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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re:	§	**Chapter 11**
	§	
PILGRIM'S PRIDE CORPORATION,	§	**Case No. 08-45664 (DML)**
	§	
Debtor.	§	**Jointly Administered**

CONSOLIDATED REPLY IN SUPPORT OF REORGANIZED DEBTORS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT ON PROMISSORY ESTOPPEL

[*Relates to Docket Nos. 4208, 5686, 5688, 5690, 5692, 5694, 5696, 5702 5816, 5817, 5818, 5819, 5820, and 5821*]

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT 1

II. REPLY 3

A. The Clinton Growers' promissory estoppel claims are barred by contract 3

1. The Clinton Growers' contracts with Pilgrim's Pride govern the entirety of the parties' relationship 3

2. Relevant case law supports dismissing the Clinton Growers' promissory estoppel claims because they are barred by the existence of valid contracts 4

a. *City of Clinton v. Pilgrim's Pride Corp* 4

b. *Moore v. Keith Smith Co* 6

c. *Linville v. ConAgra, Inc* 7

d. *Regency Hospital Co. of Northwest Arkansas, LLC v. Arkansas Blue Cross Blue Shield* 9

B. The Clinton Growers' reliance on *Tyson v. Davis* is misplaced 10

1. The *Tyson* court's review focuses on fraud and lacks analysis or detail regarding promissory estoppel 11

2. *Tyson* did not alter the well-established rule that promissory estoppel applies only in the absence of a written contract 12

3. *Tyson* fails to provide sufficient detail regarding the contract at issue 13

4. The promises made in *Tyson* and those in this case are not the same 14

5. The Clinton Growers' relatively long experience in the poultry industry distinguishes this case from *Tyson* 15

C. The Clinton Growers' promissory estoppel claims are barred by the absence of actionable promises on which the Clinton Growers could justifiably rely 16

1. Because the Clinton Growers' fraud and promissory estoppel claims are based on identical allegations, and because the Clinton Growers do not oppose summary judgment on their fraud claims, summary judgment should also be entered on their promissory estoppel claims 17

TABLE OF CONTENTS
(continued)

Page

2. The Clinton Growers fail to address Debtors' dispositive legal arguments or to adduce competent summary judgment evidence 17

3. *Tyson* does not save the Clinton Growers' promissory estoppel claims, and Judge Means' *City of Clinton* decision summarily disposes of them 19

4. The Clinton Growers cannot establish justifiable reliance, a separate and distinct element of promissory estoppel 20

D. The Clinton Growers' promissory estoppel claims are barred by the statute of limitations 21

1. Because the Clinton Growers' fraud and promissory estoppel claims are based on identical allegations, and because the Clinton Growers do not oppose summary judgment on their fraud claims, summary judgment should also be entered on their promissory estoppel claims 22

2. The Clinton Growers should not be allowed to argue that their promissory estoppel claims never accrued when they previously pleaded that such claims had accrued, but the statute of limitations was tolled on the basis of fraudulent concealment 22

3. The Clinton Growers fail to establish that their promissory estoppel claims accrued in August 2008 24

4. Damages are not essential to a promissory estoppel claim, but even if they were, the Clinton Growers' alleged damages accrued over three years before August 2008 25

E. The Clinton Growers' promissory estoppel claims are barred by the merger doctrine 26

1. Relevant case law supports dismissing the Clinton Growers' promissory estoppel claims because they are barred by the merger doctrine 27

F. The Clinton Growers' promissory estoppel claims are barred by the parol evidence rule 30

G. The Clinton Growers' promissory estoppel claims are barred by the statute of frauds 33

1. The Clinton Growers' purported performance does not abrogate the statute of frauds 34

TABLE OF CONTENTS
(continued)

Page

2. The Clinton Growers do not refute Debtors' arguments regarding statements made within one year of the Clinton complex idling 38

3. Merely asserting promissory estoppel does not allow the Clinton Growers to circumvent the statute of frauds.....38

III. CONCLUSION 41

TABLE OF AUTHORITIES

FEDERAL CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 18

Barnett v. Kohler, No. 4:05-CV-1328 GTE,
2006 U.S. Dist. LEXIS 64142 (E. D. Ark. Sept. 7, 2006) 31

Binkley v. Entergy Ops., Inc., 602 F.3d 928 (8th Cir. 2010) 20

City of Clinton v. Pilgrim's Pride Corp., 653 F. Supp. 2d 669 (N.D. Tex. 2009) 6

City of Clinton v. Pilgrim's Pride Corp.,
654 F. Supp. 2d 536 (N.D. Tex. 2009) 4, 5, 20, 24

City of Clinton v. Pilgrim's Pride Corp., No. 4:09-cv-386-Y, 4:09-cv-387-Y,
2009 U.S. Dist. LEXIS 117525 (N.D. Tex. Nov. 23, 2009) 6

Heating & Air Specialists, Inc. v. Jones,
180 F.3d 923 (8th Cir. 1999) 2, 3, 5, 10, 12, 27

Linville v. ConAgra, Inc., No. 1:04-CV-00004-WRW, 2004 U.S. Dist. LEXIS
10129 (E.D. Ark. May 20, 2004), *aff'd*, 186 Fed. App'x 704 (8th Cir. 2006) 7, 8

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 547 (1986) 18

Mickens v. Corr. Med. Servs., Inc.,
395 F. Supp. 2d 748 (E.D. Ark. 2005) 2, 3, 12, 27

Montwood Corp. v. Hot Springs Theme Park Corp.,
766 F.2d 359 (8th Cir. 1985) 35, 36

Mountain Pure LLC v. Bank of Am., No. 4:02-CV-00100 JLH, 2008 U. S. Dist.
LEXIS 115227 (E. D. Ark. July 8, 2008), *amending* 2008 U. S. Dist. LEXIS
44884 (June 6, 2008) 31

Regency Hosp. Co. of Northwest Ark., LLC v. Arkansas Blue Cross Blue Shield,
No. 4:08-CV-04177 GTE, 2009 U.S. Dist. LEXIS 118574
(E.D. Ark. Dec. 21, 2009) 9, 10

Shelton v. Valmac Indus., Inc., 539 F. Supp. 328 (W.D. Ark. 1982) 29

Simmons Foods, Inc. v. Hill's Pet Nutrition, Inc., 270 F.3d 823 (8th Cir. 2001) 29, 30

Starling v. Valmac Indus., Inc., 589 F.2d 382 (8th Cir. 1979) 29

Yarborough v. DeVilbiss Air Power, Inc., 321 F.3d 728 (8th Cir. 2003) 16

TABLE OF AUTHORITIES

STATE CASES

Brace v. Oil Fields Corp., 293 S.W. 1041 (Ark. 1927).....36

Cobb v. Leyendecker, 200 S.W.3d 924 (Ark. Ct. App. 2005).....37

Country Corner Food & Drug, Inc. v. Reiss, 737 S.W.2d 672 (Ark. Ct. App. 1987).....40

Dolphin v. Wilson, 942 S.W.2d 815 (Ark. 1997), *appeal after remand*, 983 S.W.2d 113 (Ark. 1998).....35

Ethyl Corp. v. Johnson, 49 S.W.3d 644 (2001).....12

Farm Bureau Ins. Co. of Ark., Inc. v. Running M Farms, Inc., 237 S.W.3d 32 (Ark. 2006).....28, 30

Guenther v. Guenther, 258 S.W.2d 562 (Ark. Ct. App. 1953).....35

Hampton v. Taylor, 887 S.W. 2d 535 (1994).....21

Hoffius v. Maestri, 786 S.W.2d 846 (Ark. Ct. App. 1990).....36, 37, 39

Hyden v. Highcouch, Inc., 110 S.W.3d 760 (Ark.).....31

Klinke v. Famous Recipe Fried Chicken, 600 P.2d 1034 (Wash. Ct. App. 1979), *aff'd*, 616 P.2d 644 (Wash. 1980).....40

Kramer v. Alpine Valley Resort, Inc., 321 N.W.2d 293 (Wis. 1982).....28, 32

Marley v. Hackler, 3 S.W.2d 20 (Ark. 1928).....27

Martin v. E. Lansing Sch. Dist., 483 N.W.2d 656 (Mich. Ct. App. 1992).....40

Merci Corp. v. World Int'l Corp., 2005 MP 10, 32 (N. Mar. I. 2005).....40

Merrifield v. Troutner, 269 N.W.2d 136 (Iowa 1978).....40

Miller v. Lawlor, 66 N.W.2d 267 (Iowa 1954).....40

Moore v. Keith Smith Co., No. CA 08-884, 2009 Ark. App. LEXIS 283 (Ark. Ct. App. May 6, 2009).....6, 7, 10

Oxley v. Ralston Purina Co., 349 F.2d 328, 335 (6th Cir. 1965).....40

TABLE OF AUTHORITIES

Pfeifer v. Raper, 486 S.W.2d 524 (Ark. 1972) 36

Pursell v. Wolverine-Pentronix, Inc., 205 N.W.2d 504 (Mich. Ct. App. 1973) 40

Ralston Purina Co. v. McCollum, 611 S.W.2d 201 (Ark. Ct. App. 1981) 39

Riddle v. Udouj, 267 S.W.3d 586 (Ark. 2007) 23

Sanders v. Dantzler, 375 So. 2d 774 (Miss. 1979) 40

Skallerup v. City of Hot Springs, 309 S.W.3d 196 (Ark. 2009) 2, 12, 13, 27

Stewart v. Stewart, 37 S.W.3d 667 (Ark. Ct. App. 2001) 37

Talley v. Blackmon, 609 S.W.2d 113 (Ark. Ct. App. 1980) 37

Taylor v. Eagle Ridge Developers, LLC, 29 S.W.3d 767 (Ark. Ct. App. 2000) 39, 40

Taylor v. George, 212 S.W.3d 17 (Ark. Ct. App. 2005) 2, 12, 28

Trammel Crow Co. No. 60 v. Harkinson, 944 S.W.2d 631 (Tex. 1997) 24

Tyson Foods, Inc. v. Davis, 66 S.W.3d 568 (Ark. 2002) 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 24, 25, 26, 29, 30, 31

Ultracuts Ltd. v. Wal-Mart Stores, Inc., 33 S.W.3d 128 (Ark. 2000) 30

Van Dyke v. Glover, 934 S.W.2d 204 (Ark. 1996) 20, 24

Waterall v. Waterall, 155 S.W.3d 30 (Ark. Ct. App. 2004) 40

Waugh v. Lennard, 211 P.2d 806 (Ariz. 1949) 40

DOCKETED CASES

City of Clinton, Ark. v. Pilgrim's Pride Corp., No. 09-04222-dml 6

Shelia Adams v. Pilgrim's Pride Corp., No. 09-04221-dml 5

Ricky Arnold v. Pilgrim's Pride Corp., No. CV2008-196-5 (Ark. Cir. Ct. Sept. 10, 2008) 1

TABLE OF AUTHORITIES

FEDERAL RULES

5th Cir. R. 28.7 6

General Order 2010-3 (Bankr. N.D. Tex. Aug. 25, 2010) 6

ARKANSAS STATE STATUTES AND RULES

Ark. Code Ann. § 4-59-101 (2010) 34

Ark. Code Ann. § 16-56-105 (2010) 21

Ark. Sup. Ct. Rule 1-1 6

Ark. Sup. Ct. Rule 5-2(c) 6

MISCELLANEOUS

David G. Epstein et al., *Contract Law's Two "P.E.s": Promissory Estoppel and the Parol Evidence Rule,* 62 Baylor L. Rev. 397 (2010) 29

10 Richard A. Lord, Williston on Contracts § 27:16 (4th ed.) 40

73 Am. Jur. 2d, *Statute of Frauds*, § 565 40

Pilgrim's Pride Corporation ("Pilgrim's Pride"), and its affiliated reorganized debtors in the above-referenced chapter 11 cases (collectively, as reorganized, the "Debtors"),[1] filed six motions for partial summary judgment on the Clinton Growers'[2] promissory estoppel claims (along with supporting briefs) because the claims are barred by (1) contract, (2) the absence of actionable promises on which the Clinton Growers could justifiably rely, (3) the merger doctrine, (4) the parol evidence rule, (5) the statute of frauds, and (6) the statute of limitations. (Dkt. Nos. 5686–97.) The Clinton Growers filed a consolidated response in opposition to Debtors' motions and supporting briefs. (Claimants' Consol. Br. in Opp'n to Debtors' Mot. for Summ. J. on the Promissory Estoppel Claims ("Br. in Opp'n") (Dkt. No. 5824).) Debtors now file this Consolidated Reply in Support of Reorganized Debtors' Motions for Partial Summary Judgment on Promissory Estoppel and would show the Court the following:

I. Preliminary Statement

Having conceded that all of their fraud and statutory claims have no merit, the Clinton Growers' consolidated response confuses the issues and misinterprets Arkansas law in a futile effort to avoid dismissal of their sole remaining promissory estoppel claims. Although there are written contracts that govern the parties' relationship—and although those contracts expressly supersede all previous agreements, statements, and communications, and the Clinton Growers agreed that they were not relying on any statements not contained in the contracts—the Clinton Growers relegate their discussion of whether these contracts bar their promissory estoppel claims to the last two and a half pages of their 50-page brief. They do this because Arkansas law is

[1] The Reorganized Debtors in these cases are Pilgrim's Pride; PFS Distribution Company; PPC Transportation Company; To-Ricos, Ltd.; To-Ricos Distribution, Ltd.; Pilgrim's Pride Corporation of West Virginia, Inc.; and PPC Marketing, Ltd.

