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	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF JOINT MOTIONS FOR FINAL APPROVAL OF SETTLEMENTS WITH AMERICAN AND SHELBY DEFENDANTS

Introduction

The Court has entered Orders Preliminarily Approving Settlement, Certifying Settlement Class, And Directing Notice (Docket Nos. 451 & 452 ("Preliminary Approval Orders")), with respect to settlements between 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"), and American Concrete Company, Inc. (the "American Settlement") and Shelby Gravel, Inc. d/b/a Shelby Materials, Richard Haehl, and Philip Haehl (the "Shelby Settlement"). The Preliminary Approval Order certified a Plaintiff Settlement Class with respect to each Settlement, and directed notice of the Settlements to members of the Shelby and American Settlement Classes. The Plaintiffs, together with the American and Shelby Defendants, have now jointly moved the Court for final approval of the American and Shelby Settlements pursuant to Fed. R. Civ. P. 23(e).

The settling parties have complied with the terms of the Preliminary Approval Orders, issuing mailed and publication notice, and notice to governmental authorities under the Class

Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1715. Although a very small number of Settlement Class members have elected to exclude themselves from the Settlements, no Settlement Class members have objected to the American or Shelby Settlements. This is not surprising, as the Settlements provide substantial benefits to Settlement Class members, including more than $5 million in settlement funds and future cooperation in litigation against the non-settling Defendants, and are easily characterized as fair, reasonable and adequate to Settlement Class members. The Court should therefore grant the Joint Motions for Final Approval filed by the Plaintiffs, American and Shelby.

Summary of Shelby and American Settlements

Prior to reaching settlements with American and Shelby, Plaintiffs received and reviewed hundreds of thousands of pages of documents and a large volume of computerized data. Discovery obtained by the Plaintiffs prior to these settlements also 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 took Fed.R.Civ.P. 30(b)(6) depositions of most corporate Defendants on subjects related to the collection and storage of this data. The Plaintiffs also obtained and reviewed testimony and exhibits from the criminal jury trial of Defendants Ma-Ri-Al Corporation d/b/a Beaver Materials, Chris Beaver and Ricky Beaver, as well as materials and information prepared or obtained by the Federal Bureau of Investigation ("FBI"). Following the settlement negotiations with American and Shelby, Plaintiffs have taken depositions of several individual Defendants and employees of corporate Defendants. *See*, Affidavit of Irwin B. Levin in Support of Final Approval of Settlements with Shelby and American Defendants ("Levin Dec."), ¶ 12.

The American Settlement followed several months of arms-length negotiations between Interim Co-Lead Counsel and counsel for American. The negotiations included several in-person meetings between counsel, in-person and phone mediation sessions with Magistrate Judge Jane Magnus-Stinson, and the exchange of information in addition to what had been produced by the parties in discovery. Importantly, the settlement discussions included the review by Interim Co-Lead Counsel of financial information related to American's ability to pay a settlement or judgment. This documentation confirmed the sale by American, in 2005, of substantially all of its assets. Levin Dec., ¶ 13.

The financial documentation disclosed that the cash available for American to pay a settlement or a judgment totaled $368,000.00, the sum American has now agreed to pay for the benefit of the Settlement Class. American has also agreed to provide reasonable and continuing cooperation and assistance in the Plaintiffs' prosecution of this action against the remaining Defendants, including information, documents and testimony related to the conspiracy alleged by the Plaintiffs. American has further agreed 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.[1]

The Plaintiffs and American Settlement Class members have agreed to release any claims that were or could have been asserted in this action against American by the Plaintiffs and Settlement Class members, and to a final judgment dismissing the Plaintiffs' and Settlement Class members' claims against American. However, the American Settlement does not result in a release or dismissal of the claims of the Plaintiffs and Settlement Class Members against any

[1] At this time, Settlement Class Counsel have chosen not to seek an award of attorneys' fees, or reimbursement of expenses, from funds paid pursuant to the American Settlement, but reserve the right to do so in the future as litigation proceeds. Levin Dec., ¶ 21.

other Defendants. Thus, the American 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 American's participation in the conspiracy.

The Shelby Settlement is also the result of several months of arms-length negotiations between Interim Co-Lead Counsel and counsel for Shelby. The negotiations included several in-person meetings between counsel and the exchange of information in addition to what had been produced by the parties in discovery. The settlement discussions included the review by Interim Co-Lead Counsel of financial and transactional information related to Shelby's production and sale of Ready-Mixed Concrete in the central Indiana area, and Shelby's ability to pay a settlement or satisfy a judgment. The settlement discussions also followed several in-person interviews of Shelby principals Richard Haehl and Philip Haehl pursuant to their agreement to provide substantial cooperation to the Plaintiffs and their counsel under the Leniency Program. Levin Dec., ¶ 15.

The Shelby Settlement calls for the payment by Shelby of $4,700,000 into a Settlement Fund for the benefit of the Settlement Class. Like American, Shelby has also agreed to provide reasonable and continuing cooperation and assistance in the Plaintiffs' prosecution of this action against the remaining Defendants, including information, documents and testimony related to the conspiracy alleged by the Plaintiffs. This includes cooperation pursuant to both the Shelby Settlement and the Leniency Program. American has further agreed 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.[2]

The sum paid by Shelby represents approximately 5.6% of Shelby's revenue from the sale of ready-mixed concrete to Settlement Class members from and including July 1, 2000 through and including May 25, 2004. The adequacy and fairness of this payment by Shelby in settlement of the claims against it is strongly supported by two factors: (i) Shelby has applied for, and is likely to be found to have satisfied the requirements of, the Leniency Program authorized by under Pub.L. 108-237, Title II, Subtitle A, § 213 ; and (ii) as a successful applicant under the Leniency Program, Shelby would not be liable for treble damages or joint and several liability with other Defendants. Levin Dec., ¶ 16.

