

**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-VSS

THIS DOCUMENT RELATES TO:)
ALL ACTIONS)

**CASE MANAGEMENT PLAN AND ORDER PROVIDING
FOR CONSOLIDATION AND ORGANIZATIONAL MATTERS**

WHEREAS, this action and the cases consolidated herein allege violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

WHEREAS, the Court has determined that formal consolidation of all related actions and appointment of interim Co-Lead Counsel for class plaintiffs is appropriate and consistent with the recommendations of the MANUAL FOR COMPLEX LITIGATION (4th ed. 2004) and with Rule 23(g) of the Federal Rules of Civil Procedure;

WHEREAS, counsel for the parties¹ conducted a conference on October 14, 2005, pursuant to Fed. R. Civ. P. 26(f), for the purpose of discussing the terms of a Case Management Plan and Order Providing for Consolidation and Organizational Matters, and have submitted a joint proposal of the same for approval by the Court;

NOW, THEREFORE, the COURT hereby ORDERS as follows:

I. CONSOLIDATION OF RELATED CASES

- A. On September 19, 2005, the Court consolidated this case with the following cases, which arise out of the same operative facts:

¹ The parties submitting this Case Management Plan are those who have appeared by counsel in one or more of the consolidated actions, and do not include all defendants recently added by plaintiffs in the Amended Consolidated Class Action Complaint filed on October 19, 2005.

CWE Concrete Construction, Inc. v. American Concrete Company, Inc., Case No. 1:05-cv-977;

CWE Concrete Construction, Inc. v. Builder's Concrete & Supply Co., Inc., Case No. 1:05-cv-978;

Kort Builders, Inc. on behalf of itself and all others similarly situated v. Irving Materials, Inc., Case No. 1:05-cv-1002;

Van Valkenburg Builders, Inc., individually and on behalf of a class of all those similarly situated vs. Irving Materials, Inc., Case No. 1:05-cv-1005;

R. Shane Tharp, on behalf of itself and all others similarly situated v. Irving Materials, Inc., Prairie Material Sales, Inc., Builder's Concrete & Supply, Inc., Shelby Gravel, Inc. d/b/a Shelby Materials, American Concrete Company, Inc., Ready Mixed Concrete Company, Carmel Concrete Products, Co., and Unnamed Co-Conspirators, Case No. 1:05-cv-1045;

Michael Reisert, on behalf of himself and all others similarly situated v. Irving Materials, Inc., and Unnamed Co-Conspirators, Case No. 1:05-cv-1046;

Dan Grote, a Sole Proprietorship, individually and on behalf of a class of all those similarly situated v. Irving Materials, Inc., Case No. 1:05-cv-1055;

Siniard Concrete Services, Inc., individually and on behalf of a class of all those similarly situated v. Irving Materials, Inc., Case No. 1:05-cv-1056;

Environ, LLC, individually and on behalf of a class of all those similarly situated v. Irving Materials, Inc., Case No. 1:05-cv-1057;

Dennis Leon Myers d/b/a Myers Concrete Finishing, on its behalf and on behalf of all others similarly situated v. Irving Materials, Inc., Case No. 1:05-cv-1081;

M&M Properties of Louisville, LLC, MDR Properties of Louisville, LLC, and 502 Properties, LLC on behalf of themselves and all others similarly situated v. Irving Materials, Inc., Price Irving, Fred R. "Pete" Irving, John Huggins and Daniel C. Butler, Case No. 1:05-cv-1103;

Stacy M. Wissel Trustee of Chapter 7 Debtor Grohoff Construction, Inc., individually and on behalf of a class of all those similarly situated v. Irving Materials, Inc., Case No. 1:05-cv-1104;

Cherokee Development, Inc., individually and on behalf of a class of all those similarly situated v. Irving Materials, Inc., Case No. 1:05-cv-1105;

Engelhardt Contracting, on behalf of itself and all others similarly situated v. Irving Materials, Inc., Case No. 1:05-cv-1130;

Scott Pentecost d/b/a A&K Concrete, individually and on behalf of a class of all those similarly situated v. Irving Materials, Inc., Case No. 1:05-cv-1133;

Craw-Con, Inc., individually and on behalf of all others similarly situated v. Irving Materials, Inc., Daniel C. Butler, John Huggins, Fred R. "Pete" Irving, and Price Irving, Case No. 1:05-cv-1190;

Trotter Construction Company, Inc., on behalf of itself and all others similarly situated v. Irving Materials, Inc. and Unnamed Co-Conspirators, Case No. 1:05-cv-1216

Wininger/Stolberg Group, Inc., d/b/a Wininger/Stolberg Group-Claybridge, Inc., Wininger/Stolberg Homes/Jackson Mill, Inc., Wininger/Stolberg Land Holdings, Inc., Wininger/Stolberg Homes/Brighton Point Villas, Inc., Wininger/Stolberg Homes/The Villa Glen, Inc., and American Custom Homes, Inc. v. Irving Materials, Inc., Price Irving, Fred R. "Pete" Irving, John Huggins, Daniel C. Butler, and Unnamed Co-Conspirators, Case No. 1:05-cv-1265;

