

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

*In re*  
*Genetically Modified Rice Litigation*

Master Case No. 4:06MD1811CDP  
MDL Docket No. 1811

This document relates to:

STEPHEN S. HOSKYN, CONSTANCE  
ELIZABETH HOSKYN, STEPHEN  
HOSKYN FARMS, HOSKYN FARMS  
PARTNERSHIP, JERRY J. HOSKYN,  
PRAIRIE HILL FARMS, INC., HOSKYN  
PLANTING COMPANY, INC.,  
HOSCO FARMS, INC., KAY T. TRICE,  
ANGELICA ISLAND, AND EDWYELL J.  
TENDELL STATE

PLAINTIFFS

VS.

CIVIL ACTION NO. 4:09-CV-01583

BAYER CROPSCIENCE LP,  
BAYER CROPSCIENCE HOLDING, INC.  
BAYER CORPORATION, BAYER AG,  
AND BAYER BIOSCIENCE NV

DEFENDANTS

**PLAINTIFFS' UNOPPOSED MOTION FOR LEAVE TO FILE AMENDED COMPLAINT**

TO THE HONORABLE CATHERINE D. PERRY

STEPHEN S. HOSKYN, CONSTANCE ELIZABETH HOSKYN, STEPHEN HOSKYN FARMS, HOSKYN FARMS PARTNERSHIP, JERRY J. HOSKYN, PRAIRIE HILL FARMS, INC., HOSKYN PLANTING COMPANY, INC., HOSCO FARMS, INC., KAY T. TRICE, ANGELICA ISLAND, AND EDWYELL J. TENDELL ESTATE, respectfully request leave of Court to file their Second Amended Complaint.

1. Plaintiffs request leave to amend their Complaint with new liability background facts and damages recently developed in discovery with Defendants. FED. R. CIV. P. 15(a)(2).

Plaintiffs are also amending to remove their ultra-hazardous activity claim and are adding a new cause of action for private nuisance.

2. Defendants are not prejudiced by Plaintiffs' Second Amended Complaint as it is filed timely pursuant to Case Management Order No. 26, leaving Defendants ample time to conduct adequate discovery.

3. Plaintiffs have also attached and are filing its amended pleading along with its motion for leave.

4. Plaintiffs conferred with Defendants via electronic mail on January 7, 2011 and Defendants indicated that they were unopposed to Plaintiffs filing their Second Amended Complaint.

WHEREFORE, Plaintiffs pray that the Court grant their Motion for Leave to file Second Amended Complaint, and for any such further relief the Court deems just and proper.

Respectfully submitted,

**GOLDMAN, PENNEBAKER & PHIPPS, P.C.**

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BY: /s/ Martin J. Phipps

MARTIN J. PHIPPS

State Bar No. 00791444

**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify that I have this 10<sup>th</sup> day of January, 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/ Martin J. Phipps

MARTIN J. PHIPPS

# Exhibit A

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BAYER CROPSCIENCE LP,  
BAYER CROPSCIENCE HOLDING, INC.  
BAYER CORPORATION, BAYER AG,  
AND BAYER BIOSCIENCE NV

DEFENDANTS

**SECOND AMENDED COMPLAINT**

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

Plaintiffs, STEPHEN S. HOSKYN, CONSTANCE ELIZABETH HOSKYN, STEPHEN  
HOSKYN FARMS, HOSKYN FARMS PARTNERSHIP, JERRY J. HOSKYN, PRAIRIE HILL  
FARMS, INC., HOSKYN PLANTING COMPANY, INC., HOSCO FARMS, INC., KAY T.  
TRICE, ANGELICA ISLAND, AND EDWYELL J. TENDELL ESTATE, Plaintiffs by  
undersigned counsel and upon information and belief as to all matters, allege in support of this  
Complaint the following:

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**A. NATURE OF THE ACTION**

1. Defendants, BAYER CROPSCIENCE LP, BAYER CROPSCIENCE HOLDING, INC., BAYER CORPORATION, BAYER AG and BAYER BIOSCIENCE NV (collectively “Bayer”), acquired and developed several different varieties of genetically modified rice which they dubbed Liberty Link Rice. Each different variety of Liberty Link was denoted by a unique number, LL601, LL604, LL062, etc. (collectively “LLRice”), but no variety of Liberty Link Rice was approved for human consumption.

2. Bayer developed LLRice rice in laboratories and tested it in fields in the Southern United States and Puerto Rico. In the course of the testing and development, Bayer allowed the LLRice to contaminate the United States domestic rice supply. Once the contamination was discovered, several foreign markets stopped importing rice grown by United States rice farmers.

3. Plaintiffs are individuals and entities from Arkansas that are or were in the business of rice farming at the time of the contamination. The Liberty Link contamination caused each Plaintiff significant damages, and they bring this action against Bayer for Bayer’s negligence, gross negligence, trespass, conversion, and nuisance in contaminating the United States rice supplies and injuring Plaintiffs.

