

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE GENETICALLY MODIFIED
RICE LITIGATION

4:06 MD 1811 CDP

TRIAL COMMENCING
May and July, 2011

**ARKANSAS PLAINTIFFS' MOTION TO EXCLUDE
DESIGNATION, REPORT AND TESTIMONY OF ALAN MCHUGHEN**

Plaintiffs Rudy Hufford and Cheryl Hufford (partners of Hufford Farms); Ronald Catt (as husband and wife with Judy Catt); Gary Richey, Jeramy Richey, Tina Richey and Vicky Richey, members of Richey Farms, joint venture successor to R&R Farms Joint Venture; Mark Williams and Pamela G. Williams (individually and as partners of Williams Farms G.P.); Guy Brinkley; Aylene Williams individually and as trustee for the J.L. Williams Family Trust; Frank Binkley, Lynn Gene, Inc. Eifling Investment Co., Sam Don, Inc., Rebecca Lynne, Inc., Clayton Lee, Inc., Don L. Eifling, Inc., and D. Lynn Eifling, Inc. (partners of Don Eifling & Son), Jeffrey Keeter, Robert J. Venable and Robbin V. Tuller (partners of RJR Farms, Keeter Farms, Inc. and P&K, Inc.), Dennis Brown, Sherry Brown and Coty Brown (partners of Legacy Farms Partnership) (collectively, the "Arkansas Plaintiffs"), hereby move, pursuant to Fed.R.Evid. 702, 703, 403 and the principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to exclude all expert reports and testimony of Defendants' expert Alan McHughen. As grounds for this motion, the Arkansas Plaintiffs state as follows:

1. Alan McHughen (“McHughen”) proposes to testify on the meaning and intent of the regulations at 7 C.F.R. Part 340. This and other opinions he proffers constitute inadmissible legal conclusions, which further are lacking in foundation and reliability, and also contradicted by the facts of this case.

2. McHughen’s legal conclusions also are legally wrong. Because his opinions concerning Bayer’s compliance with applicable regulations rely upon his own, incorrect interpretation, they too are inadmissible. *See Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp.2d 794; 806 (N.D. Ill. 2005) (“Expert opinions that are contrary to law are inadmissible” as they “cannot be said to be scientific, to be reliable, or to be helpful to the trier of fact”); *United States v. Wintermute*, 443 F.3d 993, 1001 (8th Cir. 2006) (by misconstruing legal burden, expert’s testimony was irrelevant and would “confuse rather than assist the jury”); *Southard v. United Regional Health Care System*, 2008 WL 4489692 at *2 (N.D. Tex. Aug. 5, 2008) (expert opinion based on erroneous legal premise excluded).

3. McHughen relies upon, and proposes to recite, discussions with current and former APHIS employees reflecting merely personal opinions that carry no weight and are otherwise inadmissible hearsay.

4. McHughen relies upon, and proposes to testify about, vague and unidentified discussions without source or reliability as required by Rules 702 and 703.

5. McHughen relies upon, and proposes to testify about, various academic and research studies and programs with no bearing on this case.

6. McHughen relies upon, and proposes to testify about, the USDA Report of LibertyLink Rice Incidents, which is irrelevant to whether a violation of 7 C.F.R. Part 340 occurred and is highly prejudicial.

7. McHughen proposes to define “contamination” without source or authority, contrary to the evidence, and in a way such to inflame or mislead the jury.

8. McHughen proposes to testify that certain levels of impurity are unavoidable and acceptable in various contexts unrelated to this case. This testimony is not “relevant to the task at hand” as required by *Daubert* and Rule 702. See *J.B. Hunt Transp., Inc. v. General Motors Corp.*, 243 F.3d 441, 444 (8th Cir. 2001); *Wheeler Pittsburg Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 714-15 (8th Cir. 2001); *Ferguson v. Bombardier Servs., Corp.*, 244 Fed. Appx. 944, 949 (11th Cir. 2007). This testimony not only is wholly irrelevant, but lacks foundation, lacks reliability, conflicts with the facts, and is highly misleading and otherwise prejudicial.

9. McHughen proposes to testify that growers are responsible to prevent contamination in contexts other than the one relevant to this case. He admits that this testimony does not apply to the facts of this case. It also lacks foundation, lacks reliability, and is highly misleading and otherwise prejudicial.

10. McHughen proffers a host of general observations about regulatory practices regarding confined field trials that lack foundation, are irrelevant, and highly prejudicial.

11. McHughen proffers opinions regarding who should be liable for breaches of confinement under circumstances not involved in this case. This testimony constitutes inadmissible legal opinion, is irrelevant, lacks foundation or reliability, is highly misleading and otherwise prejudicial.

12. McHughen opines that the losses claimed by the plaintiffs were not attributable to any violation of 7 CFR 340. This constitutes an inadmissible legal opinion that is otherwise irrelevant, unreliable, and contrary to the facts of this case.

13. McHughen opines that Bayer met “industry standards” in conducting its regulated field trials of LL601 and LL604. His opinions and proposed testimony incorporate incorrect legal conclusions lack foundation, and do not actually identify any actual applicable custom or practice.

14. McHughen proposes generalized testimony regarding University research methods and standards with no showing that such were followed by the Universities that actually worked with LLRICE and as such, is irrelevant, lacking in foundation, highly misleading and otherwise prejudicial.

