

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

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

**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE  
SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT**

The Plaintiffs submit this brief in support of their motion for leave to file their Second Amended Consolidated Class Action Complaint (“Amended Complaint”). A redlined version of the Amended Complaint is attached as Exhibit “A.” The proposed amendments are timely offered based on recently revealed information and, since discovery is yet in its early stages, will not prejudice the defendants. Accordingly, the Plaintiffs respectfully request that the Court grant their Motion.

**BACKGROUND**

This case involves a conspiracy to set supracompetitive prices for ready-mixed concrete manufactured and sold by the defendants and their co-conspirators.

On June 29, 2005, the United States Department of Justice (DOJ) announced that defendant Irving Materials, Inc. agreed to plead guilty and pay a \$29.2 million criminal fine for conspiring and fixing prices for ready-mixed concrete in violation of the Sherman Act. The DOJ also announced that four IMI executives who are defendants in this action, Fred R. “Pete” Irving, Price Irving, John Huggins, and Daniel C. Butler, agreed to plead guilty and serve prison time for their roles in the conspiracy. In light of the DOJ’s announcement and independent investigations into pricing irregularities in the ready-mixed concrete market, the Plaintiffs initiated this lawsuit seeking civil damages and injunctive relief under the antitrust laws on behalf of a nationwide

class of those who purchased ready-mixed concrete directly from the defendants or their co-conspirators.

On November 28, 2005, at the request of the Department of Justice, the Court stayed most discovery in this case pending completion of the criminal proceedings. *See* Exhibit “B.” The Court lifted the discovery stay on December 19, 2006. In the interim, ongoing federal criminal proceedings against the defendants revealed information that warrants amending the Complaint.

**A. The Proposed Amendments**

The Plaintiffs seek leave to amend their Amended Consolidated Class Action Complaint, filed October 19, 2005 (the Complaint), as follows:

- (1) The Plaintiffs seek to add Ricky Beaver, Chris Beaver, and John Blatzheim as defendants.
- (2) The Plaintiffs seek to add Monroe County, Indiana to the definition of “Central Indiana Area” in paragraph 7(e) of the Complaint. Thus, the proposed Class definition would include: “All Persons who purchased ready-mixed concrete directly from any of the defendants or any of their co-conspirators, which was delivered from a facility within the Central Indiana Area, at any time during the class period ... ,” where the “Central Indiana Area” means Boone, Hamilton, Hancock, Hendricks, Johnson, Madison, Marion, Monroe, Morgan, and Shelby Counties, Indiana.
- (3) The Plaintiffs seek to drop Craw-Con, Inc. and Van Valkenburg Builders, Inc. as plaintiffs because they no longer wish to bear the burdens of participating as class representatives.

(4) The Plaintiffs seek to correct non-substantive, inadvertent errors in the Complaint.

**B. The New Information from the Criminal Proceedings**

While discovery in this case was stayed, there were several developments in the criminal investigation of the conspiracy:

1. On March 30, 2006, Builder's Concrete & Supply Co., Inc., and one of its executives, Gus B. "Butch" Nuckolls, III, pleaded guilty to price-fixing conspiracy charges. *See* Exhibit "C."
2. On April 27, 2006, Hughey, Inc. (d/b/a Carmel Concrete Products) and one of its executives, Scott D. Hughey, pleaded guilty to price-fixing conspiracy charges. *See* Exhibit "D."
3. On April 11, 2006, Ricky ("Rick") Beaver, Chris Beaver, and MA-RI-AL Corporation d/b/a Beaver Materials, along with John J. Blatzheim, an executive of defendant Builder's Concrete and Supply Co., were indicted on criminal antitrust conspiracy charges. *See* Exhibit "E."
4. On November 3, 2006, Blatzheim pleaded guilty to price-fixing conspiracy charges. *See* Exhibit "F."
5. On November 16, 2006, after a four-day jury trial conducted Chief Judge Larry J. McKinney in the Southern District of Indiana (the Beaver Trial), Beaver, Ricky Beaver, and Chris Beaver were convicted on price-fixing conspiracy charges. A copy of the docket from the Beaver criminal case, with an entry reflecting the verdict, is attached as Exhibit "G."

The Plaintiffs' request for leave to add Ricky Beaver, Chris Beaver, and John Blatzheim as defendants is based on the grand jury Indictment, Blatzheim's guilty plea and the outcome of the Beaver trial.

