



Bellwether Trials that “there should be no net worth discussions or anything like that in the first part of the trial.” Ex. A, First Bellwether Pretrial Conf. Tr. 38:2-4, Oct. 29, 2009; *see also* Ex. B. Second Bellwether Pretrial Conf. Tr. 62:14-20, Jan. 7, 2010. Prior to the Third Bellwether Trial, the Court denied Bayer’s motion as moot because Plaintiffs agreed not to elicit such testimony. *See* Ex. C, Third Bellwether Pretrial Conf. Tr. 65:20-25, June 16, 2010.

Prior to the Fourth Trial, the Court decided not to bifurcate any punitive damages phase but ruled that Plaintiffs could not discuss net worth “until you have approached the bench and asked me if it's okay, which should be near the end of your case so that I will determine by that time whether I think you have submitted a sufficient case to submit on punitives.” Ex. D, Fourth Bellwether Pretrial Conf. Tr. 53:10-13, Oct. 7, 2010. Because the Court has ruled that it will bifurcate this trial, net worth has no relevance in the compensatory phase and Bayer respectfully requests that the Court do as it did in the prior Bellwether trials and make clear that “there should be no net worth discussions or anything like that in the first part of the trial.” Ex. A, First Bellwether Pretrial Conf. Tr. 38:2-4, Oct. 29, 2009; *see also* Ex. B. Second Bellwether Pretrial Conf. Tr. 62:14-20, Jan. 7, 2010.

## **II. Inflammatory Characterizations of LLRICE**

Plaintiffs’ counsel may attempt to make improper references to LLRICE during trial. Such improper references to LLRICE including, but not limited to, the term “Frankenfood,” appeal only to the passions and prejudice of the jury, would waste the time of the court by forcing the Bayer Defendants to respond, and are therefore inadmissible. *See* Fed. R. Evid. 403; *United States v. Singer*, 660 F.2d 1295, 1304 (8th Cir. 1981) (references to the defendants as “crooks” were “clearly improper”). The Court explained before the first trial that the plaintiffs could say that there are “reason[s] that some people might not want [LLRICE],” but clarified that

the parties must show “appropriate restraint.” Ex. A, Pretrial Conf. Tr. 51:25-52:3. Prior to the Second, Third, and Fourth Bellwether Trials, the Court said that plaintiffs could mention the artificial nature of LLRICE but could not refer to “Frankenfood” or “fish genes being implanted in tomato plants or flowers.” Ex. B, Second Bellwether Pretrial Conf. Tr. 62:23-63:10; Ex. C, Third Bellwether Pretrial Conf. Tr. 65:12-20; Ex. D, Fourth Bellwether Pretrial Conf. Tr. 82:21-23. The Bayer Defendants respectfully request the same guidance for this trial.

**III. Argument that Compensatory Damages Should Be Used to Punish the Bayer Defendants or for Any Other Purpose than to Reimburse for Actual Losses**

The purpose of compensatory damages is compensation, not punishment, deterrence, or retribution. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

Argument that suggests, directly or indirectly, that compensatory damages should be awarded to punish the Bayer Defendants or should be awarded for anything other than the actual losses allegedly incurred by plaintiffs is improper and prejudicial and should be precluded.

The Court made clear in the First and Second Bellwether Trials that any such suggestion would be improper. *See* Ex. A, First Bellwether Pretrial Conf. Tr. 52:6-8 (“[O]f course the plaintiffs are not going to argue that they should use compensatory damages to punish the defendant.”); Ex. B, Second Bellwether Pretrial Conf. Tr. 63:11-13. The Court denied the Bayer Defendants’ motion as moot prior to the Third Bellwether Trial because plaintiffs agreed not to elicit such testimony. Ex. C, Third Bellwether Pretrial Conf. Tr. 65:22-25. The Court granted this aspect of a similar motion prior to the Fourth Trial. Ex. D, Fourth Bellwether Pretrial Conf. Tr. 83:7-10.

