

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

IN RE:)
GENETICALLY MODIFIED)
RICE LITIGATION)
_____)

4:06 MD 1811 CDP

MOTION AND SUPPORTING MEMORANDUM
BY PLAINTIFFS' CO-LEAD COUNSEL TO APPROVE
QUALIFIED SETTLEMENT FUND TRUST AGREEMENT, ESCROW
DEPOSIT AGREEMENT, AND AMENDMENTS TO THE
COMMON BENEFIT FUND QUALIFIED SETTLEMENT AGREEMENT

Don M. Downing and Adam J. Levitt – Plaintiffs’ Court-appointed Co-Lead Counsel (“Lead Counsel” or “Movants”), respectfully move the Court to approve the Qualified Settlement Fund Trust Agreement, the Escrow Deposit Agreement, and amendments to the Common Benefit Fund Qualified Settlement Agreement. In support of their Motion, Lead Counsel state as follows:

1. Under the terms of the MDL Bayer Settlement Agreement (the “MDL Settlement Agreement”) negotiated and executed between Bayer¹ and certain plaintiffs’ counsel identified as the Negotiating Claimants’ Counsel (the “NCC”), the funds Bayer is obligated to pay to in settlement of the producer claims submitted by each Enrolled and Eligible Claimant, as defined in the MDL Settlement Agreement and as bound by that agreement (the “Settling Claimants”), are to be paid by Bayer into a Qualified Settlement Fund (“MDL QSF”) established under

¹ In the MDL Settlement Agreement, “Bayer” collectively refers to and includes the following settling entities: Bayer CropScience LP, Bayer CropScience Holding Inc., Bayer CropScience Inc., Bayer CropScience LLC, Stoneville Pedigreed Seed Company, Bayer Corporation, Bayer AG, Bayer CropScience AG, Bayer BioScience NV, Bayer CropScience Holding SA and Bayer CropScience SA.

Section 468B of the Internal Revenue Code, 26 U.S.C. § 468B and the Treasury Regulations promulgated thereunder (collectively, the “QSF Statute and Regulations”).

2. A form of agreement for the MDL QSF prepared by NCC and approved by Bayer was identified as Exhibit F to the MDL Settlement Agreement. Thereafter, NCC representatives identified several financial institutions as potential trustees or administrators of the MDL QSF, and, after a comprehensive selection process, chose US Bank National Association (“US Bank”) to serve in that capacity, negotiating the specific terms under which US Bank would agree to do so. Those terms varied from the MDL QSF form previously approved by Bayer in connection with the MDL Settlement Agreement. A copy of the modified *Genetically Modified Rice MDL Eligible Claimants’ Qualified Settlement Fund Trust Agreement* (the “Trust Agreement”) negotiated with US Bank is attached as Exhibit A-1 to this motion.² Bayer has approved and consented to the substance and form of Exhibit A-1. The fees for US Bank to serve as the Trustee of the MDL QSF are set forth in Exhibit C-1 to the Trust Agreement. By this motion, Lead Counsel respectfully seek the Court’s approval of the Trust Agreement attached as Exhibit A-1.

3. Movants also respectfully request that the Court permit them to transfer the funds that are presently being held at Bank of America under the terms of the qualified settlement fund for the common benefit fees and costs – which this Court approved in its June 9, 2010, Order (Dkt. No. 2992) (the “CBF QSF”) – to an account at US Bank in accordance with an Escrow Deposit Agreement (the “CBF Deposit Agreement”), the form of which is attached hereto as

² For ease of reference, Movants have also attached to this Motion, as Exhibit A-2, a redlined version of the Trust Agreement, highlighting the substantive differences between the version of the agreement attached to the MDL Settlement Agreement and the Trust Agreement for which approval is presently being sought.

Exhibit B. Movants, in their capacity as Trustees of the CBF QSF, believe that this transfer will further streamline and facilitate resolution of this facet of the litigation because, in large measure, the fees and costs negotiated with US Bank for the MDL QSF were part of a package that assumed that the funds held under CBF QSF would also be deposited with US Bank. Moreover, having both accounts at the same institution will streamline and simplify the administration of these accounts for Co-Lead Counsel, in their respective capacities as Trustees under the CBF QSF and as the initial members of the Oversight Committee under the Trust Agreement. In conjunction with this requested transfer, Movants also respectfully request that this Court also approve the amendments to the CBF QSF set forth in Exhibit C-1 to this Motion (the “CBF QSF Amendments”).³ These proposed amendments expressly provide that the fees incurred under the MDL QSF may be paid out of the CBF QSF.

4. The QSF Statute and Regulations require Court approval of the Trust Agreement.

5. Movants respectfully submit that the Trust Agreement (Exhibit A-1), the CBF Deposit Agreement (Exhibit B), and the CBF QSF Amendments (Exhibit C-1), and their approval by this Court, are in the best interests of the Settling Claimants and other interested parties (including non-producers, their counsel or other parties not participating in the MDL Settlement who may nonetheless wish to make claims for recovery of fees or expenses out of the CBF QSF) in this litigation and respectfully request that this Court approve each of them in the status conference presently scheduled for December 8, 2011. In anticipation of that status conference, the Joint Report of Lead Counsel filed on December 1, 2011 (Dkt. No. 4325),

³ Exhibit C-2 is a redlined version of the proposed, amended CBF QSF comparing the amended version with the version approved by the Court under its June 8, 2010, Order. Exhibit C-1 is a clean copy of the proposed, amended CBF QSF.

identified the approval of the MDL QSF as one of the matter to be addressed during the course of that conference.

WHEREFORE, for the foregoing reasons, Lead Counsel respectfully request that this Court approve the Trust Agreement, the CBF Deposit Agreement and the CBF QSF Amendments, each as more particularly set forth in the exhibits to this motion.

DATED: December 5, 2011.

Respectfully submitted,

GRAY, RITTER & GRAHAM, P.C.

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this 5th day of December, 2011, electronically filed a copy of the foregoing with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the parties of record.

/s/ Don M. Downing

Don M. Downing