

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

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

**IMI DEFENDANTS' MOTION TO EXCLUDE EXPERT
TESTIMONY AND OPINIONS OF DR. JOHN BEYER**

IMI defendants, pursuant to Fed. R. Evid. 702,¹ request that the Court exclude the expert testimony and opinions of Dr. John Beyer, including that class-wide impact can be shown by common proof in this case, and in support state as follows:

1. The standard for determining whether Dr. Beyer's testimony and opinions should be excluded uses a two part analysis. First, the Court must determine whether his testimony and opinions are reliable under the constraints of Fed. R. Evid. 702. Second the Court must determine whether the testimony and opinions are relevant. *Daubert*, 509 U.S. at 589.

¹ Rule 702 requires:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The Rule was revised in 2000 to incorporate the holdings of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999). See *Committee Note* to the 2000 amendments.

2. Although Dr. Beyer holds himself out as an economist, he did not apply generally accepted economic principals² in making his assertions nor did he apply accepted methods, including statistical analysis, to test those assertions. The fatal flaws in Dr. Beyer’s analysis are set forth in the Expert Reports of Professor Hausman (MIT); Professor Umbeck (Purdue), and Professor Marshall (Penn State) and are discussed in IMI’s brief in response to plaintiffs’ Motion for Class Certification.³ As Professor Hausman summarized:

From my point of view as an economist who has both published widely in the most prestigious economics 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 Rep. ¶ 17.)⁴

3. Dr. Beyer’s opinion in this case is nothing but a theory⁵ (based on his selective and inadequate investigation of the facts) that he has not tested by generally accepted economic

² For example, in his analysis of market power (Beyer Rep. ¶ 33) Dr. Beyer relies on a theory – the “structure-conduct-performance paradigm” – that has been “widely rejected among economists.” (Hausman Rep. ¶ 28; Umbeck Rep. 20, fn. 55.)

³ For the Court’s convenience, Dr. Beyer’s numerous and substantial deficiencies as identified by Professors Hausman, Umbeck and Marshall are set forth in the attached outline which references the various assertions in Dr. Beyer’s reports and how they fail to withstand scrutiny under generally accepted principles and methodologies of economic science.

⁴ See also Umbeck Rep. 4 (“[Dr. Beyer’s] methodology and his application of the principles of economics do not meet standards generally accepted in the economics profession and are actually contradicted by many of the economists he cited.”); Marshall Rep. ¶ 9 (“While I disagree with Dr. Beyer’s conclusions in this matter, a more important point to note is that Dr. Beyer does not analyze the defendant transaction data, the industry, or the operation of the ready-mix conspiracy to test his assertions that plaintiffs’ allegations can be analyzed within a common framework. In my opinion, an investigation such as Dr. Beyer’s that replaces testing with assertion, effectively ‘assumes the conclusion,’ and, thus, is not scientific and would not survive peer review.”)

⁵ The heart of Dr. Beyer’s theory of common proof is that if ready-mix is an “undifferentiated product” – *i.e.* purchasers would buy based on price as opposed to other supply and demand factors, such as location of the closest plant, quality, and service – and defendants had market power, then all purchasers could not avoid “the effects of the alleged cooperative behavior.” (Beyer Rep. ¶ 20; see also Umbeck 4-5.)

methods. (Hausman Rep. ¶¶ 17, 38; Umbeck Rep. 3-4; Marshall Rep. ¶ 9.) Neither of the two “tests” Dr. Beyer claims he performed to test his theory of common proof approach the requirements of general acceptance in the profession, objectivity, and replicability required by the scientific method and the law. *See Daubert*, 509 U.S. at 591-94; *Kuhmo*, 119 U.S. at 138-39.

4. As to the first test, Beyer repeatedly opines that ready-mixed concrete is an undifferentiated product such that no defendant could command a “price premium”⁶ based on branding, service, or quality, and affirmatively 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 of sufficient superiority in the Central Indiana Area to motivate customers to pay a price premium for that incremental difference in quality or service.**" (Beyer R. ¶ 26, (emphasis added))

