

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

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IN RE GENETICALLY MODIFIED RICE )  
LITIGATION ) CASE NO. 4:06MD01811-CDP  
This document relates to: )  
Stephen R. Hale, et al. ) Case No.: 4:09CV01689-CDP  
v. )  
Bayer AG, et al. )

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REPLY IN SUPPORT OF PLAINTIFFS'  
MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Plaintiffs move for leave to amend their Complaint to add additional rice producers seeking relief for injuries caused by the Liberty Link Rice contamination. *See* D.I. 3947 in the MDL and D.I. 32 in 4:09CV01689-CDP for the Second Motion to Amend and D.I. 4030 in the MDL and D.I. 33 in 4:09CV01689-CDP for the Supplemental Motion. In response, the Bayer Defendants (“Bayer”) acknowledge that the Court has previously rejected its arguments against amendment under Rule 15 but file an opposition solely “to preserve their position for the record in this case.” Def. Opp. at 1. Bayer raises no new objections to Plaintiffs’ proposed amendment but relies exclusively on arguments set forth in “their opposition to a similar motion in *Bullard Farms, Inc. et al. v. Bayer CropScience LP, et al.*, No. 4:09-cv-01591-CDP.” *Id.* The arguments raised by Bayer in its prior opposition have been addressed at length in the Plaintiffs’ Reply in Support of Their Motion for Leave to File Second Amended Complaint filed in the *Bullard Farms* action on July 19, 2010 (D.I. 3079 in the MDL; D.I. 17 in 4:09-cv-01591-CDP), which

Plaintiffs hereby incorporate by reference. A copy of the reply brief filed in *Bullard Farms* is attached hereto as Exhibit "A". The Plaintiffs' motion for leave to amend should be granted.

Dated February 22, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this 22nd 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/Ralph E. Chapman  
Ralph E. Chapman

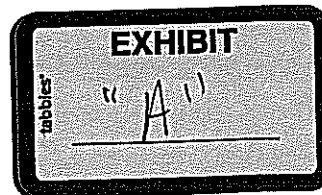
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IN RE GENETICALLY MODIFIED RICE	)	CASE NO. 4:06MD01811-CDP
LITIGATION	)	
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Bullard Farms, Inc. et al.	)	Case No. 4:09CV01591-CDP
v.	)	
Bayer CropScience, LP, et al.	)	

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR  
LEAVE TO FILE SECOND AMENDED COMPLAINT**

Defendants seek to prevent Plaintiffs from amending their Complaint to add new plaintiffs on the grounds that the motion is somehow "improper" under the Federal Rules of Civil Procedure.<sup>1</sup> This argument is wholly unsupported and clearly contradicted by the law of this Circuit. Plaintiffs' Motion for Leave to File Second Amended Complaint to add plaintiffs is unquestionably proper under Rule 15(a). Defendants make no legitimate argument that they will be prejudiced by such an amendment. Rather, Defendants' opposition is no more than an attempt to force Plaintiffs to undertake a significantly more time consuming and expensive procedural route, in contravention of the language and spirit of the Federal Rules, which would ultimately lead to the same conclusion. Plaintiffs should not be forced to expend such needless

<sup>1</sup> Defendants also state that seeking leave to file an amended complaint contradicts CMO-3 but disregards the Court's later statement that pleadings or motions may be filed in individual producer cases for good cause. CMO-4 at 10. As stated herein, the proper application of the Rules of Civil Procedure and the avoidance of significant, needless fees and duplicative work justify Plaintiffs' motion.



time and expense. To the contrary, the Federal Rules of Civil Procedure “should be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding.” Fed. R. Civ. Pro. 1. Plaintiffs’ Motion should be granted.