Under the Sherman and Clayton Acts, any other Defendant found to have participated in a conspiracy to fix prices will be liable for three times the total damages caused by all participants in the conspiracy, including those caused by Shelby and another settling Defendant, American Concrete Company, Inc. The Shelby Defendants have also provided substantial cooperation to Plaintiffs pursuant to their application for leniency, and have agreed to continue doing to through the termination of this litigation. Levin Dec., ¶ 16.

The combined sum of $5.68 million has been paid by Shelby and American following the Court's entry of the Preliminary Approval Orders, and has been placed in an interest-bearing account at a commercial bank until such time as distributions are approved by the Court. Under the Shelby and American Settlements, Settlement Class Counsel may seek permission from the Court to receive payments from the Settlement Fund for distribution to Class members, to reimburse Class Counsel for reasonable expenditures made or to be made on behalf of Class

[2] At this time, Settlement Class Counsel have chosen not to seek an award of attorneys' fees, or reimbursement of expenses, from funds paid pursuant to the Shelby Settlement, but reserve the right to do so in the future as litigation proceeds. Levin Dec., ¶ 21.

Members to pursue this case against the Defendants other than Shelby and American, or for the payment of attorneys' fees. Levin Dec., ¶ 18.

Because of the ongoing nature of the claims in the Lawsuit against the other Defendants, Settlement Class Counsel plan to defer distribution of the Settlement Fund to Class Members until a later date. Settlement Class Counsel are presently discussing the possibility of settlement with counsel for other Defendant(s), and it is possible that additional contributions will be made to the Settlement Fund in the relative near term. The intention of Settlement Class Counsel to defer distribution to the Settlement Class was shared with Settlement Class members in the mailed and published notices. Levin Dec., ¶ 19.

Although the specific amounts of any proposed distribution to Settlement Class members have not been determined at this time, it is anticipated that at an appropriate time, depending upon the course of future litigation, Settlement Class Counsel will seek approval of a distribution of Settlement funds to Settlement Class members in a *pro rata* amount to be determined by the amount of a Settlement Class member's purchases of ready-mixed concrete from all Defendants during the Class period. It is also anticipated that such a distribution would be accompanied by the sending of claim forms and instructions to Settlement Class members. Levin Dec., ¶ 20.

Notice to the Settlement Classes and Class Member Responses

The Preliminary Approval Orders, *inter alia,* appointed Interim Co-Lead Counsel as Settlement Class Counsel with respect to the American Settlement and the Shelby Settlement, approved the form and content of notices to Settlement Class members, established deadlines for settlement class members to object or exclude themselves from the American and Shelby Settlements, and directed Settlement Class Counsel to issue mailed and published notice to Settlement Class members in the form approved by the Court.

For purposes of issuing mailed notice to Settlement Class members, Settlement Class Counsel retained the firm of A.B. Data, Ltd., a company specializing in class action notice and administration. *See*, Affidavit of Michelle M. La Count, Esq., Levin Dec., Ex. "A" ("La Count Aff."), ¶¶ 1-4; Levin Dec., ¶ 3. Settlement Class Counsel provided A.B. Data with the Shelby Settlement, American Settlement, Preliminary Approval Orders, court-approved mail notices, a list of 8,120 Settlement Class members and address information for 7,170 Settlement Class members. La Count Aff., ¶ 6. The name and address information provided by Settlement Class Counsel was provided by the Defendants during the course of discovery in this case. Levin Dec., ¶ 3.

A.B. Data prepared the class list for mailing by standardizing and de-duplicating the information provided by Defendants, searching for addresses to match the names provided without address information, and updating the class list addresses using NCOA^{Link}, a national database of address changes that is compiled by the United States Postal Service ("USPS"). La Count Aff., ¶ 7. On February 6, 2008, A.B. Data delivered 6,778 envelopes containing the Shelby and American Settlement notices to the USPS to be mailed via First-Class Mail, postage prepaid. La Count Aff., ¶ 9. An additional 195 Notices were subsequently sent to individuals/ entities on the class list for which addresses were not provided and addresses were not located until after the initial mailing on February 6, 2008. La Count Aff., ¶ 10. As of March 18, 2008, 806 of the 6,973 Notices (the "UAA Notices") that were mailed have been returned by the USPS to A.B. Data as undeliverable as addressed ("UAA"); among the UAA Notices returned, 35 had forwarding addresses and were resent. La Count Aff., ¶ 11. *See also*, Levin Dec., ¶ 4.

