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., 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.

PLAINTIFFS

vs.

CASE NO. 4:11-CV-256

BAYER CROPSCIENCE, LP, BAYER CROPSCIENCE HOLDING, INC., BAYER CORPORATION, BAYER AG, BAYER BIOSCIENCE NV, BAYER CROPSCIENCE AG AND RICELAND FOODS, INC.

DEFENDANTS

RESPONSE TO PLAINTIFFS' MOTION TO REMAND

I. Introduction

Plaintiffs fraudulently joined Riceland Foods, Inc. ("Riceland"), an Arkansas corporation, to defeat diversity jurisdiction because Plaintiffs' claims against Riceland were time-barred when Plaintiffs filed their complaint in state court. Plaintiffs seek remand to state court by distorting Arkansas law governing when claims accrue and when statute of limitations are tolled, but Arkansas case law establishes plainly that Plaintiffs' claims against Riceland accrued when they first suffered damages in August 2006 and had lapsed at the time they filed their complaint in state court. Naming a defendant

against whom all claims have lapsed is fraudulent joinder.[1] 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, Plaintiffs allege that the Bayer Defendants conducted testing and research on genetically-modified rice from 1996 to 2001 from which some genetically modified material made it into the commercial rice supply. (Comp. at ¶ 15).

Riceland's involvement came later, when the contamination first came to light. Plaintiffs allege that Riceland learned about the contamination on January 20, 2006, but suppressed the information from Plaintiffs, who are members of Riceland. (*Id.* at ¶ 20). Riceland collected samples and tested them in May 2006, with the test results being positive for genetically-modified rice. (*Id.* at ¶ 22). Plaintiffs allege that Riceland provided those samples to Bayer in June 2006 and that Bayer reported the positive tests to the United States Department of Agriculture ("USDA") on July 31, 2006. (*Id.* at ¶ 23). The USDA announced the contamination to the public on August 18, 2006. (*Id.* at ¶ 24).

According to Plaintiffs' complaint, they began to suffer damages immediately upon the USDA announcement:

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[1] Plaintiffs note that consent of Riceland was not obtained. (Pl.'s Mot. at ¶ 6). 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).

> The GMO Contamination was first made public in mid-August 2006. On August 18, 2006, the U.S. Department of Agriculture announced that LL601 had been discovered in the rice supply. The response in the rice markets was swift and negative. On August 19, 2006, Japan suspended imports of long-grain rice from the United States until shipments could be certified to be free of any trace of unapproved or genetically modified rice varieties. On August 24, 2006 the European Union announced that it would require all long-grain rice imported from the U.S. to be tested and certified to be free of LL601 or other genetically modified varieties. Other significant export markets, such as Korea, Saudi Arabia, and Iraq either banned or significantly disfavored American rice.

(*Id.*) This "loss of the export markets severely damaged American rice farmers, including Plaintiffs. In fact, the Chicago Board of Trade (CBOT) rice future market slashed the price of rice immediately, with futures losing more than 5% of their value the day of the announcement." (*Id.* at ¶ 25).

III.
Argument

A. 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).

B. Plaintiffs' claims against Riceland are time-barred, so Riceland was fraudulently joined.

Plaintiffs cannot dispute that their claims against Riceland are governed by a three-year statute of limitations, and Plaintiffs cannot dispute that they filed their complaint on November 19, 2010, more than three years after their complaint alleges that their first damages occurred. To avoid removal, then, Plaintiffs must rely not only on application of the *American Pipe* class action tolling doctrine, but also upon a continuing tort/discovery rule theory that the Arkansas Supreme Court has rejected.[2] The proper analysis under the Arkansas occurrence rule

[2] 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, Plaintiffs' claims were barred one year after the GM rice class action was dismissed on September 28,

demonstrates that Plaintiffs' claims against Riceland accrued August 19, 2006, when Plaintiffs first suffered damages and that the limitations period for Plaintiffs' claims against Riceland expired, at the latest, November 15, 2010, four days before they filed their complaint in this matter.

Arkansas law requires plaintiffs to file tort claims within three years of the date the claims accrue. 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).