Despite the Court’s admonition, plaintiffs counsel made such a plea during closing argument in the liability phase of the First Bellwether Trial. Ex. E, Trial Tr. vol. 19A, 12:3-10; 13:3-8, Dec. 2, 2009. The Bayer Defendants made a motion for mistrial on this ground and

believe that the misconduct by plaintiffs' counsel is prejudicial error.

In order to prevent this problem from arising again, the Bayer Defendants respectfully request that the Court prohibit any such argument in the coming trial.

**IV. Promise to Give a Portion of Damages Award to Charity**

Plaintiffs should not be permitted to offer any testimony or make any argument to the effect that any portion of a damages award might be donated to charity because such testimony or argument would be unfairly prejudicial and would cause confusion of issues. *See* Fed. R. Evid. 403. Plaintiffs did not contest this motion at the first trial, and the Court made clear that neither party should be "talking about their charitable deeds." *See* Ex. A, First Bellwether Pretrial Conf. Tr. 52:8-14. The Court did not specifically address this aspect of the motion for the Second Bellwether Trial, and the Court denied the Bayer Defendants' motion as moot in the Third Bellwether Trial. Ex. C, Third Bellwether Pretrial Conf. Tr. 65:23-25. The Court granted this aspect of a similar motion prior to the Fourth Trial. Ex. D, Fourth Bellwether Pretrial Conf. Tr. 83:7-10. The Bayer Defendants request that such testimony be excluded.

**CONCLUSION**

For these reasons, plaintiffs should again be prohibited from referring to or offering evidence on any of the above subjects.

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  
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PRETRIAL CONFERENCE  
October 29, 30, 2009

TERI HANOLD HOPWOOD, RMR, CRR  
Thomas F. Eagleton Courthouse  
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St. Louis, Missouri 63102

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

1 ethical, but there is no way I can exclude all of that  
2 evidence.

3 So the ones we need to hear argument on are the first  
4 one, which is the aggregate compensation of experts, the fourth  
5 one, which is moral duties -- did I talk about Number 5?  
6 Number 5 had other things besides net worth, and so we need to  
7 talk about that, and then we need to talk about Numbers 11 and  
8 12.

9 So, let's start with the expert witnesses and the  
10 aggregate compensation, and this has to do with the fact that  
11 one witness in particular has a lot of hours in the case, and  
12 we talked about this previously in camera, and I'm not actually  
13 going to say the numbers right now on the record, but it's  
14 clear that there are some very large numbers in terms of what  
15 some of the witnesses have been paid. The defendants have  
16 proposed that only the hourly rate of the experts should be  
17 introduced, and then the second part of that had to do with the  
18 University of Missouri policies, and the plaintiff has agreed  
19 they are not going to raise anything about that.

20 What do you want to do, Mr. Downing, in terms of the --  
21 what do you want to say on cross-examination that would be  
22 covered by this motion in limine?

23 MR. DOWNING: Your Honor, I simply want to offer --  
24 ask the witness how much time he spent in the case, number of  
25 hours, and how much he has been paid, total for his work in

1 transactions," in the very first paragraph under the heading A  
2 on the first page of your memorandum in support. "Any evidence  
3 of sales, profits, or transactions." It seems a little broad.

4 MR. OLSON: Perhaps it's an inartful parenthetical,  
5 but any evidence of net worth or financial condition, including  
6 sales, profits, or transactions. In other words, what are our  
7 gross sales, what are our gross profits. I certainly recognize  
8 and don't contest the plaintiffs' ability to talk about the  
9 motivation for the development of the Liberty Link rice  
10 product. We obviously have some disagreements on that exact  
11 motivation, but that's something that both parties will put  
12 into evidence. This only relates to aggregate information to  
13 the extent --

14 THE COURT: Let me say this. The things -- the  
15 examples that the plaintiffs gave in their briefs I found were  
16 relevant and appropriate, but as opposed to what Mr. Olson is  
17 talking about, aggregate net sales, we don't care how much  
18 aspirin they sold, but their profit motives in this case is a  
19 legitimate area of inquiry.