**B. PARTIES**

4. Plaintiffs, STEPHEN S. HOSKYN, CONSTANCE ELIZABETH HOSKYN, STEPHEN HOSKYN FARMS, HOSKYN FARMS PARTNERSHIP, JERRY J. HOSKYN, PRAIRIE HILL FARMS, INC., HOSKYN PLANTING COMPANY, INC., HOSCO FARMS, INC., KAY T. TRICE, ANGELICA ISLAND, AND EDWYELL J. TENDELL ESTATE, are individuals and/or domestic entities engaged in rice farming with real property interest in Arkansas and venue is proper in this county pursuant to Arkansas Code §16-60-101 and § 16-55-213. Plaintiffs shall be collectively referred to as “Plaintiffs.”

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5. Defendant Bayer CropScience LP is a Delaware corporation with its principle office at 2711 Centerville Road, Suite 400, Wilmington, DE 19808. It succeeded by name change or assignment to the interests and liabilities of Aventis CropScience USA LP in June of 2002. Bayer CropScience LP is a corporation that, individually or through subsidiaries that it controls, researches, manufactures, tests, markets, and sells agricultural chemicals and technologies, such as the genetically-modified rice seeds at issue here. Bayer CropScience LP is a subsidiary of Bayer CropScience AG, the registered owner of the “Liberty Link” trademark for rice and other associated agricultural products. Bayer CropScience LP operates, directly or through its subsidiaries and affiliates, within Arkansas such that it is subject to the state’s minimum contacts jurisdiction, and it can be served through its registered agent Corporation Service Company at 300 Spring Building, Suite 900, 300 S. Spring Street, Little Rock, AR 72201. Defendant has been served and has filed an answer.

6. Defendant Bayer CropScience Holding, Inc. is a Delaware corporation with its principle office at 2 T.W. Alexander Drive, Research Triangle Park, North Carolina 27709. It is the general partner of Bayer CropScience LP, and it was previously named Aventis CropScience USA Holdings, Inc. Bayer CropScience Holding, Inc operates, directly or through its subsidiaries and affiliates, within Arkansas such that it is subject to the state’s minimum contacts jurisdiction, and it can be served through its registered agent Corporation Service Company at 300 Spring Building, Suite 900, 300 S Spring Street, Little Rock, AR 72201. Defendant has been served and has filed an answer.

7. Bayer Corporation is an Indiana corporation whose principal place of business is at 100 Bayer Road, Building 4, Pittsburgh, Pennsylvania 15205. Bayer Corporation is the domestic holding company for many Bayer subsidiaries and affiliates. Through these subsidiaries and affiliates, Bayer Corporation operates within Arkansas such that it is subject to

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the minimum contacts jurisdiction of the state. Bayer Corporation can be served through its registered agent Corporation Service Company at 300 Spring Building, Suite 900, 300 S Spring Street, Little Rock, AR 72201. Defendant has been served and has filed an answer.

8. Bayer AG is a German corporation that, individually or through subsidiaries that it controls, researches, manufactures, tests, markets, and sells agricultural chemicals and technologies, such as the genetically-modified rice seeds at issue here, and it is the registered owner of the “Liberty Link” trademark for rice and other agricultural products. Bayer AG is a successor by merger to Bayer CropScience GmbH, and it has succeeded to all the debts, liabilities, and commitments of Bayer CropScience GmbH. Bayer AG operates, through its subsidiaries and affiliates, within Arkansas such that it is subject to the minimum contacts jurisdiction of the state.

9. Defendant Bayer BioScience NV is a Belgium corporation and wholly-owned subsidiary of Bayer AG. Bayer BioScience NV researches, develops, and markets seeds including the genetically-modified rice seeds at issue here. Bayer BioScience NV is an assignee of three or more U.S. patents relating to genetically-modified rice seeds or traits. Bayer BioScience NV operates, through its subsidiaries and affiliates, within Arkansas such that it is subject to the minimum contacts jurisdiction of the state.

10. At all times relevant to this action, Defendants, Bayer CropScience, LP, Bayer CropScience Holding, Inc., Bayer Corporation, Bayer AG and Bayer BioScience NV have been unified in interests and ownership. The entities are alter-egos of each other, and they have been collectively run as a single business enterprise. Thus, they will subsequently be collectively referred to as “Bayer.”

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### **C. JURISDICTION AND VENUE**

11. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332, because the dispute is between citizens of different states and Plaintiffs' claims exceed the jurisdictional minimum amount in controversy of \$75,000.

12. This Court has personal jurisdiction over the Defendants, because they are business entities actively doing business in the State of Arkansas, have sufficient minimum contacts in Arkansas, or have otherwise availed themselves of the markets within the state such that jurisdiction of this court is proper and necessary.

13. Venue is proper in this District pursuant to 28 U.S.C. §1391 because Defendant conducts substantial business in this District, a substantial part of the events and omissions occurred in the District, or the Defendant otherwise has sufficient contacts to be fairly brought into court in this District.

