IN THE 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-VSS
THIS DOCUMENT RELATES TO: ALL ACTIONS	)))	

[REDACTED[1]] MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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

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

PLAINTIFFS' INTERIM CO-LEAD COUNSEL

[1] The unredacted version of this Memorandum has been filed under seal pursuant to the Protective Order of the Court dated March 2, 2006.

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3	Correspondence from the United States Department of Justice to counsel for IMI (the "IMI Conditional Amnesty Agreement"), submitted as Government Exhibit 15 in the trial of *United States v. MA-RI-AL Corp., et al.*, No. IP 06-CR-1, 2, 3 (S.D. Ind.)
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INTRODUCTION

The plaintiffs respectfully submit that the Court should certify the proposed Class for the following reasons:

- Volumes of evidence from the criminal proceedings against many of the defendants establish that they conspired to fix concrete prices in Indiana.

- Sound economic analysis shows that if the defendants in fact conspired, their conspiracy impacted all members of the proposed Class, [redacted].

- The elements of Rule 23 are satisfied, and principles of efficiency and fairness underlying the class action mechanism will be well-served by class treatment here. Class certification opens an avenue of recovery to the victims of the defendants' illegal acts that would be otherwise unavailable.

The plaintiffs also request that the Court appoint them as Class Representatives and appoint Interim Co-Lead Counsel as Class Counsel.

The plaintiffs will prove at trial that the defendants conspired to fix prices of ready-mixed concrete in violation of the antitrust laws and that direct purchasers of ready-mixed concrete were injured by the conspiracy. All but a few of the defendants have been criminally charged for their participation in the conspiracy and have either been convicted by jury, pled guilty, or entered into leniency agreements with the government.

The plaintiffs seek certification of the following class (the proposed Class):

> All individuals, partnerships, corporations, limited liability companies, or other business or legal entities 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 Counties of Boone, Hamilton, Hancock, Hendricks, Johnson, Madison, Marion, Monroe, Morgan, or Shelby in the State of Indiana, at any time from July 1, 2000 through May 25, 2004, but excluding defendants, their co-conspirators, their respective parents, subsidiaries, and affiliates, and federal, state, and local government entities and political subdivisions.

Plaintiffs' Second Amended Consolidated Class Action Complaint (Compl.), filed Mar. 9, 2007 (Docket No. 281), ¶ 37 submitted herewith as Exhibit 1 to the Declaration of Irwin B. Levin

("Levin Dec.").[1] The Class Period is defined in the Complaint as "the period from at least July 1, 2000 through at least May 25, 2004." *Id.* ¶ 7(b).[2] The Central Indiana Area is defined in the Complaint as "Boone, Hamilton, Hancock, Hendricks, Johnson, Madison, Marion, Monroe, Morgan, and Shelby Counties, Indiana." *Id.* ¶ 7(e).[3] A map and table showing the locations of the defendants' ready-mixed concrete plants in the Central Indiana Area are submitted as collective Exhibit 5.

The proposed Class will pursue federal antitrust claims based on the defendants' agreements and concerted actions undertaken to artificially raise and fix prices for ready-mixed concrete in the Central Indiana Area. These actions suppressed or eliminated competition in the market for ready-mixed concrete, violating § 1 of the Sherman Act, 15 U.S.C. § 1 (2002), and injuring the plaintiffs and the other Class members. Compl. ¶¶ 4, 45-55, 61. The plaintiffs will also prove that the defendants fraudulently concealed their actions. *Id.* ¶¶ 56-60.

This case is a model antitrust class action. The class numbers in the thousands and every

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[1] Unless otherwise noted, all referenced exhibits are submitted under the Declaration of Irwin B. Levin filed with this Memorandum.

[2] The Class Period is based on the IMI defendants' admissions in their plea agreements that they violated the Sherman Act during this time period. The plea agreements of IMI, Price Irving, Pete Irving, John Huggins, and Dan Butler are submitted as Exhibit 2. As discussed below, search warrants were executed by the FBI on the last day of this period, May 25, 2004.

[3] The plaintiffs initially defined the Central Indiana Area to include the counties adjacent to Marion county; with leave of the Court, the plaintiffs amended their complaint to add Monroe County based on statements in IMI's conditional amnesty letter and Price Irving's testimony at the Beaver defendants' criminal trial that ready-mixed concrete producers conspired to restrain competition in Bloomington, Indiana, as well. *See* IMI's Conditional Amnesty Letter, dated May 26, 2005, Exhibit 3, at 1 (stating that IMI's agreement with the government relates to "possible price-fixing or other conduct violative of Section 1 of the Sherman Act . . . in the ready-mixed concrete industry in the metropolitan areas of Bloomington, Indiana; Marion, Indiana; and Muncie, Indiana"); Tr., *United States v. MA-RI-AL Corp., et al.*, No. IP 06-CR-1, 2, 3, at 203:5-203:17 (S.D. Ind. Nov. 14, 2006) (Price Irving) (testifying that in its conditional amnesty application, IMI admitted conspiratorial conduct in Bloomington), submitted as Exhibit 4. The Plaintiffs will cite the Beaver criminal trial transcript as "Beaver Trans." by internal page and line numbers. The witness's name will be noted in parentheses.

Class member's claim depends on one fundamental, common issue: Whether the defendants engaged in a conspiracy to fix ready-mixed concrete prices that affected the prices paid by the Class members. The plaintiffs and the other Class members are seeking damages and injunctive relief of a kind generally applicable to the Class and based on a common method for assessing impact, injury, and damages. The plaintiffs and Interim Co-Lead Counsel are well qualified to represent the interests of the Class. Given the complexity of this case and the large number of claims involved, a class action is the only realistic way for the Class members to achieve a fair and efficient resolution of their claims. The government did not seek restitution orders against some of the defendants in their criminal cases, because it recognized that this lawsuit provides the appropriate avenue to recover economic damages for the victims of the conspiracy.[4] Indeed, some defendants themselves argued that the matter of restitution is better addressed in this civil action.[5]

The Supreme Court has emphasized the importance of class actions for enforcing the antitrust laws. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972) ("[C]lass actions may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture."). And in *Reiter v. Sonotone Corp.*, the Supreme Court stated:

> Respondents also argue that allowing class actions to be brought by retail

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[4] *See, e.g.*, Tr. Of Change of Plea Proceedings, *United States v. Builder's Concrete & Supply Co. & Gus B. Nuckols, III*, No. IP-06-54-CR-M, at 18:2-18:6, 35:23-36:2 (S.D. Ind. Mar. 31, 2006) ("[I]n light of the civil case filed, which potentially provides for the recovery of a multiple of actual damages, the United States has agreed that it will not seek a restitution order for the offense charged in this information."); Tr. of Guilty Plea, *United States v. John Blatzheim*, No. IP 06-CR-04, at 8:6-8:10 (S.D. Ind. Nov. 3, 2006) (same). These transcripts are submitted as Exhibits 6 and 7, respectively.

[5] *See, e.g.*, Sentencing Memorandum of Hughey, Inc. d/b/a Carmel Concrete, *United States v. Hughey, Inc. d/b/a Carmel Concrete* at 5 (S.D. Ind. Aug. 9, 2006), submitted as Exhibit 8.

> consumers like the petitioner here will add a significant burden to the already crowded dockets of the federal courts. That may well be true but cannot be a controlling consideration here. . . . Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.

442 U.S. 330, 344 (1979).

In fact, class actions are considered "a particularly appropriate method for the litigation of antitrust actions alleging a price-fixing conspiracy." 5 MOORE'S FEDERAL PRACTICE § 23.47[3][a] at 23-236-23-239.[6] After all, a price-fixing conspiracy is no more than a single, common course of action undertaken by a small group for the purpose of suppressing competition and thereby injuring a large group of consumers—in other words, a perfect class-action situation. *See Weeks v. Bareco Oil Co.*, 125 F.2d 84, 88 (7th Cir. 1941) ("[s]trong and persuasive reasons favor the extension of the class suit theory to include a suit to vindicate the rights of several persons contemporaneously injured by a criminal conspiracy effectuated by the same conspirators and directed against a specific class of individuals."). The magnitude of the injury may vary from consumer to consumer but the type of injury—a financial loss from paying artificially elevated prices—is identical. *See id.* ("The illegal conspiracy gives rise to one statutory cause of action incident to the violation of law. Many persons have the identical cause

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[6] *See also In re Playmobil Antitrust Litig.*, 35 F.Supp.2d 231, 238-39 (E.D.N.Y. 1998) (noting that "class actions are particularly appropriate for antitrust litigation concerning price-fixing schemes because price-fixing subjects purchasers in the market to a common harm"); *Jerry Enters. of Gloucester County, Inc. v. Allied Bevs. Grp., LLC*, 178 F.R.D. 437, 446 (D.N.J. 1998) (similar); *In re Plastic Cutlery Antitrust Litig.*, 1998 WL 135703, at *2 (E.D. Pa. Mar. 20, 1998) ("Class actions are widely-recognized as being particularly appropriate for the litigation of antitrust cases alleging a price-fixing conspiracy because price-fixing schemes presumably impact all purchasers in the affected market, so that common questions on the issue of liability predominate."); *In re Hydrogen Peroxide Antitrust Litig.*, 240 F.R.D. 163, 168 (E.D. Pa. 2007) ("Because litigation in price-fixing cases will usually focus on the existence, scope, and effect of the alleged conspiracy, the goals of judicial economy and fairness in such cases will very often be well served by [Federal Rule of Civil Procedure] 23's tools.").

of action, arising from the same wrong, but varying in scope of damages to each, depending on the effect of the illegal act upon the individual."). The nearly mechanical regularity with which classes are certified in price-fixing conspiracy cases suggests that class certification in this case is appropriate and consistent with Federal Rule of Civil Procedure 23.[7]

BACKGROUND

A. The Plaintiffs' Claims

The plaintiffs allege that the defendants perpetrated a price-fixing conspiracy in violation of § 1 of the Sherman Act. To prevail, the plaintiffs must establish the existence of a contract, combination, or conspiracy resulting in an unreasonable restraint of trade in the relevant market that injured the plaintiffs. *Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1220 (7th Cir. 1993). "[H]orizontal price-fixing is illegal *per se*" and does not require a separate showing that the co-conspirators' actions actually restrained trade in the pertinent market.[8] *Id.* at 1221; *see United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218, 223-24 (1940). Rather, "[t]he pernicious effects are conclusively presumed." *Denny's Marina*, 8 F.3d at 1222.

The plaintiffs' damages will be based on the amounts they paid for ready-mixed concrete in excess of what the price would have been in a free and openly competitive market. Compl. ¶¶ 54-55, 61. The plaintiffs allege that these amounts are substantial. *Id.*

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[7] The plaintiffs believe that the class should be certified based on the facts and expert opinions discussed in this brief. This brief does not contain an exhaustive summary of the current record and discovery in this case remains ongoing. The plaintiffs reserve the right to supplement this brief as additional pertinent evidence becomes available during discovery, particularly in light of certain limits on discovery now in place based upon the assertion of Fifth Amendment privilege. And although the plaintiffs are confident that the Class may be certified now, if the Court has any hesitation about certification based on the evidence presented here, the Plaintiffs also reserve their right to renew their motion for class certification after discovery is completed.

[8] Horizontal price-fixing is an understanding or agreement among direct competitors "formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce." *Saucony Vacuum*, 310 U.S. at 223-24.

B. The Criminal Proceedings

On June 29, 2005, the United States Department of Justice (DOJ) announced that defendant Irving Materials, Inc. ("IMI") had agreed to plead guilty and pay a $29.2 million criminal fine—the largest fine ever levied in any domestic antitrust investigation—for conspiring to fix and fixing the price of Ready-Mixed Concrete. Compl. ¶ 48; Exhibit 2. In addition, current or former IMI executives Price Irving, Pete Irving, Dan Butler, and John Huggins pled guilty, agreed to pay fines, and served time in prison for their roles in the conspiracy. Compl. ¶ 48; Exhibit 2.

