IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE: READY-MIXED CONCRETE ANTITRUST LITIGATION	))	Master Docket No. 1:05-cv-00979-SEB-JMS
THIS DOCUMENT RELATES TO: ***[ALL ACTIONS]***	))	

BUILDER'S DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

and

IN SUPPORT OF THEIR MOTION TO EXCLUDE REPORT AND TESTIMONY OF JOHN C. BEYER

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Defendants, Builder's Concrete & Supply, Inc., Gus D. ("Butch") Nuckols, III and John L. Blatzheim (collectively "BCS" or the "Builder's Defendants"), by counsel, respectfully submit this Memorandum in Opposition to Plaintiffs' Motion for Class Certification and in Support of their motion to this Court for an order excluding the testimony of the Plaintiffs' expert John C. Beyer (the "BCS Defendants' Memorandum").[1] In order to avoid redundancy, BCS joins in and incorporates by reference the legal arguments and authorities set forth in the IMI Defendants' Memorandum in Opposition to Plaintiffs' Motion for Class Certification (the "IMI Defendants' Memorandum"), as more specifically indicated herein below.[2] The BCS Defendants' Memorandum primarily supplements the memorandum of the IMI Defendants with facts that are specific to BCS and addresses erroneous aspects of the analysis of Plaintiffs' expert, John C. Beyer, Ph.D., specifically relevant to the inadequacies of his proposed regression analysis.

The evidence and argument proffered by the BCS Defendants demonstrates that Plaintiffs' effort to satisfy the predominance requirements of Federal Rule of Civil Procedure 23(b)(3) fail for multiple, independently sufficient reasons. For this reason, as discussed further below, the BCS Defendants respectfully seek denial of the Plaintiffs' Motion for Class Certification.

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[1] As stated in the motion, references to Dr. Beyer's "testimony" include his July 30, 2007 report ("Report") as submitted by the Plaintiffs to this Court on August 1, 2007 [Dkt.399] and his March 27-28, 2008 deposition ("Dep.").

[2] The Response by Beaver Defendants in Opposition to Plaintiffs' Motion for Class Certification ("Beaver's Response Memorandum") also provides factual and legal reasons why the Plaintiffs' Motion for Class Certification should be denied.

I.

CLASS CERTIFICATION SHOULD BE DENIED

A. Plaintiffs Have Failed to Establish the Predominance Requirements of Rule 23(b)(3).

A class action is maintainable under Rule 23(b)(3) if "questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members" and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed.R.Civ.P. 23(b)(3) (emphasis added). Rule 23(b)(3) has two aspects: (1) predominance, *i.e.,* whether questions of fact or law common to the class predominate over questions affecting only individual members, and (2) superiority, *i.e.,* a determination that a class action is the best method for achieving a fair, just and efficient adjudication of the controversy. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997). The predominance requirements test whether proposed classes are sufficiently cohesive to warrant adjudication by representation. *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005) (citing *Amchem*, 521 U.S. at 623); *see also Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.,* 259 F.3d 154, 186 (3d Cir. 2001). The legislative history of Rule 23(b)(3) supports this characterization and further indicates that the policy behind the rule was to cover cases "in which a class action would achieve economies of time, effort, and expense, and promote … uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem*, 521 U.S. at 615 (citing Advisory Committee's Notes on Rule 23; 28 U.S.C. App., Title IV, at p. 697 (1966)). Whether questions are common or individual will turn on the nature of the relevant evidence:

> If, to make a prima facie showing on a given question, the members or a proposed class will need to present evidence that varies from member to member,

> then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question.

Blades, 400 F.3d at 566 (citing *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136-40 (2d Cir. 2001).

The fact that a case is proceeding as a class action does not in any way alter the substantive proof required to prove up a claim for relief. *State of Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 327 (5th Cir. 1978). In undertaking the predominance analysis the essential elements of an antitrust claim must be examined. *Id.* Those elements are: (1) a violation of the antitrust law, (2) direct injury to the plaintiff caused by the violation, and (3) damages sustained by the plaintiff. *Windham v. American Brands, Inc.*, 565 F.2d 59, 65 (4th Cir. 1977). The gravamen of an antitrust complaint is not the first element, here, the alleged conspiracy, but, rather, "the crux of the action is injury, *individual injury*."[3] *Id.* at 66 (citing Handler**,** Twenty-fourth Annual Antitrust Review, 72 Col.L.Rev. 1, 37 (1972) (emphasis added). The plaintiff's injury must be causally connected to that which makes the defendants' acts unlawful. *NCAA v. Bd. of Regents of Univ. of Okla.,* 468 U.S. 85, 103 (1984); *see also Atlantic Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 344 (1990) (A private plaintiff can recover only where the loss "stems from the competition-reducing aspect of the effect of the defendant's behavior."); *see also Brunswick Corp. v. Pueblo Bowl-O-Mat*, *Inc.*, 429 U.S. 477, 489 (1977)

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[3] The terms "injury" and "impact" are used relatively interchangeably in the body of case law analyzing the appropriateness or lack thereof of anti-trust actions for class action treatment. *See*, *e.g.*, *Blue Bird*, 573 F.2d at 317 (citing *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 20 (5th Cir. 1974)) ("[T]he issue of liability in antitrust cases includes not only the question of violation, but also the question of fact of injury, or impact."); *In re Beef Industry Antitrust Litig.*, 1986 WL 8890, *1 (N.D. Tex. June 3, 1986) ("This question of 'fact of injury' or 'impact' is an integral element of liability and, in the class action context, the Court must determine whether 'impact' is subject to generalized proof or whether instead it is an issue unique to each class member.").

(plaintiff's injury must "flow from that which makes defendants' acts unlawful."). In *Brunswick,* the Supreme Court limited application of Section 4 of the Clayton Act by requiring the plaintiff to establish more than injury caused by the defendant's conduct. *Id.* at 488.[4] The plaintiff must show that it has suffered an injury of the type the antitrust laws were designed to prevent and that its injury directly flows from that which makes the defendant's conduct illegal under the antitrust laws. *Id.* Recovery under § 4 of the Clayton Act is based on "the actual injury 'to business or property' suffered by the individual plaintiff and caused by the underlying antitrust violation." *Dry Cleaning & Laundry Inst. of Detroit, Inc. v. Flom's Corp.*, 1993 WL 527928, *2 (E.D. Mich. Oct. 19, 1993) (citing 15 U.S.C. § 15). This impact or injury standard is a standing requirement,[5] and "leaves no room for awarding damages to some amorphous 'fluid class; rather than, or in addition, to one or more actually injured persons. It likewise does not permit any person to recover damages sustained not by him, but by someone else who happens to be a member of such class." *Id.* To satisfy the predominance standard, plaintiffs must show that both conspiracy and impact can be proven on a systematic, class-wide basis. *In re Agricultural Chemicals Antitrust Litigation*, 1995 WL 787538, *3 (N.D. Fla. Oct. 23, 1995).

This has been recognized to be a "major stumbling block for class actions," as "the evidence establishing damages usually varies from class member to class member." *Abrams v. Interco Inc.*, 719 F.2d 23, 31 (2d Cir. 1983). Where the issue of damages and impact does not lend itself to "a mechanical calculation, but requires 'separate mini-trials(s)' of an overwhelming

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[4] In *Brunswick*, the Court rejected the plaintiff's claim where the only injury alleged was denial of increased market share. The Court reasoned that in order for an injury to be considered adequate for antitrust purposes, the injury should reflect the anticompetitive effect of either the violation or the anticompetitive acts made possible by the violation. 429 U.S. at 489.

[5] *See*, *e.g.*, *Windham*, 565 F.2d at 71, n.38; *Butt v. Allegheny Pepsi-Cola Bottling Co.*, 116 F.R.D. 486, 491 (E.D. Va. 1987).

large number of individual claims, courts have found that the 'staggering problems of logistics' thus created 'make the damage aspect of (the) case predominate,' and render the case unmanageable as a class action." *Blue Bird*, 573 F.2d at 326-327 (citing *Windham*, 565 F.2d at 68 (footnotes omitted)). The burden is on the party seeking class certification to demonstrate that all of the requirements of Rule 23 have been satisfied. *General Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 161 (1982); *Trotter v. Klincar*, 748 F.2d 1177, 1184 (7th Cir. 1984); *Exhaust Unlimited, Inc. v. Cintas Corp.*, 223 F.R.D. 506, 509 (S.D. Ill. 2004). As such, where class-wide proof of damages is not possible, as here, certification is improper.

