

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

IN RE READY-MIXED CONCRETE ANTITRUST LITIGATION.	)	Master Docket No.
THIS DOCUMENT RELATES TO:	)	1:05-cv-00979-SEB-VSS
ALL ACTIONS	)	_____

**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE  
SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT**

The Plaintiffs submit this brief in support of their motion for leave to file their Second Amended Consolidated Class Action Complaint (“Amended Complaint”). A redlined version of the Amended Complaint is attached as Exhibit “A.” The proposed amendments are timely offered based on recently revealed information and, since discovery is yet in its early stages, will not prejudice the defendants. Accordingly, the Plaintiffs respectfully request that the Court grant their Motion.

**BACKGROUND**

This case involves a conspiracy to set supracompetitive prices for ready-mixed concrete manufactured and sold by the defendants and their co-conspirators.

On June 29, 2005, the United States Department of Justice (DOJ) announced that defendant Irving Materials, Inc. 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. The DOJ also announced that four IMI executives who are defendants in this action, Fred R. “Pete” Irving, Price Irving, John Huggins, and Daniel C. Butler, agreed to plead guilty and serve prison time for their roles in the conspiracy. In light of the DOJ’s announcement and independent investigations into pricing irregularities in the ready-mixed concrete market, the Plaintiffs initiated this lawsuit seeking civil damages and injunctive relief under the antitrust laws on behalf of a nationwide

class of those who purchased ready-mixed concrete directly from the defendants or their co-conspirators.

On November 28, 2005, at the request of the Department of Justice, the Court stayed most discovery in this case pending completion of the criminal proceedings. *See* Exhibit “B.” The Court lifted the discovery stay on December 19, 2006. In the interim, ongoing federal criminal proceedings against the defendants revealed information that warrants amending the Complaint.

**A. The Proposed Amendments**

The Plaintiffs seek leave to amend their Amended Consolidated Class Action Complaint, filed October 19, 2005 (the Complaint), as follows:

- (1) The Plaintiffs seek to add Ricky Beaver, Chris Beaver, and John Blatzheim as defendants.
- (2) The Plaintiffs seek to add Monroe County, Indiana to the definition of “Central Indiana Area” in paragraph 7(e) of the Complaint. Thus, the proposed Class definition would include: “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 ... ,” where the “Central Indiana Area” means Boone, Hamilton, Hancock, Hendricks, Johnson, Madison, Marion, Monroe, Morgan, and Shelby Counties, Indiana.
- (3) The Plaintiffs seek to drop Craw-Con, Inc. and Van Valkenburg Builders, Inc. as plaintiffs because they no longer wish to bear the burdens of participating as class representatives.

(4) The Plaintiffs seek to correct non-substantive, inadvertent errors in the Complaint.

**B. The New Information from the Criminal Proceedings**

While discovery in this case was stayed, there were several developments in the criminal investigation of the conspiracy:

1. On March 30, 2006, Builder's Concrete & Supply Co., Inc., and one of its executives, Gus B. "Butch" Nuckolls, III, pleaded guilty to price-fixing conspiracy charges. *See* Exhibit "C."
2. On April 27, 2006, Hughey, Inc. (d/b/a Carmel Concrete Products) and one of its executives, Scott D. Hughey, pleaded guilty to price-fixing conspiracy charges. *See* Exhibit "D."
3. On April 11, 2006, Ricky ("Rick") Beaver, Chris Beaver, and MA-RI-AL Corporation d/b/a Beaver Materials, along with John J. Blatzheim, an executive of defendant Builder's Concrete and Supply Co., were indicted on criminal antitrust conspiracy charges. *See* Exhibit "E."
4. On November 3, 2006, Blatzheim pleaded guilty to price-fixing conspiracy charges. *See* Exhibit "F."
5. On November 16, 2006, after a four-day jury trial conducted Chief Judge Larry J. McKinney in the Southern District of Indiana (the Beaver Trial), Beaver, Ricky Beaver, and Chris Beaver were convicted on price-fixing conspiracy charges. A copy of the docket from the Beaver criminal case, with an entry reflecting the verdict, is attached as Exhibit "G."