On March 30, 2006, Builder's Concrete & Supply, Inc. ("BCS") and its president, Butch Nuckols, pled guilty to price-fixing charges. Compl. ¶ 49. On April 27, 2006, Hughey, Inc. d/b/a Carmel Concrete ("Carmel") and its president, Scott Hughey, pled guilty to price-fixing charges. *Id.* at ¶ 50. On November 3, 2006, John Blatzheim, a former BCS executive, pled guilty to price-fixing charges. *Id.* at ¶ 52.[9] On November 16, 2006, after a four-day trial and five hours of deliberation, a jury convicted Ricky Beaver, Chris Beaver, and MA-RI-AL Corporation d/b/a Beaver Materials (collectively "Beaver") of conspiracy to violate the Sherman Act in *United States v. MA-RI-AL Corp., et al.*, No. IP 06-CR-1, 2, 3 (S.D. Ind. 2006) (Judge Larry J. McKinney). *Id.* at ¶¶ 51, 53.

The results of the criminal proceedings for the defendants formally charged with participation in Central Indiana Area Ready-Mixed Concrete price-fixing conspiracy are summarized in the following table (corporate defendants listed in bold):

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[9] The plea agreements of BCS, Nuckols, Carmel, Hughey and Blatzheim are submitted as Exhibits 9, 10, 11, 12 and 13, respectively.

Defendant	Charged	Plea/Conviction	Sentence[10]
Hughey	4/27/06	4/27/06 (Plea)	8/17/06: $225,000 fine; 5 years probation
Scott Hughey	4/27/06	4/27/06 (Plea)	12/18/06: 14 months in prison; $30,000 fine
IMI	6/29/05	6/29/05 (Plea)	7/5/05: $29,200,000 fine
Daniel Butler	6/29/05	6/29/05 (Plea)	12/14/05: 5 months in prison; $100,000 fine
Price Irving	6/29/05	6/29/05 (Plea)	12/20/05: 5 months in prison; $100,000 fine
Fred Irving	6/29/05	6/29/05 (Plea)	12/20/05: 5 months in prison; $200,000 fine
John Huggins	6/29/05	6/29/05 (Plea)	12/14/05: 5 months in prison; $100,000 fine
BCS	3/30/06	3/30/06 (Plea)	7/24/06: $4,000,000 fine; 2 years probation
Butch Nuckols	3/30/06	3/30/06 (Plea)	2/05/07: 14 months in prison; $50,000 fine
John Blatzheim	4/11/06	11/3/06 (Plea)	2/20/07: 9 months in prison; $5,000 fine
Beaver	4/11/06	11/16/06 (Conviction)	3/01/07: $1,750,000 fine; 5 years probation
Chris Beaver	4/11/06	11/16/06 (Conviction)	2/20/07: 27 months in prison for each count, concurrent; $5,000 fine
Ricky Beaver	4/11/06	11/16/06 (Conviction)	2/20/07: 27 months in prison, each count, concurrent; $5,000 fine

Other defendants avoided prosecution by signing amnesty agreements. On June 22, 2004, Shelby Gravel, Inc. d/b/a Shelby Materials ("Shelby") and two of its officers, Richard and Philip Haehl, entered into a leniency agreement with the DOJ which immunized them from prosecution in exchange for their cooperation. A copy of the Shelby defendants' leniency agreement is submitted as Exhibit 15. In August 2006, Jason Mann, president of American Concrete Company, Inc. ("American"), signed a similar immunity agreement with the DOJ. *See American Concrete's Response to Plaintiffs' First Set of Interrogatories to All Defendants* at 12, submitted as Exhibit 16.

[10] The criminal judgment forms reflecting the convictions and sentences for defendants listed in the table are submitted as Exhibit 14.

C. The Conspiracy

The defendants intentionally entered into agreements with the principal goal of suppressing competition in the Central Indiana Area ready-mixed concrete market by raising and maintaining prices for ready-mixed concrete at artificially high, supracompetitive levels. Compl. ¶¶ 1-3, 45-47. The co-conspirators met secretly on several occasions and discussed and agreed on what prices to set. What follows is a summary of some of the defendants' anticompetitive meetings and agreements.

1. From Before the Class Period to Mid-2000

John Huggins, a former IMI vice president, told the FBI that IMI, Carmel, and other defendants have had discussions about ready-mixed concrete pricing since the mid-1980s. FBI FD-302 Report of Interview with John Huggins, Sept. 16, 2004, at AM 069086 (submitted as Exhibit 17); FBI FD-302 Record of Interview with Scott Hughey, Aug. 19, 2004, at AM 069098 (submitted as Exhibit 18) ("Even prior to Hughey becoming president [in 1991], [Carmel] engaged in price increase discussions with IMI."). Huggins recalled having pricing discussions with Scott Hughey of Carmel at least 20 times between 1995 and his retirement from IMI in 2001. Exhibit 17 at AM 069086; Exhibit 18 at AM 069098 (explaining that Hughey and Huggins met annually to discuss price increases, typically in March). Huggins explained that "[a]fter discussing pricing with Hughey each year, Hughey indicated that he would contact Beaver, American Concrete, and [Prairie]." Exhibit 17 at AM 069086; Exhibit 18 at 069098 (detailing annual pricing discussions with Nuckols of BCS).

In mid-1998 or early 1999, Huggins and Pete Irving met with a high-level manager of Prairie Material Sales, Inc. ("Prairie") in Chicago to discourage Prairie from supplying Ready-Mixed Concrete in Bloomington, Indiana. FBI FD-302 Record of Interview with John Huggins,

Jan. 4, 2005, at AM 069090 (submitted as Exhibit 19). Around January 1999, Huggins met and discussed pricing with Jerry Krozel, a Prairie vice president, while attending a National Ready-Mixed Concrete Association Meeting. *Id.* Huggins advised Krozel that Prairie's prices were too low in Bloomington and tried to reach an agreement with Krozel to raise prices. *Id.* at AM 069090-91. In March or April 1999, Huggins and IMI Area Manager Gene Wiggam met with Gary Matney, the officer of Prairie in charge of Prairie's ready-mixed concrete operations in the Central Indiana Area during the Class Period, to discuss pricing in Bloomington. *Id.* at AM 069091-92. Huggins complained that Prairie's prices in Bloomington were too low; "Matney agreed with Huggins' comments and explained that he would try to get the price up and get his guy in line." *Id.* at AM 069092. After this meeting, Huggins informed Mike Lagrange, IMI's Bloomington Area Manager, Danny Todd, an IMI salesman in Bloomington, and one other salesman "that he had met with Matney and that [Prairie] agreed to stop cutting prices." *Id.* Prairie started pricing ready-mixed concrete in accordance with their agreement within one month of Huggins' meeting with Matney; IMI also lived up to the agreement. *Id.* at 069092-93. Huggins had several more meetings with Matney to discuss ready-mixed concrete prices in Indianapolis and Bloomington. *Id.* at 069092-93.

Shelby opened its Beech Grove plant and began supplying ready-mixed concrete in the Indianapolis area in June 1999. Beaver Trans. 124:3-124:6 (Richard Haehl); *see also* Exhibit 5 (map and table of plant locations). In August 1999, Butch Nuckols of BCS met with Richard Haehl of Shelby at the Oaken Barrel Brewing Company restaurant in Greenwood, Indiana. *Response of Shelby Materials to Plaintiffs' First Set of Interrogatories* at 11 (submitted as Exhibit 20). At that meeting, Nuckols advised Haehl that Shelby would be able to charge higher prices for ready-mixed concrete in Indianapolis than Shelby charged elsewhere. *Id.* Sometime

in 2000, Philip Haehl of Shelby met with Scott Hughey of Carmel at a Cracker Barrel restaurant. Beaver Trans. 351:11-351:18 (Scott Hughey). Hughey called the meeting to discuss Shelby's pricing of ready-mixed concrete: "I met with Phil Haehl at the Cracker Barrel and discussed with him about him being off on a number that IMI told me they were off on." *Id.* at 351:15-351:17 (Scott Hughey). Sometime in early July 2000, Huggins met with Nuckols at a Sahm's Restaurant in Fishers, Indiana, where Huggins complained that BCS's prices for ready-mixed concrete were too low. *BCS Defendants' Answers to Plaintiffs' First Set of Interrogatories to All Defendants* at 16 (submitted as Exhibit 21).

2. The First Horse Barn Meeting

On July 12, 2000, Butch Nuckols and/or Scott Hughey organized a meeting (the "First Horse Barn Meeting") at Nuckols's horse barn attended by John Huggins for IMI, Nuckols for BCS, Hughey for Carmel, Richard and Philip Haehl for Shelby, and Rick Beaver for Beaver. Beaver Trans. 141:14-143:11 (Richard Haehl), 303:15-304:10 (Scott Hughey); Exhibit 20 at 11; Exhibit 21 at 17. Hughey testified that the meeting was held because "we thought we needed to get together and stabilize the market by limiting discounts and getting the price up." Beaver Trans. 304:13-304:15 (Scott Hughey). The attendees agreed to limit discounts off the net price (the base price minus the timely payment discount) of ready-mixed concrete products to no more than $5.50 per cubic yard. Beaver Trans. 145:5-145:15 (Richard Haehl); Exhibit 20 at 12; Exhibit 21 at 17. They discussed further limiting the discount to $3.50 in the future. Exhibit 20 at 12. They also discussed eliminating the 10 percent discount customarily offered as an inducement to use ready-mixed concrete rather than asphalt for paving jobs. *Id.* at 12. Finally, the co-conspirators discussed the need for Shelby to raise its price for the chemical waterproofing additive DCI. *Id.* Scott Hughey told the group that he would communicate the

substance of the conspirators' agreements to Gary Matney of Prairie and Jason Mann of American. Beaver Trans. 146:20-146:22 (Haehl).

3. From the First Horse Barn Meeting to Fall 2002

On September 21, 2001, Matney met with Philip and Richard Haehl at the Cracker Barrel restaurant in Shelbyville, Indiana, and advised the Haehls that Prairie intended to open a plant in eastern Indianapolis, that Prairie had "allowed [BCS] to grow too fast," and that "altering concrete mixes has the effect of cutting prices." Exhibit 20 at 12. Also in 2001, Tim Kuebler of BCS met with Matney and "began feeling [him] out about pricing." *Affidavit of FBI Special Agent Steven L. Schlobohm in Support of Application for Search Warrant* ¶ 18 (submitted as Exhibit 22).[11] Before meeting with Kuebler, Jason Mann of American advised Matney that Kuebler was "'making the rounds'" with the ready-mixed concrete producers in an attempt to get a group price increase. *Id.* And in 2001 or early 2002, Matney twice called Nuckols "to complain about BCS prices and threaten[] to take business away from BCS if Mr. Nuckols did not cease to underbid Prairie's prices." Exhibit 21 at 17. Sometime in mid-2002, American received from IMI by facsimile a copy of American's bid for a project with a handwritten statement indicating that American's price was too low. Exhibit 16 at 16; Exhibit 22 ¶ 30(b).

On January 14, 2002, IMI organized a meeting with Philip and Richard Haehl to introduce them to Dan Butler, who was taking over for Huggins as vice president in charge of IMI's ready-mixed concrete division and as the person who, along with Price Irving, was in charge of ready-mixed concrete pricing and sales in the Indianapolis area. Exhibit 17 at 12;

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[11] Schlobohm references an unidentified cooperating witness ("CW"). *See, e.g.*, Exhibit 22 ¶ 16. At the Beaver criminal trial, Schlobohm identified the cooperating witness as Gary Matney. Beaver Trans. 405:12-405:16 (Schlobohm). *See also Defendant Prairie Material Sales, Inc.'s Responses to Plaintiffs' First Set of Interrogatories to All Defendants* at 11-12 (submitted as Exhibit 23) (confirming that Matney cooperated with the FBI and DOJ in investigating the conspiracy).

