

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

IN RE GENETICALLY MODIFIED RICE
LITIGATION

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4:06 MD 1811 CDP

TRIAL COMMENCING
JANUARY 18, 2011

**THE BAYER DEFENDANTS' MOTION IN LIMINE TO EXCLUDE EVIDENCE AND
ARGUMENT REGARDING LIABILITY INSURANCE**

The Bayer Defendants move to exclude evidence or argument regarding the Bayer Defendants' liability insurance policies. The Court granted an identical, unopposed, motion for the first trial. *See* Ex. A, First Bellwether Pretrial Conf. Tr. 37:13-23, Oct. 29, 2009; Ex. B, Second Bellwether Pretrial Conf. Tr. 62:11-13, Jan. 7, 2010; Ex. C, Third Bellwether Pretrial Conf. Tr. 42:17-19, June 16, 2010; Ex. D, Fourth Bellwether Pretrial Conf. Tr. 64:3-5, Oct. 7, 2010.

ARGUMENT

Rule 411 of the Federal Rules of Evidence states that “[e]vidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.” The comment to Rule 411 recognizes that “knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds.” Fed. R. Evid. 411 advisory committee’s note (1972). The Eighth Circuit has indeed held that “interjection of the fact that the defendant is protected by insurance or other indemnity may be prejudicial error requiring reversal.” *Griffin v. Hilke*, 804 F.2d 1052, 1057 (8th Cir. 1986). Evidence of the Bayer Defendants’ insurance policies is not relevant to any issue in the case, is plainly prejudicial, and is therefore inadmissible. Fed. R. Evid. 401 and 402.

CONCLUSION

For these reasons, plaintiffs should again be prohibited from introducing evidence or argument regarding the Bayer Defendants' liability insurance policies.

Dated: December 21, 2010.

Respectfully submitted,

/s/ Stephen J. Cowen

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2010, 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, 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 THE COURT: We can do that. Remind me when you want
2 me to give that instruction. If somebody reminds me to say it,
3 I'll say this is the instruction about redacted exhibits. I'll
4 say to the jury, "A lot of these exhibits may have parts taken
5 out because we've taken out parts that aren't relevant. Don't
6 worry about that, they are not relevant for your consideration,
7 you shouldn't consider it anyway," and it wouldn't be
8 necessarily specific to this exhibit, but the first time it
9 comes up, somebody can remind me and I'll give that
10 instruction.

11 Defendant's motions in limine. There was one big
12 motion, and it had a lot of subparts. Some of those I really
13 do not need to hear argument on. Let me start by asking the
14 two obvious ones. Ms. Garrison, you all did not file an
15 objection to -- or whoever is speaking for the plaintiffs, for
16 the subpart 3, defendant's liability insurance, and subpart 8,
17 defendant's other claims or litigation involving the Bayer
18 defendants. So I assume I can grant those two subportions of
19 Motion in Limine Number 1708, is that correct?

20 MR. DOWNING: Yes, Your Honor. We have been
21 informed that there is no liability insurance, and we wouldn't
22 do it anyway.

23 THE COURT: Subparts 3 and 8 are granted. What I
24 need is somebody from the plaintiff to be standing up at the
25 lectern because I'm going to be asking you, I'm not sure if I

1 will entirely, but I'm going to be asking you what is it you
2 would introduce that would be covered by this motion in limine.
3 So, let me go through the others I see no reason for
4 discussion. I have reviewed the briefs thoroughly, and on
5 subpart 2, which is the motion to exclude cumulative testimony
6 of plaintiffs' experts, I am denying that as a motion in
7 limine. You can make an objection if you think they are being
8 cumulative, but I'm not going to go through in advance and tell
9 them what they can and cannot say because I think the
10 plaintiffs have a right to pick and choose how they present
11 these experts at trial.

12 Subpart 6, unrelated wrongful acts. This is either moot
13 because the plaintiffs said they wouldn't do it anyway, or it's
14 way too vague, and so I'm denying this as a motion in limine.
15 If you think they are getting into something, you can jump up
16 and object, of course.

17 Number 7, the same. I think that's just too vague for
18 me to say you can't talk about other general corporate
19 wrongdoing. You can't talk about anything that's not relevant
20 to this case, and I just don't know exactly what would be
21 covered by that, and I'm denying it as a motion in limine. I'm
22 not going to in advance set that rule.