### **D. FACTUAL BACKGROUND**

14. Arkansas farmers have grown long grain and medium grain rice for almost 100 years. Many Arkansas rice farms have been passed down from generation to generation. Arkansas rice is marketed as a commodity domestically and abroad to foreign countries. In 2005, Arkansas farmers planted approximately 1.54 million acres of long-grain rice generating sales exceeding one billion dollars.

15. Arkansas rice farmers grow non-genetically modified rice. They do not grow genetically modified rice for several reasons. First, it has not been scientifically proven that genetically modified rice is safe for long-term human or animal consumption. Second and as a result, many American and foreign consumers will not buy it. Third, there is no known method to prevent genetically modified traits from contaminating non-genetically modified rice varieties. Finally, growing genetically modified rice permanently damages a farmer's or a landowner's rice

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crops, land, and future crops, because it is an uncontrollable organism that stays in the soil to mutate and have unknown impacts. For these reasons, Arkansas rice farmers, including Plaintiffs, have not intentionally planted genetically modified rice for commercial production.

16. Bayer, through its predecessors Aventis and AgrEvo, entered into a business endeavor to develop new technology in the rice industry consisting of new varieties of rice through developing, planting, and testing genetically modified rice known as Liberty Link Rice (“LLRICE”). The idea behind Bayer developing LLRICE was that rice farmers battle problems with weeds and wild forms of rice, commonly known as “red rice,” that negatively affect their production and revenue. Bayer, through its predecessors and its own actions, created/developed LLRICE which has a genetically modified protein that allegedly makes the LLRICE rice resistant to glufosinate, a herbicide that Arkansas farmers could apply to their crops to kill weeds, including red rice, without concern of harming their rice crop. Bayer’s ultimate goal was to develop and sell to rice farmers a genetically modified variety of rice (containing the genetically modified LLRICE trait(s)) along with the Liberty® herbicide, thus, controlling a substantial part, if not all, of the Arkansas rice market reaping them millions if not potentially billions of dollars.

17. Bayer and/or its predecessor Aventis, planted and tested thousands of different LLRICE varieties/types (or LLRICE “events” as Bayer often refers to its different LLRICE varieties/types), including but not limited to the specific types known as Liberty Link Rice 62 (“LL62”), Liberty Link Rice 601 (“LL601”) and Liberty Link Rice 604 (“LL604”) in fields across the United States from approximately 1996 to 2006. Following the field trials, Bayer decided not to market its LLRICE, including but not limited to LL62, LL601 and/or LL604. Bayer realized that Arkansas and U.S. consumers along with Europe and other markets did not want genetically modified foods, specifically genetically modified rice. Accordingly, Bayer never submitted LL601, LL604 as well as many of its other LLRICE varieties (or LLRICE events) to

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the U.S. Department of Agriculture's Animal and Plant Health Inspection Service, the U.S. Food and Drug Administration, or the U.S. Environmental Protection Agency for approval. Therefore, LL601, LL604 and many of Bayer's other LLRICE varieties (or LLRICE events) was/were never approved for cultivation, sale, or human consumption in the United States.

18. At all relevant times, LLRICE was or should have been in the exclusive control of Bayer and its agents. During its field tests, Bayer, along with everyone in the rice industry, knew that rice is a cross-pollinating plant. As such, Bayer knew or should have known that the LLRICE was likely to cross-pollinate with marketable, non-genetically modified rice, thereby forever contaminating the genetic makeup of natural non-genetically modified rice. At the time of the field tests and through the present-day, Bayer also knew or should have known that the LLRICE and the other genetically modified varieties could contaminate non-genetically modified rice and land including but not limited to the following ways: (1) birds and/or other natural elements such as wind transporting genetically modified rice to other fields containing non-genetically modified rice, (2) use of equipment on fields where genetically modified rice was being planted/grown/tested and then using the same equipment on fields that were supposed to only contain non-genetically modified rice, thereby transporting genetically modified rice and contaminating non-genetically modified rice fields, and (3) commingling of genetically modified rice with non-genetically modified rice during harvest, transport, storage and processing.

19. During the years that Bayer and/or its agents were developing and testing the LLRICE (from 1996 to 2006), Bayer and/or its agents contaminated non-genetically modified Arkansas rice and land with LLRICE, including but not limited to the varieties/types known as LL62, LL601 and LL604 (commonly referred to in the industry as the "GMO Contamination"). Bayer caused the GMO Contamination by, among other things, (1) allowing or failing to take proper precautions to prevent cross-pollination, (2) by planting/farming/testing genetically

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modified rice too close to rice fields that were supposed to only contain non-genetically modified, (3) failing to take proper precautions to prevent the GMO Contamination through the use of tarps, safe zones, or other methods to prevent contamination, (4) allowing genetically modified rice to commingle with non-genetically modified rice at local rice dryers and/or mills who process/store rice from multiple rice farmers, (5) Bayer's use of equipment on fields where genetically modified rice was being planted/grown/tested and then using the same equipment on fields that were supposed to only contain non-genetically modified rice, thereby transporting genetically modified rice and contaminating non-genetically modified rice fields and (6) improper transportation and storage.

