

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

IN RE GENETICALLY MODIFIED RICE LITIGATION	)	4:06 MD 1811 CDP
	)	TRIAL COMMENCING
	)	May and July, 2011
	)	
	)	
	)	

**PLAINTIFFS’ REPLY IN FURTHER SUPPORT OF PLAINTIFFS’  
MOTION FOR PARTIAL SUMMARY JUDGMENT  
ON SUCCESSOR, GENERAL PARTNER AND AGENCY STATUS**

In opposition to Plaintiffs’ motion for partial summary judgment on successor, general partner and agency status, the Bayer Defendants (“Bayer”) incorporate Bayer’s prior arguments made in response to previous filings on this subject. *See* The Bayer Defendants’ Response To Plaintiffs’ Motion for Partial Summary Judgment on Successor, General Partner and Agency Status (“Resp.”) at 2. Bayer acknowledges that the Court already has granted a portion of Plaintiffs’ motion including several undisputed facts relating to joint enterprise and agency, and that there is “no new issue for the Court to decide.” *Id.* at 1. Bayer renews its prior arguments but provides no basis for this Court to reconsider its ruling. That ruling was correct and should be entered again in this case.

In regard to the other portion of Plaintiffs’ motion, Plaintiffs respectfully incorporate and reassert the facts and argument previously asserted in regard to summary judgment on the issues of joint venture and agency among the Bayer entities, including the replies previously filed on

this subject (*see* D.I. 1582, 2002, 2880). Plaintiffs have demonstrated the elements of agency and joint venture under Arkansas law. Moreover, these issues already have been litigated and resolved against Bayer. In the second bellwether trial, the jury was requested to and did complete Verdict Form D, containing the following questions:

- “1. Was Bayer CropScience LP acting as an agent for Bayer CropScience AG?
2. Was Bayer BioScience NV acting as an agent for Bayer CropScience AG?
3. Was Bayer BioScience NV acting as an agent for Bayer CropScience LP?
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?
6. If your answer to question 5 was ‘yes,’ please list those defendants listed in Question 5 you found were acting as a joint venture (can be two or more).”

The jury answered “yes” to each of the questions numbered 1 through 5. *See* Verdict Form D (D.I. 2493). The jury further found in response to Question numbered 6 that the following Bayer entities were acting as a joint venture: Bayer CropScience LP, Bayer CropScience AG, Bayer BioScience NV. *Id.* The judgment entered upon these (and other) findings (D.I. 2534) was joint and several against the Bayer entities (as well as StarLink Logistics).

“Collateral estoppel, also known as issue preclusion, bars relitigation of issues of law or fact previously litigated by a party.” *Johnson v. Union Pacific R.R.*, 104 S.W.3d 745, 750 (2003) (citing *Palmer v. Arkansas Council on Econ. Educ.*, 344 Ark. 461, 40 S.W.3d 784 (2001); *Zinger v. Terrell*, 336 Ark. 423, 985 S.W.2d 737 (1999)). There are four elements: (1) the issue to be precluded is the same as involved in a prior litigation; (2) the issue was actually litigated; (3) the issue was determined by a valid and final judgment; and (4) the determination was essential to the judgment. *Id.* at 750. All of these elements are present. Bayer should not be permitted to re-litigate what has already been tried and found against it under Arkansas law.

Dated: February 7, 2011

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify that I have this 7th day of February 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