

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

IN RE GENETICALLY MODIFIED RICE
LITIGATION

)
) 4:06 MD 1811 CDP
)
) TRIAL COMMENCING
) JANUARY 18, 2011

**THE BAYER DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION IN LIMINE TO
EXCLUDE EVIDENCE OF OR REFERENCE TO SEVERAL TOPICS**

INTRODUCTION

With their motion *in limine* to exclude testimony and evidence of “several topics,” plaintiffs seek a preemptive strike of multiple categories of evidence, many of which the Bayer Defendants have no intention of offering and others of which the Court has made clear in previous Bellwether Trials were relevant and admissible. Plaintiffs have offered no persuasive argument why any of these rulings should differ in this case.¹ Plaintiffs have added one new request that the Court exclude evidence of Dr. Linscombe’s reputation as a rice breeder, which should be denied. Dr. Linscombe’s reputation and experience as a rice breeder is not character evidence as plaintiffs suggest. This evidence is directly relevant to the reasonableness of the Bayer Defendants’ decision at the time to use LSU as a cooperator and is not otherwise excludable.

¹ The citations to many of the prior rulings here come from the First Bellwether Trial, but the Court for the Second Bellwether Trial made clear that “[t]he rulings [were] the same as they were in the first trial.” Ex. A, Second Bellwether Pretrial Conf. Tr. 51:25-52:1, Jan. 7, 2010; *see also* Ex. B, Third Bellwether Pretrial Conf. Tr. 96:6-104:7, June 16, 2010.

A. Any Comment, Inference, Evidence, Testimony or Document Regarding Farmers Taking Risks or Being Gamblers, Investors, and Speculators. Pls. Mot. 3.²

The Court previously made clear that the Bayer Defendants could present evidence that “there are many risks inherent in farming,” Ex. C, First Bellwether Pretrial Conf. Tr. 143:8-11, Oct. 29, 2009. The Bayer Defendants request the same ruling here. Indeed, evidence concerning these elements of uncertainty is highly relevant to plaintiffs’ claims for future damages under Louisiana law. *See Szcepanik v. First S. Trust Co.*, 883 S.W.2d 648, 649 (Tex. 1994) (holding that there was no evidentiary basis for testimony on lost profits and counter-defendant was entitled to instructed verdict on damages).

B. Any Comment, Inference, Evidence, Testimony or Document Regarding Any Settlement Discussions in This Case or the MDL Litigation Generally. Pls. Mot. 3.

The Bayer Defendants do not intend to offer evidence or make any argument on this topic, and the Court noted the agreement on this category of evidence in the prior trials. Ex. C, First Bellwether Pretrial Conf. Tr. 143:12-14. This aspect of plaintiffs’ motion should thus be denied as moot.

C. Any Comment, Inference, Evidence, Testimony or Document Regarding How, When or Under What Circumstances Plaintiffs Employed an Attorney. Pls. Mot. 3.

The Bayer Defendants do not intend to offer evidence or make any argument on this topic. This aspect of plaintiffs’ motion should thus be denied as moot.

² Paragraphs lettered based upon Plaintiffs’ Motion in Limine to Exclude Evidence of or Reference to Several Topics, D.E. 3767, Dec. 21, 2010.

D. Any Comment, Inference, Evidence, Testimony or Document Suggesting that if Defendants Must Pay a Judgment Entered in this Case, that Defendants May Have Limited Policy Limits or Cash, or the Effect or Results of Such Judgment Upon the Insurance Rates, Premiums, Finances or Ability of Defendants to Compete in the Marketplace. Pls. Mot. 3.

The Bayer Defendants do not intend to offer evidence or make any argument on this topic during this trial.

E. Any comment, inference, evidence, testimony or document tending to suggest to the jury that an award of punitive damages in this case is unconstitutional, illegal, or not supported by the current state of the law. Pls. Mot. 3

The Court has already denied plaintiffs' request that the Court refrain from bifurcating the trial. Putting aside that this topic of plaintiffs' motion is therefore premature, the Bayer Defendants do not intend to offer evidence or make any argument on this topic during the liability phase of this trial. The Bayer Defendants of course have the right to argue in connection with any punitive damages phase that the evidence in this case does not satisfy the requirements for punitive damages under the applicable law as provided by the Court.

F. Any Comment, Inference, Evidence, Testimony or Document Mentioning Any Purported "Litigation Crisis," "Lawsuit Crisis," "Lawsuit Abuse" or Similar Words. Pls. Mot. 3-4.

The Bayer Defendants do not intend to make any such references. This aspect of plaintiffs' motion should thus be denied as moot.

G. Any Comment, Inference, Evidence, Testimony or Document That Plaintiffs' Attorneys and Their Law Firms Primarily Represent Plaintiffs in Lawsuits or Specialize in Injury/Product Liability/Mass Tort/Class Action Litigation. Pls. Mot. 4.

The parties have agreed that they would not refer to opposing counsel's legal specialization, and the Court ruled that neither side should. Ex. C, First Bellwether Pretrial Conf. Tr. 144:12-18. The Bayer Defendants have no objection to an identical ruling in this trial.

H. Any Comment, Inference, Evidence, Testimony or Document Regarding Plaintiffs' Fee Arrangement and Who is Paying Expenses or is Responsible for Expenses in Connection with This Litigation. Pls. Mot. 4.

The parties have agreed in the past that neither side would comment on the source of funding for the litigation, and the Court has ruled accordingly. Ex. C, First Bellwether Pretrial Conf. Tr. 144:18-22. The Bayer Defendants have no objection to that ruling in this trial.

I. Any Comment, Inference, Evidence, Testimony or Document That Any Defendant Donated Money to Any Charity, How Much Money is Donated, Which Charities are Supported By These Corporations or Other Charitable or Philanthropic Activities of Any Defendants. Pls. Mot. 4.

The Bayer Defendants do not intend to offer evidence or make any argument on this topic. This aspect of plaintiffs' motion should thus be denied as moot.

J. Any Comment, Inference, Evidence, Testimony or Document that Any Defendant Sells, Manufactures, Markets or Develops Other Goods, Products or Pharmaceutical Medications Which are Used and Relied Upon by the American Public. For Example, Defendants Should Not Be Permitted to Tell the Jury That If They Opened Their Medicine Cabinet at Home, They Would Likely Find More Than a Dozen Products or Medications Manufactured or Sold by Defendants. Pls. Mot. 4.

The Court previously made clear that it was permissible for the Bayer Defendants to provide background about themselves, such as to “[i]ntroduce the company Bayer, point out that it has a pharmaceuticals division that many people have heard of, talk about this company and its different businesses, where it’s located, where its employees are, . . . who it’s affiliated with around the world, and what those businesses are engaged in pursuing.” Ex. C, First Bellwether Pretrial Conf. Tr. 145:17-146:2. The Bayer Defendants request the same ruling for this coming trial. Such background can be helpful to the jury in understanding who the parties to the litigation are. Such information is not unfairly prejudicial to plaintiffs, and precluding the Bayer Defendants from introducing such evidence would be prejudicial to them in light of the information on corporate structure that may be introduced by the plaintiffs.

K. Any Comment, Inference, Evidence, Testimony or Document that the Plaintiffs Filed this Lawsuit “for The Money” and/or Similar Comments, such as Comparing the Plaintiffs’ Right to Recover to the Lottery, or from Mentioning, in Any Way, that Plaintiffs Will Receive a Windfall. Pls. Mot. 5.

The Court made clear that it was proper bias examination to point out that plaintiffs “stand to gain by this lawsuit.” Ex. C, First Bellwether Pretrial Conf. Tr. 146:9-147:1. It is likewise appropriate for the Bayer Defendants to point out any overreaching by plaintiffs in their liability and/or damages claims and the extent to which such claims would result not in compensation for injuries actually suffered but in unjust windfalls.

L. Any Comment, Inference, Evidence, Testimony or Document Regarding Dr. Steve Linscombe’s Conversation(s) with Dr. Jim Oard About Any Test Results Obtained by Dr. Oard of Cheniere Rice Samples Which Dr. Linscombe Opines is Suggestive of Cross-Pollination. Pls. Mot. 5.

During the First Bellwether Trial, the Court granted plaintiffs motion with regard to Dr. Linscombe’s conversations with Dr. Oard “as an *in limine* matter,” but said that the parties should approach the Court when they wanted to present such evidence. Ex. C, First Bellwether Pretrial Conf. Tr. 150:16-21. The Bayer Defendants have no objection to the Court making a similar *in limine* ruling, but reserve the right to approach the Court if proper context has shown its admissibility under Fed. R. Evid. 703.

M. Any Comment, Inference, Evidence, Testimony or Document Regarding “Farmers’ Desire” for Liberty Link Rice or the Potential “Benefit to Farmers” of Liberty Link Rice as an Agent to Control Red Rice. Pls. Mot. 6.

At the first trial, the Court denied this portion of the motion as an *in limine* matter, subject to later questions on the admissibility of individual pieces of evidence under the hearsay rules. See Ex. C, First Bellwether Pretrial Conf. Tr. 155:5-9. The Bayer Defendants request the same ruling once again. Such evidence is clearly relevant background to explain why the defendants were engaged in the field trials at issue in the case. It also bears on the

reasonableness of the Bayer Defendants' conduct, which is relevant to the issues of negligence, private nuisance, and punitive damages.

N. Any Comment, Inference, Evidence, Testimony or Document Indicating That Genetically Modified Technology Is Good for the World or Will Feed the World or Will End Starvation. Pls. Mot. 6.

The Court previously denied this aspect of plaintiffs' motion. *See* Ex. C, First Bellwether Pretrial Conf. Tr. 157:11-14. The Bayer Defendants request the same ruling. Like evidence regarding the benefits of the specific technology at issue, such evidence is relevant background to explain why the defendants were engaged in the development of genetically engineered crops. It also bears on the reasonableness of the Bayer Defendants' conduct, which is relevant to the issues of negligence and private nuisance.

O. Any Comment, Inference, Evidence, Testimony or Document Regarding Whether or Not Liberty Link Rice 601 or 604 is Safe for Human Consumption. Or in the Alternative, any Comment, Inference, Evidence, Testimony or Document That LL604 is Safe for Human Consumption. Pls. Mot. 6.

The Court has previously denied this portion of plaintiffs' motion, making clear that testimony regarding whether LLRICE is "safe for human consumption" is relevant and admissible. *See* Ex. C, First Bellwether Pretrial Conf. Tr. 157:15-17. The Court should do so again. Evidence regarding the safety of LLRICE is undoubtedly relevant to the reasonableness of the Bayer Defendants' conduct, which again is one of the principal issues in the case. Such evidence is also necessary, as the Court recognized, to prevent juror confusion because whether LLRICE is safe "is going to be the first question in every juror's mind, and to not put any evidence about this is misleading to the jury, and the jury needs to know the context of what we're talking about here" *Id.* at 28:1-4.

P. Any Comment, Inference, Evidence, Testimony or Document Tending To Suggest That Defendants Employ People in the Community or How Much Money they Contribute to the Farming Community or Farming in General. Pls. Mot. 6.

The Bayer Defendants do not intend to introduce evidence concerning charitable donations. But plaintiffs' motion covers many things that this Court has ruled are admissible and relevant. *See* Ex. B, Third Bellwether Pretrial Conf. Tr. 103:1-25. The fact that the Bayer Defendants' products are useful to farmers and contribute to farmers' bottom lines is relevant to the reasonableness of the Bayer Defendants' decision to develop LLRICE. Evidence of the Bayer Defendants' domestic employees is also relevant to let the jury know who the parties are and the likely effect of an award of punitive damages.

Q. Any Comment, Inference, Evidence, Testimony or Document Regarding the Bifurcated Nature of This Trial. Pls. Mot. 6.

This Court has bifurcated each of the trials in which punitive damages have been submitted to the jury. The Court denied plaintiffs' request that the Court refrain from bifurcating this trial. For the First and Second Bellwether Trials, the Court ruled that "[w]e're not going to talk about the second phase in the first phase except for the very limited inquiry [the Court would] allow on the voir dire." *See* Ex. C, First Bellwether Pretrial Conf. Tr. 157:7-10. Given the Court's ruling on bifurcation, the Bayer Defendants have no objection to a similar ruling for this trial.

R. Any Comment, Inference, Evidence, Testimony or Document Tending To Suggest or Describe That the Plaintiffs Are "Rich" or "Wealthy." Pls. Mot. 7.

In the Third Bellwether Trial, this Court ruled that "plaintiffs' financial condition is going to be an issue in this case." Ex. B, Third Bellwether Pretrial Conf. Tr. 104:8-19. The Bayer Defendants request the same ruling.