[2] The "Clinton Growers" are the 107 separate claims filed in this bankruptcy case by individuals or entities that are either plaintiffs in the pre-petition case styled *Ricky Arnold et al. v. Pilgrim's Pride Corp. et al.*, No. CV2008-196-5 (Ark. Cir. Ct. Sept. 10, 2008) or allege to have claims and causes of action against Pilgrim's Pride that are similar to the claims and causes of action asserted in that case.

clear: Promissory estoppel is an alternative theory that applies only in the absence of a valid contract. *Heating & Air Specialists, Inc. v. Jones*, 180 F.3d 923, 934 (8th Cir. 1999); *Mickens v. Corr. Med. Servs., Inc.*, 395 F. Supp. 2d 748, 753 (E.D. Ark. 2005); *Skallerup v. City of Hot Springs*, 309 S.W.3d 196, 201 (Ark. 2009); *Taylor v. George*, 212 S.W.3d 17, 25 (Ark. Ct. App. 2005).

Attempting to avoid dismissal of their promissory estoppel claims because of the existence of their contracts with Pilgrim's Pride, the Clinton Growers state that they are not claiming breach of the contracts. Instead, the Clinton Growers assert that their promissory estoppel claims are "based on assurances given of a long-term relationship" that induced them to enter into their contracts with Pilgrim's Pride. (Br. in Opp'n at 22.) This attempt to couch their contract claims as promissory estoppel claims fails, however, because the alleged promise of a long-term relationship cannot be separated from the Clinton Growers' contracts with Pilgrim's Pride. The only relationship that has ever existed between Pilgrim's Pride and the Clinton Growers concerns Pilgrim's Pride's agreement to supply, and the Clinton Growers' agreement to grow, poultry, which is the subject of the parties' contracts.

The Clinton Growers entered into valid contracts with Pilgrim's Pride that concern the same subject matter raised by the Clinton Growers' promissory estoppel claims. The Clinton Growers' promissory estoppel claims, therefore, fail as a matter of law and should be dismissed with prejudice because promissory estoppel applies only in the absence of a valid contract. Additionally, the Clinton Growers' promissory estoppel claims are barred by the absence of actionable promises on which the Clinton Growers could justifiably rely, the statute of limitations, merger, the parol evidence rule, and the statute of frauds. Each basis, any of which

allows for the dismissal of the Clinton Growers' promissory estoppel claims, will be addressed in turn.

II. Reply

A. The Clinton Growers' promissory estoppel claims are barred by contract.

1. The Clinton Growers' contracts with Pilgrim's Pride govern the entirety of the parties' relationship.

Knowing that recovery by promissory estoppel is unavailable in the face of a valid contract, *Heating & Air Specialists, Inc.*, 180 F.3d at 934; *Mickens*, 395 F. Supp. 2d at 753, the Clinton Growers insist that their claims do not arise from the contracts at issue, but are "based on assurances given of a long-term relationship" that induced them to enter into such contracts. (Br. in Opp'n at 22.) Despite their best efforts, however, the Clinton Growers cannot separate their "relationship" with Pilgrim's Pride from their contracts because the entirety of the parties' relationship is contemplated and established by the terms of the parties' written agreements. That is why each of the contracts states that it not only "supersedes, voids and nullifies any and all previous Broiler Production Agreements," but also "all other previous agreements *governing the relationship* between [the growers and Pilgrim's Pride]." (Ex. J § H(9), App. 1846 (emphasis added).)

Although the Clinton Growers assert that their claims are based on the alleged promise of a long-term relationship that is separate and apart from their contracts, they neither distinguish the alleged promise from the parties' contractual relationship nor explain the conflict between the two. According to the Clinton Growers' Complaint affixed to their proofs of claim, the issue is that Pilgrim's Pride allegedly promised the Clinton Growers that they would be provided with poultry for so long as they wanted to raise poultry, and then failed to follow through with the promise when Pilgrim's Pride idled the Clinton complex and terminated the Clinton Growers'

contracts on the basis of economic necessity. (*See* Ex. B ¶ 77, App. 1297–98.) Because the contracts govern the parties' relationship (*see* Ex. J § H(9), App. 1846), and because they address, among other things, the duration of grower arrangements and how and when poultry would be provided (*see* Ex. J §§ C–D, F–G, App. 1843–45), the alleged promise of a long-term relationship is in direct conflict with the very subject matter of the contracts. The Clinton Growers' promissory estoppel claims, therefore, must fail.

2. Relevant case law supports dismissing the Clinton Growers' promissory estoppel claims because they are barred by the existence of valid contracts.

a. *City of Clinton v. Pilgrim's Pride Corp.*

Less than a year ago, Judge Means dismissed promissory estoppel claims brought against Pilgrim's Pride by poultry growers from Arkansas. *City of Clinton v. Pilgrim's Pride Corp.*, 654 F. Supp. 2d 536, 544–45 (N.D. Tex. 2009). After noting that promissory estoppel applies only where no contract on the subject matter exists,[3] and after reviewing the plaintiffs' allegations in light of their poultry grower agreements, Judge Means rejected the plaintiffs' promissory estoppel claims: "[B]ecause Pilgrim's has produced agreements that address Plaintiffs' obligation to comply with Pilgrim's decisions regarding housing of the chickens, the duration of the grower arrangements, and how the growers would be compensated, Plaintiffs may not maintain promissory-estoppel claims based on these promises." *Id.* at 544.

This is significant because (1) Judge Means determined that the plaintiffs' promissory estoppel claims fell within the same subject matter as their contracts with Pilgrim's Pride, and (2) the dismissed claims are nearly identical to the promissory estoppel claims asserted by the Clinton Growers in this case. The similarities are highlighted in the following table:

[3] Because the case involved growers from Arkansas, Louisiana, Oklahoma, and Texas, Judge Means reviewed the applicable law from each of these states, concluded that the laws were the same regarding promissory estoppel, and then applied Texas law. *Id.* at 544 n.1.

Allegations by *City of Clinton* Plaintiffs	**Allegations by Clinton Growers**
Pilgrim's Pride said that the plaintiffs "could raise chickens in their houses as long as they wanted to raise chickens."	Pilgrim's Pride said that the Clinton Growers "would have broilers at their houses as long as they wanted to grow broilers."
Pilgrim's Pride said that the plaintiffs' poultry houses "were appropriate to raise chickens for Pilgrim's [Pride]."	Pilgrim's Pride said that the Clinton Growers' "poultry houses were appropriate to raise broilers for processing by Pilgrim's Pride."
Pilgrim's Pride said that it "was committed to growers for the long run."	Pilgrim's Pride said that it "was committed to the growers for the long run."
Pilgrim's Pride said that the plaintiffs' poultry houses would "last indefinitely with proper maintenance."	Pilgrim's Pride said that the Clinton Growers "could expect their poultry houses to last indefinitely with proper maintenance."

Compare id. at 544 *with* Ex. B ¶ 77, App. 1298 (emphasis omitted).

Just as the claims in *City of Clinton* concerned the subject matter of the plaintiffs' contracts with Pilgrim's Pride, the same is true of the Clinton Growers' claims and contracts. The Clinton Growers' contracts with Pilgrim's Pride not only govern the entirety of the parties' relationship (*see* Ex. J § H(9), App. 1846), but they also address, among other things, the duration of grower arrangements, how and when chickens would be provided, how the Clinton Growers would be compensated, and the Clinton Growers' obligation to comply with Pilgrim's Pride's specifications regarding housing (Ex. J §§ B, F–G, App. 1843–44). Thus, the Clinton Growers' promissory estoppel claims are barred by the existence of written contracts governing the same subject as the promises on which they claim to have relied. *See, e.g.*, *Heating & Air Specialists, Inc*., 180 F.3d at 934.

Contrary to the Clinton Growers' argument (Br. in Opp'n at 50), Judge Means's decision is not on appeal. The opinion cited by Pilgrim's Pride relates to the "Adams Growers" claims filed by attorney Mark Brodeur in the former adversary matter styled *Shelia Adams et al. v. Pilgrim's Pride Corporation*, No. 09-04221-dml. The reference was withdrawn with regards to the Adams Growers' claims, transferred from Judge McBryde to Judge Means, and consolidated

with the other adversary Mr. Brodeur filed on behalf of Clinton, Arkansas that also had the reference withdrawn. *See City of Clinton, Ark. v. Pilgrim's Pride Corp.*, No. 09-04222-dml. What is on appeal is Judge Means' dismissal order relating to the City of Clinton's claims against Pilgrim's Pride. *See City of Clinton v. Pilgrim's Pride Corp.*, 653 F. Supp.2d 669 (N.D. Tex. 2009) and *City of Clinton v. Pilgrim's Pride Corp.*, No. 4:09-cv-386-Y, 4:09-cv-387-Y, 2009 U.S. Dist. LEXIS 117525 (N.D. Tex. Nov. 23, 2009).

b. *Moore v. Keith Smith Co.*

Faced with similar alleged promises in *Moore v. Keith Smith Co.*, No. CA 08-884, 2009 Ark. App. LEXIS 283 (Ark. Ct. App. May 6, 2009), the Arkansas Court of Appeals rejected a promissory estoppel claim because of the existence of a valid contract.[4] Like the Clinton Growers, the plaintiffs in *Moore* alleged that the poultry company they contracted with promised, among other things, to provide them with poultry for so long as they wanted to raise poultry. *Id.* at *4. In rejecting the plaintiffs' promissory estoppel claim, however, the trial court noted that the parties had a flock-to-flock contract, which was not breached when the company decided not to enter into a new contract, and promissory estoppel was not available because of the existence of an enforceable contract. *Id.* at *9. The appellate court agreed, stating: "Promissory estoppel is a basis for recovery when formal contract elements do not exist.

[4] The Clinton Growers criticize Debtors for citing unpublished Arkansas cases. (Br. in Opp'n at 10–11.) This criticism is unwarranted because the Clinton Growers' reliance on Rule 5-2(c) of the Rules of the Supreme Court of Arkansas only applies to proceedings in the Arkansas Supreme Court and the Arkansas appellate courts. *See* Ark. Sup. Ct. R. 1-1. As indicated in the recent Order Adopting Amended Local Rules and Orders, this Court applies the Amended Local Rules in "all cases filed on or after this date, and all cases pending in this Court as of this date." General Order 2010-03 (Bankr. N.D. Tex. Aug. 25, 2010). The Amended Local Rules do not restrict citation to unpublished state court opinions. *See id.* at R. 7007-1, -2, 7056-1. And the Fifth Circuit expressly permits it. 5th Cir. R. 28.7. In addition, the Clinton Growers' contracts expressly provide that the *substantive* law of Arkansas applies, since it is undisputed that all of the Clinton Growers' farms are located in Arkansas. (Ex. J § H(17), App. 1846 (emphasis added).) They do not similarly provide that the procedural rules of Arkansas apply. (*See id.*) Thus, this Court is not bound by the rules of the Supreme Court of Arkansas.