A.B. Data was also instructed to establish an Internet site for the American and Shelby Settlements. Levin Dec., ¶ 5. On or about January 29, 2008, A.B. Data established the case-

specific web site, concreteantitrustsettlement.com for the above-captioned case. La Count Aff., ¶ 13; Levin Dec., ¶ 5. Included on this web site was general information regarding the case and its current status as well as documents for download by Class Members, including the American Settlement Notice, the Shelby Settlement Notice, the Second Amended Consolidated Class Action Complaint, the Settlement Agreement with American Concrete Company, Inc., the Settlement Agreement with Shelby Gravel, Inc. d/b/a Shelby Materials, Richard Haehl, and Philip Haehl, and the Preliminary Approval Orders. La Count Aff., ¶ 13; Levin Dec., ¶ 5. A link to the settlement web site has been placed on the Court's web site. Levin Dec., ¶ 5.

In addition, on January 25, 2008 and January 27, 2008, notice of the American and Shelby Settlements was published in the *Indianapolis Star* in the form approved by the Court. *See*, Affidavit of Publication, Levin Dec., Ex. "B." *See also*, Levin Dec., ¶ 5. Settlement Class Counsel have also been informed by counsel for the American and Shelby Defendants that notices of the American Settlement and Shelby Settlement have been issued by Defendants to relevant government authorities pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1715. *See*, Copies of the Defendants' CAFA Notices (without attachments), Levin Dec., Ex. "C". *See also*, Levin Dec., ¶ 7.

Since notice of the American and Shelby Settlements was issued by mail and publication, Settlement Class Counsel have responded to numerous inquiries from, and provided additional information to, Settlement Class members. Levin Dec., ¶ 8. According to A.B. Data documents hosted on the settlement web site have also been downloaded several times. La Count Aff., ¶¶ 13 & 14; Levin Dec., ¶ 11.

The Preliminary Approval Orders established a deadline thirty (30) days after mailed notice for Settlement Class members to exclude themselves from the American or Shelby

Settlements ("Exclusion Deadline"). Settlement Class members were advised of the Exclusion Deadline, March 7, 2008, in the mailed and published notices. As of the Exclusion Deadline, nine (9) Settlement Class members had exercised their right to be excluded from the Shelby and/or American Settlements. *See*, List of Settlement Class Member Exclusions, Levin Dec., Ex. "D." *See also*, Levin Dec., ¶ 9.

The Preliminary Approval Orders also established a deadline thirty (30) days after mailed notice for Settlement Class members to object to the American or Shelby Settlements ("Objection Deadline"). Settlement Class members were advised of the Objection Deadline, March 7, 2008, and the manner for submitting objections, in the mailed and published notices. As of the Objection Deadline, no objections to the Shelby or American Settlements had been served upon Settlement Class Counsel, and no untimely objections have been received by Settlement Class Counsel after the Objection Deadline. Levin Dec., ¶ 10.

Certification of the Settlement Classes

In the Preliminary Approval Orders, the Court certified two settlement classes, one with respect to the American Settlement, and one with respect to the American Settlement. Because each Settlement is brought to the Court on behalf of all direct purchasers, from all Defendants, of ready-mixed concrete during the class period, the Settlement Class definitions are identical:

> 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.

Preliminary Approval Orders, ¶ 3. The Court found that for purposes of the Settlements the requirements of Fed. R. Civ. P. 23(a) and (b)(3) were satisfied. Preliminary Approval Orders, ¶¶ 4 & 5.

The Court's certification of the Settlement Classes was correct as a matter of law and supported by the Pleadings, the Settlements, and evidence designated by Plaintiffs in support of their Motion for Class Certification in the form of an extensive Appendix of supporting exhibits. *See*, Declaration of Irwin B. Levin in Support of Plaintiffs' Motion for Class Certification, Exhibit 37 (Docket No. 398) ("Levin Class Dec."). Evidence included in the Declaration submitted in support of Class Certification is summarized at length in the Plaintiffs' Memorandum in Support of Motion for Class Certification (Docket No. 401) ("Class Memorandum"), at pages 5 through 21. This evidence includes testimony and exhibits from the criminal jury trial of Defendants Ma-Ri-Al Corporation d/b/a Beaver Materials, Chris Beaver and Ricky Beaver, and materials and information prepared or obtained by the Federal Bureau of Investigation ("FBI"). *Id*.

In addition, the Plaintiffs submitted the Declaration of John Beyer, Ph.D, in support of class certification. Levin Class Dec., Ex. 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 – and for which many have pleaded guilty or sought leniency – their conspiracy impacted all members of the proposed Class, which includes over 5,000 direct purchasers of ready-mixed concrete. The Beyer Declaration concludes that damages can fairly be determined in this case on a class-wide basis. Dr. Beyer's conclusions concerning the market for ready-mixed concrete, the impact of the conspiracy, and

the likely ability of the proposed class to establish class-wide damages, are also summarized in the Plaintiffs' Memorandum. *See*, Class Memorandum, pp. 21-26.

As this Court knows, "whether for litigation or for settlement, before certifying a class, the district court must find that the prerequisites for class certification set forth in Rule 23 are satisfied." *In re Bromine Antitrust Litigation*, 203 F.R.D. 403, 406 (S.D.Ind. 2001). However, as the United States Supreme Court recognized in *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997), "[s]ettlement is relevant to class certification." *Id*. 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)). Although the Plaintiffs do not believe that manageability should be a concern for the Court when considering certification of a litigation class in this matter, the decidedly lower standard applied to this aspect of Rule 23(b) in the settlement context supports the Court's decision to certify the Settlement Classes.