B. The Alleged Anti-Trust Injury Cannot Be Demonstrated On A Class-Wide Basis.

The named Plaintiffs posit that they are entitled to certification of the following class:

> All individuals, partnerships, corporations, limited liability companies, or other business or legal entities who purchased ready-mixed concrete directly from any of the defendants or any of their co-conspirators, which was delivered from a facility with the Counties of Boone, Hamilton, Hancock, Hendricks, Johnson, Madison, Marion, Monroe, Morgan or Shelby in the State of Indiana, at any time from July 1, 2000 through May 25, 2004, but excluding defendants, their co-conspirators, their respective parents, subsidiaries, and affiliates, and federal, state, and local government entities and political subdivisions.

Plaintiffs' Memorandum in Support of Motion for Class Certification ("Plaintiffs' Mem.") at p.1 [Dkt. 400]. However, because Plaintiffs are unable to satisfy the requirements of Rule 23(b), the BCS Defendants respectfully suggest that class certification must be denied.

Certain factors have been recognized as indicative of markets or industries in which common proof of class-wide impact is not possible including: (1) the absence of a homogeneous or fungible product, (2) the existence of a plurality of product or geographic markets, (3) the occurrence of individualized negotiations leading to prices and discounts outside any conspiratorial agreements, (4) distinctions in the manner of purchasing between the putative

class members, and (5) the variability of supply and demand elasticity.[6] Examination of the central Indiana ready-mixed concrete industry in light of these factors reveals that even if a causal connection between the Defendants' alleged antitrust violations and the Plaintiffs' purported damages could be established, it can be demonstrated only on an individualized, transaction-by-transaction basis. Further, the fact and amount of damages will require individualized proof.

1. Ready-Mixed Concrete is a Heterogeneous Product.[7]

Ready-mixed concrete is not a homogenous product, but is instead heterogeneous, in that it is developed into hundreds, even thousands, of different mix designs to meet each customer's unique needs and product specifications.[8] Declaration of Gus B. "Butch" Nuckols, III ("Nuckols' Decl."), ¶4.[9] BCS offers over 800 different ready-mixed concrete products, few of

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[6] The referenced factors and supporting case law are discussed at length in the *IMI Defendants' Memorandum*, which is incorporated by reference herein. This brief will not replicate that discussion, but adds facts specific to the Builders' Defendants relevant to this discussion.

[7] Several of the factors discussed in this section evidence the existence of distinct product markets, further supporting the need for customer or transaction specific analyses. "Common proof of actual injury to each class member requires that all class members operate in the same relevant market, otherwise, they could not be affected in a common manner by the challenged conduct." *Exhaust Unlimited,* 223 F.R.D. at 513. This matter as further discussed in the IMI Defendant's Memorandum, at pp. 38-41 [Dkt. 551], is also incorporated herein. There is no evidence in this case that there is a single geographic or product market.

[8] The ingredients used in a batch of ready-mixed concrete can make a qualitative difference, as evidenced in the testimony of named Plaintiff Daniel Grote, who switched suppliers after the specific cement he requested for a particular project was not used by the first supplier, leading to a longer setting and finishing time. Daniel Grote Deposition ("Grote Dep."), 50:19-22, 51:14-12, 55:1-2, attached at Tab B. Mr. Grote, the President of Dan Grote Construction, recognizes the importance of utilizing good quality concrete, and notes that the slump varies among ready-mixed suppliers. Grote Dep., 48:12-13, 49:6-9. At least one of the other named Plaintiffs, Robert Salazar, the owner of T&R Contractors, recognized that quality of ready-mixed concrete varies by supplier. Robert Salazar Deposition ("Salazar Dep."), 89:4-15, attached at Tab C.

[9] A copy of the Nuckols Decl. is attached at Tab A.

which appear on published price lists. Nuckols Decl., ¶4. Moreover, the actual substance that is ready-mixed concrete is not, in isolation, the product that ready-mixed suppliers market and sell; rather, ready-mixed concrete is a complex bundled product that includes specific customer requirements for product mix, time and date of delivery, form and sequence of delivery, quality control and related service components all designed to meet customer needs and specific end uses or applications of ready-mixed concrete.[10] Nuckols Decl., ¶5. For this reason, suppliers can and do create unique niches in the ready-mixed concrete market by providing superior quality materials, specific delivery options, quality control and superior customer service, as BCS has done for decades. Nuckols Decl., ¶7.

BCS has undertaken numerous measures to position itself as an industry leader in quality and customer service, including providing superior quality and innovative materials.[11] Nuckols Decl., ¶8; Declaration of John J. Blatzheim ("Blatzheim Decl."), ¶6a.[12] BCS focuses on ensuring accurate and timely delivery of concrete through the use of ACI Level I Certified Concrete Technician dispatchers and written dispatch guidelines, and by obtaining National Ready Mix Concrete Association certification for all plants and drivers. Blatzheim Decl., ¶6b-e. Plaintiffs' expert, John C. Beyer, Ph.D., noted that BCS promises delivery within 40 minutes for 98% of its

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[10] Certain named Plaintiffs concede that customer service factors such as timely delivery are of paramount concern in purchasing decisions, noting that not all suppliers are able to achieve consistently timely delivery. Grote Dep., 48:1-4; Salazar Dep., 52:10-13, 54:16-23; Craig Blorstad Deposition ("Blorstad Dep."), 44:9-12, attached at Tab E. Mr. Blorstad is the Chief Financial Officer of the Wininger/Stolberg Group.

[11] In 1994, BCS introduced 2 new products called "Flowable Fill." Nuckols Decl., ¶9. In 1995, BCS began selling Flowable Fill, and since 1998 Flowable Fill has become an increasingly popular product. *Id*. Other examples of innovative products offered by BCS include its Solution Series line.

[12] A copy of the Blatzheim Decl. is attached at Tab D.

jobs and achieves that result in 96% of its jobs. Report of John C. Beyer, Ph.D. ("Beyer Report") at ¶31. [Dkt. 399]. No other supplier claims to have such an extraordinary record. BCS accommodates its customers by providing service on the weekend and at unconventional hours. Blatzheim Decl., ¶6f. BCS provides additional services to its customers such as educational opportunities regarding the latest industry trends and techniques, excellent quality control, and proactive safety approaches. Blatzheim Decl. at ¶6g.-j. BCS consistently seeks ways to improve the quality of its products and services. Blatzheim Decl., ¶5-6.g. The efforts of BCS to distinguish itself through excellence have been successful, and have, as discussed more fully below, enabled BCS to charge a premium price for its products, particularly on complex commercial jobs where service and quality control are of particular importance. Nuckols Decl., ¶10; Blatzheim Decl., ¶7.

Perhaps the best of evidence of the success BCS has enjoyed in distinguishing itself through excellent customer service comes from BCS customers such as Lauth Property Group, who purchases exclusively from BCS (Nuckols Decl., ¶13), and Mike Davis, the Vice-President of Midwest Concrete and Pumping, Inc. ("Midwest Concrete"), one of Indiana's largest concrete contractors. Declaration of Mike Davis ("Davis Decl."), ¶¶ 2-4.[13] Mr. Davis explains that price was not the most important consideration when Midwest Concrete selected a ready-mixed supplier. Davis Decl., ¶5. Paramount considerations included past service, reputation for quality service, and plant location. Davis Decl., ¶¶6-8. Mr. Davis recognizes the differences in the quality of ready-mixed concrete offered by various suppliers, noting that BCS "is known to have the best quality of concrete." Davis Decl., ¶9. Although BCS did not offer the lowest prices for its products, Midwest Concrete opted to purchase from BCS because of "BCS's high quality of

[13] A copy of the Davis Decl. is attached at Tab F.

product, reliability and excellent service." Davis Decl., ¶10. Further, Midwest Concrete considers itself to have "an excellent relationship with BCS" fostered by "the way BCS treated MCP during times of slow payment" and "BCS's treatment of" Midwest Concrete's employees. Davis Decl., ¶14. Mr. Davis considers this relationship when selecting a supplier. Davis Decl., ¶15. In fact, even on bid jobs BCS's experience indicates that 60-80% of prospective customers will choose a ready-mixed concrete supplier based on relationship and quality of service. Nuckols Decl., ¶12. These factors all illustrate that Plaintiffs' characterization of ready-mixed concrete as a homogenous, commodity-like product ignores important marketplace realities.

