

**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-JMS
THIS DOCUMENT RELATES TO: ALL ACTIONS)	

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF
SETTLEMENT AGREEMENT WITH BUILDER'S CONCRETE & SUPPLY, INC.,
GUS B. ("BUTCH") NUCKOLS, III AND JOHN J. BLATZHEIM**

The Plaintiffs, Kort Builders, Inc., Dan Grote, Cherokee Development, Inc., Wininger/Stolberg Group, Inc., Marmax Construction, LLC, Boyle Construction Management, Inc., and T&R Contractor, Inc. (collectively "Plaintiffs"), by Class Counsel, have moved this Court for an Order preliminarily approving the Settlement Agreement With Defendants Builder's Concrete & Supply, Inc., Gus B. ("Butch") Nuckols, III, and John J. Blatzheim ("Builder's Settlement"), preliminarily certifying a Plaintiff Settlement Class, and directing notice of the Builder's Settlement to members of the Settlement Class. The Builder's Settlement, which is attached to the Motion as Exhibit "1," resolves the claims in this action of the Plaintiffs and the proposed Settlement Class as against Defendants Defendants Builder's Concrete & Supply, Inc., Gus B. ("Butch") Nuckols, III, and John J. Blatzheim (collectively "Builder's Defendants") only, in exchange for the payment of the sum of \$5.5 million (the "Settlement Amount").

The Builder's Settlement is the final settlement agreement reached with Defendants in this case, and brings the combined settlement funds recovered for class members to \$59,143,000. These settlements, including the Builder's Settlement, were obtained despite years of aggressive opposition by several well-funded Defendants, and despite widely diverging views on damages

and the scope and impact of the Defendants' conspiracy. Moreover, the Builder's Settlement follows extensive, arms-length negotiations between the Plaintiffs and the Builder's Defendants and an exhaustive review of the financial condition of the Builder's Defendants. The Settlement reflects the risks to both parties of continued litigation, plainly qualifies as a fair, reasonable and adequate result, and easily satisfies the standards for preliminary approval.

Introduction

The Plaintiffs initiated several actions¹ against the named Defendants in mid-2005, seeking treble damages, costs of suit, attorneys' fees, and injunctive relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, for the injuries sustained by Plaintiffs and class members arising from violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Plaintiffs have alleged that from at least July 1, 2000 through at least May 25, 2004, the Defendants and their co-conspirators, including the Builder's Defendants, entered into and engaged in a combination and conspiracy to suppress and eliminate competition by fixing the price of ready-mixed concrete in the central Indiana area. Plaintiffs allege that as a result of the unlawful conduct of Defendants and their co-conspirators, Plaintiffs and the other class members paid artificially inflated prices for ready-mixed concrete.

The Plaintiffs' actions followed an announcement by the United States Department of Justice ("DOJ"), on June 29, 2005, that the IMI Defendants had agreed to plead guilty and pay a \$29.2 million criminal fine for conspiring and fixing prices for ready-mixed concrete in violation of the Sherman Act. Since the IMI Defendants' guilty pleas, a number of other individual and corporate Defendants have pleaded guilty, been convicted following a jury trial, or entered into leniency or cooperation agreements with the United States. *See* Memorandum in Support of

¹ Several similar actions were filed in this Court against Builder's and the other Defendants, and were consolidated by this Court under the caption set forth above.

Plaintiffs' Motion for Class Certification (Docket No. 401), p. 7 (summarizing Defendants' guilty pleas, convictions and cooperation agreements).

On November 28, 2005, at the request of the DOJ, the Court stayed most discovery in this case pending completion of the criminal proceedings. The Court lifted the discovery stay on December 19, 2006, after the jury trial conviction of the Beaver Defendants. Since the lifting of the discovery stay, the Plaintiffs have received and reviewed literally hundreds of thousands of pages of documents and immense volumes of computerized data. Discovery obtained by the Plaintiffs has included extensive transactional and financial data from the Defendants from a period before and following the Plaintiffs' proposed class period of July 1, 2000 through May 25, 2004. The Plaintiffs have also obtained and reviewed testimony and exhibits from the criminal jury trial of Defendant Ma-Ri-Al Corporation d/b/a Beaver Materials, and materials and information prepared or obtained by the Federal Bureau of Investigation ("FBI"). The Plaintiffs have also conducted over 30 depositions, some of them lasting several days, including numerous Rule 30(b)(6) depositions of Defendant representatives, and lengthy depositions of Defendants' three experts.