20. Bayer knew or should have known that because of its actions, that LLRICE, including but not limited to the varieties/types known as LL62, LL601 and LL604 had contaminated the non-genetically modified Arkansas rice and farm land during the years that it was testing the LLRICE. Bayer purposively withheld this information as well as its failures to properly handle its LLRICE from Arkansas rice farmers because they knew the negative impact that LLRICE or any genetically modified rice organism contamination would have on the rice market/industry, if the public was made aware of the contamination or likely contamination. Bayer simply sat back, did nothing, and hoped that the GMO Contamination would not surface.

21. Periodically, during the development, testing and growing of its LLRICE, Bayer would apply to the USDA for approval of specific varieties/types of its LLRICE in hopes that the USDA would approve such varieties/types as being safe for human consumption. Bayer's hopes were that if it could get the USDA to say that its LLRICE was safe for human consumption that other foreign markets would accept its genetically modified rice. In the late 1990s and/or the early 2000s, Bayer applied to the USDA to approve one of its specific LLRICE varieties/types known as LL62 as being safe for human consumption, which the USDA did approve. However

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and with that said, Bayer knew that even though the USDA approved LL62 to be safe for human consumption, that other foreign markets, including but not limited to the EU, would not purchase rice contaminated with LLRICE varieties, even if such varieties had been approved by the U.S. From 1996 to December 2005, Bayer was testing both LLRICE varieties that had been approved by the USDA (as an example LL62) and varieties that had not been approved (as an example LL601 and LL604). From 1996 to December 2005, on multiple occasions, Bayer discovered that LL62 (which had been approved by the USDA) had contaminated multiple non-genetically modified rice varieties (as an example, the medium grain rice variety known as Bengal) and that such rice was subsequently distributed to unknowing U.S. Rice farmers who subsequently planted, grew, harvested, and sold the contaminated rice. Bayer became aware of the LL62 contamination but took the position that since the USDA had approved LL62 in the U.S., that they had no obligation to disclose the contamination to the U.S. rice farmers. Bayer sat back, did nothing and gambled that the contaminated rice would not be sold to and detected by foreign customers. From 1996 to December 2005, despite the fact that Bayer were aware that multiple rice varieties that were supposed to be non-genetically modified rice varieties were contaminated with LLRICE, Bayer failed to disclose to the U.S. rice farmers that such contamination was occurring and failed to take the necessary steps to prevent further contamination from occurring.

22. Bayer's GMO Contamination was first discovered by foreign markets in January 2006 by a French customer of Riceland Foods, Inc., who reported their discovery to Riceland. After being notified by its French customer of the GMO Contamination, Riceland collected samples of rice from several grain storage locations. These storage locations included rice from Riceland's five-state production area including Arkansas. Even though Bayer knew that their genetically modified rice had contaminated the Arkansas commercial rice supply for years, Bayer finally began developing tests to determine the specific LLRICE variety that had contaminated the rice

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received by the French customer as well as to determine whether any of the rice from Riceland's storage locations had been contaminated. In developing the tests to determine whether rice had been contaminated, Bayer's scientists first developed a test that could detect whether any LLRICE variety had contaminated the rice. However, at the direction of Bayer's management, Bayer developed a strategy test to only test for certain LLRICE varieties so as to limit the discovery of the extent of Bayer's contamination of the U.S. rice industry. With that said, upon receiving the test results from Bayer's genetically modified rice tests, Riceland discovered that a "significant number [of samples] tested positive for the Bayer trait." The positive results were "geographically dispersed and random throughout the rice-growing area" including Arkansas.

23. In June 2006, Riceland provided Bayer with rice samples. In July 2006, Bayer confirmed the positive results for one particular LLRICE variety contaminant, LL601. Bayer did not report the GMO Contamination to the U.S. government until July 31, 2006. As set forth above, Bayer knew or should have known that Arkansas rice fields had been contaminated with LLRICE, including but not limited to LL601, LL604 and LL62 long before this date. However, Bayer intentionally withheld this information from the Arkansas rice farmers, including Plaintiffs, so that the farmers would plant their rice crops to the benefit of Bayer and to the detriment of the farmers.

24. The GMO Contamination was first made public in mid-August 2006. On August 18, 2006, the U.S. Department of Agriculture announced that LL601 had been discovered in the rice supply. The response in the rice markets was swift and negative. On August 19, 2006, Japan suspended imports of long-grain rice from the United States until shipments could be certified to be free of any trace of unapproved or genetically modified rice varieties. On August 24, 2006 the European Union announced that it would require all long-grain rice imported from the U.S. to be tested and certified to be free of LL601 or other genetically modified varieties. Other significant

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export markets, such as Korea, Saudi Arabia, and Iraq either banned or significantly disfavored American rice.