Tippman Construction, Inc., Elbrecht Investments, LLC and CWE Concrete Construction, Inc. v. Irving Materials, Inc., Case No. 1:05-cv-1278;

Marmax Construction, LLC and Cal Paysinger d/b/a Genesis Concrete, individually and on behalf of all others similarly situated v. Irving Materials, Inc., Builder's Concrete & Supply Co., Inc., Hughey, Inc d/b/a Carmel Concrete Products and Doe's 1-25, Case No. 1:05-cv-1280;

Wardwell Bothers, Inc. v. Builder's Concrete & Supply Co., Inc. and Irving Materials, Inc., Case No. 1:05-cv-1296; and

T&R Contractor, Inc., individually and on behalf of all others similarly situated v. Irving Materials, Inc., Price Irving, Fred R. "Pete" Irving, John Huggins and Daniel C. Butler, Case No. 1:05-cv-1365.

- B. Any other actions now pending or hereafter filed in or transferred to this Court that arise out of the same operative facts as this case will be consolidated pursuant to Rule 42(a) of the Federal Rules of Civil Procedure. This "Consolidated Action" shall be referred to as *In re: Ready-Mixed Concrete Antitrust Litigation*, Master Docket No. 1:05-CV-0979-SEB-VSS.

II. CAPTION OF CASES

Every pleading filed in the Consolidated Action shall bear the following caption:

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-VSS
_____)
THIS DOCUMENT RELATES TO:)
_____)

- A. When a pleading or other submission is filed in the Consolidated Action is intended to apply to all actions therein, the words “All Actions” shall appear immediately after the words “THIS DOCUMENT RELATES TO:” in the caption set out above.
- B. When a pleading or other submission is filed and is intended to be applicable to less than all such actions, the party filing the document shall indicate, immediately after the words “THIS DOCUMENT RELATES TO:” the action(s) to which the document is intended to be applicable by last name of the plaintiff(s) and the docket number(s).

III. MASTER DOCKET

- A. A Master Docket for this Consolidated Action will be maintained under Civil Action No. 1:05-cv-00979-SEB-VSS, and will include actions subsequently consolidated herein pursuant to this Order. Entries in said Master Docket shall be applicable to the Consolidated Action, and entries shall be made therein in accordance with the regular procedures of the Clerk of this Court, except as modified by this Order.
- B. When a pleading is filed and the caption, pursuant to this Order, shows that it is applicable to “All Actions,” the Clerk shall file such pleading in the Master File and note such filing in the Master Docket. No further copies need be filed nor other docket entries made.
- C. When an electronic filing occurs and the caption shows that it is applicable to fewer than All Actions, the filing shall be made in the Master File and

in each separate action to which it applies, noting note such filing in the Master Docket and in the docket of each separate action.

IV. MASTER FILE AND SEPARATE ACTION FILES

A Master File is hereby established for the consolidated proceedings in the Consolidated Action. The Master File shall be Civil Action No. 1:05-cv-00979-SEB-VSS. The original of this Order shall be filed by the Clerk in the Master File herein established. The Clerk shall maintain a separate file for each of the Consolidated Actions and filings shall be made in accordance with the regular procedures of the Clerk of this Court, except as modified by this Order. The Clerk shall file a copy of this Order in each such separate file. The Clerk shall mail or email a copy of this Order, according to its regular procedures for distributing orders, to counsel of record in each of the Consolidated Actions.

V. NEWLY FILED OR TRANSFERRED ACTIONS

A. When a case that arises out of the same operative facts as the above referenced actions is hereafter filed in or transferred to this Court, it shall be consolidated with this action as provided in Section I above and the Clerk of Court shall:

1. File a copy of this Order in the separate file for such action;
2. The Clerk of the Court shall mail or electronically serve the Order to the attorneys for the plaintiff(s) in the newly filed or transferred case and to any new defendant(s) in the newly-filed or transferred case; and
3. Make the appropriate entry in the Master Docket.

B. This Court requests the assistance of counsel in calling to the attention of the Clerk of this Court the filing or transfer of any case that might properly be consolidated as part of this litigation.

VI. APPLICATION OF THIS ORDER TO SUBSEQUENT CASES

A. This Order shall apply to each action assigned to the undersigned alleging claims similar to those set forth in the Consolidated Action. This Order shall apply to each such case which is subsequently filed in or transferred to this Court, and which is assigned to the undersigned, unless a party objecting to the consolidation of that case or to any other provision of this Order serves an application for relief from this Order or from any of its provisions within ten (10) days after the date on which the Clerk mails or emails a copy of this Order to counsel that party. The

provisions of this Order shall apply to such action pending the Court's ruling on the application. Unless a plaintiff in a subsequently filed or transferred case is permitted by the Court to use a separate complaint, defendants shall not be required to answer, plead or otherwise move with respect to that complaint. If a plaintiff in any such case is permitted to use a separate complaint, defendants shall have thirty days from the date the Court grants such permission within which to answer, plead or otherwise move with respect to that complaint.