2. Differing Products, Distribution Channels or Means of Purchase Preclude Proof of Class-Wide Impact.

The first issue that a court must address in ruling on a motion to certify a class action is a definitional one: namely, who will compromise the proposed class if the court decides to grant certification. *In re Agricultural Chemicals Antitrust Litigation*, 1995 WL 787538, *1. "It is essential that the court demand the moving party to present it with a description of a clearly identifiable group of specific individuals whose interests are being placed before it—a so-called 'adequately defined class'—before the court begins its analysis of the matter." *Id.* Because the Plaintiffs proposed class would not be readily ascertainable without a prolonged and individualized analytical struggle, certification herein should be denied.

In *Butt v. Allegheny Pepsi-Cola Bottling Co.*, a case involving a private antitrust claim against alleged co-conspirators Pepsi and Coca-Cola, the plaintiffs sought class status as to a broadly defined group including all direct purchasers of soft drinks in a specified area. 116 F.R.D. at 487. The evidence supported a violation of the antitrust laws as to sales resulting from promotional letters. *Id.* at 490. However, the evidence also revealed that defendants utilized several other sales and pricing techniques including the wholesale price, a permanent discount,

and spot discounts. *Id.* For this reason, proof of injury required a "customer-by-customer assessment of which purchases were made under promotional-letter offers." *Id.* at 491. Ultimately, the *Alleghany* court denied certification because it was not persuaded that:

> [P]urchasers other than promotional-letter purchasers were affected by the alleged conspiracy. Consequently, even if plaintiff proves the alleged conspiracy, he will have a difficult, if not impossible, task to prove class-wide injury. Rather, it appears that injury is an individualized matter that will have to be proved by a detailed customer-by-customer and transaction-by-transaction analysis.

Id.[14]

This case is similar in many ways to the *Allegheny* case. For example, like the defendants in *Allegheny*, BCS sold ready-mixed concrete through several pricing techniques, specifically, (1) to those with individually negotiated annual contracts, which constituted approximately 37-49% of BCS's ready-mixed concrete sales, (2) when it successfully bid, and (3) to customers who purchased by "cash on delivery" payment.[15] Nuckols Decl., ¶11. Moreover, prices are set on the basis of general factors unique to specific customers. Nuckols Decl., ¶¶14-15. Plaintiffs have failed to differentiate the effect of these different approaches to pricing.[16] Further, the criminal violations on which Plaintiffs so heavily rely only involved bid prices. For the same reasons that this type of evidence was insufficient to support class certification in *Allegheny* (*i.e.*, it fails the standing test), it is wholly insufficient here and further

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[14] As discussed above, the *Alleghany* and *Windham* courts define the impact test in Rule 23(b) as a standing requirement. *Windham*, 565 F.2d at 71, n.38; *Allegheny*, 116 F.R.D. at 491.

[15] Several of the named Plaintiffs rarely or never purchased ready-mixed concrete through a bidding process, but, rather, purchased through "spot" or "cash on delivery" payment. *See*, *e.g.*, Timothy Toth Deposition, 46:22-24, 47:3-7, 52:21, attached at Tab G; Grote Dep., 45:23-24; Salazar Dep., 38:16-18, 39:10-13, 125:15-22)[15] Mr. Toth is the owner of Cherokee Development Company.

[16] The evidence supporting this fact is discussed in detail in *Beaver's Response Memorandum*, which is incorporated herein by reference.

underscores the necessity of individual transaction-by-transaction analyses to determine impact and damages.[17]

3. Available Substitute Products and Alternative Sources of Supply Preclude Proof of Class-Wide Impact.

The existence of substitute products and alternative sources of supply dictate the need for transaction-by-transaction analyses for purposes of demonstrating impact, if any. The *In re Agricultural Chemicals Antitrust Litigation* court refused to certify a national class of agricultural chemical purchasers who bought from specified manufacturers or distributors at allegedly collusive prices when the market included readily-available substitute products and local competitors who were not parties to the alleged conspiracy. 1995 WL 787538, *11-12. In fact, the court characterized it as, "'factually unrealistic' to presume that all purchasers paid inflated prices when local competitors not involved in the conspiracy were available as alternative sources of supply." *Id.* at 11 (citing *In re Electric Weld Steel Tubing Antitrust Litigation*, 1980 WL 1992 (E.D.Pa. Nov. 7, 1980)).

Here, certain named Plaintiffs acknowledged using substitute products in place of ready-mixed concrete, such as asphalt for driveways and masonry blocks for walls. Grote Dep., 44:24-25, 45:1-5; Blorstad Dep., 32:7-14. Additional viable product substitutes include brick, pre-cast materials, lumber and steel. Nuckols Decl., ¶6. Moreover, it is undisputed that certain ready-mixed concrete suppliers in central Indiana were not associated with the alleged conspiracy and

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[17] The *Allegheny* court recognized that, "[e]ven where it is shown that particular customers purchased soft drinks pursuant to a promotional letter, injury may still not have occurred." *Id.* at 491. Likewise, here, analysis will reveal that even those who purchased ready-mixed concrete based on bid prices were not necessarily impacted by the alleged conspiracy.

that portable plants utilized within Indianapolis created an additional competitive force.[18] The ability of some ready-mixed concrete suppliers to use portable plants is a factor that BCS considers when deciding whether to bid for a job and the manner for which it should bid for that job. Nuckols Decl., ¶16. BCS has lost jobs because it does not have a portable plant. *Id.* Even the Plaintiffs' expert, Dr. Beyer, noted that Butch Nuckols was upset when a Cincinnati competitor (Spurlino Materials) brought a portable plant to Indianapolis to compete on a job. Beyer Report at ¶41.

4. "Cheating" and Lengthy Periods of Non-Participation Limit or Extinquish Potential Impact.

Further complicating the impact analysis before this Court is the evidence of cheating within the alleged cartel. In *Allegheny*, the court noted that, "[e]ven where it is shown that particular customers purchased soft drinks pursuant to a promotional letter [*i.e.*, the pricing form as to which the defendants pled guilty relative to criminal violations of the anti-trust laws], injury may still not have occurred" because:

> Evidence at the Gravely criminal trial suggested that, because the conspirators had cheated and deviated from their agreement, the conspiracy may have been ineffective. … In the present suit, the possibility that the parties ignored their alleged agreement and continued to engage in their normal discounting practices introduces enormous additional complications to determining whether individual members of the proposed class were in fact injured."

116 F.R.D. 486 at 491. As detailed in the Beaver's Response Memorandum, the evidence of cheating and periods of non-participation in the alleged cartel are rampant and significantly limit if not extinguish all potential impact of the allegedly collusive conduct.

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[18] Plaintiffs have not properly defined a relevant geographic or product market; nor have they established with admissible evidence whether there is one or several relevant markets.

II.

THE STANDARD FOR ADMITTING OR EXCLUDING EXPERT WITNESS TESTIMONY

A. The *Daubert* Standard.

The United States Court of Appeals for the Seventh Circuit has applied the standards for determining the admissibility of expert testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), in numerous cases. *See, e.g., Ammons v. Aramark Uniform Servs., Inc.,* 368 F.3d 809, 816 (7th Cir. 2004) (describing *Daubert* framework and affirming district court's correct application of it); *see also Porter v. Whitehall Labs., Inc.,* 9 F.3d 607, 614 (7th Cir. 1993) (analyzing treatment of the admissibility of expert testimony under pre- and post- *Daubert* standards). *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137 (1999), extended the holdings in *Daubert* to apply to all forms of expert testimony, including technical and non-scientific experts. 526 U.S. at 141; see *also General Elec. Co. v. Joiner*, 522 U.S. 136, 139 (1997). "The *Daubert* standard applies to all expert testimony, whether it relates to an area of traditional scientific competence or whether it is founded on engineering principles or other technical or specialized expertise." *Smith v. Ford Motor Co.*, 215 F.3d 713, 719 (7th Cir. 2000) (citing *Kumho,* 526 U.S. at 141). "Under *Daubert,* the testimony of a scientific expert is admissible only if it is both relevant and reliable." *Bryant v. City of Chicago,* 200 F.3d 1092, 1097 (7th Cir. 2000) (citing *Kumho*, 526 U.S. 137); *Daubert,* 509 U.S. at 589.

