re
Genetically Modified Rice Litigation**

**Master Case No. 4:06MD1811CDP
MDL Docket No. 1811**

This document relates to:

TURNER GRAIN MERCHANDISING, INC.,	§	PLAINTIFFS
TURNER COMMODITIES, INC., GERALD LOYD,	§	
JASON COLEMAN, DALE BARTLETT, BARTLETT	§	
FARMS, JOSEPH GRIFFITH, SCOTT GRIFFITH	§	
PARTNERSHIP, LP, SIDNEY CALDWELL,	§	
SIDNEY CALDWELL FARMS, JANET COLEMAN,	§	
and PEDO & MABEL, L.L.C.	§	
	§	
VS.	§	NO. 4:11-CV-256
	§	
BAYER CROPSCIENCE, LP,	§	
BAYER CROPSCIENCE HOLDING, INC.,	§	
BAYER CORPORATION, BAYER AG,	§	
BAYER BIOSCIENCE NV AND	§	
RICELAND FOODS, INC.	§	DEFENDANTS

**REPLY TO BAYER’S RESPONSE
TO PLAINTIFFS’ MOTION TO REMAND**

A. INTRODUCTION

This case is one of many lawsuits filed by rice farmers against Riceland Foods, Inc. (“Riceland”) and the Bayer Defendants in various state courts throughout Arkansas relating to the contamination of the U.S. rice with genetically modified organisms. Bayer removed this action from Arkansas state court claiming that Riceland was fraudulently joined to defeat diversity. Riceland has not joined in the removal. Bayer admits that similarly situated plaintiffs have colorable claims against Riceland, but Bayer distinguishes the instant case by arguing that Plaintiffs’ claims against Riceland are time-barred.

Plaintiffs filed a Motion to Remand the case and made clear that the statute of limitations had not expired prior to Plaintiffs filing suit, because Riceland fraudulently concealed their conduct which tolled the running of the statute of limitations under Arkansas law, and the statute of limitations was further tolled by the pendency of a class action. Bayer concedes that the statute of limitations was tolled during the pendency of the class action, but Bayer argues that the statute of limitations against Riceland ran from the date of the occurrence or August 18, 2006 despite Riceland's fraudulent concealment. Bayer justifies their argument by quoting the Arkansas Supreme Court in stating that the statute of limitations "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.**" See Bayer's Response to Plaintiffs' Motion to Remand quoting *Chalmers v. Toyota Motor Sales*, 326 Ark. 895, 901, 935 S.W.2d 258, 261 (1996) (emphasis added by Bayer).

Plaintiffs direct the Court to the eight words "in the absence of concealment of the wrong" which qualify the language Bayer chose to emphasize. Plaintiffs entire argument for remand is that Riceland concealed the wrong. Plaintiffs pled as much in their Original Complaint and specified Riceland's specific acts of concealment in their Remand briefing. In response, Bayer focused on the occurrence rule in Arkansas while ignoring the exception where a defendant, such as Riceland, concealed the wrong. The exception is applicable here and is fatal to Bayer's removal; Riceland concealed its wrongdoing until at least August 29, 2006, so the statute of limitations against Riceland expired no earlier than November 30, 2010, or eleven days after Plaintiffs filed suit.

B. THE GENERAL RULE IN ARKANSAS IS INAPPLICABLE

Bayer spends a third of its response echoing Arkansas courts' prior rejections of the "continuing tort" theory, but Plaintiffs do not rely on such a theory. Bayer recites the rule that "[t]he 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." See Bayer's Response to Plaintiffs' Motion to Remand quoting *Chalmers v. Toyota Motor Sales*, 326 Ark. 895, 901, 935 S.W.2d 258, 261 (1996) (emphasis modified). Here Plaintiffs pled a cause of action for fraudulent concealment and has exhaustively outlined Riceland's positive acts of fraud. See Plaintiffs' Amended Brief in Support of Motion to Remand, paragraphs 25 through 35. Riceland's positive acts of fraud are precisely the type of concealment of the wrong which *Chalmers* recognized make the occurrence rule inapplicable. Ark.Code.Ann§ 16-56-106; *Shelton v. Fiser*, 340 Ark. 89, 8 S.W.3d 557, 561-62 (2000); *Miles v. A.O. Smith Harvestore Products, Inc.*, 992 F.2d 813; 816 (8th Cir.1993).

C. RICELAND'S FRAUDULENT CONCEALMENT TOLLED THE STATUTE OF LIMITATIONS

In Arkansas law, concealment of a wrong makes the general rule on limitations inapplicable and tolls the statute of limitations. Ark. Code. Ann. § 16-56-120. Plaintiffs provided a number of actions by Riceland which were fraudulent. See Plaintiffs' Amended Brief in Support of Motion to Remand, paragraphs 25 through 35. Bayer does not dispute that the cited actions support a cause of action for fraudulent concealment, but instead argues that all the cited actions occurred prior to August 18, 2006. Bayer attempts to distinguish *Adams v. Wolf* because the concealment in *Adams v. Wolf* occurred after the cause of action otherwise accrued but Riceland's concealment occurred prior to the August 18, 2006 announcement or before the cause of action accrued. This distinction makes no legal difference, because once the fraudulent

