

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

_____)	
IN RE GENETICALLY MODIFIED RICE)	4:06 MD 1811 CDP
LITIGATION)	
)	TRIAL COMMENCING
_____)	JANUARY 18, 2011

PLAINTIFFS' PROPOSED JURY INSTRUCTIONS

The Mississippi Plaintiffs respectfully submit the attached proposed jury instructions. Plaintiffs request that these instructions be given and object to the instructions on these subjects offered by Defendants.

INSTRUCTION NO. __

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of trial are not repeated here.

The instructions I am about to give you now as well as those I gave you earlier are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

INSTRUCTION NO. __

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdicts should be.

INSTRUCTION NO. __

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, you may consider a witness' intelligence, the opportunity a witness had to see or hear the things testified about, a witness' memory, any motives a witness may have for testifying a certain way, the manner of a witness while testifying, whether a witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any other evidence that you believe.

INSTRUCTION NO. __

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to your.

The burden of proving a fact is upon the party whose claim depends upon that fact. In this case, that is the Plaintiffs. The party who has the burden of proving a fact generally must prove it by the greater weight of the evidence.

To prove something by the greater weight of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and the reasonable inferences derived from it and deciding which evidence is more believable.

You may have heard the term “proof beyond a reasonable doubt.” That is a stricter standard which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

INSTRUCTION NO. __

When making your findings, the following facts must be considered as established:

a. Bayer CropScience AG, as the survivor of its April 1, 2007 merger with Bayer CropScience GmbH (“BCS GmbH”) assumed all assets and liabilities of BCS GmbH, including any liabilities which arose regarding the activities related to LibertyLink rice at issue in this litigation, and therefore is the successor to BCS GmbH, including the time periods when BCS GmbH was previously known as Aventis CropScience GmbH (“ACS GmbH”) or Hoechst Schering AgrEvo GmbH (“AgrEvo GmbH”), and as successor is subject to liability for the acts of its predecessors.

b. Bayer BioScience NV (“BBS NV”), as the successor by name change to Bayer CropScience NV (“BCS NV”), Aventis CropScience NV (“ACS NV”), and Plant Genetic Systems NV (“PGS”), is subject to liability for any acts which occurred regarding the activities related to LibertyLink rice at issue in this litigation during the time periods in which it was known as BCS NV, ACS NV, and/or PGS.

c. Bayer CropScience LP (“BCS LP”), as the successor by name change to Aventis CropScience USA LP (“ACS USA LP”), is subject to liability for the activities related to LibertyLink rice at issue in this litigation during the time period in which it was known as ACS USA LP and for any such liability assumed by or transferred to ACS USA LP from AgrEvo USA Company (“AgrEvo USA”) or its general partners.

d. ACS USA LP, and thus BCS LP, assumed and had transferred to it all liabilities incurred by AgrEvo USA and its general partners regarding their activities related to LibertyLink rice at issue in this litigation during the period in which they conducted those activities.

e. Starlink Logistics Inc., as the successor by name change to Aventis CropScience USA Holding Inc. (“ACS USA Holding”), is subject to liabilities as general partner of ACS USA LP related to LibertyLink rice at issue in this litigation during the period from December 1999 to December 2001.

f. Bayer CropScience Holding Inc. (“BCS Holding Inc.”), as the successor by name change to Aventis CropScience USA Holding II Inc. (“ACS Holding II Inc.”), is subject to liability as general partner of BCS LP related to LibertyLink rice at issue in this litigation.

g. Bayer CropScience Inc. (“BCS, Inc.”), as the successor by merger and name change from Rhone Poulenc Ag Company Inc. is subject to liability of AgrEvo USA and its general partners, AgriVet, Inc. (“AgriVet”) and NOR-AM Chemical Company (“NOR-AM”), related to LibertyLink rice at issue in this litigation and which may have arisen during the time such activities were undertaken by AgrEvo USA prior to the formation of ACS USA LP.

