

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

BOYLE CONSTRUCTION
MANAGEMENT, INC.,

Plaintiff,

vs.

CASE NO. 1:05-cv-0979-SEB-VSS

IRVING MATERIALS, INC. and
UNNAMED CO-CONSPIRATORS,

Defendants.

DECLARATION OF STEPHEN D. SUSMAN

Introduction

1. My name is Stephen D. Susman. I am more than 21 years of age, of sound mind, and competent to make this Declaration.
2. I am lead counsel for 11 of the 18 plaintiffs who since June 29, 2005, have filed class action complaints against Irving Materials, Inc. ("IMI") and others in this Court for antitrust violations involving the metropolitan Indianapolis ready-mixed concrete industry. This Declaration is submitted in support of the motion by those plaintiffs for my appointment as sole lead counsel for all class plaintiffs and members of the class.
3. I have attached, as Exhibits A-C to this Declaration, a copy of materials that provide details about my education and experience as a trial lawyer. These include:
 - B.A. from Yale University, *magna cum laude*, in 1962 and J.D. from University of Texas Law School, with highest honors, in 1965.

- Editor-in-chief of the Texas Law Review, 1964-65.
 - Law Clerk to The Honorable John R. Brown, United States Court of Appeals for the Fifth Circuit, 1965-66.
 - Law Clerk to Justice Hugo L. Black, Supreme Court of the United States of America, 1966-67.
 - Associate and partner, Fulbright & Jaworski, Houston, Texas, 1967-1975.
 - Founding and Managing Partner, Susman Godfrey L.L.P., Houston, Dallas, Los Angeles, and Seattle, 1980-present.
4. Training and experience that pertain to my ability to represent the interests of the class fairly and adequately will be discussed in appropriate places below.
5. As IMI pointed out on August 8, 2005,¹ Rule 23(g) of the Federal Rules of Civil Procedure lists factors for a court to consider in selecting interim and post-certification class counsel. These considerations include “the work counsel has done in identifying or investigating potential claims in the action;” “counsel’s experience in handling class actions, other complex litigation, and claims of the type asserted in the action;” “counsel’s knowledge of the applicable law;” “the resources counsel will commit to representing the class;” and “any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class”. Fed. R. Civ. P. 23(g)(1)(C)(i). A court also “may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs”. *Id.* 23(g)(1)(C)(ii). The rest of this Declaration addresses each of these factors.

¹ Defendant’s Motion for Appointment of Interim Class Counsel and to Defer Responsive Pleading and Other Proceedings Pending Such Appointment, Docket No. 26.

Work in Identifying and Investigating Potential Claims in this Action

6. My firm's work in identifying and investigating potential claims in this action resulted, on August 17, 2005, in the filing of an amended complaint that named six additional ready-mixed concrete suppliers as participants in the conspiracy with IMI. *See* Docket No. 30. Before that time, no class action complaint identified any of IMI's co-conspirators. To date, no other class action complaint includes all seven of the defendants in the amended complaint.
7. The work that enabled our client to discover and add six defendants involved substantial effort. It included
 - consultations with an economics firm regarding market structure and the probability of cartel-like activity;
 - research into the sales and solvency of co-conspirators;
 - review and analysis of government reports on the ready-mixed concrete and cement industries;
 - review and analysis of the Antitrust Division's press releases and filings with the Court;
 - development of a chronology of events; and
 - discussions with plaintiffs and potential class members.
8. I and others in my firm have also consulted extensively with defense counsel and other plaintiffs' counsel. These discussions have aimed at minimizing unnecessary work by streamlining and expediting this litigation while uncovering facts, documents, and witnesses crucial to preparing the antitrust claims for trial.
9. Other firms apparently have done less work on the merits despite earlier signs of price-fixing. On April 28, 2005, for example, the Antitrust Division filed in this Court a Plea Agreement in which the former president of a ready-mixed concrete

supplier agreed to plead guilty to price-fixing on sales of ready-mixed concrete in three Indiana counties outside of metropolitan Indianapolis, according to public records.² Disclosure of the Plea Agreement and related proceedings should have caused local private lawyers to investigate potential claims against ready-mixed concrete suppliers in Indiana. But, as of one month after the Plea Agreement, no one had filed a civil complaint that alleged antitrust violations in the Indiana ready-mixed concrete industry.

10. All that changed on June 29, 2005, when the Department of Justice Antitrust Division announced Plea Agreements by IMI and four IMI executives. Every one of the 20 antitrust cases now pending in this Court against IMI was filed on the heels of the Antitrust Division's announcement.