VII. ORGANIZATION OF INTERIM LEAD PLAINTIFFS' CO-COUNSEL

- A. Pursuant to Rule 23(g)(2)(A) of the Federal Rules of Civil Procedure, the Court on September 19, 2005, ordered the following attorneys to act as Interim Lead Plaintiffs' Co-Counsel for putative class plaintiffs in the Consolidated Action, with the responsibilities hereinafter described:

Irwin B. Levin
COHEN & MALAD, LLP
One Indiana Square, Suite 1400
Indianapolis, IN 46204
Telephone: (317) 636-6481
Facsimile: (317) 636-2593
ilevin@cohenandmalad.com

Stephen D. Susman
SUSMAN GODFREY L.L.P.
901 Main Street, Suite 4100
Dallas, Texas 75202
Telephone: (214) 754-1900
Facsimile: (214) 754-1933
ssusman@SusmanGodfrey.com

In addition to the court-appointed Interim Lead Plaintiffs' Co-Counsel, putative class plaintiffs are represented by other attorneys that are identified on the electronic dockets for the consolidated cases identified in Section I.A. above.

- B. Interim Lead Plaintiffs' Co-Counsel in the Consolidated Action shall have authority over the following matters on behalf of all putative class plaintiffs in those respective actions:
1. convening meetings of counsel;
 2. initiating, responding to, scheduling, briefing, and arguing of all motions;
 3. determining the scope, order, and conduct of all discovery proceedings;
 4. assigning such work assignments to other counsel as they may deem appropriate;
 5. retaining putative class plaintiffs' experts;

6. designating which attorneys may appear at hearings and conferences with the Court;
 7. conducting settlement negotiations with defendants; and
 8. other matters concerning the prosecution of or resolution of their respective cases.
- C. No motion shall be initiated or filed on behalf of any putative class plaintiff in the Consolidated Action except through Interim Lead Plaintiffs' Co-Counsel.
 - D. Interim Lead Plaintiffs' Co-Counsel will solely determine all work assignments in the Consolidated Action and attorneys responsible therefor.
 - E. Interim Lead Plaintiffs' Co-Counsel shall have authority to communicate with defendants' counsel and the Court on behalf of all Plaintiffs. Defendants' counsel may rely on all agreements made with Interim Lead Plaintiffs' Co-Counsel, and such agreements shall be binding.
 - F. As requested by Judge Barker during the September 19, 2005, hearing, Interim Lead Plaintiffs' Co-Counsel for putative class plaintiffs Irwin B. Levin has been assigned the initial responsibility of exploring settlement possibilities with defendants.
 - G. Nothing in this order or the Court's September 19, 2005 order shall be deemed to presumptively obligate any Defendant to pay any attorney fees or costs to or for any counsel for any plaintiff, any putative class or class member, or to or for Interim Lead Plaintiffs' Co-Counsel.

VIII. COORDINATION

- A. Interim Lead Plaintiffs' Co-Counsel shall coordinate activities to avoid duplication and inefficiency in the filing, serving and/or implementation of pleadings, other court papers, discovery papers, and discovery practice.
- B. Discovery shall be consolidated in the Consolidated Action.

IX. MAINTENANCE OF CONTEMPORANEOUS ATTORNEY TIME AND EXPENSE RECORDS

All putative class plaintiffs' counsel shall submit to Interim Lead Plaintiffs' Co-Counsel a record of the time expended and expenses incurred in the form set forth by Interim Lead Plaintiffs' Co-Counsel on a monthly basis. Counsel who fail to comply with this

reporting requirement shall be ineligible to receive assignments from Interim Lead Plaintiffs' Co-Counsel to perform services in this matter.

X. SERVICE OF PLEADINGS, MOTIONS AND OTHER PAPERS

- A. The parties shall affect service of papers on each other by attaching them as a .pdf document to an email addressed to all counsel designated herein to receive such service. Service of papers on putative class plaintiffs counsel shall be made solely on co-lead counsel and no additional service shall be required on other counsel for plaintiffs. The provisions of this paragraph shall not apply to any papers filed with the Court and subject to the Southern District of Indiana's CM-ECF policies and procedures. All counsel wishing to receive service shall promptly register for electronic service through the CM-ECF system. Counsel not so registered shall not be entitled to service and no service on them shall be required by any other party.
- B. Notwithstanding the foregoing Section X.A., in the event a hearing is scheduled upon less than 48 hours' notice, in addition to the notice required under Section X.A., lead counsel shall give notice by facsimile or otherwise to all counsel designated herein to receive service.

XI. COMMUNICATION AMONG COUNSEL

The Court recognizes that cooperation by and among counsel is essential for the orderly and expeditious resolution of this litigation. Accordingly, the communication of information among and between plaintiffs' counsel shall not be deemed a waiver of the attorney-client privilege, the attorney work product protection or other applicable privileges or protections. Similarly, the communication of information among and between counsel for Defendants shall not be deemed a waiver of the attorney-client privilege, the attorney work product protection or other applicable privileges or protections.