In their Class Memorandum, in support of a litigation class, the Plaintiffs have discussed in detail authority and evidence that also support a finding that the Settlement Classes meet the requirements of Rule 23(a) and (b)(3). Class Memorandum, pp. 27-50. The law and evidence presented in the Class Memorandum allow this Court to conduct the "heightened" Rule 23 analysis applicable when a district court certifies settlement only class, as required by *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848-49 (1999), and to "make whatever factual and legal inquiries are necessary under Rule 23," as required by *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001). In the interest of efficiency, that discussion is incorporated herein

by reference and not set forth in full. However, a brief summary illustrates the correctness of the Court's certification of the Settlement Classes.

A. The Requirements of Rule 23(a).

Under Federal Rule of Civil Procedure 23(a), class certification is appropriate only if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are common questions or law or fact common to the class, (3) the claims of the representative parties are typical of the claims of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

These prerequisites, commonly called "numerosity," "commonality," "typicality," and "adequacy," are satisfied here.

1. Numerosity.

The plaintiffs need not allege the precise number of class members to satisfy the numerosity requirement. Instead, a "finding of numerosity may be supported by common sense assumptions," particularly in antitrust actions. *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 239 (E.D.N.Y. 1988); HERBERT B NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS, § 3.5 (4th ed. 2005). Dr. Beyer's preliminary analysis of the defendants' transactional data shows that at least 5,000 customers purchased Ready-Mixed Concrete directly from the defendants in the Central Indiana Area during the Class Period. Levin Class Dec., Ex. 37 ¶ 16. Following preliminary approval, A.B. Data delivered 6,778 envelopes containing the Shelby and American Settlement notices to the USPS to be mailed. La Count Aff., ¶ 9. This evidence easily satisfies the numerosity requirement. *See*, *Hubler Chevrolet, Inc. v. General Motors Corp.*, 193 F.R.D. 574, 577 (S.D.Ind. 2000) (certifying class numbering 200 members).

2. Commonality.

The commonality "requirement is satisfied 'as long as the class claims arise out of the same legal or remedial theory.'" *Bromine,* 203 F.R.D. at 408 (quoting *Johns v. DeLeonardis,* 145 F.R.D. 480, 483 (N.D. Ill. 1992)). It is well-established that "the question of the existence of a conspiracy in restraint of trade is one that is common to all potential plaintiffs, and the importance of this question usually warrants treating them as a class." *Bromine,* 203 F.R.D. at 408 (quoting *Sebo v. Rubenstein,* 188 F.R.D. 310, 313 (N.D. Ill. 1999)). It is accurate to say that the commonality element is readily found to be satisfied in price-fixing cases. *See,* Class Memorandum, p. 30 fn. 21 (collecting cases).

The commonality requirement is ordinarily satisfied when there is "a common nucleus of operative facts." *Rosario v. Livaditis,* 963 F.2d 1013, 1018 (7th Cir. 1992). There are numerous common questions of law or fact arising out of the "common nucleus of operative facts" in this case, including:

1. Whether the Defendants engaged in a conspiracy to fix ready-mixed concrete prices;
2. The identities of the participants in the conspiracy;
3. The duration and extent of the conspiracy;
4. Whether the conspiracy violated § 1 of the Sherman Act;
5. Whether the co-conspirators fraudulently concealed their unlawful actions;
6. The effect of the conspiracy on the price of Ready-Mixed Concrete sold in the Central Indiana Area;
7. Whether the defendants' conduct caused injury to the business or property of plaintiff and the other members of the Class; and
8. The appropriate measure of damages sustained by the members of the Class.

Common issues essentially identical to these supported the Court's certification of a price-fixing class in the *Bromine* case, both for settlement and for purposes of litigation. *Bromine*, 203 F.R.D. at 408. Commonality is also easily satisfied here.

3. Typicality.

To satisfy the requirement of "typicality," the representative plaintiffs' claims must "arise[] from the same . . . practice or course of conduct that gives rise to the claims of other class members and . . . [be] based on the same legal or remedial theory." *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983). Considerations supporting commonality often also support typicality. *Hubler Chevrolet*, 193 F.R.D. at 577. Because typicality refers to "the nature of the claim of the class representatives, and not to the specific facts from which the claim arose or relief is sought," even relatively pronounced factual differences between the plaintiffs' claims and those of the class members do not preclude class certification. *De La Fuente*, 713 F.2d at 232.

Variations in the methods by which the representative Plaintiffs and Settlement Class members purchased ready-mixed concrete, their bargaining power, the variety or quantity of concrete purchased, whether they negotiated with the producer, whether they purchased pursuant to a long term contract, the price they paid, and whether they received discounts, do not preclude a finding of typicality. *See, e.g.*, *Bromine*, 203 F.R.D. at 409-10 (typicality is satisfied in a price-fixing class action because "any illegal price-fixing possibly engaged-in by Defendants creates the same claim for all purchasers, large or small"); *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 261 (D.D.C. 2002) ("[t]he typicality requirement does not mandate that products purchased, methods of purchase, or even damages of the named plaintiffs must be the same as those of the absent class members"); *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 406 (S.D. Ohio 2007) ("if the named class members' claims are based on the same legal theory or arise from the same course of conduct, factual differences in date, size, manner, or conditions of purchase, the type of purchaser, or other concerns do not make named plaintiffs atypical"). Here, despite

variations in products and purchasing methods, typicality is satisfied because the representative Plaintiffs and the Settlement Class members seek to recover for the same injury, caused by the same price-fixing conspiracy, by way of the same cause of action.