23 Now, the next one I don't need any discussion on is
24 Number 10, which is improper punitive damages evidence. All
25 improper evidence is excluded, but I am just denying this for

1 now as a motion in limine. I've told you what we're going to
2 do with punitive damages, and there should be no net worth
3 discussions or anything like that in the first part of the
4 trial.

5 Then the last one that I don't think I can rule on as a
6 motion in limine is Number 9, the Bayer defendants out of state
7 or foreign status, and let me tell you about this one. I'm
8 denying the motion in limine because I think it is relevant
9 where the defendant -- you know, who the defendant is. I think
10 later on there is a motion where you all talked about nobody
11 can say the defendants are from out of town, nobody can say
12 their lawyers are from out of town, nobody can say, "I'm a poor
13 little town lawyer," Mr. Chaney.

14 MR. CHANEY: Have I ever --

15 THE COURT: No, you haven't, but you have the accent
16 for it, but, you know, I don't want either side commenting on
17 the other lawyers, they are from a big firm, we're from a small
18 firm, any of that stuff, and I don't expect that the plaintiffs
19 would start arguing, you know, some blatant violation of what
20 is a rule in every case, which is all persons stand equal about
21 the Court, that you should rule in favor of our plaintiffs
22 because we're individuals and the defendant is a big German
23 corporation with lots of subsidiaries, but the out-of-state and
24 foreign status goes too far. I can't eliminate all of that.
25 You all need to be very careful that your arguments are

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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 B

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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
111 South Tenth Street
St. Louis, Missouri 63102

1 this is the order, this is the extent of granting this motion.
2 Plaintiffs may not ask the jury to consider who was at fault in
3 the StarLink incident, may not argue or suggest to the jury
4 that the Bayer defendants were at fault in this StarLink
5 incident, and may not argue or suggest that the jury should use
6 the StarLink incident in any way to determine the Bayer
7 defendants' liability in this case, so I am granting that.
8 That does not mean that I'm excluding StarLink, as you asked me
9 to in the last one.

10 Motion Number 2102, the defendants' motion in limine to
11 exclude evidence and argument that the Bayer defendants were
12 the responsible party. I am denying the motion in limine to
13 exclude the evidence. That does not mean if you wish to object
14 that you may object if you wish to when it comes up. I don't
15 know how it's going to be used here, but I'm not going to
16 exclude all evidence and argument that Bayer was the
17 responsible party. It is a fact in the case, and how you
18 characterize argument is an issue of how you characterize
19 argument, so 2102 is denied.

20 The next one I have is 2103, the defendants' motion in
21 limine to discuss evidence of subsequent remedial measures. I
22 am denying that motion because based on the argument here
23 today, I am told that the only evidence that would be covered
24 by this is something that Donna Mitten says happened well
25 before the discovery of this problem. It is, therefore, very

1 close to the time period that Bayer's own expert is testifying
2 about what's going on in the industry, and given the limited
3 nature of that subsequent remedial measures evidence that has
4 been represented to me, that that's what's talked about, I'm
5 denying 2103. If the plaintiffs have something else that
6 happened after the discovery of this, or other evidence that
7 has not been disclosed to me in answer to my questions today,
8 and in the brief, then the plaintiff needs to tell me before
9 they introduce it, but it sounds like they don't, so 2103 is
10 denied.

11 2104, a motion in limine to exclude evidence and
12 argument regarding liability insurance. That is unopposed and
13 is granted.

14 2105, this is the defendants' motion in limine to
15 exclude irrelevant and unfairly prejudicial evidence. This is
16 granted in part and denied in part. As I ruled in the first
17 case, I agree that there will be no evidence of the defendants'
18 net worth during the initial phase of the trial. If we have a
19 punitive damages trial, there can be discussions of it at that
20 time. The breadth of the motion is too broad, so I'm not
21 excluding evidence of sales, profits, business projections,
22 etcetera, because that is relevant to the case.

23 I am granting it as to Frankenfood, and I will add fish
24 genes. I don't want to hear about fish genes being implanted
25 in tomato plants or flowers. We don't have any fish genes

1 here, so no animal genes please, because there is no evidence
2 they had anything to do with this case, and I don't think
3 anybody should talk about animal genes being inserted into
4 food.

5 However, the plaintiffs can talk about the artificial
6 nature of it. That was one of the things in the motion in
7 limine, and obviously, there is some artificiality here, and
8 the defendants can explain why it's not artificial, so that's
9 something you all can talk about. It's just the Frankenfood
10 and the fish or animal genes.