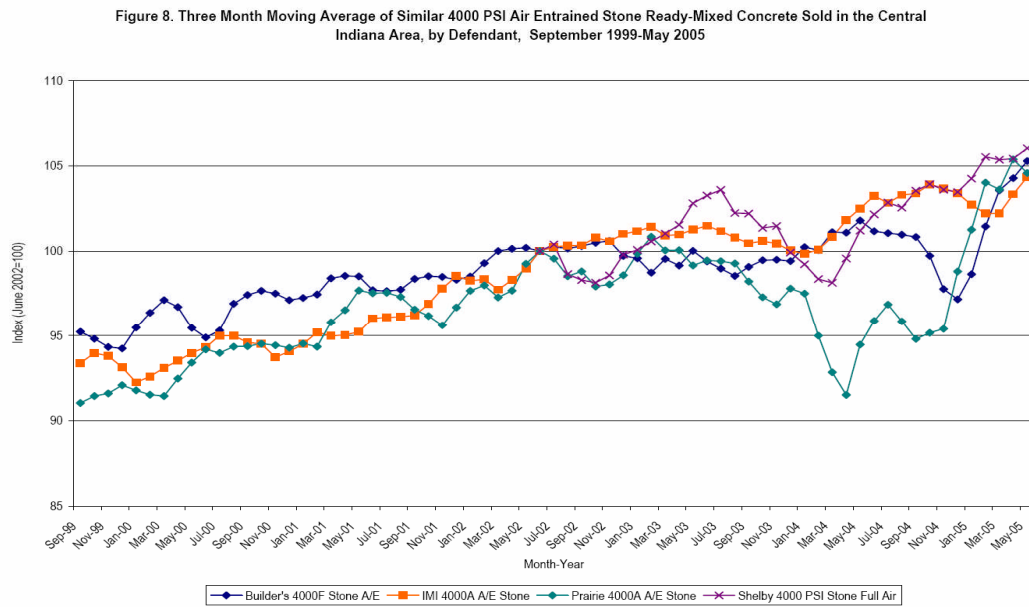
Beyer asserts that his indexed⁷ graphs of the sales price data for the codefendants' highest volume products serve to demonstrate the absence of a price premium for service, quality, branding, etc. He claims no defendant could charge a price premium for what he has termed an “undifferentiated product.” When the indexing is removed, the graphs clearly show that both IMI and Builders in fact commanded price premiums over Prairie Materials for similar products.

⁶ 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 R. 26.)

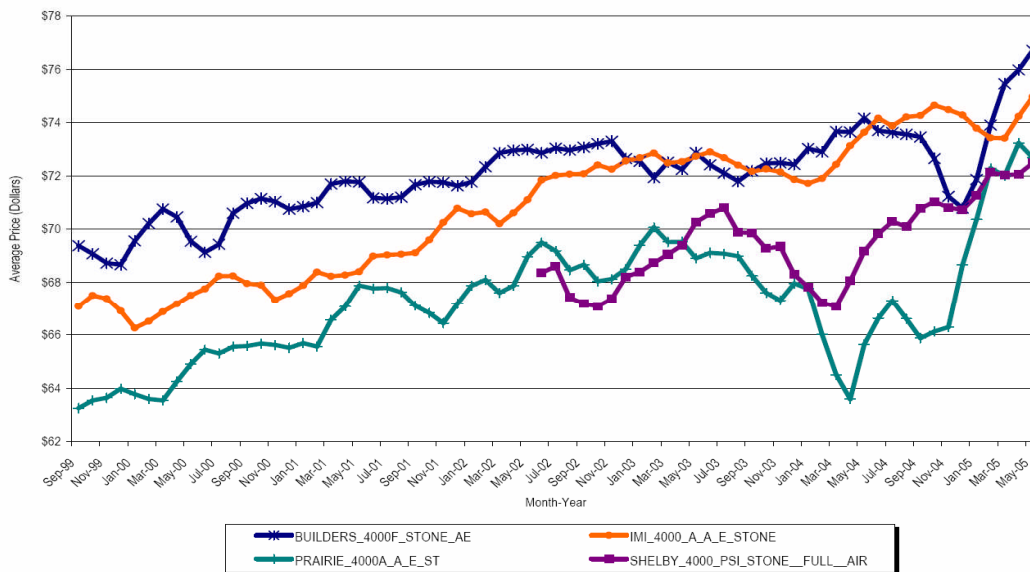
⁷ Indexing is statistical method by which price differences can be reduced to a common parameter, the index number -- in the case of Dr. Beyer’s charts, “100.” For example, the “consumer price index” reduces thousands of prices for a wide variety of products to a single number, the CPI, which can be used to measure changes over time. The use of the index makes it appear as if all the prices of those products are the same, but they are not. (Umbeck Rep. 5-8, fn. 7 and Appendix III.)

5. The first chart below shows Dr. Beyer's Figure 8 as it appears in his report, with the index. The second chart shows the same data but with Dr. Beyer's indexing removed.

With Dr. Beyer's index:



Without Dr. Beyer's index:



(See also, Exhibits 169 - 172 to Beyer Dep. Attached hereto as Attachment A, which also show Beyer's graphs for other products with and without the indexing, and Umbeck Rep. 5-10, Appendix pp 32-34.)