The Plaintiffs' request for leave to add Ricky Beaver, Chris Beaver, and John Blatzheim as defendants is based on the grand jury Indictment, Blatzheim's guilty plea and the outcome of the Beaver trial.

The Plaintiffs' request for leave to amend the Complaint's Class definition to include Monroe County, Indiana is based on testimony from the Beaver trial. Specifically, Price Irving's testimony reveals that the price-fixing conspiracy involved facilities located in Bloomington, Indiana, which is in Monroe County:

Q: ... As part of this plea agreement did IM agree to waive indictment and plead guilty to a one count information charging IMI with participation in a price fixing agreement?

A: Yes.

Q: What else did IMI agree to pursuant to this plea agreement?

A: To pay a 29.2 million dollars fine and cooperate with the Government.

Q: In turn, did the United States agree to advise the Court of IMI's full and truthful cooperation?

A: Yes.

Q: Did the United States agree not to bring further criminal charges against IMI?

A: Yes.

Q: Did IMI also apply for conditional amnesty?

A: Yes.

Q: What conduct did IMI report in its conditional amnesty application?

A: What conduct?

Q: Yeah. Did IMI report conduct in any other markets?

A: Yes.

Q: What kind of conduct did it report?

A: Talking to other producers.

Q: Was that conspiratorial conduct?

A: Yes.

Q: Were these markets Bloomington, Marion, and Muncie?

A: Yes.

Q: Why did IMI report this conduct?

A: We were being truthful with the Government.

An excerpt from the Beaver Trial transcript containing this testimony is attached as Exhibit "H."

### ARGUMENT

Leave to amend the complaint “shall be freely given when justice so requires.” FED. R. CIV. P. 15(a); *Barry Aviation Inc. v. Land O’ Lakes Municipal Airport Comm’n*, 377 F.3d 682, 687 (7th Cir. 2004). The Seventh Circuit characterizes leave to amend under Rule 15(a) as nearly “automatic.” *See Bohlen v. City of East Chicago, Ind.*, 799 F.2d 1180, 1184 (7th Cir. 1986). In class actions, courts emphasize the liberality of this rule when the moving party seeks to modify the class definition. *See, e.g. In re N.Y. City Municipal Secs. Litig.*, 87 F.R.D. 572, 580-81 (S.D.N.Y. 1980) (“[p]rior to a decision on the merits, leave to amend the complaint to redefine the class should be freely given except when some prejudice results ...”). Leave to amend is committed to the Court’s discretion. *Daughterity v. Traylor Bros., Inc.*, 970 F.2d 348, 351 (7th Cir.1992). Except in unusual circumstances not applicable here, leave should be granted absent undue delay that prejudices the opposing party. *Dubicz v. Commonwealth Edison Co.*, 377 F.3d 787, 792-93 (7th Cir. 2004); *Bohlen*, 799 F.2d at 1184.

There has been no undue delay in offering these amendments. Most discovery has been stayed since November 2005. The Plaintiffs were unaware of the facts forming the basis for the proposed amendment to the Class definition until the recent guilty pleas and the Beaver trial. So too, Craw-Con and Van Valkenburg only recently expressed their desire to withdraw as class representatives.

Nor will the amendments prejudice the defendants. There is no unfair surprise – Blatzheim knew of his own involvement, and Mr. Irving’s testimony at the criminal trial at the very least establishes IMI’s knowledge of the geographic breadth of the conspiracy. The defendants have not wasted discovery efforts since full discovery is only now in its initial stages. And, because Irving Materials, Inc. and Prairie Material Sales, Inc. are the only Defendants with

concrete plants in Monroe County, Indiana, discovery is not likely to greatly increase in scope. Indeed, the withdrawal of two class representatives likely will decrease the defendants' discovery burden. Finally, the amendments will promote efficiency by allowing for the resolution of additional factually and legally similar claims in this single action.

**CONCLUSION**

For the foregoing reasons, the Plaintiffs respectfully request that the Court grant their motion for leave to file their Second Amended Consolidated Class Action Complaint.

Dated: January 26, 2006

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 26, 2007, a copy of the foregoing 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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