

from China to the United States between 2003 and 2009.¹ First Am. Compl. ¶ 1. In a 2011 proceeding before the World Trade Organization, China admitted establishing, through MOFCOM, export quotas, implemented via a quota bidding and license system. *See* World Trade Organization Reports of the Panel, China – Measures Related to the Exportation of Various Raw Materials, WTDS394/R, DS395/R, DS398/R (July 5, 2011) (“WTO Panel Report”) at 75, ¶ 7.219. However, pursuant to this Court’s instruction at a January 9, 2012 hearing, Plaintiff alleges that Defendants engaged in price-fixing and supply restriction “over and above” the Chinese government’s actions. First Am. Compl. ¶ 61; MTD Hr’g Tr. 64:17-23 January 9, 2012 (attached hereto as Exhibit 4) (ordering Plaintiff to amend its complaint). Defendants dispute this allegation, and this disagreement forms the core of this lawsuit.

II. Government and Market Factors Increased Bauxite’s Price From 2003 to 2009

Between 2003 and 2009, government and market forces deeply affected the Chinese refractory grade bauxite market. First, the Chinese government’s export quantity restrictions, and related fees and changes in tax policy, restricted the supply of bauxite and raised prices. In the WTO dispute on this issue, China did not dispute that it imposed an export quota on bauxite, administered a fee-based quota bidding system, and determined the total quantity of exports to be allocated through bidding. *Id.* at ¶¶ 7.172-.176, at 62-63, and 7.187-.201, at 66-79. Through the operation of the laws of supply and demand, the supply restriction and related costs, in addition to changes in taxes and duties, increased prices for Chinese refractory grade bauxite exports. *E.g.*, Roskill Information Services, Ltd., *The Economics of Bauxite and Alumina* 355 (6th ed. 2005).²

¹ Bauxite is a naturally occurring mineral used to produce alumina for refining into aluminum metal, refractories for steel, glass, and cement; electronic components substrates; and other uses. First Am. Compl. ¶ 27-28, 31.

² Lamb relied upon *The Economics of Bauxite and Alumina* in preparing his report. Lamb Damages Report, Appendix B.

Second, the domestic demand for processed (or “calcined”) bauxite in China increased, and this increased demand within China reduced the amount of bauxite available for export. “China’s Bauxite Blockade,” *Industrial Minerals* July 2009 (attached hereto as Exhibit 5); Staff Research Study, Office of Industries, U.S. International Trade Commission, “The Effects of Increasing Chinese Demand on Global Commodity Markets” 3-1 through 3-14 (June 2006) (discussing increased bauxite and aluminum demand in China) (attached hereto as Exhibit 6)³; Lamb Deposition at 116:7-12.⁴ As one trade article noted:

Global bauxite supply and demand is being driven by Chinese domestic consumption . . . It seems clear that the export politics will remain very restrictive due to the need for China’s own consumption, and that bauxite – like many other Chinese raw materials – has discontinued being the cheap and unlimited source for the world markets.

Ex. 6 at 41. Because defendants buy calcined bauxite in China to export to the United States and other countries, an increase in the domestic bauxite prices pressures exporters such as Defendants to raise their prices to cover the additional cost – a point Lamb eventually conceded at deposition. Deposition of Russell Lamb (“Lamb Depo.”) at 75:2-5, 76:2-7; 125:21 – 126:9; 126:12 (“I would say generally that’s true.”) (attached hereto as Exhibit 1).

Third, the Chinese government closed kilns around China because of pollution concerns. “China Bauxite Crisis Deepens,” *Mineral Price Watch* October 2007 (attached hereto as Exhibit 7); *see also* Ex. 8 at RESCO LAMB 0000995 (referring to closure of Chinese kilns). Bauxite producers use kilns to calcine bauxite, and Defendants purchase this calcined bauxite to export to the United States and elsewhere. Closing these kilns reduced the supply of bauxite, which increased bauxite

³ Lamb relied on this article in preparing his report. Lamb Damages Report, Appendix B.

