
ENGELHARDT CONTRACTING, on behalf)	CASE NO. 1:05-cv-1130-SEB-VSS
of itself and all others similarly situated,)	
)	
Plaintiff,)	
)	
v.)	
)	
IRVING MATERIALS, INC.,)	
)	
Defendant.)	

**MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF ORDER (1)
CONSOLIDATING RELATED ACTIONS; (2) SETTING CERTAIN PRE-TRIAL
PROCEDURES; AND (3) APPOINTING IRWIN B. LEVIN AS PLAINTIFFS' LEAD
COUNSEL**

I Introduction and Summary of Relevant Facts

Irwin B. Levin of Cohen & Malad, LLP filed the first class action lawsuit in this litigation on June 30, 2005, immediately after the United States Department of Justice filed an information naming Irving Material, Inc, an Indiana corporation, as a criminal defendant in this antitrust matter, and before any other class actions were filed. Even more important, Mr. Levin was retained by his client in September, 2004, nearly a year ago. Accordingly, he has been investigating this matter over the course of the last twelve months, well before the commencement of this litigation. In addition, Mr. Levin does not seek to create a fixed executive committee in this matter, but instead proposes a more flexible leadership structure that will allow the lawyers who are best suited to work on this case to participate in a cohesive, efficient and cost-effective manner.

After other counsel filed subsequent lawsuits, Mr. Levin approached other counsel in an effort to eliminate any disputes over leadership and to present a united front to the Court and to the defendants. Unfortunately, on August 17, 2005, one group of lawyers filed a “Motion to

Consolidate and for Entry of Case Management Order,” in which they ask the Court to appoint Stephen Susman, of Dallas, Texas, as lead counsel in this action, and to appoint an executive committee composed of Steven Berman of Washington, Joseph Kohn of Pennsylvania, and Gregory Hansel of Maine. Notably, the proposed Case Management Order No. 1 which they tendered to the Court does not provide a role for any counsel from Indiana or other Midwestern states where this case is located. On August 18, 2005, another out-of-state firm, Spector, Roseman & Kodroff, P.C. from Pennsylvania, also filed a lead counsel motion. Regrettably, the Court must now become involved in the process of selecting among these leadership structures and the leadership structure proposed by Mr. Levin and the undersigned law firms, all of whom support him in this endeavor, in order for this litigation to proceed.¹

The Plaintiffs’ counsel involved in this matter enjoy significant reputations and have substantial accomplishments. Before considering the professional background and credentials of Mr. Levin – which include successfully arguing class certification before this Court in *In Re Bromine Antitrust Litigation*, IP 00-9310-c-B/S. MDL No. 1310, (Order Certifying Class and Preliminary Approving Partial Settlement Agreement, entered on September 28, 2001, certifying nationwide class of purchasers of bromine products from overseas defendants as against non-settling defendants, and granting preliminary approval to settlement as against certain other

¹ Agreement exists among all of the parties as to the threshold issue of the consolidation of all of the related cases. Defendant Irving Materials, Inc. has encouraged the Court to consolidate these cases pursuant to Local Rule 42.2 as the first step in the process of appointing lead counsel. See Defendant’s Motion for Appointment of Interim Class Counsel and to Defer Responsive Pleading and Other Proceedings Pending Such Appointment, n. 1.

In addition to the undersigned counsel in the class action litigation, Irwin Levin’s application to be appointed as lead counsel in this matter also is supported by Gene Leeuw of the Indianapolis firm of Leeuw, Oberlies & Campbell, P.C. Mr. Leeuw has brought two related cases on behalf of a single plaintiff, neither of which are filed as class actions. Although Mr. Leeuw is not formally involved in the current dispute over the appointment of lead counsel in the class actions under F.R.Civ.P. 23, he recognizes the benefits of the appointment of qualified lead counsel in these related class action cases, and has authorized Mr. Levin to report to the Court that he supports Levin’s motion to be appointed as lead counsel in this matter.

settling defendants) – together with the qualifications of his colleagues in the present matter, the Court should be aware of several specific points relating to the different approaches that Plaintiffs’ counsel have taken toward this litigation, which bear upon the selection of lead counsel.