However, in the present case a formal contract does exist. Therefore, appellants cannot proceed on the basis of promissory estoppel." *Id.* at *13.

c. *Linville v. ConAgra, Inc.*

Although *Linville v. ConAgra, Inc.*, No. 1:04-CV-00004-WRW, 2004 U.S. Dist. LEXIS 10129 (E.D. Ark. May 20, 2004), *aff'd*, 186 Fed. App'x 704 (8th Cir. 2006) was cited and discussed in Debtors' opening brief (Dkt. No. 5697), the Clinton Growers dismiss the case out of hand by saying that it was merely cited for the purpose of restating the general rule regarding when a claim for promissory estoppel may be properly applied. (Br. in Opp'n at 50.) But *Linville* does much more than state the general rule, and its significance should not be overlooked. It stands for the proposition that plaintiffs cannot avoid what they view as unfavorable contract provisions by couching their claims in terms of promissory estoppel, as the Clinton Growers are trying to do here.

The *Linville* plaintiffs, in an effort to avoid ConAgra's motion to compel arbitration under the parties' poultry grower agreements, argued that compelling arbitration in accordance with the contracts would be improper because they had sued on the basis of promissory estoppel and not breach of contract. *See id.* at *18–20. Noting that the plaintiffs sought damages for renovations they performed on their poultry houses in anticipation of receiving more chickens from ConAgra, *id.* at *19, the court recognized that the plaintiffs' claims, regardless of what they were called, were closely tied to, and arose out of or related to, their poultry grower agreements with ConAgra, *id.* at *18. The court stated: "Even though Plaintiffs couch their Amended Complaint in terms of promissory estoppel, the wrongdoing complained of by Plaintiffs clearly concern ConAgra's agreement to supply, and Plaintiffs' agreement to grow, chickens, which is the subject of the Grower Contracts." *Id.*

The Clinton Growers are trying to do here what the district court sitting in Arkansas properly refused to allow the plaintiff-grower to do in *Linville*. That is, they are seeking to avoid the terms of their contracts with Pilgrim's Pride by asserting their claims fall outside the scope of those contracts. The question is: Does Pilgrim's Pride's alleged promise of a long-term relationship (described as a promise to provide the Clinton Growers with poultry for so long as they want to raise poultry) concern the same subject matter as the parties' contracts? Because the contracts govern the entirety of the parties' relationship (*see* Ex. J § H(9), App. 1846), and because they address, among other things, the duration of grower arrangements and how and when poultry would be provided (*see* Ex. J §§ C–D, F–G, App. 1843–45), the answer is undeniably *yes*.

Despite the Clinton Growers' current effort to divorce their claims from their contracts with Pilgrim's Pride, the Clinton Growers repeatedly refer to their contracts with Pilgrim's Pride throughout the Complaint affixed to their proofs of claim and Claimant's Statements, admitting that they entered into and performed under these contracts (Ex. B ¶¶ 8, 18, App. 1273–74), and even referring to themselves as "contract growers" (Ex. B ¶ 2, App. 1270). Until recently, the Clinton Growers also asserted a cause of action based on certain provisions of their contracts allegedly violating the Arkansas Livestock and Poultry Contract Protection Act.[5] Because the Clinton Growers refer to, and rely heavily on, the existence of their contracts with Pilgrim's Pride, they should not be permitted to ignore the existence of the contracts, or vary the scope of the contracts, in an effort to justify their promissory estoppel claims.

[5] The Clinton Growers dropped this cause of action after Debtors moved for summary judgment, saying that they "do not oppose the entry of summary judgment in the Debtors' favor as to the Arkansas Livestock Act claims." (Claimants' Resp. to Reorganized Debtors' Mot. for Partial Summ. J. on Alleged Violations of the Ark. Livestock and Poultry Contract Protection Act (Dkt. No. 5822) at 1.)

d. *Regency Hospital Co. of Northwest Arkansas, LLC v. Arkansas Blue Cross Blue Shield*

Another case properly denying promissory estoppel claims given the existence of governing contracts is *Regency Hosp. Co. of Northwest Ark., LLC v. Arkansas Blue Cross Blue Shield*, No. 4:08-CV-04177 GTE, 2009 U.S. Dist. LEXIS 118574 (E.D. Ark. Dec. 21, 2009). There, a healthcare provider sued an insurance company after failing to obtain satisfactory payment under the terms of its patients' healthcare plans. Like the Clinton Growers, the provider asserted a claim for promissory estoppel, arguing that its damages arose from detrimental reliance on the insurance company's words and actions—not the language in the patients' contracts. *Id.* at *15. The court rejected this argument because the insurance company's obligation was to provide benefits according to the terms of the applicable contracts. Thus, the court found it necessary to compare the requirements of those contracts against any contrary promises allegedly made by the insurance company. *Id.* at *16.

The same reasoning applies here. Pilgrim's Pride's agreed to supply poultry to the Clinton Growers per the terms of the written contracts. Thus, the Court should compare the terms of the contracts against any contrary oral promise allegedly made. The contracts state:

- the contract "supersedes, voids and nullifies . . . all other previous agreements governing the relationship between [the growers and Pilgrim's Pride]" (Ex. J § H(9), App. 1846);
- the contract, and its exhibits, "constitute the entire agreement between the parties" (Ex. J § H(9), App. 1846);
- the contract, and its exhibits, "supersede all oral statements and other communications made before [their] execution" (Ex. J § H(9), App. 1846);
- the growers have not relied on any statements that are not contained in the contract itself, or its exhibits (Ex. J § H(9), App. 1846);
- Pilgrim's Pride makes no representations, guaranties, or warranties, express or implied, with respect to the growers' operations, except as set forth in the contract itself (Ex. J § F(14), App. 1844);

- the contract continues on a flock-to-flock basis (Ex. J § C, App. 1843); and
- the contract can be terminated after a flock is settled and before a new flock is placed (Ex. J § D, App. 1843).[6]

On the other hand, the alleged oral promises are of a long-term relationship during which the Clinton Growers "would have broilers at their houses as long as they wanted to grow broilers." (Ex. B ¶ 77, App. 1298.)

The obligations outlined in the contracts are simply incompatible with the contrary promise allegedly made by Pilgrim's Pride. The Clinton Growers' claims fail because promissory estoppel is neither "to be used as a vehicle to engraft a promise on a contract that differs from the written terms of the contract" nor "applied in order to determine the parties' rights under a contract that is otherwise enforceable." *Regency Hosp. Co.*, 2009 U.S. Dist. LEXIS 118574, at *20 (quoting *Moore*, 2009 Ark App. LEXIS 283, at *13; *Heating & Air Specialists, Inc.*, 180 F.3d at 934 (internal quotations marks omitted)).

B. The Clinton Growers' reliance on *Tyson v. Davis* is misplaced.

The Clinton Growers argue that their promissory estoppel claims are not barred by the existence of their contracts with Pilgrim's Pride because the Arkansas Supreme Court in *Tyson Foods, Inc. v. Davis*, 66 S.W.3d 568 (Ark. 2002), found that, on the facts before it, the promise of a long-term relationship relating to the supply of hogs was not encompassed by the parties' short-term contract. (*See* Br. in Opp'n at 48.) The Clinton Growers focus on *Tyson* because of certain factual similarities between it and the present case. But their reliance is misplaced because the similarities between the cases are superficial, and because *Tyson* is limited in its application.

[6] Pilgrim's Pride's rights with respect to terminating the agreements are more limited than those of the Clinton Growers, but they do not guarantee or otherwise provide for a perpetual duration. (Ex. J §§ C–D, App. 1843.)

1. The *Tyson* court's review focuses on fraud and lacks analysis or detail regarding promissory estoppel.

In an effort to stretch the meaning of *Tyson*, the Clinton Growers state that that the Arkansas Supreme Court did not hold that the existence of Davis's short-term written contract barred Davis's promissory estoppel claim. (Br. in Opp'n at 48.) But the absence of such a holding in *Tyson* is not dispositive in this case. The *Tyson* court could not have so held because the issue was not raised on appeal and thus the *Tyson* court did not address whether the existence of a written contract bars a promissory estoppel claim.

Next, the Clinton Growers argue that *Tyson* held, as a matter of law, that the long-term oral promise Tyson gave to Davis was not the same subject matter addressed in the short-term production contract. (Br. in Opp'n at 48.) But the Arkansas Supreme Court did not so hold, and the portion of the opinion cited by the Clinton Growers does not support their contention.

Further, the majority opinion in *Tyson* neglects to address the elements of promissory estoppel or apply those elements to the facts presented by the parties at trial. There are entire sections of the opinion devoted to "Fraud," the "Statute of Limitations," "Reasonable Reliance/Substantial Evidence," and "Damages" in which the court addresses the facts of the case in the context of fraud. *Tyson*, 66 S.W.3d 576–81. The facts, however, are never addressed in the context of promissory estoppel.[7] The court notes that promissory estoppel was an issue submitted to the jury, but makes no attempt to explain why the existence of a contract between the parties did not bar the claim.

[7] The *Tyson* majority mentions promissory estoppel a total of 12 times. *See generally* 66 S.W.3d 568. Five of the 12 references to promissory estoppel also mention fraud and negligence, and six of the 12 references mention promissory estoppel together with fraud but not negligence. *Id.* The only stand-alone reference to promissory estoppel is simply: "The jury was also instructed on promissory estoppel." *Id.* at 578. Fraud, conversely, is mentioned more than three times as often—37 times to be exact. *See generally id.* And where promissory estoppel is mentioned in isolation only once, fraud is addressed separately 26 times. *See generally id.*

As explained below, part of the problem is that *Tyson* provides insufficient detail regarding the contract at issue, making it impossible to determine the circumstances that would have justified an exception to the well-established rule that promissory estoppel applies only in the absence of a valid contract. *Heating & Air Specialists, Inc.*, 180 F.3d at 934; *Mickens*, 395 F. Supp. 2d at 753; *Skallerup*, 309 S.W.3d at 201; *Taylor*, 212 S.W.3d at 25. The *Tyson* court simply fails to explain why an otherwise enforceable contract did not bar Davis's promissory estoppel claim.

The reason for this is that the *Tyson* court was handicapped by the limited scope of its review. Because Tyson appealed a jury verdict entered on a general verdict form, the court was unable to determine whether the jury found liability on fraud, promissory estoppel, negligence, or on all of the theories, and the court refused to invade the sanctity of the jury room in order to impeach the jury's verdict. *Tyson*, 66 S.W.3d at 578. The court's standard of review was "whether the jury's verdict is supported by substantial evidence . . . which goes beyond suspicion or conjecture and is sufficient to compel a conclusion one way or the other." *Id.* at 579 (citing *Ethyl Corp. v. Johnson*, 49 S.W.3d 644 (2001)). Because the verdict was entered on a general verdict form, the court stopped its analysis once it determined that Davis presented substantial evidence of fraud. There is simply no meaningful discussion of the law or evidence supporting Davis's promissory estoppel claim.[8]

2. *Tyson* did not alter the well-established rule that promissory estoppel applies only in the absence of a written contract.

Tyson does not refute, reverse, or disavow cases like *Heating & Air Specialists, Inc.*, 180 F.3d at 934, or *Mickens*, 395 F. Supp. 2d at 753, that state the well-established rule that

[8] It is instructive that not a single case cites *Tyson* regarding promissory estoppel. Instead, the majority of cases cite *Tyson* for the elements necessary to prove fraud, a few cite *Tyson* for the applicable statute of limitations relating to fraud, and a few cite *Tyson* for the scope of review relating to jury questions.

promissory estoppel applies only in the absence of a written contract. And in its most recent opinion addressing the issue, the Arkansas Supreme Court actually reaffirmed the rule, stating: "Promissory estoppel applies when the elements of a contract cannot be shown." *Skallerup*, 309 S.W.3d at 201. The existence of contracts in *Skallerup* made promissory estoppel inapplicable, and the Arkansas Supreme Court held that there was no relief available under either equitable or promissory estoppel. *Id.*

3. *Tyson* fails to provide sufficient detail regarding the contract at issue.