On August 1, 2007, the Plaintiffs filed their Motion for Class Certification, along with a supporting Memorandum and an extensive appendix of supporting exhibits. In addition to testimony from the Beaver trial, statements obtained by the FBI, and an affidavit from an FBI investigator, the Plaintiffs submitted the Declaration of John Beyer, Ph.D. *See*, Declaration of Irwin B. Levin, Exhibit 37 (Docket No. 398-55 (filed under seal)) ("Beyer Declaration"). The Beyer Declaration applied established economic analysis to show that if the Defendants conspired in the manner alleged by the Plaintiffs their conspiracy impacted all members of the proposed Class, which includes over 5,000 direct purchasers of ready-mixed concrete.

Following the submission of briefs and materials in opposition to class certification, and the submission by Plaintiffs of additional materials in support, the Court granted the Plaintiffs' motion for class certification on September 9, 2009, and certified a Plaintiff Class composed "all Persons who purchased Ready-Mixed Concrete directly from any of the Defendants or any of their co-conspirators, which was delivered from a facility within the Counties of Boone, Hamilton, Hancock, Hendricks, Johnson, Madison, Marion, Monroe, Morgan, or Shelby, in the State of Indiana, at any time during the period from and including July 1, 2000 through and including May 25, 2004, but excluding Defendants, their co-conspirators, their respective parents, subsidiaries, and affiliates, and federal, state, and local government entities and political subdivisions." (Doc. No. 738). On September 23, 2009, Builders, Beaver and IMI Defendants filed a Rule 23(f) Petition with the Seventh Circuit seeking permission to take an interlocutory appeal of the class certification order. The Seventh Circuit rejected that request, however, allowing the claims to proceed to trial as a class action.

The Builder's Settlement

The Builder's Settlement is the result of negotiations between Class Counsel and counsel for Builder's spanning at least two years. The negotiations leading to settlement began with a mediation session carefully planned with the assistance of Magistrate Jane Magnus-Stinson and conducted by mediator Eric D. Green. The preparation for mediation included several meetings with Defendants' counsel, the review of data and discovery produced by all Defendants during the course of litigation, the production by Defendants of additional transactional data, and the preparation and in-person presentation of damages analyses by both Plaintiffs' and Defendants' experts. Although a settlement with Builder's did not occur during the mediation, counsel resumed negotiations shortly thereafter. After the exchange of additional information and further

negotiations over several months – during which the Plaintiffs and Builder’s Defendants were also preparing for trial – the parties agreed on the terms of the Builder’s Settlement.

The terms of the Builder’s Settlement are straightforward, and consistent with those found in similar settlements for claims brought under Section 1 of the Sherman Act for price fixing, including the Settlements with all other Defendants. The key elements of the Builder’s Settlement are as follows:

- The certification as to the Builder’s Defendants, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3), of a Settlement Class, the appointment of the Plaintiffs to represent the Settlement Class, and the appointment of Interim Co-Lead Counsel as Settlement Class Counsel;
- The issuance of notice of the Settlement, by mail and publication, advising members of the Settlement Class of the terms of the Settlement and their right to exclude themselves from or object to the Settlement;
- The scheduling of a final fairness hearing to consider whether the Settlement should be finally approved;
- The payment by Builder’s of \$5,500,000, in installments over five years, into a Settlement Fund for the benefit of the Settlement Class;
- Certain continuing cooperation and assistance of Builder’s and its officers in the Plaintiffs’ prosecution of this action against the remaining Defendants, including as necessary affidavits and declarations under oath, trial testimony, and depositions if Builder’s cooperation cannot be secured voluntarily;
- An agreement by the Builder’s Defendants not to oppose Settlement Class Counsel’s request for Court approval of the payment of attorneys’ fees in an amount not to exceed

33 1/3 % of the Settlement Amount, and reimbursement of reasonable expenses, to be paid from the Settlement Fund; and

- The release of claims that were or could have been asserted in this action against the Builder's Defendants and related persons by the Plaintiffs and Settlement Class members, and a final judgment dismissing the Plaintiffs' and Settlement Class members' claims against the Builder's Defendants.

The Builder's Settlement does not result in a release or dismissal of the claims of the Plaintiffs and Settlement Class Members against any other Defendants. Indeed, the Builder's Settlement is consistent with and recognizes the right of the Plaintiffs and Settlement Class members, under the Sherman and Clayton Acts, to continue to seek, from all other Defendants, treble the damages resulting from all Defendants' – including the Builder's Defendants' – participation in the conspiracy.