Source: October 9, 2006 Order at 31-33; December 9, 2009 Order at 14-16.
Submitted by Plaintiffs

INSTRUCTION NO. ____

You heard evidence regarding an agreement between LSU and AgrEvo USA Company. Regardless of the terms of that agreement, or any other agreement between LSU and Bayer or any of its predecessor companies, you are instructed that LSU and Dr. Steven Linscombe were acting as Bayer's agents and on Bayer's behalf when they handled LLRICE. Other cooperators who handled LLRICE also were acting as Bayer's agents and on Bayer's behalf.

INSTRUCTION NO. __

You have heard reference in the evidence to the regulations in 7 C.F.R. Part 340. These regulations govern genetically modified crops that have not yet been approved by the USDA. These regulations contain performance standards which do not allow the escape of genetically modified material at any level and also prohibit persistence in the environment.

INSTRUCTION NO.
(Circumstantial Evidence-Mississippi Plaintiffs)

"Direct evidence" is direct proof of a fact, such as testimony by a witness about what that witness personally saw, heard, or did. "Direct evidence" is the testimony of someone who claims to have actual knowledge of a fact or who claims to have personal knowledge of the commission of the crime which has been charged. "Direct evidence" is simply evidence which, if you believe it, directly proves a fact. An example is if a witness testified that he or she saw it raining outside, and you believed him or her, that would be direct evidence that it was raining. "Circumstantial evidence" is proof of a fact or facts from which you could conclude, by your reason and common sense, that another fact exists, even though it has not been proven directly. "Circumstantial evidence" is proof of one or more facts from which you could find another fact. "Circumstantial evidence" is simply a chain of circumstances that indirectly proves a fact. An example is if someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.

The law makes no distinction between the weight to be given either direct or circumstantial evidence. You, as the jury, should decide how much weight to give to any evidence.

INSTRUCTION NO. ____
(Definition of Negligence-Mississippi Plaintiffs)

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like or similar circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like or similar circumstances, or in failing to do something that a reasonably careful person would do under like or similar circumstances.

INSTRUCTION NO. __
(Res Ipsa Loquitur – Mississippi Plaintiffs)

You are permitted to infer that Bayer CropScience LP, Bayer CropScience AG, and Bayer BioScience NV, or any one of them, was negligent, if you find:

First, that LLRICE601 and LLRICE604 were under the exclusive control of Bayer CropScience LP, Bayer CropScience AG, and/or Bayer BioScience NV or their agents; and

Second, in the ordinary course of things, contamination of the U.S. rice supply would not have happened if Bayer CropScience LP, Bayer CropScience AG, and/or Bayer BioScience NV or their agents had used reasonable care; and

Third, the contamination was not due to any voluntary act on the part of the Plaintiff.

INSTRUCTION NO. __
(Negligence – Mississippi Plaintiffs)

In Verdict Form __, your verdict must be for [Plaintiff] and against one or more of the Defendants Bayer CropScience LP, Bayer CropScience AG, and Bayer BioScience NV if you believe:

First, Defendant, individually or jointly with other Defendants or their agents, engaged in the field testing of LLRICE601 and LLRICE604, which were regulated, genetically modified rice, and either:

knew or by using reasonable care should have known that it could not contain LLRICE601 and LLRICE604 but brought these regulated articles into the United States and field tested them in the rice-growing regions of the United States, or

failed to select an appropriate location for the field testing of LLRICE601 and LLRICE604, or

introduced LLRICE601 and LLRICE604 into the United States commercial rice supply without prior authorization from the USDA, or

failed to maintain LLRICE601 and LLRICE604 at one or more destination facility in such a way that there would be no release into the environment, or

failed to plant LLRICE 601 and LLRICE604 in such a way that they were not inadvertently mixed with non-regulated plant materials, or

failed to maintain LLRICE601 and LLRICE604 in such a way that the identity of all material was known while it was in use, or