25. United States farmers depend heavily on export markets, because they export approximately 264,000 tons of long-grain rice to the European Union alone. The loss of the export markets severely damaged American rice farmers including Plaintiffs. In fact, the Chicago Board of Trade (CBOT) rice future market slashed the price of rice immediately, with futures losing more than 5% of their value the day of the announcement.

26. As a part of the above, the rice farming industry learned that LL601 contaminated a popular variety of rice known as Cheniere. Prior to the GMO contamination, Arkansas rice farmers planted the Cheniere rice variety because it was proving to have substantially higher yields, on average twenty barrels (or bushels) per acre. Along with higher yields, the Cheniere variety also proved to have a better milling quality resulting in higher grades and, thus, higher prices for rice farmers. Additionally, Cheniere was less susceptible to shattering in high winds. Due to the GMO contamination of Cheniere, Arkansas rice farmers, including Plaintiffs, could no longer plant Cheniere resulting in lost revenues.

27. When Plaintiffs thought the situation could not get worse, on March 5, 2007, they were informed that Clearfield 131 seed stocks were found to have been contaminated with another LLRICE variety, LL604. Rice farmers were having great success using Clearfield 131 to combat red rice, thus increasing their yields and revenues. In March of 2007, rice farmers, including Plaintiffs were prohibited from planting Clearfield 131. Due to the fact that Cheniere and Clearfield 131 were banned, Plaintiffs were left to scramble for seed at the beginning of their 2007 planting season. Plaintiffs, like most Arkansas farmers, were unable to find enough unaffected seed and were unable to plant rice on all of their available land. The rice that was

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planted was less profitable than Cheniere or Clearfield 131 because of reduced yields and added expense in controlling weeds like red rice.

28. As a direct consequence of Bayer's acts and omissions, Plaintiffs have been significantly damaged both in the short term and long term. They lost revenues from their 2006 and subsequent crops, from the reduced planting, and from the loss of the most bountiful seed varieties. In addition, Plaintiffs' land has been permanently contaminated.

### **E. CLAIMS ALLEGED**

#### **COUNT ONE (Negligence)**

Plaintiffs incorporate by reference paragraphs 1 - 28.

29. Bayer owed legal duties to Plaintiffs that they breached proximately causing damage to Plaintiffs. First, Bayer had a duty to prevent injury to Plaintiffs when it reasonably appeared or should have reasonably appeared that the testing of genetically modified rice had created a dangerous condition for rice farmers. Second, they had a duty to exercise reasonable care to avoid the foreseeable risk of injury to Plaintiffs and a duty to take affirmative action to control or avoid increasing the danger they created by planting and testing GM Rice. Third, Bayer had a duty to use ordinary care in making representations and in ascertaining the accuracy of information given to Plaintiffs. Fourth, Bayer had a duty to exercise reasonable care in performing services that they should have recognized as necessary for the protection of Plaintiffs and their property.

30. As a product manufacturer, Bayer and its agents had a duty to use ordinary care in the design and testing of any genetically modified rice including LL601, LL62 and LL604 to protect Plaintiffs from unreasonable risk of harm. They failed to use ordinary care in the design and testing of their genetically modified rice. Bayer's negligent design and testing was a

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proximate cause of the harm to Plaintiffs. Bayer is liable for all damages to Plaintiffs proximately caused by its actions.

31. Bayer had a further duty to test for genetically modified rice including LL601, LL604 and LL62 in a manner that would not cause harm or injury to Plaintiffs. Bayer failed to adequately test for these genetically modified rice or to take appropriate steps to prevent the damage described above. Bayer's negligent testing was a proximate cause of the harm to Plaintiffs. Bayer is liable for all damages to Plaintiffs proximately caused by their actions.

32. A product manufacturer, like Bayer and its agents, has a duty to give reasonable and adequate warning of dangers inherent or reasonably foreseeable in the use of the product. A violation of this duty is negligence. Bayer violated its duty to give Plaintiffs a reasonable and adequate warning of the dangers inherent and reasonably foreseeable in the use of any genetically modified rice, including LL601, LL604 and LL62. The inadequate warnings were a proximate cause of the harm to Plaintiffs. Bayer is liable for all damages to Plaintiffs proximately caused by its actions.

33. Bayer had a duty to properly instruct and train those who tested, used, handled, studied, transported, stored, planted and harvested genetically modified rice, including LL601, LL604 and LL62. A product manufacturer and its agent have a duty to give reasonable and adequate instructions with respect to the conditions and methods of its safe use when danger is reasonably foreseeable in its use. A violation of this duty is negligence. Bayer failed to properly instruct and train those who tested, used, handled, studied, transported, stored, planted and harvested genetically modified rice.

34. Bayer's actions were the proximate cause of the harm to each Plaintiff in excess of \$75,000. Bayer is liable for all damages to Plaintiffs proximately caused by its actions.