The Bayer Defendants do not intend to directly comment on plaintiffs' financial status *per se*. But plaintiffs' counsel in prior trials have repeatedly referred to each farming group as a "family farming operation"—to give the inference that these plaintiffs are small time farmers that have been devastated by the Bayer Defendants' actions. *See, e.g.*, Ex. D, First Bellwether Trial Tr. vol. 11B, 24:17-22, Nov. 17, 2009; Ex. E, Second Bellwether Trial vol. 9B, 17:1-5, Jan. 22, 2010 (Q. "Mr. Penn, is there any doubt in your mind that the Penn family farming operation, the three entities we've been talking about, lost a lot of money as a result of this contamination? A. There's no doubt in my mind."). Depending on the evidence and argument offered by the plaintiffs at trial, evidence of the size of plaintiffs' operations may be relevant and necessary to rebut this prejudicial and false inference.

S. Any Reference to the Multidistrict Litigation or Attempt at Class Certification or that Numerous Other Cases Have Been Filed. Pls. Mot. 7.

Certain witnesses who may testify also have their own suits pending against the Bayer Defendants. For these witnesses, the fact that they have filed suit against the Bayer Defendants is relevant to establish bias, and this Court has stated that such evidence can be used. Ex. B, Third Bellwether Pretrial Conf. Tr. 104:23-105:6. Apart from this potential reference to other suits, the Bayer Defendants agree that no such testimony should be presented by either side.

T. Any Statements or Evidence About Plaintiff's or Plaintiff's Attorneys' Involvement In Other Litigation and In Any Correspondence to Potential Clients. Pls. Mot. 7.

The Bayer Defendants do not intend to present any correspondence to potential clients to the jury and do not intend to refer to any other litigation or claims.

U. Any Comment, Inference, Evidence, Testimony or Document Tending to Suggest to the Jury that Evidence has Been Excluded By this Court. Pls. Mot. 7.

This Court granted this motion in part but denied it in part. The Court stated that neither side should say that the Court is “not letting you see evidence” but that the presence of redacted documents would not be affected. Ex. B, Third Bellwether Pretrial Conf. Tr. 106:6-16. The Bayer Defendants have no objection to a similar ruling. The Bayer Defendants have no intention of introducing documents solely for the purpose of telling the jury that the Court has excluded certain evidence. There are, however, certain redacted documents that might suggest the existence of excluded evidence that are nonetheless admissible.

V. Any Comment, Inference, Evidence, Testimony or Document Regarding Dr. Steve Linscombe’s Reputation as a Conventional Rice Breeder. Pls. Mot. 7.

Plaintiffs’ motion to exclude evidence related to Dr. Linscombe’s reputation should be denied. At the Fourth Bellwether Trial, the Court denied a similar motion. Ex. F, Fourth Bellwether Pretrial Conf. Tr. 91:6-18, Oct. 7, 2010. The Bayer Defendants respectfully submit that the Court should issue the same ruling.

Plaintiffs in prior bellwether trials have faulted the Bayer Defendants for using cooperators, and in particular for choosing Dr. Linscombe and LSU. *See, e.g.*, Ex. G, Third Bellwether Trial Tr. vol. 16, 51:21-23, July 13, 2010 (“Bayer didn’t have to do it this way. It could have created its own facility with its own people and its own land. It chose not to do that.”) (closing argument of Mr. Downing). They have argued that Bayer chose LSU to make money by trading off of Dr. Linscombe’s conventional breeding reputation, and argued that it was not reasonable to test genetically modified rice in a location that was doing foundation seed work. *Id.* at 53:15-54:25. Evidence of Dr. Linscombe’s reputation as a highly competent rice

breeder is directly relevant to rebut these arguments and to show that the Bayer Defendants' choices were reasonable.

The evidence of Dr. Linscombe's reputation is not (as plaintiffs' would have it) related only to his experience as a conventional rice breeder. Dr. Linscombe, in addition to being the world's preeminent rice breeder, had as much experience as anyone in "working with genetically-engineered crops under the confined conditions that the USDA imposes." *See, e.g.*, Ex. H, Third Bellwether Trial Tr. vol. 10A, 43:3-5, July 2, 2010 (testimony of Dr. McHughen); *see also id.* at 44:25-45:7 (noting Dr. Linscombe's lack of a contamination event and that this "would be a consideration that Bayer or other potential partners would consider").

Nor is evidence of Dr. Linscombe's reputation and history with conventional rice breeding irrelevant to this inquiry. Indeed, as Dr. McHughen has testified, the skills and discipline necessary to make a successful conventional rice breeder bear on the decision of whether to use someone for genetically modified field trials:

Dr. Linscombe as a rice breeder, like all breeders, have to be a very particular kind of person, in particular I mean meticulous, they have to keep accurate records, they have to know the materials. The breeding program would have thousands of different genotypes, different lines, and he would have to keep an eye on those, keep accurate records. It would take several years to take a line from the initiation to the ultimate commercialization. You have to know where the seeds are year after year, how they are progressing through the system and so on. People who are sloppy are not successful at that.

Id. at 45:15-25. All of Dr. Linscombe's reputation and experience is relevant to the Bayer Defendants' perception of his ability and skill in performing regulated field trials.

Plaintiffs cite Federal Rule of Evidence 404, but the Bayer Defendants do not wish to admit evidence of Dr. Linscombe's reputation to prove "action in conformity therewith," which is the only barred use of character evidence in Rule 404. Plaintiffs themselves have put the

Bayer Defendants' decision to hire Dr. Linscombe at issue—they cannot bar evidence of the factors relevant to that decision.

Although this Court has said that Dr. Linscombe's "fame alone is not directly relevant to the physical containment of genetically modified rice," this statement came in the context of saying that Dr. Linscombe's reputation "does not diminish the basis for Dr. Van Acker's Opinion." July 20, 2010 Mem. & Order at 3, D.E. 3180. Even if Dr. Linscombe's reputation does not mean that there are legally insufficient grounds for liability, *see id.*, such evidence is still relevant to the reasonableness of Bayer's decision to use LSU and to rebut plaintiffs' claims.

Plaintiffs' claim of prejudice or confusion from this testimony is also meritless. Plaintiffs have submitted, and will again submit hours of evidence and argument to establish the proposition that genetically modified rice is different from conventional rice. They have argued that "[u]nder our laws, Bayer cannot introduce LLRICE 601 or 604 into our environment." Ex. G, Third Bellwether Trial Tr. vol. 16, 47:7-8 (closing argument of Mr. Downing). They say that "[w]ith conventional rice breeding, you can have escape, you can have off-types without causing serious consequences and the loss of an entire foreign market." *Id.* at 60:5-7. Plaintiffs do not explain how the jury could nonetheless remain confused about the differences between conventional and regulated field trials. Regardless, the reasonableness of the Bayer Defendants' decision to hire LSU is a central aspect of plaintiffs' case against the Bayer Defendants, and the probative value of this evidence outweighs any prejudice to plaintiffs.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion in Limine to Exclude Evidence of or Reference to Several Topics should be denied.

Dated: January 7, 2011

Respectfully submitted,

/s/ Stephen J. Cowen

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 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/ Stephen J. Cowen

Exhibit A

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

In Re: Genetically-Modified Rice
Litigation

No. 4:06-MD-1811

PRESENT: The Honorable Catherine D. Perry, Presiding

ATTORNEYS FOR PLAINTIFF: Don M. Downing, Gretchen Garrison,
William B. Chaney, Scott A. Powell (appearing by telephone),
Andrew York, Jason Sapp

ATTORNEYS FOR DEFENDANT: Mark E. Ferguson, Glen E. Summers,
John M. Hughes, Jameson Jones

ATTORNEY FOR SLLI: Vance Gibbs

PRETRIAL CONFERENCE

January 7, 2010

TERI HANOLD HOPWOOD, RMR, CRR
Thomas F. Eagleton Courthouse
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1 experts who will take and apply Dr. Kalaitzandonakes' work for
2 the individual sales of each of the plaintiffs. There will be
3 no confusion there. Nobody is going to say --

4 THE COURT: Those other witnesses are not going to
5 talk about these other things, this is just Dr.
6 Kalaitzandonakes.

7 MR. FERGUSON: That's correct, and he's going to
8 talk about it in this context, not by suggesting that the
9 plaintiffs ought to be affected by a calculation that came from
10 either Louisiana or Texas, or if it's not applicable, milled
11 rice prices.

12 THE COURT: Okay. We're going to take a recess, and
13 it's going to be 30 minutes. We're going to come back at ten
14 after 12, and that's what we'll do.

15 MR. POWELL: This is Scott Powell. I know my cell
16 phone had been ringing, and I apologize to the Court. My
17 doctor was trying to reach me, and I had to take that call. It
18 is on mute and it won't happen any more.

19 THE COURT: Okay. That's fine. Thank you. We're
20 going to take this recess. The question I was going to ask you
21 all is would you talk to each other about how you will refer to
22 the previous trial when you're questioning witnesses and you
23 need to refer to their prior testimony, and the way we usually
24 do it is we say, "Didn't you previously testify -- didn't you
25 testify at a previous hearing in this case," or something like

1 that. We don't talk about a previous trial. That's what we
2 have done in criminal cases when I have hung juries and we do
3 it again, we always say, "testify on a previous occasion in
4 this case," or, "at a previous hearing in this case," even
5 though it wasn't this case, but that's usually how we do it,
6 but I would just ask you all to talk about that, and then
7 that's one issue I want to talk about this afternoon, so you
8 can talk about it. We're going to be in recess for 30 minutes.

9 (A recess was taken.)

10 THE COURT: Okay, we are ready to go. Let me tell
11 you -- I'm now going to tell you the rulings on the motions in
12 limine, and this may take me an minute, but I'm going to try to
13 do this, so take notes. I'm going to do these in the order in
14 which they were docketed because that makes it easier for me.

15 So, the first one is plaintiffs' motion in limine to
16 exclude evidence, and let me back up and tell you this. The
17 clerk is going to do a minute entry that either grants or
18 denies or says these are granted in part or denied in part.
19 That will be the only order to issue. What I'm telling you
20 now, I'll tell you more than will be in the minute entry so
21 you'll know what I'm doing, but this is the ruling.

22 The first one is Document Number 2090, plaintiffs'
23 motion in limine to exclude evidence of or reference to several
24 topics and supporting memorandum. That is granted in part and
25 denied in part. The rulings are the same as they were in the

1 first trial.

2 The defendants' response to that motion was Docket
3 Number 2162, and I believe the defendants' response to the
4 motion correctly summarized all of my rulings, so that's the
5 ruling on that.

6 2091 is the next one, 2091. This is plaintiffs' motion
7 in limine to exclude portions of the USDA report, and also to
8 include any representation that the USDA found that Bayer did
9 not violate the regulations. The defendants opposed this
10 motion and argue that I should reconsider the rulings I made in
11 the earlier case, and allow either -- they want the entire
12 report, but then they also specifically wanted me to reconsider
13 a particular sentence in that report, and the APHIS report, or
14 USDA, so here is what I'm doing on that. I am granting in part
15 and denying in part the plaintiffs' motion. My rulings are
16 exactly the same as they were before, and so as you all recall,
17 I am largely granting the relief the plaintiffs asked for, but
18 there are some portions they asked me to redact that I am not
19 redacting, and I want to explain what these are.

20 First of all, the defendants asked me to reconsider the
21 admissibility of the entire report because they believe that
22 it's really important to show that, as they say, the Government
23 investigated the LLRICE release and found no evidence of any
24 such violation. I don't believe that's what the APHIS report
25 says. I believe what it says is that based on its findings

1 they will not be pursuing enforcement action, and that's a
2 different thing, and I've said that repeatedly, and I continue
3 to say it.

4 Then they asked me to reconsider one factual statement
5 in the report, and that factual statement is the sentence that
6 says investigators were able to determine that the presence of
7 LLRICE 601 was limited to the long-grain rice variety of
8 Cheniere, and the presence of LLRICE 604 was limited it the
9 long-grain variety CL 131, and so Bayer has asked me to
10 reconsider this, and I have reconsidered it, but I'm still
11 excluding it, and among the other reasons that I stated
12 previously at the other -- before the other trial in this case,
13 it's just not fair to allow this. Yes, there is a hearsay
14 exception for documents such as this, but there has to be
15 sufficient indicia of reliability for anything to be entered
16 into evidence, and in this case, I heard evidence in the first
17 trial that this statement is not true. It may be true about
18 what the investigators were able to determine, but the
19 underlying fact that it was limited to Cheniere and CL 131 may
20 be true and it may not be true. There is evidence on either
21 side. The plaintiffs would not be able to cross-examine the
22 USDA on their report about this conclusion, and I believe that
23 the jury would unfairly believe that this was an established
24 fact because the Government said it, and would not consider the
25 evidence the plaintiff has to the contrary.

1 know the rules, if there is bad weather, there are
2 circumstances where we can give jurors motel vouchers so they
3 don't have to drive back and forth, and if they are further
4 than 100 miles away, we can do that as well, but it's not
5 normal.

6 Court is in recess. I will see you all Monday morning,
7 and I will send out orders by the end of the day tomorrow on
8 those two issues that I've told you I still need to look at.