Rule 702 of the Federal Rules of Evidence was revised effective December 1, 2000 to reflect the *Daubert* standard.[19] *See Dura Automotive Systems of Ind., Inc. v. CTS Corp.,* 285

[19] The Rule was revised in 2000 to incorporate the holdings of *Daubert* and the many cases applying *Daubert*, including *Kumho*. *See Committee Note* to the 2000 amendments to Federal Rule of Evidence 702. 28 U.S.C. App., Article VII (2000) ("The amendment affirms the trial

F.3d 609, 617 (7th Cir. 2002) (Woods, J. dissenting) (explaining the history of the Seventh Circuit's "now familiar" approach for reviewing the admissibility of expert witness testimony). Federal Rule of Evidence 702 provides that "a witness qualified as an expert by knowledge, skill, experience, training, or education," may testify as to his opinion on the matter "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."

B. The District Court's Role.

Based on *Daubert,* the district court has a duty to apply Rule 702 to admit an expert's testimony only if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. 509 U.S. at 591. District courts also evaluate the credentials and qualifications of proffered experts as a threshold matter. *See id.* The primary function of the district court is to act as a "gatekeeper" to screen both the reliability and then the relevancy of expert testimony. *Kumho*, 526 U.S. at 152. The "party proffering expert testimony must show by a 'preponderance of proof' that the expert whose testimony is being offered is qualified and will testify to scientific knowledge that will assist the trier of fact in understanding and disposing of issues relevant to the case." *United States v. Allen,* 207 F. Supp. 2d 856, 868 (N.D. Ind. 2002) (quoting *Daubert,* 509 U.S. at 592 n.10).

> The objective of [*Daubert's* gatekeeping] requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."

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court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony.")

Kumho, 526 U.S. at 152; *accord Clark v. Takata Corp.,* 192 F.3d 750, 756 (7th Cir. 1999); *Bourelle v. Crown Equip. Corp.,* 220 F.3d 532, 536 (7th Cir. 2000).

The district "court's gatekeeping function focuses on an examination of the expert's methodology." *Smith,* 215 F.2d at 718. "To put it another way, the district court should determine whether "it was appropriate for [the expert] to rely on the test that he administered and upon the sources of information which [the expert] employed." *Walker v. Soo Line R.R. Co.,* 208 F.3d 581, 587 (7th Cir. 2000); *accord Smith,* 215 F.3d at 718. The district court is charged with "ruling out any subjective belief or unsupported speculation." *Chapman v. Maytag Corp.,* 297 F.3d 682, 687 (7th Cir. 2002).

Federal Rule of Evidence 702 requires the court to decide if the testimony is likely to assist the trier of fact. The usefulness of the expert's opinion in assisting the fact finder to determine an issue of fact is the ultimate test for admissibility under Rule 702. *United States v. Hall,* 93 F.3d 1337, 1342 (7th Cir. 1996), *after remand,* 974 F. Supp. 1198 (C.D. Ill. 1997). Speculation or unsupported opinion testimony is not reliable, not relevant and not helpful. *Daubert,* 509 U.S. at 591. Under Fed.R.Evid. 702 such testimony should be excluded.

C. The Reliability Prong of the *Daubert* Standard.

In *Daubert*, the Court listed four factors to serve as guidelines district courts may use in the determination of whether an expert's opinion on scientific matter is reliable: (1) whether the expert's theory has been or is capable of being tested; (2) whether the theory has been subject to peer review and publication; (3) the theory's known or potential rate of error; and (4) whether the theory is generally accepted in the relevant scientific community. *Daubert*, 509 U.S. at 593-94. This inquiry, however, is a flexible one and the specific standards for reliability should be adapted to the circumstances of the evidence proffered. *Kumho,* 526 U.S. at 147; *see also*

Dhillon v. Crown Controls Corp., 269 F.3d 865, 870 (7th Cir. 2001). "The district court must use criteria relevant to the particular kind of expertise in a specific case to 'make certain that an expert, whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Smith,* 215 F.3d at 719 (quoting *Kumho,* 526 U.S. at 152). *See also Cummins v. Lyle Indus.,* 93 F.3d 362, 369 (7th Cir. 1996) (excluding expert's testimony who did no testing and had read no studies, surveys or analyses regarding design, manufacture or use of machinery at issue).

Daubert's "scientific knowledge" requirement "implies a grounding in the methods and procedures of science." 509 U.S. at 590. It "connotes more than subjective belief or unsupported speculation." *Porter,* 9 F.3d at 613-14 (*quoting Daubert*, 509 U.S. at 590) (district court must rule out "subjective belief or unsupported speculation"); *see also Tucker v. Nike, Inc.,* 919 F. Supp. 1192, 119607 (N.D. Ind. 1995). Expert testimony that is not supported by testing or other appropriate means of validating the expert's conclusions is speculative and fails the reliability test. *Ammons,* 368 F.3d at 816 (excluding expert conclusions that were speculative, unreliable and inadmissible).

Where the expert's theory easily lends itself to testing, conclusions that are not substantiated by testing may be excluded. *Dhillon,* 269 F.3d at 870; *Masters v. Hesston Corp.,* 291 F.3d 985, 993 (7th Cir. 2002) (excluding opinion of expert who did no design work, no testing and no measurement of proposed guard for hay baler).

Generally any deviation from accepted testing protocols must be explained and justified by the expert. Whenever, "an expert proposes to depart from the generally accepted methodology of his field and embark upon a sea of scientific uncertainty, the court may

appropriately insist that the [expert] ground his departure in demonstrable and unscrupulous adherence to the scientist's creed of meticulous and objective inquiry." *Braun v. Lorillard, Inc.,* 84 F.3d 230, 235 (7th Cir. 1996); *see also Lennon v. Norfolk & Western Ry. Co.,* 123 F. Supp. 2d 1143, 1152 (N.D. Ind. 2000) (same). The district court is not the place where novel scientific theories or approaches are to be aired. "Law lags science; it does not lead it." *Rosen v. Ciba-Geigy Corp.,* 78 F.3d 316, 319 (7th Cir. 1996).

D. The Relevancy Prong of the *Daubert* Standard.

If the expert's methods are deemed reliable, then the second prong of the *Daubert* test requires the district court to determine the relevancy of the expert's opinion to the case. *Daubert,* 509 U.S. at 591. To meet the relevancy test, the expert's opinion must assist the trier of fact with its understanding of and analysis of an issue in the case. *Smith,* 215 F.3d at 718; *Walker,* 209 F.3d at 587 "An expert's credentials and methodology may be impeccable, but if the proffered testimony fails the general test of relevance under Rule 402, or if, in the words of Rule 702, it is not likely to 'assist the trier of fact to understand the evidence or to determine a fact in issue' then the district court should reject the proffer." *Hall,* 93 F.3d at 1342.[20]

Further, to be helpful to the fact finder, and thus relevant, the expert "must testify to something more than what is 'obvious to the layperson' in order to be of any particular assistance to the jury." *Dhillon,* 269 F.3d at 871 (quoting *Ancho v. Pentek Corp.,* 157 F.3d 512, 519 (7th Cir. 1998). Thus, testimony based on "common sense" is not admissible because such matters

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[20] For this reason, experts may also not testify on legal issues or questions of credibility. *Bammerlin v. Navistar Int'l Transp. Corp.,* 30 F.3d 898, 900-01 (7th Cir. 1994) (meaning of a regulation was an issue of law, not an issue of fact upon which expert could opine); *Goodwin v. MTD Products, Inc.,* 232 F.3d 600, 609 (7th Cir. 2000) (expert was not permitted to opine as to the veracity of other evidence) (citing *Hasham v. California State Bd. of Equalization,* 200 F.3d 1035, 1047 (7th Cir. 2000).

are within the province of the fact finder. *Dhillon,* 269 F.3d at 871 (excluding testimony of expert whose conclusion a closed door would keep operator's legs inside compartment and who testified, "It really shouldn't take a rocket scientist to figure this one out."). To meet the relevancy prong under *Daubert,* the expert's testimony "must add something" to the jury's understanding of the facts. *Id. See also Barber v. United Air Lines, Inc.,* 17 Fed. Appx. 433, 437-38 (7th Cir. 2001) (district court did not err in excluding expert who opined that thunderstorms cause air turbulence).