The Pretrial Order that Mr. Levin has submitted to the Court proposes that he serve as lead counsel without the distraction, duplication of effort and inefficiencies created by a Court-appointed executive committee that could dilute the lead counsel’s responsibility to the Court. This streamlined structure places the primary responsibility for ensuring the efficient progress of this litigation squarely upon the shoulders of one local lawyer. In addition, that sole lead counsel will ensure that the responsibilities for prosecuting this litigation are shared among the qualified firms seeking to participate in this litigation, and are not limited only to the firms that are supporting this application for lead counsel.²

This structure should assure the Court not only that the litigation will be prosecuted by an experienced team of competent counsel, but also that any concerns the Court may have concerning this litigation will be addressed directly by a local attorney who both has substantial experience in class action litigation and who lives and practices in this jurisdiction on an ongoing basis. The proposed Pretrial Order further provides that counsel to whom work is assigned must submit monthly time and expense reports, and that work will not be assigned to counsel who fail

² While the memorandum filed by the Spector firm proposes that that firm act as sole lead counsel, assisted by a liaison counsel, that memorandum makes no reference to assigning work to any other firms in this litigation, whether drawn from the group of lawyers associated with Mr. Susman, or the group of lawyers supporting Mr. Levin’s application. As set forth above, Mr. Levin has already committed that if he is appointed Lead Counsel he will assign responsibilities on a professional basis to lawyers with the appropriate qualifications to get the job done. In addition, the Spector firm’s discussion of the relative amounts of ready mixed concrete purchased by the various plaintiffs is drawn from the entirely separate context of securities fraud litigation under the Private Securities Litigation Reform Act, and has no application whatsoever to this present antitrust litigation.

to submit such reports. Mr. Levin believes that this particular enforcement mechanism will ensure proper recordkeeping and an accurate assessment of the work performed and time and resources expended in this litigation.³

II. Discussion

The undersigned plaintiffs have all filed class action complaints (the "Complaints") against defendant, Irving Materials, Inc. All of the Complaints are substantially similar and allege that defendant, a producer and seller of ready-mixed concrete, has violated Section 1 of the Sherman Act, 15 U.S.C. §1 by conspiring with others to fix, raise, maintain or stabilize the prices of ready-mixed concrete sold in the United States and conspiring with others to allocate markets for ready-mixed concrete sold in the United States. These complex cases should be consolidated and organized to promote economic use of judicial and litigant resources, and the most expeditious resolution of the matter. See Federal Rule of Civil Procedure, Rule 42(a).

Plaintiffs are all direct purchasers of ready-mixed concrete who purchased ready-mixed concrete from defendant and have been adversely affected by defendant's illegal price-fixing. Therefore, it is essential that all plaintiffs are represented by an experienced, capable, and successful class action attorney. The undersigned counsel propose that the Court appoint Irwin

³ Finally, movants note that that one of the lawyers seeking to serve on the executive committee composed of out of state firms appears to have already engaged in a violation of the Indiana Rules of Professional Responsibility relating to solicitation of clients in connection with this litigation. On July 1, 2005, Gregory Hansel of the Portland, Maine firm of Preti, Flaherty, Beliveau, Pachios & Haley, LLP transmitted a letter to a potential class member seeking to represent him in this matter. A complete copy of that letter is attached as Exhibit 1 to the Declaration of Marshall Fletcher, attached hereto as Exhibit "A". The letter and the envelope in which it was transmitted lack the requisite statement that the materials contain "Advertising Material" as required by Rule 7.3 of the Indiana Rules of Professional Conduct, which is binding upon out of state counsel pursuant to Rule 8.5 of the Indiana Rules of Professional Conduct and Rule 83.5 of the Local Rules of this Court. The conduct of that lawyer provides a potential basis for Defendants to attack his adequacy and the adequacy of the leadership structure with which he is involved pursuant to Fed.R.Civ. P. 23(a)(4), and could also provide the grounds for attacking the adequacy of any class representative who may have retained counsel in response to any such improper solicitation letter, all of which obviously could undermine the interests of the class members. In addition, the Court may have separate reservations about placing its confidence in counsel who appears to already have evidenced a failure to comply with Indiana ethical standards.

