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	)	

IMI DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND IN SUPPORT OF MOTION TO EXCLUDE EXPERT TESTIMONY AND OPINION OF DR. JOHN BEYER

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I. Introduction – Summary

This is a civil lawsuit. The central issue before this Court at this stage of the proceedings is that plaintiffs have failed to present admissible, much less convincing, evidence under Fed. R. Evid. 702 that there is common proof (as required under Fed.R.Civ.P. 23(b)(3)) that the ineffective, half-baked, "on-again/off-again" conspiracy caused injury to all purchasers of ready-mixed concrete (or "ready-mixed"). The IMI defendants have accepted criminal responsibility, paid their fines and served their time. Plaintiffs parade this information like it is end of the analysis of the civil liability issues rather than just the beginning. To prevail on their motion for class certification, plaintiffs must demonstrate that there was an effective conspiracy, such that each of the putative class members was injured (antitrust standing) and under Rule 23(b)(3), common proof of such injury to each putative class member.

Plaintiffs can no longer hide behind the allegations of the complaint under a Rule 12(b)(6) standard and present an expert opinion to establish common proof of injury tested only under a "not fatally flawed" or "threshold showing" standard. The Seventh Circuit, beginning in *Szabo* and then in *West*,[1] has made it clear that:

- A district judge cannot accept the allegations of the complaint in deciding whether Rule 23's requirements have been met. [*Szabo*, 249 F.3d at 675-76]
- A court may certify a class under Rule 23(b)(3) "only if it finds that all of the prerequisites . . . have been demonstrated. . . ." [*Id.* at 676]
- Plaintiffs cannot obtain class certification "just by hiring a competent expert." [*West*, 282 F.3d at 938].

[1] *Szabo v. Bridgeport Machines Inc.*, 249 F.3d 672 (7th Cir. 2001); *West v. Prudential Securities, Inc.*, 282 F.3d 935 (7th Cir. 2002). The other circuits have followed without dissent (*see infra*, pp. 19-26.) except for the Third Circuit, which has allowed two interlocutory appeals pursuant to FRCP 23(f) pending on this point in *In re: Hydrogen Peroxide Antitrust Litigation* (3rd Cir. No. 07-1689) and *In re: Plastics Additives Antitrust Litigation* (3rd Cir. No. 07-8004).

- "A district judge may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification may also affect a decision on the merits." *Id.*
- "Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives." *Id.*
- This includes resolving the battle of expert economists at the certification stage in order to determine whether plaintiffs have carried their burden of proof by a preponderance of the evidence (not just a "threshold showing"). *Id.*

Plaintiffs' asserted common proof of impact is the report of a purported economist whose opinions plaintiffs seek to shield from any meaningful scrutiny or analysis.[2] But they have the Seventh Circuit's law quite wrong and they present an expert who has survived in the past only because he too has been sheltered for years by the wrong law. Plaintiffs' basic economic assertion is that ready-mixed is an undifferentiated product purchased based on price (where differences in quality, service, relationships and branding were not sufficient for any supplier to charge a price premium). But this conclusion is based on hiding price premiums that do exist behind indexed charts and subjectively "eyeballing" graphic depictions of transaction data to conclude there is "price structure."

This is "junk economics." When tested under generally accepted methods, Dr. Beyer's conclusions are flat wrong. The evidence is uncontested that ready-mixed concrete is not a homogeneous, undifferentiated product which is purchased based on price, and that a seller can charge a "price premium" based on service, quality, and branding. Rather, it is a unique,

[2] Plaintiffs state: "While defendants may choose to dispute the correctness of Dr. Beyer's analysis of the market, such arguments are not relevant at the class certification stage. Courts have repeatedly rejected defendants' attempts to defeat a showing of the predominance of impact as a common issue . . . based on attacks on plaintiffs' economic analysis." (Plaintiffs' brief 42.) Under *Szabo* and *West*, this is flat-out wrong. "Tough questions must be faced and squarely decided" at the certification stage. *West*, 282 F.3d at 938.

"bundled" combination of materials and services transacted in variable economic environments not amenable to common proof of impact.

"Concrete" is a unique material, perishable within a short distance/time (reduced by 50% in the summer) from the plant and manufactured in ten yard trucks enroute to a construction site where it must be discharged while still workable. It is not mere "concrete" that is being bought and sold – rather, it is widely varying bundles of concrete, services, quality and other "value added" features – varying:

- from a single truck load for a patio in southeast Shelby County that some defendants cannot reach because its too far from their plants,
- to 5000 yards for a union project, delivered/mixed in 500 trucks from two or more plants, which must be continuously poured at the rate of 200 yards (20 trucks) per hour, with salesmen coordinating the continuous arrival of the trucks and quality control personnel on site making adjustments to the routes and mixes, for which project only a few defendants can compete,

In between are thousands of variations with ever-varying prices not on a published price list. Perhaps the most important "valued added" feature is relationship capital.[3] The contractor and the supplier depend on the relationship for the next project, the next year. A price premium is available to those suppliers who are perceived to be the most dependable over the years. Common proof of impact on such widely varying purchases is impossible.

[3] *Chad Syverson*, "Markets: Ready-Mixed Concrete", *Journal of Economic Perspectives*, Vol. 22, No. 1, 217, 225 (Winter 2008)

II. Plaintiffs' Common Proof Of Impact[4] – Unscientific Or Nonexistent

[Plaintiffs' Brief, pp. 22-26, 37-44]

Plaintiffs' assertions concerning the "ready-mixed concrete market" and common proof of impact on each direct buyer come solely from Dr. Beyer's "junk economics".[5] Dr. Beyer seeks to establish ready-mixed as a homogeneous, undifferentiated product where no supplier was able to successfully brand, nor was any difference in quality or service sufficient to gain a "price premium" for the supplier's products. (Beyer Rep. ¶¶ 22, 26).[6] Hence, Dr. Beyer argues that "price rules if multiple defendants can satisfy the purchaser's requirements" so the purchase decision is made, and customers choose suppliers, "based on price." (Beyer Rep. ¶ 26.)

Were this so, however, there should be evidence in the transaction data by which Dr. Beyer could test his theory that ready-mixed is an undifferentiated product so no supplier could charge a price premium. But as set forth in the *Daubert* motion and hereafter, the transaction data directly rebut Dr. Beyer's assertion that ready-mixed is an undifferentiated product with purchases based on price. Dr. Beyer's own data (with Dr. Beyer's attempted disguises removed) demonstrate there were in fact "price premiums", thus proving that purchasers do not perceive the various producers' ready-mixed products to be undifferentiated.

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[4] Plaintiffs' Brief, pp. 22-26, 37-44.

[5] As stated in Professor Hausman's report, "from my point of view as an economist who has both published widely in the most prestigious economic journals and served as an editor and referee for such journals, the Beyer Declaration contains extensive junk economics. In many instances, his methodology is not generally accepted among economists and, indeed fails to constitute a scientifically valid approach. His analysis, methods and conclusions would not survive the peer review process at an economics journal. . . ." Hausman, ¶ 17. *See generally Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Kuhmo Tire Co. v. Carmichael*, 536 U.S. 137 (1999); *Ammons v. Aramark Uniform Services, Inc.*, 368 F.3d 809 (7th Cir. 2004); *Chapman v. Maytag Corporation*, 297 F.3d 682 (7th Cir. 2002); *Target Marketing Publishing. v. ADVO, Incorporated*, 136 F.3d 1139 (7th Cir. 1998); *Kirstein v. Parks Corporation*, 159 F.3d 1065 (7th Cir. 1998), *cert. denied* 526 U.S. 1065 (1999); *Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607 (7th Cir. 1993).

[6] Beyer states that "because ready-mixed concrete was an undifferentiated product perceived to have similar characteristics regardless of the manufacturer, no supplier was able to gain a premium based on branding." (Beyer Rep. ¶ 10(a)(i).)

Plaintiffs assert that Dr. Beyer's "price structure" means "that if defendants succeeded in cooperatively fixing prices, their actions 'would have raised all prices, so that every purchaser of [ready-mixed] would have been impacted.'" (Beyer Rep. ¶ 51, Plaintiffs' Brief 25.) Dr. Beyer's "price structure" theory also fails. Dr. Beyer's theory of "price structure" based on his visual observation of whether multiple lines on a piece of paper move together over time – is a subjective artifice, more "junk economics," which is not accepted in the field. Moreover, when Dr. Beyer's charts with visually observed "price structure" are subjected to objective economic tests through correlation and cointegration – there is no such price structure whatever. (Marshall Rep. ¶¶ 80-90.) Finally, Dr. Beyer assumed the conspiracy as alleged but the facts are far different, showing a half-baked and widely ignored cartel making common proof of impact impossible.

A. The Unmasked Sales Data Disprove Dr. Beyer's Assertion That Ready Mixed Concrete Is Undifferentiated

Dr. Beyer repeatedly opines that ready-mixed concrete is an undifferentiated product such that no defendant could command a price premium[7] based on branding, service or quality. He states that:

> "Any differences in quality are not sufficient to motivate customers to pay a price premium to a particular supplier. . . . Price rules when the purchaser is indifferent among suppliers' quality and service because multiple suppliers can satisfy the purchasers' requirements. There is no information that demonstrates that a defendant offered product quality or service or sufficient superiority in the Central Indiana Area to motivate customers to pay a price premium for that incremental difference in quality or service." (Beyer Rep. ¶ 26.)

[7] According to Beyer a "price premium" is where, "for the exact same product at a given point in time, a supplier, producer of that product, is able to consistently achieve a higher price, therefore, a premium, than its erstwhile competitors." (Beyer Dep. 148.)

The test for such a conclusion is to review the sales data to see if any producer did, in fact, command a price premium consistently over time. (Umbeck Rep. 4-11.) If so, then the product is not undifferentiated and the theory fails. (Umbeck Rep. 11-13.) Dr. Beyer claimed that he did perform this test[8] and that this information was set forth on his Figures 8, 9, 10 and 11.[9] As to whether the indexing served to disguise anything, Dr. Beyer stated:

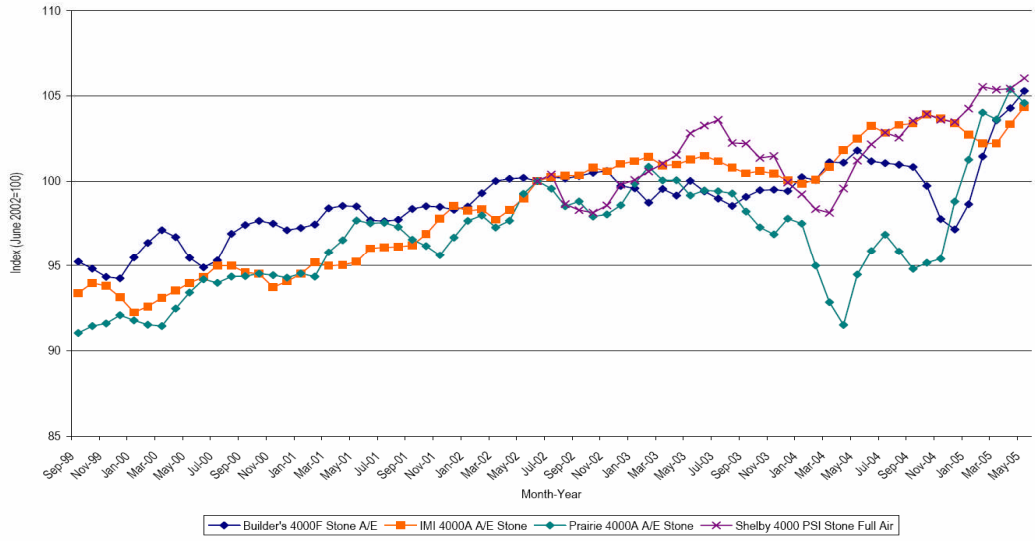
> "No. It is a way of presenting . . . an index is a neutral way of presenting in this case, price information over time." (Beyer Dep. 154.)

In fact, Dr. Beyer masked the actual sales data by converting it to an index, which hides the fact that two suppliers, IMI and Builders, did consistently command a price premium over their competitors. For example, Dr. Beyer's Figure 8 from his report, reproduced below, purports to show price data for defendants' sale of one particular concrete mix, a 4000 psi air-entrained stone:

[8] "Q. What transaction data did you examine with respect to whether any seller of ready-mixed in the ten-county area was getting a premium with respect to any product? A. I examined the prices by different suppliers for standard, by which I mean large purchase or sale items from each of the suppliers, calculated average prices, and examined the relationship and what I saw . . . both for preparation of the report and subsequent to it; what I saw was the absence of any persistent, as I have just defined it, price premium by one supplier compared to the other." (Beyer Dep. 150, 146.)

[9] "The index is simply one way of presenting the information . . . what Figures 8, 9, 10 and 11 . . . reveal is that there is not a price premium for at least these products, which are the major products in terms of dollars or cubic yards by the suppliers in the central Indiana area."

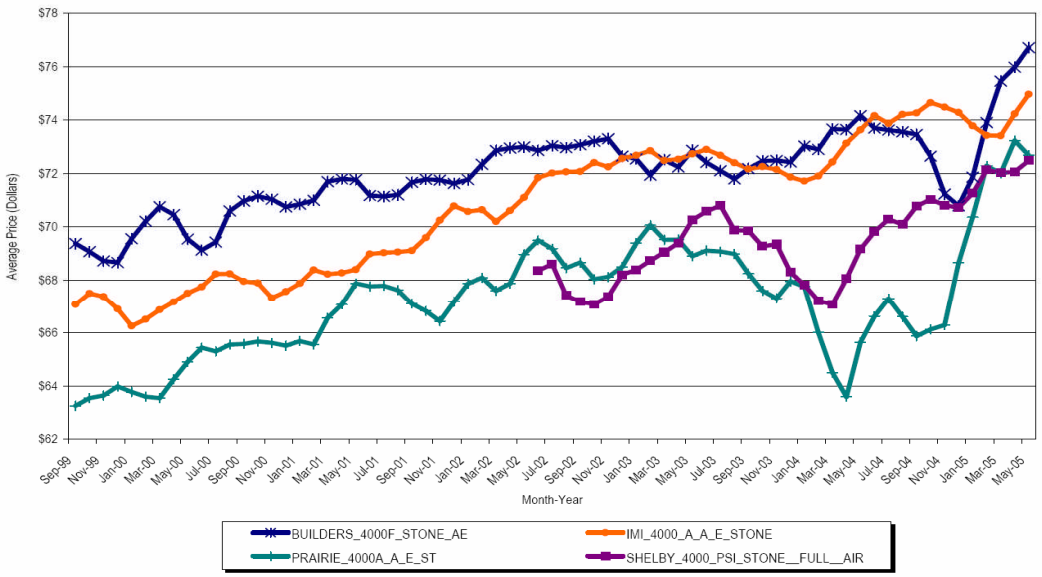
Figure 8. Three Month Moving Average of Similar 4000 PSI Air Entrained Stone Ready-Mixed Concrete Sold in the Central Indiana Area, by Defendant, September 1999-May 2005



Source: Defendant Electronic Data

The graph seems to show that all defendants were charging roughly the same or similar prices, sometimes higher, sometimes lower, than each other. Indeed, in June 2002 the lines all cross, as if defendants all charged exactly the same price on that date. But this graph does not represent reality. The graph shows an *index* of three-month moving averages of the prices charged, not the actual prices charged. There was no legitimate scientific basis for Dr. Beyer to have indexed the data. (Umbeck Rep. fn. 7.)

