

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE GENETICALLY MODIFIED
RICE LITIGATION

4:06 MD 1811 CDP

LOUISIANA 1ST
REMAND CASES

**THE LOUISIANA FIRST REMAND PLAINTIFFS' MOTION TO EXCLUDE
DESIGNATIONS, REPORTS AND TESTIMONY OF DANIEL FISCHEL, CRAIG
SCHULMAN, RONNIE HELMS AND ALAN MCHUGHEN**

The Louisiana First Remand Plaintiffs ("Plaintiffs"), hereby move, pursuant to Fed.R.Evid. 702, 703, 403 and the principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to exclude all expert reports and testimony of Defendants' experts, Daniel Fischel, Craig Schulman, Ronnie Helms and Alan McHughen. As grounds for this Motion, the Plaintiffs state as follows:

DANIEL FISCHEL

1. Daniel Fischel, along with his coauthors, Gustavo Bamberger and David Modecai ("Fischel") propose to jointly testify on damages flowing from the event, the alleged short duration of the event and criticisms of the conclusions reached by Plaintiffs' experts Collin Carter and Bruce Babcock. In making his damage assessment, Fischel has failed to both employ a reliable methodology or apply it reliably to the facts of the case. His expert testimony must therefore be excluded under the principles of *Daubert*.

2. Fischel has performed a spread analysis to calculate damages using what he calls the "yardstick" methodology. This methodology, and Fischel's application of it, lacks any scientific foundation as a basis for calculating damages in this case.

3. In 8 different charts, Fischel compares the prices of 4 "natural benchmarks" to two different U.S. long grain rice prices. Fischel then takes the spread which existed between the

two prices on August 18, 2006, the day before the contamination announcement, and draws a horizontal line on each chart to denote the August 18, 2006 spread for all dates charted. If the actual spread on a particular date is higher than the August 18, 2006 spread, Fischel finds no damage. If the spread is lower than the August 18, 2006 spread, Fischel concludes there was damage.

4. Fischel's analysis lacks any scientific methodology. His use of the August 18, 2006 spread is arbitrary and unrepresentative of historical spreads, his choice of benchmarks has not been econometrically tested and, by his own admission, no individual spread analysis has any statistical significance. Contrary to Fischel's bold statement that the average of his 8 spreads are the "best estimates of damages", they are no estimates of damage and must be excluded from evidence.

5. In concluding that Plaintiffs' damages were short-lived, Fischel relies primarily upon the article by Li, et al. ("Li article") published in the February 2010 *Journal of Agricultural and Applied Economics*. Although Fischel contends this article was peer reviewed and is therefore *ipso facto* reliable, the results of the article could not be replicated by Bayer's other tendered expert, Craig Schulman, and cannot be used as a foundation to support Fischel's opinion. Moreover, the opinion of Fischel is directly contradicted by one of the authors of the Li article, Eric Wailes, and Fischel's conclusion that damages were of a short duration is not supported by the evidence as the Li article did not test for or analyze long term price suppression and did not explore sustained damage that may have been caused to the U.S. rice industry.

6. Fischel criticizes the conclusions reached by Drs. Carter and Babcock, both noted experts in agricultural economics. Fischel has no undergraduate or graduate degrees in economics or econometrics. His undergraduate and graduate degrees are in American history. Despite having written on the subject of econometrics and having taught economics and the law,

Fischel has no training or expertise in econometrics or agricultural economics and is not qualified to criticize the opinions of Drs. Carter and Babcock.

CRAIG SCHULMAN

1. Although Schulman is a trained economist and econometrician and has employed a reliable methodology; that methodology has not been applied reliably to the facts of this case.

2. To support his conclusion that the LLRICE event had a relatively short impact on U.S. rice farmers, Schulman developed and estimated an Error Correction Model (ECM) as his basic economic model explaining the differences in weekly U.S. rough rice prices before and after the contamination events. In this model, Schulman chose as his benchmark Thailand 100B milled rice prices, the same benchmark used by Li in her article. However, Schulman reached different results from Li and Schulman's results are admittedly not statistically significant.

3. Schulman acknowledges that to have a valid ECM, the reference price series and benchmark price series must be cointegrated. Yet, Schulman failed to properly test for cointegration or employ any available cross-checks to insure his price series' were cointegrated. Properly tested and cross-checked, Schulman's price series' are not cointegrated and Schulman's ECM results are therefore invalid.

4. Schulman also utilized a Cumulative Abnormal Return (CAR) analysis similar to the one employed by Li. However, Schulman acknowledges that analyzing a single commodity such as rice in a CAR analysis yields results of extremely low power, rendering them statistically insignificant. Schulman also claims his CAR analysis verified the findings of his ECM, acting as a robustness check to eliminate the possibility his ECM may have underestimated the duration of the event's impact. Schulman was unable to identify any academic literature supporting the use of a CAR analysis for this purpose. Schulman's conclusions from his CAR analysis should therefore be excluded from evidence.