9 (A recess was taken.)

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REPORTER'S CERTIFICATE

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/S/ Teri Hanold Hopwood, RMR

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TERI HANOLD HOPWOOD, RMR

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Official Court Reporter

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Exhibit B

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

_____)
IN RE GENETICALLY MODIFIED RICE) No. 4:06-MD-1811-CDP
LITIGATION)
_____)

PRETRIAL CONFERENCE

BEFORE THE HONORABLE CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

JUNE 16, 2010

APPEARANCES:

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1 MR. SUMMERS: If you'd like, Your Honor, we could
2 file a supplemental submission on these detailed bullet
3 points.

4 THE COURT: Before he testifies, I would like you to
5 do so, both sides.

6 MS. GARRISON: I'm sorry, from us?

7 THE COURT: Well, I don't know what you want me to
8 do. Okay. Well, you say you have cited these, right, so I'll
9 go by what you have got in your response. I won't need
10 anything supplemental. And I do have another copy of the
11 report, so I will give this back to you. So I am not ruling
12 on 17. In general, I am telling you that they shouldn't
13 testify about things that are beyond the scope of the report,
14 lacking in foundation, and/or irrelevant, but I will consider
15 those specific things and give you rulings on those specific
16 things after I have had the time to study his report in more
17 detail and before he testifies.

18 MS. GARRISON: Your Honor, one last thing just for
19 the record. For those things that we haven't discussed, are
20 your rulings the same?

21 THE COURT: Yes.

22 MS. GARRISON: Thank you.

23 THE COURT: And so that is granted in part and denied
24 in part. My rulings are the same on those. Now the 2951
25 several topics motion in limine, plaintiffs' motion in limine

1 to exclude evidence of or reference to several topics, and the
2 defendant responded to these point-by-point, and I just think
3 that some of these are too vague for me to grant as a motion
4 in limine. Obviously, I don't think that, you know -- well,
5 it's a matter of characterization.

6 I am going to deny letter A. The farmers themselves
7 are going to talk about taking risks, and they can
8 cross-examine them about the fact that they take risks. If
9 the defendants start arguing that, you know, they are just
10 gamblers and they're just rolling the dice and what they get
11 is what they deserve for being in this silly business, you
12 know, then I expect the plaintiffs to be objecting, but I am
13 not going to exclude it in evidence.

14 B, settlement discussions. You know, the defendant
15 says they don't intend to enter any settlement discussions,
16 and so that is granted. Nobody is going to do that.

17 C, how, when, or under what circumstances plaintiffs
18 employed an attorney, that is sustained and granted. The
19 defendants should not elicit evidence about when they went and
20 got lawyers.

21 Any comment, inference -- this is Section D -- any
22 suggestion if defendant has to pay, they may have limited
23 policy limits or cash, or the results of such judgment upon
24 insurance rates, that one also is sustained. Nobody is going
25 to do that.

1 E, mitigation crisis, lawsuit abuse, no one is going
2 to do that. That is also sustained.

3 F, the law firms primarily represent plaintiffs in
4 mass tort or class action cases, everyone is going to agree
5 that they are not going to do that. And also I don't know
6 what the plaintiffs' lawyers are going to say, that the
7 defendants always represent big corporations; right? So it
8 goes both ways.

9 And G, who is paying the expenses. Neither side is
10 going to comment on the source of funding for the litigation.
11 That's agreed, so that is also granted.

12 And then H, nobody is going to give money to
13 charity -- both sides are agreeing they are not going to give
14 money to charity or they are not going to talk about giving
15 money to charity from either side.

16 I is who is Bayer, and I am going to overrule that.
17 Bayer can say who they are. They can say if you open up your
18 medicine cabinet, you are going to find all of our drugs, and
19 we're in your house already. You all want to say that?

20 MR. SUMMERS: We do, Your Honor, and then they get to
21 say that they're just great family farmers, so it all washes
22 out.

23 THE COURT: Right. J is -- hold on a second.
24 Counsel, plaintiff, what is your name?

25 MR. WHALEY: J.R. Whaley.

1 THE COURT: And, Mr. Whaley, I should let you say
2 something, shouldn't I, since you're standing up there for the
3 first time today.

4 MR. WHALEY: You were making progress, so I didn't
5 want to interfere.

6 THE COURT: Okay. So I do know you are there just so
7 you know. But these are mostly pretty easy. It's just having
8 to go through them each. Anything about being in this lawsuit
9 for the money or for getting a windfall --

10 MR. SUMMERS: You know, this one, Your Honor, I think
11 you have seen us in the last two trials. We are not going to
12 do anything improper here, but this is one where the Court
13 previously mentioned that obviously the plaintiffs stand to
14 gain. There are issues about the validity of the damages
15 claims and the size of the damages claims, and so this is one
16 where I think we understand that the Court doesn't want us to
17 get carried away, but at the same time we have a right to make
18 the point that this is a for-profit enterprise for these
19 plaintiffs.

20 THE COURT: Well, I don't know about it being a
21 for-profit enterprise, but the purpose of a lawsuit is to win
22 money, and I am not going to preclude you from pointing that
23 out.

24 Okay. Number K, this one I may need a little more
25 work on. Tell me, Mr. Whaley, what you are trying to exclude

1 here.

2 MR. WHALEY: Yes, Your Honor. This is one in which
3 Dr. Steve Linscombe from LSU testified in his deposition that
4 he had a conversation with Dr. Jim Oard, another scientist
5 from LSU, and Dr. Oard's belief about the cause of the
6 contamination being cross-pollination rather than commingling,
7 and our position, Your Honor, is that that deposition
8 testimony is hearsay, double hearsay maybe. And we had
9 brought this motion in limine in prior trials, Your Honor, and
10 I believe Your Honor dealt with it as the deposition clips
11 came up to be played at trial.

12 THE COURT: Right. And so are you -- have you
13 designated that portion of his testimony?

14 MR. SUMMERS: I think we have designated exactly the
15 same portions that we designated previously.

16 THE COURT: Yeah, I don't remember, so please answer
17 me.

18 MR. SUMMERS: And there was material about Oard that
19 did come in without objection, and I believe there was some
20 material that was excluded by the Court. Just a little
21 further background because we do think the Court should
22 reconsider its ruling on this issue, Your Honor.
23 Dr. Linscombe was trying to figure out what happened here, and
24 so he took seed -- he took his old foundation seed, planted
25 grubs and plants, sprayed them with Liberty herbicide, and had

1 a few survivors, and then he took material from those
2 surviving plants and gave them to Dr. Oard and asked Dr. Oard
3 to do genetic fingerprinting, and Dr. Oard came back and said,
4 Dr. Linscombe, what we have here is neither Cheniere, nor
5 Cocodrie, but it is similar to both, and Dr. Linscombe takes
6 from that that that is suggestive of this being
7 cross-pollination because you would have material from both
8 species or both varieties in the offspring. And so we view
9 this evidence as being probative on the question of whether
10 this was a seed admix or cross-pollination and suggestive of
11 cross-pollination.

12 THE COURT: It might be if Dr. Oard were here
13 testifying.

14 MR. SUMMERS: That's true except that this is the
15 sort of thing that experts in this field, they typically do
16 rely on this sort of information. I don't think there is any
17 question about the validity of the information.

18 THE COURT: So where is Dr. Linscombe's expert
19 report? I don't think I have seen that.

20 MR. SUMMERS: Well, I think we can address the
21 specific Q's and A's when the Linscombe dep comes up, and I
22 don't think this is going to be a big issue.

23 THE COURT: I mean, let's make it clear. He is not
24 designated as an expert.

25 MR. SUMMERS: He is not, Your Honor.

1 THE COURT: So I think it's hearsay and I will
2 exclude it. You can ask me again when we come up with the
3 deposition, but I think it is hearsay and it is not
4 admissible.

5 So the next one is benefit to farmers -- this is L,
6 farmers' desire for LibertyLink and benefit to farmers. I'm
7 going to deny this portion of the motion in limine, and you'll
8 have to make objections as it comes up, but I believe that the
9 defendants are entitled to say that it would be good to
10 control red rice, and if there is hearsay that is being
11 introduced, you should object at the time and I will consider
12 it then.

13 MR. SUMMERS: You know, one issue, Your Honor, we can
14 raise it later. Going back to K, I think the Court's ruling
15 addresses whether the Linscombe testimony comes in. I guess
16 the other question is whether Dr. McHughen can address this.
17 It is within his report, and the question then would be
18 whether the testing that Dr. Oard did is the sort of thing
19 that an expert in McHughen's field would rely upon. But maybe
20 we can deal with that at the time Dr. McHughen testifies.

21 THE COURT: Yeah, it's probably not going to be
22 admissible. I mean, I'm not saying that it should be. So if
23 you want to introduce it, you need to approach the bench
24 before you think you do, and we'll talk about it at that time.

25 Bifurcated trial, do we have a bifurcated trial? I

1 think we just have one trial here, so that is moot.

2 MR. FERGUSON: I would love to break it up into as
3 many pieces as possible, but I don't think it's going to
4 happen.

5 THE COURT: Right. Sub N I will also deny as I did
6 before. I think the jury can hear the arguments from both
7 sides about whether this is good or bad for the world;
8 although, you know, ending starvation, I would agree that
9 ending starvation is carrying it too far and is playing to the
10 sympathies of the jury, and so I will tell you not to talk
11 about ending starvation, but you can talk about the benefit to
12 the world.

13 Okay. O, safe for human consumption, my ruling
14 remains the same and Bayer can introduce this evidence. So
15 the motion in limine is denied on that part.

16 And then P, plaintiffs' motion in limine to preclude
17 defendants from introducing anything that suggests that
18 defendants employ people in the community or how much money
19 they contribute to the farming community or farming in
20 general, and in response, Bayer says they don't intend to
21 introduce evidence about the people they employ in the
22 community or any charitable donations, but I don't understand
23 what you are objecting to then in the motion in limine. What
24 is it you intend to introduce that would be covered by this
25 portion of the motion in limine?

1 MR. FERGUSON: I can because I have it in mind. We
2 have talked in the past about Bayer being a big company but
3 with a substantial American presence. You have seen it
4 before. It is that one set of slides that says where our U.S.
5 operations are and how many American employees we have. We do
6 intend to talk about benefits that are provided to farmers by
7 genetic engineering research that Bayer does because the
8 suggestion on the other side has been it's all about our
9 profits, we are just motivated by money, and the flip side of
10 that is a business is in business to make money, but you only
11 make money if you provide a good product to your customers, so
12 we do intend to talk about that.

13 THE COURT: Mr. Whaley.

14 MR. WHALEY: I don't believe that that's what was
15 contemplated to be covered by this particular motion in
16 limine.

17 THE COURT: What do you think is covered?

18 MR. WHALEY: Any suggestion that we give block grants
19 to universities, we support research stations, you know, that
20 type of thing is what was the intent of this particular
21 portion of the motion in limine.

22 THE COURT: Or if you rule against us, it's going to
23 throw a bunch of people out of work. That would be a problem.
24 So the things that Mr. Whaley said, you can't do; the things
25 that Mr. Ferguson said, you can do.

1 MR. FERGUSON: I will say this. In a case that has
2 punitive damages where the argument is --

3 THE COURT: But it doesn't, so you don't have to say
4 it.

5 MR. FERGUSON: I will have a different argument in
6 another case. That is all I want to say. I don't want this
7 one to be taken in the next one as me agreeing.

8 THE COURT: I understand. Section Q, which is to
9 preclude any comment, inference, evidence, testimony, or
10 document tending to suggest or describe the plaintiffs as rich
11 or wealthy. The plaintiffs' financial condition is going to
12 be an issue in the case, so, you know, I think that I'm going
13 to deny this motion to the extent -- this portion of the
14 motion to the extent it would exclude issues about their
15 financial condition. We try to avoid inflammatory terms. I
16 mean, you know, I don't know that using words "rich" or
17 "wealthy" are appropriate, but I think their financial
18 situation is going to be an issue, so I am denying that
19 motion -- that portion of the motion in limine.

20 And anything about other cases, multi district
21 litigation, class certification, everyone agrees that will not
22 come in. That was sub R.

23 MR. SUMMERS: Your Honor, if I may raise one little
24 footnote on this. There may be a witness in this case or two
25 who have their own claims against Bayer who are not parties,

1 and I think we would have the right to just mention in cross
2 examination that they have their own claims against Bayer
3 because that does go to bias.

4 THE COURT: It does go to bias, and I believe you can
5 do that. But otherwise, the fact that there are other
6 lawsuits should not be disclosed.

7 And similarly, the fact that plaintiffs' counsel have
8 other clients bringing lawsuits should similarly not be
9 disclosed. That's S.