4. Adequacy of Plaintiffs.

In order that the representative plaintiffs "fairly and adequately protect the interests of the class," they "must not have interests antagonistic to those of the class." *Hubler Chevrolet*, 193 F.R.D. at 578. In this case, the representative Plaintiffs' interests are co-extensive with those of the Settlement Class members. There are neither actual nor potential conflicts of interest, and each representative Plaintiff and Settlement Class member has suffered an economic injury as a result of the Defendants' price-fixing conspiracy. The named Plaintiffs therefore satisfy the adequacy requirement.

The representative Plaintiffs have also displayed their adequacy. Each of the Plaintiffs has communicated as necessary with Interim Co-Lead Counsel, has provided ongoing cooperation and assistance to Interim Co-Lead Counsel in the prosecution of this litigation, has responded to certain Defendants' Interrogatories to Plaintiffs, has provided deposition testimony, has located and produced documents related to purchases from the defendants and other documents requested by the Defendants, and has provided access to and the production of electronic data designated by the Defendants. Each of the Plaintiffs has also been advised of the terms of the Shelby and American Settlements, has discussed those terms with Settlement Class Counsel, and has agreed to those terms on behalf of the Shelby Settlement Class and the American Settlement Class. Levin Dec., ¶ 22. This involvement further demonstrates the Plaintiffs' adequacy. *See, Kaplan v. Pomerantz,* 131 F.R.D. 118, 122 (N.D.Ill.1990) ("As long as the plaintiff has some basic knowledge of the lawsuit and is capable of making intelligent

decisions based upon his lawyers' advice, there is no reason that he may not delegate further factual and legal investigation to his attorneys.").

B. The Requirements of Rule 23(b)(3).

Rule 23(b)(3) states, "An action may be maintained as a class action if ... the court finds 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." "Common questions predominate when they 'present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication.'" *Bromine*, 203 F.R.D. at 412, citing Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure: Civil* § 1778. As discussed in detail in the Plaintiffs' Class Memorandum, the basic elements of the Plaintiffs' claims – existence of a conspiracy, class-wide impact, and class-wide damages – are all susceptible to proof that is common to all class members. Class Memorandum, pp. 37-48.

Indeed, the principal issue – whether the Defendants conspired to fix the price of ready-mixed concrete in the Central Indiana Area – is itself an issue that would be subject to identical proof by any Settlement Class member. *See, e.g., Chevalier v. Baird Sav. Ass'n*, 72 F.R.D. 140, 149 (E.D. Pa. 1976) ("[T]he existence *vel non* of a conspiracy has been recognized as an overriding issue common to the plaintiff class."); *T.R. Coleman v. Cannon Oil Co.*, 141 F.R.D. 516, 525 (M.D. Ala. 1992) (existence of conspiracy alone meets predominance requirement); *DeLoach v. Phillip Morris Cos. Inc.*, 206 F.R.D. 551, 560 (M.D.N.C. 2001) (whether defendants "exchanged price information, agreed to fix … prices and allocate [their products], and took other steps to stabilize … prices are susceptible of generalized proof"). The common issue of whether the Defendants conspired to fix ready-mixed concrete prices is the predominant question

of law and fact in every Settlement Class member's antitrust claim. As discussed above, evidence of such a conspiracy, and the participation by the Defendants, is summarized at length in the Class Memorandum.

The Plaintiffs have also established that the issues of class-wide impact and class damages are subject to common proof and raise predominant common issues. Courts sometimes presume impact when a price-fixing conspiracy is established. *See, e.g., Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 455 (3rd Cir. 1977). However, the Plaintiffs have submitted a widely-accepted form of economic analysis, conducted by Dr. Beyer, to establish that the structural characteristics of the Central Indiana Area ready-mixed concrete market allow impact of the conspiracy to be established by class-wide proof. Class Memorandum, pp. 41-42 (summarizing Dr. Beyer's market structure and impact analysis); Levin Class Dec., Ex. 37, ¶¶ 22-47. Such evidence is sufficient to establish that the issue of "impact" predominates for purposes of class certification. *See, e.g., In re Polyester Staple Antitrust Litig.*, 2007 WL 2111380 at *21-27 (W.D.N.C. July 19, 2007) (concluding, based on similar analysis of the market by Dr. Beyer, that the impact of an alleged horizontal conspiracy to fix polyester staple prices was a predominating common issue that supported certification). *See also, Bromine*, 203 F.R.D. at 412 (noting that cases law supports the assertion that "common methods can be used to show impact throughout the class" despite a wide range of products and prices). Dr. Beyer has presented a plausible method for demonstrating the impact of the Defendants' conspiracy based on class-wide proof, which is all that is required for class certification.