The Clinton Growers' contracts with Pilgrim's Pride contain provisions that make clear they govern the entirety of the parties' relationship. They not only supersede, void, and nullify any and all previous poultry grower agreements, but also "all other previous agreements governing the relationship between [the growers and Pilgrim's Pride]." (Ex. J. § H(9), App. 1846.) By executing their contracts, the Clinton Growers also expressly released and extinguished all claims that they may have had against Pilgrim's Pride under any previous poultry grower agreement "and all other previous agreements governing the relationship between [the growers and Pilgrim's Pride]." (Ex. J. § H(9), App. 1846.) *Tyson* provides no such details about the contract at issue in that case.

In addition to governing the entirety of the parties' relationship, the Clinton Growers' contracts also contain express merger provisions. *See* section II.E, *infra*. Specifically, the Clinton Growers agreed that: (1) the contracts and their exhibits "constitute the entire agreement between the parties"; (2) the contracts and their exhibits "supersede all oral statements and other communications made before [their] execution"; and (3) they were not relying on any statements not contained in the contracts or their exhibits. (Ex. J § H(9), App. 1846.) Again, there is nothing to indicate that the contract at issue in *Tyson* contained these types of provisions, or how the existence of such provisions would have altered the court's opinion.

Finally, another distinguishing fact between *Tyson* and this case is that to the extent that the alleged promises that serve as the bases of the promissory estoppel claims were made by ConAgra employees before Pilgrim's Pride acquired the Clinton complex, the Clinton Growers later were requested and in fact signed new contracts with Pilgrim's Pride with the aforementioned clauses. The execution of new contracts with a new integrator with the various clauses cited above renders *Tyson* inapposite, if not irrelevant.

4. The promises made in *Tyson* and those in this case are not the same.

The evidence shows that, unlike in *Tyson*, no grower in this case was told *both* that (1) Pilgrim's Pride would provide them with chickens to grow for the term of their debt *and* (2) he or she would receive flock-to-flock contracts as part of a longer-term relationship. *See Tyson*, 66 S.W.3d at 573; (*contra* Br. in Opp'n at 7–8). Rather, the summary judgment evidence negates the Clinton Growers' argument that they were told to expect flock-to-flock contracts but that they could rely on Pilgrim's Pride performing for a much longer period of time. Indeed, not a single grower's allegations include a promise referring to the flock-to-flock term contained in his or her contract with Pilgrim's Pride. (*See generally* Exs. A.1–.108, App. 1–1263.)

Moreover, the testimony of Danny Boone, Clint Rivers, and Jamie Statler quoted in the response brief reinforces that Boone and Statler only told the Clinton Growers what they each hoped and believed to be true. (*See* Br. in Opp'n at 13–15.) In contrast, the testimony in *Tyson* reflects much more definite promises. Davis testified that he told Tyson's regional manager that he "needed twenty years or better" and that, in response, the regional manager told him: "I don't see any reason it won't last twenty years or till death do us part." *Tyson*, 66 S.W.3d at 573. Davis's banker corroborated this testimony, testifying that he called the same regional manager and was told: "Don Davis was going to be able to grow hogs as long as he wants." *Id.* These statements are a far cry from Boone's and Statler's testimony that they spoke with some of the

Clinton Growers about their personal hopes and beliefs as chicken growers for ConAgra or Pilgrim's Pride.[9]

5. The Clinton Growers' relatively long experience in the poultry industry distinguishes this case from *Tyson*.

Both Tyson and Davis were new to the bedded-floor hog raising business. Contrary to the Clinton Growers' representation that *Tyson* "never even hinted that the plaintiff's experience level had anything to do with the result to affirm" (Br. in Opp'n at 9–10), the *Tyson* court actually referred to the parties' experience multiple times:

- "[Davis] alleges that Tyson encouraged him to *enter into* the business . . . ." *Tyson*, 66 S.W.3d at 571 (emphasis added).
- "Davis's argument, however, is . . . that he was induced to *enter into bedded-floor hog production* for Tyson . . . ." *Id.* at 575 (emphasis added).
- "Davis alleges that Tyson represented to him that they were *entering the bedded-floor production of hogs* in the same way they were in the poultry business . . . ." *Id.* (emphasis added).
- "The evidence put before the jury showed *this bedded-floor program was experimental*, and Davis testified that other producers who utilized the bedded-floor program were not available." *Id.* at 577 (emphasis added).
- "He further alleges that Tyson induced him to *enter into the business* . . . ." *Id.* at 575 (emphasis added).
- "Tyson . . . encourag[ed] him to *enter into the business* . . . ." *Id.* at 577 (emphasis added).
- "Davis further asserted this representation was made to induce him to . . . *engage in the business* of raising hogs on bedded floors . . . ." *Id.* at 578 (emphasis added).

[9] (*See* Br. in Opp'n at 13 (quoting Ex. W, Statler Dep. at 55–56, App. 3239 (". . . that would have been my belief," "if you felt that way . . . .")); Br. in Opp'n at 14 (quoting Ex. X, Boone Dep. at 125–26, App. 3341 (" . . . we all hoped that . . . ")); Br. in Opp'n at 14 (quoting Ex. X, Boone Dep. at 138, 164, App. 3344, 3350 (" . . . I believed . . .")); Br. in Opp'n at 14–15 (quoting Ex. W, Statler Dep. at 44, App. 3236 (" . . . we believe . . . my belief . . . .")); Br. in Opp'n at 15 (quoting Ex. W, Statler Dep. at 72–73, App. 3243–44 ("It was my hope and belief . . . .")).)

- "The damages asserted by Davis were based upon the alleged false representations that Tyson would be in the bedded-floor hog business long term and that Tyson encouraged Davis to *enter into the business* . . . ." *Id.* at 580 (emphasis added).

As a result of both Davis's and Tyson's inexperience in the bedded-floor hog business, Tyson responded to Davis's questions about longevity by referring him to its poultry operations. *Id.* at 573. Some poultry growers had been growing for Tyson for many years, and one grower had been serving Tyson for thirty-five years. *Id.* at 573.

Not only was there no similar point of reference for the Clinton Growers to rely on, but it is undisputed that Pilgrim's Pride did not begin operating in the Clinton, Arkansas area until November 2003. (Ex. Y, Rivers Dep. 18:18–20, App. 3455.) Unlike Davis, many of the Clinton Growers had more than a decade of experience in the poultry industry dealing with ConAgra and other integrators at the time of the alleged promises.[10] *See Yarborough v. DeVilbiss Air Power, Inc.*, 321 F.3d 728, 731–32 (8th Cir. 2003) (distinguishing *Tyson* based on Davis's inexperience in the hog business). The Clinton Growers also each represented that they had an opportunity to consult with counsel before executing their contracts with Pilgrim's Pride. (Ex. J § H(14), App. 1846.)

C. The Clinton Growers' promissory estoppel claims are barred by the absence of actionable promises on which the Clinton Growers could justifiably rely.

The Clinton Growers do not, and cannot, seriously dispute the legal analysis and summary judgment evidence supporting Reorganized Debtors' Motion for Partial Summary Judgment on Promissory Estoppel—Absence of Actionable Promises on Which the Clinton Growers Could Justifiably Rely ("Promises MSJ") (Dkt. No. 5694). Both conclusively establish

[10] In fact, the Claimant's Statements establish that approximately 13 of the Clinton Growers entered into the poultry business in the 1970s, 17 in the 1980s, and 37 in the 1990s. *See, e.g.*, Michael David Chism & Wendell Neal Chism, 1972 (Ex. A.17, App. 199 at No.3); Bobby Beavers, 1978 (Ex. A.4, App. 50 at No.3); Benny and Annette Williams, 1986 (Ex. A.98, App. 1185 at No. 3); Marilyn Carr, 1987 (Ex. A.16, App. 182 at No. 3); Ricky & Debi Arnold, 1990 (Ex. A.2, App. 5 at No. 3); Bradley & Angela Faulkner, 1995 (Ex. A.37, App. 425 at No.3).

that the Clinton Growers' promissory estoppel allegations do not constitute actionable promises and, therefore, the Clinton Growers could not justifiably rely on them as a matter of law.

1. Because the Clinton Growers' fraud and promissory estoppel claims are based on identical allegations, and because the Clinton Growers do not oppose summary judgment on their fraud claims, summary judgment should also be entered on their promissory estoppel claims.

The Clinton Growers do not oppose Reorganized Debtors' Motion for Partial Summary Judgment on Fraud—Absence of Misrepresentations of Material Fact on Which the Clinton Growers Could Justifiably Rely ("Materiality MSJ") (Dkt. No. 5678). (*See* Dkt. No. 5812.) Their opposition to the Promises MSJ, therefore, is inconsistent because the Clinton Growers' individual allegations of fraud and promissory estoppel are identical. It is because they are identical that Pilgrim's Pride attached the same "Summary Chart—Non-Material" to both the Materiality MSJ and the Promises MSJ. (*See* Ex. P, App. 2993–3061.) It is logically, legally, and factually impossible for the Clinton Growers' concessions with respect to the Materiality MSJ to dispose of the Clinton Growers' fraud claims while simultaneously failing to dispose of their promissory estoppel claims on the same grounds. Accordingly, the Promises MSJ should be granted as a matter of law.

2. The Clinton Growers fail to address Debtors' dispositive legal arguments or to adduce competent summary judgment evidence.

Beginning on page 46 of their opposition, the Clinton Growers dedicate two pages to addressing Debtors' factually and legally intensive 30-page Promises MSJ and 70-page "Summary Chart—Non-Material." The Promises MSJ and the Summary Chart disposed of each

of the Clinton Growers' approximately 200[11] individualized promissory estoppel allegations. By contrast, not only did the Clinton Growers fail to address nearly all of Debtors' dispositive legal arguments, but they also entirely failed to produce any competent summary judgment evidence in support of their deficient promissory estoppel allegations.[12]

Most revealing is the Clinton Growers' failure to provide any declarations from the Clinton Growers to rectify the obvious deficiencies in their allegations. They could also have readily attached their own chart summarizing their allegations, or simply revised the Summary Chart produced by Pilgrim's Pride, identifying how their individual promissory estoppel grounds should survive summary judgment, but they chose not to do so. To survive a motion for summary judgment, the non-moving party with the burden of proof on the merits must introduce sufficient evidence to establish all essential elements of its claims. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 547, 587 (1986). The Clinton Growers failed to meet this burden.

The arguments in Debtors' Promises MSJ dispose of the Clinton Growers' promissory estoppel claims in their entirety. Because the Clinton Growers failed to dispute or refute those arguments, there is no need for Debtors to repeat all of those arguments here. By way of example, the grounds for disposing of the Clinton Growers' promissory estoppel claims include, but are not limited to, (1) the Clinton Growers' failure to assert their promissory estoppel

[11] The 107 Clinton Growers aver approximately 200 individualized promissory estoppel allegations. There are varying circumstances surrounding each grower's tenure with Pilgrim's Pride and ConAgra Poultry Company, and, for the majority of them, their ongoing relationships with different poultry companies after Pilgrim's Pride. The Clinton Growers' assertion that all 200 individualized promissory estoppel allegations are "substantially identical" to the promise that Tyson made to a single grower that its "bedded-floor program was here for the long term" is wrong. *See Tyson*, 66 S.W.3d at 571.

[12] Instead, they refer the Court to only 11 (out of approximately 200) allegations made by only 11 (of approximately 107) Clinton Growers on pages 12–13 of their statement of facts. (*See* Br. in Opp'n at 47.) Pilgrim's Pride, however, analyzed, and disposed of those specific allegations in its MSJ Promises and Summary Chart—Non-Material. And the Clinton Growers' deficient analysis most certainly does not satisfy the Clinton Growers' burden to adduce competent summary judgment evidence with respect to *all* of their claims and allegations. Accordingly, their claims should be dismissed as a matter of law.

allegations with particularity (*see* Promises MSJ at 13–17), (2) the alleged promises concern non-actionable future events (*id*. at 19–21), (3) the alleged promises did not specify that the growers could grow into the future *with ConAgra or Pilgrim's Pride* (*id.* at 24), and (4) the alleged promises were non-actionable opinions (*id.* at 27–28). Regarding this last ground, the Clinton Growers' own opposition is littered with words demonstrating that Pilgrim's Pride's alleged promises are non-actionable opinions.[13]

3. *Tyson* does not save the Clinton Growers' promissory estoppel claims, and Judge Means' *City of Clinton* decision summarily disposes of them.