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**COUNT TWO  
(NEGLIGENT UNDERTAKING OF BAYER)**

Plaintiffs incorporate by reference paragraphs 1 - 34.

35. Bayer had a duty to act carefully in its testing of GM Rice, whether the testing was for revenue or gratuitous, and should have recognized that its failure to exercise reasonable care in the testing of GM Rice could result in harm to Plaintiffs. Bayer knew its failure to exercise reasonable care in the testing of GM Rice increased the risk of harm to Plaintiffs. Also, Plaintiffs suffered harm due to their own reliance, and the reliance of others, upon Bayer's undertaking. Restatement (Second) of Torts § 323 and §324(a).

36. Bayer's negligent undertaking proximately caused damages to each Plaintiff.

**COUNT THREE  
(RES IPSA LOQUITUR)**

Plaintiffs incorporate by reference paragraphs 1 - 36.

37. The improper release of GM Rice, including but not limited to LL601, LL604 and LL62, by Bayer could not have occurred without their negligence because it was under their sole management and control. Bayer designed and manufactured GM Rice and its agents tested, planted, and farmed GM Rice on Arkansas land. Bayer's GM Rice then contaminated the Arkansas rice supply, which could not have occurred without Bayer's negligence. Bayer had exclusive control over their GM Rice and such a damaging and illegal substance could not have escaped into the Arkansas and U.S. rice supply without a lack of proper care.

38. Plaintiffs were each damaged as a result of circumstances that could not have occurred without the negligence of Bayer.

**COUNT FOUR  
(PUNITIVE DAMAGES)**

Plaintiffs incorporate by reference paragraphs 1 - 38.

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39. Bayer's negligent conduct described above justifies an award of punitive damages. Bayer knew or ought to have known, in light of the circumstances surrounding its testing of GM Rice, that its conduct would naturally and probably result in injury and damages to Plaintiffs and Bayer continued such negligent conduct in reckless disregard and with conscious indifference of the consequences from which malice may be inferred. Furthermore, Bayer intentionally pursued a course of conduct for the purpose of causing damages and Bayer's conduct did, in fact, harm Plaintiffs. Ark. Code Ann. § 16-55-208(b)(1)-(2) (2010).

40. Plaintiffs have suffered injury and seek punitive damages arising from Bayer's willfull, wanton and/or reckless conduct. Plaintiffs also seek all costs and attorneys' fees as allowed by law.

**COUNT FIVE  
(TRESPASS)**

Plaintiffs incorporate by reference paragraphs 1 - 40.

41. Plaintiffs owned or had a lawful right and continue to own or have a lawful right to possess their land. Bayer intentionally caused and permitted LLRICE to enter Plaintiffs' real property. Specifically, Bayer planted/farmed/tested genetically modified rice on U.S. rice fields from 1996 to 2001 thereby contaminating the seed rice sold and/or distributed to Plaintiffs. Bayer's actions constitute trespass.

42. Bayer's contamination of Plaintiffs' land has permanently damaged Plaintiffs' real property in the form of loss of use. Specifically, Plaintiffs are now unable to grow non-genetically modified rice on their land. Plaintiffs' real property has also been damaged which is reflected in a loss of market value. Additionally, Bayer's trespass in the form of the contamination has interfered with Plaintiffs' business causing lost revenues.

43. Plaintiffs seek compensatory and/or punitive damages in an amount that exceeds

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\$75,000, including lost business revenues, for Bayer's trespass, and all costs and attorney's fees as allowed by law.

**COUNT SIX  
(CONVERSION)**

Plaintiffs incorporate by reference paragraphs 1 - 43.

44. Bayer's acts and/or omissions described above constitute conversion. At all relevant times, Plaintiffs owned or had a lawful right and continue to own or have a lawful right to possess their personal property. Bayer intentionally caused and permitted genetically modified rice varieties to enter Plaintiffs' real property. Specifically, Bayer planted/farmed/tested genetically modified rice on U.S. rice fields from 1996 to 2001 thereby contaminating the seed rice sold and/or distributed to Plaintiffs.

45. Bayer's intentional contamination of Plaintiffs' land has permanently damaged Plaintiffs' real property in the form of loss of use. Specifically, Plaintiffs' are now unable to grow for certain non-genetically modified rice on their land. Plaintiffs' real property has also been damaged in the form of loss of market value as their land is less marketable and valuable. Additionally, Bayer's trespass in the form of the contamination has interfered with Plaintiffs' business causing lost revenues.

46. Plaintiffs seek compensatory and/or punitive damages for Bayer's acts and/or omission, which have resulted in conversion, and all costs and attorney's fees as allowed by law.

**COUNT SEVEN  
(PRIVATE NUISANCE)**

Plaintiffs incorporate by reference paragraphs 1 - 46.