20 The next one is characterizations of Liberty Link rice,  
21 and you said you don't intend to call it Frankenfood, but you  
22 do want to explain the artificial characteristics of Liberty  
23 Link rice and the genetic manipulation that occurred to create  
24 it. Of course, I can't tell if we're really fighting about  
25 anything here or not.

1 MR. WHALEY: I don't believe we are, Your Honor, but  
2 Mr. Olson --

3 THE COURT: Mr. Olson, what is it besides  
4 Frankenfood, or calling them crooks, which they are not going  
5 to do, you know, what else are you talking about here?

6 MR. OLSON: It's the general criticism of  
7 genetically-modified crops and LLRICE generally being  
8 artificial, something immoral, bad.

9 THE COURT: There is a big difference between  
10 artificial and immoral and bad. Artificial is a fact, and they  
11 can talk about it. Immoral and bad, I don't think we  
12 characterize food as immoral or not immoral.

13 MR. OLSON: With Your Honor's guidance on the USDA  
14 discussion, as well as this situation, I don't believe we have  
15 a dispute here so long as we're limited to the facts that can  
16 be proven in evidence and not characterizations or descriptions  
17 that are judgmental in nature.

18 THE COURT: One of the big facts of this case is the  
19 Europeans don't want this stuff, and I expect there to be  
20 testimony in this case about that, and about, you know, why,  
21 and I expect there will be -- I think the plaintiffs had said  
22 we can't have your expert say that it's irrational or the  
23 Europeans are all nuts, or whatever it is they wanted to say,  
24 we're not going to let him say that, but we're not going to let  
25 them say -- you know, we're not going to prohibit them from

1 saying that there is any reason that some people might not want  
2 this stuff. You know, that's an issue in the case, and it can  
3 come out, but appropriate restraint.

4 MR. OLSON: That's all we're asking for, Your Honor.

5 THE COURT: Of course, there are several subparts to  
6 this. Subpart C, which is compensatory damages, of course the  
7 plaintiffs are not going to argue that they should use  
8 compensatory damages to punish the defendant. The plaintiffs  
9 agree they will not have any testimony that anybody is going to  
10 give their money -- if they win any award, that they will give  
11 it to charity, and that should not be stated, and also I  
12 believe there is a flip side to this, that I don't think  
13 defendants should be talking about their charitable deeds,  
14 either. That's not something that is relevant in the case. I  
15 agree with that. This motion is sort of granted in part and  
16 denied in part. I think it's awfully general, and I think you  
17 all know what rules you need to follow.

18 MR. WHALEY: Thank you, Your Honor.

19 THE COURT: The next one we need to talk about are  
20 the ones that were subparts of this motion, 11 and 12, and  
21 those have some more -- let's talk about StarLink first because  
22 that's a pretty big issue, and we can talk about -- actually  
23 talk about them together because they are somewhat related, and  
24 they are different legal issues, but I'll hear whatever you  
25 want to say on those. What do you think they should do,

1 Mr. Olson?

2 MR. OLSON: We have split up. Mr. Summers is going  
3 to handle StarLink.

4 THE COURT: Let's talk about StarLink first.  
5 Mr. Chaney, you're doing StarLink?

6 MR. CHANEY: Yes, ma'am. Yes, Your Honor.

7 THE COURT: Remind me your name.

8 MR. SUMMERS: Glen Summers, Your Honor.

9 THE COURT: Mr. Summers, why? You know, StarLink  
10 appears to be all over your case, all over the documents, all  
11 over the communications. Your people are talking about it at  
12 the same time all these things are going on. How can we  
13 exclude this any sort of evidence about this?