The Clinton Growers put all of their eggs in one basket by relying solely on *Tyson*. They argue that their promissory estoppel allegations are not too vague because they are "substantially similar" to those that "passed muster" with the Arkansas Supreme Court in *Tyson.* (*See* Br. in Opp'n at 47.) But the *Tyson* court never ruled that Davis's promissory estoppel claim contained actionable promises. In fact, the *Tyson* court never identified the elements of promissory estoppel, much less performed any analysis of Davis's promissory estoppel claim. Instead, the *Tyson* court, not knowing whether the jury found for Davis on his promissory estoppel claim,[14] focused its analysis on Davis's fraud claim.

The fact that *Tyson* focuses on fraud is important because the Clinton Growers voluntarily disposed of their fraud claims rather than dispute Debtors' summary judgment arguments and evidence. And, of course, the *Tyson* court failed to apply the heavy burden Arkansas law places on a party relying on promissory estoppel. Specifically, that he or she

[13] Indeed, even the quotes the Clinton Growers cherry pick from depositions contain opinions. (*See, e.g.*, Br. in Opp'n at 13 (quoting Ex. W, Statler Dep. at 55–56, App. 3239 (". . . that would have been my belief," "if you felt that way . . . .")); Br. in Opp'n at 14 (quoting Ex. X, Boone Dep. at 125–26, App. 3341 (" . . . we all hoped that . . . ")); Br. in Opp'n at 14 (quoting Ex. X, Boone Dep. at 138, 164, App. 3344, 3350 (" . . . I believed . . .")); Br. in Opp'n at 14–15 (quoting Ex. W, Statler Dep. at 44, App. 3236 (" . . . we believe . . . my belief . . . .")); Br. in Opp'n at 15 (quoting Ex. W, Statler Dep. at 72–73, App. 3243–44 ("It was my hope and belief . . . .")).)

[14] *See Tyson*, 66 S.W.3d at 576 ("However, this court has no means to determine how damages were assessed, whether based on negligence, fraud, promissory estoppel, or some combination thereof. Where a general jury verdict is used, this court will not speculate on what the jury found.")

"must prove it strictly, there must be certainty to every intent, the facts constituting it must not be taken by argument or inference, and nothing can be supplied by intendment." *See Binkley v. Entergy Ops., Inc*., 602 F.3d 928, 930 (8th Cir. 2010) (affirming grant of summary judgment on promissory estoppel claim).

Not only do the Clinton Growers mistakenly rely on *Tyson* for positions that it does not support, but the Clinton Growers also summarily dismiss Judge Means' *City of Clinton* opinion, labeling it as an inapplicable "Texas" decision in which Judge Means improperly applied Texas law. (*See* Br. in Opp'n at 47.) As discussed above and in the Promises MSJ, Judge Means dismissed the promissory estoppel claims of former Pilgrim's Pride growers from Arkansas that are virtually identical to the promissory estoppel claims asserted by the Clinton Growers in this case. And Judge Means explicitly applied Arkansas law to the Arkansas growers' claims after unequivocally concluding "that the Arkansas and Louisiana plaintiffs may not rely on Texas law." *City of Clinton*, 654 F. Supp. 2d at 542. Thereafter, while citing to Arkansas case law, *id*. at 544 (citing *Van Dyke v. Glover*, 934 S.W.2d 204, 209 (Ark. 1996)), Judge Means specifically ruled that the laws of Arkansas, Louisiana, Oklahoma, and Texas are the same regarding promissory estoppel, *id.* at 544 n.1.

That Judge Means did not cite to *Tyson* is not surprising because that opinion adds nothing to the jurisprudence of promissory estoppel claims. Accordingly, the Debtors' Promises MSJ should be granted and the promissory estoppel claims dismissed with prejudice.

4. The Clinton Growers cannot establish justifiable reliance, a separate and distinct element of promissory estoppel.

The Clinton Growers' opposition also cites to portions of several depositions of current or former Pilgrim's Pride employees in support of the argument that the Clinton Growers justifiably relied on promises allegedly made by Pilgrim's Pride. The cited testimony, however,

does not support the Clinton Growers' promissory estoppel claims. First, the cases cited by Pilgrim's Pride demonstrate that, as a matter of law, a plaintiff cannot justifiably rely upon vague, indefinite, or speculative promises about future events. (*See* Promises MSJ at 28–29.) The handful of quotes selected by the Clinton Growers are just that. Therefore, summary judgment should be entered in favor of Pilgrim's Pride.

Second, the Clinton Growers confuse the elements of promissory estoppel. Justifiable reliance is a separate and distinct element from the actionable-promises element. Should the Clinton Growers establish justifiable reliance, it does not mean they have established an actionable promise. And Pilgrim's Pride has demonstrated that they can establish neither. Accordingly, the promissory estoppel claims should be barred as a matter of law.

D. The Clinton Growers' promissory estoppel claims are barred by the statute of limitations.

The Clinton Growers argue that Debtors' position with respect to the statute of limitations leads to "absurd" results that would require overruling 150 years of precedent. (*See* Br. in Opp'n at 39, 44). The Clinton Growers reach this conclusion because they misinterpret Arkansas precedent, which firmly supports Debtors' position.[15]

Further, the Clinton Growers' arguments lack credibility because they concede summary judgment on statute of limitations grounds for fraud while simultaneously dispute the entry of summary judgment on the same grounds for promissory estoppel. Debtors' legal arguments and evidence for both causes of action are nearly indistinguishable, an identical three-year statute of limitations applies to both, and the Clinton Growers' concession on the statute of limitations as it

[15] *Tyson*, at 66 S.W.3d at 582 ("Until this case, the law in Arkansas has been clear. The statute of limitations for an action based on fraud is three years. Ark. Code Ann. § 16-56-105 (2010); *Hampton v. Taylor*, 887 S.W.2d 535 (1994). The limitation period begins to run, in the absence of concealment of the wrong, when the wrong occurs, not when it is discovered. *Hampton, supra*. Accordingly, the running of the statute of limitations commenced when Johnson made the oral promise that Davis could have hogs as long as he lived, but was tolled during the time Davis had not discovered that it was false.") (Thornton, J, dissenting).

relates to fraud is tantamount to a concession on the statute of limitations as it relates to promissory estoppel.

1. Because the Clinton Growers' fraud and promissory estoppel claims are based on identical allegations, and because the Clinton Growers do not oppose summary judgment on their fraud claims, summary judgment should also be entered on their promissory estoppel claims.

The Clinton Growers do not oppose Reorganized Debtors' Motion for Partial Summary Judgment on Fraud—Statute of Limitations ("Fraud SoL MSJ") (Dkt. No. 5682). (*See* Dkt. No. 5814.) Their opposition to Reorganized Debtors' Motion for Partial Summary Judgment on Promissory Estoppel—Statute of Limitation ("Promissory Estoppel SoL MSJ") (Dkt. No. 5692), therefore, is inconsistent because the Clinton Growers' individual allegations of fraud and promissory estoppel are virtually identical. Moreover, Debtors' dispositive legal analysis and summary judgment evidence are based on the same factual and legal bases, including that a three-year statute of limitations applies to both fraud and promissory estoppel claims. It is because the Clinton Growers' allegations of fraud and promissory estoppel are identical that Pilgrim's Pride attached the same "Summary Chart—Statute of Limitations" to both the Fraud SoL MSJ and the Promissory Estoppel SoL MSJ. (*See* Ex. O, App. 2919–92.) It is logically, legally, and factually impossible for the Clinton Growers' concessions with respect to the Fraud SoL MSJ to dispose of the Clinton Growers' allegedly fraudulent misrepresentations while at the same time failing to dispose of their promissory estoppel claims on the same grounds. Accordingly, the Promissory Estoppel SoL MSJ should be granted as a matter of law.

2. The Clinton Growers should not be allowed to argue that their promissory estoppel claims never accrued when they previously pleaded that such claims had accrued, but the statute of limitations was tolled on the basis of fraudulent concealment.

The Clinton Growers contend in their opposition that the statute of limitations defense is not applicable because their promissory estoppel claims never accrued. (Br. in Opp'n at 39.)

This position directly conflicts with the position the Clinton Growers asserted—under oath—in their proofs of claim and Original Complaint. (*See* Ex. E, App. 1766–92.) Indeed, the Clinton Growers inserted tolling into these proceedings by asserting it in their Original Complaint, which they attached to each of their individual proofs of claim. Specifically, the Clinton Growers alleged as follows:

> TOLLING OF THE STATUTES OF LIMITATION
>
> 138. Plaintiffs re-allege and incorporate by reference each and every allegation set forth in the preceding and subsequent paragraphs herein.
>
> 139. Much of the conduct and many of the acts complained of were performed surreptitiously and, consequently, Plaintiffs were unaware of Defendants' misconduct and fraud when it occurred. PILGRIM'S PRIDE knowingly acted to conceal facts and otherwise hide their misconduct in a manner that the Plaintiffs could not reasonably discover the wrongs committed against them. These acts of Defendants constitute fraudulent concealment and serve to toll any applicable statutes of limitations until at least August 11, 2008.

(Ex. B ¶¶ 138–39, App. 1308.)

Despite their earlier position on tolling, the Clinton Growers' opposition abruptly attempts to recast the Clinton Growers' position because they have no answer to Debtors' summary judgment evidence and arguments that conclusively establish the absence of fraudulent concealment. (*See* Br. in Supp. of Reorg. Debtors' Mot. for Partial Summ. J. on Promissory Estoppel—Statute of Limitations ("Br. in Supp. of Promissory Estoppel SoL MSJ") (Dkt. No. 5693) at 21–30.) Indeed, they do not even attempt to address, much less refute, the evidence—even though it is their burden to establish tolling and fraudulent concealment. (*Id.* at 21–22 (citing *Riddle v. Udouj*, 267 S.W.3d 586, 592–93 (Ark. 2007)).) Therefore, Debtors' Promissory Estoppel SoL MSJ should be granted as a matter of law.

3. The Clinton Growers fail to establish that their promissory estoppel claims accrued in August 2008.

Further ignoring their own request for tolling, and their burden to establish fraudulent concealment, the Clinton Growers now assert that their claims have yet to accrue and dedicate their opposition to addressing when causes of action purportedly accrue. The Clinton Growers contend that their promissory estoppel claims only accrued in August 2008 when Pilgrim's Pride announced the idling of the Clinton complex. (Br. in Opp'n at 39.) According to the Clinton Growers, it was only then that they were first damaged.

Like the *Tyson* court, however, the Clinton Growers conspicuously omit any reference to the elements of promissory estoppel. Also, like *Tyson*, the Clinton Growers cite primarily to fraud cases, rather than to promissory estoppel cases, to advance their position. To that end, they again quote, and even underline, portions of *Tyson* for the proposition that "[d]amages are an essential element of fraud." (*See* Br. in Opp'n at 40 (citing *Tyson*, 66 S.W.3d at 577–78) (emphasis omitted).) But the Clinton Growers have jettisoned their fraud claims, and they fail to identify any case law holding that damages are an element—much less an essential element—*of promissory estoppel*. Again, like the *Tyson* court, the Clinton Growers fail to analyze the elements of promissory estoppel. If they had, then they would have been forced to concede that damages are not essential to a claim of promissory estoppel,[16] and that Debtors' motion should be granted as a matter of law.[17] (Br. in Supp. of Promissory Estoppel SoL MSJ at 18.)

[16] *See City of Clinton*, 654 F. Supp. 2d at 545 ("To state a claim for promissory estoppel, a plaintiff must allege: (1) that the defendant made a promise; (2) that the defendant should have foreseen that the plaintiff would rely on the promise; (3) that the plaintiff did, in fact, act in reliance on the promise to his detriment; and (4) that injustice can only be avoided by enforcing the promise.") (citing *Trammel Crow Co. No. 60 v. Harkinson*, 944 S.W.2d 631, 636 (Tex. 1997); *Van Dyke*, 934 S.W.2d at 209).