E. Expert Credentials and Qualifications.

As gatekeepers, district courts should also consider the expert's credentials. The district court must determine the qualifications of the expert to testify as to the specific matter at issue. *Tuf Racing Products, Inc. v. American Suzuki Motor Corp.,* 223 F.3d 585, 591 (7th Cir. 2000).[21]

The admissibility analysis does not end with the conclusion that an expert is qualified to testify as to any specific matter. "Even 'a supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based on some recognized scientific method.'" *Smith,* 215 F.2d at 718 (citing *Clark,* 192 F.3d at 759 n.5). The testimony of the "well credentialed expert who employs an undisclosed methodology," who engages in speculation, who fails to follow reliable principles, or who offers opinions lacking "analytically sound bases" should be excluded. *Id.* at 950. "The *Daubert* test must be applied with due

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[21] *Daubert* and *Kumho* did not specifically alter the Rule 702 requirements with respect to expert qualifications. *See Kumho,* 526 U.S. at 148-49. However, "[t]o hold that an expert's credentials alone can satisfy the reliability requirement identified in *Daubert* would require the court to ignore the *Daubert* opinion itself, which devoted a fairly lengthy footnote to relating the 'impressive credentials' of the experts whose opinions were at issue, *see* 509 U.S. at 583 n.2, then never again mentioned extent of expertise among the considerations that might be used to decide whether expert scientific testimony is based on reliable principles." *Olinger v. United States Golf Ass'n,* 52 F. Supp. 2d 947, 949 (N.D. Ind. 1999).

respect for the specialization of modern science. A scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty." *Dura,* 285 F.3d at 614 (excluding testimony of hydrogeologist whose opinion depended on econometrics).

F. This Court Must Resolve Any "Battle of the Experts" and Merits Issues to Determine If Rule 23 Requirements Are Met.

In their memorandum, the IMI Defendants discuss at length the significant changes in class certification jurisprudence since the Seventh Circuit's decision in *Szabo v. Bridgeport Machines, Inc.,* 249 F.3d 672 (7th Cir. 2001) and *West v. Prudential Sec., Inc.,* 282 F.3d 935 (7th Cir. 2002). District courts must resolve any dispute between opposing experts as well as disputed facts relative to the merits of the case that overlap with or are determinative of Rule 23 requirements, including the predominance requirements of Rule 23(b)(3). *Szabo,* 249 F.3d at 676; *West*, 282 F.3d at 938; *see also Isaacs v. Sprint Co.*, 261 F.3d 679, 682 (7th Cir. 2001). The IMI Defendant's Memorandum addressing this subject is incorporated herein by reference.

III.

APPLYING THE *DAUBERT* STANDARD IN THIS CASE MEANS DR. BEYER'S TESTIMONY SHOULD BE EXCLUDED.

To fulfill its "gatekeeping" duty in this case, this Court should determine whether the Plaintiffs' expert, Dr. Beyer, has the requisite qualifications to render the opinions he offers and whether his testimony is based upon sufficient facts and data, is the product of reliable principles and scientific methods, and demonstrates that he applied scientific principles and methods reliably to the facts of this case. *Daubert,* 509 U.S. at 591. To the extent that Dr. Beyer's testimony is speculative or unsupported, it is not reliable, not relevant and not helpful, and should be excluded. *Id.* Because Dr. Beyer is: (1) admittedly not an expert econometrician, (2) failed to use generally accepted methods of testing and analysis, (3) failed to apply reliable

scientific principles and methods to the specific facts of this case, (4) made assumptions that are unsupported and inconsistent with the evidence, and (5) offered testimony that is not reasonably grounded in the record, but reflects a conclusory, results-driven approach that is not helpful to the fact finder, his testimony should be excluded as inadmissible under Federal Rule of Evidence 702. *Id.*

A. Dr. Beyer Is a Professional Witness, But Admittedly Not a Qualified Expert.

Dr. Beyer makes his living testifying on behalf of plaintiffs[22] as "a hired gun."[23] Dr. Beyer has not earned a Ph.D. in econometrics or even in economics, but in international and development economics. Beyer Dep. 11:10-11; 12:20-25, attached as Tab H. Dr. Beyer admits he lacks the necessary expert credentials and qualifications to qualify as an expert for this case. At his deposition, Dr. Beyer stated, "I would not put forward myself as an expert in econometrics . . . . As the court determines an expert, I would not proffer myself as an expert." Beyer Dep. 26:21-22; 27:4-5.[24] *See Dura,* 285 F.3d at 614 (scientist must be qualified in the specialized field for which the opinion is offered).

> "The *Daubert* test must be applied with due respect for the specialization of modern science. A scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty. A theoretical economist, however able, would not be allowed to testify to the findings of an econometric study conducted by another economist if he lacked

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[22] Dr. Beyer's curriculum vita is attached as Appendix A to his Report (Dkt. 399).

[23] *Lantec, Inc. v. Novell, Inc.,* 306 F.3d 1003, 1025 (10th Cir. 2002) ("Dr. Beyer is clearly a hired gun and any semblance of objectivity is lacking."). Between 2003 and March 2007, Dr. Beyer testified in legal cases at least thirty-one times, most often for plaintiffs in antitrust actions. Some courts have admitted Dr. Beyer's testimony without conducting a *Daubert* analysis.

[24] Further, Dr. Beyer proposed an alternative approach to calculating class-wide damages that would use analysis of the Defendants' financial statements to determine profit margins. Beyer Report at ¶58. Dr. Beyer admitted he was not a certified public account and had no specific qualifications to conduct such an analysis. Beyer Dep. 230:11-14.

> expertise in econometrics and the study raised questions that only an econometrician could answer."

Dura, 285 F.3d at 614 (testimony of hydrogeologist that rested on testing to be performed in the future by undisclosed experts in mathematical modeling of groundwater flow "rested on air" and was properly excluded by district court). Dr. Beyer's qualifications and approach as an expert have not been accepted by some courts.[25]

This Court should exclude Dr. Beyer's testimony for the reason that he is not qualified as an econometrician and not competent to render the opinions he proffers. Opinions such as Dr. Beyer's that reflect the "hired gun" approach and which, as shown in greater detail below, fail the reliability and relevance tests, should be excluded. Such opinions are ultimately not helpful to the fact finder and this Court should exclude them.

