

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE GENETICALLY MODIFIED
RICE LITIGATION

4:06 MD 1811 CDP

REMAINING INITIAL TRIAL
POOL PLAINTIFFS

PLAINTIFFS' MOTION TO PRECLUDE THE TESTIMONY OF DANIEL R. FISCHEL

Plaintiffs hereby move to preclude Bayer from calling Daniel R. Fischel in any of the remaining initial trial pool cases. As grounds for this motion, plaintiffs state as follows:

1. Dr. Colin Carter provided a supplemental report to Bayer on April 26, 2010. That report contained updated conclusions based upon new data and new events.
2. At the November 18, 2010 status conference and in Case Management Order No. 27 the Court allowed Bayer to present a new expert to rebut the conclusions in Dr. Carter's supplemental report, but made clear that "any new witness will be limited to rebutting only the conclusions of Dr. Carter that are based on new data and new events, as disclosed in Dr. Carter's supplemental report." CMO 27 at 3-4 (D.I. 3682) (emphasis added).
3. As described in detail in the accompanying memorandum, Bayer ignored the limitation imposed by the Court. It attempted through its new rebuttal expert, Daniel R. Fischel, and his rebuttal report to do something the Court has repeatedly and consistently ruled that it cannot do in the initial trial pool cases – utilize a new expert to attack Dr. Carter's previous

methodologies and conclusions. Nothing in Fischel's rebuttal report is narrowly tailored to rebut only the updated conclusions in Dr. Carter's supplemental report as required by the Court.

4. Because Bayer refused to comply with this Court's order limiting the scope of any rebuttal testimony, the Court should preclude Bayer from calling Fischel as an expert witness in any of the remaining initial trial pool cases.

WHEREFORE, plaintiffs pray that Bayer be precluded from calling Fischel in any of the remaining initial trial pool cases.

Dated: March 11, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this 11th day of March, 2011, electronically filed a copy of the foregoing with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the parties of record.

/s/ Don M. Downing