

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.

Respectfully submitted,

BAKER & DANIELS LLP

By: s/ Robert K. Stanley

Robert K. Stanley (Attorney #1745-49)
James H. Ham, III (Attorney #7401-49)
Kathy L. Osborn (Attorney #21927-53)
Ryan M. Hurley (Attorney #24956-49)
Matthew D. Lamkin (Attorney #26174-49)
300 North Meridian Street, Suite 2700
Indianapolis, IN 46204-1782
(317) 237-0300
(317) 237-1000 (fax)
robert.stanley@bakerd.com
jay.ham@bakerd.com
kathy.osborn@bakerd.com
ryan.hurley@bakerd.com
matthew.lamkin@bakerd.com

*Attorneys for Defendant
Prairie Material Sales, Inc.*

SOMMER BARNARD P.C.

By: s/ Edward W. Harris III (w/permission)

Edward W. Harris, III
Gayle A. Reindl
Jonathan G. Polak
Abram B. Gregory
One Indiana Square, Suite 3500
Indianapolis, IN 46204
(317) 713-3500
(317) 713-3699 (fax)
eharris@sommerbarnard.com
greindl@sommerbarnard.com
jpolak@sommerbarnard.com
agregory@sommerbarnard.com

*Attorneys for MA-RI-AL Corp., Beaver
Materials Corp., Rick Beaver and Chris Beaver*

JENNER & BLOCK LLP

By: s/ Chris C. Gair (w/permission)

Chris C. Gair
Adam H. Morse
330 N. Wabash Avenue
Chicago, IL 60611
(312) 227-9350
(312) 527-0484 (fax)
cgair@jenner.com
amorse@jenner.com

Attorneys for Gary Matney

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.

<p>Irwin B. Levin Richard E. Shevitz Scott D. Gilchrist Eric S. Pavlack Arend J. Abel Vess A. Miller COHEN & MALAD, LLP ilevin@cohenandmalad.com rshevitz@cohenandmalad.com sgilchrist@cohenandmalad.com epavlack@cohenandmalad.com aabel@cohenandmalad.com vmiller@cohenandmalad.com</p>	<p>Stephen D. Susman Barry C. Barnett Jonathan Bridges Garrick B. Pursley Warrant T. Burns SUSMAN GODFREY L.L.P. ssusman@susmangodfrey.com bbarnett@susmangodfrey.com jbridges@susmangodfrey.com gpursley@susmangodfrey.com wburns@susmangodfrey.com</p>
<p>G. Daniel Kelley, Jr. Thomas E. Mixdorf Edward P. Steegmann Anthony P. Aaron Abigail B. Cella ICE MILLER LLP daniel.kelley@icemiller.com thomas.mixdorf@icemiller.com ed.steegman@icemiller.com anthony.aaron@icemiller.com abby.cella@icemiller.com</p>	<p>Steven M. Badger Shannon D. Landreth McTURNAN & TURNER sbadger@mtlitig.com slandreth@mtlitig.com</p>
<p>Brady J. Rife J. Lee McNeely McNEELY STEPHENSON THOPY & HARROLD bjrife@msth.com jlmcneely@msth.com</p>	<p>George W. Hopper Jason R. Burke David M. Bullington HOPPER BLACKWELL, P.C. ghopper@hopperblackwell.com jburke@hopperblackwell.com dbullington@hopperblackwell.com</p>
<p>Judy L. Woods Bryan H. Babb Curtis T. Jones Melinda R. Shapiro BOSE McKINNEY & EVANS, LLP jwoods@boselaw.com bbabb@boselaw.com cjones@boselaw.com mshapiro@boselaw.com</p>	<p>Chris C. Gair Adam H. Morse JENNER & BLOCK LLP cgair@jenner.com amorse@jenner.com</p>

Edward W. Harris III Gayle A. Reindl Jonathan G. Polak Abram B. Gregory SOMMER BARNARD PC eharris@sommerbarnard.com greindl@sommerbarnard.com jpolak@sommerbarnard.com agregory@sommerbarnard.com	Michael W. Boomgarden Frank J. Vondrak U.S. DEPT. OF JUSTICE, ANTITRUST DIV. michael.boomgarden@usdoj.gov frank.vondrak@usdoj.gov
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s/ Robert K. Stanley
