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

IN RE GENETICALLY MODIFIED RICE LITIGATION	))))))	**4:06 MD 1811 CDP** **Trials Commencing May and July, 2011**

BAYER DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO LIMIT DR. COLIN CARTER'S TESTIMONY UNDER RULE 702

The issue raised by this motion is whether Dr. Carter has any basis under *Daubert* for the new opinions in his April 2010 supplemental report. Dr. Carter's report abandons opinions he reached earlier and results in dramatically increased damage claims.

It would be one thing if Dr. Carter could pass muster under *Daubert* on his new opinions. Bayer would then have to be content with contrasting what Dr. Carter says now with what he said before. But here Dr. Carter's new opinions are not based on sufficient facts or data and do not reflect a logical application of any accepted scientific method. Instead, Dr. Carter replaces his original opinions with new, diametrically-opposed opinions without any basis in fact or logic for the change. The proper remedy for this is not cross-examination, but exclusion of the opinions.

In his prior reports, Dr. Carter had opined that the LibertyLink rice announcements in August 2006 and March 2007 had immediate negative impacts on rice prices, but also that: (1) the price effect began to dissipate immediately after the week of the announcements; (2) a December 2007 announcement about a change in European Union testing requirements immediately moderated the price impact of the earlier announcements; (3) the market's positive reaction to the December 2007 announcement "confirmed" and "established" that there was still an on-going price effect from the earlier announcements; and (4) the price effect of the announcements, and thus the damage period, would terminate at the end of 2014. (Carter April 2009 Report at ¶¶ 99, 108-09; Carter September 2009 Report ¶ 21.)[1]

Now in his April 2010 report, Dr. Carter reverses ground on each of these four points. His new opinions are: (1) the price effects of the August 2006 and March 2007 did not diminish by a single penny until years after the announcements; (2) the December 2007 announcement had no impact on rice prices; (3) the price effects of the August 2006 and March 2007 announcements did not start to dissipate until an April 2010 announcement by the European Union that it was no longer requiring destination testing; and (4) price effects and the damage period will continue until the end of 2015. Dr. Carter presents two new damage scenarios—the "Conservative" and "Most Realistic" scenarios—that are based on these new opinions.[2]

The question is whether Dr. Carter has provided any basis under Daubert for this complete about-face. The answer is that he has not. Dr. Carter bases his new opinions on only two observations: that there was an EU announcement in April 2010 that had no effect on rice prices, and that sales volumes in the EU have not increased significantly in recent years.[3] Neither of these items can possibly justify the new opinions that Dr. Carter wants to offer.

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[1] Dr. Carter's April 2009 Report is Exhibit C to Bayer's opening brief (D.E. 3916). His September 2009 Supplemental Report is Exhibit 9 to Plaintiffs' Response ("Pl. Br.", D.E. 4071).

[2] Dr. Carter also presents a "Most Conservative" scenario that reflects the opinions he advanced in his earlier reports, not his new opinions. This motion does not seek exclusion of that damage scenario, except for the part that extends damages beyond year-end 2014 to year-end 2015. Dr. Carter has provided no reliable basis for that extension. His opinions on "stigma" do not justify the extension of damages, for the reasons presented in Bayer's opening brief.

[3] *See, e.g.*, Pl. Br. at 11 (new opinions based on "trade statistics still showing no recovery of lost export and the lack of positive price impacts from the April 2010 announcement").

The April 2010 Announcement

Dr. Carter's opinions concerning the April 2010 announcement are baffling. He says: (1) the April 2010 announcement had no effect on the price of rice; (2) yet based on an announcement that had ***no effect on the market,*** he is withdrawing his opinion that the December 2007 announcement ***did*** have an effect; (3) based on this 2010 announcement that had no effect on the market, he is also withdrawing his opinion that the 2006 and 2007 price effects began dissipating immediately; and (4) instead he is now opining that any dissipation of the price effects of the 2006 and 2007 announcement begins at the time of the April 2010 announcement—an announcement that Dr. Carter says actually did not affect the market price at all.