Despite this clear pronouncement that the occurrence rule applies in Arkansas, Plaintiffs assert incorrectly that "Arkansas law is clear that in the absence of fraud . . . the SOL begins to run when plaintiffs discover their damages." (Pl.'s Br. at ¶ 37). To support this argument, Plaintiffs cite two cases—*Western Coal & Mining Co. v. Randolph*, 191 Ark. 1115, 89 S.W.2d 741 (1936) and *Midwest Mut. Ins. Co. v. Ark. Nat'l Co.*, 260 Ark. 352, 538 S.W.2d 574 (1976)—but neither case adopts the discovery rule nor abandons the occurrence rule.

2009. Plaintiffs filed their claims against Riceland in this case November 19, 2010, more than one year after dismissal of the class action. Plaintiffs' claims are time-barred under either approach.

Midwest Mutual is of little value to the Court's analysis because the Arkansas Supreme Court has deemed the material that Plaintiffs quote to be non-binding dicta. *See Flemens v. Harris*, 323 Ark. 421, 425–26, 915 S.W.2d 685, 688 (1996) (stating that "although the discussion of the limitation issue in *Midwest Mutual* is extensive, the conclusion reached regarding this issue amounts to dictum" because the case was decided on another basis). Accordingly, *Midwest Mutual* has no precedential value and cannot guide the analysis in this case.

Randolph is distinguishable on its facts. The defendant in that case negligently removed subjacent support to the plaintiff's land, which resulted in damage to the surface some time after the removal of the support. The Arkansas Supreme Court held that the cause of action accrued when the damage to the surface became apparent rather than when the defendant removed the underground support. *Randolph*, 191 Ark. at 1119, 89 S.W.2d at 743. In other words, the case simply applies the rule that a cause of action accrues when the cause of action is complete—the *Randolph* plaintiff did not have a complete cause of action for negligence until he suffered damages in the form of surface collapse. The case does not establish the discovery rule in Arkansas, but even if it did, the Arkansas Supreme Court's later pronouncements that causes of action accrue at occurrence and not at discovery would implicitly overrule *Randolph*.

The Court must analyze Plaintiffs' complaint under the occurrence rule to determine when Plaintiffs first had a complete cause of action against Riceland. Plaintiffs assert claims against Riceland for failing to disclose the GM rice contamination, which occurred before August 18, 2006, when the information became public. Plaintiffs had a complete cause of action when they suffered damages, which, according to Plaintiffs' complaint, occurred no later than August 19, 2006, when foreign governments began blocking shipments of rice from the United States. (Comp. at ¶¶ 24–25). Plaintiffs' causes of action against Riceland therefore accrued on

August 19, 2006, the date on which their causes of action became complete because they suffered damages resulting from Riceland's alleged failure to disclose the GM rice contamination.

To avoid application of the occurrence rule, Plaintiffs argue that their causes of action against Riceland did not accrue until March 4, 2007, when the USDA announced that Clearfield 131 was contaminated with GM rice. Under this theory, Plaintiffs' causes of action against Riceland accrued when their latest element of damage occurred, not when Plaintiffs first could have asserted claims against Riceland arising from its failure to notify Plaintiffs about GM rice.

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 Plaintiffs' argument that the March 2007 announcement caused a new cause of action to accrue.

Trying to avoid the running of the statute of limitations, Plaintiffs argue that certain acts of fraudulent concealment on the part of Riceland tolled the statute of limitation. The Arkansas Supreme Court has stated that:

> Fraudulent concealment tolls the statute of limitations when the persons alleged to have committed the fraud "have committed a positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetuated in a way that it conceals itself."

Barre v. Hoffman, 326 S.W.3d 415, 418 (Ark. 2009)(internal citations omitted).[3] The court has also stated that "once it is clear from the face of the complaint that the action is barred by the applicable statute of limitations period, the burden shifts to the plaintiff to prove by a preponderance of the evidence that the statute of limitations is tolled." *Id.* As set forth above, in this case, Plaintiffs' cause of action against Riceland accrued on August 19, 2006. In support of their fraudulent concealment argument, Plaintiffs cite to numerous actions by Riceland which occurred prior to the August 18, 2006 USDA announcement.[4] However, since these alleged acts occurred prior to the date on which Plaintiffs' cause of action accrued, these alleged acts of fraudulent concealment could not have tolled the statute of limitations. Rather, these actions

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[3] Despite Plaintiffs' assertion, the Arkansas Supreme Court has also stated that "[f]raudulent concealment is not a cause of action." *Barre*, 326 S.W.3d at 418.

