

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE GENETICALLY MODIFIED
RICE LITIGATION

4:06 MD 1811 CDP

FIRST GROUP OF
LOUISIANA REMAND
CASES

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

Louisiana First Remand Plaintiffs, Black River Rice Co., Verona M. Courville, Mitchell W. Deville, Gloria B. Fontenot, Jessie C. Fontenot, Jody David Fontenot, Aswell Farms Inc., Darrel Wayne Attales, Robert Allen Benoit, Troy Fruge, Keith Hensgens, Roger Leblanc, Lonesome Dove Plantation, LLC, Glenden Marceaux, Miller Brothers Farm, Brodney Mouton, Sr, Tomas A. Sarver, Cynthia L. Simon, Mark J. Simon, Mitchell Ray Soileau, Randy Stutes, Cynthia Faye Lormand Vidrine, and Leland Dale Vidrine, Sr. ("Plaintiffs"), hereby submit this consolidated Reply to *The Bayer Defendants' Responses to The First Remand Plaintiffs' Motion to Exclude Designations, Reports and Testimony of Daniel Fischel, Craig Schulman, Ronnie Helms and Alan McHughen*. Plaintiffs respectfully urge that the Bayer Defendants ("Bayer") have either conceded certain critical issues raised by Plaintiffs or have not sustained their burden of proving the admissibility of their experts' testimony. Accordingly, the testimony of Bayer's experts must either be significantly limited or excluded from evidence.

**THE DESIGNATIONS, REPORTS AND TESTIMONY OF
DANIEL FISCHEL MUST BE EXCLUDED**

While Bayer goes to great lengths to legitimize Fischel's methodology and his application of it, and urges that Plaintiffs' criticisms are more appropriately issues for cross examination rather than exclusion, Bayer cannot salvage Fischel's testimony. Despite Fischel having testified more than two hundred-fifty (250) times as an expert witness and allegedly never having been excluded from testifying on *Daubert* grounds, there is always a first time. Fischel has never before rendered an opinion in a case involving agricultural economics, Fischel Dep. 90:2-10, and his methodology and the application thereof are so far out of the conventional mainstream as to justify this Court's exercise of its gatekeeping function to exclude Fischel's testimony.

Before addressing Bayer's justifications for Fischel's work, several issues raised by Plaintiffs have not been disputed by Bayer and therefore the Court must assume Bayer does not contest these points. Most significantly, Plaintiffs have noted Fischel does not claim that damages from any one of his eight (8) spread analyses are statistically significant and Fischel provides no scientific authority supporting "the conclusion that statistically insignificant data combined with other statistically insignificant data somehow transmogrifies the data into a reliable estimate of damages." Plaintiffs' Br. at 13, fn. 14. This concession is fatal to Fischel's damage calculations since without any statistically significant results Fischel's opinions are meaningless and cannot be presented to the jury as a reliable estimate of damages.

Moreover, Bayer ignores Schulman's criticism of using the August 18, 2006 spread as the constant spread to measure damages for each of Fischel's eight (8) damage calculations.¹ As noted by Schulman, Bayer's own expert, although he does not use the yardstick method or

¹ Although Bayer claims Fischel actually performed sixteen (16) different benchmark analyses, the spreads and ratios are essentially identical calculations based upon the same data.

spread analysis with any regularity, he would only endorse using the August 18, 2006 spread if it was “not grossly out of line with the average spread over the previous period.” Schulman Dep. 358:1-12. Bayer acknowledges that the August 18, 2006 spread is neither representative of historical spreads nor close to any average spread for the pre-event period but argues that the use of an average spread allegedly would not capture all of the market changes which are reflected in the August 18, 2006 price. Bayer Br. at 9. Bayer cites no authority for use of this single date baseline other than Fischel’s own *ipse dixit* but Bayer, nevertheless, attempts to justify its use by claiming Dr. Carter’s analysis also began with rough rice prices during the week of August 18, 2006.