XII. SCOPE OF ORDER

The terms of this Order shall not have the effect of making any person, firm or entity a party to any action in which he, she or it has not been named, served or added as such in accordance with the Federal Rules of Civil Procedure. The terms of this Order and the consolidation ordered herein shall not constitute a waiver by any party of any claims in or defenses to any action nor shall such terms or the recitals herein affect in any way the substance or merits of any motion for class certification or response thereto.

XIII. PARTIES AND REPRESENTATIVES

A. Parties

- 1. Plaintiffs:** Kort Builders, Inc.; Van Valkenburg Builders, Inc.; Dan Grote; Cherokee Development, Inc.; Craw-Con Inc.; Wininger/Stolberg Group, Inc.; Marmax Construction, LLC; Boyle Construction Management, Inc.; and T&R Contractor, Inc.
- 2. Defendants:** Irving Materials, Inc.; American Concrete Company, Inc.; Prairie Material Sales, Inc.; Shelby Gravel, Inc. d/b/a Shelby Materials; Builder's Concrete & Supply, Inc.; Hughey, Inc. d/b/a Carmel Concrete Products, Co.; Ready Mixed Concrete Company; Beaver Gravel Corporation; Daniel C. Butler; John Huggins; Fred R. ("Pete") Irving; Price Irving; Gus B. ("Butch") Nuckols, III; Scott D. Hughey; Richard Haehl; Phillip Haehl; and Gary Matney.

B. Counsel

1. Interim Lead Plaintiffs' Co-Counsel:

The following counsel from Interim Lead Plaintiffs' Co-Counsel's firms will be primarily responsible for the prosecution of this action for putative class plaintiffs:

Irwin B. Levin
Richard E. Shevitz
Scott D. Gilchrist
Eric S. Pavlack
COHEN & MALAD, LLP
One Indiana Square, Suite 1400
Indianapolis, IN 46204
Telephone: (317) 636-6481
Facsimile: (317) 636-2593
ilevin@cohenandmalad.com
rshevitz@cohenandmalad.com
sgilchrist@cohenandmalad.com
epavlack@cohenandmalad.com

Stephen D. Susman
Barry C. Barnett
Jonathan Bridges
SUSMAN GODFREY L.L.P.
901 Main Street, Suite 4100
Dallas, Texas 75202
Telephone: (214) 754-1900
Facsimile: (214) 754-1933
ssusman@SusmanGodfrey.com
bbarnett@SusmanGodfrey.com
jbridges@SusmanGodfrey.com

In addition to Court-Appointed Interim Lead Plaintiffs' Co-Counsel, putative class plaintiffs are represented by other attorneys that are identified on the electronic dockets for the consolidated cases, the case numbers of which are listed in Section I.A. above.

2. Counsel for Defendants:

Counsel for Irving Materials, Inc., Fred R. (“Pete”) Irving, Price Irving, John Huggins and Daniel C. Butler:

G. Daniel Kelley, Jr.
Thomas E. Mixdorf
Edward P. Steegmann
Anthony P. Aaron
ICE MILLER
One American Square
P.O. Box 82001
Indianapolis, IN 46282
Telephone: 317-236-2294
Facsimile: 317-592-4771
daniel.kelley@icemiller.com
thomas.mixdorf@icemiller.com
ed.steegmann@icemiller.com
anthony.aaron@icemiller.com

Counsel for American Concrete Company, Inc.:

Steven M. Badger
Shannon D. Landreth
MCTURNAN & TURNER
2400 Market Tower
10 W. Market St.
Indianapolis, IN 46204
Telephone: 317-464-8181
Facsimile: 317-464-8131
sbadger@mtlitig.com
slandreth@mtlitig.com

Michael Coppes
EMSWILLER WILLIAMS
NOLAND & CLARK
Suite 500
8500 Keystone Crossing
Indianapolis, IN 46240-2461
Telephone: 317-257-8787
Facsimile: 317-257-9042
mcoppes@ewnc-law.com

Counsel for Prairie Material Sales, Inc.:

James Ham, III
Robert K. Stanley
Kathy Lynn Osborn
BAKER & DANIELS
300 North Meridian Street, Suite 2700
Indianapolis, IN 46204
Telephone: 317-237-1256
Facsimile: 317-237-1000
jham@bakerd.com
rkstanle@bakerd.com
klosborn@bakerd.com

Counsel for Shelby Gravel, Inc. d/b/a Shelby Materials, Richard Haehl and Phillip Haehl:

George W. Hopper
Jason R. Burke
HOPPER BLACKWELL
111 Monument Circle
Suite 452
Indianapolis, IN 46204
Telephone: 317-635-5005
Facsimile: 317-634-2501
ghopper@hopperblackwell.com
jburke@hopperblackwell.com

Brady J. Rife
J. Lee McNeely
MCNEELY STEPHENSON THOPY &
HARROLD
30 East Washington Street, Suite 400
Shelbyville, IN 46176
Telephone: 317-392-3619
Facsimile: 317-835-7777
bjrife@msth.com
jlmcneely@msth.com