47. Bayer's testing, growing, storing, distributing and/or transporting of LLRICE contaminated the U.S. rice supply and created a nuisance, which constitutes an unreasonable and significant interference with rights, health, comfort and convenience. This interference is

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imposed on a considerable number of individuals and entities.

48. Bayer planted, harvested, tested, stored, distributed and/or transported LLRICE without adequate safeguards to prevent contamination, cross-pollination and commingling of LLRICE with the U.S. rice supply and with the knowledge that LLRICE would likely contaminate the human food supply prior to regulatory approval.

49. Plaintiffs have suffered injuries distinct from the general public in that they have suffered and continue to suffer business losses in the form of rejection of their crops in certain markets, reduced or restricted demand for their crops, reduced prices for their crops, added costs for segregation in order to sell their crops, increased costs for testing to ensure that their crops are not contaminated with LLRICE, and contamination of their property.

50. These actions are the direct and proximate causes of economic, consequential, and property damages to Plaintiffs.

51. Plaintiffs seek compensatory damages and injunctive relief requiring abatement of the nuisance by mandating that Bayer decontaminate Plaintiffs' farming, harvesting and transportation equipment and storage facilities to prevent future contamination.

**COUNT EIGHT  
(NEGLIGENCE *PER SE*)**

Plaintiffs incorporate by reference paragraphs 1-51.

52. Defendants' acts and/or omissions as described above constitute negligence per se. ACA Section 2-15-202, provides definitions for that subchapter as follows:

- (1) "Characteristics of commercial impact" means characteristics that may adversely affect the marketability of rice in the event of commingling with any other rice and includes, but is not limited to, those characteristics:
  - (A) That cannot be identified without the aid of specialized equipment or testing;
  - (B) That create a significant economic impact in their removal from commingled rice; and
  - (C) Whose removal from commingled rice is not feasible; and

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- (2) “Person” includes any individual, partnership, limited liability company, limited liability partnership, corporation, firm, company, or any other entity doing business in Arkansas.

53. ACA Section 2-15-203 provides as follows:

Prohibition of rice with characteristics of commercial impact. No person may introduce, sell, plant, produce, harvest, transport, store, process, or otherwise handle rice identified as having characteristics of commercial impact, except in compliance with the provisions of this subchapter and the rules adopted by the State Plant Board.

54. Because LLRICE has and had characteristics of “commercial impact,” Bayer was required to comply with the provisions of the above referenced subchapter. Bayer failed to comply with this subchapter. Therefore, Bayer violated ACA Section 2-15-203.

55. Additionally, ACA Section 2-15-101 sets forth:

- (a) This section shall be known and may be cited as the “Arkansas Crop and Research Facilities Protection Act.”
- (b) (1) Any person or entity who willfully and knowingly damages or destroys any field crop product that is grown for personal or commercial purposes or for testing or research purposes in the context of a product development program in conjunction or coordination with a private research facility or a university or any federal, state, or local government agency shall be liable for twice the value of the crop damaged or destroyed.
- (2) In awarding damages under this section, the courts shall consider:
- (A) The market value of the crop prior to damage or destruction; and
- (B) Production, research, testing, replacement, and crop development costs directly related to the crop that has been damaged or destroyed as part of the value of the crop.
- (3) Damages available under this section shall be limited to:
- (A) Twice the market value of the crop prior to damage or destruction; plus
- (B) Twice the actual damages involving production, research, testing, replacement and crop development cost directly related to the crop that has been damaged or destroyed.

56. In addition to the above, CFR part 340.1 provides, in part, as follows:

Introduce or Introduction. To move into or through the United States, to release into the environment, to move interstate or any attempt thereat.

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Regulated article. Any organism which has been altered or produced through genetic engineering, if the donor organism, recipient organism, or vector or vector agent belongs to any genera or taxa designated in Section 340.2 and meets the definition of plant pest, or is an unclassified organism and/or an organism whose classification is unknown, or any product which contains such an organism, or any other organism or product altered or produced through genetic engineering which the Administrator, determines is a plant pest or has reason to believe is a plant pest. Excluded are recipient microorganisms which are not plant pests and which have resulted from the addition of genetic material from a donor organism where the material is well characterized and contains only non-coding regulatory regions.

Release into the environment. The use of a regulated article outside the constraints of physical confinement that are found in a laboratory, contained greenhouse, or a fermenter or other contained structure.

57. CFR part 340.0 further provides as follows:

Restrictions on the introduction of regulated articles.

(a) No person shall introduce any regulated article unless the Administrator is:

- (1) Notified of the introduction in accordance with Section 340.3, or such introduction is authorized by permit in accordance with Section 340.4, or such introduction is conditionally exempt from permit requirements under Section 340.2(b); and
- (2) Such introduction is in conformity with all other applicable restrictions in this part.

(c) Performance standards for introductions under the notification procedure. The following performance standards must be met for any introductions under the notification procedure.