10 And then T is --

11 MR. WHALEY: Could I interrupt, Your Honor?

12 THE COURT: Yeah.

13 MR. WHALEY: S frankly was not drafted clearly
14 enough, and it's something I think, Your Honor, that we are
15 going to be able to deal with at deposition testimony
16 designation time, and we have had conversations with defense
17 counsel about it as well. There are some deposition testimony
18 citations that were taken in other cases not under the
19 confines -- the Schaefer case, the Powell case -- not under
20 the confines of this MDL Court. There are also some
21 designation -- deposition testimony designations that were
22 taken in depositions that were outside the time limits for
23 discovery in this case. So this wasn't drafted articulately
24 enough, but I believe, Your Honor, that we'll be able to deal
25 with that either with agreement with Bayer or during the

1 deposition designation, but that was the intent of this
2 portion of the motion in limine.

3 THE COURT: Okay. So you can raise that if necessary
4 when we are talking about depositions.

5 MR. WHALEY: Thank you.

6 THE COURT: And then as in any case, neither party
7 should be pointing out to the jury that anything has been
8 excluded. And there is at least one redacted document, and so
9 you all can deal with that, but it's important -- I mean, you
10 can deal with it in some appropriate way, but it's important
11 that neither side be saying that, oh, the Court's hiding
12 evidence from you or we are not letting you see evidence, so,
13 you know, you all need to be careful with that. Although
14 obviously the redacted document is the redacted document.
15 Okay. So that whole motion is, you know, granted in part and
16 denied in part.

17 Now there was another motion. Remind me what we need
18 to talk about, a deposition taken outside of the time frame?
19 Have I ruled on that already? Ms. Hoekstra, is that yours?
20 Tell me which motion it is because I'm having trouble
21 remembering.

22 MS. HOEKSTRA: It was a portion of the Brenckmann
23 motion, the motion to exclude witnesses, and you said we are
24 going to put that off and we are not going to deal with them
25 individually.

1 THE COURT: Okay. So thank you. Any other motions
2 in limine that I've neglected to deal with? Mr. Olinde.

3 MR. OLINDE: Yes, Your Honor. Since we got the
4 opposition to this Thibodeaux Ag motion last night post 7:00,
5 I'm just asking whether or not we could just do a limited
6 reply just on 25C, why it doesn't apply. That was the first
7 time it was brought up.

8 THE COURT: If you do, I am going to let them do a
9 sur-reply.

10 MR. OLINDE: Okay. You'll know by noon tomorrow if
11 we file one.

12 THE COURT: If you file one, do it by noon tomorrow,
13 that's Thursday, and then if the plaintiffs want to file a
14 sur-reply, they can do it by noon on Friday if you decide to.

15 MR. OLINDE: Thank you.

16 THE COURT: Okay. Deposition designations, have you
17 guys started working on those?

18 MS. HOEKSTRA: Yes, Your Honor.

19 THE COURT: Do you have agreement already on a bunch
20 of stuff I hope?

21 MS. HOEKSTRA: We started working. We have agreement
22 on some. Our plan is to sit down tomorrow sometime, we have
23 been coordinating, and submit anything in writing to you with
24 your permission that we would need rulings on by Monday by
25 noon on Friday.

CERTIFICATE

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I, Angela K. Daley, Registered Merit Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 115 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 18th day of June, 2010.

/S/Angela K. Daley
Angela K. Daley, CSR, RMR, FCRR, CRR
Official Court Reporter

Exhibit C

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

In Re: Genetically-Modified Rice
Litigation

No. 4:06-MD-1811

PRESENT: The Honorable Catherine D. Perry, Presiding
ATTORNEYS FOR PLAINTIFF: Don M. Downing, Grant L. Davis,
Gretchen Garrison, William B. Chaney, Adam J. Levitt, Joe R.
Whaley, Jason D. Sapp
ATTORNEYS FOR DEFENDANT: Mark E. Ferguson, Eric R. Olson,
Stephen Cowen, Glen E. Summers, Terry Lueckenhoff, Vance Gibbs
ATTORNEY FOR RICELAND FOODS: Christopher Hohn
ATTORNEY FOR EUROPEAN NON-PRODUCERS: John Baker (by telephone)
ATTORNEY FOR RIVIANA FOODS, INC.: Charles L. Schlumberger (by
telephone)

PRETRIAL CONFERENCE
October 29, 30, 2009

TERI HANOLD HOPWOOD, RMR, CRR
Thomas F. Eagleton Courthouse
111 South Tenth Street
St. Louis, Missouri 63102

1 which were deregulated in 1999 and received food approval in
2 2000, and it is true of Liberty Link Rice 601, which received
3 deregulation in 2006, and equally true of LLRICE 604, that the
4 thing that differentiates all of them from conventional rice is
5 the presence of this PAT protein. There is no expert in this
6 case, no lay witness in this case who has contended that that
7 poses any danger to humans or the environment, and to suggest
8 that the jury ought not to be able to hear that tells me that
9 the implication is going to be left that since Europe doesn't
10 want it, it must be dangerous, we were dealing with a product
11 that was dangerous to humans, and boy, we should have
12 controlled it better than we did, and that's the concern.

13 This report is very explicit about what has been looked
14 at with each of these events, why the conclusion has been made
15 that they are safe, and the jury is entitled to hear that.
16 I'll tell you that the Government has said this in each of
17 their deregulation rulings on 06 and 62 and 601. They have
18 made this conclusion as to 604. The European Foods Safety
19 Authority has come to the same conclusions, and these are
20 things that are important to understand for the jury what's
21 going on here.

22 THE COURT: Okay. Here is what we're going to do.
23 I do think that the jury -- that evidence can be introduced to
24 the jury that this is not unsafe for human consumption. I
25 don't know exactly how you do that, that it is safe for human

1 consumption. That is going to be the first question in every
2 juror's mind, and to not put in any evidence about this is
3 misleading to the jury, and the jury needs to know the context
4 of what we're talking about here, and so I'm not going to bar
5 anybody from making those statements and presenting it through
6 proper evidence.

7 Here is what my rulings are on the portions of the APHIS
8 report to which the defendant has objected in this motion in
9 limine, and I'm going to try to start at the top, and I'm
10 hoping I won't miss any of it.

11 I'm granting this motion in part and denying it in part,
12 and so here is what it is. I'm overruling the objection to the
13 sentence in the first paragraph that reads, "It is important to
14 note that both GE rice lines have the same protein which has
15 been safely used in other deregulated products for more than
16 ten years." That is in.

17 In the same page, when you go down to the next objected
18 portion, which is in the last full paragraph, the middle
19 sentence, "Investigators were able to determine that the
20 presence of LLRICE 601 was limited to the long-grain rice
21 variety of Cheniere, and the presence of Liberty Link 604 was
22 limited to the long-grain variety CL 131," that is out.

23 The next sentence that is objected to, "Investigators
24 had hoped to identify how each GE rice line entered the
25 commercial supply, but they couldn't figure it out." That is

1 in.

2 What I'm doing here is making a distinction between what
3 I believe in this report are factual findings admissible under
4 the public records exception to the hearsay rule versus
5 evaluative or opinion evidence. Now any time an investigative
6 agency makes an investigation, obviously there is some analysis
7 or evaluation, but I'm trying to sort out what I believe are
8 the factual findings, and I'm sustaining the objections to the
9 extent that I think they are not factual findings, but I am
10 overruling it when I think they are.

11 MR. FERGUSON: May I point out one thing? On the
12 portion that you excluded, you said the sentence that began,
13 "Investigators were able," but there are two sentences there,
14 and the second of them --

15 THE COURT: Do you have a color-coded copy?

16 MR. FERGUSON: I do.

17 THE COURT: There is one sentence that I excluded.
18 "Investigators were able to determine that the presence of
19 LLRICE 601 was limited to the long-grain rice variety of
20 Cheniere, and that the presence of LLRICE 604 was limited to
21 the long-grain variety CL 131." That sentence is out. The
22 remainder of that paragraph is in.

23 MR. FERGUSON: That's my clarification. Thank you.

24 THE COURT: The next paragraph, which begins at the
25 bottom of page 1 and carries over to page 2, in summarizing, it

1 it is Hornbook law that irrelevant and hearsay evidence are
2 inadmissible, and you cite 403 and hearsay, and so I understand
3 that. So that's introduction.

4 I guess the second topic, "The following irrelevant and
5 hearsay testimony evidence and argument should be excluded or
6 otherwise limited. Comments, inference, evidence, testimony,
7 or documents stating that farmers take risks all the time."
8 There is no response to that in the defendant's motion. The
9 defendants have not responded to that.

10 MR. WHALEY: I don't want to speak for Mr. Olson,
11 but they did. The way they broke it out was -- I don't want to
12 speak, but --

13 THE COURT: This is their list. I've got it. I'm
14 sorry. So you're right. On page 2 of the defendant's
15 response, which is Document 1801, the defendants agreed that
16 the things that are listed as B, C, D -- now they don't agree.
17 Go back and tell me how they broke it down. I don't understand
18 how they broke it down.

19 MR. WHALEY: This is my first opportunity to speak
20 for Bayer, so let me take advantage of it.

21 MR. OLSON: He's on a short leash, Your Honor.

22 MR. WHALEY: My appreciation is they classified it
23 as unlikely, we don't really need to get into it, and on their
24 response, if you're looking at their response, Your Honor, page
25 2 goes into that. We may want to talk about some of those, but

1 it appears to me in reading it that they broke it down to
2 probably don't need to worry about it, into the second phase of
3 we probably need to argue about it because we do believe
4 it's --

5 THE COURT: Let me clarify this. What about farmers
6 take risks all the time or farmers gamble? Is some witness
7 going to say that, or are you going to argue that, Mr. Olson?

8 MR. OLSON: They will say there are many risks
9 inherent in farming.

10 THE COURT: Of course they will. If they didn't,
11 they wouldn't be talking about farming.

12 B. Any comment, inference, evidence, testimony about
13 settlement discussions. You're not going to talk about
14 settlement. That's agreed.

15 C. When the plaintiffs employed an attorney. You're
16 not going to talk about that, okay? If you think there is
17 something -- you've got some credibility issue to show that
18 somehow they are employing an attorney is relevant, you'll have
19 to approach the bench and make an argument once we have heard
20 the testimony of whoever you are going to raise it with, but
21 unless you convince me otherwise, that is granted, and when and
22 how they employed an attorney and how the attorneys
23 communicated with their clients, none of that is admissible.

24 D, limited policy limits, or limited cash, or the effect
25 or results of a judgment on insurance rates, premiums,

1 finances, or ability could compete in the marketplace, and you
2 say maybe we do want to talk about this. What is it you intend
3 to do, Mr. Olson? "Depending on evidence and argument
4 presented at trial such evidence may well be relevant."

5 MR. OLSON: Only on punitive damages, Your Honor, to
6 rebut a claim. We don't need to deal with it now.

7 THE COURT: You're not going to do that. E. This
8 is anything about punitive damages, again, you're not going to
9 do that. That's granted.

10 F. Litigation prices, lawsuit prices, lawsuit abuse,
11 you're not going to do that. That's granted.

12 G. Comment, inference, testimony or document that
13 plaintiffs' attorneys and their law firms primarily represent
14 plaintiffs or specialize in injury, product liability, mass
15 tort class action, and they say we won't do it if you don't do
16 it. What do you say?

17 MR. WHALEY: We won't do it.

18 THE COURT: Nobody is going to do it. H. Who is
19 paying the expenses or is responsible for the expenses, and
20 again, I've ruled on the experts, and you already know about
21 that. Otherwise this is granted and neither side shall talk
22 about it.

23 I. How much money the defendant has donated to charity,
24 that is granted at well. Defendant is not going to do that, or
25 talk about their charitable or philanthropic activities.

1 J. Now this one I have a little trouble with. J is the
2 one that is about you don't want me to let them say if you --
3 you don't want them to say this Bayer is the same one that
4 makes the aspirin, right?

5 MR. WHALEY: Probably this would fall into the
6 limiting instead of exclusion area. We believe that it would
7 be appropriate for there to be some limiting on the
8 descriptions of what the Bayer companies do. If they want to
9 build themselves up as an altruistic organization that cures
10 illnesses and gives sight to the blind, then I think we would
11 cross the threshold of it being relevant and/or unduly
12 prejudicial or confusing the jury. We understand this is a big
13 company that has been involved in pharmaceuticals for years,
14 and if there is some introduction that needs to be done, that
15 may be appropriate, but again, this would probably be an
16 appropriate limiting situation instead of outright exclusion.

17 MR. FERGUSON: I'll tell you what I have in mind for
18 opening, as well as for any witness that would address this.
19 Introduce the company Bayer, point out that it has a
20 pharmaceuticals division that many people have heard of, talk
21 about this company and its different businesses, where it's
22 located, where its employees are, and who it's affiliated with
23 around the world, and what those businesses are engaged in
24 pursuing. That's what I would do with witnesses, too.