Beaver Trans. 217:16-218:6 (Irving); FBI FD-302 Report of interview with Dan Butler, Aug. 17, 2005, at AM 069061-62 (submitted as Exhibit 24). On March 13, 2002, Scott Hughey met with Richard Haehl at a Cracker Barrel restaurant where Hughey accused Shelby of pricing its ready-mixed concrete below the agreed-to conspiracy price. Exhibit 20 at 12. Hughey admitted that the purpose of this meeting was "to discuss fixing prices" of ready-mixed concrete. Beaver Trans. at 353:13-354:1 (Scott Hughey). In April 2002, the Haehls met with Nuckols and Kuebler at an Olive Garden restaurant, where Nuckols and Kuebler tried to convince the Haehls not to open a plant in Clermont because there were already "'too many trucks in the market.'" Exhibit 20 at 12. In April or May 2002, Butler and Price Irving met with Matney at a Flying J Truckstop to discuss ready-mixed concrete prices, particularly in Bloomington, Indiana. Exhibit 23 at AM 069068; FBI FD-302 Record of Interview with Price Irving, Oct. 19, 2004, at AM 069135 (submitted as Exhibit 25). Butler complained that Prairie was intentionally cutting prices in Bloomington and Matney made a similar complaint about IMI. *Id.* Irving recalled that Matney agreed to review the invoices for the jobs Butler was complaining about. Exhibit 25 at AM 069135.

4. The Signature Inn Meeting

On or about October 1, 2002, Scott Hughey and Butch Nuckols organized a meeting at a Signature Inn hotel in Indianapolis ("the Signature Inn Meeting") that was attended by Richard Haehl for Shelby, Butler and Price Irving for IMI, Nuckols for BCS and Rick Beaver for Beaver. Beaver Trans. 147:20-148:7 (Richard Haehl), 218:15-219:21 (Price Irving), Exhibit 20 at 12-13; Exhibit 21 at 17. Hughey chaired the meeting. Exhibit 18 at 17. The attendees reaffirmed their agreement to limit discounts off of the net price of ready-mixed concrete to $5.50 per cubic yard. Beaver Trans. 148:8-148:18, 150:13-150:18 (Richard Haehl). And again they discussed

reducing the maximum discount at some future date. *Id.* at 149:1-149:7 (Haehl). They also agreed to communicate with one another to enforce the agreement. Specifically, if a customer reported that one of the co-conspirators offered a larger discount than the agreed-to $5.50, the co-conspirator receiving the report was to call the co-conspirator allegedly offering the larger discount to confirm. Beaver Trans. 222:14-222:17, 224:3-224:4 (Price Irving), 311:25-313:4 (Hughey); Exhibit 21 at 18; Exhibit 25 at AM 069137. After the meeting, Butler sent a memorandum to IMI's Area Managers instructing them not to bid below a certain price. FBI FD-302, Record of Interview with Dan Butler, Oct. 18, 2004, at AM 069076 (submitted as Exhibit 26).

5. From the Signature Inn Meeting to Fall 2003

Several months after the Signature Inn Meeting, Price Irving called Rick Beaver to confirm a customer's statement regarding the price Beaver had quoted for a job. Beaver Trans. 226:23-227:9 (Irving).[12] Butler recalled meeting individually with Nuckols or Hughey "on four or five separate occasions" after the Signature Inn meeting to discuss pricing issues. Exhibit 26 at AM 069076. Though Prairie and American did not send representatives to the First Horse Barn or Signature Inn Meetings, Hughey testified that he met with both Mann and Matney "for the purpose of fixing the price of ready-mix concrete." Beaver Trans. 301:23-302:4, 302:14-302:19 (Hughey); *see also Responses of Hughey, Inc. d/b/a Carmel Concrete and Scott D. Hughey to Plaintiffs' First Set of Interrogatories to All Defendants* at 12 (submitted as Exhibit

[12] *See also* Exhibit 20 at 13 (stating that after being told that IMI underbid it for the Mayflower project, Shelby contacted IMI to confirm IMI's bid, matched IMI's bid, and won the contract); Beaver Trans. at 258:13-258:15 (Irving) (describing a late fall 2002 pricing discussion involving Price Irving, Butler, and Hughey); Exhibit 25 at AM 069137 (explaining that Irving had pricing conversations with Hughey, Nuckols and at least one Shelby employee after the Signature Inn meeting).

27) ("Mr. Hughey had certain communications with Mr. Gary Matney concerning actual or proposed understandings or agreements relating to Prairie Materials").

Regarding American, in 2003 Jason Mann met and discussed ready-mixed concrete prices with: (1) Scott Hughey, who accused American of violating the conspiracy agreements and threatened to retaliate if American failed to abide by the agreement in the future, Beaver Trans. 357:4-357:23 (Hughey), Exhibit 16 at 15-16; (2) Chris Beaver, who complained that one of American's recent bids was too low, Exhibit 16 at 15-16; and (3) Nuckols and John Blatzheim of BCS, who encouraged Mann to bid in accordance with the conspiracy agreements. *See id.* at 15-16. Hughey later told Matney that Chris Beaver had presented the substance of the price-fixing agreement to American and that "'there was indication [that American] would be in on [the agreements]." Exhibit 22 ¶¶ 20, 27(b).

As to Prairie, Butler spoke with Matney at the World of Concrete Expo in early 2003 and "mentioned that prices were too cheap in Bloomington and recommended that they talk upon returning to Indianapolis." Exhibit 24 at AM 069068. On February 17, 2003, Butler and Matney met at a Bob Evans restaurant, where Butler agreed to provide some of IMI's Bloomington quotes to Matney and asked Matney to provide Prairie's quotes. *Id.* Matney also told Butler that Prairie's Bloomington bids would be above a certain price and that, although Butler could not recall the exact amount of the bids, it was "something IMI could live with" and was probably around $63 per cubic yard. *Id.* Butler believes that prices in Bloomington increased after his meeting with Matney. *Id.* at AM 069069. After that meeting, Butler and Matney had other discussions about individual bids in Bloomington with reference to their agreed-upon prices. *Id.*

6. The Second Horse Barn Meeting

In mid to late 2003, Scott Hughey and Butch Nuckols met to discuss their belief that some co-conspirators were not consistently abiding by the agreements and their desire to "get together and try to get this thing reeled in back to the agreement." Beaver Trans. 315:9-316:9 (Scott Hughey). Nuckols suggested that they hold another meeting at his horse barn. *Id.* at 315:5-315:9 (Scott Hughey). On October 22, 2003, Hughey, Price Irving, Butler, Nuckols, Blatzheim, Philip and Richard Haehl, Chris Beaver, and possibly others, met at Nuckols's horse barn (the "Second Horse Barn Meeting"). Beaver Trans. 316:20-317:4 (Scott Hughey), 156:3-156:8 (Richard Haehl); *see also* Exhibit 20 at 13 (stating that John Huggins and Rick Beaver also attended).

Nuckols opened the meeting by stating "'I called this meeting to again try and straighten out the prices in Indianapolis.'" Beaver Trans. 234:4-234:5 (Irving). The attendees reaffirmed their agreement to limit discounts to $5.50 off the net price per cubic yard. Beaver Trans. 52:10-54:5 (Butch Nuckols), 156:9-156:22 (Haehl), 236:17-236:19 (Price Irving); Exhibit 26 at AM 069077. They also reiterated their plan to reduce the maximum discount to $3.50 in the future. Beaver Trans. 317:18-317:21, 318:12-319:9 (Hughey); Exhibit 18 at AM 069102; Exhibit 22 ¶ 23(f). The attendees agreed to increase the base price of performance concrete by $2 per cubic yard and bag mixes by $2.50 per cubic yard effective April 1, 2004. Beaver Trans. 154:17-155:1 (Haehl); Exhibit 24 at AM 069054; Exhibit 25 at AM 069140-41; Exhibit 26 at AM 069077. They agreed to institute a $3 per cubic yard "winter conditions" surcharge on concrete delivered in cold months. Beaver Trans. 154:5-154:16, 160:1-160:6 (Haehl); Exhibit 24 at AM 069065; Exhibit 26 at AM 069077. And they again agreed to contact one another to verify customer statements regarding discounts exceeding the agreed-to maximum of $5.50 off the net price.

Beaver Trans. 55:2-55:11 (Nuckols), 156:24-157:17 (Haehl), 235:17-235:19 (Irving), 322:16-322:23 (Hughey); Exhibit 20 at 13; Exhibit 21 at 18-19.

Hughey and others agreed to communicate the substance of the conspirators' agreements to Gary Matney of Prairie and Jason Mann of American. Exhibit 20 at 13; Beaver Trans. 55:12-55:21 (Nuckols), 154:23-155:1 (Haehl), 319:21-319:24 (Hughey) (John Huggins agreed to contact Matney about the agreements), 319:25-320:6 (Hughey) (Chris Beaver agreed to contact Mann about the agreements); 380:17-381:2 (Hughey) (same). Richard Haehl testified that he believed that Prairie and American were parties to the conspiracy. Beaver Trans. 146:16-146:22, 154:19-155:1, 156:3-156:15, 160:7-160:20 (Haehl); *see also id.* at 392:24-393:6 (Hughey) ("A: I was meeting with [the DOJ], telling them everything I knew about the price fixing agreement that we all had. . . . Q: And including American? A Yes."). Butler told the FBI that "Hughey believed that he had established a relationship with Matney and could get him onboard. Hughey said he had talked to Matney and that he (Matney) was willing to give it a try." Exhibit 24 at 069064-65. Price Irving said that Hughey "reported that he spoke with Matney, who was supportive of limiting the discount . . . ." Exhibit 25 at AM 069138. And Huggins told the FBI that he "was under the impression that Matney was in agreement with limiting discounts along with the other competitors." Exhibit 17 at AM 069088; *see also* Exhibit 18 at AM 069094 ("Hughey told Huggins that Matney was going along with the pricing agreement in Indianapolis. . . . [B]ased on market observations, [Huggins] felt [Prairie] was participating in the Indianapolis agreement.").

7. From the Second Horse Barn Meeting to the End of the Class Period

Following the agreed-to procedure, the co-conspirators continued to communicate with each other to enforce their price-fixing agreements. For example, in May 2004, Rick Beaver

called Richard Haehl to confirm a customer's report that IMI's bid price for a project was too low. Beaver Trans. 157:21-159:22 (Haehl); Exhibit 20 at 13.[13] Matney gave the FBI several price lists that he received from co-conspirators. Exhibit 22 ¶¶ 28. Among these was a letter from American announcing a "Winter Conditions" fee beginning in December 2003 and a $2 across-the-board price increase effective April 1, 2004. *Id.* at ¶ 29.

Other late 2003 price-related discussions among co-conspirators included: (1) Price Irving, Butler, Nuckols, Hughey, and Richard or Philip Haehl discussed pricing at a micro-brewery on Southport Road in Indianapolis, Beaver Trans. 259:14-260:9 (Irving); Exhibit 21 at 19; (2) Price Irving, Butler, Nuckols, and Blatzheim discussed pricing at the Loon Lake Lodge restaurant in Indianapolis, Beaver Trans. at 260:10-261:3 (Irving); and (3) Price Irving and Hughey discussed pricing at a Cracker Barrel restaurant in Indianapolis, *id.* at 261:9-261:23 (Irving). Irving, Blatzheim, Nuckols, Hughey, and Butler also discussed pricing several times by phone. *Id.* at 262:3-263:1; Ex. 21 at 19. Butler admitted to having "several breakfast, dinner, and lunch meetings with John Blatzheim in order to discuss pricing conflicts," as well as pricing-related meetings with Richard Haehl, Chris Beaver, and Hughey. Exhibit 24 at 069065-66.