The Plaintiffs' request for leave to amend the Complaint's Class definition to include Monroe County, Indiana is based on testimony from the Beaver trial. Specifically, Price Irving's testimony reveals that the price-fixing conspiracy involved facilities located in Bloomington, Indiana, which is in Monroe County:

Q: ... As part of this plea agreement did IM agree to waive indictment and plead guilty to a one count information charging IMI with participation in a price fixing agreement?

A: Yes.

Q: What else did IMI agree to pursuant to this plea agreement?

A: To pay a 29.2 million dollars fine and cooperate with the Government.

Q: In turn, did the United States agree to advise the Court of IMI's full and truthful cooperation?

A: Yes.

Q: Did the United States agree not to bring further criminal charges against IMI?

A: Yes.

Q: Did IMI also apply for conditional amnesty?

A: Yes.

Q: What conduct did IMI report in its conditional amnesty application?

A: What conduct?

Q: Yeah. Did IMI report conduct in any other markets?

A: Yes.

Q: What kind of conduct did it report?

A: Talking to other producers.

Q: Was that conspiratorial conduct?

A: Yes.

Q: Were these markets Bloomington, Marion, and Muncie?

A: Yes.

Q: Why did IMI report this conduct?

A: We were being truthful with the Government.

An excerpt from the Beaver Trial transcript containing this testimony is attached as Exhibit "H."

### ARGUMENT

Leave to amend the complaint “shall be freely given when justice so requires.” FED. R. CIV. P. 15(a); *Barry Aviation Inc. v. Land O’ Lakes Municipal Airport Comm’n*, 377 F.3d 682, 687 (7th Cir. 2004). The Seventh Circuit characterizes leave to amend under Rule 15(a) as nearly “automatic.” *See Bohem v. City of East Chicago, Ind.*, 799 F.2d 1180, 1184 (7th Cir. 1986). In class actions, courts emphasize the liberality of this rule when the moving party seeks to modify the class definition. *See, e.g. In re N.Y. City Municipal Secs. Litig.*, 87 F.R.D. 572, 580-81 (S.D.N.Y. 1980) (“[p]rior to a decision on the merits, leave to amend the complaint to redefine the class should be freely given except when some prejudice results ...”). Leave to amend is committed to the Court’s discretion. *Daughterity v. Traylor Bros., Inc.*, 970 F.2d 348, 351 (7th Cir.1992). Except in unusual circumstances not applicable here, leave should be granted absent undue delay that prejudices the opposing party. *Dubicz v. Commonwealth Edison Co.*, 377 F.3d 787, 792-93 (7th Cir. 2004); *Bohem*, 799 F.2d at 1184.

There has been no undue delay in offering these amendments. Most discovery has been stayed since November 2005. The Plaintiffs were unaware of the facts forming the basis for the proposed amendment to the Class definition until the recent guilty pleas and the Beaver trial. So too, Craw-Con and Van Valkenburg only recently expressed their desire to withdraw as class representatives.

Nor will the amendments prejudice the defendants. There is no unfair surprise – Blatzheim knew of his own involvement, and Mr. Irving’s testimony at the criminal trial at the very least establishes IMI’s knowledge of the geographic breadth of the conspiracy. The defendants have not wasted discovery efforts since full discovery is only now in its initial stages. And, because Irving Materials, Inc. and Prairie Material Sales, Inc. are the only Defendants with

concrete plants in Monroe County, Indiana, discovery is not likely to greatly increase in scope. Indeed, the withdrawal of two class representatives likely will decrease the defendants' discovery burden. Finally, the amendments will promote efficiency by allowing for the resolution of additional factually and legally similar claims in this single action.

**CONCLUSION**

For the foregoing reasons, the Plaintiffs respectfully request that the Court grant their motion for leave to file their Second Amended Consolidated Class Action Complaint.

Dated: January 26, 2006

Respectfully submitted,

/s/ Scott D. Gilchrist

Scott D. Gilchrist

Irwin B. Levin  
Richard E. Shevitz  
Scott D. Gilchrist  
Vess A. Miller  
COHEN & MALAD, LLP  
One Indiana Square, Suite 1400  
Indianapolis, IN 46204  
Telephone: (317) 636-6481  
Facsimile: (317) 636-2593  
sgilchrist@cohenandmalad.com

Stephen D. Susman  
Barry C. Barnett  
Jonathan Bridges  
Warren Burns  
SUSMAN GODFREY LLP  
901 Main St., Ste. 4100  
Dallas, TX 75202  
Telephone: (214) 754-1903  
Facsimile: (214) 754-1933  
ssusman@susmangodfrey.com

*CO-LEAD PLAINTIFFS' COUNSEL*

**CERTIFICATE OF SERVICE**

I hereby certify that on January 26, 2007, 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.