Bayer’s argument is pure sophistry. While, of course, Dr. Carter began his analysis with the week of August 18, 2006, Dr. Carter looked at price *changes* from that date, not simply prices, and did not end his analysis on that date, as did Fischel. Dr. Carter further used a formula to predict and calculate price changes, and Fischel did not. As recognized by Schulman, Fischel’s damage analysis is flawed and cannot be presented to the jury as a reliable measure of damages. This is not simply a matter of expert disagreement which can be cured by cross examination. It goes to the very foundation of Fischel’s analysis and *Daubert* requires that the analysis be excluded from evidence.

Fischel’s simplistic damage calculations also trivialize the complex scientific foundation upon which all other experts, both for Plaintiffs and Bayer, have based their opinions. Whereas the other experts have used complicated econometric formulas to calculate “but for” price differences due to the event, Fischel apparently has no need for such complexities. Why bother with formulas and logarithms of price differences between two price series² if damages can be

² Schulman explains that logarithms are utilized to smooth out price differences caused by the heteroskedasticity of the data. Schulman Dep. 276:13-277:10.

calculated by merely subtracting one price from another? Fischel's methodology does a tremendous disservice to the field of econometrics and lacks any scientific foundation. Fischel's analysis does not measure the damages suffered "but for" the contamination event, it simply measures price spreads which happen to fall below the price spread which happened to exist on August 18, 2006, a meaningless measurement.

Fischel's choice of benchmarks is also scientifically unsound. While Bayer claims Fischel did not need to perform a cointegration analysis as this analysis would have been "unnecessary and unhelpful," Bayer Br. at 7, Fischel was not even familiar with a cointegration analysis. Fischel Dep. 173:13-174:9. Despite Schulman's acknowledgment of the need for a cointegration test to insure against a spurious correlation between the price series' being compared,³ Schulman Dep. 438:19-439:19, Fischel performed no such testing. Fischel was simply content to compare price series' with high correlations to his reference prices to conclude that his "natural benchmarks" were appropriate. Bayer Br. at 8, Fischel Report at 5-6. Fischel neither tested for a statistically significant benchmark relationship nor has he presented any evidence of statistical significance in the relationship between long grain rice prices and his benchmarks, plus a constant. Contrary to Fischel's assertion, all rice prices are not appropriate benchmarks for his reference prices and the premise that rice is rice is not an adequate statistical foundation for Fischel's series comparisons.

Plaintiffs have pointed out that all of Fischel's benchmark prices are flawed and none should have been utilized. Bayer counters with (a) the bootstrapping argument that Thai prices

³ Bayer claims that Schulman was referring to the need for a cointegration analysis to validate his Error Correction Model, not for a yardstick analysis. Bayer Br. at 7, fn. 10. Contrary to Bayer's assertion, Schulman was addressing the *general* issue of correlation v. cointegration to guard against comparisons with "no real causal relationship," Schulman Dep. 439:6-19, and insuring that the price series' being compared have a stable long term relationship is critically important for a yardstick analysis since otherwise the comparison would be the proverbial apples to oranges, rather than apples to apples.

are appropriate because Li used them, (b) the Adjusted World Price as calculated by the USDA reflects world rice prices adjusted to be comparable to U.S. rice prices, and (c) both Drs. Carter and Babcock use U.S. medium grain rice prices in their analyses. Bayer Br. at 5-6. None of these arguments has merit.

Li's use of Thai prices was as inappropriate as Fischel's since Li's results cannot be replicated and Dr. Carter has demonstrated the price series' are not cointegrated. Additionally, due to fluctuations in milling costs for Thai rice, comparing milled Thai rice to rough U.S. rice is meaningless without first establishing the existence of a stable long run relationship between the two. Similarly, comparing the non-transactional Adjusted World Price to transactional reference prices is inappropriate for the simple reason that two completely different pricing methods are being compared. Finally, despite the absence of any evidence that Dr. Carter used medium grain rice prices as a benchmark in his analysis and Dr. Carter's exclusion of medium grain rice prices because they were affected by the contamination event, Bayer continues to insist they are proper benchmarks since Drs. Carter and Babcock looked at U.S. export data for medium grain rice and some consumers consider medium grain rice a substitute for long grain rice. *Id.* However, the impact of the event upon medium grain exports and consumer sentiment about medium grain rice lends nothing to the scientific justification for using medium grain rice as a benchmark.