5. Schulman also took results reached by Dr. Carter and added admittedly statistically insignificant data to those results, thereby diluting Dr. Carter's findings. Schulman could not point to any scientific authority justifying such actions and his conclusions should therefore be excluded from evidence.

RONNIE HELMS

1. Helms proposes to testify about general rice production practices. He demonstrates no expertise in this area, except perhaps for practices in Arkansas. He relates none of his proposed testimony to any farmer – or any issue – in this case. His testimony does not assist the jury as required by Rule 702 and would constitute a needless waste of valuable time at trial.

2. Helms reserves the right to “testify regarding [his] observation of events as a rice farmer and rice seed dealer after August 18, 2006, and how those observations support [his] conclusions in this report.” He should not, however, be permitted to testify outside the confines of his report.

3. Helms proposes to testify in criticism of Plaintiffs' economic experts, Carter and Frye, regarding their calculation of plaintiffs' damages. Helms opines that flat prices offered by “some buyers” are not priced with reference to the Chicago Board of Trade. Helms makes a number of generalized statements regarding the price paid by buyers of rice in various time periods. None of these subjects require expert interpretation. Helms is unqualified to render an opinion on this subject. His opinions lack sufficient foundation to survive the reliability demands of *Daubert*. Many of his statements, even if reliable, would not assist the trier of fact and also fail *Daubert's* relevancy requirement. This Court has previously held in its October 9, 2009 opinion that Helms cannot testify as to lost profits because he is not an economist.

4. Helms proposes to testify about the conduct of field trials governed by 7 C.F.R. Part 340 and the sufficiency of certain confinement practices of two of Bayer's cooperators –

Louisiana State University (“LSU”) and the University of Puerto Rico (“UPR”). Helms expressly admits he has no expertise regarding the regulatory requirements governing this case. He also lacks sufficient experience to opine upon adequate confinement practices for regulated, GM crops. He lacks knowledge, education or experience to qualify him as an expert on a standard of care – or Bayer’s compliance therewith. His opinions otherwise lack foundation, are not reliable and are irrelevant.

5. In regard to the four specific topics on which he proposes to testify (level of supervision, dedicated equipment, third-party auditing, and monitoring), Helms similarly is unqualified as an expert, and similarly lacks a sufficient knowledge base upon which to form an opinion that in any way is the product of special knowledge, training, or experience. His opinions also lack foundation, are irrelevant, and unhelpful to the trier of fact.

ALAN MCHUGHEN

1. Alan McHughen (“McHughen”) proposes to testify on the meaning and intent of the regulations at 7 C.F.R. Part 340. This and other opinions he proffers constitute inadmissible legal conclusions, which further are lacking in foundation and reliability, and also contradicted by the facts of this case.

2. McHughen’s legal conclusions also are legally wrong. Because his opinions concerning Bayer’s compliance with applicable regulations rely upon his own, incorrect interpretation, they too are inadmissible. *See Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp.2d 794; 806 (N.D. Ill. 2005) (“Expert opinions that are contrary to law are inadmissible” as they “cannot be said to be scientific, to be reliable, or to be helpful to the trier of fact”); *United States v. Wintermute*, 443 F.3d 993, 1001 (8th Cir. 2006) (by misconstruing legal burden, expert’s testimony was irrelevant and would “confuse rather than assist the jury”); *Southard v. United Regional Health Care System*, 2008 WL 4489692 at *2 (N.D. Tex. Aug. 5, 2008) (expert opinion based on erroneous legal premise excluded).

3. McHughen relies upon, and proposes to recite, discussions with current and former APHIS employees reflecting merely personal opinions that carry no weight and are otherwise inadmissible hearsay.

4. McHughen relies upon, and proposes to testify about, vague and unidentified discussions without source or reliability as required by Rules 702 and 703.

5. McHughen relies upon, and proposes to testify about, various academic and research studies and programs with no bearing on this case.

6. McHughen relies upon, and proposes to testify about, the USDA Report of LibertyLink Rice Incidents, which is irrelevant to whether a violation of 7 C.F.R. Part 340 occurred and is highly prejudicial.

7. McHughen proposes to define “contamination” without source or authority, contrary to the evidence, and in a way such to inflame or mislead the jury.

