

**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-JMS

THIS DOCUMENT RELATES TO:)
ALL ACTIONS)

**DEFENDANTS' MOTION TO RECONSIDER
ORDERS CERTIFYING SETTLEMENT CLASSES**

Defendants Prairie Material Sales, Inc., MA-RI-AL Corp., Beaver Materials Corp., Rick Beaver, Chris Beaver and Gary Matney ("Defendants") respectfully request that the Court reconsider and vacate its orders certifying settlement classes as to American Concrete, Shelby Gravel, Inc. d/b/a Shelby Materials, Richard Haehl and Philip Haehl (the "Settling Defendants") (Docket Nos. 451 and 452).¹ As in the *Bromine Antitrust Litigation*, this Court should defer its ruling on the certification of a settlement class until it has the benefit of Defendants' briefing and evidence in opposition to an identically defined litigation class. In support of their motion to reconsider, Defendants state as follows:

1. This case is procedurally indistinguishable from the *Bromine Antitrust Litigation*, 203 F.R.D. 403 (S.D. Ind. 2001), in which this Court, in response to a motion to reconsider filed by a non-settling defendant, vacated an order certifying a settlement class and preliminarily

¹ The Court entered its orders before the deadline under Local Rule 7.1(a) to respond to Plaintiffs' motions for preliminary approval had expired. The moving Defendants would have raised the issues presented in this motion in response to plaintiffs' motions, but now bring a motion to reconsider in light of the Court's orders.

approving a settlement. In *Bromine*, plaintiffs filed a motion to certify a settlement class defined in the same manner as plaintiffs' proposed litigation class. *Id.* at 406. Plaintiffs' contested motion to certify a litigation class was pending at the time plaintiffs moved for certification of a settlement class. *Id.* at 405. This Court entered an order preliminarily approving the settlement and certifying a settlement class four days after plaintiffs' motion to approve the settlement was filed. *Id.* at 405. Then, in response to a motion to reconsider filed by a non-settling defendant, the Court vacated its order and deferred its ruling on certification of a settlement class until it considered the full record on the motion to certify a litigation class. *Id.* at 405 n. 4.

2. In this case, Plaintiffs filed their motions to certify a settlement class as to the Settling Defendants while Plaintiffs' contested motion to certify an identically defined litigation class is still pending. Indeed, a day after the Court entered its orders on the proposed settlements, Magistrate Judge Magnus-Stinson entered an order (i) modifying the briefing schedule on Plaintiffs' motion to certify a litigation class, (ii) modifying the schedule for *Daubert* challenges related to Plaintiffs' motion to certify a litigation class; and (iii) requiring Plaintiffs' expert, Dr. Beyer, to produce prior reports and depositions necessary to allow Defendants to challenge his methodology, or lack thereof. (Docket No. 454).

3. As this Court has explained, "[C]ourts faced with a settlement that includes a request for class certification must apply Rule 23's protocol with particular care, because they do not have information that might ordinarily surface during the course of litigation." *Uhl v. Thoroughbred Tech. & Telecomm. Inc.*, 2001 WL 987840, *5 (S.D. Ind. Aug. 28, 2001) (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997)), *aff'd*, 309 F.3d 978 (7th Cir. 2002). In *Bromine*, the Court noted the advantage of having the "full argument in opposition to class certification" when it decided whether certification of identically defined settlement and

litigation classes was appropriate. 203 F.R.D. at 406. The Court would have the same advantage here if it would vacate the settlement class orders and defer its decision on the settlement class until the litigation class motion is fully briefed and argued. That is particularly true since Plaintiffs, like the plaintiffs in *Bromine*, incorporated their litigation class papers and the litigation class report of their expert, Dr. Beyer, in support of their motions to certify a settlement class, but the moving Defendants have not yet received the discovery needed to challenge Dr. Beyer's methodology.

4. Moreover, deciding the motions with the benefit of the "full argument in opposition to class certification" would resolve any concerns regarding whether the current orders certifying settlement classes as to the Settling Defendants comply with the strict requirements of Rule 23. *See, e.g., In re Community Bank of Northern Virginia*, 418 F.3d 277, 298-302 (3d Cir. 2005) (district court's verbatim adoption of settling parties' proposed findings and conclusions regarding class settlement was abuse of discretion).

WHEREFORE, Defendants respectfully request that the Court (i) reconsider its orders of November 8, 2007 certifying settlement classes, (ii) vacate those orders upon reconsideration, (iii) defer its decision on Plaintiffs' motions to certify a settlement class until the Court rules on Plaintiffs' motion to certify an identically defined litigation class; and (iv) grant all other just and proper relief.

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2007, a copy of the foregoing Defendants' Motion to Reconsider Orders Certifying Settlement Class 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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