B. Levin of Cohen & Malad, LLP as Plaintiffs' Lead Counsel. The biography of Irwin B. Levin is attached hereto as Exhibit B, and the firm resume of Cohen & Malad, LLP is attached hereto as Exhibit C.

A. The Manual for Complex Litigation Contemplates Appointment of Lead Counsel in Complex Antitrust Litigation.

Section 20.22 of the MANUAL FOR COMPLEX LITIGATION (Third) (the "Manual") acknowledges that "[s]pecial procedures for coordination of counsel are . . . needed" in complex cases to streamline pretrial litigation and prevent the duplication of efforts. MANUAL FOR COMPLEX LITIGATION (Third) § 20.22 (Federal Judicial Center, West 1995). In particular, where such actions "involve voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money. . . the application of techniques and procedures for the management of a complex litigation" is appropriate. Id. This is such an action.

One of the organizational structures recommended for management of complex cases, including antitrust actions, is the appointment of lead counsel. See id. at §§20.221 and 33.1. According to Section 20.221 of the Manual, lead counsel is:

charged with major responsibility for formulating (after consultation with other counsel) and presenting positions on substantive and procedural issues during the litigation. Typically they act for the group - either personally or by coordinating the efforts of others--in presenting written and oral arguments and suggestions to the court, working with opposing counsel in developing and implementing a litigation plan, initiating and organizing discovery requests and responses, conducting the principal examination of deponents, employing experts, arranging for support services, and seeing that schedules are met.

Id. at § 20.211.

Plaintiffs in this matter have not reached agreement on the selection of lead counsel. Therefore, "the court will need to institute procedures under which one or more attorneys are selected and authorized to act on behalf of other counsel and their clients. . . ." Id. In such

instances, the Court must take steps to ensure that the lead counsel which it appoints is "qualified and responsible [and] . . . will fairly and adequately represent all of the parties on [its] side." Id. Irwin B. Levin of Cohen & Malad, LLP will ensure that plaintiffs in this litigation are being ably, efficiently, and vigorously represented by an attorney of exceptional competence, experience and integrity.

B. The Appointment of Irwin B. Levin of Cohen & Malad, LLP as Plaintiffs' Lead Counsel.

It will be necessary to conduct a thorough, independent and aggressive investigation of the defendant's activities to demonstrate liability. This Court's choice of lead counsel will affect the outcome of class certification, the success of plaintiffs in proving liability, and the extent of recovery obtained for the plaintiff class. For these reasons, it is essential that the Court choose experienced counsel who will diligently seek the best possible outcome for the plaintiffs. Irwin B. Levin is best suited for this leadership role.

Mr. Levin is an Indianapolis attorney well-suited to the responsibilities of Plaintiffs' Lead Counsel in this particular litigation. This litigation involves an Indianapolis-based defendant and purchases and sales of ready-mixed concrete occurring predominantly in this area. As set forth above, some plaintiffs' counsel have filed a motion suggesting an organization of plaintiffs' counsel with one lead counsel based in Texas, and a Court-appointed Executive Committee consisting of three member firms, all of whom are located on the east or west coasts, while another Plaintiffs' counsel seek a leadership structure composed of a single lead counsel from Philadelphia, neither of which are appropriate for this matter.⁴ Due to the regional nature and

