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-JMS
THIS DOCUMENT RELATES TO: ALL ACTIONS	))	

IMI DEFENDANTS' REPLY IN SUPPORT OF MOTION TO RECONSIDER SETTLEMENT CLASS ORDERS

Plaintiffs challenge the non-settling defendants' standing to contest the settlement class. For this to be true, however, the Court must determine that it can disapprove the litigation class while approving a settlement class – i.e. that this Court's approval of a settlement class has no effect on its considerations concerning the contested litigation class. This requires an examination of the issues concerning the proposed litigation class, as opposed to the issues concerning a settlement class.

Non-settling defendants believe that the primary issues concerning the proposed litigation class are:

1. that the required proof of impact on each putative class member[1] will require individualized inquiries as to each such class member, even as to each

[1] *See, e.g., Kochert v. Greater Lafayette Health Services, Inc.*, 463 F.3d 710, 718 (7th Cir. 2006) (to establish civil liability, an antitrust plaintiff must prove standing, a causal connection between the alleged violation and harm to the plaintiff, or "impact", the directness of that causal link and antitrust injury -in-fact); *State of Alabama v. Bluebird Body Company, Inc.*, 573 F.2d 309, 327-28 (5th Cir. 1978) (even where a Section 1 conspiracy is established, "each plaintiff must still prove that this conspiracy was actually implemented in his State and that it did in fact cause an injury").

transaction, to establish whether a transaction's price was or was not impacted by the alleged conspiracy;

2. that plaintiffs' attempted proof on class certification issues through their expert Dr. Beyer is not sufficient: (1) because Dr. Beyer's methodology does not meet the standards for expert testimony under *Daubert* and (2) because it fails to demonstrate by a preponderance of the evidence that an individualized inquiry is not required. Defendants' response papers will fully address these issues.

"Some showing" that the Rule 23 standards are met is no longer sufficient. *Szabo* and *West* (as followed by most of the circuits)[2] require the Court to resolve the "battle of the experts" in order to decide whether the requirements of Rule 23(b)(3), and other requirements, have been demonstrated by a preponderance of the evidence.

Plaintiffs appear to concede that these issues arising under Rule 23(b)(3) are in no way affected by the Court's approval of a settlement class and are not involved in approval of a settlement class. If the Court agrees and so determines, then non-settling defendants under these facts would have no standing, but were it otherwise, then non-settling defendants would have standing. Regardless of standing, *Amchem*[3] requires the Court's independent evaluation of a proffered settlement class. The points raised by defendants minimally are relevant to that independent judicial inquiry.

[2] *See, West v. Prudential Securities, Inc.*, 282 F.3d 935, 938 (7th Cir. 2002); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001). A thorough summary of the new case law in this area is presented in *In re Initial Public Offerings Securities Litigation*, 471 F.3d 24 (2d Cir. 2006).

[3] *See, Amchem Products Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 2248-49 (1997).

Respectfully submitted,

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