Hughey met with Matney "[p]robably three times" after the Second Horse Barn Meeting. Beaver Trans. 320:16-320:23 (Hughey). Hughey and Matney met on November 14 and 17, 2003, and February 4, 2004. Exhibit 22 ¶ 22; Exhibit 27 at 12. Because Matney began cooperating with the federal investigation after the Second Horse Barn Meeting, he wore a concealed recording device to these meetings. *See id.* Hughey informed Matney that Carmel,

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[13] *See e.g.*, Beaver Trans. 157:15-157:19 (Haehl) ("Q: So these contacts with your competitors were meant to help enforce the agreement? A: Yes. Q: Did you ever participate in any phone calls like this? A: Yes."); *id.* at 283:10-283:22 (Irving) (stating that he had 10 to 20 conversations with conspiracy members between 2002 and 2004); *id.* at 323:7-325:6 (Hughey) (describing numerous calls to Rick and Chris Beaver to confirm customer representations regarding Beaver's price quotes).

Shelby, IMI, BCS, and American had agreed (1) to limit discounts off net price to $5.50 until December 15, 2003 or early 2004, and then to $3.50, *id.* at ¶¶ 23, 25(b); *Defendant Gary Matney's Responses and Objections to Plaintiffs' First Set of Interrogatories* at 16 (submitted as Exhibit 28); (2) to increase performance mix prices by $2 per cubic yard and bag mix prices by $2.50 per cubic yard effective April 1, 2004, Ex. 22 ¶¶ 23(f), 25; Exhibit 28 at 16; (3) to institute a winter service charge, Exhibit 28 at 16; and (4) to call each other to confirm customer statements about bid prices, Exhibit 22 ¶¶ 23(b).[14] On the FBI's instructions, Matney told Hughey that Prairie would implement the $5.50 limitation on discounts and then began to bid in accordance with the agreement. Exhibit 22 ¶ 26; Exhibit 28 at 16.

Both IMI and the Beaver defendants invoked the Fifth Amendment rather than give details of these meetings and agreements in response to the Plaintiffs' interrogatories. *See Defendant MA-RI-AL Corporation's Objections to Plaintiffs' First Set of Interrogatories* at 16, 18; *Defendant Chris Beaver's Objections to Plaintiffs' First Set of Interrogatories* at 15, 17; *Defendant Rick Beaver's Objections to Plaintiffs' First Set of Interrogatories* at 15, 17 (collectively submitted as Exhibit 29); *IMI Defendants' Response to Plaintiffs' First Set of Interrogatories* at 22-26 (submitted as Exhibit 30).

Price-fixing was nothing new to the Indiana concrete market. Pete Irving told the FBI that IMI had been discussing prices with competitors since the 1960s. FBI FD-302 Record of Interview with Pete Irving, Sept. 16, 2004, at AM 069126-27 (submitted as Exhibit 31). He explained that one of the primary reasons the Indianapolis Ready-Mixed Concrete Association was formed was "to discuss the price of ready-mix concrete." *Id.* at AM 069127. Irving

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[14] Hughey also advised Matney that the conspirators agreed to increase the price of calcium chloride additive to $2 per cubic yard of concrete. *See* Exhibit 22 ¶¶ 25(b) &(c).

speculated that price-fixing discussions may have stopped only because the co-conspirators got wind of the FBI investigation. *Id.* at 069128. Presumably, the conspiracy ended on May 25, 2004 (the last day of the proposed Class Period) with the serving of multiple search warrants by the FBI. *See, e.g.*, Beaver Trans. at 391:5-391:10 (Hughey).

Consistent with the agreements they reached at these meetings, the co-conspirators issued price announcements, bids, or quotations reflecting the agreed-to prices. The April 2004 price lists issued by IMI, Shelby, BCS, Carmel, and Beaver, which reflect the agreed-to, across-the-board price increases, are submitted as Exhibit 32.[15] These lists demonstrate that the co-conspirators' list prices, though not always identical, were structured in a way indicative of anti-competitive collusion. The defendants then sold ready-mixed concrete to the plaintiffs and the other proposed Class members at the agreed-to, inflated prices. Compl. ¶¶ 2-3, 45-47, 54-55, 61. Jason Mann admitted to the FBI that he instituted the winter service charge after discussing it with Chris Beaver, although he claimed to have done so independently. FBI FD-302 Record of Interview with Jason Mann, Aug. 1, 2006, at AM 069159-61 (submitted as Exhibit 33). Mann also admitted to instituting a price increase in April 2004 after one of his employees received a copy of Beaver's 2004 price list. *Id.* at AM 069161.[16]

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[15] *See also* Exhibit 22 ¶ 25 (transcript of Hughey reporting to Matney that Shelby and IMI issued price lists reflecting the agreed-to $2 increase on performance mixes and $2.50 increase on bag mixes and that the other conspirators planned to issue similar price lists by April 2004).

[16] Price Irving told the FBI that he met with Mann either shortly before or shortly after the Second Horse Barn Meeting and informed Mann about IMI's upcoming 2004 price increase and winter service charge. Irving said that "Mann . . . was receptive to the price increase and service charge [and] even announced his price increase and winter service charge before IMI." Exhibit 25 at 069141; *see also id.* at 069143 (explaining that Irving provided IMI price lists to Mann "so that he would follow suit" and that "[a]fter providing the price sheets, Irving recalled Mann issuing a similar price increase announcement").

Butler stated that IMI adhered to the Second Horse Barn Meeting agreements in every regard, implementing the Winter Service Charge, the limitation on discounts, and the April 1, 2004 price increase. Exhibit 24 at 069065. Price Irving testified that IMI adhered to the conspiracy agreements. Beaver Trans. 280:13-280:14, 281:17-281:19 (Irving). Virgil Mabrey, Sales Manager for Carmel, told the FBI that in late 2003 he was instructed not to give discounts of more than $5.50 off the net price of concrete and that only Scott Hughey could approve a larger discount. FBI FD-302 Record of Interview with Virgil Mabrey, May 27, 2004, at AM 069150 (submitted as Exhibit 34). Mabrey also confirmed that Carmel increased its list prices effective April 1, 2004, as agreed at the Second Horse Barn Meeting. *Id.* at AM 069152. Scott Hughey confirmed that Carmel adhered to the conspiracy agreements. Beaver Trans. 307:24-308:11, 314:1-314:9 (Hughey). In their plea agreements, IMI, BCS, and Carmel each admitted to making "sales affected by th[e] conspiracy" to "customers within the Southern District of Indiana." Exhibit 2 (IMI plea agreement) ¶ 4(e); Exhibit 9 ¶ 4(e); Exhibit 11 ¶ 4(e). And Count One of the Indictment on which the Beaver defendants were convicted charged them with "selling ready mixed concrete pursuant to th[e] agreements at collusive and noncompetitive prices."[17] Richard Haehl testified that Shelby adhered to the conspiracy agreements, Beaver Trans. 147:5, 151:13-151:14 (Haehl), and that all parties adhered to the agreements at least sometimes. *Id*. at 196:16-197:4 (Haehl). The defendants' actions suppressed interstate commerce in ready-mixed concrete and unreasonably restrained trade in violation of § 1 of the Sherman Act. *See* Compl. ¶¶ 1-3, 54-55, 61.

[17] Indictment, *United States v. MA-RI-AL Corp., et al.*, Nos. IP 06-CR-1, 2, 3, 4 (S.D. Ind. Apr. 11, 2006) (submitted as Exhibit 35).

8. Fraudulent Concealment

The co-conspirators intentionally and fraudulently concealed their communications with each other, the existence of their conspiracy, and their unlawful actions from the plaintiffs and proposed Class members. *See* Compl. ¶ 56-60. The defendants formed their price-fixing agreements during clandestine meetings and secret conversations held at undisclosed, out-of-the way locations like Nuckols' horse barn. *See, e.g.*, Beaver Trans. 142:20-142:21 (Richard Haehl) ("Q: Why would you meet in a horse barn? A: Because it was private and, you know, what we were doing was illegal.")[18] Only co-conspirators were present at these meetings and, by design, note taking was restricted. Compl. ¶ 57. Only Scott Hughey took notes at some or all of the conspiracy meetings, but he destroyed them when he learned that he was under investigation. *See* Beaver Trans. 298:16-300:10, 301:13-301:17 (Hughey). A Department of Justice ("DOJ") exhibit from the Beaver trial, in the form of a timeline and notes regarding the co-conspirators' meetings prepared by Scott Hughey at the DOJ's request, is submitted as Exhibit 36.

The defendants' efforts to conceal their conspiracy were largely successful. Though one or more Class members or their counsel were investigating apparent irregularities in the defendants' pricing practices for about one year before Irving Materials' June 2005 guilty plea, the plaintiffs were unable to uncover enough information to file an antitrust claim prior to the guilty pleas. Compl. ¶ 58.

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[18] *See also* Beaver Trans. 46:20-46:23 (Nuckols) ("Q: Why did you decide to meet with your competitors in a horse barn? A: Well, knowing it wasn't the right thing to do, we didn't want to be out in public doing this."); 147:16-147:19 (Richard Haehl) ("Q: Why did you meet in a hotel? A: We met in a conference room that was out of the way where nobody would see us. Q: Again why was it important not to be seen? A: Because what we were doing was illegal."), 309:11-310:1 (Hughey) ("Q: Why did you decide to meet at the hotel? A: Because we didn't think it would be appropriate to meet at anyone's office. It was a secret type meeting, didn't want everyone knowing you were there. . . . Q: Why did you pay cash? A: I didn't want to put it on my charge card. Q: Why not? A: I didn't really want a . . . written record that we had the meeting.").

D. The Ready-Mixed Concrete Market

The plaintiffs' expert, Dr. John Beyer, describes and analyzes the ready-mixed concrete market in his Declaration, which is submitted (including its exhibits and attachments) as Exhibit 37. His conclusions are summarized below.

[redacted]

[redacted]

[redacted]

[redacted]

E. The Impact of the Conspiracy

[redacted]

[redacted]

F. The Plaintiffs and the Proposed Class

The named plaintiffs and proposed representatives of the Class each purchased ready-mixed concrete directly from one of the defendants during the life of the conspiracy. Compl. ¶¶ 8-14. They each paid more for ready-mixed concrete than they would have paid but for the anticompetitive actions of the conspiracy. *Id.* at ¶ 2-3, 54-55, 61.

The plaintiffs seek to represent the proposed Class of all those who purchased ready-mixed concrete directly from one of the defendants or any of their co-conspirators that was delivered from a facility within the Central Indiana Area from at least July 1, 2000 through at least May 25, 2004. The plaintiffs allege that this Class consists of at least hundreds of members. Each proposed Class member paid the co-conspirators' artificially inflated prices. The plaintiffs seek treble damages based on the difference between the inflated prices and what the prices would have been in a naturally competitive market. And they seek an injunction

restraining the defendants and the other co-conspirators from further suppressing competition in the ready-mixed concrete market.

ARGUMENT

Class certification requires that the plaintiffs satisfy the four requirements Rule 23(a) of the Federal Rules of Civil Procedure as well as at least one of the requirements of Rule 23(b). In deciding whether to certify a class action, "a judge should make whatever factual and legal inquiries are necessary under Rule 23." *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001). "Rule 23 must be liberally interpreted. Its policy is to favor maintenance of class actions." *King v. Kansas City S. Indust.*, 519 F.2d 20, 25-26 (7th Cir. 1975) (citation omitted). In evaluating class certification requests, courts should resolve doubts in favor of certification. *See Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985); *Eddleman v. Jefferson County, Ky.*, 96 F.3d 1448, 1996 WL 395013, at *3 (6th Cir. Aug. 29, 1996); *Day v. Check Brokerage Corp.*, 240 F.R.D. 414, 416 (N.D. Ill. 2007).[19]

The preference for class actions in price-fixing cases is so pronounced that, "in an alleged horizontal price fixing conspiracy case[,] when a court is in doubt as to whether or not to certify a class action, the court should err in favor of allowing the class." *Cumberland Farms, Inc. v. Browning-Ferris Indus., Inc.*, 120 F.R.D. 642, 645 (E.D. Pa. 1988) (citations omitted). Courts in

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[19] *See also Kahan v. Rosentiel*, 424 F.2d 161, 169 (3d Cir. 1970), *cert. denied*, 398 U.S. 950 (1970); *Epslin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); *Green v. Wolf Corp.*, 406 F.2d 291, 298 (2d Cir. 1968); *Rogers v. Baxter Int'l, Inc.*, No. 04 C 6476, 2006 WL 794734, at *2 (N.D. Ill. Mar. 22, 2006); 3 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 7.17 (4th ed. 2002) ("Broad flexibility to modify an initial class ruling is built into Rule 23, so that courts have concluded that when any doubt exists concerning the propriety of class certification, it should be resolved in favor of upholding the class.").

this Circuit routinely have certified classes of purchaser plaintiffs in horizontal price-fixing conspiracy suits.[20]

Here, each requirement of Rule 23(a) and Rule 23(b)(3) is easily satisfied. Because this is a price-fixing conspiracy claim under the antitrust laws, the policy interests emphasized in *Hawaii, Weeks* and other cases make class certification particularly appropriate in this case.