In *Martinez v. Rabbit Tanaka Corp. Ltd.*, 2006 WL 5100536 at *14 (S.D. Fl. 2006), the court was confronted with a *Daubert* challenge to an expert's yardstick damage calculation wherein the expert allegedly chose "nearly identical" businesses with which to compare the plaintiff's claims. Noting "serious doubts" as to the expert's qualifications, the court excluded his testimony finding his methodology to be unreliable and his choice of benchmarks to be untested for similarity, concluding the expert's reports "evidence no discernible expertise nor the

application of anything approximating a reliable methodology.” As Fischel has no expertise in agricultural economics and Bayer has failed to establish both the reliability of his methodology and any scientific justification for his benchmark comparisons, Fischel’s damage findings must be excluded from evidence.⁴

Fischel’s estimate of the damage period must also be excluded from evidence. Since Fischel’s spread analyses are not a valid indicator of damages, they can likewise not be used as support for Fischel’s duration theory. Despite damages disappearing for lengthy periods of time and then reappearing for no apparent reason, Bayer offers absolutely no explanation for why some price series’ damages reappear after a 16-week absence in the beginning of 2008 and continue indefinitely. Plaintiffs’ Br. at 15. And Fischel’s references to forecasts proven by history to be inaccurate and vague economic theory unsupported by the literature lend no additional credibility to his conclusions. Fischel’s conclusion that the damages lasted only until the end of 2007 is simply arbitrary and unsupported by any scientific methodology.

Finally, Fischel’s reliance on the Li article is unsupportable. Although purportedly peer reviewed, the results of the Li article could not be replicated by Schulman, thereby shaking the very foundation of Fischel’s conclusions. While Schulman defends his replication efforts claiming his results were “close” to and “consistent” with Li’s, they simply were not. Most notably, the P-value of the coefficient of Schulman’s Error Correction Term was a statistically insignificant 19.9%, whereas the P-value of Li’s was a statistically significant 3.1%, thereby

⁴ Without citation to any authority, Bayer states that if the price of U.S. rice and Thai rice were not cointegrated, the difference between U.S. and Thai prices could diverge from each other indefinitely. Bayer Br. at 8. Plaintiffs are unaware of any academic support for this contention and certainly a lack of indefinite price divergence is not a recognized scientific test for cointegration. However, as shown by the chart attached hereto as Ex.1, which was constructed by Dr. Babcock from Fischel’s supplied data, the various spreads *do* diverge essentially indefinitely after the end of Fischel’s arbitrary damage period.

potentially invalidating Schulman's entire Error Correction Model (ECM).⁵ As the conclusions in Li's article are based primarily upon an ECM which could not be replicated by Schulman, it is inappropriate for any expert to rely upon Li's results.

Fischel's blind reliance upon Li's findings, while ignoring both Schulman's inability to replicate the results and Wailes' declaration, is inexcusable. Contrary to Bayer's statement, Schulman did suggest that Li may have achieved her results "by totally fudging the data," Schulman Dep. 212:12-213:7, and his inability to replicate the results renders them unreliable. Although Schulman complains that Dr. Wailes refused to speak to him about the article, Schulman admits he made no attempt to speak to or contact Li, the primary author of the article who adapted the article from her Master's thesis, and also made no effort to contact the journal in which the article was published to discuss the methodology or secure the underlying data. *Id.* at 201:15-18; 207:10-17; 216:16-18. Schulman's inability to contact Dr. Wailes and his mere belief that Dr. Wailes could have adequately explained the replication problem does not transform the unreliable Li results into a reliable foundation for Fischel's opinion. As noted by Dr. Babcock in his Rebuttal Report, and as acknowledged by Schulman, *Id.* at 196:21-197:24, peer review does not automatically insure reliability, especially when the published results cannot be replicated.⁶ As clearly stated within the Li article, it was never intended to be used as a tool for "calculating losses accruing to the U.S. rice industry" or for measuring the duration of the event's economic impact since it only looked at the effect "during a short period after the

⁵ Schulman acknowledged that cointegration is required to have a valid ECM. Schulman Dep. 438:17-439:2. Without a statistically significant Error Correction Term, one of the recognized tests for a cointegration analysis, *Engle and Granger* at 266, Schulman's cointegration finding is called into serious question.