Counsel for Hughey, Inc. d/b/a Carmel Concrete Products, Co.:

Jay P. Kennedy
KROGER GARDIS & REGAS
111 Monument Circle
Suite 900
Indianapolis, IN 46204-3059
Telephone: 317-634-6328
Facsimile: 317-264-6832
jpk@kgrlaw.com

*Counsel for Builder's Concrete & Supply,
Inc. and Gus B. ("Butch") Nuckols, III:*

Judy L. Woods
BOSE MCKINNEY & EVANS, LLP
135 North Pennsylvania Street
Suite 2700
Indianapolis, IN 46204
Telephone: 317-684-5181
Facsimile: 317-223-0181
jwoods@boselaw.com

Counsel shall promptly file a notice with the Clerk if there is any change in this information.

XIV. SYNOPSIS OF CASE AND PLAINTIFFS' PROPOSED DIFFERENTIATION OF CASE MANAGEMENT FOR DIFFERENT DEFENDANTS

A. Plaintiffs' Synopsis of Case:

Plaintiffs bring this Consolidated Action for the injuries sustained by plaintiffs and members of the class arising from defendants' violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. Subject matter jurisdiction is conferred upon this Court by 28 U.S.C. §§ 1331 and 1337, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15(a) and 26.

Class plaintiffs bring the class action on behalf of 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 Central Indiana Area, at any time during the Class Period but excluding defendants, their coconspirators, their respective parents, subsidiaries, and affiliates, and federal, state, and local government entities and political subdivisions. Certain defendants operate beyond the Central Indiana Area, and plaintiffs intend to modify and expand the geographic scope of the class definition as appropriate. Plaintiffs allege that defendants and their co-conspirators entered into and engaged in a combination and conspiracy to suppress and eliminate competition by fixing the price of ready-mixed concrete. The combination and conspiracy constituted an unreasonable restraint of trade under federal antitrust law.

Defendants and their co-conspirators carried out their unlawful combination by, *inter alia*, engaging in discussions about the price at which they would sell ready-mixed concrete, agreeing to specific price increases and the timing of such increases, issuing price announcements or price quotations based on their agreements, and selling ready-mixed concrete at agreed-upon supracompetitive prices. As a result of the unlawful conduct of defendants and their co-conspirators, plaintiffs and members of the class paid

artificially inflated prices for ready-mixed concrete and have suffered antitrust injury to their business or property.

As a result of the combination and conspiracy between defendants and their co-conspirators, prices of ready-mixed concrete were artificially increased. The conduct of defendants and their co-conspirators was undertaken for the purpose and with the specific intent of raising and maintaining prices of ready-mixed concrete and eliminating competition, in *per se* violation of Section 1 of the Sherman Act.

Throughout the Class Period, defendants and their co-conspirators intended to and did affirmatively and fraudulently conceal their wrongful conduct and the existence of their unlawful combination and conspiracy from plaintiffs and members of the Class, and intended that their communications with each other and their resulting actions be kept secret from plaintiffs and class members.

As a direct result of the unlawful conduct alleged in their complaints, prices for ready-mixed concrete sold by defendants and their co-conspirators were fixed and maintained at artificially high and noncompetitive levels. Plaintiffs and members of the class were not able to purchase ready-mixed concrete at prices determined by free and open competition, and consequently have been injured in their business and property in that, *inter alia*, they have paid more for ready-mixed concrete than they would have paid in a free, open, and competitive market. Plaintiffs cannot state at this time the precise amount of damages sustained by plaintiffs and the class. A precise determination of damages will require discovery from the books and records of defendants and their co-conspirators. Plaintiffs allege that the damages are substantial.

On June 29, 2005, the United States Department of Justice announced that defendant Irving had agreed to plead guilty and pay a \$29.2 million criminal fine, the largest fine ever levied in a domestic antitrust investigation, for conspiring and fixing the price of ready-mixed concrete in violation of the Sherman Act. In addition, four Irving executives agreed to plead guilty, pay fines and serve time in prison for their roles in the conspiracy.

At the suggestion of Judge Barker during the September 19, 2005, hearing and in her minute entry following that hearing, plaintiffs believe that differentiated case management approaches are feasible in this Consolidated Action as between those defendants that previously pleaded guilty or who subsequently plead guilty to criminal charges related to the conduct that is alleged by plaintiffs in these consolidated proceedings, and those defendants that do not so plead. However, as set forth below, defendants do not agree that such an approach is feasible.