25 THE COURT: What's wrong with that?

1 MR. WHALEY: I think that would be appropriate.

2 THE COURT: That's fine. You may do that. That's
3 J. The next category is K. Any inference, evidence, testimony
4 or document that they are in it for the money, which actually
5 most people are in lawsuits for the money. That's all we give
6 in court, with limited exceptions, but it's not the lottery,
7 not a windfall, so I would agree you shouldn't be talking about
8 lotteries and windfalls.

9 MR. FERGUSON: No lotteries and windfalls. I don't
10 usually do this, but the fact that somebody might stand to make
11 money if their testimony is believed is a fair bias point.

12 THE COURT: Who is that?

13 MR. FERGUSON: The plaintiffs, for example. I don't
14 actually have in mind that I would do that.

15 THE COURT: But that's why they are plaintiffs.

16 MR. FERGUSON: Pardon me?

17 THE COURT: That's true of every plaintiff in every
18 case. If the jury believes you, you're going to get money.

19 MR. FERGUSON: That would be fair bias examination
20 if I wanted to do it. I'll say this, I have never done it.
21 Something might come up.

22 THE COURT: It's not unfair, is it?

23 MR. WHALEY: No, Your Honor.

24 THE COURT: You stand to gain by this lawsuit.

25 MR. WHALEY: It's obvious and the jury will know

1 that.

2 MR. FERGUSON: I didn't want to box that in by
3 accident.

4 THE COURT: That's not an improper thing to ask a
5 plaintiff. L. Jim Oard, O-A-R-D, Steve Linscombe's
6 conversations with Jim Oard about test results obtained by Dr.
7 Oard, subsection L, and so as I understand it, I have a big
8 question mark by this. What is it that your witnesses,
9 Mr. Olson, are going to say about these conversations?

10 MR. SUMMERS: Your Honor, here is the issue. There
11 is a question of whether what happened here was seed mixing or
12 cross pollination. To get to the bottom of that, Dr.
13 Linscombe took some seed that he still had, grew it out,
14 sprayed it with Liberty, and had some survivors. He then took
15 the survivors and sent them to another scientist at LSU, Dr.
16 Oard. Some of the plaintiffs' experts are familiar with him.
17 They say he's a good scientist, and has a good reputation.
18 They sent it to Dr. Oard, and he did DNA fingerprinting. Oard
19 says this is not Cocodire, which is what LL 601 is, the variety
20 that was inserted into it, and he said it's not Chenier. It's
21 similar to both, but it isn't a pure strain of either one.

22 Linscombe looks at that and says, based on that, it
23 appears to me that this is suggestive of cross pollination.
24 This material is in the USDA -- the affidavit that Dr.
25 Linscombe submits to the USDA, and the experts have considered

1 it and debated it. They are trying to exclude this evidence
2 because they think it's favorable to their case to prove that
3 there was a seed admix as opposed to a cross pollination.

4 THE COURT: How is this evidence going to come in
5 from you?

6 MR. SUMMERS: Dr. McHughen would say that --

7 THE COURT: That Dr. Linscombe told him that Dr.
8 Oard told him?

9 MR. SUMMERS: No. First, Dr. Linscombe has
10 testified about this, and Linscombe's deposition will be
11 played.

12 THE COURT: Nobody has testified yet. How are you
13 going to introduce this evidence to the jury?

14 MR. SUMMERS: Dr. Linscombe's testimony, and through
15 the experts who have considered and studied this evidence.

16 THE COURT: What experts?

17 MR. SUMMERS: Dr. McHughen and the plaintiffs'
18 experts, Your Honor.

19 THE COURT: What's wrong with that?

20 MR. WHALEY: Well, this dealt with Dr. Linscombe
21 testifying by deposition about what Dr. Oard told him, and
22 that's the subject of this motion in limine.

23 THE COURT: What about what he just said? Tell me
24 about what he just said would come in that you are trying to
25 keep me from letting them put in.

1 MR. WHALEY: I don't believe, Your Honor, and this
2 hasn't been my bailiwick, but I don't believe, Your Honor, that
3 Dr. McHughen testified in his -- or stated in his report that
4 he was relying on Dr. Linscombe's conversations with Dr. Oard,
5 one. Secondly, there has been deposition designated from Dr.
6 Linscombe in which Dr. Linscombe relays this story about
7 exactly what Mr. Summers just gave.

8 THE COURT: Are you saying that should be excluded?

9 MR. WHALEY: Yes, Your Honor, because it's hearsay,
10 and Dr. Linscombe has not been identified as an expert who
11 could rely upon hearsay, hasn't been listed as an expert by
12 Bayer, no expert report. He's a fact witness, obviously, a
13 knowledgeable fact witness, but certainly not an expert who
14 could provide testimony to the jury about what a third party
15 told him.

16 THE COURT: Dr. Oard is not testifying?

17 MR. WHALEY: If I could answer that question, Your
18 Honor, Dr. Oard is not going to testify. Dr. Oard has not been
19 deposed by either party, and the documents -- and Mr. Summers
20 can correct me if I'm wrong about this, my memory is that the
21 documents that -- there are no Dr. Oard documents. There is
22 testimony from Dr. Linscombe about what Oard told him, so these
23 test reports and everything of that nature, it hasn't been the
24 subject of any cross-examination, any testing of the validity
25 of it. Had we known that there would be an effort to rely on

1 Dr. Oard, we could have gone down to take Dr. Oard's deposition
2 and found out exactly what he did, how he found out, what his
3 test results were.

4 MR. SUMMERS: Very quickly, one thing. To the
5 extent there is a hearsay objection, when we get to the
6 deposition, we should look at the questions and answers to see
7 where there is hearsay and where there isn't.

8 Number two, on this question, the experts have all
9 relied on the affidavits submitted to the USDA as evidence of
10 what happened here on Linscombe's affidavits, including the
11 hearsay in them, and given that their experts have relied
12 extensively on this information, there is a tacit admission
13 that this is the sort of thing that these experts can rely on.
14 The whole case is built on the affidavits submitted to the USDA
15 that these were planted --

16 THE COURT: Hold on. I understand that. I'm not
17 ruling on this. Well, here is what I am doing. I am granting
18 this as an in limine matter and telling you not to discuss it
19 on opening, and not to ask a witness about it until you have
20 talked to me about it. I will understand this better in
21 context. You can look at the deposition testimony that you're
22 talking about introducing, and if you give me specific
23 testimony and specific questions, I may know what the answer is
24 here, but you have multiple levels of hearsay, and just because
25 an expert might be allowed to rely on it doesn't mean the

1 expert can just spout it back to the jury and it becomes good
2 evidence, even though it's three or four levels of hearsay.
3 Relying on it to reach a conclusion or an opinion is different
4 from spouting it back to the jury and having it become now
5 actual direct testimony to the jury when it shouldn't be
6 admitted, and I don't know which this is, and I'm not going to
7 figure that out this afternoon because you all have to give me
8 specifics, and that's going to be held for trial.

9 Number M. The farmers' desire for Liberty Link. What
10 is it that the plaintiffs are trying to exclude here when you
11 talk about -- what farmers, who do you think -- your witnesses
12 might be cross examined about this. Are you saying they should
13 not be cross examined about it?

14 MR. WHALEY: No, Your Honor. What we're concerned
15 about is some global statement, some global idea that there was
16 this great wellspring of support for LLRICE by farmers in the
17 farming community. Certainly I believe that it may be
18 appropriate to ask a specific farmer what his position on
19 LLRICE is, and in fact, Your Honor, there may be other
20 witnesses who can provide their take on the utility of LLRICE,
21 but what would be inappropriate is for a Bayer witness to say
22 farmers really wanted this, farmers -- this would have been
23 good for farmers, farmers really desired this, and that's the
24 global application, instead of the specific witness, what did
25 you think about the utility of LLRICE versus there was a ground

1 this survey done after the announcement. Yeah, let's go ahead
2 and get Liberty Link done since it's all in the commercial rice
3 supply. There is not enough information and I think, Your
4 Honor, it's clearly hearsay, and secondly, it would be
5 irrelevant to what other farmers want. This case is about
6 Mr. Hunter and Mr. Bell, and whether or not they want it.
7 We're not saying, Your Honor, that there is not an opportunity
8 for Bayer to talk about some of the utility of LLRICE and what
9 the goal was, but this general feeling that the farmers wanted
10 it is hearsay and prejudicial.

11 MR. FERGUSON: If I could address the hearsay point,
12 this is really being offered to show Bayer's state of mind as
13 to why it would take a product like this to market. We have
14 heard over and over again in depositions that the farmers
15 didn't want this, you knew the farmers didn't want this. Even
16 if it's just these two farmers, and the argument that these two
17 farmers didn't want this, I think it's fair for us to say we
18 have communications from many people in the farming community
19 who indicate to us that they would love to have this, and we
20 pursued it for this reason. It was of great benefit, but it
21 wasn't because we thought it was of great benefit, it was
22 because the people who we wanted to sell it to wanted it.

23 Mr. Summers reminded me, there are also letters that we
24 have from universities expressing this, university ag
25 extensions expressing the same thing, that's the point. It is

1 to address the idea that we're just a big company out there
2 stomping on people's rights, developing a product for profit
3 without regard to what our customers may think, and that's not
4 the case.

5 THE COURT: You're telling me why you want it. That
6 wasn't my question. I'm denying this section of the motion in
7 limine. I'm not saying it's admissible. You're going to have
8 to object when it comes up. I have to have context. I cannot
9 rule on that in advance.

10 MR. DAVIS: They did put these demonstratives that
11 they want to use in opening, and they are basically quotes from
12 unnamed farmers, just some person that's obviously hearsay, and
13 the fallacy in this whole thing, Your Honor, is what do you ask
14 someone. If you ask me as a lawyer, "Would you like a
15 paralegal that will do ten times more work than a normal
16 paralegal?" I would say, "Sure, that sounds great." If they
17 then say, "Oh, but she's going to commit malpractice once a
18 week," she or he, I would say, "No." There is a fallacy to say
19 that this hearsay statement is out there.

20 What they want to say, what they have done throughout
21 the depositions is say this unnamed, vague they, they, the
22 farmers wanted this. Well, we haven't found the they the
23 farmers that wanted it.

24 THE COURT: These ones here on this slide. He's not
25 going to put this slide up unless he has evidence to support

1 this document, these statements, right? You wouldn't do that,
2 Mr. Ferguson?

3 MR. FERGUSON: That is a Bayer internal document,
4 that's a copy of a document --

5 THE COURT: Wait. You were going to show this. Who
6 is going to show this? Bayer is going to show its own internal
7 documents in its slides.

8 MR. FERGUSON: That was the plan, yes.

9 THE COURT: What is it that you're going to say
10 about this document?

11 MR. FERGUSON: The point is this was not Bayer
12 shoving the product down people's throats. This was something
13 that farmers wanted. The market was not us shoving something
14 in, but rather this had a great benefit to farmers, and we
15 asked and farmers told us that.

16 MR. DAVIS: Somebody from Yuba City says, "It sounds
17 like a dream come true, because it looks like it controls all
18 the weeds that we have in our fields." Someone from Yuba City.

19 THE COURT: Right, and it's not only that. Bayer
20 wrote down in its marketing materials that someone from Yuba
21 City said it, and we're going to say this to the jury, and it's
22 going to be evidence. You all know what you're doing. You're
23 trial lawyers. You've been lawyers for a long time. If you
24 are going to say something in opening statement, you sure
25 better be able to prove it in evidence, and I'm not going to go

1 through everything you want to say in opening statement and say
2 -- you know, this isn't Mother May I. It's not I say yes, no,
3 yes, no, but I'm sure if they put this in their opening
4 statement and they ultimately don't get the evidence into
5 evidence, then I think as a trial lawyer you all know what to
6 do about that, and I caution both sides, so that's my ruling.

7 Now I'm up to N on 1701. N I've already ruled on.
8 We're not going to talk about the second phase in the first
9 phase except for the very limited inquiry I will allow on the
10 voir dire.

11 Number O. We will feed the world. I'm going to deny
12 this at this time. Again, I don't know whether it's admissible
13 or not. I'm denying it as a motion in limine. You can object
14 when it comes up.

15 P. Any comment that it's safe for human consumption
16 I've already ruled on. That covers -- this motion in granted
17 in part and denied in part. We've talked about how you're
18 going to do the depositions and exhibits.

19 The jury. I will ask the standard questions that I
20 always ask which are prior litigation experience, basic
21 background questions. You all may ask further questions.
22 There are some rules I have about jury selection. You must ask
23 the questions to the panel as a whole, have them raise their
24 hand, and then you can follow up if it is a general question.
25 The goal of voir dire is to select a jury and ask them

1 questions, not for you to make speeches or arguments.

2 So, if I ask a question and you want to follow up on
3 what a juror said, you may call on that juror individually. If
4 there is something on the juror list that you want to follow up
5 on about that juror, you may follow up with that juror
6 individually. But, you may not just pick out jurors and say,
7 and use them to describe things to the jury as a whole.