Although Dr. Beyer claimed at his deposition that the graph would look *the same* without the indexing (Beyer Rep. ¶ 3, Beyer Dep. 154), he is wrong – there is a dramatic difference. The graph below shows the three-month moving average for the prices charged by the defendants with Dr. Beyer's indexing removed:



Source: Defendant Electronic Data

(Umbeck Report, Figure 1.)

The second graph clearly shows that Builders and IMI consistently received a price premium over Prairie and Shelby. (Umbeck Rep. 5-7.) Builders consistently received approximately $5 dollars more per yard than Prairie. If the product were truly homogeneous or undifferentiated, then IMI and Builders would not be able to charge higher prices. (Umbeck Rep. 11.) Obviously, brand, service and other transaction-specific matters were important to the customers that paid the higher prices to IMI and Builders. (Umbeck Rep. 11-13.)

A similar brand premium is reflected in Dr. Beyer's other graphs once the indexing is removed. (Umbeck Rep. 4-11, App. II, III.)[10] As referenced below, Professor Marshall performed other generally accepted statistical tests that demonstrate that prices did not "move similarly" over time and that they were affected by individual, transaction-specific factors.

[10] Dr. Beyer's only response to being confronted with these graphs was that they did not control for volatility in the price brought about by changes in volumes and customers. However, at three times in his deposition, he said he controlled for this volatility by using the three months averages. (Beyer Dep. 156-58, 182-85, 222.) Professor Umbeck's Figure 1 used the same data, just with the indexing removed.

(Marshall Rep. ¶¶ 47-51.) Ready mixed concrete is not an undifferentiated product. *Id.* Dr. Beyer's conceptual foundation – that ready mixed concrete is undifferentiated – is simply not true, as established by the data he sought to hide. With the failure of this assertion, Dr. Beyer's theory collapses,[11] and so does plaintiffs' motion for class certification.

B. Dr. Beyer's Subjective Visualization Of "Price Structure" Is Not Scientific.

Dr. Beyer performed only one other "test" of his theory. To "confirm" his theory, Dr. Beyer "visually inspected" – *i.e.* eyeballed -- the graphs discussed above to see if they showed "price structure," which Dr. Beyer defines as "prices moving similarly over time." (Beyer Dep. 165.) Whatever that exercise was, it was subjective and non-replicable, and is not a generally accepted economic test.[12] It fails under Fed. R. Evid. 702.

First, real economists do not recognize a concept called "price structure" and do not recognize "visual observation" as an accepted test. (Hausman Rep. ¶¶ 19-24; Umbeck Rep. 27-28, App. IV; Marshall Rep. ¶ 77.)[13] The term "price structure" comes from Dr. Beyer's out-of-context reference to George Stigler's ground breaking article "A Theory of Oligopoly" in *The Journal Of Political Economy,* Volume 72(1), pp. 44-61. As Professor Marshall explains,

[11] Economists use the term "rejected." (Hausman Rep. ¶¶ 8, 14, 22; Umbeck Rep. 19.)

[12] Professor Marshall's report examines the many problems with these conclusions. As Professor Marshall explains, visual inspection of graphic depictions of the data is a non-replicable, subjective and unscientific basis upon which to conclude prices "moved similarly". (Marshall Rep. ¶ 14 ("proof of co-movement [of prices] that relies exclusively on subjective visual inspection is clearly unscientific, and in my opinion, of no probative value"); ¶ 22 ("Dr. Beyer appears to recognize the unscientific nature of visual inspection because he testified that it is not a process that could be replicated"); ¶ 77, ¶¶ 80-89 (applying objective statistical tests that rebut Beyer's subjective "eyeball" approach). Indeed, Dr. Beyer's use of the concept of "price structure" is made up out of whole cloth and found nowhere in the published economic literature. (Marshall Rep. ¶ 80 ("In reaching his opinions that the plaintiffs' allegations can be pursued on a common basis, Dr. Beyer argued that prices for ready mixed concrete exhibit a 'pricing structure,' a term that is not recognized within the economics profession").)

[13] As discussed in Professor Umbeck's report, it appears that Dr. Beyer selectively borrowed the term from Nobel Prize winning economist George Stigler. (Umbeck App. IV.) The concepts Dr. Stigler was addressing actually disprove Dr. Beyer's theory.

> "Dr. Beyer incorrectly imputes this article's use of the term 'price structure' to refer to prices that 'move similarly over time.' Stigler uses the term 'price structure' (not 'pricing structure') to refer to price differences at a point in time that result from maximizing industry profits. Today, economists call this practice discrimination' – a notion largely unrelated to 'prices that move similarly over time.' (Marshall Rep. ¶¶ 80-81, n. 143.)

In the absence of an accepted meaning for the term, Dr. Beyer has simply invented his own meaning.

Second, economists have developed objective statistical methods to test "co-movement" of prices to study whether products are affected by the same demand and supply conditions. They do not recognize mere graphic visualization of price series as a complete scientific test. (Marshall Rep. ¶¶ 80, 84.) Rather, looking at graphs is described as at most a first step before conducting actual statistical analyses – it provides but a "clue". (Marshall Rep. ¶¶ 80-84.)[14] Merely looking at graphs without more formal statistical analysis is not scientific. (Hausman Rep. ¶¶ 19-24; Umbeck Rep. 27-28; Marshall Rep. ¶¶ 14, 22, 36, 77, 80, 84.)

Third, Dr. Beyer's visualization of price structure is wholly subjective and non-replicable. It is not science. As the Supreme Court held in *Kuhmo Tire*, visual inspection is subjective, cannot be replicated, and is therefore suspect.[15] Similarly, in *United States v. Taylor*, the 7th Circuit held that an expert's visual scoring technique in polygraph testing was unreliable compared to an objective numerical scoring system. 154 F.3d 675 (7th Cir. 1998). In fact, another economist looking at the graphs, which clearly show price lines moving in opposite directions (*see* Beyer's Figure 8 above), could and did conclude that there was no "price structure," even as Dr. Beyer defines it. (Marshall Rep. ¶ 83.)

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[14] For example, Dr. Gujarati, who Dr. Beyer referred to at his deposition as an authority on visualization, put it this way: "Before one pursues formal tests, it's always advisable to plot the time series under study. Such plot gives an initial clue about the likely nature of the time series."

[15] *Kuhmo*, 526 U.S. at 154-155.

Fourth, the graphs Dr. Beyer used for his visualization are themselves unreliable because he used indexing and averages that hide price variation. (Marshall Rep. ¶ 90.) The effect of the averages is to smooth out price differences. (Umbeck, App. III; Marshall Rep. ¶ 90.) As Professor Marshall put it: "Dr. Beyer's use of these charts assumes away the very question that is germane to his charge in this case." (Marshall Rep. ¶ 90.)

Fifth, when the valid scientific statistical tests are applied to test Dr. Beyer's price structure hypothesis, they show that prices did not move together, which "indicates that different transactions were primarily driven by different transaction-specific economic factors such as demand and supply conditions, implying that transactions cannot be analyzed within a common framework." (Marshall Rep. ¶ 77.) Professor Marshall performed two separate analyses using generally accepted statistical methods, correlation and cointegration,[16] to see if prices were moving together:

- Professor Marshall performed correlation analyses on Dr. Beyer's Figures 12-14. One half of the correlations were negative, indicating that the putative class members were not subject to the same demand and supply conditions -- *i.e.* no "price structure," no undifferentiated product.[17] (Marshall Rep. ¶ 88.)

- Professor Marshall's cointegration analysis, set out at length in his Appendix D was consistent with his correlation analysis – *i.e.* prices did not move similarly over time. (Marshall Rep. ¶ 89.)

[16] Dr. Beyer was not even familiar with the term cointegration, even though it is a generally accepted technique to analyze whether prices move similarly over time. (Marshall Rep. ¶ 85.)

[17] Dr. Beyer at his deposition speciously argued that correlation analyses were subjective. (Beyer Dep. 169-170.) This, however, does not address the fact of negative coefficients, which are not a matter of subjective interpretation. (Umbeck Rep. 28; Marshall Rep. ¶ 88.) Regardless, Dr. Beyer's claim that correlation is subjective does not cure the admitted, inherent subjectivity of his own "visual" technique.

Dr. Beyer's assertion that prices for ready-mixed moved similarly over time, based solely on his visual inspection, is disproved, and the ready-mixed conspiracy cannot be analyzed by a common framework. (Marshall. Rep. ¶¶ 80-90.)[18]

C. Market Power: Dr. Beyer Failed To Test His Assumptions For Product And Geographic Markets

Dr. Beyer's theory of common proof depends on ready-mixed being undifferentiated *and* defendants having market power. If there is no market power, none of the class will suffer impact from the defendants' attempted collusion. (Umbeck Rep. 19.) Although he asserts that defendants had market power throughout the "Central Indiana Area" (Beyer Rep. ¶¶ 10, 33, 47), Dr. Beyer did no scientific testing to define the relevant product or geographic markets. Instead, he just assumed single market identical to the market posited by the plaintiffs' counsel in the Second Amended Complaint. (Beyer Rep. ¶¶ 33-47; Dep. 77-81, 92-93, 112-114.[19] Such practice violates generally accepted economic methods, dooming Dr. Beyer's opinion that class-wide impact can be shown with common proof. (Hausman Rep. ¶ 29, Umbeck Rep. 18-20; Marshall Rep. ¶ 45.)[20]

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[18] Unlike Dr. Beyer, Professor Marshall has not relied on an unscientific, "eyeball" approach to the transaction data. Instead, Professor Marshall has subjected the data to a rigorous battery of well-known statistical tests, examining the actual correlation coefficients and cointegration of the data to test Dr. Beyer's "moving similarly" hypothesis. Once again, the result of Professor Marshall's statistical analysis is clear: "These results are remarkably consistent with the results in Figure 11 in that they demonstrate lack of price co-movement. It is also useful to point out that cointegration analysis does suggest a 'bright line' that differentiates series that move together from series that do not. The fact that these different analyses all indicate a lack of 'pricing structure' provides me with a great deal of confidence about my conclusions." (Marshall Rep. ¶ 89.)

[19] In their briefs, plaintiffs state "Dr. Beyer has performed a widely-accepted method of economic investigation of the structural characteristics of the Central Indiana Area ready-mixed concrete market to conclude that the impact of the conspiracy can be established by class-wide proof." (Plaintiffs' Br. 41.) And, "Dr. Beyer next concludes that there is a regional market for ready-mixed concrete allowing the defendants to sell their products across the Central Indiana Area." (Plaintiffs' Br. 41.) As discussed by Professor Hausman (¶ 28), Dr. Beyer's "structural characteristics" investigation technique has been "widely rejected" among economists.

[20] In making his assertion, Dr. Beyer claimed that "market structure determines to a great extent the conduct of firms in the industry." (Beyer Rep. ¶ 33.) Professor Hausman points out that this theory has been widely rejected among ecnomists since 1981, when the book Dr. Beyer cites was published. (Hausman Rep. ¶ 28; *see* Umbeck Rep. 20, fn. 55.)

Most notably, Dr. Beyer bases his conclusion that defendants "jointly" had market power on his underlying assertions that (1) the ready-mixed industry was "highly concentrated," (2) there were barriers to entry, and (3) there were no substitute products in the market. (Beyer Rep. ¶¶ 33-47.) However, "[i]f Dr. Beyer cannot tell the court the geographic boundaries of the relevant market, it is impossible for him to measure the concentration of production, barriers to entry or the availability of substitute products in the market." (Umbeck Rep. 20; *see also* Hausman Rep. ¶ 29). Moreover, even assuming a market definition, there are generally accepted tests for measuring market concentration, the effect of non-defendant competitors, and whether there are product substitutes. (Hausman Rep. ¶¶ 29-37; Umbeck Rep. 19-27; Marshall Rep. ¶¶ 41-46.) Dr. Beyer did none of these tests. *Id.*

It is indisputable that ready-mixed is a highly perishable material, not all defendants have plants which can reach all project locations within plaintiffs' defined 10 county area and not all defendants have the plant(s) capacity, truck capacity, labor force, or technical ability to serve all types or sizes of jobs and even those who do may be oversold at any time. Professors Hausman, Umbeck, and Marshall all agree that such facts call for rigorous testing not only of the market, but concentration of production, barriers to entry and the availability of substitute products. Under similar facts, the Department of Justice concluded that there likely are distinct product and geographic markets for ready-mixed, including separate markets for small and large construction projects. Competitive Impact Statement, *U.S. v. Cemex and Rinker Group Limited*, No. 1:07-cv-00640 (May 23, 2007). Nevertheless, Dr. Beyer merely accepted counsel's allegation that the ten-county area (including Monroe County where only two defendants have plants) is the single, relevant market, and based his underlying assertions largely on the (sometimes hearsay)

statements of competitors. That is not sufficient in the science of economics to support an assertion that defendants had market power.

D. No Impact: Another Test That Dr. Beyer Failed To Perform

Another assertion of Dr. Beyer is his opinion that defendants' issuance of price increase announcements "indicated the defendants' intention for the price increases to have a generalized effect . . . ." (Beyer Rep. ¶ 50.) Dr. Beyer's inference as to intent is probative of nothing and is not a substitute for economic analysis. (Hausman Rep. ¶¶ 25-27; Umbeck Rep. 27; Marshall Rep. ¶ 79.) What matters is what actually happened as shown by the data. (Hausman Rep. ¶ 27; Umbeck Rep. 27-28; Marshall Rep. ¶ 79.) Remarkably, Dr. Beyer did not test to see whether prices *actually* increased after the price announcements or after the alleged meetings of defendants.

Professor Marshall performed this analysis using the actual sales data. It showed that the prices many customers paid did not increase after the price announcements nor did they increase after the alleged conspiratorial meetings. In fact, in some cases, the prices went down during the class period. (Marshall Rep. ¶¶ 91-97, 98-103.) Thus, Professor Marshall concludes that the alleged conspiracy did not impact all customers. (Marshall Rep. ¶¶ 76, 91-97, 98-103.)[21]

Dr. Beyer also assumes away what effect, if any, list prices have on actual transaction prices. Once again in this context, Dr. Beyer has undertaken no empirical study of the transaction data. Professor Marshall has done so, finding "many putative class members paid transaction prices that were unchanged, or even lower, subsequent to list price increases. I believe this analysis is further evidence that an individual analysis is necessary to analyze

[21] Professors Hausman, Umbeck, and Marshall have identified numerous other generally accepted principles that Dr. Beyer either ignored or violated and tests that Dr. Beyer failed to perform to test his various assertions. Those are discussed more fully in the experts' reports. Attachment B to the motion to exclude opinions of Dr. John Beyer provides an outline of those.

plaintiffs' claims because transaction prices did not move in tandem with list prices." (Marshall Rep. ¶ 98.) This is so because "individual transactions in this industry are affected by individual demand and supply conditions. Therefore, a reliable study of the industry must be conducted on an individualized basis." *Id.* at ¶ 103.