A. The Plaintiffs Satisfy Rule 23(a)'s Requirements.

Under Federal Rule of Civil Procedure 23(a), class certification is appropriate only if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are common questions or law or fact common to the class, (3) the claims of the representative parties are typical of the claims of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

These prerequisites, commonly called "numerosity," "commonality," "typicality," and "adequacy," are satisfied here.

1. Numerosity is satisfied.

Rule 23(a)(1) requires that the proposed Class be so numerous that joinder of all members is impracticable. The plaintiffs need not allege the precise number of class members to satisfy the numerosity requirement: there is no "magic number." *See Swanson v. Am. Consumer Indus.*, 415 F.2d 1326, 1333 n.9 (7th Cir. 1969); *Hubler Chevrolet, Inc. v. Gen. Motors Corp.*, 193 F.R.D. 574, 577 (S.D. Ind. 2000). Instead, a "finding of numerosity may be supported by

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[20] *See, e.g.*, *Sebo v. Rubenstein*, 188 F.R.D. 310 (N.D. Ill. 1999) (Judge Lindberg certified a class of purchasers of lithotripsy procedures in the Chicagoland area); *Panache Broadcasting of Penn., Inc. v. Richardson Elecs., Ltd.*, No. 90 C 6400, 1999 U.S. Dist. LEXIS 7941 (N.D. Ill. May 14, 1999) (Judge Nordberg certified a nationwide class of purchasers of electron tubes); *In re Brand Name Prescription Drugs Antitrust Litig.*, MDL 997, 1994 WL 663590 (N.D. Ill. Nov. 18, 1994) (Judge Kocoras certified a nationwide class of purchasers of brand name prescription drugs); *In re High Fructose Corn Syrup Antitrust Litig.*, 936 F. Supp. 530 (C.D. Ill. 1996) (Judge Mihm certified a nationwide class of purchasers of high fructose corn syrup); *United Nat'l Records, Inc. v. MCA Inc.*, 101 F.R.D. 323, 325 (N.D. Ill. 1984) (Judge Bua certified a nationwide class of purchasers of records and tapes).

common sense assumptions," particularly in antitrust actions. *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 239 (E.D.N.Y. 1988); HERBERT B NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS, § 3.5 (4th ed. 2005).

Based on the nature of the trade and the duration of the Class Period, the plaintiffs allege that the commerce affected by the conspiracy is substantial. Compl. ¶¶ 36, 38. [redacted] "A class with more than forty members is generally sufficiently numerous that joinder is considered impracticable." *Paper Sys. v. Mitsubishi Corp.*, 193 F.R.D. 601, 604 (E.D. Wis. 2000). Without question, joinder of [redacted] geographically dispersed individual plaintiffs would be impracticable. Rule 23(a)(1)'s numerosity requirement is satisfied here.

2. Commonality is satisfied.

Rule 23(a)(2) requires that there be questions of law or fact common to all Class members. "A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2)." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). Commonality does not require that all legal and factual issues be identical among the representative plaintiffs and Class members. *In re Bromine Antitrust Litig.*, 203 F.R.D. 403, 408 (S.D. Ind. 2001). Rule 23(a)(2) is construed liberally: even a single common legal or factual issue may suffice. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 310 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999). The commonality "requirement is satisfied 'as long as the class claims arise out of the same legal or remedial theory.'" *Bromine*, 203 F.R.D. at 408 (quoting *Johns v. DeLeonardis*, 145 F.R.D. 480, 483 (N.D. Ill. 1992)). "The question at this

stage is whether any common issues exist at all." *Blair v. Equifax Check Serv.*, 1999 WL 116225, at *2 (N.D. Ill., Feb. 26, 1999), *aff'd*, 181 F.3d 832 (7th Cir. 1999).

Here, Rule 23(a)(2)'s commonality requirement is satisfied because each Class member's claim turns on the same basic question: Whether the defendants engaged in a conspiracy to fix ready-mixed concrete prices that affected the prices paid by the Class member. Each Class member's claim arises out of the "common nucleus of operative fact" of the conspiracy, each Class member seeks recovery under the same legal theory, and each Class member's recovery depends on proving the existence of the conspiracy.

It is well-established that "the question of the existence of a conspiracy in restraint of trade is one that is common to all potential plaintiffs, and the importance of this question usually warrants treating them as a class." *Bromine*, 203 F.R.D. at 408 (quoting *Sebo v. Rubenstein*, 188 F.R.D. 310, 313 (N.D. Ill. 1999)). As one court explained, in price-fixing conspiracy cases like this one, commonality usually is satisfied because "Plaintiffs have a shared interest in attempting to prove that Defendants engaged in a conspiracy to fix, raise, and maintain the prices" of the pertinent product. *In re Foundry Resins Antitrust Litig.*, No. 04-cv-415, --- F. Supp. 2d ---, 2007 WL 1346569, at *11 (S.D. Ohio May 2, 2007). "Without proof of these common questions of law and fact, none of the plaintiffs recover." *Id.*[21]

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[21] *See Hydrogen Peroxide*, 240 F.R.D. at 168-69 ("Antitrust price-fixing conspiracy cases, by their nature, deal with common legal and factual questions about the existence, scope and effect of the alleged conspiracy." (quoting *In re Sugar Antitrust Litig.*, 73 F.R.D. 322, 335 (E.D. Pa. 1976)); *Serv. Spring, Inc. v. Cambria Spring Co.*, 1984 WL 2925, at *2 (N.D. Ill. Jan. 6, 1984) ("Without doubt, both the existence of a conspiracy and whether defendants fraudulently concealed the alleged conspiracy are common issues."). *See also Exhaust Unlimited, Inc. v. Cintas Corp.*, 223 F.R.D. 506, 510-11 (S.D. Ill. 2004); *Prescription Drugs*, 1994 WL 663590, at * 2 ("[T]he existence and scope of the alleged conspiracy among the defendants to unlawfully raise, fix and maintain prices of brand name prescription drugs at supra-competitive levels are questions common to all class members."); *Thillens, Inc. v. Community Currency Exch. Ass'n*, 97 F.R.D. 668, 677 (N.D. Ill. 1983) ("Although this is a multi-claim action,

In addition to the existence of the conspiracy, the numerous other common questions of law or fact at issue in this case include:

1. The identities of the participants in the conspiracy;

2. The duration and extent of the conspiracy;

3. Whether the conspiracy violated § 1 of the Sherman Act;

4. Whether the co-conspirators fraudulently concealed their unlawful actions;

5. The effect of the conspiracy on the price of Ready-Mixed Concrete sold in the Central Indiana Area;

6. Whether the defendants' conduct caused injury to the business or property of plaintiff and the other members of the Class; and

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Thillens' major claim alleges an antitrust conspiracy. The overriding common issue of law is to determine the existence of a conspiracy."); *In re Tableware Antitrust Litig.*, 241 F.R.D. 644, 649 (N.D. Cal. 2007) (finding commonality satisfied where class members allegedly paid supracompetitive prices for tableware because of a single price-fixing conspiracy); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 479 (W.D. Pa. 1999) ("[g]iven plaintiffs' allegations of a § 1 conspiracy, the existence, scope and efficacy of the alleged conspiracy are certainly questions that are common to all class members"); *In re Plastic Cutlery Antitrust Litig.*, No. 96-CV-728, 1998 WL 135703, at *3 (E.D. Pa. 1998) (finding commonality satisfied based on plaintiffs' allegation that class was injured by defendants' conspiracy to fix plastic cutlery prices); *Playmobil*, 35 F. Supp. 2d at 240 ("Particularly where the complaint sets forth allegations of price-fixing, courts generally find that there are questions of law and fact common to the class."); *In re NASDAQ Market Makers Antitrust Litig.*, 169 F.R.D. 493, 509 (S.D.N.Y. 1996) ("Numerous courts have held that allegations concerning the existence, scope, and efficacy of an alleged antitrust conspiracy present important common questions sufficient to satisfy the commonality requirement of Rule 23(a)(2)."); *Schreiber v. NCAA*, 167 F.R.D. 169, 174 (D. Kan. 1996) ("Antitrust price-fixing conspiracy cases, by their nature, deal with common legal and factual questions about the existence, scope, and effect of the alleged conspiracy." (quoting *Cumberland Farms* 120 F.R.D. at 646); *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 689 (D. Minn. 1995) ("Insofar as Plaintiffs allege that Defendants engaged in a conspiracy to fix the wholesale price of potash, they have satisfied the commonality requirement of Rule 23(a)."); *In re Infant Formula Antitrust Litig.*, 1992 WL 503465, at *4 (N.D. Fla. Jan. 13, 1992) ("By the very nature of a conspiracy antitrust action, common questions of fact and law exist."); *In re Alcoholic Beverages Litig.*, 95 F.R.D. 321, 324 (E.D.N.Y. 1982) ("The very nature of the case—involving allegations of antitrust conspiracy among defendants—appears to insure that the commonality requirement is satisfied."); *In re Corrugated Container Antitrust Litig.*, 80 F.R.D. 244, 247 (D.C. Tex. 1978) ("Each plaintiff will have to show the existence of a conspiracy to fix, raise, maintain, and stabilize the prices of corrugated sheets and containers. The existence, scope, and efficacy of the alleged conspiracy are clearly questions common to all class members."); *In re Sugar Indus. Antitrust Litig.*, 73 F.R.D. 322, 335 (D.C. Pa. 1976).

7. The appropriate measure of damages sustained by plaintiff and the other members of the Class.

These common legal and factual issues can and should be adjudicated on a class-wide basis.

Commonality also is established here by the plaintiffs' fraudulent concealment allegations. *Infant Formula*, 1992 WL 503465, at *4 ("A pattern of deception, as part of an alleged conspiracy, certainly raises common questions of law and fact regarding all class members."); *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 222 (E.D. Pa. 2001), *aff'd*, 305 F.3d 145, 161-63 (3d Cir. 2002) ("The great majority of cases on this point counsel . . . that common issues predominate over individual ones with respect to fraudulent concealment.").

Because the plaintiffs' and Class members' claims all depend on the single, common question of whether the defendants in fact conspired to fix ready-mixed concrete prices, as well as a number of other common legal and factual questions, Rule 23(a)(2) is satisfied.

3. Typicality is satisfied.

Rule 23(a)(3) requires that the claims of the representative plaintiffs be typical of those of the class. The representative plaintiffs' claims must "arise[] from the same . . . practice or course of conduct that gives rise to the claims of other class members and . . . [be] based on the same legal or remedial theory." *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983). Considerations supporting commonality often also support typicality. *Hubler Chevrolet*, 193 F.R.D. at 577.