14 MR. SUMMERS: That is a challenge, Your Honor, and  
15 there are two different approaches we should talk about. One  
16 is the idea of excluding it entirely, and the other is that we  
17 talk about how it can be used, limits on how the evidence  
18 should come in, and perhaps instructions to the jury to keep it  
19 in the proper context.

20 The concern we have, Your Honor, there certainly are  
21 documents that reference StarLink and a lot of testimony  
22 regarding StarLink. Our concern is that the plaintiffs, Your  
23 Honor, are trying to turn StarLink into a centerpiece of this  
24 trial. The StarLink case was very different. There was never  
25 a determination that Bayer did anything wrong, and yet they

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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,  
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ATTORNEY FOR SLLI: Vance Gibbs

PRETRIAL CONFERENCE

January 7, 2010

TERI HANOLD HOPWOOD, RMR, CRR  
Thomas F. Eagleton Courthouse  
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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

21

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:**

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1 before, but I'm not absolutely sure. It's the Frankenfood,  
2 it's the inflammatory characterizations, net worth, financial  
3 condition. It's a whole bunch of different things, so I guess  
4 I'm not sure where we stand on this and how to rule on it.  
5 So, Mr. Summers, is this one yours?

6 MR. SUMMERS: Yes, Your Honor. I think we can handle  
7 this fairly quickly. Maybe we should just take the four  
8 subjects in turn. The first is the net worth and financial  
9 condition of the Bayer defendants, and I think that the Court  
10 can rule consistently with its past rulings that that evidence  
11 should be excluded. In previous trials, the Court excluded --

12 THE COURT: Right. And so the plaintiffs agreed that  
13 they will abide by their earlier instruction that it is not to  
14 be included during any compensatory phase of the trial for the  
15 net worth; correct?

16 MR. SUMMERS: The difference here, of course, Your  
17 Honor, with the ruling on punitive damages, it appears that  
18 there will be no second phase, so the ruling would be I guess  
19 a little more categorical here.

20 THE COURT: And on the second part, the plaintiffs  
21 agree they won't say Frankenfood, but that they should be  
22 allowed to explain the artificial characteristics of  
23 LibertyLink rice in genetic manipulation, and so it seems to  
24 me you all are in agreement on this.

25 MR. SUMMERS: You know, yes and no. I agree with

1 Your Honor, but when I read the response, it seemed that they  
2 were hedging a bit. Everyone agrees that LibertyLink rice is  
3 the product of genetic engineering or genetic modification,  
4 and there never seemed to be a dispute in the prior trials  
5 about the use of recombinant DNA technology, and that was all  
6 explained to the jury, but it seemed like all of a sudden,  
7 they were trying to hedge a little bit in suggesting that they  
8 wanted to talk about something artificial and manipulation.  
9 I'm just not sure where they are planning to go, and if it  
10 gets into the realm of inflammatory rather than science, we  
11 would object to that.

12 THE COURT: Well, I mean, once again I think you are  
13 not disagreeing. There are -- you know, the plaintiffs can  
14 talk about the artificial nature and the genetic manipulation,  
15 and the defendants obviously can say it's a hundred percent  
16 rice as Mr. Ferguson's already said once this morning, so, you  
17 know, that's all a dispute at trial. So, you know, I am  
18 sustaining it as to Frankenfood and fish genes being implanted  
19 into a tomato plant or some other similar analogy, but  
20 otherwise I'm overruling on that second part. So the first  
21 part is moot; the second part I am granting in part and  
22 denying in part; the third part the plaintiffs have agreed to;  
23 and the fourth part the plaintiffs have agreed to. And so I  
24 think, you know, I am granting it to a limited extent as we  
25 have discussed and denying it in all other respects, okay?

1 MR. SAPP: Your Honor, just one point of  
2 clarification. In the last Bellwether, the net worth and  
3 financial condition was sought to be excluded. This time in  
4 the motion in limine, it was limited to just net worth.