[17] Taking the Clinton Growers' argument to its logical extreme, a plaintiff could sue on an alleged promise made 15, 25, 50, 75, or even 100 years earlier so long as his or her damages did not arise or occur until then. It is likely that, in that amount of time, memories would fade, relevant documents would disappear, and witnesses would be unavailable, defeating the central purpose of having a statute of limitations.

4. Damages are not essential to a promissory estoppel claim, but even if they were, the Clinton Growers' alleged damages accrued over three years before August 2008.

Even if the Clinton Growers' argument had any merit, and damages were considered an essential element of promissory estoppel, Debtors' Promissory Estoppel SoL MSJ is still meritorious. As established in Debtors' supporting brief, the Clinton Growers unequivocally knew—and readily concede throughout their opposition—that they signed poultry grower agreements with limited, flock-to-flock terms, rather than terms of indefinite duration. (*See* Br. in Supp. of Promissory Estoppel SoL MSJ at 26–29.) Accordingly, at the very time they signed those agreements, the Clinton Growers knew they had potential causes of action against Pilgrim's Pride based on its allegedly actionable and false promises to supply the Clinton Growers with poultry indefinitely.

The *Tyson* dissent readily acknowledged that the same facts should have resulted in the dismissal of Davis's fraud claims on limitations grounds. *Tyson*, 66 S.W.3d at 584. Ignoring the obvious, however, the duty-bound *Tyson* majority disregarded those facts because it admittedly only considered evidence in support of the jury verdict—deemed wholly sacrosanct in its eyes based on Arkansas' standard of appellate review and procedural rules. *See id.* at 578.

The Clinton Growers' promissory estoppel claims should also be dismissed because the Clinton Growers were allegedly damaged as a result of Pilgrim's Pride's alleged false promises when they took out loans on their farms and invested additional money to improve them. Again, the same fact was present in *Tyson* and duly recognized by the dissent, but entirely ignored by the majority. *See Tyson*, 66 S.W.3d at 584. And, unique to these proceedings, the Clinton Growers knew they were allegedly damaged when Pilgrim's Pride purchased ConAgra Poultry Company. (*See* Br. in Supp. of Promissory Estoppel SoL MSJ at 27.) At that time, the Clinton

Growers undisputedly knew they would not raise poultry for ConAgra for an unlimited time into the future.

Unlike the *Tyson* court, this Court is not bound by any jury verdict or procedural limitations. (*See id.*) If the Court, therefore, even reaches the issue of damages—which are not essential to a promissory estoppel claim—then it is appropriate for the Court to consider the summary judgment evidence establishing that the Clinton Growers' damages accrued at least three years before August 2008, time barring the Clinton Growers' claims. As a result, Debtors' Promissory Estoppel SoL MSJ should be granted and the Clinton Growers' time-barred promissory estoppel claims dismissed as a matter of law.

E. The Clinton Growers' promissory estoppel claims are barred by the merger doctrine.

The Clinton Growers' promissory estoppel claims are barred because each of the contracts between the Clinton Growers and Pilgrim's Pride contains an express merger provision. To avoid this provision, the Clinton Growers inexplicably argue that Pilgrim's Pride's alleged promises of "long-term chicken business relationships" somehow fall outside of the parties' written agreements. (Br. in Opp'n at 23.) This argument is transparent, at best, because the merger provision applies to the entirety of the Clinton Growers' and Pilgrim's Pride's relationship:

> Prior Agreements/Entire Agreement. This agreement supersedes, voids and nullifies any and all previous Broiler Production Agreements and all other previous agreements ***governing the relationship*** between Independent Grower and Company. The Independent Grower and Company hereby release and extinguish all claims that they may have against each other under any previous Broiler Production Agreement and all other previous agreements ***governing the relationship*** between Independent Grower and Company. This Agreement, and any Exhibits hereto, constitute the ***entire agreement*** between the parties, and those documents supersede all oral statements and other communications made before the execution of those documents. Independent Grower acknowledges that in entering into this Agreement, he/she has not relied upon any statements that are not contained in this document, and/or the Exhibits hereto.

(Ex. J § H(9), App. 1846 (emphasis added).)

Because the Clinton Growers' contracts cover the entire relationship between the parties, they do not distinguish between short- or long-term relationships. (*See id.*) There is also no exception to the parties' expressly stated agreement that their contracts supersede "all oral statements and other communications" made before the contracts were executed. (*Id.*) The Clinton Growers' argument to the contrary flies in the face of the very purpose underlying all contracts—that they are to give certainty to the relationship between parties. *See, e.g.*, *Marley v. Hackler*, 3 S.W.2d 20, 23 (Ark. 1928).

The Clinton Growers' contracts address in detail all of the material terms of the growers' relationship with Pilgrim's Pride. They include, among other things: (1) the growers' duties relating to growing chickens; (2) Pilgrim's Pride's obligation to deliver, provide for, catch, haul, and weigh the chickens; (3) the duration of the parties' agreement; (4) rights of termination, including for economic necessity; (5) how the growers will be paid; (6) that any prior agreements between the parties are superseded; (7) that the contract constitutes the parties' entire agreement; (8) how disputes between the parties will be resolved; (9) available damages; and (10) the circumstances under which the agreement may be modified. (*See* Ex. J, App. 1843–51.) To argue that their poultry grower agreements are not complete statements of the parties' relationship is a direct contradiction of the express terms of the agreements themselves.

1. Relevant case law supports dismissing the Clinton Growers' promissory estoppel claims because they are barred by the merger doctrine.

As an initial note, the dearth of promissory estoppel cases addressing merger is hardly surprising in light of the legal principle explained above that promissory estoppel is an alternative theory that applies only in the absence of a valid contract. *See Heating & Air Specialists, Inc.*, 180 F.3d at 934; *Mickens*, 395 F. Supp. 2d at 753; *Skallerup*, 309 S.W.3d at

201; *Taylor*, 212 S.W.3d at 25. Nevertheless, the cases discussed in the Brief in Support of Reorganized Debtors' Motion for Partial Summary Judgment on Promissory Estoppel—Merger (Dkt. No. 5691), and further discussed below, support the conclusion that the Clinton Growers' promissory estoppel claims are barred by the merger doctrine. On the other hand, the cases cited by the Clinton Growers in their opposition do not support their position.

Although the Clinton Growers criticize Debtors' reliance on *Farm Bureau Ins. Co. of Arkansas, Inc. v. Running M Farms, Inc.*, 237 S.W.3d 32, 36–37 (Ark. 2006); (*see* Br. in Opp'n at 26), that post-*Tyson* opinion addressed a merger clause in the context of refusing a company shareholder's argument that he was a third-party beneficiary under the company's insurance policy. The Arkansas Supreme Court agreed with the insurance company that testimony by one of its agents to the effect that he wrote the insurance policies at issue for the shareholder and that he felt he was insuring both the shareholder and the corporations should be excluded due to the integration clause in the parties' agreement and also the parol evidence rule. *Farm Bureau Ins. Co. of Ark., Inc.*, 237 S.W.3d at 36–37. Like the shareholder in that case, the Clinton Growers seek to broaden their written agreements to provide for a term of indefinite duration, rather than the flock-to-flock term to which they expressly agreed.

The *Kramer* opinion, which, despite applying Wisconsin law, is heavily relied on by the Clinton Growers, ironically detracts from their position. (Br. in Opp'n at 27–29 (discussing *Kramer v. Alpine Valley Resort, Inc.*, 321 N.W.2d 293 (Wis. 1982).) The Clinton Growers' contracts contain an express merger provision whereas the lease agreement in *Kramer* did not. (Ex. J § H(9), App. 1846); *cf. Kramer*, 321 N.W.2d at 294–98. The *Kramer* opinion is further distinguished below with regard to the parol evidence rule.

The *Tyson* excerpt cited by the Clinton Growers as "explain[ing] why the merger doctrine does not apply" is a recitation of the parol evidence rule. (Br. in Opp'n at 24 (quoting *Tyson*, 66 S.W.3d at 576–77).) The quoted text neither (1) addresses an express merger clause nor (2) mentions promissory estoppel. (*See id.*) In fact, the *Tyson* majority never once addresses whether the parties' hog grower agreement contained a merger provision similar to the merger provision found in the Clinton Growers' poultry grower agreements. *See generally Tyson*, 66 S.W.3d 568.

To briefly dispense with the Clinton Growers' remaining arguments related to the merger doctrine, it should be noted that the *Shelton* and *Starling* opinions cited in the Clinton Growers' opposition are not UCC cases. (*Contra* Br. in Opp'n at 27); *Shelton v. Valmac Indus., Inc.*, 539 F. Supp. 328 (W.D. Ark. 1982); *Starling v. Valmac Indus., Inc.*, 589 F.2d 382 (8th Cir. 1979). They are poultry grower cases involving service contracts, like the case at bar.

The Clinton Growers also grasp at straws by relying on a Texas law professor's opinion that the Eighth Circuit should have reached a different conclusion in *Simmons Foods, Inc. v. Hill's Pet Nutrition, Inc.*, 270 F.3d 823 (8th Cir. 2001). (Br. in Opp'n at 27.) The Clinton Growers quote the professor's query: "If, prior to the integrated agreement, all of the elements necessary for Simmons' recovery for promissory estoppel were established, why should a later writing prevent Simmons' recovery of reliance damages on its promissory estoppel claim?" (Br. in Opp'n at 27 (quoting David G. Epstein et al., *Contract Law's Two "P.E.s": Promissory Estoppel and the Parol Evidence Rule*, 62 Baylor L. Rev. 397, 430 (2010).) Here, the answer to this question is that the Clinton Growers expressly agreed to release and extinguish all claims that they may have had against Pilgrim's Pride under any previous poultry grower agreements "and all other previous agreements governing the relationship between [the growers and

Pilgrim's Pride]." (Ex. J § H(9), App. 1846.) The agreement in *Simmons* lacked a similar merger provision. *See Simmons*, 270 F.3d at 724–27.

The Clinton Growers offer no legitimate authority for failing to enforce the merger provision in their contracts in the absence of fraud, which is a claim the Clinton Growers conceded. All of the statements or agreements alleged by the Clinton Growers that were made before they executed their contracts with Pilgrim's Pride are extinguished and superseded by those contracts. (Ex. J § H(9), App. 1846.) Thus, the Clinton Growers' promissory estoppel claims are barred by the merger doctrine and should be dismissed as a matter of law.

F. The Clinton Growers' promissory estoppel claims are barred by the parol evidence rule.

The Clinton Growers' promissory estoppel claims are also barred by the parol evidence rule. Even in the absence of an express merger provision, application of the parol evidence rule excludes evidence of any alleged promises not contained in the Clinton Growers' contracts with Pilgrim's Pride.

The cases cited by Debtors, and dismissed out of hand by the Clinton Growers, teach that, unlike fraud, promissory estoppel is not an exception to the enforcement of the parol evidence rule. *See, e.g.*, *Farm Bureau Ins. Co. of Ark., Inc.*, 237 S.W.3d at 36–37 (quoting *Ultracuts Ltd. v. Wal-Mart Stores, Inc.*, 33 S.W.3d 128, 134 (Ark. 2000) ("[I]n the absence of fraud, accident or mistake, a written contract merges, and thereby extinguishes, all prior and contemporaneous negotiations, understandings, and verbal agreements on the same subject.")); *see also Tyson*, 66 S.W.3d at 576 (declining to apply parol evidence rule because Davis alleged fraud or deceit).

The oft-repeated recitation of the parol evidence rule states that it does not apply when fraud exists, but it does not contain a similar exception for cases where promissory estoppel is alleged. *See, e.g.*, *Farm Bureau Ins. Co. of Ark., Inc.*, 237 S.W.3d at 37. The Clinton Growers

no longer assert fraud, so they cannot escape application of the parol evidence rule on that basis. (*See* Dkt. No. 5809.) Nor do the Clinton Growers allege an accident or mistake that would render the parol evidence rule inapplicable. And although they argue that promissory estoppel, like fraud, may excuse application of the parol evidence rule based on *Tyson*, the Clinton Growers' faith in that opinion is misplaced. As discussed above, *Tyson* is focused on fraud, not promissory estoppel.