B. Defendants' Synopsis of the Case:

Each of the defendants contests class certification, liability, and damages in this complex case. Plaintiffs have alleged a class of all who purchased ready mixed concrete from defendants, conspirators, predecessors, parents, subsidiaries, or affiliates during an indefinite period of time prior to and including July 2000 to May 2004. "Ready-mixed concrete" is a generalized term for hundreds of products, often made to particular specifications of the purchasers, each product having distinct and separate uses and characteristics. Ready mixed concrete products are perishable goods that can be transported only very limited distances within limited times. As such, the ready mixed concrete industry is comprised of local markets, rather than regional or state-wide markets or a national market, and the competitors in these markets are many and varied. These local markets rarely, if ever, overlap. Ready-mixed concrete products are largely purchased only after extensive negotiations over price, services and other terms between the producer and purchaser. Purchasers have a wide range of bargaining power in these negotiations depending upon a plurality of factors, including but not limited to the amount of concrete, product specification, services, existing relationships, and many other factors. Because of the nature of contracts in the construction industry, many direct purchasers of concrete will not have antitrust standing. Even if some direct purchasers have specific antitrust standing for certain purchases, that standing will not extend to all purchases made. The actual price paid in any particular purchase is the result of many complex factors, each of which will need to be assessed in order to determine whether the transaction falls within the sweeping parameters plaintiffs have alleged. These basic facts demonstrate that class certification should be denied and that liability, and damages are far from certain and will require extensive discovery, analysis and briefing.

At the September 19, 2005 hearing, the Court suggested that counsel consider the feasibility of whether differentiated case management plans between the IMI defendants and the other defendants who have not been indicted or pleaded guilty. However, Irving Materials pled guilty to one count of conspiracy to fix prices of ready-mixed concrete in an Indianapolis ready mixed concrete market during the period July 2000 to May 24, 2004. Four of IMI's executives have conditional plea agreements to the same alleged conspiracy, but these pleas have not been accepted. IMI's plea and the conditional pleas did not extend to markets beyond Indianapolis or to subsidiaries, affiliates, etc, or to any period before July 2000. In addition, IMI did not admit as part of its plea agreement regarding an Indianapolis market, and in fact specifically denied, that there was any impact or that the putative class members were harmed. Moreover, by statute and decisional law, the guilty pleas of IMI and four of its executives do not conclusively establish civil liability. In any event, none of the other defendants has entered into any plea agreement with respect to the matters alleged by plaintiffs, none of the other defendants has been indicted, and at least one defendant (Prairie) has reason to believe it is not a target of the government's investigation. Defendants do not concede liability to

the plaintiffs and deny that plaintiffs have suffered antitrust injury. Each defendant retains the right to act and respond individually to plaintiffs' claims, including the right to dispute plaintiffs' contention that the defendant participated in the alleged conspiracy.

XV. PRETRIAL PLEADINGS, DISCLOSURES, CLASS CERTIFICATION, AND DISPOSITIVE MOTIONS

Track 4: The parties believe that the complex nature of this putative class action against multiple defendants necessitates additional flexibility and departure from Tracks 1-3.

A. Pretrial Pleadings and Disclosures

1. The parties shall serve their Fed. R. Civ. P. 26 initial disclosures on or before **December 19, 2005**. Upon the entry of this Order, the parties shall be free to serve discovery prior to the date established for initial disclosures.
2. Plaintiffs shall file their Amended Consolidated Complaint on or before **October 19, 2005**. Defendants shall respond to Plaintiff's Amended Consolidated Complaint on or before **December 19, 2005**. No defendant shall be required to respond to any complaint or amended complaint filed before October 19, 2005.
3. Any motions for leave to amend the pleadings or join additional parties filed after **March 17, 2006**, shall be for cause.
4. Plaintiffs shall file a preliminary witness and exhibit list on or before **May 15, 2006**, and defendants shall file their preliminary witness and exhibit lists **15 days** thereafter. If the witness list of any party identifies any person whom the listing party will not voluntarily produce for deposition, then address and other contact information sufficient for service of process on that witness shall be included.

B. Class Certification Proceedings

1. Plaintiffs shall file their Motion for Class Certification and supporting Brief on or before **March 1, 2006**. Plaintiff shall also file supporting materials on that date, including expert disclosures and reports, to the extent possible in light of defendants' discovery responses as of February 15, 2006.
2. Defendants shall file their response to Plaintiffs' Motion for Class Certification on or before **June 1, 2006**. Defendants shall also file

supporting materials on that date, including expert disclosures and reports, to the extent possible in light of plaintiffs' discovery responses as of May 18, 2006.

3. Plaintiffs shall file their reply in support of class certification on or before **September 1, 2006**.
4. A class certification hearing shall be scheduled by the Court at its convenience no earlier than 90 days after the close of initial briefing.
5. Any additional expert reports filed in support of or in opposition to class certification shall be disclosed to opposing parties no later than **60 days** prior to the hearing on class certification.
6. All remaining materials in support of or in opposition to class certification, including pre-hearing briefs, shall be filed no later than **30 days** prior to the hearing on class certification.

C. Dispositive Motions

Dispositive motions shall be filed within **180 days** after the Court's ruling on class certification. Response briefs shall be filed within **60 days** after the filing of any such motion and reply briefs shall be filed within **30 days** after the filing of the response.