6. Because certain competitors could command price premiums, ready-mix is not an undifferentiated product purchased based on price. (Umbeck Rep. 10; Marshall Rep. ¶ 49, fn. 83) This is fatal to Dr. Beyer's theory of common proof and to plaintiffs' motion for class certification.

7. Dr. Beyer's other "test" is his admittedly subjective "visual inspection" of graphs of three-month moving average prices for similar products that he claims show "price structure," (prices appearing to move similarly over time) which in turn is supposed to support that ready-mixed is an undifferentiated product. Price structure is important to Dr. Beyer because, according to his theory, if prices move similarly over time, it confirms class-wide impact can be shown through common proof. (Beyer Rep. ¶¶ 51-56.) Plaintiffs assert that "price structure" means that "if defendants succeeded in cooperatively fixing prices, their actions 'would have raised all prices so that every purchaser of [ready-mix] would have been impacted.'" (Beyer R. ¶ 51, Plaintiffs' Brief 25.) But visual inspection of graphs is not a scientific test. (Hausman Rep. ¶ 24; Umbeck Rep. 27-28; Marshall Rep. ¶ 80.) And because Dr. Beyer's visual inspection is wholly subjective, it does not meet the standards of Rule 702.⁸ In fact, all three academic economists who viewed the same graphs reached the opposite conclusion – there is not "price structure." (Umbeck Rep. 27; Marshall Rep. ¶¶ 82-83; Hausman Rep. ¶ 13.) Moreover, Dr. Beyer's subjective conclusion is simply wrong.

⁸ *Kuhmo Tire*, 526 U.S. 154-55 (expert's opinions based on subjective visual inspection of tire properly excluded); see also *United States v. Taylor*, 154 F.3d 675 (7th Cir. 1998)(subjective interpretation of polygraph charts properly excluded in favor of objective, numerical analysis); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded).

8. When the accepted statistical analyses are performed using the actual sales data, the analyses show that there is not “price structure.” In fact, and in the simplest terms, many of the price movements are *negatively correlated*, meaning that *objectively* they move in opposite directions. (Marshall Rep. ¶¶ 85-88, fn. 160; Umbeck Rep. 28.) This is confirmed by additional statistical analyses using cointegration – a widely accepted tool with which Dr. Beyer is unfamiliar. (Marshall Rep. ¶ 89, Appendix D.)⁹ These analyses indicate that common proof of impact is not possible because of the idiosyncratic nature of ready-mix concrete transactions. (Marshall Rep. ¶¶ 13, 27, 110, 124.)¹⁰ Statistical analysis also establishes that it is very likely that there are many, many class members who were likely not impacted at all by the alleged conspiracy. (Marshall Rep. ¶¶ 91-103, Figures 21-28.)¹¹

9. Finally, Beyer opines that “there are sufficiently reliable data and methodologies to estimate damages on a class-wide basis, including regression analysis.” These are appeals to econometric techniques, but Beyer has stated under oath that he is not an expert in econometrics. (Beyer Dep. 27.) Professor Marshall agrees with Beyer’s self-assessment because he demonstrated “a remarkable lack of understanding of even basic econometric and statistical theory.”¹²

⁹ (Beyer Dep. 171-72.) Clive Granger received the Nobel Prize in 2003, *in Economics*, for developing cointegration as a tool for analyzing whether time series show common trends. (Marshall Rep. ¶ 85.)

¹⁰ For example, the data indicate that one customer might pay different prices to the same defendant for the same product on the same day. (Marshall Rep. ¶¶ 25, 48.) The reasons for this can only be investigated at the transaction level.

¹¹ For example, Professor Marshall’s analysis revealed that 30-60% of IMI’s customers paid the same or *lower* prices for four popular products following the list price increase announcement in 2002. (Marshall Rep. 100.) Similar analyses for all defendants for every year following price increases and following each alleged meeting of competitors reveal that substantial number of customers did not pay higher prices. (Marshall Rep. ¶¶ 91-103; Figures 21-28)

¹² See Marshall Rep. ¶ 58 fn 180 stating:

10. In light of Dr. Beyer's propensity for unscientific tests and having demonstrated "a remarkable lack of understanding of even basic econometric and statistical theory", this Court should not accept any promise or assurance from Dr. Beyer.

11. Dr. Beyer is a notorious "hired gun,"¹³ whose opinions have been described by courts as "worthless,"¹⁴ lacking "any semblance of objectivity,"¹⁵ and "not provid[ing] a rational basis for a judgment."¹⁶ Judges from one end of the country to the other have found his claimed

For example, Dr. Beyer testified that spurious correlation arises "where the signs of the independent variables [sic] are contrary to what one would expect in economics" (Beyer deposition, p. 210).

