

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

IN RE GENETICALLY MODIFIED)	
RICE LITIGATION)	4:06 MD 1811 CDP
)	
This Document Relates to:)	
<i>Riceland Foods, Inc. v. Bayer AG, et al.,</i>)	
4:09 CV 433 CDP)	

**PLAINTIFFS’ LEADERSHIP GROUP’S REPLY MEMORANDUM
IN FURTHER SUPPORT OF ITS MOTION TO ENFORCE THIS COURT’S
COMMON BENEFIT ORDER AS TO RICELAND FOODS, INC.**

I. INTRODUCTION

In opposing Plaintiffs’ Leadership Group’s¹ Motion to Enforce, Riceland persists in its efforts to avoid its common benefit obligations. Riceland, however, cannot overcome the following indisputable facts, which subject it to this Court’s jurisdiction and the provisions of the Common Benefit Order:

- Riceland affirmatively filed suit against Bayer in federal court and, through JPML transfer, is a party before this Court in the Rice MDL;
- This Court, in its Common Benefit Order, concluded that it had jurisdiction over all parties to the Rice MDL; and
- As a party to the Rice MDL, Riceland is subject to this Court’s Orders, including the Common Benefit Order (to which Riceland neither objected nor otherwise opposed when this Court was considering entry thereof).

¹ All capitalized terms have the same meaning as in Plaintiffs’ Leadership Group’s Memorandum in Support of its Motion to Enforce This Court’s Common Benefit Order as to Riceland. (Dkt. No. 3905).

Riceland's opposition – to the extent it is even relevant to this analysis – does not and cannot overcome these facts. Not only do Riceland's arguments lack support, they are internally inconsistent. For example, even while eschewing its own common benefit contribution obligations into the Rice MDL common benefit fund, Riceland asserts that it may ultimately seek payment *from that very fund*.

Notably, Riceland's own contentions support Plaintiffs' Leadership Group's argument. As Riceland acknowledges, "Riceland has not attempted to dismiss its federal claims against Bayer." Riceland's Memorandum in Opposition to Plaintiffs' Leadership Group's Motion to Enforce This Court's Common Benefit Order (Dkt. No. 3995) ("Riceland Mem.") at 8. Thus, by its own admission, Riceland remains a party to the Rice MDL and is within this Court's jurisdiction. The fact that it has chosen to pursue its identical claims elsewhere neither changes that fact nor absolves it of its common benefit obligations.

II. ARGUMENT

A. This Court Has Jurisdiction Over Riceland and Its Claims Against Bayer

Riceland contends that notwithstanding its pending action against Bayer in the Rice MDL, it is not subject to this Court's jurisdiction, and, correspondingly, the Common Benefit Order, because it has chosen to actively pursue its claims against Bayer in an Arkansas state court. *See* Riceland Mem. at 4-5.² The very fact that Riceland has an action pending in the Rice MDL, however, subjects it to this Court's jurisdiction, and thus the terms of the Common Benefit Order. That alone should end the analysis.

² Riceland's reliance on *Baptist Health v. Murphy*, -- S.W.3d --, 2010 Ark. 358 (Ark. 2010) to support this contention is unavailing. *See* Riceland Mem. at 5. *Baptist Health* does nothing more than underscore the procedural ability of litigants to simultaneously litigate "identical" federal and state proceedings, and thus has nothing to do with the jurisdictional issue at the core of the present dispute.