- (1) If the plants or plant materials are shipped, they must be shipped in such a way that the viable plant material is unlikely to be disseminated while in transit and must be maintained at the destination facility in such a way that there is no release into the environment.
- (2) When the introduction is an environmental release, the regulated article must be planted in such a way that they are not inadvertently mixed with the non-regulated plant materials of any species which are not part of the environmental release.
- (3) The plants and plant parts must be maintained in such a way that the identity of all material is known while it is in use, and the plant parts must be contained or devitalized when no longer in use.
- (4) There must be no viable vector agent associated with the regulated article.
- (5) The field trial must be conducted such that:
  - i. No viable material shall remain which is likely to volunteer in subsequent seasons, or

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- ii. Volunteers shall be managed to prevent persistence in the environment.

(d) Procedural requirements for notifying APHIS.

58. Bayer had a duty to comply with the Arkansas Code Annotated, Arkansas State Plant Board Regulations and the Code of Federal Regulations. Bayer had a duty to Plaintiffs to test, grow, store, transport and dispose of its LLRICE in a manner that would not result in the contamination of the rice industry. Bayer did not comply with the applicable provisions of the Arkansas Code Annotated. Additionally, Bayer did not comply with the applicable provisions of the Code of Federal Regulations. Specifically, but limited to the following, Bayer did not obtain the necessary permit(s) as required by the Arkansas State Plant Board Sections relating to the regulation of rice containing characteristics of commercial impact. Furthermore, Bayer breached its duties by testing, growing, storing, transporting and disposing of LLRICE in violation of standards that would prevent contamination. Such breaches are the direct and proximate cause of the damages suffered by the Plaintiffs. As a result of Bayer's actions, Plaintiffs have suffered damages proximately caused by the actions and/or inactions of Bayer in regards to its LLRICE. Plaintiffs seek compensatory and punitive damages for the damages they suffered as a result of Bayer's negligent, reckless and willful conduct. In addition to the above, Plaintiffs are entitled to the applicable double damages as provided by the Arkansas Code Annotated as well as attorney's fees, as permitted by applicable law.

**F. REQUEST FOR RELIEF**

Plaintiffs incorporate by reference paragraphs 1 - 58.

59. Bayer's acts and omissions described above which allowed the contamination of the Arkansas rice supply with Bayer's GM Rice, detrimentally affected Plaintiffs' ability to sell their rice.

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60. The contamination of the U.S. rice supply with GM Rice has caused the loss of certain markets within the United States and certain export markets for American and Arkansas long-grain rice and, coupled with the above-described export declines, has resulted in reduced prices for all U.S. long-grain rice.

61. The cost of segregating non-GM Rice from GM Rice is significant. Because there are no approved, genetically modified rice products, the distribution, transportation and storage infrastructure is not set up for such segregation. As a result of the acts and omissions of Bayer described above, Plaintiffs have had to take extra steps to attempt to preserve the integrity and economic value of their rice crops. This includes additional testing both here in Arkansas and in export markets.

62. Plaintiffs have also sustained damages to their property as a result of the wrongful conduct of Bayer and Riceland described above, through the contamination of their rice farming and production chain, including, but not limited to, farmland, farming equipment, storage facilities, harvesting equipment, and transportation facilities and equipment. Bayer forever contaminated Plaintiffs' property with genetically modified organisms, decreasing its value and increasing risk to Plaintiffs of future contamination and future crops unsuitable for human or animal consumption. Furthermore, there are no mechanisms in place to stop the spread of this genetically modified organism thereby further damaging Plaintiffs' property and increasing the risk that other plants such as red rice will become contaminated.

63. Plaintiffs have sustained damages, both general and specific, both economical and consequential, that were proximately caused by the conduct of Bayer described above.

64. Plaintiffs demand a trial by jury and enclose the fees required for such a request.

For these reasons, Plaintiffs demand from all Bayer Defendants, jointly and severally, both general and specific compensatory damages in an amount of more than \$75,000 per Plaintiff, as

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determined by the trier of fact, costs of Court, pre-judgment interest at the highest rate permitted by law, post-judgment interest from the date of judgment until paid at the highest rate permitted by law, and punitive damages in an amount to be determined by the trier of fact.

65. In addition to the above, Plaintiffs are entitled to the applicable double damages as provided by the Arkansas Code Annotated as well as attorney's fees, as permitted by applicable law. All of the damages described and others, both general and specific, both economical and consequential, were proximately caused by Bayer's conduct described above.

66. PLAINTIFFS HEREBY REQUEST A TRIAL BY JURY.

For these reasons, Plaintiffs demand from all Defendants jointly and severally compensatory damages in an amount of more than \$75,000 per Plaintiff, as determined by the trier of fact, costs of Court, pre-judgment interest at the highest rate permitted by law, post-judgment interest from the date of judgment until paid at the highest rate permitted by law, punitive damages in an amount to be determined by the trier of fact.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify that I have this 10<sup>th</sup> day of January, 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/ Martin J. Phipps  
MARTIN J. PHIPPS