The damages caused by the Defendants' conspiracy are also subject to class-wide proof. As summarized in the Class Memorandum, Dr. Beyer proposes to use benchmarks and multiple regression analysis to determine the percentage of Ready-Mixed Concrete prices during the Class

Period that is overcharge attributable to conspiracy. *See,* Class Memorandum, pp. 44-48; Levin Class Dec., Ex. 37 ¶¶ 58-71. Courts have repeatedly approved the methodology proposed by Dr. Beyer as sufficient for class certification purposes. *See, e.g. Polyester Staple*, 2007 WL 2111380 at *25-26; *Foundry Resins*, 242 F.R.D. at 398-401; *In re Carbon Black Antitrust Litig.*, 2005 WL 102966 at *20-21 (D. Mass. Jan. 18, 2005); *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 217-18 (E.D. Pa. 2001), *aff'd*, 305 F.3d 145 (3d Cir. 2002); *In re Hydrogen Peroxide Antitrust Litig.*, 240 F.R.D. 163, 175 & fn. 18 (E.D. Pa. 2007). Even if the proposed methodology only roughly estimated damages, which Plaintiffs do not expect, the class should be certified: "No precise damage formula is needed at the certification stage of an antitrust action; the court's inquiry is limited to whether the proposed methods are so unsubstantial as to amount to no method at all." *Paper Sys. v. Mitsubishi Corp.*, 193 F.R.D. 601, 615 (E.D. Wis. 2000). The availability of Dr. Beyer's proposed damage analysis is sufficient to support certification of the Settlement Classes.

Finally, class action treatment is obviously superior to other methods of adjudication. The alternative is numerous individual actions raising the same claims, proceeding on separate timetables, and involving duplicative motions and discovery proceedings. And it would not be economically feasible for most Class members to pursue their claims individually. The class action device is the best means to a comprehensive resolution to this matter. As this Court explained in *Hubler Chevrolet*:

> One reason to favor a class action is to avoid duplicative lawsuits, which would thereby waste the parties' and the courts' time and resources . . . . [A] class action would allow economies of scale to operate and ultimately reduce the overall burden on the courts associated with pursuing the claims versus maintaining individual actions. . . . A class action allows discovery to proceed on all of the potential claims jointly [and] . . . eliminates the potential that the

> defendants will be subject to contradictory resolutions of the ultimate legal issue . . . .

193 F.R.D. at 582 (citation omitted). Considering the alleged scope of Defendants' price-fixing conspiracy, denying class treatment would leave the alternative of duplicative, complex lawsuits. As set forth by the Plaintiffs in support of class certification, the four factors set out in Rule 23(b)(3) also support this conclusion. *See*, Class Memorandum, pp. 48-49.

C. Settlement Class Counsel Adequacy Under Rule 23(g).

Rule 23(g) of the Federal Rules of Civil Procedure requires the Court to consider several factors in appointing Class Counsel. Settlement Class Counsel have done a substantial amount of work in investigating and identifying potential claims as evidenced by the investigation, discovery, briefing, and settlement negotiation that they have already completed in this case. They are members in good standing of their respective state bars. They have extensive backgrounds in prosecuting complex class actions, including antitrust price-fixing cases, and thus have more than adequate knowledge of the applicable law. Materials documenting the relevant experience of Settlement Class Counsel were previously submitted to this Court.[3] The submitted materials and the efforts of Interim Co-Lead Counsel in this case to date support the Court's previous appointment of them as Settlement Class Counsel.

The Fairness of the American and Shelby Settlements

A district court may approve a settlement only if it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(1)(C). The review of a district court's approval of a class action settlement is limited to whether there was an abuse of discretion. *Isby v. Bayh,* 75 F.3d 1191, 1196 (7th Cir.

[3] *See, Memorandum in Support of Motion for Entry of Order (1) Consolidating Related Actions; (2) Setting Certain Pre-trial Procedures; and (3) Appointing Irwin B. Levin as Plaintiffs' Lead Counsel*, and Exhibits A, B, and C thereto, filed Aug. 30, 2005 (Docket No. 21); *Motion to Consolidate, to Appoint Interim Lead Counsel and for Entry of Case Management Order No. 1 and Brief in Support*, and Exhibits A, B, C, and D thereto, filed September 7, 2005 (Docket No. 25).

1996). In order to evaluate the fairness of a settlement, a district court must consider "the strength of plaintiffs' case compared to the amount of defendants' settlement offer, an assessment of the likely complexity, length and expense of the litigation, an evaluation of the amount of opposition to settlement among affected parties, the opinion of competent counsel, and the stage of the proceedings and the amount of discovery completed at the time of settlement." *Isby*, 75 F.3d at 1199. The Seventh Circuit Court of Appeals has held that district judges must "exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions" to consider whether the settlement is "fair, adequate, and reasonable, and not a product of collusion." *Reynolds v. Beneficial Nat'l Bank,* 288 F.3d 277, 279 (7th Cir. 2002).

Even under this stringent standard, it is clear that the American and Shelby Settlements, reached prior to the certification of a settlement class, are fair, reasonable and adequate to Settlement Class members. The Settlements reflect a maximum recovery from one Defendant (American) and a substantial cash recovery from a Defendant that is likely to face a substantially lower judgment than other Defendants (Shelby) as a result of its participation in the DOJ's Leniency Program. In accepting these Settlements, the Settlement Classes do not release their right to recover *all* damages – less a set-off for the Settlement payments – including mandatory trebling, from all or even one of the remaining, non-settling Defendants. In short, the Settlements are an excellent result for Class members in light of the possible recoveries from American and Shelby, the complexities of this case, the stage of proceedings, and the risks of further litigation.

This conclusion is supported by an analysis of the six factors applied by the Seventh Circuit Court of Appeals to class action settlements. *See, General Elec. Capital Corp. v. Lease Resolution Corp.,* 128 F.3d 1074 (7th Cir. 1997) ("a district court considers: 1) the strength of the

plaintiff's case on the merits measured against the terms of the settlement; 2) the complexity, length, and expense of continued litigation; 3) the amount of opposition to the settlement among affected parties; 4) the presence of collusion in gaining a settlement; 5) the stage of the proceedings; and 6) the amount of discovery completed"). These factors are discussed below.