concealment occurs, the statute of limitations is tolled and “the suspension remains in effect until the party having the cause of action discovers the fraud or should have discovered it by the exercise of due diligence.” *See Meadors v. Still*, 344 Ark. 307, 40 S.W.3d 294, 300 (Ark. 2001). The August 18, 2006 announcement could not have alerted Plaintiffs to *Riceland’s* concealment; the August 18, 2006 announcement only alerted farmers to the fact of contamination and Bayer’s involvement. To the extent that *Riceland’s* fraudulent concealment also concealed Bayer’s involvement, the announcement is significant, but the announcement did nothing to put a diligent farmer on notice of *Riceland’s* fraudulent concealment which is the operative question when determining when the statute of limitations ran against *Riceland*. While the statute normally would run on the same day for *Riceland* and Bayer, it did not do so in this case on account of *Riceland’s* fraudulent concealment.

On account of *Riceland’s* positive acts of concealment, the statute of limitations did not begin to run until Plaintiffs or a diligent person in their shoes would have discovered the fraud. *See Meadors v. Still*, 344 Ark. 307, 40 S.W.3d 294, 300 (Ark. 2001). Tellingly, Bayer does not offer a date for this other than the August 18, 2006 announcement of contamination, and Bayer does not explain how this announcement put a diligent plaintiff on notice of the fraud. It did not, and the first potential notice to Plaintiffs of *Riceland’s* fraudulent concealment was no earlier than August 29, 2006. Admittedly, Plaintiffs did not learn about *Riceland’s* fraudulent concealment until later, but August 29, 2006 is the first date they could have discovered the fraud and thus the date the statute of limitations began to run. *See Meadors v. Still*, 344 Ark. 307, 40 S.W.3d 294, 300 (Ark. 2001).

D. BAYER HAS NOT MET ITS BURDEN TO SHOW FRAUDULENT JOINDER

When a party seeking removal alleges fraudulent joinder, the removing party bears the burden of proving the alleged fraud by a preponderance of the evidence. *See Altimore v. Mount Mercy College*, 420 F.3d 763, 768 (8th Cir. 2005). To meet its substantial burden, the removing party must show that there is ***no possibility*** that the plaintiff would be able to establish a cause of action against the resident defendant in state court. *Monroe v. Consolidated Freightways, Inc.*, 654 F.Supp. 661, 662-63 (E.D. Mo. 1987). Any contested fact issues or doubts about federal jurisdiction must be resolved in favor of the plaintiff and must be resolved in favor of remand. *Id.* at 663 (citing *B. Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981)); *see also Willman v. Riceland Foods, Inc.*, 630 F.Supp.2d 999 (E.D. Ark. 2007); *Wilkinson v. Shackelford*, 478 F.3d 957, 963 (8th Cir. 2007).

Here, this Court as well as Judge Miller and Judge Wilson in the Eastern District of Arkansas have ruled that farmers have colorable claims against Riceland and colorable claims of fraud for Riceland's actions. Bayer attempts to distinguish this case only upon the running of the statute of limitations, but Bayer faces a steep burden in distinguishing this case. Bayer must show that there is no possibility that Plaintiffs can maintain a cause of action against Riceland on account of the statute of limitations. Indeed, if there were any chance of success, there is little question Riceland would have filed a motion to dismiss or for summary judgment immediately. They did not for the same reason this case should be remanded – Riceland's positive acts of concealment could not have been and were not discovered until August 29, 2006 such that Plaintiffs' lawsuit is not barred by the statute of limitations.

E. REQUEST FOR ATTORNEY'S FEES, EXPENSES AND SANCTIONS

As stated in their prior briefing, Plaintiffs believe that this is the sixth time Bayer has improperly removed a case to the federal court to prevent an Arkansas state court judge and jury from deciding cases regarding the contamination of the United States commercial rice supply.

Here, Bayer cannot deny fraudulent acts were pled against Riceland, and Bayer does not offer any argument that a diligent farmer or plaintiff should have discovered Riceland's fraudulent concealment before August 29, 2006. Since Bayer concedes the pendency of class certification tolls the statute of limitations, there was no reasonable grounds for yet another removal, and Plaintiffs respectfully request this Court (1) award Plaintiffs' counsel all their fees and expenses incurred responding to this removal and (2) sanction Bayer for continuing to remove cases from Arkansas state court.

F. CONCLUSION

Plaintiffs respectfully request that this Court remand this case to the Circuit Court of Monroe County, Arkansas so that pretrial discovery can proceed. Plaintiffs also respectfully request that this Court award reasonable attorney's fees and expenses incurred by Plaintiffs in responding to Bayer's removal, sanction Bayer pursuant to Federal Rule of Civil Procedure 13, in an amount proportionate to their conduct and to deter Bayer's removal of similar cases from Arkansas state courts, and for any further relief this Court deems just and proper.

Respectfully submitted,

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BY: /s/ Martin J. Phipps
MARTIN J. PHIPPS (Ark. Bar No. 2008108)

CERTIFICATE OF SERVICE

I, Martin J. Phipps, hereby certify that on April 7th, 2011, I electronically filed the foregoing document with the Clerk of Court to be served by operation of the Court's CM/ECF upon the parties of record.

BY: /s/ Martin J. Phipps
MARTIN J. PHIPPS