Like commonality, in this case typicality is satisfied first and foremost because the representative plaintiffs and the other Class members all claim that they were injured by the defendants' price-fixing conspiracy. The representative plaintiffs and all the other Class members: (1) purchased ready-mixed concrete directly from the defendants or other co-

conspirators; (2) paid supra-competitive prices; (3) allege that the conspiracy and the co-conspirators' actions violated § 1 of the Sherman Act; and (4) seek relief under §§ 4 and 16 of the Clayton Act. "Typicality in the antitrust context will be established by plaintiffs and all class members alleging the same antitrust violation by the defendants." *Estate of Jim Garrison v. Warner Brothers et al.*, No. CV 95-8328 RMT, 1996 WL 407849, at *2 (C.D. Cal. June 25, 1996); *see also Bromine*, 203 F.R.D. at 409-10 (explaining that typicality is satisfied in a price-fixing conspiracy class action because "any illegal price-fixing possibly engaged-in by Defendants creates the same claim for all purchasers, large or small"). Because typicality refers to "the nature of the claim of the class representatives, and not to the specific facts from which the claim arose or relief is sought," even relatively pronounced factual differences between the plaintiffs' claims and those of the Class members do not preclude Class certification. *De La Fuente*, 713 F.2d at 232 ("[S]imilarity of legal theory may control even in the face of differences of fact."); *Bromine*, 203 F.R.D. at 409-10.

Variations in the level of market participation among plaintiffs and the class do not defeat typicality. *See, e.g.*, *Serv. Spring*, 1984 WL 2925, at *3 (smaller relative market participation by named plaintiffs did not defeat typicality); *De La Fuente*, 713 F.2d at 232 (typicality upheld despite shorter duration of named plaintiffs' employment by offending farm labor contractor relative to other class members). Nor do variations in the nature of the Class members' Ready-Mixed Concrete purchases defeat typicality. Courts repeatedly reject defendants' attempts to defeat class certification based on variations among representative plaintiffs and class members regarding the type, quantity, or price of products purchased or the process of purchasing.

For example, in *In re Carbon Black Antitrust Litig.*, 2005 WL 102966, at *12 (D. Mass. Jan. 18, 2005), the court rejected the defendants' contention the representative plaintiffs' claims

were not typical of the claims of the class members because "the class members are diverse in size and . . . they paid for diverse products pursuant to a variety of different agreements." The court held typicality satisfied, concluding:

> The named class members' claims, as well as the claims of the proposed classes, arise from the alleged price-fixing scheme perpetrated by defendants. The overarching scheme is the linchpin of plaintiffs' amended complaint, regardless of the product purchased, the market involved or the price ultimately paid. Furthermore, the various products purchased and the different amount of damages sustained by individual plaintiffs do not negate a finding of typicality, provided the cause of those injuries arises from a common wrong.

Id. (quoting *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 480 (W.D. Pa. 1999)). And in the *Vitamins* case, the court explained that "[t]he typicality requirement does not mandate that products purchased, methods of purchase, or even damages of the named plaintiffs must be the same as those of the absent class members." *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 261 (D.D.C. 2002). "[I]f the named class members' claims are based on the same legal theory or arise from the same course of conduct, factual differences in date, size, manner, or conditions of purchase, the type of purchaser, or other concerns do not make named plaintiffs atypical." *Foundry Resins*, 2007 WL 1346569 at * 13.[22]

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[22] *See also Foundry Resins*, 2007 WL 1346569 at * 12 ("Some Plaintiffs purchased on a 'spot basis' while others attempted to negotiate or bargain, and some Plaintiffs purchased under long-term contracts subject to discounts or limited price adjustments while others did not obtain such concessions."); *Tableware*, 241 F.R.D. at 649 ("The fact that named plaintiffs purchased different types of tableware products at different prices from those of the absent class members does not render their claim atypical."); *Bromine*, 203 F.R.D. at 409-10 (variations in amount of unfairly priced product purchased did not defeat typicality); *In re Rubber Chemicals Antitrust Litig.*, 232 F.R.D. 346, 353 (N.D. Cal. 2005) ("That some members of the proposed class may have received discounts . . . such that they did not pay the prices set does not counsel against class certification."); *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1036 (N.D. Miss. 1993) ("There is nothing in Rule 23(a)(3) which requires the named plaintiffs to be clones of each other or clones of other class members. The diversity of named plaintiffs who differ in their methods of operation and conduct is often cited by defendants as an impediment to class certification. However, as long as the substance of the claim is the same as it would be for other class members, then

Typicality may be satisfied where class members purchased different products or participated in different markets. In *United National Records, Inc. v. MCA, Inc.*, 99 F.R.D. 178 (N.D. Ill. 1983), the court certified a class of purchasers of phonograph records or pre-recorded magnetic tapes in a price-fixing conspiracy suit. The class included wholesalers, retailers, large chains, and small stores. The court rejected the defendants' typicality challenge, which was based on the multiple products and transaction-types involved, concluding that, "[a]lthough such product diversity may go to the amount of damages recoverable by various class members, it does not negate the fact that all class members share the same claim resulting from the defendants' alleged conspiracy." *Id.* at 181. And in *Rozema v. Marshfield Clinic*, 176 F.R.D. 295, 300-303 (W.D. Wis. 1997), the court held typicality satisfied for a class of purchasers of "physician services," despite the defendants' objection that "physician services" covered multiple distinct product markets, "because plaintiffs' claims arise out of the same alleged course of conduct on the part of defendants and are based on the same legal theory." *Id.* at 303. As the court explained in *Flat Glass*: "The *overarching scheme* is the linchpin of plaintiffs' . . . complaint, regardless of the product purchased, the market involved or the price ultimately paid." 191 F.R.D. at 479-80 (emphasis added).[23]

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the claims of the named plaintiffs are not atypical."); 1 ABA Section of Antitrust Law, *Antitrust Law Developments* 932 (5th ed. 2002) (typicality is normally satisfied in horizontal price-fixing conspiracy cases "even though the plaintiffs followed different purchasing procedures, purchased in different quantities or at different prices, or purchased a different mix of products than did the members of the class").

[23] *See also In re Auction Houses Antitrust Litig.*, 193 F.R.D. 162, 164-65 (S.D.N.Y. 2000); *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 185 (D.N.J. 2003); NASDAQ, 169 F.R.D. at 510; *In re Lorazepam Antitrust Litig.*, 202 F.R.D. 12, 27 (D.D.C. 2001); *Fears v. Wilhelmina Model Agency, Inc.*, 2003 WL 21659373 at *5 (S.D.N.Y. July 15, 2003); *In re Workers' Compensation*, 130 F.R.D. 99, 106 (D. Minn. 1990) ("If the representatives must prove a conspiracy, its effectuation, and damages therefrom—precisely what the absentees must prove to recover—the representative claims can hardly be considered atypical" even if "all of the methods through which the conspiracy was allegedly effected

Here, typicality is satisfied because the representative plaintiffs and Class members seek to recover for the same injury, caused by the same price-fixing conspiracy, by way of the same cause of action. Variations in the methods by which the representative plaintiffs and Class members purchased Ready-Mixed Concrete, their bargaining power, the variety or quantity of concrete purchased, whether they negotiated with the producer, whether they purchased pursuant to a long term contract, the price they paid, whether they received discounts, etc., do not preclude class certification. The representative plaintiffs and the other proposed Class members allege that they were injured by the same horizontal price-fixing conspiracy by being forced to pay artificially inflated prices. They all seek recovery on the same legal theory using the same federal antitrust cause of action. Rule 23(a)(3) is satisfied.

4. Adequacy is satisfied.

Rule 23(a)(4) requires that the representative plaintiffs "fairly and adequately protect the interests of the class." In other words, "the plaintiffs must not have interests antagonistic to those of the class." *Rosario*, 963 F.2d at 1018; *see Sosna v. Iowa*, 419 U.S. 393, 403 (1975); *Hubler Chevrolet*, 193 F.R.D. at 578. This condition is satisfied here.[24]

In this case, the representative plaintiffs' interests are co-extensive with those of the Class members. There are neither actual nor potential conflicts of interest. Each representative plaintiff and Class member has suffered an economic injury as a result of the defendants' price-

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were not utilized against the named plaintiffs."); *In re Chlorine and Caustic Soda Antitrust Litig.*, 116 F.R.D. 622, 626 (E.D. Pa. 1987) (holding that in a price-fixing conspiracy class action "the claims of the plaintiffs are not antagonistic to and are typical of the claims of the other putative class members"); *Alcoholic Beverages*, 95 F.R.D. at 324 (typicality requirement was met even though there were many products and prices and plaintiffs were not defendants' customers for part of the class period).

[24] The adequacy of Interim Co-Lead Counsel to serve as Class Counsel, which is now evaluated under Rule 23(g) is addressed in Subsection C, *infra*.

fixing conspiracy. The representative plaintiffs therefore share with the Class members a vested interest in demonstrating the defendants' liability in order to recover under the antitrust laws. By pursuing this litigation the representative plaintiffs will advance the interests they share with the Class members. *See, e.g.*, *Tableware*, 241 F.R.D. at 649 (holding Rule 23(a)(4) satisfied in part because "[m]embers of the class were allegedly overcharged for tableware and have a mutual and coterminous interest in establishing defendants' liability and in recovering damages" in common with the representative plaintiffs).

Moreover, each of the Plaintiffs has communicated as necessary with Interim Co-Lead Counsel, has provided ongoing cooperation and assistance to Interim Co-Lead Counsel in the prosecution of this litigation, has responded to certain Defendants' Interrogatories to Plaintiffs, has located and produced documents related to purchases from the defendants and other documents requested by the Defendants, and has provided access to and the production of electronic data designated by the Defendants. *See* Levin Dec., ¶ 38. Each of the Plaintiffs has agreed to act as a class representative on behalf of the proposed Plaintiff Class. *Id.*

B. The Plaintiffs Satisfy Rule 23(b)(3).

Rule 23(b)(3) states, "An action may be maintained as a class action if . . . 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." The Supreme Court has noted that Rule 23(b)(3)'s predominance requirement is "readily met" in antitrust cases like this one. *Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997). More recently, Judge Frost in the *Foundry Resins* case explained that "[a]s a general rule in antitrust price-fixing cases . . . courts have consistently found that common issues regarding the existence and scope of the conspiracy

predominate over questions affecting only individual members." *Foundry Resins*, 2007 WL 1346569 at *16.[25] "[T]he common issues need not be dispositive of the litigation[,] rather only predominant[.]" *Butkus v. Chicken Unlimited Enters., Inc.*, No. 71 C 1607, 1971 WL 582, at * 2 (N.D. Ill. Nov. 5, 1971) (citing *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968)).

Rule 23(b)(3) is satisfied where central elements of the class claims may be established by class-wide proof. *Martino v. McDonald's Sys., Inc.*, 81 F.R.D. 81, 87 (N.D. Ill. 1979); *Halverson*, 69 F.R.D. at 335 ("The pivotal question is whether defendants' liability depends on legal and factual issues which are the same for all [class members]."). The central elements of the plaintiffs' antitrust claims are: "(1) proof of antitrust violations, that is, that defendants illegally conspired; (2) proof of causation, that is, that the alleged antitrust violations caused plaintiffs to suffer some injury; and (3) proof of damages due to the violations." *Paper Sys.*, 193 F.R.D. at 612 (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 113 (1969)). Here liability and causation are common issues that can and should be adjudicated based on class-wide proof. These issues satisfy the predominance requirement and foreclose any determination that individualized issues will outweigh the numerous common issues in this case.

1. The existence of the conspiracy is a predominating common issue.

The plaintiffs allege that the defendants engaged in a conspiracy to fix the price of Ready-Mixed Concrete that injured the plaintiffs and the Class members. There is no question that the existence of the conspiracy may be established by class-wide proof.