11 The punishment, I agree that there should be no argument
12 that compensatory damages or a finding of liability should be
13 used to punish the defendant, so I'm granting that in part and
14 denying it in part.

15 The motion in limine regarding the safety of glufosinate
16 ammonium, Motion Number 2106. I'm granting the motion in
17 limine and excluding from evidence the discussions regarding
18 the safety of glufosinate ammonium. Even if glufosinate
19 ammonium is not safe, that does not show that this rice was not
20 safe, and so I do not think it is relevant to this case.

21 I will tell you that I am concerned that some of the
22 defendants' arguments may make this relevant, and so I am
23 simply saying that, you know, as with others I'm granting the
24 motion in limine and excluding it as evidence, but to the
25 extent the plaintiffs believe that there is something the

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 C

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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:

For Plaintiffs:

Don M. Downing, Esq.
Gretchen Garrison, Esq.
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John F. Olinde, Esq.
Peter Rotolo, Esq.
CHAFFE MCCALL, LLP

1 statute, and it is no longer the law, so I don't know why you
2 would find that and cite it to me, and I would just advise you
3 that you shouldn't think that just because I issued the
4 opinion, it's something you ought to cite, especially when
5 it's totally off point. This is not to say that the
6 plaintiffs can't describe what happened to them. I don't want
7 a lot of the inflammatory statements, but the plaintiffs are
8 going to describe what happened, and they are not seeking
9 emotional distress damages, so they need to be careful, but
10 I'm not saying they cannot say how they found out, what they
11 found out, etc.

12 2959, that is the defendants' motion in limine to
13 exclude evidence and argument regarding moral duties or
14 business ethics. And, you know, as I did before, I am denying
15 this motion, but I am cautioning the plaintiffs that this is
16 not a case where we are talking about ethics or moral duties.
17 We are talking about legal duties here, and so I am cautioning
18 the plaintiffs that if I think they are doing this
19 inappropriately, I will certainly sustain objections, but
20 there are times as the plaintiffs point out in their response
21 where Bayer itself makes reference to moral issues or business
22 ethics, and so, you know, I am not going to grant that motion.

23 Motion number 2962, the defendants' motion regarding
24 other litigation and claims to preclude any evidence of other
25 litigation or claims against Bayer, that is granted.

1 Motion number 2963, the defendants' motion -- or
2 docket number 2963, the defendants' motion to exclude evidence
3 and argument that the Bayer defendants were the responsible
4 party, that motion is denied.

5 2964, the defendants' motion in limine to exclude
6 improper argument concerning the StarLink incident, that
7 motion is denied. And to the extent that I am not explaining
8 my reasons for denying these, they are the same as they were
9 previously, or for my rulings I may supplement a little, but I
10 don't need to explain the reasoning all over again.

11 2965, the defendants' motion in limine to exclude
12 evidence describing aggregate compensation paid to any expert
13 witness, that motion is granted to the same extent as it was
14 before. Any expert witness may only be questioned about the
15 hourly rate, not about any total number of hours spent on this
16 case or these cases.

17 Then on 2966, the defendants' motion in limine to
18 exclude evidence and argument regarding liability insurance, I
19 am granting that motion.

20 2968, this is the Mr. Keith Glover motion, and as I
21 understand it, defendant wanted to exclude any conversations
22 Mr. Glover might want to testify that the Bayer people made
23 statements to him or assurances that there was no LLRICE in
24 the commercial stocks. I am denying the motion in limine as
25 to that area of testimony. He can testify about those

1 conversations. And then he also testified previously about a
2 conversation he had with Donna Mitten where he said you need
3 to do the right thing and clean up your mess, and she said
4 something like, I don't know what, I'll pass it along I think
5 is what he said she said. I believe that that is -- so far
6 Bayer has shown that that is a settlement conversation. If
7 the plaintiff thinks that there is something it should be able
8 to introduce that can establish that it was not a settlement
9 conference as the plaintiffs indicated in their response, if
10 they do decide to try to introduce that, they will approach
11 the bench and tell me why they think it is not barred as a
12 settlement discussion.

13 Then 2969, that is Bayer's motion in limine to
14 exclude evidence regarding Bayer's contact with Colin Carter,
15 and I am granting that as to the fact that anyone called
16 Mr. Carter and asked him if he was available to talk about
17 this case, but to the extent there is something -- I believe
18 he can testify that he did work for Bayer in the StarLink
19 case, but I don't think that he should be able to, you know,
20 testify or anyone should testify that Bayer's lawyers called
21 him and asked him to work on this case. So I am granting that
22 one in part and denying it in part.