8 You cannot say, "Now Mrs. Jones, there may be an issue
9 in this case about punitive damages." This is a bad example
10 because you're not going to do this. "Would you be able to do
11 punitive damages," and then say, "Who else on the jury agrees
12 with Mrs. Smith?" If you want to ask a general question, "Is
13 there anybody on the jury who has trouble with lawsuits in
14 general, is there anybody on the jury who is X or Y," they
15 raise their hands, and can answer it. Don't ask general
16 questions individually, ask general questions generally and
17 follow up.

18 Don't make examples of jurors. Obviously, there will be
19 times when they will say things, and it's appropriate to say,
20 "Does anybody else feel the same way," but I don't want you to
21 start that process, that's if they respond to your questions.

22 You all are fighting over whether we should have eight
23 jurors or ten jurors, so we're going to have nine jurors. That
24 was really hard. We will have approximately 30 for the voir
25 dire. It may be more. I don't think it will be less. If we

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REPORTER'S CERTIFICATE

I, TERI HANOLD HOPWOOD, RMR, Official Court Reporter for the United States District Court for the Eastern District of Missouri do hereby certify that the foregoing is a true and correct transcript of the proceedings had in this cause as same appears from my stenotype notes made personally during the progress of said proceedings.

/S/ Teri Hanold Hopwood, RMR

TERI HANOLD HOPWOOD, RMR

Official Court Reporter

Exhibit D

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

_____)
IN RE GENETICALLY MODIFIED RICE)
LITIGATION,) No. 4:06-MD-1811 CDP
_____)

JURY TRIAL

BEFORE THE HONORABLE CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

VOLUME XI-B
(Afternoon Session)

NOVEMBER 17, 2009

APPEARANCES:

For Plaintiffs: Don M. Downing, Esq.
Gretchen Garrison, Esq.
Jason D. Sapp, Esq.
GRAY, RITTER, & GRAHAM, P.C.

Grant L. Davis, Esq.
DAVIS, BETHUNE & JONES, LLC

Adam J. Levitt, Esq.
Stacey T. Kelly, Esq
WOLF HALDENSTEIN ADLER FREEMAN & HERZ, LLC

Richard J. Arsenault, Esq.
John Randall Whaley, Esq.
NEBLETT BEARD & ARSENAULT, LLP

(APPEARANCES CONTINUED ON PAGE 2)

REPORTED BY: ANGELA K. DALEY, CSR, RMR, FCRR, CRR
Official Court Reporter
United States District Court
111 South Tenth Street, Third Floor
St. Louis, MO 63102
(314) 244-7978

PRODUCED BY COURT REPORTER COMPUTER-AIDED TRANSCRIPTION

1 A No. We've always been able to obtain seed.

2 Q Now you mentioned planting soybeans. Did you also plant
3 some corn on land where you would have planted rice if the
4 contamination hadn't occurred?

5 A Yes, sir, a small amount.

6 Q Were you going to plant some corn that year even without
7 the contamination happening?

8 A Yes. Yes. We were going to plant some corn on some land
9 that wasn't yet suitable for rice or conditioned for rice.

10 Q Is that land that had been newly acquired by the Bell
11 family farming operation?

12 A Yes, yes.

13 Q And when you say it wasn't suitable for rice, what do you
14 mean by that, that new land that was acquired?

15 A Well, it wasn't graded or it didn't have wells on it for
16 irrigation.

17 Q Go ahead.

18 A You know, and the soil texture on some of it was just
19 enough where we thought we could plant some corn.

20 Q On a lot of that new land, would it some day be suitable
21 for rice after it was graded and after you had irrigation
22 installed on it?

23 A Yes, most of it will.

24 Q But in the year 2007, it wasn't suitable for rice because
25 you didn't have irrigation and you didn't have it graded?

1 A Right, right, it wasn't feasible.

2 Q And when the Bell family farming operation acquires a
3 large quantity of land in a year, does it have the capability
4 to get that whole large quantity of land ready for rice
5 planting in the first year?

6 A No, no. It's kind of a long expensive process, drawn out
7 process.

8 Q And is that the reason that the Bell family farming
9 operation planted the number of acres of corn that it did that
10 year?

11 A Yes.

12 Q Now besides being able -- not able to plant as much rice
13 on the Bell family farming land that it had planned to -- I
14 believe you said it had planned to plant about 6,000, and it
15 planted about 3,300; right?

16 A Yes.

17 Q Mr. Matlock, is there any doubt in your mind that the
18 reason the Bell family farming operation did not plant
19 6,000 acres that year and instead planted 3,300, is there any
20 doubt in your mind as to why that difference existed?

21 A No, there is no doubt whatsoever. It was from the
22 contamination solely.

23 Q Now in addition to not being able to plant those acres in
24 rice, did the Bell family farming operation also have to --
25 was it not able to plant the rice varieties, the particular

1 rice varieties that it wanted to plant, on land where it could
2 plant rice?

3 A Right, yes.

4 Q What type of conventional variety had the Bell family
5 farming operation wanted to plant on the land in 2007 that it
6 was able to plant in rice?

7 A The Cheniere.

8 Q And what varieties did it plant on those acres?

9 A Wells and Francis.

10 Q And why is -- why the did the Bell family farming
11 operation want to plant Cheniere as opposed to Wells and
12 Francis on those acres?

13 A Well, the Cheniere for us averages about 20 to 25 more
14 bushels to the acre, plus it has a good or excellent milling
15 yield, and it's a shorter crop, so it doesn't fall down or
16 lodge if a windstorm or rain or something comes about, and it
17 has a pretty good disease package over Wells and Francis.

18 Q Let's talk about some of those. You mentioned that
19 Cheniere produces, what did you say, 25 bushels or so more
20 than Wells and Francis?

21 A Yes, sir.

22 Q I don't want to put words in your mouth. Is that what
23 you said?

24 A Yes, sir.

25 Q Mr. Matlock, do you drive a combine every fall for the

CERTIFICATE

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I, Angela K. Daley, Registered Merit Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 77 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 17th day of November, 2009.

/S/Angela K. Daley
Angela K. Daley, CSR, RMR, FCRR, CRR
Official Court Reporter

Exhibit E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE GENETICALLY MODIFIED RICE
LITIGATION

)
) No. 4:06-MD-1811-CDP
)
)

JURY TRIAL

BEFORE THE HONORABLE CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

VOLUME 9-B
JANUARY 22, 2010

APPEARANCES:

For Plaintiffs:

Don M. Downing, Esq.
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William B. Chaney, Esq.
LOOPER REED & MCGRAW

For Defendants:

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Glen E. Summers, Esq.
John M. Hughes, Esq.
BARTLIT BECK HERMAN PALENCHAR & SCOTT LLP

REPORTED BY:

*Gayle D. Madden, CSR, RDR, CRR
Official Court Reporter
United States District Court
111 South Tenth Street, Third Floor
St. Louis, MO 63102 (314) 244-7987*

1 that year.

2 Q Now let's move on. As your brother testified, at some
3 point, you were able to sell the rice and receive revenues for
4 that rice, is that right?

5 A And as time moved along and the developments came, we
6 were able to sell, and we did that as fast as we could.

7 Q Now let's flash forward to the March 2007 announcement.
8 What was your reaction when you heard about the second
9 contamination of the Clearfield 131 seed by another
10 LibertyLink event, LL 604?

11 A Well, that -- that was even more worse then because, you
12 know, we'd go through one and we'd get a little relief, and
13 then when that announcement was made, I thought, "Here's
14 another one, and we've got some of that," you know, so that
15 was another portion of our rice that wasn't -- well, not only
16 that, flash forward, and I'm thinking, "Well, will they find
17 it in another one tomorrow, another one the next day, and
18 another one the next day?" So we're not talking just a few
19 minutes of worry. I'm talking all winter long, you know,
20 because not only were these announcements being made, but they
21 were having to decide how they were going to handle it and the
22 things they were going to do to try to work all of this out,
23 so --

24 Q Mr. Penn --

25 A -- it worried me.

1 Q I'm sorry. Mr. Penn, is there any doubt in your mind
2 that the Penn family farming operation, the three entities
3 we've been talking about, lost a lot of money as a result of
4 this contamination?

5 A There's no doubt in my mind.

6 MR. SUMMERS: Your Honor, may I approach?

7 THE COURT: You may approach.

8 (A bench conference was held on the record and outside of
9 the hearing of the Jury as follows:)

10 MR. SUMMERS: I thought that they pushed the envelope
11 a little bit on the emotional issues there about the worrying
12 and worrying and worrying, and now it seems like we're getting
13 a witness -- I'm really worried about the scope here and where
14 we're going with him. You know, he shouldn't be validating or
15 vouching for the economists and doing those sorts of things,
16 so I'm a little concerned given that they pushed the envelope
17 on the emotional issues where we're going right now.

18 THE COURT: Your concern -- if your concern is an
19 objection, it's overruled.

20 (The following proceedings were held within the hearing
21 of the Jury.)

22 Q (By Mr. Downing) Let me ask the question again. I'm not
23 sure if you were able to answer it. Is there any doubt in
24 your mind, Mr. Penn, as someone who keeps the books and
25 records for the Penn family farming operation, that that

1 operation and the three entities we've talked about lost a lot
2 of money as a result of the LL rice contamination?

3 A There's no doubt that we lost a lot of money.

4 Q Now, Mr. Penn, have you ever sued anyone before?

5 A No, I have not.

6 Q Why did you choose to sue Bayer in this case?

7 A Well, I just felt like someone hadn't done their job.
8 You know, as a farmer, we do our job. We bought the seed. We
9 planted the seed. We raised the crop. We delivered it to the
10 market, and so at that point, we had -- we had done our job,
11 and I just don't feel like that Bayer did their job, and I
12 think it cost my family, all of us, quite a bit of money, and
13 I just really feel like Bayer should be responsible for their
14 job.

15 MR. DOWNING: No further questions, Your Honor.

16 THE COURT: Cross-examination.

17 CROSS-EXAMINATION

18 BY MR. SUMMERS:

19 Q Just a couple quick questions, Mr. Penn. I understand
20 that there was some worry when these things occurred, but just
21 to be clear, you were able to sell all of your '06 crop,
22 correct?

23 A We were able to sell the crop.

24 Q And by historic standards, you got a very, very good
25 price for your crop, correct?

CERTIFICATE

I, Gayle D. Madden, Registered Diplomate Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 53 inclusive.

Dated at St. Louis, Missouri, this 22nd day of January, 2010.

/s/ Gayle D. Madden
GAYLE D. MADDEN, CSR, RDR, CRR
Official Court Reporter

Exhibit F

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

In Re: Genetically-Modified Rice
Litigation

No. 4:06-MD-1811

PRESENT: The Honorable Catherine D. Perry, Presiding
ATTORNEYS FOR PLAINTIFF: Don M. Downing, Adam J. Levitt,
Gretchen Garrison, William B. Chaney, Jason Sapp, Jennifer M.
Hoekstra, Stacey T. Kelly
ATTORNEYS FOR DEFENDANT: Mark E. Ferguson, John M. Hughes
Hughes, Jamison R. Jones, Terry Lueckenhoff
Also Appearing: Martin Phipps
Appearing by telephone: Christopher Hohn, Alex Gray, David
Tyler, John Galvin

Status Conference and Pretrial Conference
October 7, 2010

TERI HANOLD HOPWOOD, RMR, CRR
Thomas F. Eagleton Courthouse
111 South Tenth Street
St. Louis, Missouri 63102

1 and we give money and so be nice to us, Bayer is not going to
2 do that, but that doesn't mean it's not relevant who they are
3 and what their business is.

4 Subsection Q, any suggestion that the plaintiffs are
5 wealthy, and the response to this is depending on the evidence
6 and argument offered that plaintiff's evidence of the size of
7 plaintiff's operations, it may be relevant and necessary to
8 rebut the inference that they are little bitty farmers, and I
9 don't know about these farmers and how big they are.

10 I think if you go back to the very first trial, I don't
11 think anybody would try to say that Mr. Bell, although he
12 clearly has a family farming operation, I don't think the jury
13 was misled in thinking he was just a little guy. They heard
14 how big his operations were. I don't know what the evidence is
15 going to be in this case. I think it depends on what evidence
16 comes in, and so I'll grant that, but I would expect that after
17 the plaintiffs testify on direct, if you tell me that you want
18 to go into it, I'm going to say you can. I don't know what you
19 intend to do on either side.

20 Subsection R, any reference to all the other lawsuits,
21 that's granted by agreement.

22 Subsection S, plaintiffs' involvement in other
23 litigation or any correspondence to potential clients, that is
24 granted by agreement.

25 Subsection T, any comment or inference that there has

1 been any evidence excluded from the Court, that is also
2 granted. I understand the concern about the redacted
3 documents, but we just show them to the jury and we don't worry
4 about that, but you don't need to say -- nobody should suggest
5 to the jury that we're hiding evidence from them.