A. The Strength of the Plaintiffs' Case Measured Against Recovery.

The most important factor relevant to the fairness of a class action settlement is the first one listed: "the strength of plaintiff's case on the merits balanced against the amount offered in the settlement." *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1132 (7th Cir. 1979) (citing the MANUAL FOR COMPLEX LITIGATION § 1.46 at 56 (4th ed.1977)). Citing *Reynolds*, the court in *Synfuel Technologies, Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646 (7th Cir. 2006), described this process as follows:

> In conducting this analysis, the district court should begin by "quantify[ing] the net expected value of continued litigation to the class." *Reynolds*, 288 F.3d at 284-85. To do so, the court should "estimat[e] the range of possible outcomes and ascrib[e] a probability to each point on the range." *Id.* at 285. Although we have recognized that "[a] high degree of precision cannot be expected in valuing a litigation," the court should nevertheless "insist[ ] that the parties present evidence that would enable [ ] possible outcomes to be estimated," so that the court can at least come up with a "ballpark valuation." *Id.* at 285.

Synfuel, 463 F.3d at 653. This analysis illustrates the fairness of both the American and Shelby Settlements.

With respect to American, the amount offered in settlement is both the beginning and the end of the valuation analysis. American has agreed to pay the sum of $368,000.00 in settlement. As reported by Settlement Class Counsel, this sum reflects all of the cash available for American – which is no longer a functioning company – to pay a settlement or a judgment. Levin Dec., ¶¶ 13 & 14. Given the limit on American's ability to pay a judgment, an analysis of the strength of the Plaintiffs' case or the possible outcomes of further litigation is academic. A judgment

exceeding this sum would not result in a higher recovery for Settlement Class members from American.

With respect to Shelby, the payment of $4.7 million in settlement reflects a substantial recovery for Settlement Class members when considered in light of the possible recoveries against Shelby if litigation against it continued. As reported by Settlement Class Counsel, this sum represents approximately 5.6% of Shelby's revenue from the sale of ready-mixed concrete to Settlement Class members from and including July 1, 2000 through and including May 25, 2004. Levin Dec., ¶ 16. However, in considering the "range of possible outcomes" from further litigation against Shelby, *Reynolds,* 288 F.3d at 284-85, two factors must be weighed: (i) Shelby has applied for, and is likely to be found to have satisfied the requirements of, the Leniency Program authorized by under Pub.L. 108-237, Title II, Subtitle A, § 213 ; and (ii) as a successful applicant under the Leniency Program, Shelby would not be liable for treble damages or joint and several liability with other Defendants. Shelby's settlement payment must therefore be considered against a range of actual damages, as opposed to trebled damages and joint and several liability.

Plaintiffs have not presented an estimate of damages at this time against which to compare the Shelby Settlement payment. However, it is illustrative to compare the 5.6% overcharge represented by the Shelby settlement against recoveries in similar cases. For example, in *In re Anthracite Coal Antitrust Litig.*, 79 F.R.D. 707, 714 (D.C. Pa. 1978), *aff'd in part and vac'd in part mem. sub nom. Colonial Fuel Corp. v. Blue Coal Corp.*, 612 F. 2d 571 (3d Cir. 1979), the court approved a settlement representing 3% of the defendant's sales, which was 28% of the plaintiffs' experts' estimate of an 11% overcharge. In *In re Catfish Antitrust Litig.,* 939 F.Supp. 493, 498 (N.D. Miss. 1996), the court approved a settlement representing a small

percentage of the plaintiffs' expert's estimate of a 8.3% overcharge. In *In re Linerboard Antitrust Litig.,* 2004 WL 1221350, *4 (E.D. Pa.), the court approved a settlement representing 42% of the plaintiffs' expert's estimated overcharge of 2.7%. In *Paper Systems, Inc. v. Mitsubishi Corp.,* 193 F.R.D. 601 (E.D. Wisc. 2000), plaintiffs' expert estimated overcharges of between 8.76% and 9.46%. In *In re Polypropylene Carpet Antitrust Litig.,* 93 F.Supp.2d 1348, 1360 (N.D. Ga. 2000), the court admitted plaintiffs' expert's opinion estimating overcharges of 8.3%. These examples reflect settlements at a *percentage* of estimated overcharges ranging between 2.7% and 11%.

The Shelby Settlement payment would exceed a damages estimate of 5% of ready-mixed concrete sales, would be 56% of a damages estimate of 10% of ready-mixed concrete sales, and would be more than 33% of a damages estimate of 15% of ready-mixed concrete sales. If a 50% litigation risk multiplier is applied to the 5-15% overcharge range – as suggested by *Reynolds* – the Shelby Settlement ranges between 66% of possible recovery and more than 200% of possible recovery. While this approach necessarily entails some guesswork, it is nonetheless appropriate when considering settlement of a complex case. *See, e.g., In re Electrical Carbon Prods. Antitrust Litig.,* 447 F. Supp.2d 389, 401 (D. N. J. 2006) ("reluctantly" applying a *Reynolds*-type analysis, given the complexity of the litigation, and assuming a 10% overcharge). Given the factors limiting the liability of Shelby should the claims against them proceed to trial, in addition to the inherent risks of litigation, this "ballpark" valuation supports the adequacy of the Shelby Settlement.

