

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

IN RE GENETICALLY MODIFIED RICE LITIGATION)))))	4:06 MD 1811 CDP
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This filing relates to the following case:

Kennedy Rice Dryers, LLC
v. Bayer CropScience, LP

Case No. 4:07-cv-01773-CDP

**THE BAYER DEFENDANTS’ RESPONSE STATEMENT OF UNDISPUTED FACTS TO
KENNEDY RICE DRYERS’ MOTION FOR PARTIAL SUMMARY JUDGMENT
ON DEFENDANTS’ AFFIRMATIVE DEFENSE NO. 4**

Bayer CropScience LP, Bayer CropScience Holding Inc., Bayer CropScience LLC, Bayer CropScience Inc., Bayer Corporation, Bayer BioScience NV, Bayer CopScience AG, Bayer CropScience Holding SA, Bayer AG, and Stoneville Pedigreed Seed Company (the “Bayer Defendants”), submit this response Statement of Undisputed Facts to Plaintiffs’ Motion for Partial Summary Judgment on Defendants’ Affirmative Defense No. 4 filed by Kennedy Rice Dryers, LLC (“Kennedy”).

**STATEMENT OF MATERIAL FACTS DEMONSTRATING
GENUINE ISSUES OF FACT ON THE DEFENSE OF INTERVENING CAUSE**

1. Kennedy claims that it was able to dry less rice because rice farmers in Louisiana planted less rice in 2007 and 2008. Ex. A, Sept. 29, 2009 Report of Dr. Merrill Bateman at 69-90.

2. Any decline in acreage planted, however, has to do with the independent decisions of rice farmers based on what they deem economically advantageous to plant. Ex. B, Apr. 23, 2010 Report of Quentin Mimms at 12-13.

3. Farmers' planting decisions in 2007-2008 depend on a number of factors that are independent of LLRICE, including fuel costs, fertilizer costs, the price of wheat, the skyrocketing price of corn due to ethanol, and residual effects of saltwater from hurricanes on the fertility of farmland. *Id.* at 12-16.

4. The USDA, after an extensive investigation involving over 8500 staff hours, did not charge the Bayer Defendants with any violation of federal regulations and could not state the definitive cause of the adventitious presence. *See* Ex. 7,¹ U.S. Dep't of Agric. Report of LibertyLink Rice Incidents ("USDA Report") 1-2.

5. Kennedy's own experts cannot state beyond terms of probability and possibility the source of the adventitious presence. *See* Ex. 54, Expert Report of Neil Rutger ("Rutger Report") 2-3; *See* Ex. 88, Rutger Dep. 150:18-151:24, 163:23-164:17, Apr. 28, 2009.

6. Dr. Steve Linscombe is one of the foremost rice breeders in the United States, working at the preeminent research institution on rice breeding. *See* Ex. 88, Rutger Dep. 52:22-54:1; Ex. 53, Expert Report of Alan McHughen ("McHughen Report") 60; Ex. 79, Linscombe Dep. 367:4-367:20, 371:14-372:4, Mar. 25, 2009. He cannot determine how LLRICE came to be present in conventional rice. *See* Ex. 78, Linscombe Dep. 117:17-117:24, Mar. 24, 2009; Ex. 79, Linscombe Dep. 623:22-624:11.

7. Dr. Linscombe's seed breeding activities were entirely separate from any field trials that he was conducting for any company, including the Bayer Defendants. *See* Ex. 78, Linscombe Dep. 114:9-116:4. In fact, Dr. Linscombe testified that Louisiana State University ("LSU") entered into a Material Transfer agreement with Bayer in order to "protect our variety",

¹ Exhibits 1 through 34 are attached to the August 17, 2009 Affidavit of John M. Hughes, D.E. 1439. Exhibits 35 through 111 are attached to the September 10, 2009 Affidavit of John M. Hughes, D.E. 1508. For clarity, exhibits attached to this motion are denominated with letters.

and further testified if Bayer had commercialized a variety of rice that was based on a transformation of Cocodrie, LSU may have been entitled to royalties. *See id.* at 275:6-276:5.

8. LL601 was introduced into the seed supply in the 2003 Cheniere Foundation Seed created by Dr. Linscombe at LSU, likely arising from breeding activities in 2001. *See* Ex. 53, McHughen Report 43; Ex. 72, Halsey Dep. 181:18-182:6; Ex. 7, USDA Report 4.

9. Seed growers then multiplied the 2003 Foundation seed without testing for the presence of GMOs. *See* Ex. 70, Garrett Dep. 165:12-165:24, Mar. 27, 2009.

10. Seed dealers then sold seed to farmers and millers, who moved rice towards ultimate retail sale, all without testing for GM content. *See* Ex. 87, Ouzts Dep. 475:18-476:6, Feb. 18, 2009; Ex. 71, Gingras Dep. 21:6-21:17, Dec. 17, 2008.

11. Moreover, Riceland discovered the commingling in January 2006, months before any rice seed was planted for the 2006 rice crop, but Riceland did not inform Bayer of its discovery until June 2006, after all 2006 rice was planted. Ex. 71, Gingras Dep. at 212:22-213:1

12. The source of the trace amount of LLRICE discovered in CL131 is even more uncertain. Plaintiffs' expert Dr. Rutger states that he "can't even speculate" on the source of LLRICE in CL131. *See* Ex. 88, Rutger Dep. 131:22-132:4.

13. Kennedy never served any discovery on the Bayer Defendants seeking the basis for the defenses asserted in response to Kennedy's complaint.

14. Based on the foregoing, material issues of fact exist as to whether an act of a third party was an intervening cause of plaintiffs' claimed injuries and, therefore, plaintiffs are not entitled to summary judgment on Defendants' Affirmative Defense No. 4.

Dated: July 19, 2011

Respectfully submitted,

/s/ John M. Hughes

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

/s/ John M. Hughes

John M. Hughes