Significantly, Riceland’s entire “jurisdictional” argument arises from its misreading of the Common Benefit Order. Based on that misreading, Riceland contends that since “[t]he *Meins* case is pending in the Circuit Court of Arkansas County, Arkansas, . . . [it] is expressly excluded from the Court’s Common Benefit Order.” Riceland Mem. at 5. ***But that is not what the Common Benefit Order says.*** To the contrary, the Common Benefit Order applies to all *parties* before this Court. See Common Benefit Order at 9-10. Specifically, in concluding that it lacked jurisdiction over strictly state court litigants, this Court heavily relied on *Showa Denko K.K. L-Tryptophan Products Liability Litigation*, 953 F.2d 162 (4th Cir. 1992). See *Id.* In *Showa Denko*, the Fourth Circuit ruled that the district court lacked jurisdiction to order contributions from parties “not before the court,” that is, “[c]laimants who have not sued and plaintiffs in state and untransferred federal cases [who] have not voluntarily entered the litigation before the district court.” 953 F.2d at 166. Similarly, in *Hartland v. Alaska Airlines*, 544 F.2d 992, 1001 (9th Cir. 1976), another case upon which this Court relied, the Ninth Circuit held that a district court did not have jurisdiction ***to order non-parties*** to contribute to a common benefit fund. Relying on *Showa Denko* and its progeny, this Court reluctantly concluded that it lacked jurisdiction over litigants who were strictly litigating their claims in state court. Common Benefit Order at 2, 11.

Unlike plaintiffs who are pursuing their LLRICE-related claims solely in state court – and also unlike the plaintiffs in *Showa Denko* and *Hartland* – Riceland *is* a plaintiff before this Court. Riceland voluntarily filed suit against Bayer in the Eastern District of Arkansas on January 29, 2009. That case was transferred to this MDL.³ Riceland could have dismissed its

³ Riceland has never opposed the transfer of its federal action to this Court.

federal action but did not, affirmatively choosing to remain subject to this Court's jurisdiction, including the Common Benefit Order.⁴

Riceland also attempts to downplay this Court's ruling in *Lowry Robinson v. Bayer CropScience LP*, 4:10cv1849 (CDP), where plaintiffs sought to voluntarily dismiss their complaint pursuant to Fed. R. Civ. P. 41(a)(2) and this Court granted dismissal without prejudice "on the condition that plaintiffs contribute...11% of any gross recovery, whether through settlement or otherwise, to the common benefit trust fund." Dkt. No. 3612 at 1. Riceland contends that the present situation is factually distinguishable because, among other things, "Riceland has not attempted to dismiss its federal claims against Bayer." Riceland Mem. at 8. The point, however, is that in both situations, there is a plaintiff who, while choosing to litigate elsewhere, is before this Court and thus subject to this Court's jurisdiction and, correspondingly, its power to reject those parties' efforts to avoid common benefit contribution. As this Court held in affirming the *Lowry Robinson* plaintiffs' common benefit obligations, notwithstanding their effort to press their claims in state court: "I have consistently found that the leadership group's work has provided a substantial benefit to all plaintiffs in this litigation and that *fairness requires all plaintiffs within this Court's jurisdiction to contribute to the common benefit fund according to my Order of February 24, 2010.*" Dkt. No. 3612 at 1 (emphasis added). Like the *Lowry Robinson* plaintiffs, Riceland also is a "plaintiff[]" within

⁴ Not only does this Court have jurisdiction over Riceland, but it also has jurisdiction over its claims against Bayer. As set forth in Plaintiffs' Leadership Group's opening memorandum, Riceland's Federal Complaint is virtually identical to its *Meins* Cross Claim filed in Arkansas state court – the only difference being that the *Meins* Cross Claim also contains a contribution claim against Bayer to recoup damages, if any, that Riceland is ordered to pay the *Meins* plaintiffs. All of Riceland's affirmative claims against Bayer are before this Court. In short, this Court is fully within its jurisdiction to require Riceland to hold back and set aside a total of 10% of any recovery it receives from Bayer for placement into the Common Benefit Fund, regardless of where its claims are ultimately adjudicated.

this Court’s jurisdiction,” and, similarly, should be required to contribute to the common benefit fund, regardless of where its claims are ultimately adjudicated.