B. Dr. Beyer's Testimony Should Be Excluded Because It Is Unreliable

Dr. Beyer's promise of a future expert to develop a model at some future time using unknown and as yet undesignated variables and measures is insufficient to meet the requirements of Federal Rule of Civil Procedure 23 to show common proof and damages on a class-wide basis

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[25] The United States Courts of Appeal for the Tenth and Seventh Circuits have rejected Dr. Beyer's approach. *See Lantec*, 306 F.3d at 1025; *Blue Cross and Blue Shield of Wisc. v. Marshfield Clinic,* 152 F.3d 588, 593 (7th Cir. 1998) (Dr. Beyer's reports "are worthless."). *See also Schwab v. Philip Morris USA, Inc.*, 2005 WL 2401647, *3-4 (E.D. N.Y. Sept. 29, 2005) (excluding Dr. Beyer's testimony under *Daubert* due to the unsupported nature of his factual assumptions which were found to be "inconsistent with common sense and the evidence generally" and unsupported by acceptable data); *In re Agricultural Chemicals Antitrust Litigation*, 1995 WL 787538 at *10 (excluding Dr. Beyer's testimony in support of a price fixing class because it "ignore[d] market place realities and failed to consider the individual analysis needed to support an overcharge claim"); *In re Catfish Antitrust Litigation*, 939 F. Supp. 493, 498 (N.D. Miss. 1996) (court noted that it "had serious concerns about the admissibility of Dr. Beyer's testimony because of the apparent novelty of his economic theories in light of the dictates of *Daubert*."); *Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group*, 247 F.R.D. 156, 167 (C.D. Cal. 2007) (denying class certification due in part to Dr. Beyer's improper use of statistical averaging techniques to prove class-wide impact, but declining to exclude his testimony).

and is inadmissible under Federal Rule of Evidence 702. *See, e.g., Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group*, 247 F.R.D. 156, 167 (C.D. Cal. 2007). This court must consider whether Dr. Beyer's testimony demonstrates that the work he has performed meets standards of intellectual rigor. *See Smith,* 215 F.3d at 719 To make this determination, first, the court "must rule out 'subjective belief or unsupported speculation.'" *Deimer v. Cincinnati Sub-Zero Prods., Inc.,* 58 F.3d 341, 344 (7th Cir. 1995) (citing *Porter,* 9 F.3d at 614 (quoting *Daubert,* 509 U.S. at 590)). A second step in this process is to determine whether the expert's opinion is actually based on the expert's special skills. *Id*. Finally, the court must decide under Rule 702 whether the expert's testimony "actually assists the trier of fact in understanding or determining a fact in issue." *Smith,* 215 F.3d at 718-719. This Court should insist on "meticulous and objective inquiry" and "scrupulous adherence" to the accepted methods. *Braun v. Lorillard Inc.*, 84 F.3d 230, 235 (7th Cir. 1996). Dr. Beyer's methodology is flawed in multiple ways and deviates substantially from accepted methodology and scientific principles, and thus his testimony is unreliable and should be excluded.

1. Dr. Beyer Has Done Little More than State the Obvious: Regression Analysis Is Sometimes an Appropriate Method of Determining Class-Wide Impact and Damages.

Federal Rule of Civil Procedure 23(b)(3) requires that the Plaintiffs establish that that common questions of law and fact predominate over individual questions. To establish class-wide impact from the Defendants' conduct and class-wide damages, the Plaintiffs propose to rely on regression analysis. Plaintiffs' Mem. at pp. 44-48 [Dkt. 400]. While Plaintiffs are correct that regression analysis has been accepted in many cases certifying classes, Plaintiffs' expert has done no more than restate the obvious. Regression analysis *can* be used in certifying classes. Whether a *particular* regression analysis *should* be used to certify a specific class depends on the

particular model proposed and the application of the model to the particular facts of the case. Marshall Report at ¶ 17. [26] Dr. Beyer agreed:

> Q: Am I getting it correct that you're proposing a fixed effects model here?
> A: I mentioned in my report, . . . a fixed effects component to the multiple regression analysis is possible, but whether it is – will be used is yet to be determined.

Beyer Dep. 235:23-236:4.

Dr. Beyer's promise of a future, as-yet undeveloped model is insufficient to satisfy Rule 23. Plaintiffs seek to establish a class for all direct purchasers of ready-mixed concrete in a ten-county area over a four-year span. The Defendants are a diverse group of suppliers ranging from small family-owned companies to large-scale suppliers whose operations cover several states. The purchases at issue include single purchases on a C.O.D. basis of a single yard of ready-mixed concrete for a backyard patio to annually negotiated contracts for specialized uses to sealed bids for large-scale governmental and commercial projects, involving specialized mixes, complex continuous pours, and particularized specifications and quality control issues. Without identifying the specific variables he will use, and providing scant other details of his proposed model, Dr. Beyer asks the court to trust him that a model *can be* developed. Dr. Beyer promised just such approach in *Allied Orthopedic Appliances,* 247 F.R.D. at 188. The *Allied* court rejected Dr. Beyer's promissory approach because it was deemed insufficient to prove that the defendants' wrongful conduct caused economic loss to each plaintiff and to overcome the need for individualized proof of loss. *Id.* Similarly in *Piggly Wiggly Clarksville Inc. v.*

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[26] The IMI Defendants have designated three experts: Dr. Umbeck, Dr. Jerry Hausman, and Dr. Robert C. Marshall in support of their motion to exclude Dr. Beyer's testimony [Dkt. 554, Exhibits 1, 2 and 3, respectively]. BCS incorporates and adopts the expert designations of Dr. Marshall, Dr. Umbeck and Dr. Hausman in further support of this motion.

Interstate Brands Corp., 100 Fed. Appx. 296, 299-300 (5th Cir. 2004), the Court of Appeals for Fifth Circuit stated:

> Multiple regression analysis is not a magic formula. It is simply a mathematical tool for estimating a dependent variable based on a number of independent variables, which may or may not yield statistically significant results. The expert did not offer a formula based on regression analysis, but merely opined that one could be found. The affidavit was only a preliminary overview of how damages might be calculated.

100 Fed. Appx. at 299. Citing difficulties such as how to assign a numerical number to the vagaries of prices that are the product of individual negotiations, and other difficulties not addressed by the expert's promise of an as yet unspecificed model, the Fifth Circuit affirmed the decision of the district court not to certify a class on the grounds that the predominance requirement had not been met. *Id.* at 300; *see also Newton*, 259 F.3d at 187-88 & n.33 (plaintiffs must present a viable formula for calculating damages and negate the need to provide individualized proof of economic loss).[27] Dr. Beyer's unspecified and untested generic regression model is not admissible under *Daubert*, and fails to demonstrate class wide impact or damages.

2. Dr. Beyer Admits He Did No Testing Of Transactional Data.

Dr. Beyer's Report is little more than a promise to the Court that some other expert at some future time "probably" could devise scientifically acceptable econometric tests to determine class-wide impact and class-wide damages. Beyer did not develop a model or conduct statistical tests to determine whether such a proposed model was suitable for testing his

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[27] *See also In re Medical Waste Services Antitrust Litigation*, 2006 WL 538927, *7-8 (D. Utah March 3, 2006) ("It is simply not enough that plaintiffs merely promise to develop in the future some unspecified workable damage formula. A concrete, workable formula must be described before certification is granted."); *Sample v. Monsanto Co.*, 218 F.R.D. 644, 650 (E.D. Mo. 2003), *aff'd sub. nom., Blades v. Monsanto Co.,* 400 F.3d 562 (8th Cir. 2005) (court cannot presume, assume or conclude class-wide impact during the certification stage).

hypothesis of class-wide impact. *See* Beyer Report at ¶¶ 58-71. When pressed at his deposition, Beyer admitted:

- He did not analyze transactional data with respect to relevant product markets. Beyer Dep. 92-93.
- Did not do any statistical analysis to determine the existence of product markets within the ten-county area. Beyer Dep. 93-94.
- Did not do any statistical analysis of relevant antitrust markets. Beyer Dep. 95.
- Has done no studies to determine whether the county is a single relevant geographic market. Beyer Dep. 114:19-23.
- Did not calculate the number of discrete purchasers of ready mix concrete. Beyer Dep. 137:4-6.
- Did not do any calculations to support his conclusions about price structure. Beyer Dep. 170.
- Has not done any empirical analysis of the effect of the Defendants' price announcements. Beyer Dep. 252.
- Has not defined the specific regression model or formula that should be used to test his theories about the effects of the Defendants' cartel on ready-mixed concrete prices. Beyer Dep. 194-195.
- Has not determined what time period should be tested. Beyer Dep. 190.
- Has not determined what demand variables other than the cost of cement and aggregates (sand, gravel and stone) should be included in the regression model. Beyer Dep. 76, 198-199.
- Has not determined whether he will need to account for nonlinearity in the data.

Beyer Dep. 213.