E. The Half-Baked On Again/Off Again Conspiracy – Beyer Assumed The Opposite

Contrary to *Szabo* and *West*, Beyer assumed the allegation of the Second Amended Complaint that the defendants conspired to fix the prices of ready-mixed concrete as to sales to all class members during the class period. (Beyer Rep. ¶ 4.) He assumed the conspiracy was implemented and was effective as alleged in the Complaint. (Beyer Dep. 44-45). To the contrary, the evidence shows that the terms of the unlawful deal were at best vague and uncertain, indeed incoherent, from the beginning. At the group meetings, a discount limit of $5.50 was discussed.[22] But some participants, such as Builder's Butch Nuckols, believed the limit applied to published price lists.[23] Others thought it applied only to "bid work", but not to published price lists.[24] Still others did not think any understanding at all had been reached at the

[22] *Beaver* Transcript, pp. 46 (Lines 6-14), 52 (Lines 10-15), 70 (Lines 23-25) (Nuckols Testimony); pp. 145 (Lines 1-15), 148 (Lines 8-23), 154 (Lines 1-4), 155 (Lines 21-24) (Haehl Testimony); pp. 224 (Lines 1-8), 228 (Lines 12-13), 235 (Lines 17-22) (Price Irving Testimony), pp. 278 (Lines 2-15), 279 (Lines 3-9), 312 (Lines 2-20), 317 (Lines 15-21), 318 (Lines 12-14) (Hughey Testimony).

[23] *Id.* at p. 53 (Lines 4-6); p. 54 (Lines 4-5) (same).

[24] *Id.* at p. 153 (Lines 22-24); p. 156 (Lines 11-12).

Signature Inn meeting and acted accordingly.[25] Some even understood that the discount limit was $3.50 rather than $5.50.[26]

Moreover, some participants believed that whatever the understanding was did not apply with respect to "favorite" customers, the identities of which, like most other matters, were not specified.[27] It is undisputed from the criminal record that the confused cartel was often, if not always, ineffective because the producers did not want to give up their customers and hence would match or go lower regardless of the $5.50 or otherwise.[28]

Some at the criminal trial testified that there were "hundreds of times" just in the initial two year period that they did not adhere to any agreement.[29] Others testified that essentially

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[25] *Id.* at 235 (Lines 17-25) and 236 (Lines 1-3). Mr. Irving testified: "Q. What was the agreement reached? A. We agreed to keep calling each other, to confirm prices, work on a 5.50 discount. Dan [Butler] and myself announced we were going to have a $2.00 price increase for the 2004 year. That was discussed. I don't know if I said that or Dan said that. We did talk about IMI having a winter charge that was going to be a $3.00 charge from December 1st to March 31st on a per yard concrete. That was discussed some. I don't think anybody came to an agreement on that. We told them we were going to do it. I don't think that was agreed to by everybody or liked by anybody.")

[26] *Id.* at p. 312 (Lines 13-20). Nuckols understood the initial limit discussed in July 2000 to be $3.50, not $5.50. *Id.* at p. 67 (Lines 20-25).

[27] Shelby's Richard Haehl described this exception to the Agreement as follows: "Q [by Mr. Voyles]: Yeah, if you find IMI was underbidding a job you had and you wanted it, you underbid them, didn't you? A. I didn't always have to underbid them. And there are relationships in this industry and there were times when it probably made no difference what I bid. If IMI had a relationship with this person, whatever price I put out there, they could match, beat, maybe not even do that. Q. So there wasn't an agreement. Because IMI has got a special customer, they will do whatever to keep the customer like you would correct. A. Yeah. Q. Okay. And that had been happening from 2000 to 2002? A. Yes." Transcript, p. 189 (Lines 2-14). In his deposition, Haehl reiterated that "my most favorable – favored customers got discounts that were greater than $5.50 most of the time." (Haehl Dep. 110.) Carmel's Scott Hughey testified that during the Signature Inn discussion IMI's Dan Butler stated that he would not price in accordance with the agreement with respect to long standing customers (not specified by name). (Hughey Dep., 117 (lines 7-25).) Beaver's Bob Matthews testified that he went to great lengths to keep C.P. Morgan's business because "they controlled such a high percentage of our business, we were, quite frankly, scared to death to lose them." (Matthews Dep. 125.) Beaver never raised prices with Morgan and even lowered them one year. (Matthews Dep. 121-122.)

[28] *Id.*

[29] Transcript, p. 254 (Lines 1-4). As Mr. Irving concluded on redirect:

> Q. [By Mr. Schleef]: Why wasn't the original agreement working? A. I guess we were all – all the competitors were too selfish or too greedy to lose our accounts that we have. Q. People were cheating? A. Yes.

nobody was living up to any kind of an agreement about $5.50 and that problems began immediately after the meetings. (*Beaver* Transcript at p. 116 (Line 25) and 117 (Lines 1-15).)[30] This testimony was echoed by Richard Haehl of Shelby who stated that the repeated meetings were called because "everybody strayed from the original agreement."[31]

Carmel's Scott Hughey got so fed up with the other participants' failure to adhere to the agreement that in 2002, after the Signature Inn meeting, Carmel pulled out of the agreement altogether.[32] He also stated that the repeated meetings were called because of the participants' lack of adherence to the agreement.[33] The conspiracy was aptly described by Judge McKinney

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Id. at p. 280 (Lines 8-14). *See also,* Transcript, p. 252 (Lines 10-25) and 253 (Lines 1-4) ("Q. [By Mr. Voyles]: And you are doing with your Indianapolis plants, everybody else is doing it, so you don't have an agreement, do you, Mr. Irving? A. We are not following the agreement. . . . Q. Well, you don't have any agreement. You walk out and as soon as you get in your cars and you are leaving you guys are cutting each other's throats that quick, aren't you? A. Yes.").

> [30] Q. [By Mr. Voyles]: Nobody had agreed to anything because you found out that there wasn't anybody living up to any kind of agreement about $5.50, didn't you? A. [By Mr. Nuckols]: That's right. Q. None of those people? A. You're right. Q. Whatever they told you, if their lips are moving, they are lying. A. That's right.

Even between Builder's Concrete's two representatives at the meetings, Mr. Nuckols and his top lieutenant, John Blatzheim, there was no agreement about what had occurred. Mr. Blatzheim did not believe any agreement had been reached to fix prices. (Blatzheim Dep. 333 (lines 18-23), 334 (lines 5-12)) ("Q. Did you ever participate in any discussion about pricing where there was an agreement reached to actually fix prices? . . . A. I did not."). Similarly, while Beaver's Bob Matthews was aware that price discussions occurred, Chris Beaver "indicated to me that he didn't agree to anything." (Matthews Dep. 57, 64-65.)

[31] *Id.* at p. 149 (Lines 1-5 and 20-21) ("we strayed and everyone else strayed"); p. 184 (Lines 1-7) ("When I [Mr. Haehl] walked out of the meeting I knew that people would stray from the agreement"); p. 185 (Lines 12-18) (same); p. 187 (Lines 1-14) "Q. [By Mr. Voyles]: My question to you, Mr. Haehl, was that from 2000, when you had this first meeting, until 2002, nobody lived by an agreement. You are trying to shore it up two years later, correct? A. Yes. Q. Weeks after you leave this meeting [at Signature Inn] nobody is following it, including you and your company and your brother? A. That's correct."; p. 188 (Lines 7-25) and 189 (Line 1); p. 196 (Lines 10-15) (same).

[32] *Id.* at p. 325 (Lines 7-25) and 326 (Lines 1-2); p. 354 (Lines 2-13). Q. [By Mr. Lockwood]: Then you [Mr. Hughey] had a meeting at the Burger King with Dan Butler and Price Irving to discuss the fact that you didn't believe that people were abiding by the Agreement? A. [By Mr. Hughey]: Correct. That's when I told him I was not going to do it anymore . Q. That was a price fixing meeting too, wasn't it, sir? A. Well, I guess you would say that. It was to tell him I was getting out of it. I don't know, I wouldn't call that a price fixing meeting, no.").

[33] Transcript, pp. 308 (Lines 8-25), 309 (Lines 1-3) ("Butch [Nuckols] and I were discussing the fact that people weren't abiding by the agreement and that we needed to sit down and talk about it."); 311 (Lines 12-17) ("Butch and I started [the Signature Inn meeting] talking about what we had talked about before the meeting, and I

of this Court as "an on again/off again conspiracy" because of its ineffectiveness. Transcript 22 (lines 2-5) (December 14, 2006 Hughey sentencing hearing).[34]

The ineffectiveness of the conspiracy was due in part to the participants' failure to communicate it to their salesmen.[35] IMI's Mike Browne confirmed that the substance of the agreement was never conveyed to him or his fellow salesmen, as did Mike LaGrange. (Browne Dep. 13, 322-329, LaGrange Dep. 86-89.) Beaver's Bob Matthews similarly stated that he was aware of no agreement. (Matthews Dep. 64-65.) Indeed, given the complexities of the industry, a successful cartel would have been virtually impossible to establish – as one experienced

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recalled just saying that, 'you know, guys, this thing is not being adhered to'"). Transcript, pp. 314 (Lines 13-15) ("Q. [By Mr. Vondrak]: Was there anybody who lived up to the agreement all of the time other than yourself? A. [By Mr. Hughey]: No."); p. 315 (Lines 1-5) (Q. How did that [October 2003 horse barn] meeting come to be? A. The pricing here again was, seemed to be eroding as far as where people were on the agreed discount. It was kind of, you know, adherence to the agreement was falling apart, was not being adhered to a greater degree and felt we needed to have a meeting"); p. 317 (Lines 8-14) ("Butch started talking about what he and I had talked about . . . that, you know, pricing is getting off, not adhering to the agreement . . . ."); p. 350 (Lines 14-25) ("I [Hughey] was out of the agreement" and "we [Carmel] are still bidding in the market place, following what is out there, but not adhering to, you know, the agreement").

[34] Hughey repeated the substance of this testimony in his deposition, stating that "sometimes they did, sometimes they didn't" adhere to the agreement. (Hughey Dep. 121-123, 138, 145-148, 154, 168, 205, 303.) "If we agreed and everybody agreed and did what they said, we would have only had one meeting. You know, we kept – people weren't doing it and had hopes that we could just – it's as easy as agreeing to do something and do it, but it didn't happen." (Hughey Dep. 205.) Shelby's Richard Haehl also reiterated that he and others failed to adhere to the agreement some of the time. (Haehl Dep. 110-112.)

[35] Price Irving testified on this point as follows:

> Q. [by Mr. Voyles]: As a matter of fact, when you left one of these meetings, you never even went back and told your staff anything about offering discounts, your sales force, to anybody? A. [By Mr. Irving]: Correct. Q. Is that right? A. Correct. Q. So the people who were selling concrete for your company never were told to implement any kind of discount for anybody by you, correct? A. That had to do with these meetings? Q. Right. A. Correct.

Beaver Transcript, p. 264 (Lines 14-25). *See id.* at p. 266 (Lines 9-13) "Q. [By Mr. Voyles]: Yeah. That's why you didn't tell your sales force whatever happened at the meeting because you knew inside your heart that you were making more money than any of these guys at this meeting talking about it, including Butch Nuckols, right? A. [By Mr. Irving]: I would agree with that."

salesman put it, there were just too many service issues involved and because all suppliers did not offer the same services no agreement could encompass all of those factors.[36]

Entirely apart from the incoherence, inefficacy and on/off again nature of the conspiracy, there are two major competitors, Prairie Materials and American Concrete, who were not present at any of the horse barn or Signature Inn meetings and who testify that they did not take part in the cartel.[37] Nevertheless, in arriving at his opinion of common proof of impact, Beyer simply assumes away all of the facts concerning the half-baked, on again/off again conspiracy – and for good reason. The evidence shows that there would have to be an individual inquiry into each transaction, with the analyst searching on a transaction-specific basis for the effect of the $5.50 discount limit, for example, or for application of the "favored customer" exception. The reasons for the failure of the cartel reflect no credit on the participants – but their culpability of intent does not dispense plaintiffs from the Clayton Act's normal standing, causation and impact requirements, nor from Rule 23(b)(3)'s requirement of common proof of impact predominating.

III. The Court Must Resolve A "Battle Of Experts" And Any Merits-Related Issues Necessary To Determine If Rule 23(b)(3) Standards Are Met

The last six years have seen a revolution in the law of class certification. Until the Seventh Circuit's decision in *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001), many courts accepted the truth of plaintiffs' allegations at the certification stage or declined to resolve a "battle of the experts" as a part of class certification analysis. *Szabo* rejected the first

[36] *See* Browne Dep. 137 ("A. [by Mr. Browne]: I think there's a lot of factors involved. I think there's service issues. My competitors do not have the same service and abilities that I do. So for me to sit down with my competitors and work out a price fixing, they don't offer the same services that I do, so I think it would be difficult. Q. [by Mr. Levin]: So anybody who tried to do that would just be stupid, wouldn't they? A. Yeah, I think it would be – yeah, I think it would be very difficult to do.")

[37] American Concrete's Responses to Plaintiffs' First Set of Interrogatories to All Defendants, p. 13 (Answer to Interrogatory No. 10). Defendant Prairie Material Sales Inc.'s Responses to Plaintiffs' First Set of Interrogatories to All Defendants, pp. 19-20 (Answer to Interrogatory No. 10). Defendant Gary Matney's Responses and Objections to Plaintiffs' First Set of Interrogatories to All Defendants, p. 11 (Answer to Interrogatory No. 10).

approach, which improperly engrafted a Rule 12(b)(6) standard on to Rule 23, and a long line of subsequent cases now rejects the second approach as well. The current state of the law in this circuit was described by the Court in *West v. Prudential Securities, Inc.*, 282 F.3d 935, 938 (7th Cir. 2002):

> [T]he [district court] judge observed that each side has the support of a reputable financial economist (Michael J. Barclay for the plaintiffs, Charles C. Cox for the defendant) and thought the clash enough by itself to support class certification and a trial on the merits. That amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert. A district judge may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification also may affect the decision on the merits. Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives.

West, 282 F.3d at 938. *See also, Isaacs v. Sprint Corp.*, 261 F.3d 679, 682 (7th Cir. 2001)(same).[38]

[38] To the extent that this Court's decision in *In re Bromine Antitrust Litigation*, 203 F.R.D. 403, 414 (S.D. Ind. 2001) stands for the proposition that the Court cannot resolve a "battle of the experts" at the certification stage, it has been superseded by *West* on this point. In *Bromine*, the Court relied on testimony "that common methods can be used to show impact throughout the class. Case law agrees. A wide range of products and prices does not make it impossible to use common proof to demonstrate impact." *Id.* at 414. After *West*, however, plaintiffs can no longer rest on such testimony to "obtain class certification just by hiring a competent expert." Rather, this Court is entitled, indeed required, to *resolve* those expert disputes as a part of its certification analysis. Moreover, the *Bromine* Court noted that the plaintiffs' expert had not been made subject to a *Daubert* motion, as Dr. Beyer has here. *Id.* at 408. Plaintiffs cites to district court opinions from other circuits, such as *In re Hydrogen Peroxide Antitrust Litigation*, 240 F.R.D. 163 (E.D. Pa. 2007) and *In re Flat Glass Antitrust Litigation*, 191 F.R.D. 472 (E.D. Pa. 1999), fall under the same rubric. These are either cases from the Third Circuit using the widely-discredited *Bogosian* "short-cut" to presumed impact or otherwise involve a failure by the courts to undertake the expert fact-finding now required in this Circuit by *Szabo* and *West*. Accordingly, these cases are not persuasive authority here. *Compare Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 455 (3d Cir. 1977) *with Atlantic Richfield*, 110 S.Ct. at 1893 ("We also reject respondent's suggestion that no antitrust injury need be shown where a *per se* violation is involved"); *Kochert v. Greater Lafayette Health Services, Inc.*, 463 F.3d 710, 716-18 (7th Cir. 2006) (requiring distinct proof of causation/impact and antitrust injury-in-fact as core elements of liability in *addition to* proof of a Section 1 violation); *MCI Communications v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1161-64 (7th Cir. 1983) (civil antitrust plaintiff must establish that its alleged harm was caused by the defendants' violation and the Court must disaggregate any harm caused by other factors at the liability – not "damages" – stage). Indeed, the Third Circuit itself appears to have receded from the concept of "presumed" impact. *Weisfeld v. Sun Chemical Corp.*, 84 Fed.Appx. 257, 260-61, 2004 WL 45152, *2-3 (3d Cir. 2004). Plaintiffs' reliance upon other cases such as *In re Foundry Resins Antitrust Litigation*, 242 F.R.D. 393 (S.D. Ohio 2007) is directly contrary to *Szabo* and *West* because the courts there accepted as true the allegations of the complaint in ruling on class certification. *See e.g., id.* at 402.