⁴ Lamb relied on *Industrial Minerals* in preparing his report. Lamb Damages Report, Appendix B. Another article on which Lamb relied called *Industrial Minerals* the “world’s leading non-metallic minerals info source.” Moore, Paul, “The Changing Face of the Global Refractories Industry” (attached hereto as Exhibit 8).

prices within China, which, in turn, increased the price of Chinese bauxite exports. In addition, transportation shortages and mine closures, some traceable to Government action, also constrained supply during the relevant period. “Three’s a Crowd? Refractory Bauxite Supply,” *Industrial Minerals*, March 2003 (“Combined with the government-imposed closure of polluting kilns, the result has been an increase in the price of both raw bauxite and coal, and a shrinkage of supply.”) (attached hereto as Exhibit 9);⁵ *see also* Vincent G. Hill and Errol D. Sehnke, *Industrial Minerals and Rocks* 244 (2006) (“The closure of the [Chinese] polluting kilns, along with the government terminating operations at several illegal and unsafe mines, has increased the price of raw bauxite and reduced overall supply.”).

III. Lamb’s Assumed Conspiracy and Improper Regression Analysis

Plaintiff has retained Lamb as its damages expert. In September 2014, Lamb set forth his “Expert Report Concerning Damages” (the “Lamb Damages Report,” attached hereto as Exhibit 2), and in December 2014, Lamb submitted his “Supplement Expert Report Concerning Damages” (the “Lamb Supplemental Report,” attached hereto as Exhibit 3).

In both reports, Lamb insists that he is not testifying as to liability, but only as to damages. In the Lamb Damages Report, he explains: “I assume that the allegations contained in the complaint are in fact true. That is, I assume that the defendants engaged in a conspiracy to fix prices and restrain supply of refractory grade bauxite products in the U.S. during the class period [2003-09].” Lamb Damages Report at 4; *see also* Lamb Supplemental report at 1; Lamb Depo. at 6:14 – 7:2. (“Q. . . . So is it accurate to say that your report does not purport to help the finder of fact decide whether the allegations of the complaint are true or false; is that right? A. Well, I think by nature of the fact that I’ve assumed liability that . . . it’s clear I’m not analyzing the question of liability.”)

⁵ Dr. Lamb relied upon this article in preparing his report. Lamb Damages Report, Appendix B.

(objection omitted). Because he assumed, without any independent analysis or investigation, the existence of a price-fixing and output restriction conspiracy, as well as Defendants' involvement in it, his reports and his testimony offer nothing admissible on the question of liability.⁶

To calculate the alleged damages, Lamb compared refractory grade bauxite price in 2002 with its price in 2003-09, a comparison he calls a "before-during" method. Lamb Damages Report ¶¶ 20-21. The difference between the "before" price and the "during" price forms the baseline for his damages calculation. However, as Lamb recognizes, "factors which affect demand for refractory grade bauxite, as well as factors that affect its production costs or supply, are likely to influence price." *Id.* ¶ 25. Lamb claims to have performed a multiple regression analysis to control for these factors. *Id.* ¶ 26.

The Eleventh Circuit explained the concepts underlying multiple regression analyses in *Eastland v. Tennessee Valley Authority*, 704 F.2d 603 (11th Cir. 1983). There, the court held:

Multiple regression analysis is a quantitative method of estimating the effects of different variables on some variable of interest.

In multiple regression, one first specifies the major variables that are believed to influence the dependent variable. . . . There inevitably remain minor influences, each one perhaps very small, but creating in combination a non-negligible effect. These minor influences are treated by placing them in what is called a random disturbance term and assuming that their joint effect is not systematically related to the effects of the major variables being investigated—in other words by treating their effects as due to chance. . . .

The probative value of a multiple regression analysis depends in part upon: (1) the inclusion of all the major variables likely to have a large effect on the dependent variables; and (2) the validity of the assumption that the remaining effects (the influences

⁶ These statements make it clear that Plaintiff does not and will not offer Lamb as an expert as to liability. Thus, Defendants respectfully submit that neither his Reports nor his testimony should be offered or admitted into evidence as to the existence of the alleged conspiracy, or either Defendants' involvement in it.

included in the random disturbance term) are not correlated with the independent variables included

Eastland, 704 F.2d at 621 (quoting Fisher, “Multiple Regression in Legal Proceedings,” 80 Colum. L. Rev. 702, 705–06 (1980)) (emphasis added); *see also In re Chocolate Confectionary Anti-Trust Litigation*, 289 F.R.D. 200, 211-12 (M.D. Penn. 2012) (explaining multiple regression analysis).

Here, instead of using explanatory variables specific to refractory grade bauxite – such as bauxite export quotas, increases in domestic bauxite prices, and government mandated kiln and mine closures – Lamb used general indices covering a wide array of goods, services and industries, as explanatory variables. The indices Lamb used failed to account for the bauxite-specific variables that industry sources – including sources upon which Lamb supposedly relied to prepare his report – acknowledge affected bauxite prices between 2003 and 2009. For this reason, Defendants respectfully request the Court to exclude Lamb’s report from evidence.