5 THE COURT: Right. I don't know. So what are you  
6 going to say about their financial condition?

7 MR. SAPP: Well, Your Honor, the issue is, there  
8 are -- when they said financial condition, things like sales,  
9 profits, transactions, some of those items are relevant as far  
10 as their motivation for why they proceeded at a certain pace,  
11 and we don't have an issue with not raising net worth or  
12 comparative size of the parties, which is what was limited in  
13 this most recent motion in limine, that is fine, but to the  
14 extent that there is any idea that as of today we are moving  
15 that to expand that into financial conditions, sales, profits,  
16 we believe that there is some very relevant topics that relate  
17 to those specific aspects of finances.

18 THE COURT: Mr. Summers.

19 MR. SUMMERS: I guess I'm not exactly sure what the  
20 dispute is, and maybe this is just something that needs to be  
21 taken up more --

22 THE COURT: Well, here is the answer. They are not  
23 going to talk about net worth, but they are not precluded from  
24 trying to establish that, you know, Bayer was doing this to  
25 make money, that there was -- you know, that they were trying

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.

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/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

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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 were they punishing the plaintiffs? I don't know.

2 MR. FERGUSON: I don't know from what we heard that  
3 there was any anger or punitive intent in the result. In other  
4 words, nobody was trying to punish anybody for anything, they  
5 were trying to get the right result.

6 At the end of the day, I think that there is a  
7 suggestion of some speculative prejudice that I don't think  
8 there is very much evidence of to the plaintiffs, and a lot of  
9 pretty clear likelihood of prejudices that come from things  
10 that courts over and over again have recognized as real and  
11 significant issues leading to the need to bifurcate, and that's  
12 why I think we ought to bifurcate.

13 THE COURT: The states that do it like Missouri and  
14 Texas generally have the jury decide whether to award punitive  
15 damages before, and then bifurcate and only have the short  
16 hearing of where they say here is the net worth evidence, and  
17 now tell us how much the punitive damages will be, after they  
18 have already said, "Yes, we apply punitive damages," and that  
19 reflects that those courts or those states that have adopted  
20 those rules don't really think that the mere fact that you  
21 might be seeking punitive damages, or that people might be  
22 telling them that punitive damages -- that this is a case where  
23 they should be punished, or they should use different standards  
24 than clear and convincing, that those states have determined  
25 that none of that stuff is a problem. The only thing they

1 think is a problem is the net worth evidence, or whatever the  
2 other evidence is, and I'm going to grant the motion that we do  
3 not bifurcate. I'm not going to bifurcate this case. This may  
4 not be the only thing I'll do differently from the other cases,  
5 although most of our rulings have been the same, so we're not  
6 going to bifurcate it, so you will have until Tuesday to  
7 prepare for that. We're going to do one trial.

8 I will tell the plaintiffs that you must limit any  
9 evidence that would go to punitive damages and not present any  
10 net worth evidence until you have approached the bench and  
11 asked me if it's okay, which should be near the end of your  
12 case so that I will determine by that time whether I think you  
13 have submitted a sufficient case to submit on punitives, so it  
14 shouldn't be in opening statement, and it shouldn't be in  
15 the -- I mean, the net worth evidence should not be in opening  
16 statement, and should not be introduced to the jury until you  
17 have approached the bench and I've told you you can introduce  
18 evidence of net worth. Otherwise, I'm not bifurcating.

19 I think in this case there is not enough showing that  
20 there is prejudice, and it's actually not necessarily the usual  
21 practice anywhere. Some people do it all time and some people  
22 don't, and in this court it's a mixed bag, and I think these  
23 juries are very smart, and I think they are capable of  
24 categorizing and compartmentalizing the evidence appropriately.

