

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

IN RE: READY-MIXED CONCRETE PRICE FIXING LITIGATION)	Master Docket No. 1:05-cv-00979-SEB-VSS
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)	
THIS DOCUMENT RELATES TO: ALL ACTIONS)	
)	

GOVERNMENT’S 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 THE COMPLETION OF CRIMINAL PROCEEDINGS

INTRODUCTION

Defendants, Builder’s Supply & Concrete, Inc. and Gus B. “Butch” Nuckols, III (collectively, “BCS”) have moved this Court to reconsider, or in the alternative to clarify, its Order of November 28, 2005, granting the *Motion to Limit the Scope of Discovery until Completion of Criminal Proceedings* filed by the United States of America (“the Order”). The Government opposes the Defendants’ Motion to Reconsider the Order.

ARGUMENT

Since November 28, 2005, the date on which the Court entered its Order, no events have occurred that would justify rescinding or modifying the Order. On December 9, 2005, four executives of Irving Materials, Inc. (“IMI”) were sentenced in the Southern District of Indiana for their roles in the conspiracy that is presently being investigated by the Grand Jury. However, the Grand Jury’s investigation is not finished, and the Grand Jury has not yet considered whether to indict others who are the subjects or targets of that investigation. As a consequence, the considerations cited by the Government in its Motion remain. Accordingly, the Government, in responding to the Motion for

Reconsideration, refers the Court to the arguments and authority cited in its *Memorandum in Support of the Government's Motion to Limit the Scope of Discovery until Completion of Criminal Proceedings*.

Briefly restated, permitting additional civil discovery would permit the likely criminal defendants to undermine the Grand Jury's investigation by allowing the parties involved in the civil action to determine the scope and focus of the investigation, interfere with the privacy rights of witnesses and potential witnesses, facilitate the destruction of evidence by those who have not yet produced documents, and encourage coordination of stories by subjects and potential witnesses. This Court should exercise—as it previously has—its inherent authority to protect the Grand Jury's proceedings by limiting discovery in the civil case.

BCS has proposed either a modification of the Order that would permit additional discovery to occur (BCS's *Proposed Order-Alternative A*) or, in the alternative, an order staying all discovery until the completion of all criminal proceedings (BCS's *Proposed Order-Alternative B*). The Government maintains that the Order should not be rescinded or modified, as it strikes a reasonable balance between permitting discovery in the civil case to proceed, while protecting the integrity of the Grand Jury's investigation.

The Government's primary interests in seeking the Order were and are: (1) the protection of the Grand Jury's proceedings and (2) prevention of discovery through the civil case to which potential criminal defendants are not entitled.. The Government also submits that staying the proceedings in this matter until the completion of all criminal proceedings would also serve the Court's interest in achieving judicial economy. The present limitations in the Order allow the parties to advance discovery on the issue of damages, while avoiding interference with the Grand Jury's investigation. Thus, the Order not only serves to preserve the integrity of the Grand Jury's investigation and the

subsequent criminal prosecutions, it also serves as a means by which the parties to the civil action may advance discovery on the issues that are likely to be most significant to the outcome of that action.

BCS has also claimed that the Order is inconsistent with the Case Management Plan approved by this Court. The Government would submit that ordinarily an order of a court supercedes its prior orders to the contrary. However, if the parties are truly stymied by any actual or perceived inconsistencies between the Case Management Plan and the Order, the solution is simple: the parties should negotiate a new Case Management Plan consistent with the Order and submit it to the Court for approval.

If, in spite of the arguments and considerations cited above, the Court concludes that the Order unfairly puts one or more of the civil litigants at a disadvantage, the Government would oppose expanding the scope of permissible discovery (as contemplated in *Proposed Order-Alternative A*), and would urge the Court to stay all discovery (as contemplated in *Proposed Order-Alternative B*). Virtually all the categories of discovery that BCS has proposed the Court permit in its *Proposed Order-Alternative A* would allow the likely criminal defendants to undermine the Grand Jury's investigation by allowing the parties involved in the civil action to determine the scope and focus of the investigation, interfere with the privacy rights of witnesses and potential witnesses, facilitate the destruction of evidence by those who have not yet produced documents, and encourage coordination of stories by subjects and potential witnesses.

CONCLUSION

The Court's Order of November 28, 2005 adequately protects the Grand Jury's proceedings from interference by the possible criminal defendants, while still permitting discovery on the issues most likely to be litigated in the instant proceedings, those related to the amount of damages.

Accordingly, BCS's Motion to Reconsider should be denied.

If the Court finds that one or more parties to the civil litigation are unfairly disadvantaged by the Order, the Government would strongly argue against permitting any additional discovery, and instead urge the Court to stay all discovery until the completion of all criminal proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of December, 2005, a copy of

GOVERNMENT'S MEMORANDUM IN OPPOSITION TO
DEFENDANT BUILDER'S CONCRETE & SUPPLY, INC.
AND GUS B. NUCKOLS, III'S MOTION TO RECONSIDER, OR IN THE
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was served upon the following counsel of record by electronic mail, pursuant to the October 31, 2005

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