ARGUMENT

IV. Dr. Lamb’s Opinion Is Inadmissible Because He Failed To Consider Several Major Factors

A. Contrary to the Court’s Instruction, Lamb Failed to Take into Account the Chinese Government’s Mandates, Such as the Export Quota and Related Costs

As explained previously, Lamb omitted several factors from his multiple regression analysis. Most surprisingly, Lamb disregarded the Chinese government’s export quota and the related Government-imposed costs – issues at this case’s epicenter. At the January 9, 2012 hearing on Defendants’ Motion to Dismiss, the Court made clear that, to proceed in this litigation, the Court ordered Plaintiff “to provide a more definite statement with respect to what effects of the cartel are separate and distinguishable from any Government mandated *ex parte* restriction.” Ex. 4 at 64:17-23.

Despite the Court's clear guidance on the export quota's importance, Lamb did not include the quota, the export license, or any other quota-related cost as an explanatory factor in his multiple regression analysis. As he testified at deposition: "[T]here's no reason to include in separate variable to measure the effect of the quota or the cost of the export license on the price of refractory grade bauxite sold in the U.S." Lamb Depo. 63:6-10. Later, he admitted, "I probably didn't include it in my multiple regression analyses." *Id.* at 96:16-17. Lamb's disregard of the quota apparently fostered an ignorance of the bidding costs associated with bauxite export licenses – a key component of the Chinese government's bauxite quota system. *Id.* at 172:18-20 ("Q. So you don't know what a split public bidding format is with respect to the Chinese export licenses? I haven't seen that term, no."). In other words, Lamb failed to educate himself about the bauxite export quota system or to consider it in his analysis.

Although he failed to include the bauxite export quota in his analysis, Lamb himself conceded that the export quota reduction could affect the bauxite price:

Q. Does it make sense to you that reduction in the export quota for Chinese bauxite would lead to an increase in the price of the Chinese refractory grade bauxite?

A. It could. It depends on the magnitude of change in whether the quota is binding or not.

Lamb Depo. at 93:12-16. However, when asked whether the quota was binding – that is, whether the exporters would have wished to export more than the quota allowed⁷ -- Lamb did not know:

Q. Were there times between 2002 and 2009 during which Bosai would have wanted in your opinion to export more refractory grade bauxite than the Chinese export policy allowed?

A. I think what I said was there may have been. I'd have to go back and look at the history of the quantity of exports relative to the quota.

Q. So you don't know, is the answer?

⁷ See Lamb Depo. at 100:9-14.

A. [T]hat's right. . . .

Lamb Depo. at 102:22 – 103:8. In other words, Lamb recognized that the Chinese government's export quota reduction would have increased refractory grade bauxite prices if those quotas constrained Defendants' exports, but he testified that he remained ignorant of whether those quotas constrained Defendants' exports during relevant time period.

In fact, they did. The book upon which Lamb relied in preparing his report notes the export quota's effect on increasing bauxite prices, as do other reliable industry sources that Lamb's own information sources have deemed reliable. *E.g.*, Roskill Information Services, Ltd., *The Economics of Bauxite and Alumina* 355 (6th ed. 2005) (relied upon by Lamb according to Lamb Damages Report, Appendix B); Ex. 5 at 42 ("Export taxes and licenses form a big share of the [Chinese bauxite] price, which means that availability and price of the product is not fully market driven."); Mike O'Driscoll, "Bauxite Chop & Change," *Industrial Materials* 7 (February 2005) ("Market observers estimate that at least 1.4m. tonnes [sic] of Chinese bauxite is expected to be the final officially exported volume in 2004, and therefore the reduced quota volume of 1m. tonnes [sic] in 2005 will result in serious shortages on the market.").

Lamb simply ignored this wealth of information and proceeded with his analysis as if the quota had no effect. Lamb's failure to address the quota, quota-related costs, and information regarding the quota renders his analysis unfit for trial. As explained previously, omitting even one major control variable from a multiple regression analysis renders the entire analysis unreliable and thus inadmissible. *E.g.*, *Smith*, 84 F.3d at 673; *Eastland*, 704 F.3d at 625; *see generally Bazemore*, 478 U.S. at 400 n.10. Here, Lamb disregards the key variable that has resided at this case's core since Defendants placed it at issue in the October 2009 Motion to Dismiss. This crucial variable's

omission renders Lamb's multiple regression analysis unreliable and inadmissible, and Defendants respectfully request the Court to exclude his analysis on this ground.