- Will "probably" use a two-tailed test of correlation coefficients, but had not considered the point before his deposition. Beyer Dep. 215.
- Had not considered before his deposition what data outliers, if any, should be removed from the data base before testing. Beyer Dep. 220.
- Has not done analysis of the Defendants' financial statements. Beyer Dep. 230.
- Has done no analysis to determine whether a single overcharge number can be calculated to apply to the formula he proposes to use to calculate class-wide damages. Beyer Dep. 231.
- Proposes a "fixed effects regression model but has not yet determined whether it should be used in this case. Beyer Dep. 234-35.
- Is not even recommending at this stage of the case that a fixed regression model should be used. Beyer Dep. 236.
- Has not run any regressions on any data. Beyer Dep. 236.
- Has not yet determined which specific variables for supply or demand should be included in the regression model. Beyer Dep. 238-40.
- Has not determined whether the conspiracy to fix prices applied to some or all of the purchasers of ready-mixed concrete. Beyer Dep. 244.

Under these circumstances it would not be an abuse of the Court's discretion to deny class certification. *See Piggly Wiggly,* 100 Fed. Appx. 299-300.

3. Dr. Beyer's Promised Approach to Regression Analysis Is Unscientific.[28]

Dr. Beyer's promise of future regression analysis suffers from additional flaws because his vague and generalized formula fails to account for variables that may have affected prices, but are unrelated to the alleged conspiracy.[29] Where the regression model is incomplete and omits important explanatory variables it does not provide a reliable measure of damages.[30] As Dr. Marshall observes, it is the *particular* facts and data that determine the suitability of a *particular* regression model. Marshall Report at ¶ 17. Dr. Beyer agreed that the inclusion or omission of even a single variable "may make a tremendous difference in the outcome" of the analysis. Beyer Dep. 217; *see also* Beyer Dep. 213. At this stage, there is no way to know what variables might be included or omitted because Dr. Beyer has failed to define them for the Court. For example, Dr. Beyer does not know how different products will be identified in the model (Beyer Dep. 204-205); does not plan to include the place of delivery in his model (Beyer Dep. 203); has only identified the changes in cost of production in terms of some raw materials costs (Beyer Dep. 76:10-77:6) and the demand variables in terms of generalized statewide data for concrete sales as a percentage of gross domestic product (Beyer Dep. 55:6-13.). The variable

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[28] *See* the report of Dr. Jerry Hausman [Dkt.554, Exhibit 2] for a more detailed critique of the flaws in Dr. Beyer's approach to regression analysis.

[29] In *Blue Cross*, Dr. Beyer's reports were discarded as "worthless" because he failed to include sufficient variables in his regression model to account for factors that may have affected the price but were unrelated to the defendants' antitrust violations. *Blue Cross*, 152 F.3d at 592-93.

[30] Numerous other cases have addressed the improper use of econometric models or the use of models based on faulty assumptions and omitted important variables. *See e.g., Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1198 (7th Cir. 1997); *Kuhn v. Ball State Univ.*, 78 F.3d 330, 332-33 (7th Cir. 1996); *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 415-16 (7th Cir. 1992); *Tagatz v. Marquette University*, 861 F.2d 1040, 1044-45 (7th Cir. 1988); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1164-65 (7th Cir. 1983).

cost information set forth in Beyer's report has nothing to do with common proof of any impact, but only "the feasibility of estimating damages." Beyer Dep. 77:7-13; *see also* Beyer Report at ¶¶17-18. Plaintiffs may argue that Dr. Beyer's promissory approach to designation of the relevant variables simply goes to the probative value, not the admissibility, of his Report. "Where significant variables that are quantifiable are omitted from a regression analysis, however, the study may become so incomplete that it is inadmissible as irrelevant. Because the burden of proving helpfulness and relevance rests on the proponent of a regression analysis, it is the proponent who must establish that the major factors have been accounted for in a regression analysis." *Freeland v. AT&T Corp.*, 238 F.R.D. 130, 145 (S.D.N.Y. 2006) (rejecting analysis that failed to account for important variables).

Dr. Beyer's reliance on the most basic expression of the regression formula (*see* Beyer Dep. at 194), his failure to define the relevant explanatory variables for his model and lack of actual testing of his hypothesis, demonstrate a lack of scientific rigor, and a willingness to opine without first conducting investigation of the quantitative data. "[W]hen an offered opinion involves only unverified statements unsupported by scientific method, it provides no basis for relaxing the usual first-hand knowledge requirement of the Federal Rules of Evidence on the ground that the expert's opinion has a reliable basis in knowledge and experience of his discipline." *Daubert,* 509 U.S. at 615; *see also Deimer,* 58 F.3d at 345; *In re Brand Name Prescription Drug Antitrust Litigation,* 1999 WL 33889, *12 (N.D. Ill. Jan. 19, 1999), *aff'd in part, rev'd in part and remanded*, 186 F.3d 781 (7th Cir. 1999). ("[E]ven economic opinion requires some level of scientific analysis and testing.").

4. Dr. Beyer's Conclusions about "Pricing Structure" Are Subjective and Unscientific.

Dr. Beyer's conclusions about "pricing structure" boil down to this: using a series of

techniques designed to eliminate variation in the data for the price of a single ready-mixed concrete product for some, but not all, of the Defendants, Dr. Beyer produced a series of graphs that he inspected visually to conclude there is "pricing structure," in the ready-mixed concrete industry in a ten-county area. Beyer Report at § III.D. ¶¶ 51-57. Dr. Beyer's graphs were generated using average data, he then combined the averages into rolling three-month averages, indexed them,[31] and presented them in graph form using an abbreviated *y* axis. Each of these techniques is a means of minimizing variability in the data. Dr. Beyer then "visually inspected" his gerrymandered graphs and concluded "beginning in September 1999 and at least through some point in 2004, prices moved in a similar manner over that five or six-year period." Beyer Dep. 169:17-19; 169:23. This is a classic case of circular reasoning. Having gone to great lengths to remove variability from the data, Dr. Beyer concluded there was no variability. This sleight of hand is critical: Plaintiffs' case for certification rests on Dr. Beyer's conclusion that all prices moved in the same direction and no supplier could command a price premium.

Dr. Marshall provides the Court with a detailed analysis of the scientific flaws in Dr. Beyer's approach in part VIII.1. of his report; *see also* Dr. Hausman's Report at part III. Dr. Beyer's visual inspection of his charts is not an accepted scientific methodology. *Id.* Visual inspection of the data is the first and preliminary step in the process, but not one on which scientists would rely.[32] Marshall Report at ¶ 80 and n.144; Hausman Report at ¶¶ 22, 24 and n.6.

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[31] There was no scientific reason to use an index; when looking for price differences *and* index masks those differences. *See* Umbeck Report at 7, n. 7, Appendix III. The graphs with the indexing removed disprove Dr. Beyer's theory. *Id.* at 5-7, 32-34.

[32] This type of "visual inspection" is not the type of evidence for which expert testimony is needed or helpful to the fact finder. *Mercado v. Salim Ahmed*, 974 F.2d 863, 870 (7th Cir. 1992) (quoting *Salem v. U.S. Lines Co.*, 370 U.S. 31, 35 (1962) (expert testimony is properly excluded as to matters within a jury's common understanding); *Hibiscus Assoc. Ltd. v. Bd. of Trustees of Policemen and Firemen Retirement Ass'n*, 50 F.3d 908, 917 (11th Cir. 1995) ("expert testimony

Moreover, even Dr. Beyer has criticized this approach in other cases. Marshall Report at n.145. Dr. Beyer admitted that his visual inspection of his "price structure" charts was not followed by any actual calculations or testing of the data and conceded "Well, in the end, it is a subjective analysis." *See* Beyer Dep. at 170 – and 174:2-9.[33]

Dr. Beyer was unfamiliar with accepted scientific methods for *testing* whether prices move together over time. Beyer Dep. 171-172; *see* discussion of use of correlation coefficients[34] and Nobel Prize winner Clive Granger's work on co-integration at ¶85 in the Marshall Report. Most importantly, Dr. Beyer's approach was *designed* to remove variability from the price data. Thus, Dr. Beyer's conclusions that there was a pricing structure that showed lack of variation in the Defendants' prices for ready-mixed concrete represent a classic case of *a priori* reasoning, not the type of rigorous scientific method required by *Daubert.* Stripped of it subjectivity and put to actual econometric testing, Dr. Beyer's conclusions about pricing structure must yield to Dr. Marshall's conclusion that the use of average prices for all customers by definition removes customer-specific price idiosyncrasies and "cannot speak to whether all or substantially all putative class members can be analyzed within a common framework." Marshall Report at ¶ 90.