Riceland’s parallel contention that it had no choice but to litigate its claims in the *Meins* state court action is legally unsupportable and demonstrably false. *See* Riceland Mem. at 2 and 8 (“Riceland has simply defended claims brought by the plaintiff-farmers in state court while prosecuting its own damage claims in the same case, and that matter is proceeding to trial before the federal claims brought by Bayer”). Riceland was *not* required to pursue its claims against Bayer in the *Meins* state court action, as Arkansas does not require compulsory cross claims. *See* Ark. R. Civ. P. 13(f); *see also Independent Party of Arkansas v. Priest*, 907 F. Supp. 1276, 1282 (E.D. Ark. 1995) (noting that cross-claims under Arkansas Rule 13(f) are “permissive.”). The fact that Riceland has chosen to litigate those claims in that forum is of no moment to the present analysis.⁵

B. Riceland’s Other *Ex Post Facto* Arguments Do Not Excuse its Obligations Under the Common Benefit Order

Riceland does not dispute that it did not oppose Plaintiffs’ Leadership Group’s motion to establish a common benefit fund. Nevertheless, Riceland now advances a variety of additional, belated arguments to avoid its common benefit obligations. For example, Riceland contends that it should be relieved of its common benefit obligations because its damages

⁵ Even if Riceland was, in fact, legally compelled to press its cross claims in Arkansas state court (which it was not), Riceland nonetheless remains a party to the Rice MDL and thus subject to this Court’s jurisdiction and the provisions of the Common Benefit Order. Moreover, Riceland was also named as a defendant in two other Arkansas state court actions that have already proceeded to trial. *Kyle v. Bayer AG*, Civ. 2008-107 in the Circuit Court of Woodruff County Arkansas and *Sims v. Bayer CropScience, LP*, Civ. 2009-118-3 in the Circuit Court of Desha County, Arkansas. Riceland did not pursue – and, to the best of Plaintiffs’ Leadership Group’s knowledge, did not assert – cross claims for affirmative relief against Bayer in either of those cases. This underscores not only the permissive nature of cross claims under Arkansas law, but also the fact that Riceland is shopping for what it believes to be the best forum to assert its affirmative relief claims.

claims against Bayer differ from the producer plaintiffs' damages claims (as Riceland is seeking to recover for lost milled rice sales as opposed to rough rice sales). Riceland Mem. at 3. The type of damages Riceland seeks to recover from Bayer, however, has *nothing* to do with this Court's jurisdictional reach, and is irrelevant to the issue of Riceland's obligations under the Common Benefit Order. Moreover, other non-producers subject to that Order – some of whom have already paid into the Common Benefit Fund – have had damages different from the producer plaintiffs' damages as well.⁶

Riceland also contends that it should not be required to contribute to the common benefit fund because Riceland itself has performed some “common benefit” work, including taking several depositions and, further, because it has expended resources actively litigating its claims. *See* Riceland Mem. *at, e.g.*, 3-4. This Court has already rejected arguments materially identical to Riceland's contentions on this point. Indeed, when these arguments were previously raised by parties opposing Plaintiffs' Leadership Group's Motion to establish a Common Benefit Fund, this Court held:

I reject the objectors' arguments that because they did some of their own pre-trial preparation, they should not have to contribute. It was never intended that the leadership group would perform all of the work for every plaintiff in this litigation. Plaintiffs are substantially benefitted by ‘the mere availability’ of relevant discovery, even if an objecting plaintiff chooses not to use it. *In re Diet Drugs*, 582 F.3d at 544-45. In this case, of course, the objectors actually used the leadership group's materials.

⁶ The liability evidence against Bayer is essentially the same for all plaintiffs regardless of the type of damages being sought. Even if the type of damages being sought were material to the present analysis (which it is not), it is inarguable that the liability case against Bayer is the same. Plaintiffs' Leadership Group has provided all plaintiffs, including Riceland, with an enormous benefit by obtaining, marshalling, and presenting the liability evidence and successfully trying three bellwether trials against Bayer. Representatives from Riceland attended all these trials, gaining valuable insight for Riceland's own trial.

Common Benefit Order at 13-14. Plaintiffs' Leadership Group does not dispute that Riceland has performed tasks that may ultimately be considered to be "common benefit" in nature. That fact, however, does not excuse Riceland from its common benefit obligations. The law firms comprising Plaintiffs' Leadership Group and their clients are also obligated to contribute to the fund, despite the fact that these law firms have performed the vast majority of common benefit work.⁷ In short, Riceland has provided no justification for avoiding its common benefit obligations.⁸

Finally, Riceland has the temerity to disclaim its common benefit obligations, *while simultaneously asserting its intent to seek common benefit compensation from the very fund it refuses to pay into*, stating that "[a]t the appropriate time, Riceland will likely pursue a motion for a common benefit award," for the common benefit work it believes its counsel has performed. Riceland Mem. at 4. Riceland's "have its cake and eat it too" position highlights not only the inconsistency of Riceland's arguments, but also the inequities that would result if its position were adopted.

