

**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)))

**PLAINTIFFS' RESPONSE TO MOTION OF DEFENDANTS
BUILDERS CONCRETE & SUPPLY, INC. AND GUS B. NUCKOLS TO RECONSIDER,
OR, IN THE ALTERNATIVE, TO CLARIFY ORDER LIMITING THE SCOPE OF
DISCOVERY UNTIL THE COMPLETION OF CRIMINAL PROCEEDINGS**

I Introduction and Procedural Background

The United States Department of Justice ("Government") filed a motion to limit the scope of discovery in this civil litigation until the completion of related criminal proceedings arising out of the defendants' price-fixing activity. In seeking to protect the integrity of the criminal proceedings, however, the Government did not seek to stay discovery in this matter entirely. After consulting with counsel in the civil litigation, the Government presented four categories of business records which it agrees can be exchanged between the parties in the civil litigation without interfering with the criminal matter.

Those categories of documents include routine business records generated and maintained in the ordinary course of Defendants' operations, and their disclosure will not undermine the integrity of the criminal proceedings. The Government explained in its papers that "limiting reciprocal discovery to the [specified] categories of documents until the completion of the criminal proceedings will protect the government's legitimate interest in ensuring that the grand jury's investigation is not compromised while advancing discovery in the

civil matters to the extent possible.” Memorandum in Support of Motion to Limit the Scope of Discovery Until Completion of Criminal Proceedings, p. 1

On November 28, 2005, this Court entered an Order granting the Government’s motion to limit discovery to four specific categories of documents (the “Discovery Order”). For the Court’s convenience, a copy of the Discovery Order is attached hereto as Exhibit “A.”

On December 9, 2006, Defendant Builder’s Concrete & Supply, Inc. and Gus B. Nuckols (“Builders”) filed a motion to reconsider or clarify the Discovery Order, accompanied by two alternative proposed orders on discovery. Those two orders make it clear that Builders really seeks to obtain a complete stay of discovery. The first proposed order would allow for discovery to proceed on a much wider scope than would be acceptable to the Government.¹ Builders alternative proposed order would stay discovery entirely, and in effect bring this litigation to a standstill.

Builder’s argues that such relief is necessary because it is “laboring under CMP deadlines” and would be prejudiced by the limits on discovery requested by the Government. Builder’s argument mischaracterizes the flexible case management schedule agreed upon by the parties and approved by the Court in Case Management Plan in this matter, which can easily be adjusted to accommodate any delay that may be associated with the limitations upon discovery. Builders’ argument is premised on the highly disingenuous notion that this litigation is best managed by bringing it to a complete standstill rather than adjusting the Case Management Plan

¹ For example, that order would permit depositions as to any party unless “he, she or it remains a target, is under indictment, or has not been sentenced in connection with the Government’s pending investigation of alleged price fixing by producers of ready mixed concrete in central Indiana.” Such depositions would allow Builders to inquire into the government’s investigation into Builder’s involvement in the criminal conspiracy. Of course, the Government is likely to oppose the use of civil discovery in this manner by defendants who are alleged to have participated in the criminal conspiracy and who may be the subject of the government’s ongoing criminal investigation.

to allow it to proceed in a more limited fashion pending the outcome of the criminal proceedings. The Court should place little credence in Builders' self-serving and convoluted argument that Builders is so committed to the expeditious progress of this litigation that the proceedings must be stayed entirely if broader discovery is not permitted. This is particularly so in light of the choice of other Defendants to amend their discovery requests in order to comply with the Discovery Order.