6 Then Dr. Linscombe's evidence, his reputation as a
7 conventional rice breeder, I think this was a new portion, and
8 the argument from the plaintiffs is the fact that he had a good
9 reputation as a conventional rice breeder is character evidence
10 that should not be admitted, and is not relevant to whether he
11 was going to be good at doing genetically-modified rice work.
12 I am overruling that motion, and that portion of it is denied.
13 I believe that that's an argument that the plaintiff certainly
14 can present to the jury, but I'm not going to exclude the
15 evidence if the plaintiff -- I think the plaintiffs have
16 presented that argument to the jury in the past, and I think
17 it's an area that the jury can hear about. I'm not excluding
18 the evidence on Dr. Linscombe.

19 I think that covered all of the topics. That one is
20 granted in part and denied in part. Did I miss anything?

21 McHuguen and Helms, Docket Entry Number 3397. I was
22 trying to figure out how this is different from what I have
23 ruled on before. It's a lot of sort of splitting hairs that he
24 can say this but he can't say that. How is it different?

25 MS. GARRISON: It's no different. I'm sorry if I

1 interrupted. It's no different, it's the same.

2 THE COURT: Do you remember my previous rulings?

3 MS. GARRISON: I do.

4 THE COURT: Do you remember them, Mr. Hughes?

5 MR. HUGHES: I have a working knowledge of them,
6 yes.

7 THE COURT: All right. I'm not going to restate
8 them. My rulings are the same, so that's granted in part and
9 denied in part. Then we will have to look them up if I don't
10 remember them. I generally do. I hope I have a working
11 knowledge and memory of it, but if I get it wrong and you start
12 fighting about it, you're going to have to show me where I said
13 what. Any other of the plaintiff's motions in limine that I
14 missed?

15 MR. CHANEY: Your Honor, there is a matter that is
16 not a motion in limine that is on file, but it's only come to
17 our attention after we reread Mr. Glover's testimony from the
18 last trial and compared it in light of the Court's summary
19 judgment ruling on new and intervening cause.

20 You may recall at the last trial Mr. Downing put on Mr.
21 Glover and the initial cross-examination by Mr. Summers delved
22 into incidents in November of '05 and January of '06 in which
23 Producers may have been put on notice of possible contamination
24 and what Producers did or did not do in response.

25 Those arguments and dealing with those matters are much

1 all Tuesday morning.

2 (A recess was taken.)

3

4

REPORTER'S CERTIFICATE

5

I, TERI HANOLD HOPWOOD, RMR, CRR, Official Court

6

Reporter for the United States District Court for the Eastern

7

District of Missouri do hereby certify that the foregoing is a

8

true and correct transcript of the proceedings had in this

9

cause as same appears from my stenotype notes made personally

10

during the progress of said proceedings.

11

12

/S/ Teri Hanold Hopwood, RMR, CRR

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TERI HANOLD HOPWOOD, RMR, CRR

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Official Court Reporter

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Exhibit G

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

In Re: Genetically-Modified Rice
Litigation

No. 4:06-MD-1811

PRESENT: The Honorable Catherine D. Perry, Presiding
ATTORNEYS FOR PLAINTIFF: Don M. Downing, Gretchen Garrison,
William B. Chaney, Bruce Kingsdorf, Jason Sapp, Jennifer
Hoekstra
ATTORNEYS FOR DEFENDANT: Mark E. Ferguson, Glen E. Summers,
John Olinde

JURY TRIAL

Volume 16

July 13, 2010
July 14, 2010

TERI HANOLD HOPWOOD, RMR, CRR
Thomas F. Eagleton Courthouse
111 South Tenth Street
St. Louis, Missouri 63102

1 maintain control over its LLRICE. First of all, Bayer
2 designated itself as the responsible party, or the responsible
3 person. You've seen these exhibits. I'm going to go through
4 them. This is the notification. Before Bayer could bring this
5 into our country, it had to designate itself as the applicant/
6 responsible party, AgrEvo USA, as one of the Bayer
7 predecessors.

8 It had to do this every time it moved the rice in our
9 country. It did it over and over again. Every time it
10 notified our Government about this, it also had to certify to
11 our Government that it was going to comply with our laws, which
12 required them to allow no escape. It did that over and over
13 again.

14 Several of Bayer's witnesses acknowledged that they knew
15 that it was Bayer's responsibility to maintain control over
16 this rice. Several of Bayer's witnesses also admitted that
17 Bayer was responsible for its cooperator's conduct.

18 Now let me define what I mean by "responsible person" as
19 Bayer acknowledged the responsibility. Mike, show DM 3. Under
20 our laws, when you designate yourself as the responsible
21 person, that's the person who has control and will maintain
22 control over the introduction of the regulated article. I
23 think we know that was Bayer in this case. Bayer's witnesses
24 have admitted it.

25 Now several of Bayer's witnesses admitted that they knew

1 not only that they were responsible for maintaining control,
2 they were also responsible for its cooperators' conduct, like
3 LSU, all of its cooperators. Margaret Gadsby admits that Bayer
4 knew it was responsible for its cooperators' compliance with
5 our laws. Mike, play the Margaret Gadsby video clip.

6 (Portion of Margaret Gadsby deposition played.)

7 Under our laws, Bayer cannot introduce LLRICE 601 or 604
8 into our environment, or let it persist in our environment
9 without permission from the USDA except as expressly
10 acknowledged by the notifications that it sent to our
11 Government. Well, Bayer never got permission to introduce or
12 release LLRICE into our commercial rice supplies, never sent a
13 notification telling our Government that we're going to release
14 this into the commercial rice supplies. Bayer knew it was not
15 supposed to let that happen. Bayer made commitments to our
16 Government that it would not let that happen.

17 Mike, show DM 9. You've seen these before. These are
18 the performance standards. I'm not going to go through them
19 one by one. You've heard a lot of about them during the trial.
20 Under these performance standards Bayer knew there could be no
21 release whatsoever outside of the contained conditions of the
22 field trials and the laboratories where they notified our
23 Government it would be. You will get the performance standards
24 when you deliberate. It's Exhibit 1 in this case, so if you
25 want to read them, if you want to read them carefully, you will

1 have them in your jury deliberations. Look for Exhibit Number
2 1.

3 Now if Bayer had not made the commitment to our
4 Government that it did, that it would keep this under control
5 and maintain control, it would not have been allowed to bring
6 LLRICE into our country, and it would not have been allowed to
7 conduct field tests in our country of LLRICE.

8 We've covered what Bayer's responsibilities were because
9 it was Bayer's rice. Let me move on to the second topic now.
10 It got out. Put up DM 100.

11 We know this. I'm not going to go through every single
12 one of these with you. You were here when I asked Peg Cherny
13 about these, and she confirmed virtually every escape on this
14 page, if not all of them. It got out everywhere. It
15 contaminated two of our most popular seed varieties, Cheniere,
16 CL 131. Those varieties were planted on 30 percent of the rice
17 acreage in this country. It got out everywhere.

18 It also -- one thing I wanted to point out, you see LL
19 62 on this screen. Well, LL 62, as you know, the field trials
20 were conducted for LL 62 under the same containment protocols
21 that they were conducted for LL 601 and 604. Well, LL 62 got
22 out.

23 You know LL 62 was deregulated in our country, but not
24 in Europe, so LL 62 got into the European Union market as late
25 as 2008. You've seen the document in this case where LL 601,

1 negligent.

2 Another circumstance is that Bayer knew beyond any
3 shadow of a doubt, Bayer knew that an escape would cause
4 serious consequences because of the EU's zero tolerance policy.
5 Mike, show the video clip from Bernhard Schreiber's deposition.

6 (Portion of Bernhard Schreiber deposition played.)

7 Not only did Bayer know that there were serious
8 consequences of any escape from its StarLink episode, which
9 you've heard about the Taco Bell disaster in this case, Bayer
10 knew that even a little escape of a genetically-modified
11 unapproved substance could cause enormous financial
12 consequences. So for all these reasons, Bayer understood under
13 its obligation not to be negligent, it understood, and its
14 expert witness Dr. McHughen testified that it had to be very,
15 very, very careful to ensure the LLRICE did not get out.

16 Here is Dr. McHughen, Bayer's own expert's testimony
17 acknowledging this.

18 Question: All right. And you agree, don't you, that a
19 developer, Bayer in this case, has to be very, very, very
20 careful in the handling of transgenic material, you agree with
21 that, don't you?

22 Answer: Yes, I do.

23 So, now that we know how careful Bayer had to be, let's
24 look at what Bayer did and see if they were careful. I put
25 this up in the opening statement, questions that I raised in

1 the opening statement about whether Bayer was careful. I'm not
2 going to have time to go through all of these today, but let me
3 go through some of them with you, and Mr. Arsenault is going to
4 talk about some issues related to this as well.

5 First of all, Bayer had, as you know, nine different
6 cooperators performing field trials in four different states
7 plus Puerto Rico.

8 Mike, if you would show DM 98. Here is the cooperators,
9 you've heard about some of them, but here are all nine. Now,
10 nine different cooperators performing field trials all over.
11 One point I want to make before I talk about all of them
12 collectively, just one of those cooperators in one field trial
13 test, the University of Puerto Rico, the one at the top, they
14 produced in one field trial in 2001 over 180 million LL 601
15 seeds, so we're not talking about small plots in all of these,
16 we're talking about large scale seed increases, 180 million
17 seeds.

18 So, nine different cooperators, four states and Puerto
19 Rico, hundreds of millions of seeds being involved, there is a
20 lot of potential for escape when you do your GMO development
21 this way. Bayer didn't have to do it this way. It could have
22 created its own facility with its own people and its own land.
23 It chose not to do that. It chose to use nine different
24 cooperators in four states.

25 Common sense dictates that the more cooperators and the

1 more seed, the greater the risk of escape. For each of these
2 cooperators, just think about it, Bayer had to transport the
3 seed to the site, it had to be taken out with the trucks or
4 however it was transported, envelopes, it had to be handled
5 perhaps by multiple people, it had to be planted, and in some
6 cases it had to be harvested, and in some cases it had to be
7 destroyed, and other cases the seed was shipped back somewhere
8 else. Multiple opportunities all along the way for each of
9 these cooperators for there to be some escape.

10 Now, if you're going to use this many cooperators in
11 this many locations, you had better be certain that you have
12 your act together. You better be certain that you have a
13 rigorous method of keeping track of all the seeds and a very
14 comprehensive system to monitor compliance with all appropriate
15 containment measures.

16 We will examine whether Bayer had such a system in place
17 in just a minute, but first let's focus on Bayer's decision to
18 go to one of these cooperators, LSU. You've heard a lot of
19 testimony in this case about LSU. Well, was it careful for
20 Bayer to imbed its LLRICE field trials, some of it, in a rice
21 breeding program? Was that careful? Let's look at the
22 decision.

23 First of all, let's look at why Bayer would go to LSU.
24 Did Bayer go to LSU to be careful? I think the evidence
25 suggests not. LSU and Dr. Steve Linscombe had a well-deserved

1 reputation for breeding commercially successful conventional
2 rice seed varieties. Having Steve Linscombe's name associated
3 with your variety was like the Good Housekeeping Seal of
4 Approval. You could sell your rice if it had his name behind
5 it. Bayer wanted to trade off Steve Linscombe's name if it
6 ever was going to be able to sell LLRICE. It was a great brand
7 name to have behind your rice. That's why Bayer, the evidence
8 suggests, wanted to go to LSU.

9 But was imbedding your field trials of unapproved
10 experimental genetically-modified rice in a breeding program, a
11 breeding program, was it careful, not was it a chance to make a
12 lot of money, but was it careful? Is that where you would go
13 if you were trying to be very, very, very careful to make sure
14 this didn't get out?

15 Well, the closer you go to commercial rice supplies, the
16 greater the risk of escape. No question that if you go to an
17 isolated area far away from where commercial rice is being
18 bred, the chances of escape are virtually nonexistent, but if
19 you go to a rice breeding station where conventional rice
20 varieties are getting bred, then exponentially multiplied, then
21 shipped all over the southern United States to seed dealers and
22 to farmers, the risk you run, if there is any escape, it's
23 going to be -- and it gets into the foundation seed supplies,
24 it's going to be multiplied and then shipped all over our
25 country. Steve Linscombe himself at LSU, he told us that the

1 risk of contamination of non-GM crops would have been
2 substantially reduced if the field testing of LL 601 and 604
3 had not taken place at a facility that was doing foundation
4 seed work.

5 Here is his testimony.

6 Question: Would not the risk of contamination of non-GM
7 products have been substantially reduced if the field testing
8 of the GM products had taken place at a facility not doing
9 foundation seed work?