5. Dr. Beyer's Untested Assumptions Are an Unreliable Basis for His Conclusions.

Dr. Beyer assumes that ready-mixed concrete is an undifferentiated, homogenous or

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is properly excluded when it is not needed to clarify facts and issues of common understanding which jurors are able to comprehend for themselves") (also citing *Salem*). If indeed Beyer's charts (Beyer Report p. 26, ¶ 55, Figures 8, 9, 10 and 11) are so visually obvious and self evident, then his "expert" testimony on the matter should be excluded *See also Barber,* 17 Fed.Appx. at 438 (expert not necessary to establish that thunderstorms cause air turbulence).

[33] *See* "Hausman Report at ¶¶19-24 and Umbeck Report at 11, 27-28, for further critiques of the Dr. Beyer's visual inspection approach.

[34] Dr. Marshall did the requisite testing that Dr. Beyer should have done after his first step visual inspection. Dr. Marshall's test results are presented at ¶¶88-89 and Appendix D to his Report.

commodity-like product (*see, e.g.,* Beyer Report at ¶ 22) and that "customers primarily chose their suppliers of ready-mixed concrete on the basis of price" (*see, e.g.,* Beyer Report at ¶¶10a.i, 22). Dr. Beyer concludes "There is no information that demonstrates that a defendant offered product quality or service of sufficient superiority in the Central Indiana Area to motivate customers to pay a price premium for that incremental difference in quality or service." Beyer Report at ¶26. Beyer's assumptions, and hence his conclusions, are inconsistent with the evidence, and thus his testimony should be excluded as unreliable and irrelevant. Fed.R.Evid. 702; *Daubert,* 509 U.S. at 591; *see also Barber*, 17 Fed. Appx. at 437. Beyer *concludes, but does not determine on an empirical basis,* that ready-mixed concrete is a commodity product for which no defendant could command a price premium. Beyer then takes his conclusion about "lack of price differentiation" and further "conclude[s] that there is common proof of impact on ready-mixed concrete purchasers from the alleged joint conduct." Beyer Report at ¶57. Beyer's tautology fails to meet the *Daubert* reliability standard and is the type of *ipse dixit* approach rejected by the Supreme Court. *General Elec.,* 522 U.S. at 146.

As shown in Dr. Marshall's report and discussed above, there is evidence that some of the Defendants obtained a price premium. BCS obtained a price premium based on the quality of its service, including on-time delivery. Marshall Report at ¶48 and n. 86, pp. 25-26; Nuckols Decl. at ¶10. Dr. Beyer recognized that BCS made nearly 96% of its deliveries within 40 or fewer minutes. Beyer Report at ¶31. On time delivery is an important part of the bundled product/service mix that BCS offers and for which it obtains a price premium. Dr. Beyer glosses over this, and even goes so far as to state that place of delivery will *NOT* be a part of his analysis. Beyer Dep. at 202:22-25. The record is replete with evidence that place and time of delivery, as well as other service-related factors are critical variables in selecting a supplier of

ready-mixed concrete and in determining the price for specific transactions. Dr. Beyer simply ignores this evidence in favor of his conclusory approach.

Dr. Beyer makes additional untested assumptions that lead to other faulty conclusions. For example, Dr. Beyer concludes that there is common proof of impact on the putative class from the Defendants' cartel based on the issuance of certain price announcements. Beyer Report at ¶57. This conclusion is based on another conclusion by Dr. Beyer that because Defendants' price announcements were addressed "To Our Customers" (or similar words) the Defendants "intended for the price increases to have a generalized effect in the Central Indiana Area market for ready-mixed concrete." Beyer Report at ¶¶ 48-50. Yet at his deposition, Beyer stated that he had made no assumptions about *which* customers the defendants had conspired to fix prices as to (Beyer Dep. 244) and had done no analysis to determine if in fact there were price increases following the price announcements or to which customers or products the increases (if any applied). Beyer Dep. 252. See also discussion of this subject in Marshall Report at ¶¶98-103.

C. Dr. Beyer's Testimony Should Be Excluded Because It Is Irrelevant.

As shown above, Dr. Beyer's testimony is based on flawed economic methods and principles, touts conclusions that remain untested and is based on circuitous reasoning. Taken as a whole, Dr. Beyer's testimony lacks scientific rigor and should be excluded under the reliability prong of the *Daubert* standard. Dr. Beyer's testimony also fails the relevancy prong of the *Daubert* standard and should be excluded for that independently sufficient reason.

Daubert and *Kumho* require an appropriate "fit" with respect to an offered opinion and the facts of the case. *See Kumho*, 526 U.S. at 157 (affirming exclusion of expert testimony because there was no evidence that any other expert in the industry accepted the methodology of the proposed expert); *see also General Elec.,* 552 U.S. 136 (finding there was too great an

analytical gap between the data and the opinion offered). Opinions prepared without sufficient grounding in the facts of the case, such as Dr. Beyer's, have no validity or reliability and cannot assist the fact finder. *Daubert*, 509 U.S. at 591.

1. Dr. Beyer's Assumptions Do Not Fit the Facts in this Case

Dr. Beyer begins by assuming that the facts alleged in the Second Amended Complaint are true. Beyer Report at ¶9. "[I]t is very easy to render an opinion concerning a fact if one assumes that fact to be true for purposes of the opinion." *Dana,* 866 F. Supp. at 1501 (internal citation omitted). Dr. Beyer makes numerous erroneous assumptions about the facts of this case, some of which have been discussed above. Dr. Beyer's assumptions either differ from or ignore critical facts in the case and thus are irrelevant and should be excluded. *See Tucker,* 919 F. Supp. at 1198 (excluding expert's opinion which did not "fit" facts of case where expert opined plaintiff's jump caused the injury but the plaintiff testified he did not jump). Here Dr. Beyer has assumed the critical facts necessary to show common impact and damages.[35] That approach fails under *Szabo* (249 F.3d at 675-76), and is not a basis on which this Court may certify the proposed class. *West*, 282 F.3d at 938.

When the factual basis for an expert's opinion is inaccurate or incomplete, the expert's opinion is unreliable and should not be admitted. *Kumho*, 526 U.S. at 1177-1179; *see also Irvine v. Murad Skin Research Lab.*, 194 F.3d 313, 321 (1st Cir. 1999) (ordering new jury trial on damages where jury had accepted the expert's computations based on erroneous facts). An expert may not "cherry pick" the facts that support his theory and ignore other facts. *Barber,* 17 Fed. Appx. at 437. (excluding expert report who rejected data that did not support his opinion).

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[35] Additional errors in Dr. Beyer's testimony based on his erroneous factual assumptions or failure to fit his conclusions to the facts of the case are set forth in the Report of Dr. Marshall and are not repeated here.

Dr. Beyer's testimony is so entwined with the assumptions in the Second Amended Complaint and uninformed by critical evidence in the case that it should be excluded. *See General Elec.,* 522 U.S. at 146. Where the expert has failed to investigate adequately the issues, and the expert's testimony is inconsistent with the undisputed facts of the case, the testimony should be excluded. *See Bourelle,* 220 F.3d at 538; *Lantec Inc. v. Novell, Inc.,*306 F.3d at 1025-26; *Schwab v. Philip Morris USA, Inc.,* 2005 WL 2401647 at *3-4; *In re Agricultural Chemicals Antitrust Litigation,* 1995 WL 787538 at * 11-12; *Allied,* 247 F.R.D. at 167. In short, Dr. Beyer is nothing more than a "conduit" for Plaintiff's counsel's advocacy. Dr. Beyer's uniformed and conclusory testimony will not aid the fact finder and should therefore be excluded under Fed.R.Evid. 702.

IV.

CONCLUSION

For all the foregoing reasons, the proposed plaintiff class should not be certified and the Report and deposition testimony of the Plaintiffs' Expert Dr. John C. Beyer should be excluded.

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CERTIFICATE OF SERVICE

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