15. McHughen proposes to opine that Bayer was not negligent and to criticize Plaintiffs’ experts. His testimony “merely comments on the evidence or lack thereof” and proposes to make credibility assessments, both of which invade the province of the jury. *See, e.g., United States v. W.R. Grace*, 455 F. Supp.2d 1156, 1169 (D. Mont. 2006); *Brill v. Marandola*, 540 F. Supp.2d 563, 570 (E.D. Pa. 2008). McHughen also did not review information sufficient to form a belief in regard to the subjects on which he opines, which lacks foundation, lacks reliability, conflicts with the facts of this case, is irrelevant, highly misleading and otherwise prejudicial.

16. McHughen offers photographs of various offices, facilities and equipment he observed at the LSU Rice Research Station in April, 2009, testimony that such compare favorably with other university cooperators, and that he “find[s] no evidence that improper handling or other negligence on the part of LSU contributed in any way to the LL601 AP in Cheniere rice or the LL604 AP in CL131.” McHughen does not know whether the pictures, equipment, or conditions at LSU in 2009 are representative of equipment or conditions as they existed during the relevant time frame and as such, the pictures and his testimony in regard to such are inadmissible. McHughen otherwise lacks sufficient information to form a belief as to

the conditions as they existed at LSU during the relevant time frame. McHughen's opinions "regarding the overall reasonableness of the procedures" at LSU is not a fact-based opinion as required under Rule 702 and must be excluded.

17. McHughen proposes various opinions regarding the "irrationality" of the EU's opposition to genetically modified rice, as well as testimony regarding supposed discussion to determine tolerance levels. McHughen's characterizations have no foundation, are utterly irrelevant, conflict with the facts of this case, are highly misleading and otherwise prejudicial.

18. McHughen proposes to testify that Bayer had no reason to know that the escape of LL601/LL604 would cause economic harm. He has no foundation for this testimony, which conflicts with the actual evidence, is irrelevant, is highly misleading and otherwise prejudicial.

19. McHughen proposes to testify that risk of market disruption is not (and should not) be considered in regard to regulation of GM crops. This constitutes an inadmissible legal conclusion, lacks foundation and reliability, and is wholly irrelevant to the issues in this case. It also is highly misleading and otherwise prejudicial.

20. McHughen proposes to testify about testing methods, sampling, and testing results, to opine that testing of conventional varieties grown in proximity to LL601/LL604 was not feasible and/or meaningful, and to criticize evidence that LL601 was found in varieties other than Cheniere. McHughen does not demonstrate expertise on these subjects and is not qualified to testify thereon. His opinions otherwise lack foundation and are not reliable.

21. McHughen proposes to opine upon the source, time, and place of the entry of LL601 into Cheniere and upon the entry of LL604 into CL 131. McHughen does not have expertise sufficient to qualify him as an expert on these subjects. His opinions also lack foundation and reliability.

WHEREFORE, Plaintiffs pray that the Court exclude the designation, testimony and report of Alan McHughen in their entirety.

Respectfully submitted,

GRAY, RITTER & GRAHAM, P.C.

By: /s/ Don M. Downing
Don M. Downing, Bar # 41786
Gretchen Garrison, Bar # 3189
Jason D. Sapp, Bar #5218238
701 Market Street, Suite 800
St. Louis, Missouri 63101-1826
Tel: (314) 241-5620
Fax: (314) 241-4140
ddowning@grgpc.com
ggarrison@grgpc.com
jsapp@grgpc.com

Plaintiffs' Designated Co-Lead and Liaison Counsel

By: /s/ Adam J. Levitt
Adam J. Levitt
Stacey T. Kelly
**WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLC**
55 West Monroe Street, Suite 1111
Chicago, Illinois 60603
Tel: (312) 984-0000
Fax: (312) 984-0001
levitt@whafh.com
skelly@whafh.com

Plaintiffs' Designated Co-Lead Counsel

Richard J. Arsenault
John Randall Whaley
Jennifer M. Hoekstra
NEBLETT BEARD & ARSENAULT, LLP
2220 Bonaventure Court, P.O. Box 1190
Alexandria, Louisiana 71309
Tel: (800) 256-1050
Fax: (318) 561-2591

Scott E. Poynter
EMERSON POYNTER LLP
500 President Clinton Avenue, Suite 305
Little Rock, Arkansas 72201
Tel: (501) 907-2555
Fax: (501) 907-2556

Stephen A. Weiss
Diogenes P. Kekatos
James A. O'Brien III
SEEGER WEISS LLP
One William Street
New York, New York 10004
Tel: (212) 584-0700
Fax: (212) 584-0799

Joe R. Whatley Jr.
Deborah Clark Weintraub
Adam P. Plant
WHATLEY DRAKE & KALLAS LLP
2001 Park Place North, Suite 1000
Birmingham, Alabama 35203
Tel: (205) 328-9576
Fax: (205) 328-9669

William B. Chaney
James L. Reed
William J. French
Michael Kelsheimer
Drew York
LOOPER REED & MCGRAW
1601 Elm Street, Suite 4600
Dallas, Texas 75201
Tel: (214) 237-6403
Fax: (214) 953-1332

Ralph E. Chapman
Sara B. Russo
CHAPMAN, LEWIS & SWAN
501 First Street
P. O. Box 428
Clarksdale, Mississippi 38614
Tel: (662) 627-4105
Fax: (662) 627-4171

Plaintiffs' Executive Committee

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this 20th day of January, 2011, electronically filed a copy of the foregoing with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the parties of record.

/s/ Don M. Downing