⁷ Riceland's contention that "there is a disagreement between the PLG and Riceland regarding how to value benefits conferred by the PLG and benefits conferred by Riceland to the overall litigation" is misplaced. See Riceland Mem. at 6. The Common Benefit Order established default common benefit hold-back percentages to compensate Plaintiffs' Leadership Group (and, perhaps, others, to the extent appropriate) for their efforts. By their present motion, Plaintiffs' Leadership Group is simply seeking for Riceland (by the procedural construct set forth in the Common Benefit Order) to be compelled to honor those obligations – which require neither negotiation nor agreement.

⁸ Riceland also argues that some of the complaints filed by Plaintiffs' Leadership Group's clients named Riceland as a defendant. Riceland Mem. at 2. This is immaterial to whether the Court has jurisdiction to enforce its Common Benefit Order as to Riceland. Moreover, only one of Plaintiffs' Leadership Group firms' clients' named Riceland as a defendant, that firm did so in just a small number of cases, and all but one of those cases have been voluntarily stayed or dismissed.

C. Plaintiffs' Leadership Group's Motion is Timely

Finally, Riceland argues that Plaintiffs' Leadership Group's motion is premature. This Court previously addressed this issue in its Common Benefit Order. Specifically, the Court held that

the timing of this [common benefit] motion is entirely appropriate. ...Here, the leadership group has already conferred a substantial benefit upon all of the other plaintiffs and plaintiffs have already obtained favorable verdicts in two bellwether trials. It is entirely appropriate to establish a trust at this time, and no accounting is now required. Before any distributions are made from the fund, the court will provide an opportunity for all parties to be heard and to seek appropriate information.

Common Benefit Order at 16-17. By its present motion, Plaintiffs' Leadership Group is seeking enforcement of the Common Benefit Order over a federal litigant that has affirmatively disclaimed its common benefit obligations. It is not seeking any new relief.

Moreover, Riceland's contention about the purported prematurity of the Plaintiffs' Leadership Group's present motion practice – on the grounds that “the PLG has not attempted to intervene in the *Meins* case (as they have done in other state court proceedings)” – is unavailing. *See* Riceland Mem. at 8. Plaintiffs' Leadership Group intervened in those state court actions because the plaintiffs in those actions were purely state court litigants. In contrast, Riceland's affirmative presence as a Rice MDL plaintiff makes the current motion both timely and procedurally appropriate.

Riceland also asserts that Plaintiffs' Leadership Group's motion is premature because Riceland purportedly has not definitively disclaimed its common benefit obligations. *See* Riceland Mem. at 7-8. This assertion, of course, belies Riceland's primary argument that it, in fact, has no common benefit obligation. Riceland affirmatively told Plaintiffs' Leadership Group that “[t]he bottom line is that Riceland is not willing to do anything at this point.”

Riceland Mem. at 7; *see also id.* at 6. Riceland continues to dispute its common benefit obligations even now. As Riceland's position on this issue is clear, there is no reason for delay.

III. CONCLUSION

For all of the reasons set forth above, as well in its opening memorandum, Plaintiffs' Leadership Group respectfully requests that this Court enter an Order enforcing the Common Benefit Order over Riceland Foods, Inc. and compelling the Bayer Defendants to hold back and set aside the aggregate amount of 10% (7% for attorneys' fees and 3% for common benefit costs and expenses) from any judgment, settlement, or other resolution of Riceland's claims against the Bayer Defendants arising out of the LLRICE contamination.

Dated: February 8, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this 8th day of February, 2011, electronically filed a copy of the foregoing with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the parties of record.

/s/ Adam J. Levitt _____