failed to contain or devitalized LLRICE601 and LLRICE604 when no longer in use, or

failed to conduct field tests of LLRICE601 and LLRICE604 such that LLRICE601 and LLRICE604 would not persist in the environment, or

failed to conduct field tests of LLRICE601 and LLRICE604 such that no offspring of LLRICE601 and LLRICE604 could be produced that could persist in the environment, or

failed to ensure, upon termination of the field tests, that no viable LLRICE601 and LLRICE604 material remained that was likely to volunteer in subsequent seasons or failed to manage volunteers to prevent persistence in the

environment, or

failed to implement a system adequate to prevent LLRICE601 LLRICE604 from escaping into the commercial rice supply; or

failed to test conventional seed supplies for the presence of genetically modified rice to ensure that LLRICE601 and LLRICE604 would not escape or did not escape and persist in the environment; and

Second, Defendant, individually or jointly with other Defendants, or one or more of its agents in any one or more of the respects submitted in paragraph first, was thereby negligent; and

Third, such negligence proximately caused or proximately contributed to cause damage to Plaintiff.

Langston v. Kiddler, 670 So.2d 1, 15 (Miss. 1995) (instruction regarding genuine issue of material fact where credible evidence in record exists to support the instruction); *Paccor Financial Corp. v. Howard*, 615 So.2d 583, 590 (Miss. 1993) (same).
Miss. Model Instr. § 15:5 (concurrent cause)

Submitted by Plaintiffs

INSTRUCTION NO. __
(Nuisance – Mississippi Plaintiffs)

In Verdict Form __, your verdict must be for [Plaintiff] and against one or more of the Defendants Bayer CropScience LP, Bayer CropScience AG, and Bayer BioScience NV if you believe:

First, Defendants, field tested LLRICE601 and LLRICE604 which escaped into the U.S. commercial rice supply; and

Second, Defendants, or any one of them or their agents, failed to use reasonable care to keep LLRICE601 and LLRICE604 from escaping into the commercial rice supply.

Third, such escape proximately caused or proximately contributed to cause an invasion of Plaintiff's interest in the use and enjoyment of [his] [its] property.

Biglane v. Under The Hill Corp., 949 So.2d 9 (Miss. 2007)(elements of nuisance); *Langston v. Kiddler*, 670 So.2d 1, 5 (Miss. 1995) (instruction regarding genuine issue of material fact where credible evidence exists to support instruction); *Paccor Financial Corp v. Howard*, 615 So.2d 583, 590 (Miss. 1993)(same).

Submitted by Plaintiffs

INSTRUCTION NO. ___
(Damages-Mississippi Plaintiffs)

If you find in favor of one or more [Plaintiff], then you must award [Plaintiff] such sum as you find will reasonably compensate the Plaintiff for [his] [its] loss that defendant proximately cause or proximately contributed to cause. Such damages are called compensatory or actual damages and are awarded for the purpose of making the plaintiff whole again insofar as a money verdict can accomplish that purpose.

VERDICT FORM []

Complete the following paragraphs by filling in the blanks as required by your verdict.

On the claim of Plaintiff _____ against Defendants for negligence we find in favor of:

Plaintiff or _____
Defendant Bayer CropScience LP

Plaintiff or _____
Defendant Bayer CropScience AG

Plaintiff or _____
Defendant Bayer BioScience NV

On the claim of Plaintiff _____ against Defendants for nuisance we find in favor of

Plaintiff or _____
Defendant Bayer CropScience LP

Plaintiff or _____
Defendant Bayer CropScience AG

Plaintiff or _____
Defendant Bayer BioScience NV

Complete the following paragraphs only if one or more of your above findings were in favor of plaintiff.