⁴ Many of the firms supporting Irwin B. Levin as sole lead counsel also have the skill and experience to serve in that role in this matter. In recognition of the regional scope of this matter, and given their confidence in Mr. Levin's capacity to lead the efforts of plaintiffs' counsel, they have not sought a formal leadership role. Under these circumstances, this motion does not burden the record with voluminous copies of the resumes and biographies of these experienced counsel, which list, among other things, their prior appointments as lead counsel in complex antitrust cases. Of course, if the Court requests that information, it will be provided promptly.

relative size of this litigation compared to those of many other antitrust class actions, such a complex court-appointed organization of plaintiffs' counsel is not warranted, and will likely result in duplication of effort and delay. Mr. Levin has a long history with many of the Plaintiffs' counsel and will use these relationships to effectively manage this case. Mr. Levin has the skill and experience necessary to effectively and economically marshal the efforts of the talented resources afforded him and the class by the various law firms representing plaintiffs in this matter. Most of these firms have worked with Mr. Levin and Cohen & Malad, LLP on other class actions and represent a large pool of antitrust class litigation experience. Efforts of all firms – including those firms supporting other leadership structures -- would be consulted, directed and lead by Mr. Levin with an eye toward creating economies and efficiencies for the class and the Court.

Further, Mr. Levin has been involved in this litigation since its inception. He and his firm, along with others of the undersigned, have been investigating defendant's misconduct for nearly a year and were the first to file a class action complaint against Irving Materials, Inc. on June 30, 2005, the day after the Department of Justice issued a press release announcing Irving Materials, Inc.'s guilty plea.

Mr. Levin is the managing partner of Cohen & Malad, LLP, in Indianapolis, Indiana where he has practiced since 1978. His practice is dedicated principally to class action litigation. He has been involved in class action litigation including antitrust, securities fraud, insurance and consumer fraud litigation at a national level. In particular, Mr. Levin is well-known and regarded for his involvement in the first class action case filed in the United States against Swiss Banks on behalf of Holocaust survivors. He and other attorneys from Cohen & Malad, LLP not only worked extensively on the factual investigation and legal issues in that historic matter, but Mr. Levin also was appointed to the Executive Committee in that case and ultimately played a

major role in the settlement negotiations which resulted in a \$1.25 billion settlement for the class. Mr. Levin's other representative cases are described in the firm resume and biographical information attached hereto. As set forth in those exhibits, Mr. Levin and his firm, Cohen & Malad, LLP, have substantial experience both prosecuting and defending class actions on a national level and have obtained millions of dollars in recoveries for class members in those cases. As a firm employing more than 20 attorneys with decades of litigation experience, the attorneys of Cohen & Malad, LLP, have the expertise and resources necessary to vigorously represent plaintiffs' interests.

In addition, the undersigned plaintiffs' counsel have successfully led numerous antitrust class actions and have collectively recovered billions of dollars for plaintiffs in those and other class actions.

Accordingly, plaintiffs and the undersigned counsel support the appointment of Irwin B. Levin of Cohen & Malad, LLP, as Lead Counsel for the purpose of assuring the effective, efficient, expeditious and economical conduct of this important antitrust litigation.

III. Conclusion

For all of the foregoing reasons, the undersigned plaintiffs respectfully request that this Court enter Pretrial Order No.1 and appoint Irwin B. Levin and Cohen & Malad, LLP as Plaintiffs' Lead Counsel.

Respectfully submitted,

Dated: August 30, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August, 2005, a copy of the foregoing Memorandum in Support of Motion For Entry of Order: (1) Consolidating Related Actions; (2) Setting Certain Pretrial Procedures; and (3) Appointing Irwin B. Levin As Plaintiffs' Lead Counsel 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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Additionally, I certify that on this 30th day of August, 2005, a copy of the foregoing Memorandum in Support of Motion For Entry of Order: (1) Consolidating Related Actions; (2) Setting Certain Pretrial Procedures; and (3) Appointing Irwin B. Levin As Plaintiffs' Lead Counsel was served upon the following Counsel in each of the Actions identified in this motion by United States First Class Mail:

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