Anthony P. Aaron  
ICE MILLER  
anthony.aaron@icemiller.com

Arend J. Abel  
COHEN & MALAD  
aabel@cohenandmalad.com

Bryan H. Babb  
BOSE McKINNEY & EVANS, LLP  
bbabb@boselaw.com

Steven M. Badger  
McTURNAN & TURNER  
sbadger@mtlitigation.com

Barry C. Barnett  
SUSMAN GODFREY LLP  
bbarnett@susmangodfrey.com

Steve W. Berman  
HAGENS BERMAN SOBOL SHAPIRO LLP  
steve@hbsslaw.com

Robert J. Bonsignore  
BONSIGNORE & BREWER  
rbonsignore@aol.com

Michael W. Boomgarden  
United States Department of Justice  
michael.boomgarden@usdoj.gov

Jonathan Bridges  
SUSMAN GODFREY LLP  
jbridges@susmangodfrey.com

W. Joseph Bruckner  
LOCKRIDGE GRINDAL NAUEN PLLP  
wjbruckner@locklaw.com

James A.L. Buddenbaum  
PARR RICHEY OBREMSKEY & MORTON  
jbuddenbaum@parrlaw.com

Jason R. Burke  
HOPPER & BLACKWELL  
jburke@hopperblackwell.com

Warren T. Burns  
SUSMAN GODFREY LLP  
wburns@susmangodfrey.com

Bryan L. Clobes  
MILLER FAUCHER & CAFFERTY LLP  
bclobes@millerfaucher.com

Jay S. Cohen  
SPECTOR ROSEMAN & KODROFF P.C.  
jcohen@srk-law.com

Stephen E. Connolly  
SCHIFFRIN & BARROWAY LLP  
sconnolly@sbclasslaw.com

Jeffrey J. Corrigan  
SPECTOR ROSEMAN & KODROFF P.C.  
jcorrigan@srk-law.com

Isaac L. Diel  
LAW OFFICES OF ISAAC L. DIEL  
dslawkc@aol.com

Jonathan A. Epstein  
United States Department of Justice  
jonathan.epstein@usdoj.gov

Vincent J. Esades  
HEINS MILLS & OLSON  
vesades@heinsmills.com

Lara E. FitzSimmons  
JENNER & BLOCK LLP  
lfitzsimmons@jenner.com

Yvonne M. Flaherty  
LOCKRIDGE GRINDAL NAUEN PLLP  
jmflaherty@locklaw.com

Lisa J. Frisella  
THE MOGIN LAW FIRM  
lisa@moginlaw.com

Jerry A. Garau  
FINDLING GARAU GERMANO &  
PENNINGTON  
jgarau@fggplaw.com

Michael D. Gottsch  
CHIMICLES & TIKELLIS LLP  
michaeltgottsch@chimicles.com

Mark K. Gray  
GRAY & WHITE  
mkgrayatty@aol.com

Geoffrey M. Grodner  
MALLOR CLENDENING GRODNER &  
BOHRER  
gmprodne@mcgb.com

James H. Ham, III  
BAKER & DANIELS  
jham@bakerd.com

Gregory P. Hansel  
PRETI FLAHERTY BELIVEAU PACHIOS  
& HALEY LLP  
ghansel@preti.com

William E. Hoese  
KOHNSWIFT & GRAF PC  
whose@kohnsswift.com

Troy J. Hutchinson  
HEINS MILLS & OLSON  
thutchinson@heinsmills.com

Curtis T. Jones  
BOSE MCKINNEY & EVANS LLP  
cjones@boselaw.com

G. Daniel Kelley, Jr.  
ICE MILLER  
daniel.kelley@icemiller.com

Jay P. Kennedy  
KROGER GARDIS & REGAS  
jpk@kgrlaw.com

Chris C. Gair  
JENNER & BLOCK LLP  
cgair@jenner.com

Scott D. Gilchrist  
COHEN & MALAD  
sgilchrist@cohenandmalad.com

Thomas J. Grau  
DREWRY SIMMONS VORNEHM, LLP  
tgrau@drewrysimmons.com

Betsy K. Greene  
GREENE & SCHULTZ  
bkgreene@kiva.net

Theresa Lee Groh  
MURDOCK GOLDENBERG SCHNEIDER &  
GROH LPA  
tgroh@mgs glaw.com