Liability constitutes a predominating common issue where, as here, "[r]egardless of

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[25] *See also Catfish*, 826 F. Supp. at 1039 ("As a rule of thumb, a price fixing antitrust conspiracy model is generally regarded as well suited for class treatment."); *Halverson v. Convenient Food Mart, Inc.*, 69 F.R.D. 331, 334 (N.D. Ill. 1974) (predominance is satisfied where "there [is] an essential common factual link between all class members and the defendant for which the law provides a remedy").

which plaintiff presents the evidence, the same facts will establish the defendants' liability." *Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484, 488 (D.C. Ill. 1969). Here, to establish the defendants' liability, the plaintiffs will prove that the defendants violated the antitrust laws by entering into and acting upon agreements to artificially manipulate the prices of ready-mixed concrete. Courts have repeatedly held that the existence of a price-fixing conspiracy is an overriding common issue that predominates for purposes of Rule 23. *See, e.g., Hydrogen Peroxide*, 240 F.R.D. at 173 ("There is no question that common proof will predominate with respect to defendants' alleged violation of the antitrust laws."); *Paper Sys.*, 193 F.R.D. at 612-16 (common issues of liability predominated where a class of direct purchasers alleged a conspiracy to fix prices of jumbo rolls of thermal facsimile paper); 6 NEWBERG ON CLASS ACTIONS § 18.28 (noting that "the allegation of a price-fixing conspiracy is sufficient to establish predominance of common questions" and citing cases).[26]

As in other price-fixing cases, here "[t]he common questions and their predominance over individual claims are manifested in the fact that if plaintiffs and every class member were each to bring an individual action, they would still be required to prove the existence of the

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[26] *See also Kallen v. Nexus Corp.*, No. 71 C 569, 1972 WL 632, at *3 (N.D. Ill. May 4, 1972) (predominance requirement satisfied where class of health plan subscribers alleged a conspiracy among health maintenance organizations to fix prices of physician services); *Butkus*, 1971 WL 582, at * 2 ("any evidence of agreement or conspiracy between any of the defendants would be common to all members of the would-be-class" and "[t]he questions centering around . . . the alleged price fixing issues in particular will all require the same evidence"); *Chevalier v. Baird Sav. Ass'n*, 72 F.R.D. 140, 149 (E.D. Pa. 1976) ("[T]he existence *vel non* of a conspiracy has been recognized as an overriding issue common to the plaintiff class."); *T.R. Coleman v. Cannon Oil Co.*, 141 F.R.D. 516, 525 (M.D. Ala. 1992) (existence of conspiracy alone meets predominance requirement); *DeLoach v. Phillip Morris Cos. Inc.*, 206 F.R.D. 551, 560 (M.D.N.C. 2001) (Whether defendants "exchanged price information, agreed to fix … prices and allocate [their products], and took other steps to stabilize … prices are susceptible of generalized proof."); *In re Infant Formula Antitrust Litig.*, MDL No. 878, 1992 WL 503465, at *6 (N.D. Fla. Jan 13, 1992) ("Where a horizontal price-fixing conspiracy is alleged, the questions common to the class predominate over questions that may affect only individual class members.").

alleged activities of defendants in order to prove liability." *Cumberland Farms*, 120 F.R.D. at 647. The common issue of whether the defendants conspired to fix ready-mixed concrete prices is the predominant question of law and fact in every Class member's antitrust claim. The existence of the conspiracy can be proven on a class-wide basis simply by examining the defendants' actions. Rule 23(b)(3)'s predominance requirement is satisfied.

2. The impact of the conspiracy is a predominating common issue.

Impact—the *fact* of injury—may also be proved on a class-wide basis. "To satisfy the [impact] requirement, the plaintiff must show a causal connection between defendant's antitrust violations and plaintiff's injury." *McDonald's*, 81 F.R.D. at 90. "The fact of injury is a distinct question from the quantum of injury, and is often susceptible to common proof . . . ." *Paper Sys.*, 193 F.R.D. at 601.

[redacted] As the Northern District of Illinois noted, in price-fixing cases, "[o]nce the plaintiff shows that he was injured because he could have purchased the [price-fixed] product for less elsewhere, the causation of the plaintiff's injury is clear." *McDonald's*, 81 F.R.D. at 93. Courts may presume the existence of competitively priced alternative products in price-fixing cases. *Martino v. McDonald's Sys., Inc.*, 86 F.R.D. 145, 149 (N.D. Ill. 1980).

Courts often presume class-wide impact in price-fixing cases. *McDonald's*, 81 F.R.D. at 92-93 ("Once a class member [in a price-fixing conspiracy case] has proved that he purchased from the defendants, who fixed supracompetitive prices, then the class member has suffered damage the causation of which may be presumed."). As the Third Circuit explained in *Bogosian*

v. Gulf Oil Corp., 561 F.2d 434, 455 (3rd Cir. 1977), where a price-fixing conspiracy is established, "the result of which was to increase prices to a class of plaintiffs beyond the prices which would ordinarily obtain in a competitive regime, an individual plaintiff could prove the fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price."[27] Here, however, Dr. Beyer's analysis renders a presumption unnecessary.

[redacted]

[27] *See also Foundry Resins*, 2007 WL 1346569, at * 17 ("Courts have generally found that when parties succeed in conspiring to fix prices, everyone who purchases the relevant goods or services are invariably injured."); *In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403, 428 (S.D. Tex. 1999) ("Several courts have held that when a defendant is alleged to have participated in a . . . price-fixing conspiracy, impact will [be] presumed as a matter of law, and the predominance requirement . . . will be satisfied."); *Catfish*, 826 F. Supp. at 1041 (explaining that in price-fixing conspiracy cases, "there is a presumption that all purchasers will be impacted/injured by having to pay the higher price"); *Potash*, 159 F.R.D. at 695 ("[B]ecause the gravamen of a price-fixing claim is that the price in a given market is artificially high, there is a presumption that an illegal price-fixing scheme impacts upon all purchasers of a price-fixed product in a conspiratorially-affected market); *Linerboard*, 203 F.R.D. at 217; *Lumco*, 171 F.R.D. at 172; *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 517 (S.D.N.Y. 1996) ("The predominance requirement is satisfied unless it is clear that individual issues will overwhelm the common questions and render the class action valueless.").

[redacted] Thus, Dr. Beyer's analysis provides common proof that the defendants' price-fixing conspiracy impacted all direct purchasers.[28]

While 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. Courts have repeatedly rejected defendants' attempts to defeat a showing of the predominance of impact as a common issue in antitrust price-fixing cases based on attacks on the plaintiffs' economic analysis.[29] *See,*

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[28] *See, e.g., In re Polyester Staple Antitrust Litig.*, MDL No. 3:03CV1516, 2007 WL 2111380 at *21-*27 (W.D.N.C. July 19, 2007) (concluding, based on similar analysis of the market by Dr. Beyer, that the impact of an alleged horizontal conspiracy to fix polyester staple prices was a predominating common issue that supported certification).

[29] *See also Foundry Resins*, 2007 WL 1346569, at *18 (rejecting defendants' challenges to Dr. Beyer's analysis, certifying nationwide class of foundry resins purchasers to pursue price-fixing claims and explaining, as it relates to the plaintiffs' proffer of class-wide proof of impact, "[f]or purposes of class certification, this Court need not entertain Defendants' arguments that essentially question whether

e.g., *In re Sulfuric Acid Antitrust Litig.*, MDL No. 03-C-4576, 2007 WL 898600, at *8 (N.D. Ill. Mar. 21, 2007) (certifying nationwide class of sulfuric acid purchasers to pursue price-fixing conspiracy claim and rejecting defendants' contention that "each consumer transaction is negotiated according to a unique set of conditions" and thus that plaintiffs' expert could not calculate impact based on class-wide proof). Such arguments are so routinely rejected because courts recognize that class certification is not "the right time to engage in a 'battle of the experts.'" *Sulfuric Acid*, 2007 WL 898600, at *8. Dr. Beyer has presented a plausible method for demonstrating the impact of the defendants' conspiracy based on class-wide proof, which is all that is required for class certification.

Similarly unavailing are any arguments concerning variations among Class members in their methods of purchasing Ready-Mixed Concrete. *See Hydrogen Peroxide*, 240 F.R.D. at 173-74 (rejecting the defendants' argument that "because many purchasers negotiated long-term contracts rather than paying list-price, class-wide impact cannot be proven"). "'In a number of price-fixing cases concerning industries where discounts and individually negotiated prices are common, courts have certified classes where the plaintiffs have alleged that the defendants conspired to set an artificially inflated base price from which negotiations for discounts began.'" *Id.* (quoting *In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. 374, 383 (S.D.N.Y. 1996)). "This is sensible given that, even where individual contracts are negotiated, the list price will

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Plaintiffs' expert witness is correct in his assessment of the[] market characteristics as to whether they do, in fact, show that every plaintiff suffered a common impact. Rather, this is for the trier of fact to later decide."); *Hydrogen Peroxide*, 240 F.R.D. at 174 (certifying class despite defendants' attacks on plaintiffs' market analysis because "[a]t this stage we are not concerned with whether we find plaintiffs' evidence convincing—that is a jury question—but whether it is predominantly common to all plaintiffs. 'Plaintiffs need only make a threshold showing that the element of impact will predominantly involve generalized issues of proof, rather than questions which are particular to each member of the plaintiff class.'" (quoting *Lumco Indus. v. Jeld-Wen, Inc.*, 171 F.R.D. 168, 174 (E.D. Pa. 1997)).

likely and naturally represent a starting point for those negotiations." *Id.* "'Hence, if a plaintiff proves that the alleged conspiracy resulted in artificially inflated list prices, a jury could reasonably conclude that each purchaser who negotiated an individual price suffered some injury." *Id.*[30] [redacted] The defendants' price-fixing agreement changed the baseline from which any individualized deals would have been negotiated so that even purchasers of Ready-Mixed Concrete who were able to negotiate individualized pricing were nevertheless harmed by the defendants' unlawful actions.

Because the proposed Class is composed of those who directly purchased from conspirators during the conspiracy, it follows that every class member suffered an injury of the same quality. Impact thus predominates over any individual issues.

3. Damages may be shown by class-wide proof.

[redacted]

Courts have repeatedly approved this methodology as sufficient for class certification purposes. *See, e.g. Polyester Staple*, 2007 WL 2111380 at *25-*26; *Foundry Resins*, 2007 WL 1346569 at * 19; *Carbon Black*, 2005 WL 102966 at *20-*21; *Linerboard*, 203 F.R.D. at 217-

[30] *See also Flat Glass*, 191 F.R.D. at 486 (explaining that "even though some plaintiffs negotiated prices, if plaintiffs can establish that the base price from which these negotiations occurred was inflated, this would establish at least the fact of damages, even if the extent of damages by each plaintiff varied"); *NASDAQ*, 169 F.R.D. at 523 ("Neither a variety of prices nor negotiated prices is an impediment to class certification if it appears that plaintiffs may be able to prove at trial that, as here, the price range was affected generally.").

18; *Hydrogen Peroxide*, 240 F.R.D. at 175 & n. 18.[31] Even if the proposed methodology only roughly estimates damages, the class should be certified: "No precise damage formula is needed at the certification stage of an antitrust action; the court's inquiry is limited to whether the proposed methods are so unsubstantial as to amount to no method at all." *Paper Sys.*, 193 F.R.D. at 615 (citing *Potash*, 159 F.R.D. at 697).[32] Indeed, class certification is appropriate even where the amount of damages cannot be determined on a class-wide basis. *See, e.g.*, *Butkus*, 1971 WL 582, at *2 (certifying an antitrust class action even though "the question of damages will require separate lines of proof"); *Goldwater v. Alston & Bird*, 116 F.R.D. 342, 347 (S.D. Ill. 1987) (certifying the class despite disparities in the amount of damages owed to individual class members); *Hubler Chevrolet*, 193 F.R.D. at 581; *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87 (S.D.N.Y. 1981).[33] One court noted that if variance in the amount of damages among

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[31] *See also Flat Glass*, 191 F.R.D. at 486 (holding Dr. Beyer's proposed multiple regression analysis is one of the mainstream tools in economic study and it is an accepted method of determining damages in antitrust litigation). *Paper Sys.*, 193 F.R.D. at 614 (noting that regression analysis "allows aggregate estimated damages to be allocated to individual customers," and holding that this methodology was sufficient to show the possibility of proving the amount of damages class-wide); *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 691-93 (N.D. Ga. 1991) (holding regression analysis was an adequate method to calculate individual damages); *DeLoach*, 206 F.R.D. at 564-65; *Linerboard*, 305 F.R.D. at 153-55; *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 321-25 (E.D. Mich. 2001).