25 I also think this really does cut both ways. It may

1 seem to the jury that the plaintiffs are being greedy by asking  
2 for punitive damages, so there is some potential for prejudice  
3 to them that might hurt them in their compensatory awards.  
4 That's not an unheard of phenomenon, and frankly, you know, all  
5 of us are basing this on our judgment and what we've seen in  
6 the past, and that's all we have to base it on. There are the  
7 studies, but like you say, they haven't been tested in the  
8 sense of Daubert motions or things like that, so I'm not really  
9 relying on the studies, I'm just considering that I think it's  
10 not necessary in this case.

11 We're going to take a 15-minute break. Actually we're  
12 going to come back at quarter till, so almost a 20-minute  
13 break, quarter till 12, and we're going to continue with the  
14 final pretrial matters and go through the 97 motions in limine  
15 that you all have filed, and some of those will be easy and  
16 some of them won't, and we'll go through anything else.  
17 20-minute recess at this time.

18 (A recess was taken.)

19 THE COURT: I would like to start as usual. Let me  
20 ask you this. In terms of deposition designations, are there  
21 any further objections that need to be ruled on? What's the  
22 status of that?

23 MR. JONES: Your Honor, Jameson Jones. The parties  
24 have been conferring, and we have substantial agreement on a  
25 lot of the depositions. There are a couple new ones that have

1 want to do it?

2 MR. SAPP: There is a few reasons. Bayer has  
3 asserted in every prior bellwether trial that the impact was  
4 short and small, short duration and small impact. Dr. Babcock,  
5 although his methodology is well suited for the seasonal pool,  
6 we have certainly never put a limitation that it applies only  
7 to that.

8 This is an analysis that is done by a completely  
9 different methodology, by a completely different expert and  
10 comes to similar results that are relevant to both the duration  
11 and the impact of the LLRICE contamination.

12 The confusion question I think is a little bit  
13 misleading. The first trial, the first bellwether trial  
14 involved no plaintiffs with the seasonal pool sales, the third  
15 bellwether trial involved no plaintiffs with season pool sales.  
16 There was no apparent jury confusion in either of those two  
17 bellwether trials, there is no reason to believe there would be  
18 any additional confusion here.

19 As another issue, Bayer has spent a significant amount  
20 of time trying to address and refute the correlation between  
21 the CBOT and rice prices in Dr. Carter's analysis, and Dr.  
22 Babcock's analysis does not rely on the CBOT pricing.

23 THE COURT: Okay, I'm going to deny this motion in  
24 limine and allow Dr. Babcock. I believe it's appropriate  
25 evidence.

1           Now I want to talk about the plaintiffs' motion in  
2     limine.

3           MS. HOEKSTRA: One second. There is one more Bayer  
4     motion.

5           THE COURT: So I have missed more than one. Tell me  
6     the number on it.

7           MS. HOEKSTRA: 3393.

8           THE COURT: I didn't actually miss it, I left it to  
9     the last because it has about 17 things in it, and I was going  
10    to try to forget about it. This is the one that's confusing.  
11    I thought it was the other one. Let me find it.

12           This one is going to be granted in part and denied in  
13    part. As I understand it, on the first point, which is the  
14    Bayer defendants' net worth or financial condition, as I  
15    understand it, they are not asking for exclusion of all  
16    financial condition but just the net worth, and so as to net  
17    worth, I've told you my ruling. It may be mentioned at the end  
18    of the plaintiff's case if I tell the plaintiff after they have  
19    approached the bench that I believe they have made a  
20    submissible case, so that's the ruling on that.

21           On the Frankenfood, I am giving the same guidance as  
22    before. We won't use the word "Frankenfood," we won't talk  
23    about fish genes being implanted in tomato plants or flowers,  
24    but the plaintiffs can talk about the artificial nature of  
25    genetically-modified rice, and they can talk about the genetic

1 modification process. They can talk about what  
2 genetically-modified food is. I just don't want anything that  
3 is like, you know, you can take a fish gene and put it into a  
4 flower or a tomato plant. Within reason, you can certainly  
5 talk about what is genetically-modified food and what it is in  
6 this case.

