

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

IN RE: READY-MIXED CONCRETE) Master Docket No.
ANTITRUST LITIGATION) 1:05-cv-00979-SEB-VSS

THIS DOCUMENT RELATES TO:)
ALL ACTIONS)

**DEFENDANTS BUILDER’S CONCRETE & SUPPLY, INC.
AND GUS B. NUCKOLS, III’S CONSOLIDATED REPLY IN SUPPORT
OF THEIR MOTION TO RECONSIDER, OR IN THE ALTERNATIVE,
TO CLARIFY THE ORDER LIMITING THE SCOPE OF DISCOVERY
UNTIL COMPLETION OF CRIMINAL PROCEEDINGS**

Defendants, Builder’s Concrete & Supply, Inc. and Gus B. “Butch” Nuckols, III (collectively, “BCS”), by counsel, pursuant to S.D. Local Rule 7.1, respectfully reply to the response to their *Motion to Reconsider, or in the Alternative, to Clarify the Order Limiting the Scope of Discovery Until Completion of Criminal Proceedings* (the “Motion to Reconsider”), and in support state:

PROCEDURAL BACKGROUND

1. On December 21, 2005, Plaintiffs filed their “Response to Motion of Defendants Builders Concrete & Supply, Inc. and Gus B. Nuckols to Reconsider, or in the Alternative, to Clarify the Order Limiting the Scope of Discovery Until Completion of Criminal Proceedings” (“Plaintiffs’ Response”).

2. On December 22, 2005, the Government filed its “Memorandum in Opposition to Defendant Builder’s Concrete & Supply, Inc. and Gus B. Nuckols, III’s Motion to Reconsider, or in the Alternative, to Clarify the Order Limiting the Scope of Discovery Until Completion of Criminal Proceedings” (“Government’s Response”).

3. On December 22, 2005, Defendants Irving Materials, Inc., Fred R. (“Pete”) Irving, John Huggins, Daniel C. Butler and Price Irving (collectively, the “IMI Defendants”) filed their “Memorandum in Opposition to Builder’s Concrete’s Motion to Reconsider Discovery Order” (“IMI Defendants’ Response”).

4. This consolidated reply has been filed before the deadline imposed by Local Rule 7.1 and Fed. R. Civ. P. 6.

REPLY TO PLAINTIFFS’ RESPONSE

5. Plaintiffs primarily complain that BCS “seeks to obtain a complete stay of discovery.” Plaintiffs’ Response at 2. Not so. If BCS wanted to stay discovery, it would have asked the Court to do just that. Instead, BCS endeavored to provide the Court with an alternative to staying discovery that would allow it and the other defendants meaningfully to defend, first and foremost, class certification, and beyond that, the merits Plaintiffs’ claims.

6. Make no mistake about it. If BCS had waited until April or May of 2006 to continue the CMP deadlines based on an inability to conduct meaningful discovery in defending class certification, Plaintiffs would then be arguing “estoppel” or “waiver” because no defendant had initially objected to the Discovery Order, so (as the argument would go) the Order could not later form the basis for an eleventh hour request to continue the CMP deadlines and “unnecessarily prejudice the Plaintiffs.” Plaintiffs’ Response at 6.

7. By offering a defense perspective to the Discovery Order at this early stage, BCS and the other defendants at least understand that the Plaintiffs are amenable later to adjusting future CMP deadlines “to accommodate any delay that may be associated with the limitations upon discovery.” *Id.* at 2. Of course, no party should assume that extensions will automatically

be granted, and BCS believes their timely objection to the Discovery Order was appropriately made.

REPLY TO THE GOVERNMENT'S RESPONSE

8. The fact that the Government considers the “present limitations in the [Discovery] Order [to] allow the parties to advance discovery on *the issue of damages*,” or, stated differently, on one of “the issues ... likely to be the *most significant* to the outcome of [the civil] action,” Government’s Response at 2, 3 (emphases added), pointedly underscores BCS’s purpose in asking this Court to reconsider or clarify its Discovery Order. See Motion to Reconsider ¶14 (noting that two of the four documents classes are only “largely relevant to damages issues” that “were initially proposed by the Government in only allowing the Plaintiffs to seek discovery from the Defendants,” so that “[n]othing has effectively changed from the Government’s initial proposal”).

9. With all due respect to the Government, no defendant has conceded the issue of class certification or liability and agreed to proceed directly to “the issue of damages.” Government’s Response at 2.

10. Also, the Government’s stated concerns that BCS “Proposed Order-Alternative A” would, for example, “facilitate the destruction of evidence” and “encourage coordination of stories by subjects and potential witnesses” (*id.* at 3) simply have no basis in fact. While those are concerns noted in the case law, there is no reasonable basis to infer that the defendants in this civil case would engage in that conduct, nor would their attorneys ever sanction such behavior. Given the well-established policy of broad discovery in federal civil litigation, any discovery limitations should be well-grounded in the specific facts and circumstances of this case, not based on rote recitation of factors pertinent in other cases.

REPLY TO THE IMI DEFENDANTS' RESPONSE

11. The IMI Defendants' contention that BCS seeks "to evade the restrictions upon discovery in the parallel criminal proceedings" is unfounded. IMI Defendants' Response at 2. If that was BCS's intent, it would have never proposed an alternative order.

12. The IMI Defendants' position that under BCS's "Proposed Order-Alternative A ... the grand jury secrecy required by Federal Rule of Criminal Procedure 6(e)(2) will be breached" simply misunderstands the law. *Id.* at 2.

13. Most, if not all, of the IMI Defendants' concerns can be met by staying discovery in the civil matter. *See* BCS Proposed Order – Alternative B; *accord* IMI Defendants' Response at 6 (citing *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962)). Alternatively, the Discovery Order could be modified to address IMI's concerns as well as BCS's concerns.

14. Alternatively, the IMI Defendants' reliance on the "limited stay of discovery" implemented in *Jones v. City of Indianapolis*, 216 F.R.D. 440, 450-52 (S.D. Ind. 2003), a § 1983 action against city police officers, is inapposite to this proposed antitrust class action with an impending class certification deadline. *See* CMP Part XV.B.2.

CONCLUSION

15. In closing, BCS states for the record that it seeks to discover information provided by the amnesty candidate for the legitimate and commonsense reason that this information undoubtedly informed the drafting of the complaint and continues to guide Plaintiffs in the prosecution of their civil lawsuit.¹ BCS is entitled to review this information to which no

¹ For example, Plaintiffs' fraudulent concealment claims are claims to which BCS and the other Defendants have a right to explore thoroughly through discovery. BCS is entitled to discover what information the Plaintiffs had, when they first acquired it and the source of the information in defense of this and other Plaintiff claims. The Discovery Order now precludes this entirely.

privilege has attached and which has already been produced and provided to Plaintiffs. Grand jury secrecy concerns do not apply to information already made available to the Plaintiffs.

16. Plaintiffs footnoted statement that BCS's efforts should "call[] into question [their real motive in seeking broader discovery at this juncture]" (Plaintiffs' Response at 6 n.5) is completely unfounded and is a comment that is easily made by a group of civil plaintiffs who enjoy an advantage unlike any other plaintiff. BCS's "real motive" only concerns the defense of this civil lawsuit.

WHEREFORE, Defendants, Builder's Concrete & Supply, Inc. and Gus B. "Butch" Nuckols, III, by counsel, respectfully renew their request for the Court to reconsider, or in the alternative, to clarify its Order granting the *Motion to Limit the Scope of Discovery Until Completion of Criminal Proceedings*. Alternatively, the parties should be directed to confer and propose an agreed stay order to the Court for its approval.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2006, 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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