Defendants’ contention that “Rule 15 does not control the addition of new plaintiffs to an existing action” and that such additions are controlled by Rule 21 is flatly incorrect under Eighth Circuit law.<sup>2</sup> “Plaintiffs may amend their pleadings under Rule 15 to *add*, drop, or substitute parties to an action, *including plaintiffs*.” *Speaks Family Legacy Chapels, Inc. v. Nat’l Heritage Enters., Inc.*, 2009 WL 1035289 at \*2 (W.D. Mo., April 16, 2009) (citing *Plubell v. Merck & Co., Inc.*, 434 F.3d 1070, 1072 (8th Cir. 2006); *Pure Country, Inc. v. Sigma Chi Fraternity*, 312 F.3d 952, 955-57 (8th Cir. 2002); *National Federation of Blind of Missouri v. Cross*, 184 F.3d 973 (8th Cir. 1999)) (emphasis added). In fact, *Speaks Family Legacy Chapels* specifically addresses Defendants’ contention that Rule 21 exclusively governs the addition of plaintiffs:

While Defendants are correct that some courts have held that Federal Rule of Civil Procedure 21 rather than Rule 15 applies to motions to add parties, and that leave is always required to do so, even where no responsive pleading has been filed, this does not appear to be the law in the Eighth Circuit.

*Id.* at \*2 n.1 (citations omitted); *See, Capital Equip., Inc. v. CNH Am., LLC*, 2004 WL 3406091 at \*2 (E.D. Ark., Sept. 27, 2004) (holding that an amendment adding a party may be made under Rule 15(a)).<sup>3</sup> Clearly the Eighth Circuit treats the addition of plaintiffs by amendment under Rule 15(a) in the same manner as any other amendment.

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<sup>2</sup> The Seventh Circuit case cited by Defendants is a factually inapposite case wherein a plaintiff sought to amend a habeas corpus petition to add damage claims against thirteen new individual defendants under 42 U.S.C. § 1983. *Moore v. Indiana*, 999 F.2d 1125, 1127-28 (7th Cir. 1993). The court denied the amendment as futile. *Id.* at 1128. There is absolutely no discussion in the case as to whether Rule 15 or Rule 21 is the proper procedural route to add plaintiffs or other parties to an existing case. In fact, other district courts in the Circuit have allowed Rule 15(a) amendments to add plaintiffs. *See, Olech v. The Vill. of Willowbrook*, 138 F.Supp.2d 1036 (N.D. Ill. 2000).

<sup>3</sup> The text and footnote from Wright, Miller & Kane cited by Defendants simply suggest that some courts have followed the requirement of Rule 21 that “an amendment changing parties requires leave of court even though made at a time when Rule 15 indicates it could be done as a matter of course.” 7 Wright, Miller & Kane, FEDERAL PRACTICE & PROCEDURE: CIVIL 3D § 1688. Plaintiffs have not attempted to amend under Rule 15(a) without leave

Defendants have provided no support for their contention that “[t]he ‘freely given’ criteria of Rule 15(a)(2) . . . is not applicable” and fail to offer a different standard that Defendants believe is appropriate.<sup>4</sup> Def. Opp. at ¶ 2. Clearly, Rule 15 is applicable to this situation under Eighth Circuit law. “Rule 15(a) declares that leave to amend ‘shall be freely given when justice so requires’; this mandate is to be heeded.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). The “freely given” requirement should be followed unless Defendants show undue delay, bad faith, undue prejudice, futility or some other justifiable basis to refuse Plaintiffs’ proposed amendment. *Id.* “The party opposing amendment bears a heavy burden to demonstrate that the amendment will create undue prejudice.” *In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig.*, 2002 WL 31371945 (D. Minn. Oct. 7, 2002) (citing *Beeck v. Aquaslide ‘N’ Dive Corp.*, 562 F.2d 537, 540 (8th Cir. 1977)).