The *Tyson* court does not analyze Davis's promissory estoppel claim. Indeed, the elements of promissory estoppel are not even stated in the court's opinion. Meanwhile, fraud is discussed in a separate section of the opinion entitled "Fraud" in which the elements of fraud are enumerated and closely examined. *Tyson*, 66 S.W.3d at 576–78. There is no similar section regarding promissory estoppel. *See generally id.* Although the opinion makes passing references to promissory estoppel, it is really an opinion based on fraud.[18] *See generally id.*; *see* section II.B.1, *supra*.

The Clinton Growers' only chance of avoiding the parol evidence rule is if their poultry grower agreements govern only a narrow part of the Clinton Growers' business relationship with Pilgrim's Pride. This argument fails, however, for all of the reasons discussed exhaustively in previous sections of this reply. *See* sections II.A.1 and II.E, *supra*. It is clear on the face of the contracts that the entirety of the parties' relationship was contemplated and established in writing and was not meant to be altered or amended by reference to any alleged statements or communications not contained in the contracts themselves. (Ex. J § H(9), App, 1846.)

[18] Of the 41 cases citing to *Tyson*, only four contain the term "promissory estoppel." Of those four, none cite *Tyson* as precedent for determining the remaining issues in this case. *See Hyden v. Highcouch, Inc.*, 110 S.W.3d 760, 763–64 (Ark.) (explaining that the court will not guess the basis for a jury's answer to a general verdict form); *see also Mountain Pure LLC v. Bank of Am.*, No. 4:02-CV-00100 JLH, 2008 U.S. Dist. LEXIS 115227, at *10–11 (E.D. Ark. July 8, 2008) (addressing the availability of attorneys' fees), *amending* 2008 U.S. Dist. LEXIS 44884 (June 6, 2008) (same); *see also Barnett v. Kohler*, No. 4:05-CV-1328 GTE, 2006 U.S. Dist. LEXIS 64142, at *15 (E.D. Ark. Sept. 7, 2006) (listing elements of fraud).

Moreover, the Wisconsin case discussed at length by the Clinton Growers does not actually support their position. (Br. in Opp'n at 27–29.) In *Kramer*, the only written contracts were a series of leases for space in a shopping complex at a ski resort where the tenant and other tradesmen would display their wares. 321 N.W.2d at 295. The tenant's promissory estoppel claim was based on the landlord's representations, including informational brochures (i.e., written representations), that a large number of people would visit the complex daily throughout the year. *Id.* Despite such representations, the landlord ultimately closed the complex. *Id.*

Like retail space in a shopping mall, the tenant's lease was only valuable if the complex was in operation for at least the term of the lease. Notably, the tenant did not allege that the complex had to remain open for as long as he wanted, as the Clinton Growers do, only that the landlord was obligated to keep the complex open for at least the term of the lease. *See id.* The court determined that the lease was only a small part (i.e., rent and space) of the parties' overall agreement ("a workshop-gallery open daily to the public"), concluding:

> The parole [sic] evidence rule only applies if the writing is intended by both parties to be the final and complete expression of their agreement and only bars evidence intended to vary such expression. *Here, it has been established that the lease agreement did not embody the entire business relationship. Furthermore, the promise made to plaintiff regarding the workshop-gallery operating on a daily basis in no way varies or contradicts anything in the lease agreement*.

Id. at 296–97 (emphasis added).

The same is not true here. The Clinton Growers' contracts govern *all aspects* of the growers' relationship with Pilgrim's Pride, rather than only a small component. (*See* Ex. J, App. 1843–51.) Further, the contracts at issue in this case are not "meaningless" without a long-term relationship with Pilgrim's Pride. (*Contra* Br. in Opp'n at 28.) The Clinton Growers received chickens from Pilgrim's Pride under their agreements, grew the chickens, and were paid for their services. And the growers still have poultry houses on their farms. More than half of the Clinton

Growers, in fact, are now growing for other integrators, including Tyson and Wayne Farms. (*See* Exs. C.1–.48, App. 1310–697; *see also* Exs. D.1–.11, App. 1698–765.)

The Clinton Growers fancifully argue that they are not trying to vary or contradict the their poultry grower agreements. (Br. in Opp'n at 23–24.) In reality, however, they are not only contradicting their contracts by eschewing the flock-to-flock term, but they are also attempting to deny Pilgrim's Pride of its right to terminate the parties' relationship based on economic necessity—a right expressly afforded to Pilgrim's Pride under the agreements. (Ex. J §§ C, D, App. 1843.) As discussed above, the Clinton Growers also seek to contradict the express merger clause contained in their agreements. (Ex. J § H(9), App. 1846.)

Finally, the Clinton Growers fail to address Debtors' argument that parol evidence is inadmissible to vary the terms of the agreements entered into by the 16 growers who rely on alleged promises made after they executed their agreements. (Br. in Supp. of Reorg. Debtors' Mot. for Partial Summ. J. on Promissory Estoppel—Parol Evidence Rule (Dkt. No. 5687) at 14–15 & n.11.) Therefore, these growers' promissory estoppel claims should also be dismissed with prejudice.[19]

G. The Clinton Growers' promissory estoppel claims are barred by the statute of frauds.

The Clinton Growers' promissory estoppel claims are barred by the statute of frauds because their claims are based on allegations of oral promises that could not be performed within

[19] (*See* Ex. A.11, Claimant's Statement of Jerry Brown, App. 134–62; Ex. A.26, Claimant's Statement of Darris & Sandra Dixon, App. 268–301; Ex. A.35, Claimant's Statement of Rodney Edwards, App. 385–404; Ex. A.37, Claimant's Statement of Angie & Brad Faulkner, App. 425–44; Ex. A.36, Claimant's Statement of Gayle & Benny Faulkner, App. 405–24; Ex. A.43, Claimant's Statement of Jerry & Beverly Golden, App. 528–34; Ex. A.46, Claimant's Statement of William Steve Hartman, App. 560–63; Ex. A.50, Claimant's Statement of Timothy Honeycutt, Jr., App. 623–27; Ex. A.54, Claimant's Statement of Scott & Deana Jones, App. 646–50; Ex. A.64, Claimant's Statement of Benny & Jane McClaren, App. 767–74; Ex. A.65, Claimant's Statement of Eric McClaren, App. 775–86; Ex. A.66, Claimant's Statement of Martha McClaren, App. 787–90; Ex. A.79, Claimant's Statement of Josh & Tara Rogers, App. 961–65; Ex. A.92, Claimant's Statement of Jerri Christy Wallace, App. 1098–106; Ex. A.93, Claimant's Statement of Mike & Sandra Wallace, App. 1107–22; and Ex. A.106, Claimant's Statement of Rodney Wyllia, App. 1252–55.)

one year. *See* Ark. Code Ann. § 4-59-101 (2010). The promises underlying the Clinton Growers' promissory estoppel claims did not contain any obligation on behalf of the growers; thus, their entering or remaining in the poultry business does not constitute performance. The Clinton Growers also do not address Debtors' arguments regarding statements made within one year of Pilgrim's Pride's announcement of its plan to idle the Clinton complex, therefore, the claims based on such statements should be dismissed with prejudice. Finally, merely asserting a claim of promissory estoppel is insufficient to remove an oral agreement from the statute of frauds. The summary judgment evidence shows that the Clinton Growers are incapable of establishing actionable promises on which they could have justifiably relied. As a result, the Clinton Growers' claims are barred by the statute of frauds.

1. The Clinton Growers' purported performance does not abrogate the statute of frauds.

The Clinton Growers argue that they completely, or at least partially, performed their part of the oral promises on which their claims are based by growing chickens for more than one year after the promises were made, and that this performance takes the alleged oral agreements out of the statute of frauds. (Br. in Opp'n at 29–33.) Without citing to any evidence, the Clinton Growers argue that they "performed" by borrowing and spending money on capital improvements and by foregoing other business opportunities. (*Id.* at 30.)

Yet the growers do not each allege that such behavior formed part of their oral agreement with Pilgrim's Pride, only that Pilgrim's Pride obligated itself to provide chickens to them for so long as they wanted them. (Br. in Opp'n at 2.) The growers who purportedly took out loans are not identified, nor are the growers who claim they forfeited other business opportunities. (*See id.*) The Clinton Growers' argument reveals that they essentially believe they entered into an oral agreement that was to be performed over an infinite number of years and was unilaterally

terminable only by them and never by Pilgrim's Pride. This absurd result is the very reason agreements that cannot be performed within one year are required to be in writing.

All of the cases cited by the Clinton Growers are distinguishable, and nearly all of them involve oral agreements related to the sale of goods or concern real property. For example, the Clinton Growers cite *Guenther v. Guenther*, 258 S.W.2d 562 (Ark. Ct. App. 1953), for the proposition that an executed (performed) contract for the sale of personal property need not be in writing. (Br. in Opp'n at 30.) But the statute of frauds was not raised as a defense in that case, and the Clinton Growers' claims are not based on the sale of personal property. *See Guenther*, 258 S.W.2d at 563.

Dolphin v. Wilson, 942 S.W.2d 815, 816–17 (Ark. 1997), *appeal after remand*, 983 S.W.2d 113 (Ark. 1998), also cited by the Clinton Growers (Br. in Opp'n at 33), involved title to real property that the plaintiff alleged the defendant promised to deed to him if he kept the property from going to auction. The court determined that "both the making of the oral contract and its performance must be proven by clear and convincing evidence," and found such evidence was lacking. *Dolphin*, at 818–20. As a result, the oral agreement was barred by the statute of frauds. *Id.*

In addition, the Clinton Growers cite *Montwood Corp. v. Hot Springs Theme Park Corp.*, 766 F.2d 359, 363 (8th Cir. 1985), for the proposition that partial performance takes an oral contract out of the statute of frauds. (Br. in Opp'n at 33). In that case, Montwood leased a roller coaster to a theme park. *Id.* at 360–61. The theme park got behind on its lease payments, and Montwood agreed to sell the roller coaster to the theme park. *Id.* After the sale, Montwood argued that the theme park still owed back rents under the lease, despite language in the bill of sale releasing continuing obligations under the lease. *Id.* The court ruled that by accepting

payment for the roller coaster, Montwood could not argue that the written bill of sale was unenforceable. *Id.* at 363. There is no similar acceptance of payment for the purchase of property at issue in the instant case. And, unlike the contracts in this case, the bill of sale in *Montwood* did not contain a merger clause. *Id.* at 362.

Similarly, an oral contract for the sale of land failed in *Pfeifer v. Raper*, 486 S.W.2d 524, 524–25 (Ark. 1972). In that case, the plaintiff failed to prove formation and performance. As a result, the court declined to remove the contract from the statute of frauds. *Id.*

The Clinton Growers' reliance on cases related to oral employment contracts is also misplaced. The Clinton Growers warranted and represented in the contracts that they are not employees, agents, partners, or representatives of Pilgrim's Pride, but rather independent contractors. (Ex. J §§ A, E(1), App. 1843.) In addition, the cases cited by the Clinton Growers merely reveal that an employee must be paid for work actually performed—a premise that is not surprising. *See Brace v. Oil Fields Corp.*, 293 S.W. 1041 (Ark. 1927) (employee alleged five-year contract, worked for one full year, and received one full year of pay and benefits—not five years of pay and benefits). It is undisputed that the Clinton Growers were paid for the services they rendered under their contracts with Pilgrim's Pride.