B. Lamb Failed to Take into Account the Domestic Bauxite Price Increase

Lamb's analysis also failed to control for the increase in the domestic price of refractory grade bauxite. As explained previously, Defendants purchased refractory grade bauxite in China to export. The actual increase in the cost Defendants paid for this naturally increased Defendants' export prices. Moreover, industry sources – including sources upon which Lamb himself relies – reported that, during the period of the alleged conspiracy, domestic demand for refractory grade bauxite was very high, which caused price increases and supply shortages. Ex. 7; Ex. 6 at 3-1 through 3-14 (discussing increased bauxite and aluminum demand in China);⁸ Lamb Depo. at 116:7-12. Despite this straightforward cause and effect relationship, Lamb's multiple regression analysis fails to control for the undisputed increase in Chinese domestic bauxite prices. Instead, he asserts that Defendants' alleged export price-fixing conspiracy – the existence of which he assumes – indicated that Defendants may have also conspired to fix the domestic bauxite price – a charge Plaintiff's Complaint does not even allege and for which no evidence exists. Because his reasoning is based on a series of unsupported assumptions, Lamb's analysis is unreliable and inadmissible under *Daubert*.

As an initial matter, Lamb conceded that the price Defendants pay for calcined bauxite is a factor in the price for which they sell refractory grade bauxite:

Q. The only thing I was getting at was one of the inputs into Bosai's price that it charges for refractory grade bauxite is the price of the bauxite that it has to buy in order to make refractory grade bauxite. And it sounds to me we agree on that, right?

A. Yes.

⁸ Lamb relied on this article in preparing his report. Lamb Damages Report, Appendix B.

Lamb Depo. at 78:12-18.

In discovery, Bosai produced cost data reflecting an increase in domestic refractory grade bauxite it purchased for resale. Lamb Damages Report Appendix B (“Bates Stamped Documents”). Lamb reviewed this material but disregarded it. *Id.*, Appendix B (“Bates Stamped Documents”); Lamb Depo. at 30:7-9 (“Q. Did you use Bosai’s cost data at all? A. Well, I didn’t base my damages analysis on it. . . .”). At his deposition, he testified that he ignored the increase in the domestic price in performing his analysis.

Q. Did you consider the increase in price, the domestic price of refractory grade bauxite in your analysis?

A. Did I consider it. It wasn't one of my control variables in my damages analysis, it wouldn't have been appropriate to include it there.

Lamb Depo. 132:15 – 133:4; *see also id.* 133:18-22 (“Q. So you did not control for the increase in domestic refractory grade bauxite prices within China? A. I did not control using the domestic price . . .”).

According to his Supplemental Report, Lamb omitted this crucial factor because he assumed, without evidence, that Defendants somehow manipulated the domestic bauxite price. Based on this assumed manipulation, he further assumed that the domestic bauxite price was somehow invalid as a factor in bauxite prices. As his Supplemental Report argues:

[T]he alleged misconduct . . . ***could potentially*** have impacted both export and domestic prices. . . . Given that the domestic price of refractory grade bauxite ***could potentially*** have been tainted by the alleged misconduct . . . ***it is invalid to include the domestic price as a control in regression analysis.***

Supplemental Report at ¶ 8 (emphases added).

At deposition, Lamb made clear that he did not base this assumption upon any evidence, scholarly research, or experience. *Cf.* Fed. R. Evid. 703 (setting forth appropriate

bases of expert's opinion testimony). Rather, he testified that he merely found the assumption convenient because of the instructions he received from Plaintiff's counsel:

Q. My question was: Do you have any evidence that there was a cartel to fix domestic prices within China?

A. I think the alle -- I think if one assumes the allegation in this case are true, that is one assumes that there was an anticompetitive cartel in the export market, a natural extension of that would be that the domestic market would be suspect.

Q. Besides your assumption that the plaintiff's allegations in its complaint are true, do you have any other indication there was a conspiracy to fix domestic refractory grade bauxite prices within China?

A. No, I -- I don't need another basis for it given my assignment in this matter.

Lamb Depo. at 127:4-12, 129:6-13; 131:15-20.