The Builder's Settlement payment will be deposited into an escrow account established by Settlement Class Counsel at a commercial bank and maintained as the Settlement Fund. Settlement Class Counsel will seek permission from the Court to make distributions from the Settlement Fund to Class members. Pursuant to the Court's previous Orders approving the claims process, distribution of amounts from the Settlement Fund will be in direct proportion to the amount of a Class member's purchases of ready-mixed concrete from the Defendants at any time from July 1, 2000 through May 25, 2004. These distributions will be made in installments as payments are received from Builder's.

Standard for Preliminary Approval

It is well-established that a district court's approval of a class action settlement should proceed in two steps. The first step is to determine whether to conditionally certify a settlement

class and to notify class members of the pending settlement and their right to participate in a final fairness hearing. The second step is the fairness hearing itself, which can occur only after class members have been notified of their right to participate in the hearing or to opt out of the class altogether. *See*, Federal Judicial Center’s Manual for Complex Litigation, Fourth §§ 21.622-23 (2006).

If the district court finds a settlement proposal “within the range of possible approval,” preliminary approval is granted and class members are notified of the proposed settlement and the fairness hearing at which they and all interested parties have an opportunity to be heard. *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982) (citations omitted). The Seventh Circuit has adopted a “probable cause” approach to the preliminary approval stage of considering a proposed class action settlement:

The first step involves a preliminary determination as to whether notice of the proposed settlement should be given to members of the class and a hearing scheduled at which evidence in support of and in opposition to the proposed settlement will be received. Unless the judge is preliminarily satisfied that the proposed settlement is within the range of possible approval, there is no point in proceeding with notice and a hearing. **“Such a preliminary hearing is not, of course, a definitive (sic) proceeding on the fairness of the proposed settlement * * * (I)t is simply a determination that there is, in effect, ‘probable cause’ to submit the proposal to members of the class and to hold a full scale hearing on its fairness at which all interested parties will have an opportunity to be heard after which a formal finding of fairness will be made.”**

In re General Motors Engine Interchange Litig., 594 F.2d 1106, 1133 (7th Cir. 1979) (emphasis added), *quoting* Manual for Complex Litigation § 1.46 (1977).

Generally, the court “bases its preliminary approval of a proposed settlement upon its familiarity with the issues and evidence of the case as well as the arms-length nature of the negotiations prior to the settlement.” *In re Telectronics Pacing Systems, Inc.*, 137 F.Supp.2d 985, 1026 (S.D. Ohio 2001), *citing In re Dun & Bradstreet Credit Servs. Litig.*, 130 F.R.D. 366,

370 (S.D. Ohio 1990). “A preliminary fairness assessment is not to be turned into a trial or rehearsal for trial on the merits, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.” *In re Inter-Op Hip Prosthesis Liability Litig.*, 204 F.R.D. 330, 350 (N.D. Ohio 2001).

The management of a class action rests largely within the district court’s discretion. *Mars Steel Corp. v. Continental Ill. Nat’l Bank & Trust Co. of Chicago*, 834 F.2d 677, 684 (7th Cir. 1987). It is therefore within this Court’s discretion whether, and to what extent, it should conduct a hearing prior to preliminary approval. *Id.* at 684. As the court in *Mars Steel* held, an evidentiary hearing plainly is not required. *See also, Patterson v. Stovall*, 528 F.2d 108 (7th Cir. 1976) (no error in district court’s failure to hold evidentiary hearing either before preliminary approval or final approval); *In re General Motors*, 594 F.2d at 1133 (same). Given the substantial payment Builder’s has agreed to make in order to settle the claims of the Plaintiffs and Settlement Class members, the Court’s familiarity with this case following years of litigation, and the inherent risks of further litigation against the Builder’s Defendants, Class Counsel believe that it would be appropriate to proceed with preliminary approval without a hearing.

The Court Should Preliminarily Approve the Builder’s Settlement

As this Court has recognized, the “bar is low” when considering a settlement for preliminary approval. *In re Bromine Antitrust Litig.*, 203 F.R.D. 403, 416 (S.D. Ind. 2001). Under the standard discussed above, and circumstances leading to this agreement, there should be little question that the terms of the Builder’s Settlement are well within the range of possible approval, and that probable cause exists to certify the Settlement Class and issue notice of a final

fairness hearing. The fairness of the Builder's Settlement is strongly supported by the facts and circumstances of this case.