XVI. DISCOVERY AND EXPERTS

- A. All non-expert discovery shall conclude within **120 days** after the Court's ruling on class certification.
- B. Plaintiffs shall disclose the name, address, and vita of all expert witnesses, and shall serve the report required by Fed. R. Civ. P. 26(a)(2)(B) within **150 days** after the Court's ruling on class certification. However, if plaintiffs plan to present expert opinion testimony in connection with any motion for class certification, plaintiffs shall disclose such expert and serve their expert report pursuant to Section XV.B. above. Plaintiffs shall make such expert(s) available for deposition in Indianapolis, Indiana within **20-30 days** of such disclosure.
- C. Defendants shall disclose the name, address, and vita of all expert witnesses, and shall serve the report required by Fed. R. Civ. P. 26(a)(2)(B) within **210 days** after the Court's ruling on class certification. However, if Defendants plan to present expert opinion testimony in connection with any motion for class certification, Defendants shall disclose such expert and serve their expert report

pursuant to Section XV.B. above. Defendants shall make such expert(s) available for deposition in Indianapolis, Indiana within **20-30** days of such disclosure.

- D. Any party who wishes to limit or preclude expert testimony at trial shall file any such objections no later than **60 days** before trial. Any party who wishes to preclude expert witness testimony at the summary judgment stage shall file any such objections with their responsive brief within the briefing schedule established by Local Rule 56.1. Any party who wishes to preclude expert witness testimony at the class certification stage shall file any such objections with their responsive or other brief as established in Section XV.B. above.
- E. The plaintiffs shall file their final witness and exhibit lists no later than **60 days** before trial. The defendants shall file their final witness and exhibit lists no later than **45 days** before trial.
- F. The parties shall file any motions in limine no later than **40 days** before trial. Responses to such motions in limine shall be filed within **15 days** of service thereof.

XVII. PRE-TRIAL/SETTLEMENT CONFERENCES

- A. The final pretrial conference shall take place **30 days** before trial.
- B. The parties are willing to participate in a settlement conference with the Magistrate Judge at her convenience and discretion.

XVIII. TRIAL DATE

This case can be set for trial no less than **300 days** after the Court's ruling on class certification. The parties recommend that this matter be set for trial no earlier than November 2007.

XIX. REFERRAL TO MAGISTRATE JUDGE

At this time, all parties do not consent to refer this matter to the Magistrate Judge pursuant to 28 U.S.C. 636(b) and Federal Rules of Civil Procedure 73 for all further proceedings including trial.

XX. REQUIRED PRE-TRIAL PREPARATION

- A. **TWO WEEKS BEFORE THE FINAL PRETRIAL CONFERENCE**, the parties shall:
 - 1. File a list of witnesses who are expected to be called to testify at trial.

2. Number in sequential order all exhibits, including graphs, charts and the like, that will be used during the trial. Provide the Court with a list of these exhibits, including a description of each exhibit and the identifying designation. Make the original exhibits available for inspection by opposing counsel. Stipulations as to the authenticity and admissibility of exhibits are encouraged to the greatest extent possible.
 3. Submit all stipulations of facts in writing to the Court. Stipulations are always encouraged so that at trial, counsel can concentrate on relevant contested facts.
 4. A party who intends to offer any depositions into evidence during the party's case in chief shall prepare and file with the Court and copy to all opposing parties either:
 - a. brief written summaries of the relevant facts in the depositions that will be offered. (Because such a summary will be used in lieu of the actual deposition testimony to eliminate time reading depositions in a question and answer format, this is strongly encouraged); or
 - b. if a summary is inappropriate, a document which lists the portions of the deposition(s), including the specific page and line numbers, that will be read, or, in the event of a video-taped deposition, the portions of the deposition that will be played, designated specifically by counter-numbers.
 5. Provide all other parties and the Court with any trial briefs, along with all proposed jury instructions, voir dire questions, and areas of inquiry for voir dire (or, if the trial is to the Court, with proposed findings of fact and conclusions of law).
 6. Notify the Court and opposing counsel of the anticipated use of any evidence presentation equipment.
- B. ONE WEEK BEFORE THE FINAL PRETRIAL CONFERENCE, the parties shall:
1. Notify opposing counsel in writing of any objections to the proposed exhibits. If the parties desire a ruling on the objection prior to trial, a motion should be filed noting the objection and a description and designation of the exhibit, the basis of the objection, and the legal authorities supporting the objection.

2. If a party has an objection to the deposition summary or to a designated portion of a deposition that will be offered at trial, or if a party intends to offer additional portions at trial in response to the opponent's designation, and the parties desire a ruling on the objection prior to trial, the party shall submit the objections and counter summaries or designations to the Court in writing. Any objections shall be made in the same manner as for proposed exhibits. However, in the case of objections to video-taped depositions, the objections shall be brought to the Court's immediate attention to allow adequate time for editing of the deposition prior to trial.
3. Notify the Court and opposing counsel of requests for separation of witnesses at trial.

XXI. OTHER MATTERS

There are no other matters any party believes should be brought to the Court's attention at this time.