We assess plaintiff's compensatory damages as follows:

\$ _____ (stating the amount)

Foreperson

Date: _____

Submitted by Plaintiffs

INSTRUCTION NO. __

If you found in favor of any one or more of the plaintiffs in Verdict __ or Verdict __, please answer the following questions:

1. Was Bayer CropScience LP acting as an agent for Bayer CropScience AG?
 Yes. No.

2. Was Bayer BioScience NV acting as an agent for Bayer CropScience AG?
 Yes. No.

3. Was Bayer BioScience NV acting as an agent for Bayer CropScience LP?
 Yes. No.

4. Was Bayer CropScience AG acting as an agent for Bayer AG?

5. Were any two or more of Bayer CropScience LP, Bayer CropScience AG, and Bayer BioScience NV acting as a joint venture?
 Yes. No.

6. If your answer to Question 5 was "Yes," please identify those Defendants listed in Question 5 who you found, if any, were acting as a joint venture.

INSTRUCTION NO. __
(Agency-Mississippi Plaintiffs)

You must find that one defendant was acting as agent of the other defendant if it was authorized to act for or in place of that defendant. One may be an agent without receiving payment for services.

INSTRUCTION NO. ____
(Joint Venture – Mississippi Plaintiffs)

Acts were within a “joint venture” as used in these instructions if two or more of the defendants combined in a single business enterprise, expressed or implied, for their mutual benefit, with the understanding that each is to share in its profits or losses, and that each is to have a voice in its control and management.

INSTRUCTION NO. ___
(Exemplary Damages-Mississippi Plaintiffs)

In determining whether or not you should award punitive damages in this case, you should bear in mind that the purpose of such an award is to punish the wrongdoer and to deter that wrongdoer from repeating such wrongful acts. In addition, such damages are also designed to serve as a warning to others, and to prevent others from committing such wrongful acts.

Punitive damages are added damages awarded for the social value in bringing a wrongful party to account for its actions and to discourage others from acting in a similar manner. Such damages are not awarded as a matter of right and are not based on the idea of benefitting an injured party, but are instead founded on the premise of punishing the wrongdoer. The paramount purpose in awarding punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others, while the purpose of compensatory damages is to make the plaintiff whole.

Punitive damages may be awarded if you determine that plaintiff is entitled to compensatory damages, and you also determine, by clear and convincing evidence that the defendant acted either with actual malice, or with gross negligence which evidences a willful, wanton or reckless disregard for the rights of others.

In assessing the amount of punitive damages, if any, which are appropriate in this case, you may consider:

1. The financial condition and net worth of the defendant;
2. The nature and reprehensibility of the defendant's wrongdoing, for example, the impact on the plaintiff, or the relationship of the plaintiff and defendant;
3. The defendant's awareness of the amount of harm being caused and the defendant's motivation for causing same;
4. The duration of the defendant's misconduct and whether the defendant attempted to conceal it;
5. Any other relevant factor shown by the evidence

Miss Model Instr. 11:14
Miss Model Instr. 11:15
Miss Model Instr. 11:16
Submitted by Plaintiffs

JURY INSTRUCTION NO. _____

Personal Injury—Mental pain and anguish—without physical injury

You are instructed that, should you find for the plaintiff in this case, you may award damages for the plaintiff's mental suffering. In awarding such damages as you deem reasonable to the plaintiff, you should first consider the nature of the defendant's conduct. If you find from a preponderance of the evidence that the defendant's behavior was malicious, intentional, willful, wanton, grossly careless, indifferent or reckless, you may award the plaintiff damages for mental anguish without proof of a demonstrable harm or injury to the plaintiff. If, however, you find that the defendant was simply negligent in its behavior, you may only award the plaintiff damages for mental suffering if the plaintiff proves, by a preponderance of the evidence, that they have suffered some sort of demonstrative harm or injury and that said harm or injury was reasonably foreseeable to the defendant.

Miss. Code Ann. §11-1-60(2) (limits on noneconomic damages); Miss. Code Ann. §11-1-60(2)(c) (trier of fact is not instructed on limits on noneconomic damages).