First, Builder's has agreed to pay \$5.5 million into the Settlement Fund for the benefit of Class members. This sum represents approximately 5% of the Plaintiffs' calculation of the total sales of ready-mixed concrete by Builder's to Class members during the Class Period of July 1, 2000 through May 25, 2004. Given the financial condition of the Builder's Defendants at the time of settlement, the settlement amount to be paid by Builder's fairly accounts for the Builder's Defendants' potential exposure for joint and several liability for trebled damages, weighed against the risks inherent in further litigation.

Second, the settlement amount is supported by the difficulties of obtaining a substantial judgment against Builder's at trial. Although the Builder's Defendants have been charged by the United States with criminal violations of the Sherman Act, and have pleaded guilty to those charges, Builder's and the remaining Defendants have presented an energetic and extremely vigorous defense as to the extent of the conspiracy and to the Plaintiffs' claims of class-wide impact and damages. In order to obtain a significant judgment against Builder's at trial, Plaintiffs and the Class would be required to overcome the efforts of the Builder's Defendants to show that the conspiracy was extremely limited in scope, was ineffective and caused little damage to purchasers. Plaintiffs and the Class would also face the prospect of an appeal from any significant judgment, in which damages and the Court's certification of a litigation class would be challenged. Given the inherent risks of further litigation, Settlement Class Counsel believe that Builder's agreement to pay \$5.5 million for the benefit of members of the Settlement Class is a highly favorable result.

The terms of the Builder's Settlement also reflect the risk that the Builder's Defendants will not be able to pay even this discounted settlement amount. In the event that the Builder's Defendants fail to pay any required installment of the \$5.5 million settlement amount, the terms of the settlement call for the Court enter a judgment in favor of the Class and against the Builder's Defendants, in the amount of Ninety-Four Million, Six Hundred Fifty Thousand, Two Hundred Eighty-One Dollars (\$94,650,281). By restoring to the Plaintiff Class a judgment for an estimated amount of their requested damages from the Builder's Defendants, the entry of such a judgment places the Class in a superior position to unsecured creditors in the event that the Builder's Defendants become insolvent.

The Builder's Settlement nonetheless preserves the rights of the Plaintiffs and Settlement Class to pursue the full value of their claims – less any setoff for the settlement payment – against the remaining Defendants. Neither the release nor the dismissal contemplated by the Builder's Settlement will affect claims against the remaining Defendants, and the Builder's Defendants are required to provide useful cooperation to Settlement Class Counsel in pursuing these claims. The other Defendants will remain jointly and severally liable for damages caused by Builder's participation, with them, in a conspiracy to fix the price of ready-mixed concrete.²

The Builder's Settlement Class

Pursuant to the Settlement Agreement and Federal Rules of Civil Procedure 23(a) and 23(b)(3), the Court should certify the following Settlement Class:

All Persons who purchased Ready-Mixed Concrete directly from any of the Defendants or any of their co-conspirators, which was delivered from a facility within the Counties of Boone, Hamilton, Hancock, Hendricks, Johnson, Madison, Marion, Monroe, Morgan, or Shelby, in the State of Indiana, at any time during

² Although these terms have less importance in the settlement of claims against the "last" Defendant, the cooperation provisions could nonetheless be significant in the event that a settling Defendant breaches the terms of its settlement agreement. The cooperation and limited release provisions are also important to the efficient and fair implementation of the distribution process, which mirrors the parties' joint and several liability in this case.

the period from and including July 1, 2000 through and including May 25, 2004, but excluding Defendants, their co-conspirators, their respective parents, subsidiaries, and affiliates, and federal, state, and local government entities and political subdivisions.

For the reasons set forth in the Plaintiffs' Memorandum in Support of Motion for Class Certification (Docket No. 401), and the Court's order certifying a Plaintiff Class for litigation, which are incorporated herein by reference, the proposed Settlement Class easily meets the requirements of Rules 23(a) and (b). As discussed therein, the Settlement Class numbers in the thousands (numerosity); the Plaintiffs assert claims identical to, and not in conflict with, the claims of Settlement Class members (typicality); the claims of the Plaintiffs and Settlement Class members share nearly identical issues of liability and damages (commonality); the Plaintiffs have displayed their commitment to this action throughout the litigation, through answering extensive discovery and participating in depositions, and have no interest antagonistic to the Class (adequacy of Plaintiffs); and proposed Settlement Class Counsel are well experienced in complex and class action litigation, including antitrust matters (adequacy of counsel).