Experience in Handling Class Actions, Other Complex Litigation, and Claims of the Type Asserted in this Action

11. I have served as lead counsel in dozens of class actions, in dozens of other kinds of complex litigation, and in dozens of antitrust cases. I have also tried, as lead counsel, two class actions that alleged the kind of price-fixing behavior at issue in this litigation. I have also tried, as lead counsel, at least nine other antitrust cases and more than 50 complex commercial cases. Exhibit B lists the cases I have tried as lead counsel since 1976. Specific examples are provided below.
12. As sole lead counsel in the *In re Corrugated Container Antitrust Litigation*, MDL No. 310 (S.D. Tex.), I obtained, in 1980, the largest jury verdict of its time – a \$550 million award in favor of the plaintiff class. The civil trial followed an unsuccessful criminal prosecution by the Antitrust Division.

² See *United States v. Larry L. Lee*, No. 05:63-CR-01 (S.D. Ind.).

13. I served as one of three co-lead counsel in the *In re Vitamins Antitrust Litigation*, MDL No. 1285 (D.D.C.). Our prosecution of price-fixing claims produced, in 2003, a jury verdict of nearly \$150 million after trebling plus settlements worth more than \$1 billion on behalf of classes of direct purchasers of vitamins and vitamin products.

14. Another class action for price-fixing, *Louie Alakayak, et al. v. All Alaskan Seafoods, Inc., et al.*, No. 3AN-95-4676 (Alaska Sup. Ct.), resulted in a defense verdict after a trial lasting more than three months in 2003. I was lead counsel in that case also.

15. Like this case, *Corrugated Container, Vitamins*, and *Alakayak* involved conspiracies to fix prices for key commodities. Other price-fixing cases in which I have served as lead counsel include

- *Wilson P. Abraham Construction Corporation v. Armco Steel Corporation, et al.*, 559 F.2d 250 (5th Cir.1977) (price fixing of rebar steel).
- *Little Rock School District, et al. v. Borden, Inc., et al.*, 632 F.2d 700 (8th Cir. 1980) (price fixing of milk).
- *Campus Cleaners, Inc., et al. v. The Dallas Tailor & Laundry Supply Co., Inc., et al.*, No. 76-H-35, 1977 U.S. Dist. LEXIS 14186 (S.D. Tex.) (price fixing of laundry supplies).
- *Eddie Lindley, et al. v. Birdsong Corp. et al.*, No. S-78-81-CA (E.D. Tex.) (price fixing of peanut seed).

16. I have tried other antitrust cases as lead counsel, including:

- *Masimo Corporation v. Tyco Health Care Group, LP*, Case No. CV 02-4770 MRP (AJWx) (C.D. Cal.) (\$420 million jury award after trebling for client).
- *Electronics in Medicine, Inc., et al. v. Picker International, Inc.*, C.A. Nos. H-88-1400 and H-89-3283 (S.D. Tex.) (defense verdict for client).

- *Arkansas Gazette Co. v. Camden News Publishing Co., et al.*, No. LR-C-84-1020 (E.D. Ark.) (defense verdict against clients).
- *Coastal Distributing Company, Inc. v. NGK Spark Plug Co., Ltd., et al.*, C. A. No. H-81-1421 (S.D. Tex.) (\$2 million verdict for client, later set aside).
- *Affiliated Capital v. Gulf Coast Cable, et al.*, Case No. H-79-1331 (S.D. Tex.) (\$6.3 million verdict for client).
- *Texas Federal Pilots, Inc., et al. v. Sabine Pilots Association*, C. A. No. B-79-63 CA (S.D. Tex.) (directed verdict for client).
- *Beer Wholesales, Inc., et al. v. Hillman Distributing Co., Inc., et al.*, C. A. No. 74-4-1002 (S.D. Tex.) (defense verdict for client).
- *Stitt Spark Plug Co. v. Champion Spark Plug Co.*, C. A. No. B-76-534 (S.D. Tex.) (settled before verdict).
- *Computer Statistics, Inc. v. Blair*, C. A. No. 73-H-1727 (S.D. Tex.) (judgment for plaintiff client).

17. Many other antitrust cases that I handled as lead counsel involved favorable settlements or dismissals before trial. For instance:

- In 2004, Microsoft paid our client, Novell, \$536 million in cash to resolve antitrust claims relating to Novell's NetWare business.
- Also in 2004, the Eleventh Circuit upheld dismissal of \$1.5 billion antitrust claims against our client, Clear Channel Communications.
- During 2003, Microsoft settled antitrust claims by our client, Be, Inc., for more than \$23 million.
- In 2000, our client, Caldera, received a settlement from Microsoft for over \$250 million.

