IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RANDY SCHAFER, *et al.* **PLAINTIFFS**

v. **CASE NO. 4:06CV01407 BSM**

BAYER CROPSCIENCE LP, *et al.* **DEFENDANTS**

ORDER

Before the court are defendants' motion to stay case pending transfer (Doc. No. 33), the motions to dismiss filed by defendants Bayer AG and Bayer CropScience Holding SA ("BCS Holding") (Doc. Nos. 48 and 54) and supplement (Doc. No. 52), and plaintiffs' motion to remand (Doc. No. 64). As plaintiffs filed a fifth amended and substituted complaint after defendants Bayer AG and BCS Holding filed their initial motion to dismiss and supplement, the initial motion to dismiss and supplement (Doc. Nos. 48 and 52) are moot. For the reasons set forth below, the motion to remand is granted.

I. BACKGROUND

On October 2, 2006, defendant Bayer CropScience LP removed this case from Lonoke County, Arkansas Circuit Court, to this court alleging the existence of diversity jurisdiction and asserting the fraudulent joinder of defendant Riceland Foods, Inc. ("Riceland"), an Arkansas corporation. Plaintiffs moved to remand on October 31, 2006. On November 21, 2006, defendant Bayer CropScience LP moved for a stay of consideration of the motion to remand. On April 23, 2007, before this court ruled on the motions, the case was transferred

to the Eastern District of Missouri and made part of *In re LL Rice 601 Contamination Litigation*, MDL-1811 (the "MDL").

On October 15, 2007, the MDL court remanded the case to the Lonoke County, Arkansas Circuit Court for lack of diversity of citizenship, finding that defendants failed to establish that plaintiffs lacked a colorable claim against Riceland or that the claims against Bayer CropScience LP and Riceland should not have been joined in one suit.

On July 14, 2008, plaintiffs filed their first amended complaint, alleging in count eight that defendants violated certain duties under 7 C.F.R. § 340.3(c). On January 14, 2009, plaintiffs filed their third amended and substituted complaint, alleging in count three that "Bayer had a duty to speak based upon federal statutes regarding GMO rice contamination and its obligation to report regulated GMO contamination to the USDA within twenty four hours."

On August 18, 2009, plaintiffs filed a fifth amended complaint adding two additional plaintiffs to the case, Garner Land Company, LLC ("Garner Land") and Little Twist Land Company, LLC ("Little Twist Land"), both Arkansas companies. According to the fifth amended complaint, Albert H. Garner, a citizen of New York, is a member of both Garner Land and Little Twist Land, and Bayer CropScience, LP's limited partner, Bayer CropScience, Inc., is a citizen of New York.

On September 15, 2009, the Lonoke Circuit Court granted plaintiffs' motion to non-suit Riceland. On September 17, 2009, defendants filed an amended notice of removal and, on September 23, 2009, plaintiffs moved to remand back to state court.

II. MOTION TO REMAND

Any civil action brought in state court may be removed by a defendant to the United States District Court having jurisdiction of the place where the action is pending by filing a notice of removal "containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders" served upon the defendants. 28 U.S.C. § 1441(a); 28 U.S.C. § 1446(a). Typically, a notice of removal must be filed within thirty days after receipt by the defendant of a copy of the initial pleading. 28 U.S.C. § 1446(b).

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

Id.

Plaintiffs request remand asserting that there is no federal question or diversity jurisdiction and that the amended notice of removal was untimely filed. "Federal courts are to 'resolve all doubts about federal jurisdiction in favor of remand' and are strictly to construe legislation permitting removal." *Dahl v. R.J. Reynolds Tobacco Co.*, 478 F.3d 965, 968 (8th Cir. 2007).

A. Federal Question Jurisdiction

Defendants assert that the fraudulent concealment allegation in count three of the third amended complaint is founded on a claim or right arising under the Constitution, treaties or

laws of the United States. Plaintiffs assert that their fraudulent concealment allegation, which provides that "Bayer had a duty to speak based upon federal statutes regarding GMO rice contamination and its obligation to report regulated GMO contamination to the USDA within twenty four hours[,]" does not confer federal question jurisdiction.

"Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties." 28 U.S.C. § 1441(b). Whether a claim "arises under" federal law must be determined by reference to the well-pleaded complaint." *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808 (1986).

In *Merrell Dow*, the United States Supreme Court held that "a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treatises of the United States.'" *Id*. at 817 (quoting 28 U.S.C. § 1331). In that case, the plaintiff asserted a negligence claim in which it alleged that the defendant's violation of the Federal Food, Drug, and Costmetic's ("FDCA") labeling provision constituted a "rebuttable presumption" of negligence. *Id*. at 805-06. The Court held that there was no federal question jurisdiction when "the violation of a federal statute [was] said to be a 'rebuttable presumption' or a 'proximate cause' under state law, rather than a federal action under federal law." *Id*. at 812.