VERDICT []

On the claim of plaintiff _____ against defendants for punitive damages, we the jurors find in favor of

_____ or _____
Plaintiff Defendant Bayer CropScience LP

_____ or _____
Plaintiff Defendant Bayer CropScience AG

_____ or _____
Plaintiff Defendant Bayer BioScience NV

Complete the following paragraph only if the above finding is in favor of plaintiff.

We, the jury, assess punitive damages against:

Defendant Bayer CropScience LP in the amount of \$ _____
(state the amount, or if none, write the word "none")

Defendant Bayer CropScience AG in the amount of \$ _____
(state the amount, or if none, write the word "none")

Defendant Bayer BioScience NV in the amount of \$ _____
(state the amount, or if none, write the word "none")

Submitted by Plaintiffs

Submitted by Plaintiffs

Respectfully submitted,

CHAPMAN, LEWIS & SWAN

By: /s/ Ralph E. Chapman

Ralph E. Chapman

Sara B. Russo

CHAPMAN, LEWIS & SWAN

501 First Street

P. O. Box 428

Clarksdale, Mississippi 38614

Tel: (662) 627-4105

Fax: (662) 627-4171

Plaintiffs' Executive Committee

WOLF HALDENSTEIN ADLER

FREEMAN & HERZ LLC

Adam J. Levitt

Stacey T. Kelly

55 West Monroe Street, Suite

1111 Chicago, Illinois

60603 Tel: (312) 984-0000 Fax:

(312) 984-0001

levitt@whafh.com

*Plaintiffs' Designated Co-Lead Counsel and
Liaison Counsel*

**HARE, WYNN, NEWELL & NEWTON,
LLP**

Scott A. Powell

Donald P. McKenna, Jr.

Massey Building, Suite 800

2025 Third Avenue North

Birmingham, Alabama 35203

Tel: (205) 328-5330

Fax: (205) 324-2165

GRAY, RITTER & GRAHAM, P.C.

Don M. Downing, Bar # 41786

Gretchen Garrison, Bar # 3189

Jason D. Sapp, Bar #5218238

701 Market Street, Suite 800

St. Louis, Missouri 63101-1826

Tel: (314) 241-5620
Fax: (314) 241-4140
ddowning@grgpc.com
ggarrison@grgpc.com
jsapp@grgpc.com
*Plaintiffs' Designated Co-Lead Counsel and
Liaison Counsel*

Richard J. Arsenault
John Randall Whaley
Jennifer M. Hoekstra
NEBLETT BEARD & ARSENAULT, LLP
2220 Bonaventure Court, P.O. Box 1190
Alexandria, Louisiana 71301
Tel: (800) 256-1050
Fax: (318) 561-2591
Plaintiffs' Executive Committee

Scott E. Poynter
EMERSON POYNTER LLP
500 President Clinton Avenue, Suite 305
Little Rock, Arkansas 72201
Tel: (501) 907-2555
Fax: (501) 907-2556
Plaintiffs' Executive Committee

Stephen A. Weiss
Diogenes P. Kekatos
James A. O'Brien III
SEEGER WEISS LLP One William
Street New York, New York 10004 Tel: (212)
584-0700 Fax: (212) 584-0799
Plaintiffs' Executive Committee

Joe R. Whatley Jr.
Deborah Clark Weintraub
Adam P. Plant
WHATLEY DRAKE & KALLAS LLP
2001 Park Place North, Suite 1000
Birmingham, Alabama 35203
Tel: (205) 328-9576
Fax: (205) 328-9669
Plaintiffs' Executive Committee

William Chaney
James L. Reed

William J. French
Michael Kelsheimer
Drew York
LOOPER REED & MCGRAW
1601 Elm Street Suite 4100
Dallas, Texas 75201
Tel: (214) 237-6403
Fax: (214) 953-1332
Plaintiffs' Executive Committee

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this 21st day of December, 2010, 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/ Ralph E. Chapman