Defendants make no showing of prejudice and provide no other reason to deny Plaintiffs’ amendment. Defendants suggest that amendment is not a suitable procedural mechanism due to the number of additional plaintiffs. That suggestion, however, is unsupported. Rule 15 does not limit the number of parties that can be added. To the contrary, multiple new plaintiffs may be added via amendment. *See e.g., Joshlin v. Gannett River States Publ’g Corp.*, 152 F.R.D. 577, 579 (E.D. Ark. 1993) (granting leave to amend under Rule 15(a) where the “proposed amended complaint adds fifty-three (53) additional persons as parties Plaintiff”); *Flaherty v. Giambra*,

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of the Court. Even if the section of Wright, Miller & Kane cited by Defendant was relevant here, which it is not, the authors specifically criticize such a view and agree with the position of the Eighth Circuit as stated in *Speaks Family Legacy Chapels*. *See* 6 Wright, Miller & Kane, FEDERAL PRACTICE & PROCEDURE: CIVIL 3D § 1479 (“It might be argued that Rule 21 is the general provision since it deals in broad terms with dropping and adding parties by motion, and Rule 15(a) is a more specific provision because it sets forth a particular means by which a party may attempt to drop or add parties – by an amendment to the pleadings. Viewed from this perspective, any attempt to change parties by amendment before the time to amend as of course has expired should be governed by Rule 15(a)(1) and may be done without leave of court.”).

<sup>4</sup> Courts that have applied Rule 21 for the addition of new parties frequently use the same liberal “freely given” standard of Rule 15(a). 6 Wright, Miller & Kane, FEDERAL PRACTICE & PROCEDURE: CIVIL 3D § 1479.

2003 WL 22087617 at \*1 (W.D.N.Y., Aug. 19, 2003) (granting leave to amend adding “ninety-nine additional plaintiffs.”). Defendants’ argument that allowing additional plaintiffs would complicate the statute of limitations question does not create undue prejudice. Any appropriate statute of limitations defense can easily be raised with respect to each new plaintiff. Finally, Defendants’ assertion that the amendment would “prejudice defendants and the courts in their interest in the orderly administration of claims” (and other complaints regarding compliance with “basic rules and procedures”) is of no moment. Plaintiffs’ request is clearly within the ambit of Rule 15 and in no way circumvents any Rule of Civil Procedure.<sup>5</sup> Def. Opp. at ¶¶ 3, 4.

It is difficult to see how allowing Plaintiffs to amend their complaint under Rule 15(a) will prejudice Defendants. The amendment only adds additional plaintiffs. There are no new legal theories, no new causes of action, and no other changes to *any* of the allegations in the Complaint. Responding to the amended complaint will require virtually no additional time or effort on the part of Defendants. In fact, denial of Plaintiffs’ motion would actually create more work for Defendants who would then be forced to respond to two separate complaints alleging the same causes of action and the same underlying facts.

Plaintiffs, on the other hand, will be significantly and needlessly prejudiced if the Court denies its motion for leave to file their amended complaint. Plaintiffs do not simply seek to evade case filing fees as stated by Defendant. Def. Opp. at ¶ 4. The time and expense that Plaintiffs seek to avoid is the needless translation of a Complaint alleging no new facts and setting forth no new legal arguments into multiple languages and serving it in accordance with the Hague Convention at a cost of several thousand dollars. The necessity of this expense is

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<sup>5</sup> Defendants’ affirmative choice not to oppose other motions for leave to amend under Rule 15(a) to add plaintiffs in this litigation completely undercuts its procedural prejudice argument. *See*, Motion for Leave to File First Amended Complaint (D.E. 1429) and Response to Motion for Leave to File First Amended Complaint (D.E. 1489); *See also*, Motion for Leave to File Second Amended Complaint (D.E. 1430) and Response to Motion for Leave to File Second Amended Complaint (D.E. 1488).

completely within Defendants' control; however, they have consistently refused to waive service under the Hague Convention despite a "duty to avoid unnecessary expenses of serving the summons." Fed. R. Civ. Pro. 3(d)(1). Plaintiffs also seek to avoid the unnecessary duplication of motion practice, scheduling and other matters that increase with the additional filing of separate lawsuits all alleging the same conduct and legal theories. Filing a separate lawsuit that would ultimately be transferred to this Court and duplicating efforts on all pretrial matters in no way promotes judicial economy, as stated by Defendants, when Rule 15(a) clearly allows the addition of parties plaintiff to the current action.

For the reasons set forth above, Plaintiffs' motion should be granted.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify that I have this 19th day of July, 2010, 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/ Don M. Downing