It is impossible to make sense of these opinions. Dr. Carter's new opinions about the April 2010 announcement not only contradict his earlier opinions, they contradict themselves. If the April 2010 announcement had no effect on the market—an undisputed point that Plaintiffs press at great lengths in their brief (Pl. Br. at 7-11)—then that announcement provides no basis whatsoever to reverse Dr. Carter's earlier opinions about dissipation.

The lack of market effect of the April 2010 announcement is consistent with Bayer's position that there simply was no price effect left to counteract by April 2010. The lack of market effect of the April 2010 announcement is also consistent with the position that Plaintiffs take in their footnote 9: that there was a continuing market effect but the announcement was a non-event because it didn't really change anything. But the one thing that it is ***not*** consistent with is Dr. Carter's new opinions. There is no logic by which an expert can go from the fact that the April 2010 announcement did not affect rice prices to a conclusion about what did affect rice prices in 2006 and 2007. Dr. Carter's attempt to use the April 2010 announcement as an excuse to walk away from his earlier opinions about immediate dissipation and about the effect of the December 2007 announcement is baseless.

Just as baseless is his identification of the April 2010 announcement that did not affect market prices as the event that ***started price dissipation.*** It appears that, having renounced his earlier opinions about dissipation, Dr. Carter realized that he might look unreasonable if he said that the price impacts of the August 2006 and March 2007 continued unabated for nearly a decade—so he picked April 2010 out of the air as the date when dissipation starts. But to restate the obvious, if the April 2010 announcement did not affect market prices, there is no basis beyond Dr. Carter's arbitrary choice to say that price dissipation starts the month of that announcement.

Exports to the EU

Plaintiffs also argue that Dr. Carter's about-face is justified by the fact that exports to the EU have not significantly increased in recent years. According to Dr. Carter, the fact that imports have not recovered shows that the December 2007 announcement had little impact on actual trade levels with the EU. So far, so good. But then he concludes from this fact—that the December 2007 announcement did not lead to increased export levels in 2008, 2009, and 2010—that "it is unlikely the December 2007 announcement had a positive impact on the price." (Pl. Br. at 7-8.) He also concludes that since exports did not increase in 2008-2010, there must have been no immediate dissipation of the price effects of the LibertyLink announcements earlier in 2006 and 2007. (*Id.* at 12-13.)

The logical flaws are obvious.

EU export levels in 2008-2010 tell nothing about whether the price effects dissipated in 2006 and 2007. Price levels in 2006 and 2007 reflected perceptions in the market at the time, not something that happened years later. Dr. Carter originally acknowledged that there would be dissipation. He now wants to disavow that opinion. Perhaps this would be permissible, if he could come up with some evidence that would undermine his earlier opinion and justify a new opinion. But EU export levels in later years do not do that.

Indeed, EU export levels in 2008-2010 do not even tell anything about what happened to rice prices in those very years. An opinion about what happened to U.S. rice prices in a world-wide market cannot be based on export numbers in one small segment of that market. Sales lost in Europe may well have been made up for elsewhere. And sales may have gone down in Europe precisely because American rice mills realized that they didn't need to sell into the EU: why take on the risk of another incident in the GM-sensitive EU when you can sell that rice into other markets that do not have the same sensitivity? In short, there is no direct link between EU export levels and price levels, and Dr. Carter does not even attempt to argue for one in his supplemental report. For Dr. Carter to overthrow his previous opinions on rice prices, he would need to present some data that reflect ***prices***, not data on EU export volumes.

Dr. Carter's second purported basis for changing his opinion is thus just as unavailing as his first basis.

Conclusion

Bayer's motion should be granted. Dr. Carter's new opinions, and his "Most Realistic" and "Conservative" damage scenarios based on those opinions, should be excluded.

Dated: March 4, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this 4th day of March, 2011, electronically filed a copy of the foregoing with the Clerk of Court to be served by operation of the Court's electronic filing system upon the parties of record.

/s/ Lester C. Houtz
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