Marshall S. Hanley  
FINDLING GARAU GERMANO &  
PENNINGTON  
mhanley@fggplaw.com

Michael D. Hausfeld  
COHEN MILSTEIN HAUSFELD & TOLL  
mhausfeld@cmht.com

George W. Hopper  
HOPPER & BLACKWELL  
ghopper@hopperblackwell.com

Jean K. Janes  
MUCH SHELIST  
jjanes@muchshelist.com

Daniel R. Karon  
GOLDMAN SCARLATO & KARON PC  
karon@gsk-law.com

Jamie R. Kendall  
PRICE WAICUKAUSKI RILEY &  
DEBROTA  
jkendall@price-law.com

Jeffrey L. Kodroff  
SPECTOR ROSEMAN & KODROFF P.C.  
jkodroff@srk-law.com



Joseph C. Kohn  
KOHNSWIFT & GRAF PC  
jkohn@kohnsswift.com

Matthew D. Lamkin  
BAKER & DANIELS  
Matthew.lamkin@bakerd.com

Gene R. Leeuw  
LEEUEW OBERLIES & CAMPBELL PC  
grleeuw@indylegal.net

Irwin B. Levin  
COHEN & MALAD  
ilevin@cohenandmalad.com

James R. Malone, Jr.  
CHIMICLES & TIKELLIS LLP  
jamesmalone@chimicles.com

J. Lee McNeely  
MCNEELY STEPHENSON THOPY &  
HARROLD  
jlmcneely@msth.com

Thomas E. Mixdorf  
ICE MILLER  
thomas.mixdorf@icemiller.com

Daniel J. Mogin  
THE MOGIN LAW FIRM  
dmogin@moginlaw.com

Casandra Murphy  
SCHIFFRIN & BARROWAY, LLP  
cmurphy@sbclasslaw.com

Patrick B. Omilian  
MALLOR CLENDENING GRODNER &  
BOHRER LLP  
pomilian@mcbg.com

Eric S. Pavlack  
COHEN & MALAD  
epavlack@cohenandmalad.com

Offer Korin  
KATZ & KORIN  
okorin@katzkorin.com

Shannon D. Landreth  
McTURNAN & TURNER  
slandreth@mtlitig.com

Joseph M. Leone  
DREWRY SIMMONS VORNEHM, LLP  
jleone@drewrysimmons.com

Jennifer Stephens Love  
FINDLING GARAU GERMANO &  
PENNINGTON  
jlove@fggplaw.com

Chad M. McManamy  
THE MOGIN LAW FIRM  
chad@moginlaw.com

John M. Mead  
LEEUEW OBERLIES & CAMPBELL PC  
jmead@indylegal.net

Christopher A. Moeller  
PRICE WAICUKAUSKI RILEY &  
DEBROTA  
cmoeller@price-law.com

John C. Murdock  
MURDOCK GOLDENBERG SCHNEIDER &  
GROH LPA  
jmurdock@mgsplaw.com