In *Hoffius v. Maestri*, 786 S.W.2d 846, 850 (Ark. Ct. App. 1990), also cited by the Clinton Growers (Br. in Opp'n at 35), a written memorandum reflecting certain terms of employment was incomplete and did not satisfy the statute of frauds requirement. But the former employee tendered a detailed affidavit regarding the terms of his oral employment agreement that was sufficient for the court to reverse summary judgment and allow the case to be decided by the trier of fact. *Hoffius*, 786 S.W.2d at 851. The detailed affidavit included information about the employee's contract negotiations, his annual salary over three years, plus an annual

guaranteed bonus and guaranteed stock, life insurance details, a car allowance, and vacation time. *Id.* The Clinton Growers' allegations in this case are not nearly as detailed as the employee's allegations in *Hoffius*. And the Clinton Growers have failed to offer any rebuttal evidence to support their arguments, much less an affidavit containing detailed testimony as in *Hoffius.*

Likewise, the Clinton Growers' summary judgment evidence is strikingly lacking in comparison to the clear and convincing evidence offered in *Cobb v. Leyendecker*, 200 S.W.3d 924 (Ark. Ct. App. 2005), another case cited in the Clinton Growers' opposition. (Br. in Opp'n at 33.) There, an oral contract to repay a $25,000 loan was established through: (1) a cashier's check payable to the defendant; (2) bank records showing payments in the amount of $400 per month, consistent with the alleged oral agreement; and (3) the defendant's admission that he used the loaned funds to purchase vehicle. *Cobb*, 200 S.W.3d at 925–27. Similarly, the court in *Talley v. Blackmon*, 609 S.W.2d 113, 115 (Ark. Ct. App. 1980), found that it was "clear from a review of the evidence appellants entered into an oral agreement whereby appellants loaned appellee and wife $22,000 and that appellee agreed to repay the loan at the rate of $250 per month."

While the Clinton Growers concede that clear and convincing evidence of the making and performance of an oral agreement is required to remove it from the statute of frauds (*see* Br. in Opp'n at 33), they failed to produce such evidence. The *Cobb* opinion explains:

> Clear and convincing evidence 'is evidence by a credible witness whose memory of the facts about which he testifies is distinct, whose narration of the details is exact and in due order, and whose testimony is so direct, weighty and convincing as to enable the fact-finder to come to a clear conviction, without hesitation, of the truth of the facts related.'

Cobb, 200 S.W.3d at 926 (quoting *Stewart v. Stewart*, 37 S.W.3d 667, 669 (Ark. Ct. App. 2001)). As discussed above, and in Debtors' briefs in support of their Promises MSJ and

Materiality MSJ, the Clinton Growers do not, and cannot, in good faith argue that the evidence meets this standard.

2. The Clinton Growers do not refute Debtors' arguments regarding statements made within one year of the Clinton complex idling.

As noted above, the Clinton Growers rely on growing chickens for over a year to meet the purported performance exception to the statute of frauds. However, at least 21 growers rely on promises made within a year of the idling of the Clinton complex.[20] Therefore, these growers could not have performed for the requisite year period. Consequently, their claims should be dismissed with prejudice even assuming, *arguendo*, that the Clinton Growers' "one-year performance" exception is valid (which it is not). Thus, these growers' claims should be dismissed with prejudice regardless of the Court's application of the statute of frauds to the other growers.

3. Merely asserting promissory estoppel does not allow the Clinton Growers to circumvent the statute of frauds.

The Clinton Growers argue that merely asserting a claim of promissory estoppel bars Pilgrim's Pride from relying on the statute of frauds defense. (Br. in Opp'n at 33–39.) In Arkansas, a defendant *may* be estopped from asserting the statute of frauds, but the cases

[20] These growers are: Jerry Brown, July 2008 (Ex. A.12, App. 135 at No. 7(c)); Leonard & Stephanie Busby, 2008 (Ex. A.15, App. 179 at No. 7(c)); Wayne Cole, 2008 (Ex. A.19, App. 211 at No. 7(c), Statement No. 4); Rodney Edwards, June and July 2008 (Ex. A.35, App. 387 at No. 7(c), Statement Nos. 1 and 2); Randy Findley, 2008 (Ex. A.38, App. 447 at No. 7(c)); Chris Flory, March 18, May 22, and August 1, 2008 (Ex. A.39, App. 451 at No. 7(c)); Darrell Flory, March 18, May 22 and August 1, 2008 (Ex. A. 40, App. 477–78 at Statement Nos. 2–4); John Gibson, "through the termination" (Ex. A.42, App. 506 at No. 7(c)); Linda Ann Golden, March 2008 (Ex. A.44, App. 540 at No. 7, Statement No. 1); Timothy Honeycutt, Jr., August 2008 (Ex. A.50, App. 625 at No. 7(c)); Scott Jones, around June 2008 (Ex. A.54, App. 649 at No.6); Eulina and Doug Lay, spring 2008 (Ex. A.58, App. 681 at No. 7); Benny McClaren, winter 2007 (Ex. A.64, App. 770 at No. 7, Statement No. 2); Eric McClaren, winter 2007 and summer 2008 (Ex. A.65, App. 781 at No. 7, Statement Nos. 3–4); Martha McClaren, summer 2008 (Ex. A.66, App. 789 at No. 7(c)); Michael McNabb, through 2008 (Ex. A.67, App. 793 at No. 7(c)); James Miller, November 2007 (Ex. A.69, App. 802 at No. 7(c)); Mary R. Miller (Becky), to 2008 (Ex. A.71, App. 842 at No. 6(b)); Jerri Wallace, Spring 2008 (Ex. A.92, App. 1099 at No. 7(c)); Billy & Charlotte Wilchman, 2008 (Ex. A.97, App. 1174 at No. 7(c)); and David & Belinda Williams, around November 2007 (Ex. A.100, App. 1209 at No.3, App. 1210 at No. 7(c)).

applying this exception invariably involve far more certain promises than those alleged by the Clinton Growers in this case. *See, e.g., Hoffius*, 786 S.W.2d at 850.

For example, in *Ralston Purina Co. v. McCollum*, 611 S.W.2d 201, 202–03 (Ark. Ct. App. 1981), which is a sale of goods case cited by the Clinton Growers (Br. in Opp'n at 34), the court found that a seller of silage was justified in relying on a buyer's promise to purchase all of the silage where: (1) a third-party's testimony corroborated the seller's testimony concerning the agreement; and (2) the seller and buyer had operated under similar circumstances (an oral agreement followed by buyer sending a written contract, sometimes months later) for the previous six years. Based on this evidence, the buyer was estopped from asserting the statute of frauds. *Ralston Purina Co*., 611 S.W.2d 201 at 203.

The Clinton Growers' conclusory statement that the facts in *Ralston Purina* are similar to the facts in this case is not supported by the evidence. The Clinton Growers cite to no corroborating third-party testimony, and they ignore the critical fact that in *Ralston Purina* a new agreement was negotiated on an annual basis. *Id.* at 202–03. Unlike the Clinton Growers, the seller in *Ralston Purina* did not allege that the buyer entered into a single long-term agreement to buy the seller's harvest every year, for so long as the seller wanted.

Similarly, *Taylor v. Eagle Ridge Developers, LLC*, 29 S.W.3d 767 (Ark. Ct. App. 2000), involved an oral modification of a written agreement related to real property. The buyer agreed to postpone exercising its option to purchase the property in reliance on (1) the seller's representations that more time was needed to move out and (2) the seller's agreement to respond to the buyer's proposed contract extension. *Id.* In contrast to its promises, the seller did not respond to the buyer's proposal and then refused to sell. *Id.* In that case, multiple written agreements "clearly evidenced" the seller's intent to sell the property and the buyer's intent to

buy it. *Id.* at 770. The court determined that because the buyer's *sole* reason for not executing the sale was the seller's representations, the seller was estopped from asserting a statute of frauds defense. *Id.* at 771.

With regard to the Clinton Growers' dismissive analysis of the requirement that a promisee act *solely* based on the purported promise, the Clinton Growers cite no authority to support their argument that the word "solely" is nothing more than "throw away" language from the American Jurisprudence treatise. (*See* Br. in Opp'n at 38–39.) In fact, the court in *Eagle Ridge Developers*, 29 S.W.3d at 770–71, included the "solely" requirement without citing to a treatise when the buyer's actions were directly tied to the seller's representations.

"Solely" is also used in Williston on Contracts, quoted by the Clinton Growers. (Br. in Opp'n at 33 (quoting 10 Richard A. Lord, Williston on Contracts § 27:16 (4th ed.).) And contrary to the Clinton Growers' argument, the Arkansas courts' repeated use of the term[21] tends to reinforce its importance rather than to render it meaningless. (*Cf.* Br. in Opp'n at 39.) Moreover, despite the Clinton Growers' representation that "solely" is not used in any other jurisdiction, it has been used by state courts in at least five states.[22]

The Clinton Growers' promissory estoppel claims are barred by the statute of frauds because the promises on which they claim they relied could not be performed within one year and were not reduced to writing. Any claimed performance by the Clinton Growers does not permit them to avoid the statute of frauds. The Clinton Growers do not refute Debtors'

[21] *See, e.g., Waterall v. Waterall*, 155 S.W.3d 30, 33 (Ark. Ct. App. 2004) ("Where one has acted to his detriment solely in reliance on an oral agreement, estoppel may be raised to defeat the defense of the statute of frauds.") (citing *Country Corner Food & Drug, Inc. v. Reiss*, 737 S.W.2d 672 (Ark. Ct. App. 1987)).

[22] *See Waugh v. Lennard*, 211 P.2d 806, 814 (Ariz. 1949); *Merrifield v. Troutner*, 269 N.W.2d 136, 137 (Iowa 1978) (citing *Miller v. Lawlor*, 66 N.W.2d 267, 273 (Iowa 1954)); *Martin v. E. Lansing Sch. Dist.*, 483 N.W.2d 656, 662 (Mich. Ct. App. 1992) (citing *Pursell v. Wolverine-Pentronix, Inc.*, 205 N.W.2d 504 (Mich. Ct. App. 1973)); *Sanders v. Dantzler*, 375 So.2d 774, 775 (Miss. 1979) (quoting 73 Am. Jur. 2d, *Statute of Frauds*, § 565 at 203)); *Klinke v. Famous Recipe Fried Chicken*, 600 P.2d 1034, 1040 (Wash. Ct. App. 1979), *aff'd*, 616 P.2d 644 (Wash. 1980) (citing *Oxley v. Ralston Purina Co.*, 349 F.2d 328, 335 (6th Cir. 1965) (quoting 3 Williston on Contracts § 533A)); *see also Merci Corp. v. World Int'l Corp.*, 2005 MP 10, 32 (N. Mar. I. 2005).

arguments regarding promises allegedly made within one year of the Clinton complex's idling, thus summary judgment is appropriate on these claims.

Finally, merely asserting a promissory estoppel claim does not automatically remove the Clinton Growers' claims from the statute of frauds, and the summary judgment evidence conclusively demonstrates that the promises the Clinton Growers claim they relied on did not form the sole basis of the Clinton Growers' decision to enter into or remain in the poultry business. Because the promises at issue are not performable within one year and were not reduced to writing, and because no exception to the statute of frauds applies, the Clinton Growers' promissory estoppel claims should be dismissed with prejudice.

III. Conclusion

The Clinton Growers entered into written poultry grower agreements with Pilgrim's Pride that govern the entirety of the parties' relationship and concern the same subject matter raised by the Clinton Growers' promissory estoppel claims. Because promissory estoppel is an alternative theory that is not available when an otherwise enforceable contract exists, the Clinton Growers' promissory estoppel claims fail as a matter of law. In addition to being barred by contract, the Clinton Growers' promissory estoppel claims are precluded by the absence of actionable promises on which the Clinton Growers could justifiably rely, the statute of limitations, the merger doctrine, the parol evidence rule, and the statute of frauds.

For these reasons, and the reasons stated in Debtors' briefs in support of their motions for partial summary judgment on the Clinton Growers' promissory estoppel claims (Dkt. Nos. 5687, 5689, 5691, 5693, 5695, and 5697), Debtors respectfully request that the Court grant their motions for partial summary judgment on promissory estoppel (Dkt. Nos. 5686, 5688, 5690, 5692, 5694, and 5696), order that the Clinton Growers take nothing on their promissory estoppel claims, disallow and/or dismiss the Clinton Growers' proofs of claim based on their promissory

estoppel claims with prejudice, and grant Debtors such other and further relief to which they may be justly entitled.

Notice of this consolidated reply in support of Debtors' motions for partial summary judgment on promissory estoppel has been provided to: (1) the U.S. Trustee; (2) the names and addresses where notices should be sent as listed on the proofs of claim; and (3) the Master Service List filed with this Court. No other or further notice need be provided.

Dated: September 13, 2010
Dallas, Texas

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