II Discussion

A. The Case Management Plan in this Consolidated Litigation

The parties developed a creative case management schedule in which deadlines relating to dispositive motions, discovery as to experts and the merits, as well as the actual trial setting, are all deferred until *after* the Court determines the initial issue of class certification. Section XV(B) of the Case Management Plan ("CMP") provides for the Plaintiffs to file their opening class certification papers on March 1, 2006, for Defendants to file their opposition papers on June 1, and for Plaintiffs to reply on September 1. The schedule for subsequent motion practice and discovery relating to the merits is then tied to the date of the Court's ruling on class certification. For example, dispositive motions are not due until 180 days after the Court issues its ruling on class certification, and additional non-expert and expert discovery is scheduled to occur during the months following class certification. CMP, §§ XV(c) and XVI. The trial date likewise is to be set "no less than 300 days after the Court's ruling on class certification." CMP, § XVIII.

Linking the entire case management schedule to class certification in that flexible manner also provides very simple mechanism to relieve any pressures created by the recent Discovery Order. If the limitations upon discovery make it difficult for a party to pursue or defend class

certification, the Court can adjust the entire case management schedule in a highly streamlined fashion simply by extending the underlying dates for class certification proceedings. Stated another way, deferring class certification proceedings will automatically defer the remainder of the case management schedule in this case.

B Written Discovery Served by the Parties

On November 15, 2005, Plaintiffs served their First Set of Interrogatories and First Request for Production of Documents upon all of the Defendants in this action. In addition, on November 15, 2005, Builders served written discovery requests upon Defendant Shelby Gravel, Inc. and two of its principals (“Shelby”).²

Defendants Irving Materials, Inc., Pete Irving, Price Irving, John Huggins and Daniel Butler (“IMI Defendants”), served their First Request for Production of Documents to the Plaintiffs on November 16, 2005. After consulting with the Government and learning of the Government’s concerns relating to broad discovery in this matter, however, the IMI Defendants withdrew those discovery requests.³ Shortly after the entry of the Discovery Order, the IMI Defendants then served their *Amended* First Request for Production of Documents, which is tailored to the categories of information permitted by the Discovery Order. The IMI Defendants included a footnote in their amended discovery requests which explained the circumstances

² A cursory review of Builders’ discovery requests suggests that Builders seeks to obtain information in the civil discovery that may assist Builders in its defense of any related criminal proceedings in which it may be involved. Builders document requests to Shelby begin by requesting copies of all documents that Shelby may have provided to the Government in the ongoing criminal proceedings, as well as transcripts of any grand jury testimony provided by Shelby in that matter.

³ In this regard, Plaintiffs’ counsel believes it is useful to bring to this Court’s attention that in response to an inquiry from the Honorable Larry J. McKinney at the recent criminal sentencing hearings of Pete Irving, Price Irving, John Huggins and Daniel Butler, counsel for the Government reported that it was consulting with counsel in this related civil litigation.

surrounding that amended discovery – including their efforts to coordinate with the Government in serving discovery in this matter – as follows:

The IMI Defendants First Request for Production of Documents to Plaintiffs was originally served on November 16, 2005. Those requests were withdrawn on November 17, 2005 in anticipation of the Department of Justice's [not yet filed] Motion to Limit Discovery, which was subsequently granted by Order dated November 28, 2005. The IMI defendants have amended their requests for production in light of the Order limiting discovery with the Order's document categories related to specific request from the IMI's Defendants' First Request for Production of Documents for ease of reference.

Plaintiffs are presently gathering information responsive to IMI's Amended First Request for Production of Documents to Plaintiffs, and intend provide timely responses to IMI's discovery requests next month.

In addition, Plaintiffs have also taken steps to narrow their pending discovery request to conform to the categories of information that may be exchanged under the Discovery Order. Plaintiffs have identified those document requests that fall within the class of documents for which discovery is permitted under the Discovery Order, and have served their Second Set of Document Requests to All Defendants to add two (2) document requests that are permissible under the Discovery Order but not explicitly included in the initial document requests.⁴

C. The Court Should Deny Builder's Motion to Reconsider or, in the Alternative, to Clarify the Discovery Order.

Builders poses three questions which it believes are unanswered by the Discovery Order:

- (a) What is the effect of the discovery order on the existing Case Management Plan and the deadlines set forth in it?
- (b) What opportunity will there be for the Defendants to conduct other discovery, including third-party discovery, deposition and expert discovery directed to class certification and the merits of the dispute?