18. Exhibit B gives examples of other complex litigation in which I have acted as lead counsel. The cases involved everything from securities fraud that affected large classes of shareholders to disputes between members of wealthy families, from repudiation of agreements to pay for enormous amounts of natural gas to an

executive's claim for an investment banking fee, and from a fight over the F-18 fighter to former House Speaker Jim Wright's battle to remain in office.

Knowledge of the Applicable Law

19. My work in unfair competition cases has made me intimately familiar with substantive antitrust law. Bar and other legal institutions have recognized my knowledge of antitrust by appointing me to key positions, including:

- Editor: "ABA Civil Antitrust Jury Instructions" (1985).
- State Bar of Texas (Chairman, Section on Antitrust and Trade Regulation, 1976-77).
- American Bar Association, Section of Antitrust Law (member of Council, 1989-91) and Section of Litigation (currently member of Trial Advisory Board and Federal Practice Task Force and formerly co-chair of Task Force on Training the Advocate, chairman of Task Force on Fast Track Litigation, and member of Committee to Improve Jury Comprehension).
- Member, American Law Institute.
- ALI-ABA Advisory Group on Antitrust.
- Witness before Antitrust Modernization Commission, Hearing Regarding Civil Remedies Issues (July 28, 2005).

20. I have also written and spoken extensively about procedural aspects of complex litigation and about ways to streamline and expedite it. These include, most recently, a chapter on "Techniques for Expediting and Streamlining Litigation" for the forthcoming second edition of the ABA Section of Litigation's treatise, *Business and Commercial Litigation in Federal Courts* (Robert L. Haig ed., 2005). At the ABA's annual convention in August 2005, I spoke in the program "Advice from the Experts: Successful Strategies for Winning Commercial Cases" and on September 15, 2005, I will make a presentation for the Houston Bar Association on "Electronic Technology: Before and During Trial." I also

currently serve as an Adviser to the American Law Institute's project on Principles of the Law of Aggregate Litigation as well as many other panels, committees, and associations.

Resources Will Commit to Representing the Class

21. Susman Godfrey has 68 lawyers in Houston, Dallas, Los Angeles, and Seattle. Exhibit C summarizes the education, experience, and expertise of those lawyers.
22. The firm and its lawyers have won many awards. These include being named in 2005 by *The American Lawyer* as one of the top two litigation boutiques in the country. At least 28 of the lawyers have been recognized as "Super Lawyers" or "Rising Stars".
23. If the Court selects me as sole lead counsel, I will commit the resources of my firm and of the other firms supporting my appointment as lead counsel to litigate and try this case as quickly and cost-effectively as possible. I will personally attend all significant hearings and lead the trial team. Partner Barry Barnett, associate Jonathan Bridges, and senior legal assistant Mark Anderson from our Dallas office will work under my direction. I expect to assign substantial work, as appropriate, to professionals from Findling Garau Germany & Pennington, Hagens Berman Sobol Shapiro, Schiffrin & Barroway, John R. Price & Associates, Kohn Swift & Graf, Preti Flaherty Beliveau Pachios & Haley, The Mogin Law Firm P.C., and others according to the individuals' expertise, qualifications, and appropriateness for the particular task.

Proposed Terms for Attorney Fees and Nontaxable Costs

24. We propose to be compensated for representing the class on a percentage basis plus reimbursement of reasonable nontaxable costs. This general arrangement is appropriate for a common fund case like this because it best reflects “the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.” *Taubenfeld v. Aon Corp.*, 415 F.3d 597, 599 (7th Cir. 2005) (quoting *In re Synthroid Marketing Litig.*, 264 F.3d 712, 718 (7th Cir. 2001)).
25. Contingent fee arrangements with individual plaintiffs in cases like this normally range from one-third to one-half of the gross recovery – depending on a variety of factors, including the individual plaintiff’s purchases, the duration of the price-fixing, the extent to which the price-fixing raised prices above the competitive level, the solvency of the defendants, and the likelihood of a prompt and firm trial date. In a class case, lawyers must consider the same factors but should adjust aggregate class damages to account for potential opt outs and consider costs attending procedures for class certification, class notice, claims administration, and the like.
26. If the Court appoints me as sole lead counsel, my firm will not seek reimbursement for nontaxable costs that relate to travel that would be unnecessary if I and my firm were located in Indianapolis or include in our fee petition reference to any hours my firm’s professionals spent in such travel without working on this case.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 7, 2005

/s/ Stephen D. Susman