⁶ Bayer's suggestion that Dr. Carter disagrees with Dr. Babcock's viewpoint on the significance of peer review is misguided. Bayer Br. at 12, fn. 17. Dr. Carter, like all reputable scientists, believes the real test, the gold standard, of any experiment's validity is its ability to be replicated. Peer review is merely a first line of defense and is not the be all and end all of reliability.

public disclosure,” Li article at 38, and, with its results being called into serious question, Fischel must be prohibited from using the article as any foundation for his opinions.

**THE DESIGNATIONS, REPORTS AND TESTIMONY OF
CRAIG SCHULMAN MUST BE EXCLUDED**

Once again, Bayer urges that the criticisms of Schulman do not rise to the level of a *Daubert* challenge but may be used as fodder for cross-examination. Plaintiffs respectfully urge that Schulman’s ECM and Cumulative Abnormal Return (CAR) analysis are so flawed as to be unhelpful to assist the trier of fact in resolving this matter, thereby warranting their exclusion from evidence.

In claiming Schulman’s ECM is valid, Bayer asserts that Schulman’s sole reliance on the Augmented Dickey-Fuller test as the basis for his cointegration finding is supported by the literature. While the Augmented Dickey-Fuller test may be *an* appropriate test, given the importance of cointegration to a valid ECM, the results of which would be “meaningless” in the absence of cointegration, Schulman Dep. 186:14-17, Schulman should have cross checked his analysis using tests mandated by Engle and Granger, the authors of the seminal work on ECMs.

Schulman refused to cross check his work even though the means for doing so were readily available. While checking the Durbin-Watson statistic and the modern Johansen test may have been, in Schulman’s opinion, inferior tests, they would have nevertheless verified Schulman’s questionable results. Given that the sole cointegration test performed by Schulman found a statistically insignificant Error Correction Term, which Schulman recognizes is not acceptable in the scientific literature, Schulman Dep. 213:22-214:16, and which Engle and Granger note is an indication of lack of cointegration, *Engle and Granger* at 266, Schulman

should have been alerted at that time to run further tests. Yet, Schulman refused to do so, calling his results into serious question.⁷

Additionally, after acknowledging that Schulman used the incorrect critical value table from the Enders text, Bayer Br. at 5, Bayer never explains why Schulman used Enders rather than Engle and Yoo as a source for his critical values. As Schulman was attempting to replicate Li's ECM and Li used Engle and Yoo as her source, Li article at 33, it defies logic why Schulman would use a different source. Given Schulman's inability to duplicate Li's results, the lack of statistical significance of Schulman's Error Correction Term, the recommendation of Engle and Granger that additional cointegration tests be performed and the ease and availability of those tests, Schulman's results are untested and unreliable and must be excluded from evidence.

Bayer defends the low power and lack of statistical significance of Schulman's CAR by urging that Li used the same analysis and that Dr. Carter's own event study in his initial report analyzed a single price series. Just as Li's analysis is flawed, so is Schulman's. And Dr. Carter did not use a CAR analysis as the basis for his findings due to its acknowledged low power for a single commodity. Bayer has failed to sustain its burden of demonstrating the reliability of Schulman's results and his CAR analysis should be excluded from evidence.⁸

Bayer also fails to refute Plaintiffs' challenge to Schulman's use of a CAR analysis as a robustness check for an ECM. Just as Schulman was unable to cite any references in the academic literature to support this novel approach for checking for robustness, *Id.* at 460:18-

⁷ Interestingly, Bayer does not even address in its Response the lack of statistical significance of Schulman's Error Correction Term. Such a glaring omission speaks volumes about the reliability of Schulman's findings, which findings cannot even be defended by Bayer.