7           There should be no argument that compensatory damages  
8 should be used to punish anyone, and there should be no  
9 argument that the plaintiffs will have give a portion of their  
10 money to -- any award to charity.

11           I didn't quite understand evidence regarding plaintiff's  
12 personal financial condition. What is it you're seeking to  
13 exclude there? This one says you want to exclude anything that  
14 indicates that a portion of their damages might be donated to  
15 charity, and the heading says, "or evidence regarding  
16 plaintiff's personal financial condition," but there is nothing  
17 in the motion about that. You're not going to talk about  
18 charitable deeds. To that extent I've granted that in part and  
19 denied it in part, that's my ruling. Most of it is moot, I  
20 think. I've granted it to the extent you can't talk about fish  
21 genes in flowers. Have I missed any others?

22           MR. HUGHES: No, Your Honor, but before we turn to  
23 the plaintiff's motions, I understand your ruling on the  
24 emotional distress damages. We had been in a sense relying on  
25 the prior ruling that those weren't part of the operative

1 complaint here. We did recently take depositions of these  
2 plaintiffs, but those were limited solely to the issue of  
3 future damages. We haven't had any opportunity to explore the  
4 emotional distress damage claim, and I would ask for some  
5 deposition time with each of those plaintiffs prior to trial so  
6 we can know what's coming in terms of this new damage claim.

7 MS. GARRISON: Your Honor, do you want a response?

8 THE COURT: I do.

9 MS. GARRISON: You know, as we talked about before,  
10 this is not a surprise. It hasn't been a surprise. We've  
11 talked about it in every single trial. The rulings obviously  
12 dealt with the specific trials at hand. This is a Texas trial.  
13 They had every opportunity to ask this and they did not. So,  
14 you know, to come before the Court at this late juncture and  
15 say, "We should now be able to take discovery," when they had  
16 an opportunity to do it before many times, we think is  
17 unwarranted.

18 MR. HUGHES: If I may, Your Honor, the recent  
19 depositions were limited in scope to future damages based upon  
20 your order relating to such depositions in the first trial and  
21 by agreement between counsel prior to those depositions, and I  
22 took those depositions, and I take your orders and my agreement  
23 with opposing counsel seriously, so of course we did not delve  
24 into these.

25 Again, the past ruling was that the complaint didn't

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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# **Exhibit E**

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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

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PRESENT: The Honorable Catherine D. Perry, Presiding

ATTORNEYS FOR PLAINTIFF: Don M. Downing, Grant L. Davis,  
Gretchen Garrison, William B. Chaney

ATTORNEYS FOR DEFENDANT: Mark E. Ferguson, Eric R. Olson,  
Stephen Cowen, Glen E. Summers

JURY TRIAL

Volume XIX-A  
Morning Session

Record following Volume XIX-B

December 2, 2009

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

1 THE COURT: You say it, and we'll take it.

2 MR. FERGUSON: Sounds good.

3 THE COURT: Anything else to talk about?

4 (The following was had in the presence of the  
5 jury.)

6 THE COURT: Members of the jury, as I told you last  
7 night, we're now ready for the closing arguments in the case.  
8 As I told you way back at the beginning of the case, closing  
9 arguments are not evidence. They are the lawyers' arguments to  
10 you about how they think you should view the evidence. After  
11 the closing arguments, I'll give you the instructions on the  
12 law, and then you'll retire to deliberate on your verdict.

13 I do want to tell you a little bit about scheduling.  
14 These are going to take awhile. You'll be hearing arguments  
15 all morning, and some are after lunch, so you'll get the case  
16 mid afternoon or early afternoon, just so you know what's going  
17 to be happening. Mr. Downing, you may proceed.