8. McHughen proposes to testify that certain levels of impurity are unavoidable and acceptable in various contexts unrelated to this case. This testimony is not “relevant to the task at hand” as required by *Daubert* and Rule 702. See *J.B. Hunt Transp., Inc. v. General Motors Corp.*, 243 F.3d 441, 444 (8th Cir. 2001); *Wheeler Pittsburg Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 714-15 (8th Cir. 2001); *Ferguson v. Bombardier Servs., Corp.*, 244 Fed. Appx. 944, 949 (11th Cir. 2007). This testimony not only is wholly irrelevant, but lacks foundation, lacks reliability, conflicts with the facts, and is highly misleading and otherwise prejudicial.

9. McHughen proposes to testify that growers are responsible to prevent contamination in contexts other than the one relevant to this case. He admits that this testimony does not apply to the facts of this case. It also lacks foundation, lacks reliability, and is highly misleading and otherwise prejudicial.

10. McHughen proffers opinions regarding who should be liable for breaches of confinement under circumstances not involved in this case. This testimony constitutes inadmissible legal opinion, is irrelevant, lacks foundation or reliability, is highly misleading and otherwise prejudicial.

12. McHughen opines that the losses claimed by the plaintiffs were not attributable to any violation of 7 CFR 340. This constitutes an inadmissible legal opinion that is otherwise irrelevant, unreliable, and contrary to the facts of this case.

13. McHughen opines that Bayer met “industry standards” in conducting its regulated field trials of LL601 and LL604. His opinions and proposed testimony incorporate incorrect legal conclusions lack foundation, and do not actually identify any actual applicable custom or practice.

14. McHughen proposes generalized testimony regarding University research methods and standards with no showing that such were followed by the Universities that actually worked with LLRICE and as such, is irrelevant, lacking in foundation, highly misleading and otherwise prejudicial.

15. McHughen proposes to opine that Bayer was not negligent and to criticize Plaintiffs’ experts. His testimony “merely comments on the evidence or lack thereof” and proposes to make credibility assessments, both of which invade the province of the jury. *See, e.g., United States v. W.R. Grace*, 455 F. Supp.2d 1156, 1169 (D. Mont. 2006); *Brill v. Marandola*, 540 F. Supp.2d 563, 570 (E.D. Pa. 2008). McHughen also did not review information sufficient to form a belief in regard to the subjects on which he opines, which lacks foundation, lacks reliability, conflicts with the facts of this case, is irrelevant, highly misleading and otherwise prejudicial.

16. McHughen offers photographs of various offices, facilities and equipment he observed at the LSU Rice Research Station in April, 2009, testimony that such compare

favorably with other university cooperators, and that he “find[s] no evidence that improper handling or other negligence on the part of LSU contributed in any way to the LL601 AP in Cheniere rice or the LL604 AP in CL131.” McHughen does not know whether the pictures, equipment, or conditions at LSU in 2009 are representative of equipment or conditions as they existed during the relevant time frame and as such, the pictures and his testimony in regard to such are inadmissible. McHughen otherwise lacks sufficient information to form a belief as to the conditions as they existed at LSU during the relevant time frame. McHughen’s opinions “regarding the overall reasonableness of the procedures” at LSU is not a fact-based opinion as required under Rule 702 and must be excluded.

17. McHughen proposes various opinions regarding the “irrationality” of the EU’s opposition to genetically modified rice, as well as testimony regarding supposed discussion to determine tolerance levels. McHughen’s characterizations have no foundation, are utterly irrelevant, conflict with the facts of this case, are highly misleading and otherwise prejudicial.

18. McHughen proposes to testify that Bayer had no reason to know that the escape of LL601/LL604 would cause economic harm. He has no foundation for this testimony, which conflicts with the actual evidence, is irrelevant, is highly misleading and otherwise prejudicial.

19. McHughen proposes to testify that risk of market disruption is not (and should not) be considered in regard to regulation of GM crops. This constitutes an inadmissible legal conclusion, lacks foundation and reliability, and is wholly irrelevant to the issues in this case. It also is highly misleading and otherwise prejudicial.

20. McHughen proposes to testify about testing methods, sampling, and testing results, to opine that testing of conventional varieties grown in proximity to LL601/LL604 was not feasible and/or meaningful, and to criticize evidence that LL601 was found in varieties other than Cheniere. McHughen does not demonstrate expertise on these subjects and is not qualified to testify thereon. His opinions otherwise lack foundation and are not reliable.

21. McHughen proposes to opine upon the source, time, and place of the entry of LL601 into Cheniere and upon the entry of LL604 into CL 131. McHughen does not have expertise sufficient to qualify him as an expert on these subjects. His opinions also lack foundation and reliability.

WHEREFORE, Plaintiffs pray that the Court exclude the designation, testimony and reports of Daniel Fischel, Craig Schulman, Ronnie Helms and Alan McHughen in their entirety.

Respectfully submitted,

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