⁸ Although Schulman was unable at his deposition to name any authoritative sources validating CAR results with a power of less than 10%, Schulman Dep. 393:22-394-3, Bayer cites an article where another author (one of Bayer's state court experts) has allegedly constructed a market model analyzing a single price series in other commodities. Bayer Br. at 8. However, the article cited makes no specific mention of a CAR analysis and further relies on standard statistical techniques to show *evidence* of support for its hypothesis, not as actual support for its hypothesis.

461:5, Bayer has now, for all intents and purposes, acknowledged that this theory is Schulman's own *ipse dixit*. Moreover, Bayer has essentially acknowledged the inappropriateness of utilizing statistically insignificant dummy variables to dilute the impact of Dr. Carter's findings regarding the duration of the event. Instead, Bayer relies upon Schulman's Supplemental Report which allegedly eliminates the statistically insignificant weeks previously used.⁹ Due to the lateness of this Supplemental Report, Plaintiffs are unable to fully comment on Schulman's recent analysis but note that the dummy variable dates chosen do not reflect market news regarding the contamination event and thus have no basis for being included.

Finally, Schulman cannot hide behind his inability to communicate with Dr. Wailes as support for the Li article. After being rebuffed by Dr. Wailes, Schulman made absolutely no effort to contact Li, the primary author of the article, or the journal to secure the missing data or to answer his questions. *Id.* at 201:15-18; 207:10-17; 216:16-18. Instead, Schulman simply ignores the inconsistencies in his findings and assumes he could clear up any discrepancies if only he had an opportunity to talk with Dr. Wailes. *Id.* at 206:20-207:3. However, this rationalization does not solve the problem. Schulman remains unable to explain away the discrepancies between his findings and Li's, thus invalidating Li's results. As Schulman was unable to replicate Li's findings, they are unreliable and must be excluded from evidence.

**THE DESIGNATIONS, REPORTS AND TESTIMONY OF
DR. HELMS AND DR. McHUGHEN MUST BE EXCLUDED**

In support of its opposition relating to Dr. Helms and Dr. McHughen, Bayer relies exclusively on previously filed documents. *See* D.I. 4075 referencing D.I. 1501, D.I. 1503, D.I. 1928, D.I. 1929, D.I. 3629, and D.I. 3630. The arguments have previously been

⁹ Bayer attempts to shift the burden to Plaintiffs to identify sources prohibiting the use of statistically insignificant dummy variables to dilute otherwise statistically significant findings. Bayer misconstrues Plaintiffs' burden in a *Daubert* challenge. It is up to Bayer to support its scientific theories, not Plaintiffs.

addressed in the reply briefs filed by the Missouri, Arkansas, Mississippi and Louisiana Bellwether Plaintiffs in reply to Bayer's oppositions filed in relation to those experts' testimony, which the Louisiana 1st Remand Plaintiffs hereby incorporate by reference. *See* D.I. 1566, D.I. 1570, D.I. 2008, D.I. 2010, D.I. 2876, and D.I. 2877. The Louisiana 1st Remand Plaintiffs' further seek to preclude Helms from testifying about anything specific to the Louisiana 1st Remand Plaintiffs' farming operations and nothing in his proffered opinion specifically addresses these Plaintiffs. Plaintiffs' motion relating to these experts should be granted.

CONCLUSION

For the reasons set forth in the above referenced documents and outlined above, Plaintiffs' motion to exclude the testimony of Dr. Ronnie Helms, Dr. Alan McHughen, Dr. Craig Schulman and Daniel R. Fischel should be granted in its entirety.

Dated: March 4, 2011

Respectfully submitted,

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By: /s/ Richard J. Arsenault

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this 4th 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/ Richard J. Arsenault

EXHIBIT 1

Fischel Price Spreads to May 25, 2009