⁴ The undersigned counsel for the Plaintiffs conferred with Builders' counsel concerning the parties' respective positions but were unable to reach an agreement upon these issues prior to filing this response. The undersigned counsel for Plaintiffs' also shared Plaintiff's position with counsel for the Government prior to filing this response. In addition, the undersigned counsel was informed by counsel for the IMI Defendants that the IMI Defendants support the current Discovery Order.

- (c) What is the effect of the discovery order 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?

The practical answer to all three of these questions is very simple, and does not require further action by the Court at this time.

The Discovery Order has limited the scope of all discovery to certain categories of documents. Those limitations may eventually require the Plaintiffs to seek an extension of the March 1, 2006 deadline to file their opening papers in support of class certification, which would in turn automatically extend all of the other important deadlines in the case management plan in a highly orderly fashion. Although the interests of the Plaintiffs and class members are not served by limitations upon discovery and any relating delays in obtaining class certification and proceeding forward to the trial of this action, no Defendant can contend with sincerity to be prejudiced by any such delay in the prosecution of this entire litigation. The complete stay of discovery requested by Builders, in contrast, would unnecessarily prejudice the Plaintiffs.⁵

Every argument presented by Builders is patently self-serving and calculated to persuade the Court to impose a complete stay of discovery that would unnecessarily bring this litigation to a complete standstill instead of allowing the parties to proceed with discovery limited to the categories of documents set forth above. Builders' argument that it needs to proceed immediately with depositions of the class representatives and Plaintiffs' expert is simply not true.

⁵ There is also no urgency that would entitle Builders to receive any information that may be provided to Plaintiffs by a candidate under the federal antitrust amnesty program, or which Plaintiffs may have obtained through their own investigation. Of course, Plaintiffs will comply with their obligation to produce all relevant, non-privileged and discoverable information on a timely basis as permitted by the Court in this matter, regardless of its source. However, Builders' insistence on gaining immediate access to the fruits of Plaintiffs' investigation, or access to information provided by any amnesty candidate in this matter while the Government continues its criminal investigation, calls into question Builders' real motive in seeking broader discovery at this juncture.

Defendants are not in a position to depose the class representatives until the Plaintiffs' counsel have identified the representatives that are to serve as class representatives and have filed opening class certification papers placing them in that role. By the same token, Builders will not be in a position to depose Plaintiffs' experts until after those experts have been identified.

Builders' purported interest in rapidly advancing the progress of this litigation in compliance with the case management schedule represents a singular departure from the positions taken by any other Defendant in this case or, for that manner, defendants in other class action cases within lead counsel's prior experience. The Court should allow the Discovery Order to stand, allow for the parties to the civil litigation to proceed with reciprocal discovery as permitted by the Discovery Order and, if necessary, adjust the deadlines relating to class certification upon an appropriate request in order to allow for the parties to address the issue of class certification when sufficient information has been obtained, which will then automatically extend the remaining case management schedule in this matter.

III Conclusion

For all the reasons set forth above, the Court should deny Builders' motion to reconsider or clarify the Discovery Order.

Dated: December 21, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2005, a copy of the foregoing Plaintiffs' Response To Motion Of Defendants Builders Concrete & Supply, Inc. And Gus B. Nuckols To Reconsider Or, In The Alternative, To Clarify Order Limiting The Scope Of Discovery Until The Completion Of Criminal Proceedings 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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I hereby certify that on December 22, 2005, a copy of the foregoing Plaintiffs' Response To Motion Of Defendants Builders Concrete & Supply, Inc. And Gus B. Nuckols To Reconsider Or, In The Alternative, To Clarify Order Limiting The Scope Of Discovery Until The Completion Of Criminal Proceedings was mailed, by first-class U.S. Mail, postage prepaid and properly addressed to the following:

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