Prior to *Szabo*, some courts analogized class certification to a Rule 12(b)(6) motion and held that the plaintiffs' allegations, including even such central allegations as commonality and predominance, should be accepted as true. The practical effect of this was to make the outcome of the motion a foregone conclusion. Some courts were wary of becoming entangled in the merits at the class certification stage, which they read *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140 (1974) to prohibit. Others reasoned that to resolve factual disputes at the certification stage, whether relating to the credibility of witnesses or the cogency of expert opinions, would invade the province of the merits fact-finder. In their brief, plaintiffs continue to rely on district court opinions from other circuits for each of these propositions, as though *Szabo* and *West* do not exist.[39]

Szabo exposed the fallacy of this method of analysis. With respect to the Rule 12(b)(6) analogy, the Court explained the very different procedural contexts in which a motion to dismiss for failure to state a claim and a motion for class certification arise. The Court stated:

> The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it. The reason why judges accept a complaint's factual allegations when ruling on motions to dismiss under Rule 12(b)(6) is that a motion to dismiss tests the legal sufficiency of a pleading. It's *factual* sufficiency will be tested later – by a motion for summary judgment under Rule 56, and if necessary by trial. By contrast, an order certifying a class usually is the district judge's last word on the subject; there is no later test of the decisions factual premises (and, if the case is settled, there could not be such an examination even if the district court viewed the certification as provisional). Before deciding whether to allow a case to proceed as a class

[39] Plaintiffs boldly state that "[w]hile the defendants may choose to dispute the correctness of Dr. Beyer's analysis of the market, such arguments are not relevant at the class certification stage." Plaintiffs' Memo at 42. After *Szabo* and *West*, that is flat-out wrong. Dr. Beyer's opinions must be far more than merely "plausible" or "not fatally flawed". Rather, under *West*, "[t]ough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives" at the certification stage. *West*, 282 F.3d at 938.

> action, therefore, a judge should make whatever factual and legal inquiries are necessary under Rule 23.

Szabo, 249 F.3d at 675-76 (emphasis in original). As a result, the Court must "receive evidence (if only by affidavit) *and resolve the disputes* before deciding whether to certify the class." *Id.* at 676 (emphasis added).[40]

The *Szabo* Court also rejected a reading of *Eisen* that would prohibit fact-finding at the certification stage whenever there is an overlap with the merits. "But nothing in the 1966 amendments to Rule 23 or the opinion in *Eisen* prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in that rule and exercise the discretion it confers." *Szabo*, 249 F.3d at 677. The Court observed that merits-related findings of fact are routinely made in connection with determinations of jurisdiction and venue. "When jurisdiction or venue depends on contested facts – even facts closely linked to the merits of the claim – the district judge is free to hold a hearing and resolve the dispute before allowing the case to proceed. A motion under Rule 12(b)(6) is unique in requiring the district judge to accept the plaintiffs' allegations; we see no reason to extend that approach to Rule 23, when it does not govern even the other motions authorized by Rule 12(b)." *Id.* at 676-77. In sum, the *Szabo* Court held that neither *Eisen* nor the Rule 12(b)(6) analogy support judicial deference to a plaintiffs' allegations at the class certification stage, nor a judicial unwillingness to resolve merits-related disputes of fact which also bear upon plaintiffs' satisfaction of the Rule 23 criteria.

[40] As the *Szabo* Court noted, "this would be plain enough" if there were a question of numerosity, for example, under Rule 23(a)(1): "A judge would not and could not accept the plaintiffs' assertion as conclusive; instead the judge would receive evidence (if only by affidavit) and resolve the disputes before deciding whether to certify the class. What is true of disputes under Rule 23(a)(1) [respecting numerosity] is equally true of disputes under Rule 23(b)(3). A court may certify a class under Rule 23(b)(3) only if it finds that all of the prerequisites (such as numerosity) have been demonstrated, and in addition, the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Id.* at 676.

In *West*, the Court applied *Szabo's* reasoning to the dueling opinions of expert economists at the class certification stage. The district court in *West* had certified a securities class action, invoking the "fraud on the market" doctrine of presumed, class-wide causation. *West*, 282 F.3d at 937. The question on appeal was whether the market for the defendant's stock was sufficiently transparent to justify use of that presumed-causation doctrine. *Id.* at 938. Each side produced an expert economist to testify on this point and the district court held the very conflict of these expert opinions to be a sufficient predicate for class certification. Citing its prior opinions in *Szabo* and *Isaacs*, the Seventh Circuit disagreed: "That amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert. A district judge may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification also may affect the decision on the merits. Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives." *Id.* at 938.

The *West* Court proceeded to resolve the battle of expert economists at the certification stage, making detailed findings of fact with respect to the market at issue. *Id.* at 939-40. Specifically, the Seventh Circuit's findings included factual determinations with respect to product substitutability, demand curves for the defendant's stock and the absence of a causal link between the defendant's alleged violation of the securities laws and changes in its stock price. "By failing to test for and exclude other potential sources of price movement, Barclay [the plaintiffs' economist] undercut the power of the inference that he advanced. Indeed, Barclay's report calls into question his belief that the market for Jefferson Savings stock is efficient, the foundation of the fraud on the market doctrine." *Id.* at 939-40.[41] On the basis of these specific

[41] In connection with the Shelby and American settlement class orders, plaintiffs attempted to distinguish *West* as involving a securities fraud claim rather than an antitrust claim. *See* Plaintiffs' Opposition to Non-Settling

findings of disputed, economic fact, the *West* Court reversed the district court's class certification order.

Szabo and *West* have been highly influential in other circuits. In *In re Initial Public Offerings Securities Litigation*, 471 F.3d 24 (2d Cir. 2006), the Second Circuit recently reversed course and adopted the reasoning of *Szabo* to require resolution even of merits-related factual disputes at the class certification stage. The Court began with the basic propositions, drawn from *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160-61, 102 S.Ct. 2364 (1982), that "actual, not presumed, conformance with Rule 23(a) remains . . . indispensable" and that "the certification decision requires 'rigorous analysis.'" *IPO Securities Litigation*, 471 F.3d at 33. In other words, "the important point is that the requirements of Rule 23 must be met, not just supported by some evidence." *Id.*

Like the Seventh Circuit in *Szabo*, the *IPO Securities Litigation* Court noted that "the statement in *Eisen* that a court considering certification must not consider the merits has sometimes been taken out of context and applied in cases where a merits inquiry either concerns a Rule 23 requirement or overlaps with such a requirement." *Id.* at 34. This flawed premise then served as the basis for subsequent opinions that "condemned 'statistical dueling' between experts" at the certification stage and prohibited the resolution even of factual disputes relevant to Rule 23 analysis if those disputes also related to the merits. *Id.* at 35-36.

Defendants' Motion for Reconsideration of Orders Granting Preliminary Approval to Settlement Agreements and Certifying Classes as to American Concrete and Shelby Gravel [Document No. 463, filed December 10, 2007]. This is a distinction without a difference. The economic issues faced by the *West* Court in connection with determining the applicability of the securities "fraud on the market" doctrine were conceptually quite similar to the question of class-wide impact presented here. In both contexts, the question is whether the market(s) at issue are sufficiently cohesive and transparent to justify a class-wide presumption of harm. The *West* Court thus examined several of the very same economic issues, substitute products, demand elasticity and "potential sources of price movement", as are presented by the conflicting expert opinions in this case. The *West* Court resolved those conflicting expert opinions by making specific, economic findings of fact at the certification stage. Thus, the mere fact that this case does not involve a securities fraud claim does not dispense the Court from making similar findings of fact here.

After surveying *Szabo* and the other recent case law, however, the *IPO Securities Litigation* Court explicitly renounced this approach. *Id.* at 37-39. On the basis of this survey, the Second Circuit concluded:

> Although there are often factual disputes in connection with Rule 23 requirements, and such disputes must be resolved with findings, the ultimate issue as to each requirement is really a mixed question of fact and law. . . . Of course, in making such a ruling, the judge often resolves underlying factual disputes, and, as to these disputes, the judge must be persuaded that the fact at issue has been established. The same approach is appropriate for Rule 23 requirements.
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> With *Eisen* properly understood to preclude consideration of the merits only when a merits issue is unrelated to a Rule 23 requirement, there is no reason to lessen the district court's obligation to make a determination that every Rule 23 requirement is met before certifying a class just because of some or even full overlap of that requirement with a merits issue. We thus align ourselves with *Szabo, Gariety,* and all of the other decisions discussed above that have required definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues. As *Gariety* usefully pointed out, the determination as to a Rule 23 requirement is made only for purposes of class certification and is not binding on the trier-of-fact, even if that trier is the class certification judge.

IPO Securities Litigation, 471 F.3d at 40-41 (citing *Gariety v. Grant Thornton LLP*, 368 F.3d 356, 366 (4th Cir. 2004)).[42]

The holdings of *Szabo*, *West* and *IPO Securities Litigation* are in accord with the overwhelming majority of recent appellate authority from other circuits. These cases likewise support the requirement for findings of disputed fact at the class certification stage, even if an

[42] The *IPO Securities Litigation* Court analogized findings of fact made for purposes of class certification to the findings a Court makes in equity in ruling on a motion for a preliminary injunction. "A trial judge's finding on a merits issue for purposes of a Rule 23 requirement no more binds the Court to rule for the plaintiff on the ultimate merits of that issue than does a finding that the plaintiff has shown a probability of success for purposes of a preliminary injunction". *IPO Securities Litigation*, 71 F.3d at 39.

overlap with the merits is involved, including the specific requirement that the court resolve a "battle of experts" at the certification stage. *See, e.g., IPO Securities Litigation*, 471 F.3d at 42 ("We also disavow the suggestion in *VISA Check* that an expert's testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed. A district judge is to assess all of the relevant evidence admitted at the class certification stage and determine whether each Rule 23 requirement has been met. . . ."); *Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307, 311-313 (5th Cir. 2005) ("Although the Court's determination for class certification purposes may be revised (or wholly rejected) by the ultimate fact-finder, the Court may not merely presume the facts in favor of an efficient market" in order to certify a class); *Rodney v. Northwest Airlines, Inc.*, 146 Fed.Appx. 783, 791-92 (6th Cir. 2005) (weighing conflicting testimony of experts at the class certification stage and denying certification in an antitrust case where plaintiff's economist "cannot prove the class issues predominate the damages element because his experts have not agreed on a formula for computing damages").[43] What do plaintiffs have to say about this immense weight of recent authority? Not one word.

[43] *See also, Blades v. Monsanto Co.*, 400 F.3d 562, 574-75 (8th Cir. 2005) (resolving conflicting expert opinions in a price fixing case to deny certification where plaintiffs' "expert did not show that other common evidence could fill the gap in proof of class-wide injury that is left by appellants' evidence that appellees performed their price-fixing agreement as to some (but not all) list prices. . . . We have stated that in ruling on class certification, a court may be required to resolve disputes concerning the factual setting of the case. This extends to the resolution of expert disputes concerning the import of evidence concerning the factual setting – such as economic evidence as to business operations or market transactions."); *Gariety*, 368 F.3d at 366-67 ("The factors spelled out in Rule 23 must be addressed through findings, even if they overlap with issues on the merits"); *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294, 307 (5th Cir. 2003) (denying certification in an antitrust case based on the finding that plaintiff's proposed damage formula "makes no effort to adjust for the variegated nature of the businesses included in the classes," thus precluding common, formulaic proof of class-wide impact); *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 350 F.3d 1181, 1188 n. 15 (11th Cir. 2003) (in vacating class certification in a Section 1 antitrust case, the Court noted that the "trial court can and should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied"); *Weisfeld v. Sun Chemical Corp.*, 84 Fed.Appx. 257, 261-64 (3d Cir. 2004) (rejecting the *Bogosian* presumed impact approach, the Court weighed conflicting expert testimony at the certification stage, denying certification because plaintiffs' expert's "declaration contains only bare conclusions and a statement that the expert 'proposes' to use a multiple regression model (which may not take into account all relevant variables). Such support is insufficient to satisfy the predominance requirement of Rule 23(b)(3) in this case"); *Heerwagen v. Clear Channel Communications*, 435 F.3d 219, 232-33 (2d Cir. 2006) ("The comparison of the weight of the experts' testimony here did not amount to error inasmuch as the district court was resolving the sufficiently independent question of whether plaintiff had

IV. Criminal Convictions Do Not Establish Critical Elements Of Civil Liability: Standing, Causation/Impact And Antitrust Injury

Plaintiffs present a lengthy discussion of facts (and multiple-hearsay "facts")[44] drawn from the criminal investigation that has almost no relevance to class certification. This is so because the elements required to prove a criminal violation of § 1 of the Sherman Act and to prove a claim for damages under § 4(a) of the Clayton Act[45] are different. While criminal convictions may rest solely on a § 1 violation – an agreement in restraint of trade – § 4 requires the additional showing of standing, causation/impact and antitrust injury-in-fact. *Atlantic Richfield Co. v. USA Petroleum Co*., 495 U.S. 328, 341-42, 110 S. Ct. 1884, 1893 (1990) ("We also reject respondent's suggestion that no antitrust injury need be shown where a *per se* violation is involved. The *per se* rule is a method of determining whether § 1 of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages under § 4 of the Clayton Act.").[46] A § 1

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made a proper showing of predominance pursuant to Rule 23(b)(3)"); *Newton v. Merrill Lynch Pierce Fenner & Smith*, 259 F.3d 154, 188-89 (3d Cir. 2001) ("In a sworn declaration plaintiffs' expert provided no model formula, but instead projected that he could devise a formula that would measure damages among the class and serve as a plan for allocation. We are not convinced. But even if plaintiffs could present a viable formula for calculating damages (which they have not), defendants could still require individualized proof of economic loss").

[44] The Court should exclude from evidence and decline to consider plaintiffs' triple-hearsay references to the FBI 302 forms. These statements purport to reflect accounts given (1) by out-of-Court declarants (industry participants), (2) as recorded by other out-of-Court declarants (the FBI agents) and then (3) purportedly authenticated by a third out-of-Court declarant (Mr. Levin), who has no personal knowledge of the matters asserted. Plaintiffs do not even attempt to point to a hearsay exception applicable to each of these three layers of hearsay. No such exception applies. The statements are not "against interest" within the meaning of Fed. R. Evid. 804(b)(3) because they were made as a part of the declarants' cooperation with the criminal investigation pursuant to leniency and/or plea agreements. *See, e.g., State of West Virginia v. Meadow Gold Dairies Inc.*, 875 F.Supp. 340, 347-48 (D. W.V. 1994) (statements made by witness to government antitrust investigators were not "against interest" within the meaning of Rule 804(b)(3) where the witness testified in order to avoid criminal prosecution). Nor are the Form 302 statements admissions by a party-opponent within the meaning of Rule 801(d)(2) since they were not made "during the course and in furtherance of the conspiracy" but rather during the course and in furtherance of the government's investigation. The Court should not consider the Form 302 statements in ruling on plaintiffs' motion for class certification. Moreover, neither plaintiffs nor Beyer established that economists rely on such triple-hearsay.