As Plaintiffs have illustrated in support of the certification of a litigation class, and as the Court has now found, the requirements of Rule 23(b), "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy," are easily met in this case. The Supreme Court has noted that Rule 23(b)(3)'s predominance requirement is "readily met" in antitrust cases like this one. *Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997). More recently, Judge Frost in the *Foundry Resins* case explained that "[a]s a general rule in antitrust price-fixing cases . . . courts have consistently found that common issues regarding the existence and scope of the conspiracy

predominate over questions affecting only individual members.” *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 408 (S.D. Ohio 2007).

Indeed, in the context of settlement, the requirements of Rule 23(b) are even more easily met. In *Amchem Products*, the United States Supreme Court recognized that “[s]ettlement is relevant to class certification.” *Amchem Products*, 521 U.S. at 619. Specifically, the Court explained: “Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial.” *Id.* at 620 (citing Fed. R. Civ. P. 23(b)(3)(D)). Of course, the Plaintiffs do not believe that manageability should be a concern for the Court when considering certification of a litigation class in this matter. Nonetheless, the decidedly lower standard applied to this aspect of Rule 23(b) in the settlement context makes preliminary certification of the Settlement Class particularly appropriate.

In addition to the certification of a Settlement Class, the Builder’s Settlement sets forth a comprehensive method of providing notice of the Settlement to Class members that is consistent with the settlement notice programs previously approved by the Court. Due process requires direct notice to all class members who can be identified through reasonable effort. *See, Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 173-77 (1974); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The Builder’s Settlement calls for direct mail notice to all persons falling within the Settlement Class definition, based upon information that has been provided by Defendants. Builder’s and all other Defendants have previously provided information used for this purpose in connection with the previous Settlements. The mailed notice, in the question-and-answer format proposed by the Federal Judicial Center for class action settlement notices, provides a thorough

explanation of the Settlement and Class members' rights. The form of the proposed mailed notice is attached to the Builder's Settlement as Exhibit "A."

The Builder's Settlement also calls for published notice to appear twice in the *Indianapolis Star*. Though a summary notice, the proposed published notice also provides a thorough explanation of the Settlement and Class members' rights, as well as a means to obtain additional information from Settlement Class Counsel, from the Court-approved Settlement Claims Administrator, and from a Settlement website that provides additional information and access to documents from the litigation and the Builder's Settlement. With regard to potential class members who cannot be identified through reasonable effort, or who have changed addresses, notice by publication is recognized as a suitable method for providing notice of the litigation and certification order. WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D, § 1786. *See also*, ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS (4th ED.), § 8:2. The form of the proposed published notice is attached to the Builder's Settlement as Exhibit "B."

The combined form of mailed and published notice proposed under the Builder's Settlement provides "the best notice practicable under the circumstances." Fed. R. Civ. P. 23(c)(2). The proposed forms of notice will adequately inform Class members of the terms of the Settlement, the Court's preliminary approval and certification of a Settlement Class, the rights of Class members to exclude themselves from or object to the Settlement, and the setting of a final hearing to consider the fairness of the Settlement. The Court should therefore approve the proposed methods and form of notice and direct its consummation according to the terms of the Builder's Settlement.

Finally, preliminary approval of the Builder's Settlement is supported by the Court's final approval of the Shelby, American, Prairie and IMI Settlements, and the materials submitted by Class Counsel in support thereof. The methods of notice approved by the Court for those Settlements have been successfully employed in practice, and the data employed to identify Class members has been further refined as Settlement Class Counsel and the Claims Administrator communicate with Class members. The substantially identical procedures of the Builder's Settlement also satisfy Rule 23, meet the expectations of Class members, and warrant preliminary approval.

Conclusion

In light of the foregoing, the Plaintiffs respectfully request the Court's preliminary approval of the Settlement Agreement With Defendants Builder's Concrete & Supply, Inc., Gus B. ("Butch") Nuckols, III, and John J. Blatzheim, preliminary certification of the Settlement Class, approval of the form and method of notice of the Builder's Settlement to members of the Settlement Class, and approval and entry of the Preliminary Approval Order in the form attached to the Builder's Settlement as Exhibit "C" and submitted herewith.

Dated: April 6, 2010

Respectfully submitted,

/s/ Irwin B. Levin

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2010, a copy of the foregoing document, 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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