Dated: October 27, 2005

Respectfully submitted,

Co-Lead Counsel for Plaintiffs:

/s/ Scott D. Gilchrist

Irwin B. Levin
Richard E. Shevitz
Scott Gilchrist
Eric S. Pavlack
COHEN & MALAD, LLP
One Indiana Square, Suite 1400
Indianapolis, IN 46204
Telephone: (317) 636-6481
Facsimile: (317) 636-2593
ilevin@cohenandmalad.com
rshevitz@cohenandmalad.com
sgilchrist@cohenandmalad.com
epavlack@cohenandmalad.com

(Signed By Consent)

Stephen D. Susman
Barry C. Barnett
Jonathan Bridges
SUSMAN GODFREY L.L.P.
901 Main Street, Suite 4100
Dallas, Texas 75202
Telephone: (214) 754-1900
Facsimile: (214) 754-1933
ssusman@SusmanGodfrey.com
bbarnett@SusmanGodfrey.com
jbridges@SusmanGodfrey.com

Counsel for Irving Materials, Inc., Fred R. ("Pete") Irving, Price Irving, John Huggins and Daniel C. Butler:

(Signed By Consent)

Edward P. Steegmann
Anthony P. Aaron
G. Daniel Kelley, Jr.
Thomas E. Mixdorf
ICE MILLER
One American Square
P.O. Box 82001
Indianapolis, IN 46282
Telephone: 317-236-2294
Facsimile: 317-592-4771

Counsel for American Concrete Company, Inc.:

(Signed By Consent)

Steven M. Badger
Shannon D. Landreth
MCTURNAN & TURNER
2400 Market Tower
10 W. Market St.
Indianapolis, IN 46204
Telephone: 317464-8181
Facsimile: 317-464-8131

Michael Coppes
EMSWILLER WILLIAMS
NOLAND & CLARK
Suite 500
8500 Keystone Crossing
Indianapolis, IN 46240-2461
Telephone: 317-257-8787
Facsimile: 317-257-9042

Counsel for Prairie Material Sales, Inc.:

(Signed By Consent)

James Ham, III
Robert K. Stanley
Kathy Lynn Osborn
BAKER & DANIELS
300 North Meridian Street, Suite 2700
Indianapolis, IN 46204
Telephone: 317-237-1256
Facsimile: 317-237-1000

Counsel for Shelby Gravel, Inc. d/b/a Shelby Materials, Richard Haehl and Phillip Haehl:

(Signed By Consent)

George W. Hopper
Jason R. Burke
HOPPER & BLACKWELL
111 Monument Circle
Suite 452
Indianapolis, IN 46204
Telephone: 317-635-5005
Facsimile: 317-634-2501

(Signed By Consent)

Brady J. Rife
J. Lee McNeely
MCNEELY STEPHENSON THOPY &
HARROLD
30 East Washington Street, Suite 400
Shelbyville, IN 46176
Telephone: 317-392-3619
Facsimile: 317-835-7777

Counsel for Hughey, Inc. d/b/a Carmel Concrete Products, Co.:

(Signed By Consent)

Jay P. Kennedy
KROGER GARDIS & REGAS
111 Monument Circle
Suite 900
Indianapolis, IN 46204-3059
Telephone: 317-634-6328
Facsimile: 317-264-6832

Counsel for Builder's Concrete & Supply, Inc. and Gus B. ("Butch") Nuckols, III:

(Signed By Consent)

Judy L. Woods
BOSE MCKINNEY & EVANS, LLP
135 North Pennsylvania Street
Suite 2700
Indianapolis, IN 46204
Telephone: 317-684-5000
Facsimile: 317-684-5173

_____ PARTIES APPEARED IN PERSON/BY COUNSEL ON _____
FOR A PRETRIAL/STATUS CONFERENCE.

_____ APPROVED AS SUBMITTED.

_____ APPROVED AS AMENDED.

_____ APPROVED AS AMENDED PER SEPARATE ORDER.

_____ APPROVED, BUT ALL OF THE FOREGOING DEADLINES ARE
SHORTENED/LENGTHENED BY _____ MONTHS.

_____ APPROVED, BUT THE DEADLINES SET IN SECTION(S)
_____ OF THE PLAN IS/ARE
SHORTENED/LENGTHENED BY _____ MONTHS.

_____ THIS MATTER IS SET FOR TRIAL BY _____ ON _____
_____. FINAL PRETRIAL
CONFERENCE IS SCHEDULED FOR
_____ AT _____
_____.M., ROOM _____.

_____ A SETTLEMENT/STATUS CONFERENCE IS SET IN THIS CASE
FOR _____ AT _____ .M.
COUNSEL SHALL APPEAR:

_____ IN PERSON IN ROOM _____; OR

_____ BY TELEPHONE, WITH COUNSEL FOR
_____ INITIATING THE CALL TO ALL OTHER
PARTIES AND ADDING THE COURT JUDGE AT (____)
_____.

_____ BY TELEPHONE, WITH COUNSEL CALLING THE
JUDGE'S STAFF AT (____) _____.

_____ DISPOSITIVE MOTIONS SHALL BE FILED NO LATER THAN
.

10/31/2005

Date



SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

Form Date:
December 2004