[4] Plaintiffs attach certain test results to show that Riceland knew of contamination of different varieties of rice including Clearfield 131. The non-disclosure of these test results are the only actions (or non-actions) on the part of Riceland cited by Plaintiffs in their brief which occurred after the August 18, 2006 announcement. Plaintiffs cite to these test results even though the only alleged acts of fraudulent concealment on the part of Riceland pled in the Complaint relate to the discovery of LLRICE 601 in Cheniere and Riceland's failure to disclose this discovery prior to the August 18, 2006 announcement. *See F.D.I.C. v. Deloitte & Touche*, 834 F. Supp. 1129 (E.D. Ark. 1992) (finding that complaint did not "contain facts which can be collected to show the necessary elements of fraudulent concealment" and that since plaintiff failed to plead fraudulent concealment, statute of limitation could not be tolled). Plaintiffs are trying to avoid remand by expanding their allegations of fraudulent concealment to include circumstances not supported in the Complaint.

would be relevant to any claims Plaintiffs may have against Riceland for damages, assuming that the statute of limitations had not run.

Plaintiffs argue that they could have "gleaned absolutely nothing about Riceland" from the August 18, 2006 announcement so as to suggest that the fact that Riceland was not specifically named in the announcement tolled their statute of limitations against Riceland. However, "[a] plaintiff's ignorance of his or her right to sue does not toll the running of the statute of limitations." *Miles v. A.O. Smith Harvestore Products, Inc.*, 992 F.2d 813, 816 (8th Cir. 1993) *citing Wilson v. General Elec. Capital Auto Lease, Inc.*, 311 Ark. 84, 841 S.W.2d 619, 620-21 (1992). Plaintiffs' attempts to discover after the August 18, 2006 announcement "what had happened" did not toll the statute of limitations without evidence of fraudulent concealment during this time period. Additionally, although certain Plaintiffs claim that they were "trying to find answers to [their] questions" after the August 18, 2006 announcement and were unaware of Riceland's involvement until *Schafer* was filed, Riceland's vice president for public affairs issued a public statement on August 18, 2006, acknowledging that it had been contacted by a rice customer about discovery of genetically modified material in January 2006 and collected samples in March which tested positive. *See* Statement Regarding Genetically Engineered Material in Rice August 18, 2006, RICELAND00001816-17, attached as Exhibit "A".

To support their fraudulent concealment argument, Plaintiffs rely on *Adams v. Wolf*, 43 S.W.3d 757 (Ark. App. 2001). However, *Adams* is clearly distinguishable from this case because unlike in this case, in *Adams*, the alleged acts of fraudulent concealment occurred after plaintiffs' cause of action had already accrued. In *Adams*, the plaintiffs alleged that the defendants' improper weighing practices caused the plaintiffs to be paid less than they were owed. *Adams*, 73 S.W.3d at 759. The plaintiffs alleged that over the course of almost a decade,

the defendants concealed their misconduct in order to prevent plaintiffs from becoming aware of their cause of action. *Id.* In finding that there was evidence of fraudulent concealment, the court focused on the inaccurate settlement sheets issued to the plaintiffs. *Id.* at 762. The court found that "the issuance of documents that inaccurately reflected the weight of [plaintiffs'] product or trailers could be evidence of artifice engaged in by [defendant] to conceal its improper practices and prevent [plaintiffs] from learning of their cause of action." *Id.* These inaccurate settlement sheets prevented the plaintiffs from discovering that they were being paid less than they were owed. When these alleged acts of fraud occurred, the plaintiffs' cause of action had already accrued because when these settlement sheets were issued, the plaintiffs were already being paid less than they were owed.