Dr. Beyer testified that an F-test statistic and the R-squared statistic may be used to identify spurious correlation (Beyer deposition, pp. 210-211).

Dr. Beyer testified that a two-tailed test is one where a 90% level of significance is used, and a one-tailed test is one where a 95% level of significance is used (Beyer deposition, pp. 215-216).

Dr. Beyer testified that he had never heard of the word cointegration (Beyer deposition, pp. 171-172). This is a widely used concept that is even discussed in the elementary econometrics text that Dr. Beyer cites (Damodar N. Gujarati (2003) *Basic Econometrics: 4th Edition*. Boston: McGraw-Hill). In 2003, Clive Granger was awarded the Nobel Prize in economics "for methods of analyzing economic time series with common trends (cointegration)." (see http://nobelprize.org/nobel_prizes/economics/laureates/2003/)

These statements reflect a surprising ignorance of basic econometrics.

¹³ *Lantec Inc. v. Novell, Inc.*, 146 F.Supp.2d 1140, 1154 (D. Utah 2001) ("The purpose of the court's gatekeeper role is to avoid having the jury consider testimony that is unreliable. Dr. Beyer is clearly a hired gun and any semblance of objectivity is lacking. His opinions lack all indicia of reliability and as such can only confuse and mislead the jury. Plaintiffs seek to exclude that portion because the characterization of his testimony may affect Dr. Beyer's personal standing in his professional community and/or reflect negatively upon plaintiffs' counsel. The Court will not alter or amend its order. It accurately reflects the record and the basis of the court's ruling"). The *Lantec* Court's determination to exclude Dr. Beyer's testimony was affirmed on appeal, with the Tenth Circuit adding that Beyer's testimony was "unreliable" and "particularly troubling" because "Dr. Beyer attempted to spin anecdotes from a hand full of personal conversations with firms in a limited geographic area into evidence of a worldwide product market." *Lantec Inc. v. Novell, Inc.*, 306 F.3d 1003, 1025-26 (10th Cir. 2002).

¹⁴ *Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic*, 152 F.3d 588, 593 (7th Cir. 1998) (Posner, J.).

¹⁵ *Lantec*, 146 F.Supp.2d at 1154.

¹⁶ *Blue Cross*, 152 F.3d at 593.

expertise and his opinions lacking,¹⁷ and academic economists have severely criticized his work.¹⁸ His opinions in this case deserve no better treatment. Dr. Beyer's opinions are unreliable – neither objectively verifiable by generally accepted methods nor credible. The Court should exclude his opinions.

12. IMI defendants join in the Builder's Defendants' Motion to Exclude Expert Report and Testimony of John C. Beyer.

WHEREFORE, the IMI defendants request that the Court exclude the expert testimony and opinions of Dr. John Beyer.

Respectfully submitted,

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¹⁷ In addition to *Blue Cross and Lantec*, see *Schwab v. Philip Morris USA, Inc.*, 2005 WL 2401647, *3-4 (E.D. N.Y. 2005) (excluding Beyer's testimony under *Daubert* due to the unsupported nature of his factual assumptions. Judge Weinstein found Beyer's assumptions to be "inconsistent with common sense and the evidence generally" and unsupported by acceptable data); *In re Agricultural Chemicals Antitrust Litigation*, 1995 WL 787538 (N.D. Fla. 1995) (excluding Beyer's testimony in support of a price fixing class because it "ignore[d] market place realities and failed to consider the individual analysis needed to support an overcharge claim"). *Id.* at *5-10. See also, *In re Catfish Antitrust Litigation*, 939 F.Supp. 493, 498 (N.D. Miss. 1996) (even in the context of approving a class settlement, the Court noted that it "had serious concerns about the admissibility of Dr. Beyer's testimony because of the apparent novelty of his economic theories in light of the dictates of *Daubert*."); *Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group*, 247 F.R.D. 156, 167 (C.D. Cal. 2007) (denying class certification due in part to Beyer's improper use of statistical averaging techniques to prove class-wide impact).

¹⁸ See Franklin M. Fisher, *Statisticians, Econometricians and Adversary Proceedings*, 81 Journal of the American Statistical Association, 277, 282-85 (June 1986) (describing Dr. Beyer's work as "pseudoscience" and "poor statistical and econometric testimony masquerading as serious science"); Michael O. Finklestein & Hans Levenbach, *Regression Estimates of Damages in Price-Fixing Cases*, in *Statistics and the Law*, p. 79 (1986).

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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