[45] Sherman Act, 15 U.S.C. § 1; Clayton Act, 15 U.S.C. § 15(a).

[46] *See, also,Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697 (1977) ("Plaintiffs must prove *antitrust* injury, which to say injury of the type the antitrust laws were intended to prevent

violation is a necessary, but insufficient, predicate for civil *liability* (not merely "damages") under § 4. *See* II Areeda & Hovenkamp, *Antitrust Law* (2d), ¶¶ 303(b)(2), 303(d) and 335(a) (2000) (while a criminal prosecution may rest on violation of § 1, private actions require a showing of standing, causation/impact and antitrust injury); *4 Callmann on Unfair Competition*, § 23:5 (4th Ed. 2005) ("[T]he adverse result of a prior governmental proceeding is applicable only to the issue of the defendant's guilt, *i.e.*, the finding that his conduct was in violation of the antitrust laws. In any subsequent private action, it is still the plaintiff's burden to establish injury to his own business or property and its casual relationship to the defendant's antitrust violation").

Throughout their brief, plaintiffs attempt to conflate the distinct elements of a private action under the Clayton Act, suggesting that because price fixing is a *per se* Sherman Act § 1 violation, the distinct civil liability elements of standing, causation/impact and antitrust injury-in-fact are therefore presumed.[47] That is wrong. As cases such as *Atlantic Richfield*, *Kochert* and *MCI Communications* hold, private standing, causation/impact and antitrust injury-in-fact are *not* presumed even in cases of established, underlying violations of §§ 1 and 2 of the Sherman Act (including *per se* violations). When the elements of civil liability are superimposed on Rule 23's requirements, including that impact be shown by common proof for class certification, plaintiffs face a daunting burden.

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and that flows from that which makes the defendants' acts unlawful") (emphasis in original); *Kochert v. Greater Lafayette Health Services, Inc.*, 463 F.3d 710, 718 (7th Cir. 2006) (to establish civil liability, an antitrust plaintiff must prove standing, a causal connection between the alleged violation and harm to the plaintiff, the directness of that causal link and antitrust injury-in-fact); *MCI Communications v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1161-64 (7th Cir. 1983) (civil antitrust plaintiff must establish that its alleged harm was caused by the defendants' unlawful acts and the Court must disaggregate any harm caused by other factors); *State of Alabama v. Bluebird Body Company, Inc.*, 573 F.2d 309, 327-28 (5th Cir. 1978) (even where a Section 1 conspiracy is established, "each plaintiff must still prove that this conspiracy was actually implemented in his state and that it did in fact cause him injury"); *Butt v. Allegheny Pepsi Cola Bottling Co.*, 116 F.R.D. 486, 491 (E.D. Va. 1987) ("Whereas proof of the existence of a price fixing conspiracy is sufficient to support a criminal conviction, it is not sufficient to support recovery in a civil suit. In a private antitrust action, the gravamen of the complaint is not the conspiracy; the crux of the action is injury, individual injury").

[47] *See* Plaintiffs' Memo at 5 (citing *Denny's Marina Inc. v. Renfro Products, Inc.*, 8 F.3d 1217 (7th Cir. 1993). *Denny's Marina* just repeats the *per se* rule. It has no bearing here.

V. A Class Cannot Be Certified Without A Showing Of Class-Wide Impact By Common Proof: Plaintiffs Make No Such Showing

A. Industry Characteristics Indicate Where Common Proof Of Impact Impracticable And No Class Can Be Certified

The focus of the case law applying Rule 23's standards to price fixing allegations is on the predominance requirement of Rule 23(b)(3). The cases require that common proof be used to demonstrate antitrust impact (or cause-in-fact) on a class-wide basis before certification is appropriate. If individual, transaction-specific inquiry is necessary in order to establish impact/causation then class treatment is impracticable. The leading cases establishing this method of analysis are *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977) and *State of Alabama v. Bluebird Body Company, Inc.*, 573 F.2d 309 (5th Cir. 1978). While a detailed analysis of the case law follows, the substance of the courts' reasoning can be quickly capsuled.

Several well-recognized factors are indicative of industries or markets where common proof of a class-wide impact is impossible and individualized, customer- or transaction-specific inquiry is necessary in order to establish any cartel effect. In general terms, these factors are:

(1) There is not a homogeneous or commodity product involved and too many variations in the product, its components (*e.g.*, a bundled product of goods and services), or customer-specific requirements exist to allow for generalized, class-wide proof of impact;

(2) A plurality of product or geographic markets, or variations in distribution channels, may preclude common proof of class-wide impact because the competitors and supply/demand factors differ by customer and jobs;

(3) Even given a conspiratorial agreement with respect to a list or base price on certain products, individualized negotiations occurred resulting in various transaction prices and discounts, which in turn reflect variations in customer size, purchase volume and/or bargaining strength/skill, all of which militate against common proof of class-wide impact;

(4) The manner of purchase differs among putative class members in some material way, *e.g.*, direct versus indirect purchasers, end-users versus distributors, bid or auction purchasers versus individually-negotiated transactions, fixed term versus

spot purchasers, retail versus wholesale purchasers, or component purchasers versus finished-product purchasers; and

(5) Questions of variable supply and demand elasticity, as affected by viable product substitutes, or ease of market entry for non-members of the cartel, may preclude use of a common, class-wide approach to proof of causation/impact.

Perhaps the single most influential case is *Bluebird*, where the Fifth Circuit reversed certification of a price fixing class of school bus body purchasers. The *Bluebird* Court begins its discussion by noting that the existence of a price-fixing conspiracy is not enough, taken alone, to establish civil liability. Rather, "'liability' for Section 4 purposes means a showing of both an antitrust violation and the fact of damage. The term 'fact of damage' can be likened to the causation element in a negligence cause of action. The term simply means that the antitrust violation caused injury to the antitrust plaintiff." *Bluebird*, 573 F.2d at 317; 15 U.S.C. § 15(a) (private standing is limited to persons injured "by reason of" antitrust violations).[48]

In its predominance inquiry, the *Bluebird* Court looked to whether "generalized proof" of causation/impact could occur on a class-wide basis given the nature of the product and industry in question. The Court held that such proof was not possible because there was no homogeneous or undifferentiated product (different states and school districts had different specifications for

[48] On this basis, the *Bluebird* Court rejected the common plaintiff's argument in support of certification that individual issues can be avoided where the trial of liability and damages is bifurcated and a class certified solely for "core" or "liability" issues. Under Section 4 of the Clayton Act, the concept of antitrust "liability as embracing common causation/impact is not changed by a decision to bifurcate" and thus "bifurcation to separate juries of liability and damages in an [antitrust] case inevitably produces the possibility that in the liability phase, the first jury might find that there was such an injury, while the second jury might on the same evidence of injury in the damage phase, find none." *Bluebird*, 573 F.2d at 318. In such circumstances, a bifurcation of "liability" and "damages" to facilitate certification would violate the Reexamination Clause of the Seventh Amendment. *Id.* at 317-18. The Seventh Circuit has likewise concluded that the Seventh Amendment prohibits bifurcation or issue certification to facilitate class treatment where there is a factual overlap between liability and damage questions. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1302-04 (7th Cir. 1995) ("The right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury impaneled to hear them, and not reexamined by another finder-of-fact. . . . The [class certification] plan of the district judge in this case is inconsistent with the principles that the findings of one jury are not to be reexamined by the second, or third, or n'th jury"). *See also, Castano v. American Tobacco Co.*, 84 F.3d 734, 750-51 (5th Cir. 1996) (Seventh Amendment prohibits bifurcation of liability and damage issues to facilitate class certification where issues such as causation would likely require a second fact-finder to reconsider findings of fact by the "liability" trier-of-fact).

bus bodies) and there were different purchase procedures in different product markets (some by competitive bidding, some by individual negotiation and some purchasers providing no express guidelines at all). As a result, the Court found that even given a common issue of "conspiracy" to violate Section 1, the question of causation/impact would have to be proven on a customer-specific basis, degenerating into an endless series of mini-trials. "While a case may present a common question of violation, the issues of injury and damage remain the critical questions in antitrust cases *and are always strictly individualized*." *Bluebird*, 573 F.2d at 326 (emphasis added). On this basis, the Court found plaintiffs had not satisfied the predominance requirement for class certification.[49]

The analysis of the other leading case, the Fourth Circuit's decision in *Windham*, is quite similar. This case involved a price fixing conspiracy among tobacco growers in South Carolina. In denying class certification due to plaintiffs' failure to meet the predominance requirement, the Court noted that tobacco is a non-standardized product, coming in a variety of different grades, that the tobacco was sold in 11 distinct geographic markets in South Carolina and that variations in transaction price occurred due to a bid- or auction-style sale procedure. *Windham*, 565 F.2d at 62-63. Because of these differences, the Court found generalized proof of "direct injury" to be impossible and hence no predominant issue was present. Differences in the grades and quality of product, the plurality of geographic markets and the dispersion of transaction prices resulting from auction meant that "the issue of damages and impact does not lend itself to such a

[49] The Court explained that the requirements of Section 4 itself act to prevent a "common" issue of "conspiracy" or Section 1 violation from predominating for purposes of analysis under Rule 23(b)(3). "Proof of a violation of the Sherman Act standing alone does not establish civil liability under Section 4 of the Clayton Act. There must under Section 4 be proof of 'injury to business or property' before a Sherman Act violation becomes cognizable as a private civil remedy. Awareness of the distinction between conduct that violates Section 1 of the Sherman Act and the elements which establish liability in private party litigation under Section 4 of the Clayton Act, is vital." *Bluebird*, 573 F.2d at 317. Where a Section 4 private action is concerned, while there may be a common question of a Section 1 violation, "the issues of injury and damage remain the critical questions in antitrust cases," going to the plaintiffs' standing as well as to causation/impact, "and are always strictly individualized." *Id.* at 318.

mechanical calculation, but requires separate mini-trials," which would be unmanageable. *Id.* at 67-68.

The *Windham* Court also rejected liability-damage bifurcation or issue certification as an answer to the predominance of individualized questions on much the same basis as *Bluebird.* "In a private antitrust suit, there is no neat dividing line between the issues of liability and damage and because of the difficulty of establishing this dividing line, any severance of issues in such a case must be approached with trepidation. In this case, there is such an intertwining of the two issues of liability and damages. . . ." *Id.* at 71. As a result, once again, plaintiffs were unable to meet the predominance requirement for certification. *See also Bluebird,* 573 F.2d at 318 ("It is exactly [the] possibility of disparate findings [by 'liability' and 'damage' juries] that prompted this Court to earlier say that in a private antitrust suit there is no neat dividing line between the issue of liability and damages").

The reasoning of *Bluebird* and *Windham* was applied most recently in *Blades v. Monsanto Co.,* 400 F.3d 562 (8th Cir. 2005) to deny class certification in a price fixing case. The Court stated that while a Section 1 violation is established even if the agreement to restrain trade is "wholly nascent or abortive", this is immaterial to the certification analysis in a private action because "proof of conspiracy is not proof of common injury." *Id.* at 572. The Court then weighed the opinions of rival experts at the certification stage to conclude that plaintiffs had failed to show that the impact or effect of the Section 1 violation could be demonstrated on a class-wide basis. *Id.* at 575.

The *Blades* Court so concluded because: (1) "the genetically modified seeds are not homogeneous products. The market for seeds is highly individualized depending upon geographic location, growing conditions, consumer preference and other factors"; (2) as a result

of individual negotiations, some sellers "gave discounts or rebates to certain farmers to offset any alleged premium, and . . . some farmers in fact paid no premium"; (3) the seeds were not offered for sale at a uniform price and price lists "did not reflect the actual price paid by [purchaser] farmers"); (4) a post-judgment "claims procedure" could not account for individual issues because the amount of any overcharge attributable to the conspiracy "is relevant to a determination of impact, an essential element of a price fixing claim, and is not merely an assessment of the amount of damages, which may be properly ascertained at a later time." *Id.* at 569-70.

In face of these customer- and transaction- specific variations, plaintiffs' expert, like Dr. Beyer in this case, attempted to establish that proof of causation/impact could occur on a common, formulaic basis for all putative class members. The Court rejected this argument because "the evidence presented . . . showed that supply-and-demand conditions for seed sales varied to such an extent that the 'but-for' prices could be determined only through individualized inquiries for each potential class member." *Id.* at 570-71. In making this inquiry, "the variety of GM seeds purchased, geographic location, growing conditions and the terms of the purchase are all relevant to a determination of impact and cannot be shown with common proof on a class-wide basis." *Id.*

Moreover, even evidence that the conspirators adhered to their agreement in violation of Section 1 to some extent "does not make the case – which appellants must make in order to certify the proposed classes – that appellees' adherence extended to hundreds of list prices." *Id.* at 573. Rather, the evidence reflected that the defendants' performance of their agreement extended to some prices, but not to others. In these circumstances, "it is clear that some potential class members would require particularized evidence showing that the specific list prices

pertinent to them were included in any performance of the appellees' agreement to inflate prices." *Id.* at 574.

B. Ready-Mixed Concrete Is Not A Homogeneous, Commodity Product

The evidence here is similar to that prompting denial of class certification in *Bluebird*, *Windham* and *Blades*. Contrary to Dr. Beyer's cursory, largely unsourced and certainly untested (or maltested) conclusions, the evidence establishes that ready-mixed is not homogenous or undifferentiated. There is no such thing as "basic concrete" from which all other concrete is made or priced. Rather the term "concrete" describes materials made using cementitious material in combination with fine and coarse aggregates and water. There are different types of cementitious materials, including Portland cement (at least five different types), slag, and fly ash, and there are many different types of aggregates, from sand to gravel to stone to man-made materials. (Browne Dep. 54-59, 299-300; Price Irving Dep. 138; Scott Hughey Dep. 254; Chris Beaver Dep. (rough) 10-12; Grote Dep. 51-53; Umbeck App. IV.)[50] The various cements and aggregates each have different grades and performance characteristics that make them suitable for different applications.[51] As a result, there are thousands of possible mixes -- IMI alone has over 1000 mixes -- and only a handful are on the published price list.[52] And contrary to Dr. Beyer's unsupported surmise, not every supplier can or will supply every mix.[53]

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[50] Contrary to popular understanding, concrete does not "dry;" rather, it cures as the result of a chemical reaction, hydration, which is why time of transportation is critical. Concrete begins to harden regardless of the turning drum. In fact, the turning drum is part of the manufacturing process that assists hydration.

[51] For example, common river gravel is generally not suitable for exterior concrete because it can contain materials that cause cracking in freeze/thaw conditions.. (Browne Dep. 297-298)

[52] (Browne Dep. 50-51.) For example, IMI has several hundred "4000 psi" mixes with a large price variation among them –$60 to 800/yard -- depending upon different material costs and bundled services, none of which appear on the price list. *Id.* at p. 50-51. Rather, the price for such transactions is based on individual negotiations with the customer. *Id.* at p. 48 (annual price contract with customers based on individual negotiations, not lists); p. 48 (price lists were not the basis of Mr. Browne's bids). Price Irving likewise testified that of the thousand-plus products that IMI offers over a thousand do not appear on the price list. (Price Irving Dep. 405.) Bob Mathews testified that Beaver has several hundred mixes which are not reflected on the price list. (Mathews Dep.