The allegations in Plaintiffs' complaint demonstrate that their cause of action against Riceland accrued on August 19, 2006, when Plaintiffs first suffered damages from the release of GM rice. Without any tolling, the three-year statute of limitations expired on August 19, 2009. Plaintiffs are not entitled to any tolling of the statute of limitations for fraudulent concealment. The class action was pending for 453 days. (Pl.'s Br. at ¶ 24). Therefore, if *American Pipe* applies and Plaintiffs' claims were tolled during the pending class action, the last day Plaintiffs could file a complaint against Riceland was November 15, 2010—453 days after August 19, 2009. Plaintiffs filed their complaint November 19, 2010, four days after the tolled statute of limitations expired. Because those claims are time-barred, Riceland has been fraudulently joined, and the Court should deny Plaintiffs' motion to remand.

C. The Court Should Deny Attorneys' Fees and Costs.

Plaintiffs' request for attorneys' fees and costs under 28 U.S.C. 1447(c) should be denied. In *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005), the Court announced the standard for awarding attorneys' fees and costs for improper removal: "We hold that, absent unusual circumstances, attorney's fees should not be awarded when the removing party has an objectively reasonable basis for removal."

The basis for removal was plainly objectively reasonable. As established above, Riceland was fraudulently joined because there is no reasonable basis in fact of law for Plaintiffs' claims because Plaintiffs' claims against Riceland time barred. However, even if the Court remands this case to state court, the Court should deny Plaintiffs' request for attorneys' fees and costs.

IV.
Conclusion

Because Plaintiffs' claims against Riceland are time-barred, Plaintiffs fraudulently joined Riceland, the only non-diverse defendant in this case, to defeat diversity jurisdiction. The Court should therefore deny Plaintiffs' motion to remand and permit this case to remain in federal court. Finally, since the grounds for removal were objectively reasonable, Plaintiffs' request for attorneys' fees and costs accordingly should be denied.

Respectfully submitted, this the 28th day of March, 2011.

/s/ Lindy D. Brown

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CERTIFICATE OF SERVICE

This is to certify that I have this 28th 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

Statement Regarding Genetically Engineered Material in Rice
August 18, 2006

Bill J. Reed, vice president for public affairs, Riceland Foods, Inc., Stuttgart, Ark.

Riceland Foods, Inc.

Riceland is a farmer-owned cooperative which markets rice produced by its 9,000 farmer-members in the Southern rice-producing states. The cooperative marketed rice produced in 2005 by farmers in Arkansas, Missouri, Mississippi, Louisiana and Texas.

Response to USDA Announcement

The Food and Drug Administration and the Department of Agriculture have determined that no health or safety concerns result from the trace amounts of Bayer's genetically engineered material found in Southern rice. Given these assurances, Riceland will continue to receive rice from its farmer-members and to service its customers.

Discovery of Material

Genetically engineered material was discovered by a rice customer in January. (The name and location of our customer will not be released.) The customer contacted Riceland asking for an explanation.

As part of its due diligence effort, Riceland sent a sample from the customer and a retained Riceland sample to a U.S. laboratory which tests for genetically engineered material.

The samples tested positive for Bayer's herbicide-resistance trait which was known to be present in corn, soybeans, canola and cotton.

Since there is no known commercial U.S. production of genetically engineered rice, Riceland suspected the material would be identified as residual fragments of genetically engineered corn or soybeans resulting from use of common public transportation systems. Due to the minute quantities of genetically engineered DNA present, the laboratory was unable to determine its origin.

In an effort to clarify the issue, Riceland in May collected samples of rice from several grain storage locations. A significant number tested positive for the Bayer trait. The positive results were geographically dispersed and random throughout the rice-growing area.

Bayer Contacted

Bayer was contacted in early June when Riceland became suspicious that the discovery was a Bayer genetically engineered event in rice. Riceland provided Bayer with a rice sample and asked Bayer officials for an explanation of the results.

In late July, Bayer confirmed the positive results for its herbicide-resistance trait at a 0.06 percent (six hundredths of one percent) level, the equivalent of 6 kernels in 10,000 kernels of rice. Bayer also said that it was a regulated genetically engineered event and that Bayer was legally required to report its findings to USDA officials within 24 hours.

Involvement with USDA

USDA officials began their investigation August 1. Riceland has cooperated fully with USDA requests for information in an effort to resolve the situation and will continue to do so.

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