10 He admitted, it would have, it would have been reduced.

11 Bayer itself made the same point back in 1997 before it
12 even started these field trials in the memo that I showed you
13 in opening statement from Hugh MacGillivray, the first Liberty
14 Link project leader. In that memo, this is Trial Exhibit 407,
15 Mr. MacGillivray said going to a breeding station represents a
16 significant risk for AgrEvo. Bayer knew the risk it was taking
17 by going to LSU. We know why it went there, not to be careful
18 but to get Steve Linscombe's name behind its rice.

19 If you want to trade off Steve Linscombe's name to make
20 a lot of money, maybe LSU and its breeding station was a great
21 place to go, but if being very, very, very careful to prevent
22 an escape that could consume our entire commercial rice supply,
23 if you wanted to avoid that, if that was your goal, would you
24 want to go to a breeding station like LSU? It's absolutely the
25 worst place for you to go if that's your goal.

1 To make matters worse, as you know by now, Bayer not
2 only went to LSU, it allowed LSU to use the same equipment, the
3 same people, the same storage facilities, the same everything
4 as they used when they were doing their conventional foundation
5 breeding work, same equipment, same people, same everything.
6 This was clearly a recipe for disaster. It was an accident
7 waiting to happen. We know what did happen. Is this being
8 very, very, very careful to avoid an escape?

9 Now Bayer wants you to believe, and you'll hear today
10 I'm sure from Mr. Ferguson, Bayer wants you to believe that it
11 was careful because it went to LSU, because Steve Linscombe was
12 such a great conventional rice breeder. It says also that
13 other GMO developers went to LSU, and that somehow must suggest
14 that Bayer was careful. I think that's the argument you're
15 going to hear.

16 That sounds a lot like the everybody-else-is-doing-it
17 argument I used to make with my mom when I was young. We've
18 just had the Fourth of July, and everybody likes fireworks on
19 the Fourth of July. When I was a young boy growing up in
20 southeast Missouri, there was a particular kind of firework
21 that I liked, the Roman candles. You've seen those, little
22 tubes that you shoot fireworks up in the air. The label
23 specifically talks about that you're supposed to put those
24 Roman candles in the ground and not hold them in your hand when
25 you're using them, because if you hold them in your hand, they

1 about these notebooks. Mike, show Exhibit 26. This is one of
2 these notebooks, and go to page 2. Bayer itself recognized the
3 inadequacy of these notebooks. Basically this is what's called
4 a disclaimer. On the second page, it says, "This is intended
5 as an informational guide only. Aventis CropScience makes no
6 representations or implied warranties as to the accuracy of the
7 information, its efficacy, or its fitness for a particular
8 purpose." Bayer recognized the woeful inadequacy of its field
9 trial notebooks.

10 Another thing, if you were going to -- if you're going
11 to try to be very, very, very careful to make sure that this
12 didn't get out, would you want to put a person in charge of the
13 genetically-modified field trials who had no prior experience
14 whatsoever in genetically-modified field trials? Zero? That's
15 Kirk Johnson.

16 You've heard from Kirk Johnson. He admitted no prior
17 experience in GM field trials. He had never designed a
18 containment system in his life before he went to Bayer, never.
19 Never even thought about it. He had never read or studied in
20 detail the regulations, the performance standards, never
21 attended any industry seminars or formal training sessions
22 regarding the regulations, never read advisory material from
23 the Government on how to apply the regulations. He didn't
24 review the performance standards with each of the cooperators,
25 admitted that he didn't do that.

1 Most tellingly, and you've heard this in this trial,
2 Johnson said in one of his depositions, "Well, a yield trial is
3 a yield trial." Well, that's wrong. A GMO yield trial is not
4 any other yield trial. As I mentioned, you have to have no
5 escape on a GMO yield trial. With conventional rice breeding,
6 you can have escape, you can have off-types without causing
7 serious consequences and the loss of an entire foreign market.
8 Is Kirk Johnson the person that you would want to put in charge
9 of this massive LLRICE project, the field trials, if you were
10 trying to be very, very, very careful?

11 You would also, if you were trying to be that careful,
12 you would also want to have a system to verify or audit that
13 the cooperators had complied with all of your things in your
14 notebook and the other things you told them. Well, there is
15 nothing like that here. Donna Mitten thought, as you've heard,
16 that auditors would cost too much. You also would want to
17 devise a system to keep meticulous track in detail of the
18 locations and the amount of all the unapproved experimental GMO
19 seed that's going out to all these cooperators, where it is,
20 how much, all those sorts of things. How can you keep -- how
21 can you contain something if you don't keep track of it?

22 Dr. Van Acker, to give you a comparison, you heard Dr.
23 Van Acker testify that he did field trials for GMO for Monsanto
24 for four years. Monsanto, he testified, had a rigorous
25 tracking system, tracking all seeds down to the individual seed

1 number, 17 seeds of X, six seeds of Y, 0 seeds of Z. By
2 contrast, Bayer had no such system. It lost track, as you've
3 heard, of 180 million seeds that ended up in Jacko Garrett's
4 cold storage and didn't even know where they were. Bayer lost
5 track simply because it had no system in place to keep track.

6 Also, if you were trying to be very careful, would you
7 require that your cooperators not use the same equipment, the
8 same people, and the same storage facilities that they are
9 using on their conventional operations? Is that something you
10 would do if you were trying to be very careful? At least it
11 would be explained that if you are going to use the same
12 equipment, you have to clean it down so that there is not any
13 single rice seed left in it. Every time it touches GM rice, it
14 has to be thoroughly cleaned to make sure there is nothing
15 left, or if you're trying to be careful, you could have an
16 auditor monitor the cleaning like Monsanto does, and you heard
17 Dr. Van Acker testify about that. Bayer did not require any of
18 these protections, and didn't want to have an auditor as you've
19 heard again because they did not want to incur the additional
20 costs.

21 You would also think if you wanted to be very careful,
22 you would at least require written documentation of destruction
23 of all the seed to make sure it was destroyed, or better still,
24 require an independent party to come in and destroy the seed
25 like you've heard Dr. Van Acker say Monsanto did. Well, Bayer

1 good job, so thank you. Court is in recess.

2 (A recess was taken.)

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REPORTER'S CERTIFICATE

6 I, TERI HANOLD HOPWOOD, RMR, CRR, Official Court
7 Reporter for the United States District Court for the Eastern
8 District of Missouri do hereby certify that the foregoing is a
9 true and correct transcript of the proceedings had in this
10 cause as same appears from my stenotype notes made personally
11 during the progress of said proceedings.

9

/S/ Teri Hanold Hopwood, RMR, CRR
TERI HANOLD HOPWOOD, RMR, CRR
Official Court Reporter

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Exhibit H

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

In Re: Genetically-Modified Rice
Litigation

No. 4:06-MD-1811

PRESENT: The Honorable Catherine D. Perry, Presiding
ATTORNEYS FOR PLAINTIFF: Don M. Downing, Gretchen Garrison,
William B. Chaney, Bruce Kingsdorf, Jason Sapp, Jennifer
Hoeckstra
ATTORNEYS FOR DEFENDANT: Mark E. Ferguson, Glen E. Summers,
John Olinde

JURY TRIAL
Volume 10A
Morning Session
July 2, 2010

TERI HANOLD HOPWOOD, RMR, CRR
Thomas F. Eagleton Courthouse
111 South Tenth Street
St. Louis, Missouri 63102

1 this for many years, developed many very successful rice
2 varieties. They have the equipment, they have the staff, they
3 have the professionals, and they have the experience of working
4 with genetically-engineered crops under the confined conditions
5 that the USDA imposes.

6 Q. Prior to these field trials that Bayer hired LSU to do, LSU
7 had done work with genetically-engineered rice before.

8 A. Yes, indeed. They worked with Monsanto, for example, they
9 worked with the developers of the Golden Rice project, and
10 other smaller companies as well, so they do have the hands-on
11 experience. They know what the regulations are, they are used
12 to dealing with it, and the alternative would be just not
13 appropriate.

14 Q. Now, you mentioned Golden Rice. Let me go off and ask you
15 a little bit off subject here and ask you a question about
16 Golden Rice. What is Golden Rice?

17 A. Golden Rice is a genetically-engineered type of rice.
18 Genes have been introduced into the rice plant to have the rice
19 produce more beta carotene, which is the chemical that turns
20 into vitamin A in the body.

21 Q. Why has that been developed? What problem is it intended
22 to solve?

23 A. In some poorer parts of the world, children, particularly,
24 don't get enough vitamin A in their diet, they have a diet
25 that's satisfactory in carbohydrates in rice, starch and so on,

1 but they don't get enough vitamin A so they tend to go blind
2 and lead to later health problems as well, so this was a
3 humanitarian effort to introduce into their common food a new
4 nutrient which is rich in this vitamin A, so by having their
5 ordinary bowl of rice a day, these children could be saved the
6 problems of vitamin A deficiency.

7 Q. Is this a big problem or a little problem?

8 A. It's a huge problem. Millions of kids a year go blind
9 because of it.

10 Q. Now turning back to the question of whether it was
11 reasonable and appropriate for Bayer to hire LSU to perform
12 these field trials, did Dr. Linscombe -- was Dr. Linscombe the
13 director of the LSU Rice Research Station?

14 A. He was the director of the breeding program. I'm not sure
15 whether that includes the director of the entire station or
16 not.

17 Q. Did he have a good reputation?

18 A. His reputation, yes, indeed. He's widely recognized as a
19 preeminent if not the preeminent rice breeder right now.

20 Q. And what about LSU and the LSU Rice Research Station in
21 particular, what's the reputation they have?

22 A. Same thing. You have to have a good infrastructure, good
23 support staff, equipment and so on to be as successful as Dr.
24 Linscombe and LSU were in rice breeding.

25 Q. And you mentioned that they had been working with

1 genetically-engineered rice previously. Had they had any
2 contamination incidents or any problems that Bayer would have
3 been aware of?

4 A. No, and that would be a consideration that Bayer or other
5 potential partners would consider.

6 Q. Did LSU have a very successful breeding program?

7 A. Yes, indeed, yes.

8 Q. How did it rank in terms of rice breeding, how would it
9 rank in America?

10 A. I would say it would be very close to number one, if not
11 number one.

12 Q. And what significance was it that Dr. Linscombe was a very
13 successful and well regarded rice breeder, why would that be of
14 significance?

15 A. Dr. Linscombe as a rice breeder, like all breeders, have to
16 be a very particular kind of person, in particular I mean
17 meticulous, they have to keep accurate records, they have to
18 know the materials. The breeding program would have thousands
19 of different genotypes, different lines, and he would have to
20 keep an eye on those, keep accurate records. It would take
21 several years to take a line from the initiation to the
22 ultimate commercialization. You have to know where the seeds
23 are year after year, how they are progressing through the
24 system and so on. People who are sloppy are not successful at
25 that.

1 Q. Now, you mentioned before that you toured the facilities at
2 LSU, and that you discussed -- you discussed them with Dr.
3 Linscombe. Do you believe that at the time of these field
4 trials, LSU had the right sort of facilities for this work?

5 MS. GARRISON: May we approach?

6 THE COURT: You may.

7 (Side bar conference out of the hearing of the
8 jury.

9 MS. GARRISON: Again this is beyond the scope of the
10 report. The facility discussion, all of the facility
11 discussion in the report is on the pages with the 2009
12 pictures, and that has been stricken as well, based on the
13 pretrial ruling.

14 THE COURT: In his report he doesn't say anything
15 about what his facilities were like in 2001 or before?

16 MS. GARRISON: As a matter of fact, at the
17 deposition, this was part of the motion in limine, the question
18 was asked, "You don't know how what you saw in 2009 compared to
19 what was going on back in 1998 through 2001," and he said no.

20 MR. SUMMERS: I don't think that's accurate, Your
21 Honor. There was the issue about the current pictures, but he
22 did discuss with Dr. Linscombe what the facility -- any
23 differences and what the facility was like at the relevant time
24 period.

25 THE COURT: I need to see the report again because

1 having a date range 6/16/87 through 1/1/09. Do you see that?

2 A. Yes, uh-huh.

3 Q. And tell us how many occurrences.

4 A. One.

5 Q. Okay, and look down there at the bottom and tell us what
6 does it say about the status.

7 A. Status of the corn was denied.

8 THE COURT: Excuse me, counsel, we're going to take
9 our lunch recess at this time. Members of the jury, please
10 remember the instructions I've given you earlier about not
11 discussing the case and keeping an open mind until you've heard
12 all of the evidence. This case is in recess until 1:30.

13 (A recess was taken.)

14

REPORTER'S CERTIFICATE

15 I, TERI HANOLD HOPWOOD, RMR, CRR, Official Court
16 Reporter for the United States District Court for the Eastern
17 District of Missouri do hereby certify that the foregoing is a
18 true and correct transcript of the proceedings had in this
19 cause as same appears from my stenotype notes made personally
20 during the progress of said proceedings.

18

19 /S/ Teri Hanold Hopwood, RMR, CRR
20 TERI HANOLD HOPWOOD, RMR, CRR
21 Official Court Reporter

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