



(a) What is the effect of the stay of discovery as ordered on the existing Case Management Plan (“CMP”) and the deadlines set forth in it?

(b) What opportunity will there be for the Defendants to conduct other discovery, including third party, deposition and expert discovery, directed to class certification and merits of the dispute?

(c) What is the effect of the stay of discovery on pending discovery requests, including discovery from the Defendants to Plaintiffs and nonparties for information relevant to liability issues, including information already available to the Plaintiffs from any amnesty candidate or the Government?

4. BCS proposes that either (a) the Discovery Order be modified to permit additional discovery to Plaintiffs and non parties, including class and expert discovery (*see* proposed order at **Tab A**), or (b) that all discovery and CMP deadlines be stayed in this matter until the completion of the criminal proceedings (*see* proposed order at **Tab B**).

5. BCS understands and respects the Government’s desire to prevent what it characterizes as the “circumvention” of discovery rules in the criminal case. However, there is no evidence that any party served discovery in this case<sup>1</sup> for any improper purpose, and all the pending discovery requests are relevant to this action. Also, there are no defendants in the civil

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<sup>1</sup> Discovery served prior to the filing of the Government’s Motion includes: Builder’s Concrete & Supply, Inc.’s First Request for Production of Documents to Defendant Shelby Gravel, Inc, served on November 15, 2005; Builder’s Concrete & Supply, Inc.’s First Request for Production of Documents to Defendant, Phillip Haehl, served on November 15, 2005; Builder’s Concrete & Supply, Inc.’s First Request for Production of Documents to Defendant Richard Haehl, served on November 15, 2005; Plaintiffs’ First Set of Interrogatories to All Defendants, served on November 15, 2005; Plaintiffs’ First Set of Document Requests to All Defendants, served on November 15, 2005; IMI Defendants’ First Interrogatories to Plaintiffs, served on November 16, 2005 (withdrawn by IMI Defendants on November 17, 2005); IMI Defendants’ First Request for Production of Documents to Plaintiffs, served on November 17, 2005 (withdrawn by IMI Defendants on November 17, 2005; and IMI Defendants’ Amended First Request for Production of Documents to Plaintiffs, served on December 7, 2005.

action who are also currently defendants in any criminal case, except Fred F. (“Pete”) Irving, Price Irving, John Huggins, and Daniel C. Butler, whose sentencing is scheduled for December 9, 2005. As such, there are unique considerations at play in the civil case, which neither the Government’s Motion nor its Discovery Order take into account in limiting discovery for an indefinite period of time to finite classes of documents chosen by the Government.

6. Importantly, these considerations include prejudice to BCS and other Defendants in the *civil* case. Despite the Government’s position, BCS can demonstrate “prejudice” vis-à-vis the Plaintiffs, *see* Memorandum at 7, whom the Government has now advantaged with its Motion and Order.

7. Three (3) of the document classes (Pricing Documents, Profit and Loss Documents, and Financial Statements)<sup>2</sup> appear to facilitate the production of defense documents and aid the Plaintiffs in developing their civil case. At least two of these categories (Profit and Loss Documents and Financial Statements) are largely relevant to damages issues. It should be noted that these classes – adopted by the Court in its Order – were initially proposed by the Government in only allowing the Plaintiffs to seek discovery from the Defendants. Nothing has effectively changed from the Government’s initial proposal.<sup>3</sup>

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<sup>2</sup> While the categories of Profit and Loss Documents and Financial Statements are ones that could be applicable to Plaintiffs and Defendants, the utility of such categories to the Defendants far outweighs the utility to the Plaintiffs who have already begun discovery within these categories.

<sup>3</sup> On Monday, November 21, 2005, BCS’s counsel received an email communication from Michael Boomgarten attaching the Government’s proposed list of exceptions to its proposed stay of discovery in the civil case, which list was essentially the same as the Government’s proposed order. While counsel for the Government and counsel for the parties in the civil action had some separate discussions about an agreed stay, the impinging Thanksgiving holiday and the unavailability of some counsel to participate in discussion of an agreed stay meant that as a practical matter there was no opportunity to work out any compromise before the entry of the Order, which was signed on the following Monday, November 28, 2005.

8. Conversely, only one document class (Transactional Documents) seems to run both ways in providing Plaintiffs and Defendants with equal access to documents supporting their respective positions.

9. The Order also does not take into account the fact that BCS and other Defendants in the civil case are laboring under CMP deadlines, including the deadline of June 1, 2006, by which they must defend the issue of class certification and designate their supporting experts and disclosures. *See* CMP Part XV.B.2. Defendants' preparation for defending and defeating the issue of class certification has already begun, and will not wait until March 1, 2006, when Plaintiffs file their Motion for Class Certification, supporting brief and materials, including their expert disclosures and reports. *See id.* Part XV.B.1. None of the document categories permitted in the Discovery Order adequately addresses the type and scope of discovery that will be required to defend against class certification.<sup>4</sup>

10. Besides the use of experts on the class certification issue, the parties invariably will rely in part on the use of expert testimony to pursue other aspects of the civil case, which the Discovery Order does not account for by its plain terms. There are, for example, questions of geographic and product market definition that will arise in the civil litigation, which are not present in a criminal case and which, accordingly, would not present Fifth Amendment issues for any Defendant or impinge on any criminal investigation.

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<sup>4</sup> For example, the four categories of permitted document discovery are not sufficient to conduct discovery directed to the requirements of Fed.R.Civ.P. 23(a) and (b), including by way of example and not limitation, such things as commonality of questions of fact and law, the typicality of the plaintiffs' claims, and the extent to which common questions predominate over individual ones. While some financial documents and transactional documents are discoverable, the actual language of the Discovery Order is largely couched in terms of the seller's "pricing," thus implying that the documents will be produced by the defendants. Further, the Government's stated reasons for entering the Discovery Order do not warrant staying the depositions of plaintiffs, named plaintiffs or non party witnesses.