18 CLOSING ARGUMENT

19 BY MR. DOWNING:

20 Thank you, Your Honor. Good morning. On behalf of Ken  
21 Bell and Johnny Hunter, who you've seen these weeks, and their  
22 family farming operations, we very much appreciate the time and  
23 your attention, your very detailed attention during this trial.  
24 We know it's been a long trial. We know it's an imposition on  
25 you, and we very much appreciate it, not just you being here,

1 but the great attention that you have shown us, and the  
2 courtesy that you've shown us during these weeks.

3 This is an important case, and it's not just important  
4 for Ken Bell and Johnny Hunter and their family farming  
5 operations. The decision you make in this case will  
6 reverberate around this country and around the world. It will  
7 be looked at not just by the parties in this case, but it will  
8 be looked at by other GMO developers, and the standards that  
9 they use in operating their GMO development systems, and it  
10 will say a lot about whether --

11 MR. FERGUSON: Your Honor, may I approach?

12 THE COURT: Approach, yes.

13 (Side bar conference out of the hearing of the  
14 jury.)

15 MR. FERGUSON: That is absolutely improper argument.  
16 This case is about this case and only this case. The only time  
17 what other people might do would have any relevance is if we  
18 were in punitive damages. This is only this case, and I would  
19 ask that all that be stricken.

20 MR. DOWNING: This is normal argument, closing  
21 argument, where you talk about policy implications of a  
22 decision. It's done in medical malpractice cases and all sorts  
23 of cases.

24 THE COURT: The objection is overruled.

25 Mr. Downing, you're not being picked up on the mike, so you

1 might just try.

2 (Side bar conference concluded.)

3 MR. DOWNING: As I was mentioning, this case is  
4 important, and not just to the parties. All other GMO  
5 developers that are developing GMO varieties are going to pay  
6 attention to what you say, and it's also going to be important  
7 to help us to determine whether our laws that are designed to  
8 protect the purity of our food supplies have any meaning.

9 Now, when I finished my opening statement, it's been a  
10 long time, you may not remember, but I finished my opening  
11 statement with the following few sentences. I said you could  
12 sum up this case very easily. It's Bayer's rice, it got out  
13 through Bayer's carelessness, and Ken Bell and Johnny Hunter  
14 were hurt as a result. I said that's all you need to know.  
15 That was true then, and it's true now. That's going to be the  
16 outline for what I'm going to be talking to you about this  
17 morning, so let me write it on the poster board.

18 Now, let's look at each of those established points.  
19 There is no dispute -- can you not see, sir?

20 THE COURT: Move it closer to you. Move the whole  
21 easel closer to you. Do you need to angle it?

22 MR. DOWNING: Does that work? Now first of all, it  
23 was Bayer's rice. What does that mean? What responsibilities  
24 flow from that?

25 There is no dispute that LL 601 and 604 were Bayer's

1 rice varieties. They owned them, they controlled them. They  
2 owned the intellectual property that controlled them. They had  
3 the right to decide what to do with them. They had the right  
4 to decide whether to bring them in our country. They had the  
5 right to decide who their cooperators were going to be. They  
6 had the right to decide what they were going to do to control  
7 their cooperators, and to control that rice.

8 Not only did they have the right to do all that. They  
9 had the responsibility to control their rice and make sure it  
10 didn't get out and contaminate our commercial rice supplies.  
11 There is no dispute about that, either, that Bayer had the  
12 responsibility to control its LLRICE. It was unapproved and  
13 experimental and they had the obligation to control it. How do  
14 we know that? We've been through a little bit of this before,  
15 but Mike, could you put up DM-5.

16 Bayer designated itself as a responsible person, as a  
17 responsible person. Now, what is the responsible person under  
18 our laws? Mike, go to DM-3. The responsible person is the  
19 person who has control and will maintain control over the  
20 introduction of the regulated article. It's pretty simple.  
21 Mike, go back to the previous exhibit, DM-5. So, when Bayer  
22 brought this into our country, it had to promise our  
23 Government, certify to our Government -- and blow up the bottom  
24 portion, Mike -- that it certified that the regulated article  
25 will be introduced in accordance with the eligibility criteria

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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