In short, Lamb recognized that an increase in the price of domestic bauxite would increase the price of exported bauxite, but rather than include that factor in his analysis, Lamb pretended that the domestic bauxite market was fixed and ignored that variable accordingly. Under Rule 702, however, “[a]n expert . . . is required to take real-world facts into account in conducting his [multiple regression] analysis” *In re Intel Corporation Microprocessor Antitrust Litigation*, 2010 WL 8591815, MDL Docket No. 05–1717 (JJF), C.A. No. 05–485–JJF (D. Del. July 28, 2010) at *23. Lamb’s disregard of this important cost data renders his opinion inadmissible under *Daubert* and *Bazemore*, and the Court should exclude it accordingly. *Bickerstaff v. Vassar College*, 196 F.3d 435, 450 (2d Cir. 1999) (“We thus conclude that, because the regression analysis failed to account for the major factors . . . the district court did not abuse its discretion in according the regression analysis no probative weight.”); *Intel*, 2010 WL 8591815 at *21 (excluding expert’s multiple regression analysis due to failure to consider cost data and other major factors).

V. Lamb Failed to Account for China’s Closing of Polluting Bauxite Kilns and Other Factors

Lamb also ignored the Chinese government-mandated closing of bauxite kilns (as well as mine closures), which, as described previously, reduced the supply of calcined bauxite throughout China. Lamb Depo. at 153:16-19. (“Q. . . . And is there any variable in your index specific to kiln closures? A. No, it wouldn't be appropriate to include that in my multiple regression analyses.”). He testified at deposition that he did not even consider the issue:

Q. Did you investigate whether the closing of the kilns as described in this paragraph increased the price of refractory grade bauxite within China, calcined refractory grade bauxite?

A. No, I haven't even seen any data on – hard data of the closing of kilns that would allow you to understand anything about the effect, I haven't seen that.

Lamb Depo. at 159:5-12.

Although Lamb claimed not to have seen information on the effect of kiln closures on bauxite prices, the material that he reviewed contains information on that very effect. *E.g.*, Ex. 9 (“Combined with the government-imposed closure of polluting kilns, the result has been an increase in the price of . . . raw bauxite . . .”). That is, Lamb considered this information, disregarded it, then testified as if it did not exist. Again, such a selective consideration and disclosure of the facts does not clear the bar Rule 702 sets.

In re Intel Corporation Microprocessor Antitrust Litigation, *supra*, offers guidance here. In that case, the plaintiffs brought an antitrust action against Intel and other microprocessor manufacturers, and their expert, Nicholas Economides, performed a regression analysis. Like Lamb, Economides failed to consider or test for any alternative explanations for the increase in prices. “In fact, Economides even testified that he ‘could not think of another explanation’ for the inflation of handset prices other than the defendants' alleged tying and locking practices.” *Id.* at 428. The

defendants moved to exclude Economides's testimony due to his failure to consider alternative, nonconspiratorial causes for the alleged price increases.

The court granted the defendants' motion. The court focused its criticism on Economides's refusal to consider other variables that might have explained the price increase at issue:

Economides's failure to test for these obvious and significant alternative explanations renders Economides's analysis "essentially worthless." *Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1045 (7th Cir.1988) (rejecting study that failed to control for variables for which one can control).

In addition, in his report, Economides explicitly states that his aim in performing his regression analysis was to determine "the effect, if any, of the tying and locking of handsets and services on the price for handsets sold in the United States." His resulting failure to consider "the varying business practices, and business results" of each defendant further strips his regression analysis of reliability As a result, the regression analysis and the related portions of Economides's report must be excluded.

Id. at 428.

Similarly, Lamb assumes Defendants' liability and simply ignores every possible nonconspiratorial factor that would have increased prices. He disregarded the export quota that the Chinese government set – the very factor on which this Court focused at the January 9, 2012 Motion to Dismiss hearing. He ignored the sharp increase in the domestic Chinese price of calcined bauxite caused by short supply due to in-country demand based on an imagined domestic price-fixing conspiracy, with not a single shred of evidence in the record to suggest one. He dismissed without analysis or investigation the closing of polluting kilns and mines around China that the government mandated. In short, Dr. Lamb disregarded the most significant factors that raised prices for refractory grade bauxite, choosing instead to assume that the price of bauxite rose solely because of Defendants' conspiracy, which he also assumed. This disregard of key factors renders his opinions inadmissible under Rule 702 and *Daubert*, and Defendants respectfully request the Court to exclude his Reports and his testimony from further proceedings in this case accordingly.

CONCLUSION

For the reasons stated above, Defendants respectfully request the Court to grant this motion and exclude Plaintiff from offering the opinions, in the form of testimony or reports, of its expert, Dr. Russell Lamb, in subsequent proceedings in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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