Cathleen L. Nevin  
KATZ & KORIN  
cnevin@katzkorin.com

Kathy L. Osborn  
BAKER & DANIELS  
klosborn@bakerd.com

Bernard Persky  
LABATON SUCHAROW & RUDOFF  
LLP  
bpersky@labaton.com

Henry J. Price  
PRICE WAICUKAUSKI RILEY &  
DEBROTA  
hprice@price-law.com

Mindee J. Reuben  
WEINSTEIN KITCHENOFF & ASHER LLC  
reuben@wka-law.com

William N. Riley  
PRICE WAICUKAUSKI RILEY &  
DEBROTA  
wriley@price-law.com

Kellie C. Safar  
LABATON SUCHAROW & RUDOFF  
LLP  
ksafar@labaton.com

Robert S. Schachter  
ZWERLING SCHACHTER & ZWERLING  
LLP  
rschachter@zsz.com

Robert J. Schuckit  
SCHUCKIT & ASSOCIATES, P.C.  
rschuckit@schuckitlaw.com

Anthony D. Shapiro  
HAGENS BERMAN SOBOL SHAPIRO LLP  
tony@hbsslaw.com

Richard E. Shevitz  
COHEN & MALAD  
rshevitz@cohenandmalad.com

Robert K. Stanley  
BAKER & DANIELS  
rkstanley@bakerd.com

Stephen D. Susman  
SUSMAN GODFREY LLP  
ssusman@susmangodfrey.com

Frank J. Vondrak  
United States Department of Justice  
frank.vondrak@usdoj.gov

John R. Price  
JOHN R. PRICE & ASSOCIATES  
john@johnpricelaw.com

Brady J. Rife  
McNEELY STEPHENSON THOPY &  
HARROLD  
bjrife@msth.com

Steve Runyan  
KROGER GARDIS & REGAS  
ser@kgrlaw.com

Hollis L. Salzman  
LABATON SUCHAROW & RUDOFF  
LLP  
hsalzman@labaton.com

Eric L. Schleef  
United States Department of Justice  
eric.schleef@usdoj.gov

Frederick W. Schultz  
GREENE & SCHULTZ  
fschultz@kiva.net

Charles R. Sheeks  
SHEEKS & NIXON, LLP  
crslaw@sbcglobal.net

Eugene A. Spector  
SPECTOR ROSEMAN & KODROFF P.C.  
espector@srk-law.com

Edward P. Steegmann  
ICE MILLER  
ed.steegmann@icemiller

Justin M. Tarshis  
ZWERLING SCHACHTER & ZWERLING  
LLP  
jtarshis@zsz.com

David B. Vornehm  
DREWRY SIMMONS PITTS & VORNEHM  
dvornehm@drewrysimmons.com

Ronald J. Waicukauski  
PRICE WAICUKAUSKI RILEY &  
DEBROTA  
rwaicukauski@price-law.com

Lawrence Walner  
LAWRENCE WALNER & ASSOCIATES  
walner@walnerclassaction.com

Randall B. Weill  
PRETI FLAHERTY BELIVEAU PACHIOS  
& HALEY LLP  
rweill@preti.com

Stewart M. Weltman  
COHEN MILSTEIN HAUSFELD  
& TOLL PLLC  
sweltman@cmht.com

Joseph R. Whatley, Jr.  
WHATLEY DRAKE LLC  
jwhatley@whatleydrake.com

Matthew L. White  
GRAY & WHITE  
mattwhiteatty@aol.com

Judy Woods  
BOSE MCKINNEY & EVANS, LLP  
jwoods@boselaw.com

Robert J. Wozniak, Jr.  
MUCH SHELIST  
rwozniak@muchshelist.com

Kendall S. Zylstra  
SCHIFFRIN & BARROWAY LLP  
kzylstra@sbclasslaw.com

I hereby certify that on January 29, 2007, a copy of the foregoing was mailed, by first-class U.S. Mail, postage prepaid and properly addressed to the following:

Steven A. Asher  
WEINSTEIN KITCHENOFF & ASHER, LLC  
1845 Walnut St., Ste. 1100  
Philadelphia, PA 19103

Kathleen C. Chavez  
CHAVEZ LAW FIRM  
416 S. Second St.  
Geneva, IL 60134

Robert Foote  
FOOTE MEYERS MIELKE & FLOWERS,  
LLC  
416 S. Second St.  
Geneva, IL 60134

Samuel D. Heins  
HEINS MILLS & OLSON PLC  
3550 IDS Center  
80 South Eighth St.  
Minneapolis, MN 55402

Ellen Meriwether  
MILLER FAUCHER & CAFFERTY LLP  
One Logan Square  
18<sup>th</sup> & Cherry Streets, Ste. 1700  
Philadelphia, PA 19103

Marvin Miller  
Jennifer Sprengel  
MILLER FAUCHER & CAFFERTY LLP  
30 N. LaSalle St., Ste. 3200  
Chicago, IL 60602

Krishna B. Narine  
LAW OFFICE OF KRISHNA B. NARINE  
7839 Montgomery Avenue  
Elkins Park, PA 19027

L. Kendall Satterfield  
Richard M. Volin  
FINKELSTEIN, THOMPSON &  
LOUGHRAN  
1050 30<sup>th</sup> St., N.W.  
Washington, D.C. 20007

United States of America  
U.S. Dept. of Justice – Antitrust Division  
209 S. LaSalle St., Ste. 600  
Chicago, IL 60604

Daniel E. Gustafson  
Renaë D. Steiner  
GUSTAFSON GLUEK PLLC  
650 Northstar East  
608 Second Avenue South  
Minneapolis, MN 55402

Richard A. Lockridge  
LOCKRIDGE GRINDAL NAUEN P.L.L.PL  
100 Washington Avenue South  
Suite 2200  
Minneapolis, MN 55401

/s/ Scott D. Gilchrist  
Scott D. Gilchrist

Scott D. Gilchrist  
COHEN & MALAD, LLP  
One Indiana Square, Suite 1400  
Indianapolis, IN 46204  
Telephone: (317) 636-6481  
Facsimile: (317) 636-2593  
E-mail: [sgilchrist@cohenandmalad.com](mailto:sgilchrist@cohenandmalad.com)