The reason for the large variety of mixes is that although concrete is ubiquitous, it is not uniform in its application.[54] Sidewalks, curbs, the footers and slabs beneath tract homes, highways, highway bridges, warehouses, the structural support of Conseco Fieldhouse, the columns and floors of the AUL Building, and parking garages all contain concrete. But each of these applications requires a different mix because the concrete is asked to do different things depending on the application. (*See* Browne Dep. 304-305.)

Because concrete is a highly perishable material – a typical mix will begin to set in 45 minutes to 1 ½ hours, once the ingredients are placed into the mixer truck, and depending on the ambient temperature this can vary by 50% – a ready-mixed customer doesn't just buy a particular mix, but a particular mix to be delivered at particular times (even back-to-back over a day or more), at a particular place, in a particular consistency that is workable for the intended application. Thus, ready-mixed concrete is more than just "concrete;" it is a "complex 'delivered package' with a large service component." (Umbeck Rep. 11-12; Marshall Rep. ¶¶ 31, 33-36.)[55]

168-169.) Scott Hughey testified that Carmel had several hundred mix designs for which there was no list price. (Hughey Dep. 282, 433.)

[53] For example, Carmel Concrete could not attain certain concretes with a high strength, and it could not run granulated slag because of bin capacity limitations. (Hughey Dep. 289. *See also*, Shank Dep. 343-344; Chris Beaver Dep. (rough) 10-12.) Further, only certain suppliers were capable of producing a 7,000 psi concrete. (Browne Dep. 66-67.) Even if every supplier could provide every mix, there would be a cost of doing so that would affect the price and that Dr. Beyer did not explore. (Umbeck Rep. 15-16.)

[54] (Browne Dep. 51-52 ("Q. [by Mr. Harris]: How many total mixes does IMI – or did IMI have during the time period 2000 through 2004 approximately? A. [by Mr. Browne]: Approximately 1,000. Q. Why so many? A. Different contractors, different requirements, different architects, different engineers. They all have to be a little different. All the contractors want something a little different . . . That's why we require our guys to get a copy of the specs because it is not the same").)

[55] Among other things, this service package includes the timing of the delivery (including nights and weekends), the number and location of plants, the number and kind of trucks that will be used, the frequency of delivery (including 24 hours a day), quality control, how the producer will handle unexpected problems that might occur during the delivery (like unexpected traffic, or rain), whether the employees are union, the terms of payment and penalties for late payment by the customer, which party will assume liability for product problems that might arise because of unexpected product failure, the experience of the quality control personnel and whether they will be on the project site to monitor the ready-mixed properties when it is delivered, whether the quality control people can change a mix in the middle of a pour, and familiarity and past experience with a supplier. (*See* Umbeck Rep. 11-12 and citations therein; *see also* Marshall Rep. ¶¶ 31, 33-36 and citations therein)

Whenever there is a service component, products can no longer be viewed as undifferentiated. (Umbeck Rep. 11-12). These variations in service affect IMI's costs and hence the price at which the bundled product is sold. (Browne Dep. 52, 70.)[56]

Moreover, contrary to Dr. Beyer's representation, purchasers of ready-mixed – which include a broad spectrum, from homeowners to national construction firms – consider a wide variety of factors other than price when deciding which supplier to use. These include:

- Which suppliers they have used in the past (Grote Dep. 29, 58; Salazar Dep. 73; Marshall Rep. ¶ 36; *Chad Syverson*, "Markets: Ready-Mixed Concrete," *Journal of Economic Perspectives*, Vol. 22, No. 1. (winter 2008));

- Which suppliers can supply the particular mixes required for the project (*See e.g.*, Hughey Dep. 289; Shank Dep. 343-344; Chris Beaver Dep. (rough) 10-12; Browne Dep. 29-31, 66-67; Umbeck Rep. 15-16);

- Which suppliers can design particular mixes for a project (often to demanding specifications provided by an architect/engineer, and adjusted by the contractor) (*See e.g.*, Browne Dep. 289-290; Hughey Dep. 271-272; Salazar Dep. 59-60, 132-133; Fletcher Dep. 36, 48; Kort Dep. 52);

- Which supplier has the closest plants (Salazar Dep. 133; Marshall Rep. ¶ 36);

- Which supplier has the best quality ready-mixed (Grote Dep. 48-49);

- Whether the supplier has union drivers (for union-built projects) (Browne Dep. 29, 67; Hughey Dep. 109, 393-396);

- Which suppliers have referred work to the contractor (Toth Dep. 75, 79);

- Which supplier is reliable and on time (because the cost of labor for finishing concrete can be much higher than the material cost) (Salazar Dep. 50-53);

- With which supplier the contractor has an account/credit (Grote Dep. 58, Salazar Dep. 73, 81, 116-117, 142; Kort Dep.72);

[56] These variations in service affect the producers' costs and hence the price at which the bundled product is sold.

- Which suppliers can provide quality control (both on and off-site) (Hughey Dep. 399);
- Which suppliers have the flexibility to change/adjust mixes in the middle of a pour (Browne Dep. 303-304);
- Which suppliers have plant and truck capacity for large and continuous pours (Shank Dep. 344-345, 348; Browne Dep. 25-27; Hughey Dep. 408);
- Which suppliers have the financial wherewithal to stand behind their products on a large project (Hughey Dep. 419; Toth Dep. 52).

Dr. Beyer's conclusion that price is the determining factor ignores substantial evidence to the contrary.

That ready-mixed is not a homogeneous product is confirmed by the statistical analysis that Dr. Beyer failed to perform. First, as discussed above, because Builders and IMI were able to command price premiums, ready-mixed is not an undifferentiated product. (Umbeck Rep. 4-13, App. II, III, IV.)

Second, Professor Marshall analyzed the transaction data and concluded that price dispersion in the industry is inconsistent with a homogeneous or "undifferentiated" product. (Marshall Rep. ¶ 47.) As Professor Marshall stated:

> Defendant transaction data show that customers did not purchase ready-mix concrete at a single price. In fact, the transaction data demonstrate that a single producer may charge many different prices to different customers for the same product and, perhaps more surprisingly, charge different prices for the same product even to the same customer at the same point in time. Price differences that cannot be explained by differences in product characteristics are evidence that individual transactions are affected by individual transaction-specific factors.

(Marshall Rep. ¶ 48; *see also* ¶¶ 22, 25, 47, 48, 57-51.) Professor Marshall's work also demonstrated that many putative class members were not harmed by the alleged conspiracy, in part because of transaction-specific factors. (Marshall Rep. ¶¶ 76-103.) Unlike Dr. Beyer's *a*

priori assumption of homogeneity, the actual data reflect a broad diversity of products transacted at widely disparate (because individually negotiated) prices.

C. Multiple Product And Geographic Markets Having Different Competitors And Supply/Demand Conditions Preclude Common Proof Of Class-Wide Impact

The courts' reasoning in *Bluebird, Windham* and *Blades* emphasizes that proof of class-wide impact by common evidence is impracticable given a plurality of geographic and product markets. This is so because supply and demand conditions, and indeed the mix of viable competitors, will vary by product and/or geographic market, requiring a transaction-specific analysis in order to establish impact (if any). Once again, as Professors Hausman, Umbeck, and Marshall agree, the evidence shows a multitude of distinct product and geographic markets. (Hausman Rep. ¶ 29; Umbeck Rep. 18-24, App. V; Marshall Rep. ¶¶ 31-58.) Plaintiffs' economic analysis from Dr. Beyer makes no attempt to account for these differences in a purportedly common approach to assessing impact.

Concrete is sold in many different market sectors or "product markets". These include an initial division among commercial, residential and highway/bridge markets.[57] The commercial and residential product markets may be further sub-divided according to the nature of the end-use of the concrete and the type of structure involved. (Browne Dep. 86-88.) These product market distinctions are so well recognized as to serve as a basis for industry reporting of yardage sold.[58] Most importantly, each of these distinct product markets will have different sets of

[57] Browne Dep. 86-88.

[58] Exhibit 163 to the Beyer deposition is a trade report produced by McGraw-Hill Co. which divides concrete sales into residential, commercial and non-building categories, with the indicated sub-categories for "stores", "warehouses", "offices", "bridges" and the like. The Dodge reports reflect that the mix of products varies by end-use and geographic area. In the commercial category there are distinct product markets for office buildings, warehouses, factories and other heavy industrial applications, public/institutional work (*i.e.*, schools, power plants, water treatment facilities and hospitals) large and small retail establishments, hotels, parking garages and bridge/highway work. The residential product markets are divided between multi-family and single-family

competitors,[59] which will vary by geographic location and required mix designs/service packages." *Id.*[60]

The differing geographic markets in which ready-mixed concrete is sold also affects prices in a transaction-specific manner that cannot be captured by common, class-wide proof. As both government regulators and industry participants have recognized, geographic market distinctions are driven by the highly perishable character of ready-mixed concrete. In its Competitive Impact Statement submitted in *United States v. Cemex, S.A.B. de C.V.*, Case No.: 1:07-cv-00640 (D. D.C. 2007), the government recognized distinct geographic markets for antitrust purposes within a given metropolitan area for the sale of ready-mixed concrete.[61] As in *Cemex,* the evidence here shows many distinct geographic markets within the area plaintiffs' class definition attempts to treat as a unit. The result is a different mix of competitors, and correspondingly different supply and demand conditions, within each discrete area.

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development and subdivided between customer builders and tract developers. Each of these distinct product markets will require a different package of mix designs and associated services. Ex. 163.

[59] In certain heavy commercial applications, for example, the highly specialized mix designs, "bundled" with service components such as a high volume and rate of pour, will dramatically limit the viable competitors. Mike Browne of IMI noted several examples of this phenomenon, including IMI's work at Lucas Oil Stadium, the Conseco fieldhouse and the airport parking garage. (Browne Dep. 29-33, 312.) As a result of the customers' stringent product and service requirements for certain jobs, Mr. Browne testified that only IMI, Prairie or Carmel could do the work. *Id.* pp. 29-30. Carmel's Scott Hughey agreed. (Hughey Dep. 401.) These competitive limitations in specific product markets in turn affect price. (Browne Dep. 86-88.) In addition, the demanding requirements of such jobs, including stringent quality control requirements, often allow the few competing suppliers to command a price premium based in part on the individual supplier's reputation and ability to handle complex pours. (Browne Dep. 17-18, 22-24, 27-28, 37, 45, 73-77, 78, 303; Hughey Dep. 399.)

[60] For example, Scott Hughey testified that Carmel could not produce certain high strength products using granulated slag due to a lack of bin capacity. (Hughey Dep. 289.) Similarly, Beaver's Bob Matthews testified that Beaver did not compete for large commercial projects. (Matthews Dep. 20.)

[61] *See Id.* at § II.B.2.a and 3.a. ("Due to its perishability the cost of hauling concrete, depending on the size of the city and the associated traffic, the distance concrete can reasonably be transported for large projects, such as highways, bridges, and high-rise buildings in a metropolitan area, is limited to the metropolitan area and, in many cases, to only portions of that area"); *Chad Syverson*, "Markets: Ready-Mixed Concrete", *Journal of Economic Perspectives*, Vol. 22, No. 1, 217 (Winter 2008) ("But ready-mixed concrete does have one remarkable characteristic: other than manufactured ice, perhaps no other manufacturing industry faces greater transport barriers. The transportation problem arises because ready mixed concrete both has a low value-to-weight ratio and is highly perishable – it absolutely must be discharged from the truck before it hardens. These transportation barriers mean ready mixed concrete must be produced near its customers").

Due to the perishibility of ready-mixed concrete, who can compete for a specific job changes depending on the location of the job. (Browne Dep. 25-27.) For example, Carmel typically provided service only in a 20 mile radius around any one of its plants. (Hughey Dep. 50-51, 270.) The location of Beaver's plants meant that it could not compete effectively in certain parts of Marion, Boone, and Madison counties. (Matthews Dep. 18-19, 22-23; Chris Beaver Dep. (rough) 66).[62] Moreover, there is considerable variability in plant capacity. (Hughey Dep. 58 (Carmel's plants varied in capacity from 65 up to 230 yards per hour)). A high rate of pour may require use of multiple plants. (Hughey Dep. 408.) To determine the effect of plant/job location and capacity on price, and to differentiate it from any cartel effect, again requires an individualized inquiry incompatible with class treatment. (Marshall Rep. ¶¶ 45, fn. 76.)

In addition, competition did not stop with defendants or at the borders of the ten-county area defined by plaintiffs' counsel. The most striking example of internal competition is Lebanon Concrete which operated two plants – *i.e.* as many as Beaver and American – and was not acquired by Prairie until 2003. Then there were numerous other competitors just outside the borders that could and did compete for jobs in the ten-county area. Professor Umbeck has identified numerous non-defendant competitors who could have competed in different parts of the ten-county area based upon the various geographic service limitations posited by Dr. Beyer. (Umbeck Rep. 23, App. VI.)[63] These differences in competitive conditions in different

[62] IMI's Price Irving also noted that depending on temperature, humidity and other variables transit time from plant to job site could be as little as 15 or as much as 45 minutes. (Price Irving Dep. 292-93. *See also,* Hughey Dep. 51 (noting "that our product is perishable and [there is] a time factor"), 270 (Carmel tried not to go beyond a 20 mile radius from its plants – "it's not good for any of us").)

[63] Scott Hughey identified Baja, Plainfield Ready Mix, Lebanon Concrete, Cox and Atlas as Carmel's competitors. (Hughey Dep. 261, 403-405.) Beaver's Bob Matthews identified Lebanon Concrete as a competitor. (Matthews Dep. 122.) IMI's Mike Browne identified Atlas Ready Mix, Buster's Ready Mix and Cash Concrete as a few of the competitors who, though located outside the ten-county area, regularly competed for work inside it. (Browne Dep. 83-85.)

geographic areas present yet another reason why a common, formulaic approach to class-wide impact is not viable here. Rather, an individualized inquiry, by customer and transaction, is necessary in order to assess any cartel impact because, in many cases, non-cartel members could and did compete for work. (Hausman Rep. ¶¶ 31-35; Umbeck Rep. 23, App. VI; Marshall Rep. ¶¶ 43-45.[64])

The conclusion that there were multiple product and geographic markets is supported by the transaction data. Dr. Beyer did not analyze this data, but Professor Marshall did. Professor Marshall concludes:

> Not all ready-mix concrete companies can supply to all types of projects. Certain types of large projects, such as highways, bridges, and high rise buildings require large volumes of concrete as well as large volumes of daily concrete pours, which involve scheduling frequent truck deliveries. To be able to supply to such projects, the producer must have sufficient production capacity with multiple ready-mix concrete plants in the relevant geographic area, a large truck fleet, a sizeable and well-trained work force, and sufficient financial backing.

(Marshall Rep. ¶ 35.) As a result, "ready mixed concrete suppliers can identify the specific market conditions that apply to each large project (such as the number of suppliers that can potentially service the project's requirements), and bid accordingly. This leads to different competitive conditions faced by customers based on the particular project type and market conditions." (Marshall Rep. ¶ 43.)