23 Then 2970, the defendants' motion to exclude evidence
24 and argument concerning the Louisiana plaintiffs' alleged seed
25 cost damages, I will deny that as moot as the plaintiff

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 D

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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 a usual negligence claim. In the nuisance sense, fear or
2 annoyance is sufficient evidence of emotional harm to recover
3 your emotional damages.

4 THE COURT: Okay. Well, here is my ruling on this.
5 I'm denying the motion in limine, and I am going to allow the
6 plaintiffs to seek this category of damages if they think they
7 have evidence to do so. This is different from my ruling in
8 the prior case, and having reviewed the Texas law, and in
9 particular the nuisance and the negligence things, I believe
10 that it is appropriate, and I believe there was notice of this.
11 We've been arguing about it since the first bellwether trial,
12 so I'm denying Motion Number 3385.

13 Now I'm going to give you some rulings I don't need to
14 hear any argument on, and I don't think these rulings will be a
15 surprise.

16 3386 is the motion to limit testimony about aggregate
17 compensation to experts. It's again opposed by the plaintiffs,
18 but I am granting that as before. You can ask the experts what
19 their hourly rate is, but no one will ask any of them what
20 their total claims are.

21 The next one I want to rule on is Motion in Limine
22 Number 3387 to limit evidence of future damages. I believe
23 that that -- and it argues that you cannot estimate future crop
24 yields, and I'm denying that motion in limine. I think the
25 future crop yields are something that can be sought from a

1 jury, and the jury can determine whether they think they are
2 too speculative, so that motion in limine is denied.

3 Down to Docket Number 3390 sought to limit evidence of
4 liability insurance. That was not opposed, and I am granting
5 it. There will be no evidence of that.

6 3392 I'm also granting, that is a motion that was not
7 opposed, a motion to exclude any evidence of other claims and
8 lawsuits.

9 3394 I am denying. That is the motion to preclude any
10 evidence about Bayer being listed as the responsible party, and
11 I am denying that as I believe this is relevant.

12 Some others we've got to talk about. Let's just go
13 through some of these others, and I'm taking these in docket
14 number order, even though it may not be in logical order.

15 Defendant's motion Docket Number 3382, the motion to
16 exclude Dr. Colin Carter's more aggressive damages, I'm not
17 really sure what we're fighting over here. I guess the
18 defendants don't want Dr. Carter to be able to say, "This is
19 the most conservative estimate, I did three other -- two other
20 calculations, and one of them is I think more realistic, but
21 I'm asking this one." Is that what we don't want him to say?

22 MR. HUGHES: That's basically right. The reason we
23 filed this motion was because there were some tables included
24 in the supplemental report of Dr. Carter and Mr. Frye which
25 actually went ahead and calculated these plaintiffs' damages

1 under his more aggressive scenarios, even though that report
2 said they wouldn't be presenting those numbers, and out of an
3 abundance of caution we filed the motion to make sure there are
4 no references to those more aggressive calculations.

5 In response, the plaintiffs raised a concern that we
6 were trying to limit or objecting to Dr. Carter's testimony
7 that he thinks that his figures that he has testified to in the
8 previous trials is conservative, and we are not objecting to
9 the admissibility of the testimony about his claimed
10 conservative nature of his damages similar to what he has given
11 in the prior trials. Of course, we disagree with that
12 conclusion, but we're not objecting to its admissibility, but
13 what we are objecting to is references to these others ways of
14 calculating damages and any suggestion that the damages should
15 be calculated according to those other more aggressive methods.

16 MR. SAPP: Your Honor, I think the plaintiffs have
17 no intention of providing the actual numbers from the two
18 alternative calculations. We aren't going to quantify that the
19 damage should be higher, but the issues with the motion that
20 the defendants represented, it's vague for us in presenting our
21 case on what exactly it is that they want to exclude. We don't
22 plan on providing any specific numbers, but we have in all the
23 trials both before and after the supplemental report discussed
24 the specific ways in which Dr. Carter's analysis is
25 conservative, that it is a conservative methodology, the

1 all Tuesday morning.

2 (A recess was taken.)

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REPORTER'S CERTIFICATE

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

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Reporter for the United States District Court for the Eastern

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District of Missouri do hereby certify that the foregoing is a

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true and correct transcript of the proceedings had in this

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cause as same appears from my stenotype notes made personally

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during the progress of said proceedings.

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/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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