In *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 311-12 (2005), the Supreme Court clarified that *Merrell Dow* did not always

require a federal cause of action as a condition for exercising federal question jurisdiction and affirmed the Sixth Circuit's decision that "it sufficed that the title claim raised an issue of federal law that had to be resolved, and implicated a substantial federal interest (in construing federal tax law)." In *Grable*, defendants asserted federal question jurisdiction in removing a state law quiet title action regarding land seized and sold by the Internal Revenue Service. *Id*. at 310-11. The Court held that the case warranted federal jurisdiction because the claim of title depended entirely on the interpretation of the notice statute in the federal tax law and the meaning of the federal statute was in dispute. *Id*. at 311, 314-15.

This case is more akin to *Merrell Dow* than *Grable* because the resolution of this case does not depend upon the interpretation or resolution of a particular federal law. Rather, plaintiffs are merely attempting to use the alleged violation of a federal statute as one way of showing that defendants violated a duty owed to plaintiffs. For this reason, no federal question has been raised.

B. Diversity Jurisdiction

If federal question jurisdiction is not present, an action is removable if diversity jurisdiction exists. For diversity jurisdiction to exist, the matter in controversy must exceed "the sum or value of $75,000, exclusive of interest and costs," and be between "citizens of different States." 28 U.S.C. § 1332(a)(1).

Plaintiffs filed their fifth amended complaint on August 18, 2009, adding two non-diverse plaintiffs. Arkansas Rule of Civil Procedure 15 provides that "a party may amend his pleadings at any time without leave of the court." Ark. R. Civ. P. 15(a). Although the

opposing party may object to an amendment on the basis of prejudice or undue delay, and the court may then strike such amended pleading or grant a continuance, it appears that defendants only assert improper joinder in their answer. *Id*. "All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally or in the alternative in respect of or arising out of the same transactions or occurrences and if any question of law or fact common to all these persons will arise in the action." Ark. R. Civ. P. 20(a).

Plaintiffs state that the reason the two non-diverse plaintiffs were added to this case is because they recently filed a case in federal court against the same defendants, but recognized that the two plaintiffs were non-diverse and could not file in federal court. Therefore, plaintiffs' counsel chose to add the two non-diverse plaintiffs into this case, which was already pending in state court.

Defendants assert that the two non-diverse plaintiffs were fraudulently joined, and thus, complete diversity exists. "The relevant inquiry in analyzing fraudulent joinder . . . focuses only on whether a plaintiff 'might' have a 'colorable' claim under state law against a fellow resident, . . . not on the artfulness of the pleadings." *Wilkinson v. Shackelford*, 478 F.3d 957, 964 (8th Cir. 2007) (internal citation omitted). "A joinder is fraudulent only 'when there exists no reasonable basis in fact and law supporting a claim against the resident defendants.'" *Id.*

Specifically, defendants assert that Garner Land and Little Twist Land made no specific allegations against any of the defendants, and thus, have not asserted a cause of action on behalf of themselves. Defendants also assert that "even if a non-diverse plaintiff

[has] a valid cause of action against a defendant, that plaintiff may not prevent removal based on diversity of citizenship if there is no reasonable basis for the joinder of that non-diverse plaintiff with the other plaintiffs." *In re Prempro Products Liability Litigation*, 417 F. Supp. 2d 1058, 1060 (E.D. Ark. 2006) (quoting *In re Diet Drugs Products Liability*, 294 F. Supp. 2d 667, 673 (E.D. Pa. 2003). This case, however, is distinguishable from *In re Prempro*. There, Judge Wilson found that there was "no reason for the joinder of the non-diverse plaintiffs other than to destroy diversity jurisdiction." *Id.* Although the plaintiffs all took a hormone replacement therapy ("HRT") drug, they did not take the same HRT drug. *Id*. Additionally, plaintiffs were "residents of different states and were prescribed different HRT drugs by different doctors, for different lengths of time, in different amounts, and suffered different injuries." *Id*.

In this case, the non-diverse plaintiffs, in the fourth amended complaint, adopted all of the allegations made by the other plaintiffs. It appears that all of the plaintiffs are residents of Lonoke County and/or business entities doing business in Lonoke County, and they own and operate rice farms in Lonoke County. Plaintiffs claims relate to their ability to sell their rice after the rice supply became contaminated. After reviewing the allegations in the fourth amended complaint, it appears that all of the plaintiffs assert a right to relief arising out of the same transactions or occurrences and that questions of law and fact common to all of these plaintiffs will arise in the action. Defendants have failed to establish that the non-diverse plaintiffs lack a colorable claim against them, and they have failed to

show that the claims of the non-diverse plaintiffs should not have been joined in this suit. Thus, diversity of citizenship does not exist, and remand is appropriate.

III. CONCLUSION

Plaintiffs' motion to remand (Doc. No. 64) is granted, and defendants' motion to stay case pending transfer (Doc. No. 33) is denied. As plaintiffs filed a fifth amended and substituted complaint after defendants Bayer AG and BCS Holding filed their initial motion to dismiss and supplement, the initial motion to dismiss and supplement (Doc. Nos. 48 and 52) are moot. The court leaves the motion to dismiss filed by defendants Bayer AG and BCS Holding (Doc. No. 54) for the state court judge. The Clerk is directed to immediately send the case file to the Clerk of the Lonoke County Circuit Court.

IT IS SO ORDERED this 3rd day of November, 2009.

Brian S. Miller

UNITED STATES DISTRICT JUDGE