[64] Professor's Marshall's analysis is in sharp contrast to Dr. Beyer's mere acceptance of class counsel's definition of one geographic market: "[N]ot all suppliers can cater to all projects. One cannot claim that a particular customer had access to multiple suppliers without an individualized analysis of that customer's project location." (*Id.* at ¶ 45.) Based on the evidence, Professor Marshall concludes that "there likely exist multiple distinct geographic markets, leading to different market conditions." (*Id.*, ¶ 45.) Different supply and demand conditions will prevail in the different geographic markets. (*Id.* ¶¶ 44-45.)

D. Individually Negotiated Transaction Prices Without Reference To List Price Preclude Common Proof Of Impact.

A host of cases deny certification of price fixing classes where individual negotiations occur without reference to a list price.[65] Where actual transaction prices (as opposed to list or "board" prices) are individually negotiated, many courts have held such negotiations to preclude class-wide proof of impact, thus defeating the predominance element of Rule 23 in the price fixing context. *See, e.g., Robinson v. Texas Automobile Dealer's Association*, 387 F.3d 416, 421-24 (5th Cir. 2004) (no predominance established in a price fixing case where "plaintiffs grouped consumers with divergent negotiating histories" and where "the class members' individual negotiation styles prevent the plaintiffs from arguing that all members of the class suffered an antitrust injury").[66]

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[65] *See generally, 5 Moore's Federal Practice (3d)*, Section 23.45[5][c][i], pp. 23-240 to 23-243, describing the class certification analysis used in price fixing cases and similar to the following discussion.

[66] *See also, Exhaust Unlimited v. Cintas Corp.*, 223 F.R.D. 506, 511-514 (S.D. Ill. 2004) (certification denied because no common proof of impact or predominant question existed in price fixing case where transaction prices were individually negotiated and some customers received discounts); *Piggly Wiggly Clarksville Inc. v. Interstate Brands Corp.*, 215 F.R.D. 523, 530-31 (E.D. Tex. 2003) (no predominance in price fixing case where "the final price paid involved many factors including the amount of product purchased, the geographic market, the particular services included with each purchase, delivery costs, the discount negotiated off the wholesale list price, and potentially the negotiating skills of the purchaser and the sales representative. Because of the many individualized factors that establish what each plaintiff actually paid, it will impossible to present evidence in a common manner as to the price each plaintiff would have paid but for the alleged conspiracy"). *Keating v. Phillip Morris, Inc.*, 417 N.W.2d 132, 137 (Minn. App. 1987) (certification of state-law price fixing claims denied where members of the putative class had negotiated non-uniform discounts in certain transactions and a "class action would quickly degenerate into thousands and thousands of individual trials"); *Butt v. Allegheny Pepsi Cola Bottling Co.*, 116 F.R.D. 486, 490-93 (E.D. Va. 1987) (certification of Section 1 price fixing class denied due to potential class members' negotiation of individual discounts and "because the conspirators had cheated and deviated from their agreement, the conspiracy may have been ineffective" as to certain customers. "In the present suit, the possibility that the parties ignored their alleged agreement [to fix prices] and continued to engage in their normal discounting practices introduces enormous additional complications in determining whether individual members of the proposed class were in fact injured"); *Jackshaw Pontiac Inc. v. Cleveland Press Publishing Co.*, 102 F.R.D. 183, 194-96 (N.D. Ohio 1984) (certification denied in Section 1 conspiracy case given price dispersion among customers and because individual negotiations meant "that antitrust injury – the level of price inflation caused by antitrust conspiracy – may differ as to each member of the proposed classes. Accordingly, it cannot be said that common questions of fact and law predominate among members of the proposed classes"); *Galloway v. American Brands, Inc.*, 81 F.R.D. 580, 584-85 (E.D. N.C. 1978) (certification of Section 1 class denied because even given a common question of violation "the court would be required not only to consider the farmers' sales on an individual basis, but also relate those sales to one of the conspiracy violations alleged by representative plaintiff." In a Section 1 conspiracy "the issues of injury and damage remain the critical issues in such a case and are always strictly individualized").

In this case, both Professor Marshall's economic analysis and the undisputed testimony of industry participants is that many transaction prices are individually negotiated without reference to a list price. These negotiations involve a host of customer- and transaction-specific factors not amenable to common or formulaic proof. Mike Browne, who accounted for 25% of IMI's sales during the class period, described the many factors considered in his individual customer negotiations – and list price is not among them. (Browne Dep. 47-48, 168-69 ("my testimony is I didn't use board prices to bid.")[67] Rather, the prices for products designed to customer specification were individually negotiated on a customer- or project-specific basis without reference to list price. (Browne Dep. 15-16, 18, 48-51; Hughey Dep. 433.) Many forms of service and raw materials included in bids likewise do not appear in the price list and reflect transaction-specific customer requirements. (Browne Dep. 50-70.)[68] In sum, list price products

[67] This fact alone distinguishes plaintiffs' reference to *Hydrogen Peroxide*, 240 F.R.D. at 173-74 and *In re Industrial Diamonds Antitrust Litigation*, 167 F.R.D. 374, 383 (S.D. N.Y. 1996) for the proposition that "even where individual contracts are negotiated, the list price will likely and naturally represent a starting point for those negotiations." The undisputed evidence here reflects that the list price was not the starting point for negotiations in many instances. Indeed, the *Industrial Diamonds* Court *denied* class certification with respect to non-list price transactions. *Id.* at 384 ("With respect to the claims of purchasers of non-list price products, however, plaintiffs have not demonstrated that impact may be established through a common proof. GE asserts, and plaintiffs do not seriously question, that it sold thousands of distinct products for which it did set list prices. Many of these products were developed specifically for particular customers. GE set prices for these products based on the cost of production and on negotiations with each purchaser. In order to determine whether purchasers of these products suffered some injury, we would be required to scrutinize each transaction to ascertain whether the purchaser paid a supra competitive price"). Moreover, determining which transactions involved negotiations based on a list price would itself require transaction-specific evidence incompatible with class treatment.

[68] Mr. Browne testified that price lists include only "extremely basic" products and do not account for individual customer specifications. (Browne Dep. 50.) For example, IMI has several hundred different "4000 psi" mixes with a large price variation among them. (*Id.* 51.) In all, IMI has over 1000 different mixes, driven by customer specifications, a few of which are reflected on the price list. (*Id.* 51-52.) The raw materials and service package associated with these different products often increase the costs of production to IMI and thus increase the price. This is true, for example, of different types of cement and aggregative (sand, slag or metal fiber, etc.) and various chemical additives. *Id.* at pp. 53-62. High strength and "low heat" mixes are not found on the list. (*Id.* at 63-65.) Similarly, the cost of service and quality control for many projects are not reflected in list prices. (*Id.* 69-73, 78.)

cannot be sold where individual customer specifications for both raw materials and service go beyond the very narrow range of list price products. (Browne Dep. 295-96.)[69]

Ready-mixed concrete producers must consider some or all of the following factors in individual negotiations with customers and in bidding: (1) raw material costs for the mix design required to meet individual customer specifications for a given project or end-use application (Browne Dep. 52-62)), (2) labor and service costs associated with the project (*id.* p. 25), (3) the customer's past and expected future loyalty (*id.* p. 11), (4) volume and rate of pour required for the job [*id.* p. 17], (5) the individual bargaining strength of the customer's representatives (Hughey Dep. 117; Matthews Dep. 11, 125; Haehl Dep. 110),[70] (6) transportation costs, project and plant locations (Browne Dep. 25-26), (7) who the competitors are in a given location/product market (*id.* pp. 25-27, 85-86), (8) IMI's and its competitors' excess plant and transport capacity or "backlog" at given times/locations (*id.* pp. 36-37; Hughey Dep. 414), (9) QC requirements for the project (Browne Dep., pp. 27-28), (10) the time of day or day of the week the pour occurs (*id.* p. 24; Hughey Dep. 55), (11) the time of year of the pour occurs (Browne Dep. 24), (12) what

[69] Mr. Browne cited the examples of Lucas Oil Stadium, Conseco Field House, the airport parking garage and the Hancock County Public Library as a few instances where list price products could not have met individual customer specifications. (Browne Dep. 29-33, 297-98, 304-05, 312.) Mr. Browne testified that these illustrations are representative of the character of IMI's bid work. (*Id.* 290-291.)

[70] For example, Scott Hughey testified that the cartel agreement excluded particular customers with which Carmel had long-standing relationships. (Hughey Dep. 117.) Beaver's Bob Matthews testified that C.P. Morgan "controlled such a high percentage of our business, we were, quite frankly, scared to death to lose them." (Matthews Dep. 125.) Beaver never raised Morgan's prices. (*Id.* 121-22.) Shelby's Richard Haehl likewise testified that "favored customers got discounts that were greater than $5.50 most of the time." (Haehl Dep. 110.) The record reflects that customer goodwill or "relationship capital" is important in the ready-mixed concrete industry. IMI's Mike Browne considered customer loyalty in offering annual contract prices. (Browne Dep. 11.) IMI attempted to build goodwill with major customers by offering technical consulting to them on projects even when IMI was not in a position, owing to geographic factors, to bid on the job. (Browne Dep. 316-318.) Beaver had a strong relationship with C.P. Morgan, acting as its exclusive supplier, because "we serve them, took care of them, we provide a lot of reports and so on to them of performance by us and by their finishers." (Matthews Dep. 23.) Economists have likewise recognized that relationship capital is critical to pricing in the ready-mixed concrete industry. *See Chad Syverson*, "Markets: Ready-Mixed Concrete", *Journal of Economic Perspectives*, Volume 22, No. 1, 217, 225 (Winter 2008), pp. 217-233.

chemical or other additives are needed for a given end-use application (*id.* pp. 60-61, 65) and (13) the customer's credit worthiness (*id.* pp. 11, 24).

Even in bidding situations where individual negotiations with a customer do not occur, the producer must consider these same factors in determining what price to bid on a particular project. (Browne Dep. 24-27.) In the context of annual contract customers, a list price is often not relevant. Instead, negotiations with the customer will typically begin on the basis of the last price paid by that customer for similar products/service on similar projects in the past. *Id.* pp. 10-11. Consequently, the transaction price ultimately paid on large commercial projects will have nothing to do with a list price and everything to do with customer- and project-specific factors, as described above, including the bargaining skills of the construction contractor's representatives and their relationship with the producer.

Professor Marshall's economic analysis again bears out the testimony of the sales representatives. Unlike Dr. Beyer, Professor Marshall has actually studied the transaction data on this point and his conclusion is that "the defendant data in general revealed that putative class members paid remarkably different prices for identical products. Moreover, even at the *same* point in time, the *same* customer often pays *different* prices for exactly the *same* product from the *same* defendant. This observation implies that, even within a very specific product at a given point in time, prices are highly transaction-specific." (Marshall Rep. ¶ 10.) "Transaction data show that, even within a very specific product, transaction prices vary substantially and, in many instances, bear no relationship to list prices. In addition, some purchasers paid prices for concrete that strongly suggest they were not injured. In general, the data revealed that customer-specific pricing is highly idiosyncratic." *Id.* ¶ 19.

E. Differing Products, Distribution Channels Or Means Of Purchase Preclude Class-Wide Proof Of Impact

Many other courts recognize that a diversity of products, product markets or distribution channels renders certification inappropriate because plaintiffs cannot present common proof of class-wide impact. "The less standardized (more customized) a product is, in the sense that its specifications differ in important respects from purchaser order to purchase order rather than being uniform across orders, the more difficult it will be for the sellers of the product to collude effectively. The heterogeneity of the orders will make it impossible for the sellers to agree upon a single price for all orders." R. Posner, *Antitrust Law (2d)*, p. 75 (2001); *Nichols v. Mobile Board of Realtors Inc.*, 675 F.2d 671, 676-79 (5th Cir. 1982) (class certification denied in a price fixing case because the diversity of products and product markets rendered common proof of impact impracticable. The court so concluded because "the bundle of services actually sold to one seller may be significantly different from the services sold to another seller, even where the same broker is involved" and such bundled services were not "homogeneous and fungible products" susceptible to general, class-wide proof); *Exhaust Unlimited*, 223 F.R.D. at 513 (denying certification due to a "diverse mix of base prices and ancillary charges and of products and services, with total invoice prices varying from customer to customer"); *Burkhalter Travel Agency v. Mac Farms International Inc.*, 141 F.R.D. 144, 153-55 (N.D. Cal. 1991) (certification denied due to differing product markets and differing distribution channels embraced by the proposed class definition: "As defendants have argued, there are significant differences between the markets for macadamia nuts on Hawaii and on the mainland, between large and small purchasers, and between bulk and retail purchasers. In these different markets, defendants price nuts in different ways and purchasers have varying degrees of leverage over defendants. As this action is about price fixing activities conducted by defendants, grouping purchasers in all of

these sub-markets together ignores crucial differences in how defendants set prices for different purchasers. Given the diversity of markets, it can hardly be said that common issues predominate").[71]

In addition to the multitude of products, product markets and geographic markets noted above, ready mixed concrete is sold and distributed through different distribution channels. Some IMI customers have individually negotiated annual prices. (Browne Dep. 10-11.) These prices are the result of individual bargaining with customers based on what price the customer paid last year and projected volumes. *Id.* 10-11. IMI considers any increased raw material and other costs in offering annual prices, as well as a customer's value and loyalty to IMI. *Id.* 10-11. List price has no role in these annual price negotiations. *Id.* p. 48. Other customers do not have annual prices but rather solicit bids from IMI and its competitors for individual projects. *Id.* 11-12.

For bid work, customers will typically ask suppliers to review requests for proposals and specifications on upcoming projects. (Browne Dep. 14-15.) These customer specifications in turn drive the development of a diverse product mix and the wide dispersion of transaction prices

[71] *See also, Kenett Corp. v. Massachusetts Furniture and Piano Movers Association Inc.*, 101 F.R.D. 313, 316 (D. Mass. 1984) (certification of price fixing class denied where the case "involves a bundle of moving services that differs from mover to mover and from customer to customer. Although each service has a specific price fixed by the mover's approved tariff, these prices are only one factor in determining the total price that a customer will pay for a move. A higher hourly rate may be offset by a quicker, more efficient move. Services tailored to a particular customer's needs, (*e.g..*, a truck just large enough for the move), thereby making the most efficient use of resources and avoiding unused capacity, will also affect the total price. Large companies with national reputations may feel less pressure to price their services competitively, while small local companies may be willing to bargain with cost-conscious customers in order to win their business. . . . Because the exact mix of services purchased by each customer is unique, proof of impact can only be made on an individual basis"); *In re Transit Company Tire Antitrust Litigation*, 67 F.R.D. 59, 73-78 (W. D. Mo. 1975) (certification denied due to diversity of products and purchasers: "In this litigation, neither the products involved nor the purchasers are standardized. Rather, the class includes different sizes of transit companies, operating under different conditions throughout the United States, and the products involved, although commonly referred to as 'Special Mileage Commercial Tires' differ in many respects and have been marketed under various arrangements which were reached by different methods at different times"); *School District of Philadelphia v. Harper & Row Publishers, Inc.*, 267 F.Supp. 1001, 1004 (E.D. Pa. 1967) (certification denied in price fixing case due to diversity of products and product markets. There were also differing methods of purchase "such as, by sealed bids solicited by public notice, by bids obtained by solicitation of selected suppliers, by direct purchase from the publisher or from wholesalers or jobbers").

reported in the data by Professor Marshall. (Browne Dep. 51-52; Marshall Rep. ¶¶ 10, 27, 49.) Individual customer specifications are also responsible for the wide diversity of product market requirements. (Browne Dep. 86-88.) Depending upon product market, some customers may offer "second looks" in bidding in an effort to reduce the price or to ensure that a preferred supplier gets the work. (Browne Dep. 157-168, 238; Hughey Dep. 412.) The result is a host of transaction-specific factors which must be considered in order to determine any cartel effect.