[32] *See also J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981) (the burden of proving damages is "to some extent lightened" once an antitrust violation is established); *Catfish*, 826 F. Supp. at 1042 ("The relaxation of the standard of proof in an antitrust case is a logical and natural result of a willingness to accept some measure of uncertainty due to the difficulty of ascertaining business damages.").

[33] Courts have long held that individual issues as to the amount of damages should not preclude class certification. Indeed, courts early on developed a procedural solution: "In antitrust suits brought under Rule 23(b)(3) courts generally adopt a bifurcated approach in dealing with the problem of predominance. When the asserted statutory violation can be effectively adjudicated apart from damages, liability will be determined in a class proceeding while the question of damages awaits proof on an individual basis." *Halverson*, 69 F.R.D. at 334-35; *see Boshes v. Gen. Motors Corp.*, 59 F.R.D. 589, 599 (N.D. Ill. 1973) (denying certification because proposed class of 30 to 40 million purchasers imposed unmanageable administrative burdens, but noting that "in deciding whether common issues of fact and law predominate over individual issues, there is no longer much doubt that questions of liability can be

class members (a near-ubiquitous feature of antitrust class actions) precluded certification, it would "mark the end of almost all antitrust class actions." *Carbon Black*, 2005 WL 102966 at *21.

The market for ready-mixed concrete is relatively uniform and consists of essentially a single product, regardless of minor variations in the composition of concrete mixtures. *See* Exhibit 37 ¶¶ 22-26. But even the existence of sub-markets or sub-classes of products of varying popularity among consumers does not preclude the predominance of common issues. *United National Records*, 99 F.R.D. at 181 ("[t]here is no requirement . . . that plaintiffs' claims involve identical products or identical pricing structures."). This case does not involve the sort of non-commodity product and auction-based pricing that were at issue in *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977), where the unique conditions of the market for flue-cured tobacco resulted in frequent and massive fluctuations in prices and purchasing patterns such that individual issues predominated and class certification was precluded. *See id.* at 62-63. Nor does this case involve distinct sub-markets for fundamentally different products as did *Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005). In *Blades*, individual issues predominated and prevented class certification because the plaintiffs alleged a conspiracy to fix the prices of various genetically modified plant seeds, the markets for which varied widely according to geography, growing conditions, and consumer preference, among other factors. *See id.* at 571.

Even significant factual differences among Class members' transactions with the defendants do not necessarily overwhelm the common issues in price-fixing cases. *See, e.g.*,

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separated from individual questions of damages"). *See, e.g.*, *Green*, 406 F.2d 291; *Harper & Row*, 301 F. Supp. 484.

United Nat'l Records, 99 F.R.D. at 181 (certifying class over defendants' objection that individual issues predominated because class was composed of "wholesalers, retailers, large chains [and] corner stores"); *United Nat'l Records, Inc. v. MCA, Inc.*, 101 F.R.D. 323, 326 (N.D. Ill. 1984) (reaffirming earlier class certification despite "[t]he fact that some plaintiffs allegedly suffered unique injuries due to defendants' returns policies"). Here too, "[a]ll proposed class members, large and small, have purchased directly from one or more of the defendants during the relevant period. Although the named plaintiffs' interest may differ quantitatively, [there is] no qualitative difference between the claims of the plaintiffs and their proposed class." 99 F.R.D. at 181.[34]

The market here is simpler than the markets in *United National Records*, *Rozema*, *Windham*, and *Blades* and thus poses no impediment to class certification. Here, the market consists of essentially one product, the variations among types of ready-mixed concrete available to purchasers are minor, and price is the driving factor in purchasing decisions. *See* Exhibit 37 ¶¶ 22-26. The ways in which ready mixed concrete is purchased are few. Class certification is nearly automatic in price-fixing conspiracy cases. The exceptions are rare and usually involve unique market conditions that are not present here. In short, the product, the market, and the consumers are ready-made for adjudication of unfair competition on a class-wide basis.

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[34] Nor do individualized defenses or counterclaims preclude certification. The overwhelmingly predominant issues remain the existence and common impact of the conspiracy. "[T]he courts have not been adverse to recognizing a class action where individual defenses may exist and require individual proof, so long as the basic matter of utility and representativeness favors the class action procedure." *Contract Buyers League v. F&F Inv.*, 48 F.R.D. 7, 12 (N.D. Ill 1969). Indeed, in *Weit v. Continental Illinois National Bank and Trust Co. of Chicago*, 60 F.R.D. 5 (N.D. Ill. 1973), the court certified a class of bank credit card holders in a price-fixing conspiracy case despite a commonality/predominance challenge based on the defendants' compulsory counterclaims for unpaid balances in varying amounts against a large number of class members. *See id.* at 6-8. The court concluded "that the plaintiff classes are not rendered unmanageable by such counterclaims." *Id.* at 8.

The "plaintiffs' claims . . . relate to an alleged pattern of illegal activity which affected the class members in similar if not identical ways. . . . [A]ntitrust violations, particularly when involving a conspiracy practiced upon large groups of individuals, have been held to involve sufficient questions of law or fact to merit treatment as class actions." *Kallen,*1972 WL 632, at *3. Here, as in *Harper & Row*, "[t]he predominance of common questions contrasts sharply with the limited individual issues." 301 F. Supp. at 489. Rule 23(b)(3)'s predominance requirement is satisfied in this case.

4. Class action treatment is the best way to resolve the Class members' claims.

Rule 23(b)(3) also requires that "a class action [be] superior to other available methods for a fair and efficient adjudication of the controversy." Here, class action treatment is obviously superior. The alternative is numerous individual actions raising the same claims, proceeding on separate timetables, and involving duplicative motions and discovery proceedings. And it would not be economically feasible for most Class members to pursue their claims individually. The class action device is the best means to a comprehensive resolution to this matter. *See Shutts v. Phillips Petroleum Prods.*, 472 U.S. 797 (1985); *Minnesota v. U.S. Steel Corp.*, 44 F.R.D. 559, 569 (D. Minn. 1968). As this Court explained in *Hubler Chevrolet*:

> One reason to favor a class action is to avoid duplicative lawsuits, which would thereby waste the parties' and the courts' time and resources . . . . [A] class action would allow economies of scale to operate and ultimately reduce the overall burden on the courts associated with pursuing the claims versus maintaining individual actions. . . . A class action allows discovery to proceed on all of the potential claims jointly [and] . . . eliminates the potential that the defendants will be subject to contradictory resolutions of the ultimate legal issue . . . .

193 F.R.D. at 582 (citation omitted). Considering the alleged scope of defendants' price-fixing conspiracy, denying class treatment risks voluminous duplicative lawsuits. A class action is superior.

The four factors set out in Rule 23(b)(3) support this conclusion. First, the interest of each member in "individually controlling the prosecution or defense of separate actions" is minimal in light of the burden and expense of individual litigation and the relatively small size of the average individual class member's damages. *See Johns v. DeLeonardis*, 145 F.R.D. 480, 485 (N.D. Ill. 1992); *NASDAQ*, 169 F.R.D. at 527. Second, "the extent and nature of any litigation concerning the controversy already commenced" by Class members is reflected in the plaintiffs' October 19, 2005, Consolidated Amended Complaint comprising the claims of 23 related lawsuits. The plaintiffs' action will resolve this controversy in one proceeding, which is more efficient than clogging the courts with numerous individual actions. *See Hubler Chevrolet*, 193 F.R.D. at 582. Third, it is desirable to "concentrate[e] the litigation of the claims in the particular forum" because most of the alleged conspiracy's actions occurred in the Southern District of Indiana and because both the defendants and the bulk of the proposed Class are located in this judicial district. Finally, "the difficulties likely to be encountered in the management of a class action" are minimal and surely preferable to the difficulties that would inhere in the filing of multiple individual actions. Notably, even in cases unlike this one where class treatment does present management difficulties, courts may certify selected issues for class action treatment rather than deny class certification altogether. *See Central Wesleyan College v. W.R. Grace & Co.*, 143 F.R.D. 628 (D.S.C. 1992), *aff'd*, 6 F.3d 177 (4th Cir. 1993).

C. Interim Co-Lead Counsel Satisfy the Requirements of Rule 23(g) and Should be Appointed as Class Counsel.

Rule 23(g) of the Federal Rules of Civil Procedure requires the Court to consider several factors in appointing Class Counsel. Interim Co-Lead Counsel have done a substantial amount of work in investigating and identifying potential claims as evidenced by the investigation, discovery, and briefing that they have already completed in this case. They are members in good standing of their respective state bars. They have extensive backgrounds in prosecuting complex class actions, including antitrust price-fixing cases, and thus have more than adequate knowledge of the applicable law. Materials documenting counsels' relevant experience were previously submitted to this Court.[35] Interim Co-Lead Counsel have the legal and financial resources necessary to prosecute this action to its conclusion and have demonstrated by their actions so far that they are willing to commit those resources to representing the Class.

Given their breadth and depth of experience, their resources, and the diligence with which they have prosecuted this action so far, Interim Co-Lead Counsel satisfy Rule 23(g)'s requirements for appointment as Class Counsel.

CONCLUSION

Accordingly, the plaintiffs respectfully request that the Court certify the proposed Class, designate the plaintiffs as Class representatives, and appoint plaintiffs' Interim Co-Lead Counsel as Class Counsel.

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[35] *See 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*, and Exhibits A, B, and C thereto, filed Aug. 30, 2005 (Document No. 21 on the Court's docket); *Motion to Consolidate, to Appoint Interim Lead Counsel and for Entry of Case Management Order No. 1 and Brief in Support*, and Exhibits A, B, C, and D thereto, filed September 7, 2005 (Document No. 25 on the Court's docket). The Court appointed Stephen D. Susman and Irwin B. Levin as Interim Co-Lead Counsel by Order issued September 19, 2005. Minute Entry, Sept. 19, 2005 (Document No. 32 on the Court's docket).

Dated: August 1, 2007

Respectfully submitted,

/s/ Irwin B. Levin
Irwin B. Levin

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

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

PLAINTIFFS' INTERIM CO-LEAD COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 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 MIILER
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

David M. Bullington
HOPPER & BLACKWELL
dbullington@hopperblackwell.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

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

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

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

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

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

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

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

Abram B. Gregory
SOMMER BARNARD PC
agregory@sommerbarnard.com

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

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

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

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

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

Edward W. Harris III
SOMMER BARNARD PC
eharris@sommerbarnard.com

William E. Hoese
KOHN SWIFT & GRAF PC
whose@kohnswift.com

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

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

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

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

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

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

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

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

Joseph C. Kohn
KOHN SWIFT & GRAF PC
jkohn@kohnswift.com

Offer Korin
KATZ & KORIN
okorin@katzkorin.com

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

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

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

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

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

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

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

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

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

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

Vess A. Miller
COHEN & MALAD, LLP
vmiller@cohenandmalad.com

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

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

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

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

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

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

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

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

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

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

Jonathan G. Polak
SOMMER BARNARD PC
jpolak@sommerbarnard.com

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

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

Garrick B. Pursley
SUSMAN GODFREY L.L.P.
gpursley@susmangodfrey.com

Gayle A. Reindl
SOMMER BARNARD PC
greindl@sommerbarnard.com

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

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

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

Steve Runyan
KROGER GARDIS & REGAS
ser@kgrlaw.com

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

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

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

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

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

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

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

Edward P. Steegmann
ICE MILLER
ed.steegmann@icemiller

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

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

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

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
WELTMAN LAW FIRM
sweltman@weltmanlawfirm.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
MARCUS AUERBACH & ZYLSTRA LLC
kzylstra@marcusauerbach.com

I hereby certify that on August 2, 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
18th & 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 30th 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
Renae 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/ Irwin B. Levin
Irwin B. Levin

Irwin B. Levin
COHEN & MALAD, LLP
One Indiana Square, Suite 1400
Indianapolis, IN 46204
Telephone: (317) 636-6481
Facsimile: (317) 636-2593
E-mail: ilevin@cohenandmalad.com