11. Similarly, the Discovery Order does not address the December 19, 2005 disclosure of information as required under Fed.R.Civ.P. 26(a)(1) and the CMP.

12. Additionally, upon information and belief, the Plaintiffs have also already had the unique and decisive advantage of receiving documents and statements from a defense “antitrust leniency applicant or cooperating individual” pursuant to Section 213(b) of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004. *See* H.R. 1086 (a copy of which is attached hereto at **Tab C** and which is also codified in scattered sections of 15 U.S.C. and accompanying notes).

13. Pursuant to the Government’s amnesty applicant program, the “applicant or cooperating individual, as the case may be,” will have already

provided satisfactory cooperation to the [Plaintiffs] with respect to the civil action, which cooperation shall include –

(1) providing a full account to the claimant of all facts known to the applicant or cooperating individual, as the case may be, that are potentially relevant to the civil action;

(2) furnishing all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant or cooperating individual, as the case may be, wherever they are located; and

(3)(A) in the case of a cooperating individual –

(i) making himself or herself available for such interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require; and

(ii) responding completely and truthfully, without making any attempt either falsely to protect or falsely to implicate any person or entity, and without intentionally withholding any potentially relevant information, to all questions asked by the claimant in interviews, depositions, trials, or any other court proceedings in connection with the civil action; or

(B) in the case of an antitrust leniency applicant, using its best efforts to secure and facilitate from cooperating individuals covered by the agreement the cooperation described in paragraphs (1) and (2) and subparagraph (A).

P.L. 108-237 (Section 213(b) of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004) (accompanying note 4, “Other provisions”, to 15 U.S.C. § 1).

14. As contemplated under the rules, BCS is entitled to conduct meaningful reciprocal discovery of those documents in Plaintiffs' possession to which no privilege has attached and which will form a basis for BCS's defense in any aspect of the civil proceeding, from class certification to an eventual merits ruling, if required, especially considering that the Court has stated it will not bifurcate class certification and merits determinations. *See, e.g.*, Fed.R.Civ.P. 26(b) ("Discovery Scope and Limits") (The Advisory Committee noting that the "court must apply the [rule's] standards in an even-handed manner" and that "the court must be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare a case").

15. Plaintiffs' counsel have represented on numerous occasions that they conducted an investigation for many months before commencing this and the actions underlying it, and that their investigation includes both documents and information obtained from witnesses and others. Defendants are entitled to discover this information.

16. To the extent that any cooperating defendant or witness has already provided information or documents to any Plaintiff or Plaintiff's counsel, there can be no justification, whether on the basis of an alleged privilege, grand jury secrecy concerns (*see* Memorandum at 6-7), or otherwise, for not allowing BCS and the other Defendants to discover such information and documents. *See, e.g., Dean Foods Co. v. Eastman Chemical Co.*, No. C00-43-79 WHO, C 00-4402 WHO (JL), 2001 U.S. Dist. LEXIS 25447, at \*9 (N.D. Cal. Aug. 13, 2001) ("An amnesty-applicant privilege is not recognized by the Department of Justice ... or any court. The fact that the DOJ will not disclose the identity of an amnesty applicant without a court order does not yield a privilege as to the applicant's documents."). To the extent the Plaintiffs in this civil action have already had (or will have) access to such information and documents (whether from

a leniency candidate or the Government itself), it would be fundamentally unfair and highly prejudicial to deny the same access to Defendants in this action. Further, any suggestion that providing such information and documents to BCS would circumvent criminal discovery rules is equally unfounded.<sup>5</sup>

17. Similarly, the Government's suggestion that discovery in the civil case will be "facilitated by the existence of criminal trial transcripts" (Mem. at 7) is too remote. *See In re Plastics Additives Antitrust Litigation*, No. Civ.A. 03-2038, 2004 WL 2743591 (E.D. Pa. Nov. 29, 2004) at \*6 (prospect that criminal discovery or transcripts may limit civil discovery when criminal indictments have not been issued to some defendants was deemed too remote to warrant indefinite stay of civil discovery). Staying civil discovery, then allowing the Plaintiffs to use criminal trial transcripts simply shifts the burden and expense of this aspect of discovery onto the Defendants and off the Plaintiffs.

18. Accordingly, BCS proposes that the Court clarify and modify its Discovery Order by entering either **(i)** the proposed order attached at **Tab A**, which would allow a broader and equivalent range of discovery to proceed in this action while still upholding the Government's concerns regarding its pending criminal investigation, or **(ii)** the proposed order attached at **Tab B**, which will prevent prejudice to BCS by not depriving it of "a fair opportunity to develop and prepare [its] case." Fed.R.Civ.P. 26(b) (Advisory Committee note).

WHEREFORE, Defendants, Builder's Concrete & Supply, Inc. and Gus B. "Butch" Nuckols, III, by counsel, respectfully move the Court to reconsider, or in the alternative, to

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<sup>5</sup> It is not clear that the pending discovery requests that have been stayed as result of the Order are ones that would fall within the ambit of grand jury secrecy rules. Federal Rule of Criminal Procedure 6(e) does not impose any obligation of secrecy on witnesses appearing before it. *See In re: Plastic Additives*, 2004 WL 2743591 at \* 10 (citing Advisory Committee Note to Rule 6(e), which states the Rule "does not impose any obligation of secrecy on witnesses.").

clarify its Order granting the *Motion to Limit the Scope of Discovery Until Completion of Criminal Proceedings*, and enter an Order allowing discovery between the parties to this civil case consistent with the above stated concerns and the proposed order being submitted herewith.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 9, 2005, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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