F. Available Substitute Products And Ease Of Market Entry Preclude Common Proof Of Class-Wide Impact

Analysis of the relevant product and product market mix is further complicated by the fact that viable product substitutes offered by non-members of the cartel must be considered. As a matter of fundamental economic theory, the availability of substitutes in certain product markets or end-use applications may frustrate enforcement of a conspiracy. *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 656-57 (7th Cir. 2002); R. Posner, *Antitrust Law (2d)*, pp. 148-49 (2001) ("The ability of a group of sellers to collude is limited by the existence of sellers of products that are good substitutes either in consumption or in production. All these additional sellers must be included in order to demarcate a group of sellers that can be assumed to be facing in the aggregate a relatively inelastic demand so that if they colluded they would be able to limit output and raise price above the competitive level. The expanded group is thus a market in the sense, which is the only one relevant to an economic analysis of competition and monopoly, of a group of sellers who have the power to increase the market price by merging or colluding.")[72]

[72] *See also, Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1410-12 (7th Cir. 1995) (product markets must be defined with reference to potential substitute products on both the supply and demand sides of the transaction); *Alaska as Parens Patriae v. Suburban Propane Gas Corp.*, 1995 WL 441987, *8 (D. Alaska 1995) (denying class certification where the relevant product had varying end uses and some putative class members had available substitutes for some uses).

Closely related to an analysis of substitute products is the facility with which non-members of the cartel can enter the market in response to supra-competitive prices. *High Fructose Corn Syrup*, 295 F.3d at 657; R. Posner, *Antitrust Law (2d)* pp. 72-75 (2001) (where market entry barriers are low, supra-competitive prices "would persist for only a short time because the activities that must be coordinated in order to start a new [business] – finding suitable premises, hiring the necessary personnel, financing, making arrangements with suppliers and customers – are few and simple, and the optimum delay between the decision to enter an actual entry is therefore short").[73]

Substitute products are readily available for some end-use applications of ready mixed concrete. (Browne Dep. 40-41.) As Mr. Browne testified, "we compete with asphalt. When we are doing walls, typically there's poured in-place walls, there's block walls, there's brick walls. And a lot of times you're in competition on a building such as this whether you're bidding against cast in place or pre-cast and that is typically – that happens on parking garages as well as larger structures. You're almost always going against pre-cast." *Id.* at p. 41.[74] As Judge Posner notes, economic theory predicts that competition from substitute products may vitiate any cartel effect. Once again, however, in order to assess the applicability of this theory the analyst must examine

[73] For this reason as well, as Judge Posner observes, "a national or international monopoly is apt to be more durable than a local or regional one. Entry is likely to occur more rapidly when it can be accomplished by the expansion of an existing enterprise into a new geographical area – rather than by the creation of a brand-new firm, and such an expansion is easier when it doesn't involve crossing national boundaries." *Id.* at 73.

[74] *See also, C. Syverson, "*Markets: Ready-Mixed Concrete", *Journal of Economic Perspectives*, Vol. 22, No. 1 at 225 ("Ready-mixed concrete faces potential competition from various substitute products. In building construction, prefabricated concrete is the most likely outside option. Concrete block can be used for walls and pre-stressed structural concrete slabs (complete with imbedded reinforcing bars) can be used for floors. Recall that prefabricated concrete products and ready-mixed concrete are typically made at different plants, so that substitution between these products usually involves buying from a different producer. Another option is to use steel, wood or stone as building materials").

particular transactions and the availability of substitute products for particular end-uses. This cannot be done by common proof on a class-wide basis.

Market entry conditions in the ready mixed concrete industry are affected by portable plant technology. Portable plants can be brought in even from out of state and set up at a job site, which reduces labor and transportation costs associated with the work. (Browne Dep. 41-43, 86.) They pose a serious competitive challenge to IMI and other owners of fixed plants. *Id.* The prospect of competing against a portable plant operator must be taken into account in preparing bids. *Id.* p. 42. The competitive threat posed by portable plants varies on a job-specific basis because the technology is more useful in connection with some types of projects than with others. (Browne Dep. 41-42.)

Professor Marshall's economic analysis confirms that portable plant technology has a project-specific effect on competition because where use of a portable plant is possible, the defendants' market power may be reduced or eliminated, resulting in the conspiracy having no impact on these projects. (Marshall Rep. ¶ 43, fn. 69.) For example, "Spurlino and other portable plant operators were important competitors for jobs whose requirements matched the capabilities of portable plant operators. . . . Thus, I believe that Spurlino and other portable plant operators were important competitors in some markets, but not in others. An individualized analysis is necessary to identify the jobs for which such suppliers were viable competitors." (*Id.;* Hughey Dep. 257 (noting Spurlino's use of a portable plant).) A transaction-specific inquiry is necessary in order to assess market entry barriers facing non-members of the attempted cartel and the concomitant question of any cartel impact.

G. "Cheating" On Cartel Agreement Requires An Individual Analysis Of Impact Inconsistent With Class Treatment

"Cheating" on the cartelists' agreement was pervasive. Indeed, given the essential incoherence of the discount limits and other matters discussed, it is little wonder that the cartel was ineffective. Within IMI, Price Irving testified that the agreement was never even communicated to sales staff responsible for negotiating and entering into contracts with IMI's customers. *(See* Section II.E., *supra*) His testimony is confirmed by IMI's Mike Browne who negotiated and determined prices using his own independent judgment, not under instruction from Mr. Irving or others with knowledge of the conspiracy. (Browne Dep. 12-13, 322-29.[75]) Mr. Browne testified that neither he nor two of IMI's other major sales representatives, Jeff McPherson and Mike Shumaker, were ever instructed what to bid or what not to bid by Pete Irving, Price Irving, John Huggins or Dan Butler (the four IMI executives who pled guilty to a Section 1 violation). *Id.* at 322-29. IMI never had a uniform price or discount policy, whether reflective of the attempted cartel or otherwise. (Browne Dep. 13.) In fact, Mr. Browne testified that the whole concept of a "discount" was meaningless to his bid pricing. (*Id.* at 322-24.)

From an economic perspective, according to Professor Marshall, the fact that the agreement was not adhered to, and was not even communicated to sales staff, precludes the use of common evidence to establish class-wide impact. (Marshall Rep. ¶¶ 59, 66-75.) While the cartel may have affected some transactions, it did not affect all or most transactions. (Marshall

[75] Even among those with knowledge of the cartel agreement, Scott Hughey testified that "sometimes they did, sometimes they didn't" comply with the attempted discount limits. (Hughey Dep. 121-123, 133, 138, 145-148, 205, 303.) Indeed, Hughey became so fed up with the other conspirators' failure to adhere to the agreement that Carmel withdrew from the agreement at some point in 2003. (Hughey Dep. 159-60.) Shelby's Richard Haehl agreed that the conspirators did not always adhere to discount limits. (Haehl Dep. 112-113.) Beaver's Bob Matthews testified that he was aware of pricing discussions but believed that Beaver had not agreed to anything. (Matthews Dep. 64-65.) Even one of the participants in the second "horse barn" meeting, Builder's John Blatzheim, felt that no agreement to fix prices had been reached. (Blatzheim Dep. 333-34.) IMI's Mike LaGrange testified that the criminal investigation came as a surprise to him and he was not aware of any price fixing agreement. (LaGrange Dep. 86-89.)

Rep. ¶ 66.) To distinguish those putative class members harmed by the conspiracy from those who were not (and who thus lack standing) once again requires an individualized, transaction-specific inquiry. (Marshall Rep. ¶ 70)("Even when pricing authority was in the hands of defendants who were aware of the agreements, there exists substantial evidence in this matter that defendants did not respect or 'cheated' on, their agreements. This observation is highly relevant for the question of whether all or substantially all putative class members were impacted by the defendants' actions because if substantial cheating did occur, impact may not have been widespread. . . .")

Given the participants' failure to adhere to their agreement in at least some transactions, "one cannot conclude that all or substantially all purchasers were impacted by the alleged conspiratorial conduct. One would need to study whether a purchaser, supplier or suppliers substantially deviated from the cartel agreement when selling ready mixed concrete to that purchaser." (Marshall Rep. ¶ 75.) As a result of the defendants' "cheating," a transaction-specific inquiry incompatible with class treatment is necessary in order to assess the impact, if any, of the conspiracy.

VI. Dr. Beyer Presents No Regression Model Or Other Formulaic Proof Of Class-Wide Impact: Promises Of A Future Model Are Insufficient.

Plaintiffs point to cases where courts have accepted regression analysis in certifying classes but overlook the obvious problem: Dr. Beyer *has presented no such analysis here,* merely holding out a promise or theoretical prospect for the future. That is not good enough. To satisfy Rule 23's predominance requirement, plaintiffs must prove that a single, formulaic approach to class-wide damages is practicable. A mere "presumption" or "assumption" of such impact is impermissible at the certification stage. *See, e.g., Falcon,* 457 U.S. at 160-61 ("actual, not presumed, conformance with Rule 23(a) remains . . . indispensable"); *Newton v. Merrill*

Lynch, Pierce Fenner & Smith, 259 F.3d 154, 187-88 & n. 33 (3d Cir. 2001) (holding predominance requirement not satisfied where "plaintiffs' expert provided no model formula, but instead projected that he could devise a formula that would measure damages among the class and serve as a plan for allocation").[76]

Dr. Beyer's promissory approach is also contrary to the cases that describe how any regression analysis must be conducted. These cases establish that the analysis must control for benign, non-conspiratorial variables that could affect price. In *Blue Cross*, the Seventh Circuit found Beyer's reports to be "worthless" because his regression equations fail to control for legitimate reasons driving the variations in price that Dr. Beyer attempted to attribute to the defendants' antitrust violations. *Blue Cross*, 152 F.3d at 592-93 (noting that Dr. Beyer's reports "attribute the entire difference between the prices of the Marshfield Clinic and the prices of other Wisconsin providers of medical services to the division of markets, with no corrections for any other factor except differences in treatment mix. Statistical studies that fail to correct for salient factors, not attributable to the defendant's misconduct, that may have caused the harm of which the plaintiff is complaining do not provide a rational basis for a judgment").

[76] *See also, Piggly Wiggly Clarksville Inc. v. Interstate Brands Corp.*, 100 Fed.Appx. 296, 299-300 (5th Cir. 2004) (affirming denial of class certification where plaintiff's "expert did not offer a formula based on regression analysis, but merely opined that one could be found. The [expert's] affidavit was only a preliminary overview of how damages might be calculated."); *In re Medical Waste Services Antitrust Litigation*, 2006 WL 538927, *7-8 (D. Utah 2006) ("Plaintiffs' proffered expert testimony is nothing more than an assumption that all class members were impacted, with a few suggestions about possible damage approaches. . . . Here, the Court cannot 'assume' much less conclude that there will be class-wide impact, particularly in light of the evidence submitted by Stericycle, which demonstrates that such a presumption would be improper. . . . 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"); *Dry Cleaning & Laundry Institute of Detroit v. Flom's Corp.*, 1993 WL 527928, *6 (E.D. Mich. 1993) (denying certification in a price fixing case where "plaintiffs have offered only [their expert's] proposed methodologies without indicating how these calculations would be adapted to this case"); *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) (the Court "cannot 'presume' or 'assume' much less 'conclude' class-wide impact here because the evidence submitted during the class certification hearing demonstrates that such a presumption would be improper").

"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). In *Freeland*, the economist's failure to account for variations in product quality over time in his regression analysis lead the Court to dismiss his report as "essentially worthless." *Id.* at 147-49. Moreover, any regression analysis must differentiate a true cartel effect from the normal interdependence of pricing (*i.e.*, prices "moving similarly") found in any (lawful) oligopoly. *In re Aluminum Phosphide Antitrust Litigation*, 893 F.Supp. 1497, 1504 (D. Kan. 1995). Dr. Beyer has done none of this.

Dr. Beyer not only fails to establish "that the major factors have been accounted for in a regression analysis," he fails to present any such analysis at all. To the extent that his mere promises of a future analysis offer any substance at all, they demonstrate his failure to understand either the science of econometrics or the concrete industry. Dr. Beyer admits that he is not an expert in econometrics.[77] Professor Marshall agrees: "Based on Dr. Beyer's deposition testimony, I would agree with his self-assessment because he demonstrated a remarkable lack of understanding of even basic econometric and statistical theory." (Marshall Rep. ¶ 104.)[78]

[77] Beyer Dep. 27 ("I would not proffer myself as an expert [in econometrics].")

[78] Examples of Dr. Beyer's ignorance of basic econometrics are plentiful: (1) Dr. Beyer had never even heard the word "cointegration", which is a basic statistical test used to measure the co-movement of prices over time, a proposition central to his opinions; [Beyer Dep. 171-72.] Professor Marshall notes that cointegration "is a widely used concept that is even discussed in the elementary econometrics text that Dr. Beyer cites." [Marshall Rep. ¶ 104 , fn. 180]; (2) Dr. Beyer did not understand or conduct routine tests for spurious correlations in the time series data he presents; [Beyer Dep. 210; Marshall Rep. ¶ 104, fn. 180.] (3) Dr. Dr. Beyer did not understand the levels of statistical significance used by economists to test time-series correlations [Beyer Dep. 210; Marshall Rep. ¶ 104, fn. 180]; and (4) Dr. Beyer erroneously testified that an "F-statistic" and the "R-squared" statistic may be used to identify spurious time-series correlations. [Beyer Dep. 210; Marshall Rep. ¶ 104, fn. 180.] In each instance, Dr. Beyer's testimony reflects "a surprising ignorance of basic econometrics." [Marshall Rep. ¶ 104, fn. 180.]

While regression analysis is a useful statistical tool in some contexts, mouthing the word "regression" is not analysis. As Professor Marshall states: "The real debate should be whether *particular* techniques can be reliably applied to these *particular* facts, this *particular* class definition, and these *particular* data. Dr. Beyer has conducted no analysis to inform this debate. My review of the details of the defendants' data along with facts about the industry and conspiracy demonstrate that there are important reasons why damage estimation cannot be conducted reliably within a common framework." (Marshall Rep. ¶ 104.)

While Dr. Beyer's promissory approach offers few specifics, it is clear that the "fixed effects" regression model he describes cannot control for important (and benign factors that may influence transaction prices. (Marshall Rep. ¶ 108.) Fixed effects models "cannot control for these additional factors if they are not present in the defendants' data." (Marshall Rep. ¶ 108.) Professor Marshall cites different demand and supply conditions prevailing in different geographic markets as one example of the variables not subject to a fixed effects regression analysis. *Id.*, ¶¶ 107-108. The point extends to any intangible matters affecting price negotiations, including "relationship capital", a customer's credit worthiness and the other factors described in Part V.B. above, which are not and cannot be quantified in the data. While plaintiffs will no doubt at some point rely on bifurcation of damages, because impact/injury is an element of liability, the Seventh Amendment prohibits such.[79]

VII. Conclusion

Plaintiffs' Motion for Class Certification should be denied.

[79] *See* n. 48, *supra.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2008, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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