B. The Complexity, Length, and Expense of Continued Litigation.

The complexity, length, and expense of continued litigation in this case weigh in favor of settlement approval. The complexity and risk of antitrust is commonly recognized by court

assessing proposed settlements. *See, e.g., Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F.Supp.2d 503, 511 (E.D.N.Y.2003) ("the complexity of federal antitrust law is well known"); *In re Motorsports Merchandise Antitrust Litig.*, 112 F.Supp.2d 1329, 1337 (N.D.Ga. 2000) (in antitrust cases the "legal and factual issues involved are always numerous and uncertain in outcome"). Although Plaintiffs believe that the present case stems from a relatively straightforward example of price-fixing, it remains a complex matter involving multiple parties and inter-related factual, economic and legal issues.

Although the Plaintiffs have continued aggressively prosecuting this case against the remaining Defendants, and will do so to conclusion, the Shelby and American Settlements will have at least some expense-saving effects for the Plaintiffs and Settlement Classes by decreasing the complexity and length of these proceedings and increasing efficiency. Of course, Shelby and American each have experienced substantial cost-savings by Settlement that likely contributed to their ability to reach a settlement. For American, this savings permits the very settlement payment made to the Settlement Classes, as continued litigation would deplete the only funds available.

While Plaintiffs are confident of the strength of their case, both for class certification and at trial, there are always risks in litigation. These risks are more pronounced in complex matters. *See, e.g., In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781 (7th Cir.1999) (plaintiffs succeeded in having summary judgment against them reversed on the issue of conspiracy, but then failed to prove their case at trial). As in other, similar cases, the complexity, length and expense of continued litigation in this matter favor final approval of the American and Shelby settlements.

C. The Amount of Opposition to the Settlement Among Affected Parties.

As reported by Settlement Class Counsel, there have been no objections to the Settlements filed to date. There is therefore no opposition to the Settlements among affected parties, strongly supporting the entry of final approval.

D. The Presence of Collusion in Gaining a Settlement.

There is no suggestion that either the American or Shelby Settlement is the product of collusion. Both Settlements resulted from arms-length negotiations spread over several months. Levin Dec., ¶ 13 & 15. The American Settlement is also the product of several negotiation sessions conducted with the assistance of Magistrate Judge Jane Magnus-Stinson. Levin Dec., ¶ 13. There is nothing in the terms of the Settlements or in the negotiation process to suggest collusion, which also supports final approval.

E. The Stage of the Proceedings.

At this time, the Court has ruled on only one substantive motion, denying the IMI Defendants' Motion for Judgment on the Pleadings and permitting the Plaintiffs to allege fraudulent concealment of claims arising before June 30, 2001, the beginning of the limitations period defined under 15 U.S.C. § 15b (Clayton Act). Order Denying the IMI Defendants' Motion for Judgment on the Pleadings (Docket No. 223). The Plaintiffs' Motion for Class Certification, along with supporting materials, was filed on August 1, 2007. Under the present scheduling Order, the Defendants' opposition to class certification is due April 7, 2008, and the Plaintiffs' reply in support is due July 7, 2008. A hearing on class certification has not yet been scheduled.

The stage of proceedings supports the Settlements because pre-trial merits and class challenges still remain unresolved. The Court has not certificated a class at this time and,

although Plaintiffs are confident that their motion will be granted, there is at least some risk of denial. Further, no dispositive motions have been filed at this time, but may ultimately provide an obstacle to reaching trial. Of course, the risks of trial and appeal are also present with respect to all future litigation. In sum, the state of proceedings strongly favors a resolution of the Class Members' claims at this time through settlement.

F. The Amount of Discovery Completed.

Settlement approval is also supported by the extensive discovery conducted by Interim Co-Lead Counsel to date. Prior to reaching settlements with American and Shelby, the Plaintiffs received and reviewed hundreds of thousands of pages of documents and a large volume of computerized data. Discovery obtained by the Plaintiffs prior to these settlements also 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 took Fed.R.Civ.P. 30(b)(6) depositions of most corporate Defendants on subjects related to the collection and storage of this data. Levin Dec., ¶ 12.

The Plaintiffs also obtained and reviewed testimony and exhibits from the criminal jury trial of Defendants Ma-Ri-Al Corporation d/b/a Beaver Materials, Chris Beaver and Ricky Beaver, as well as materials and information prepared or obtained by the Federal Bureau of Investigation ("FBI"). Following the settlement negotiations with American and Shelby, Plaintiffs have taken depositions of several individual Defendants and employees of corporate Defendants. Levin Dec., ¶ 12. It is the opinion of Settlement Class Counsel that the discovery and deposition testimony obtained both before and after the settlement negotiations with American and Shelby support the fairness and adequacy of the proposed Settlements. Levin

Dec., ¶ 12. In short, the extensive and ongoing discovery in this matter, before and after the Settlements were reached, supports the fairness of the Shelby and American Settlements.

Conclusion

For the foregoing reasons, the Plaintiffs, through Settlement Class Counsel, pursuant to Fed. R. Civ. P. 23(e), respectfully request final approval of the Shelby Settlement and American Settlement), and for entry of an Order And Judgment Approving Settlement in the form attached to each Settlement as Exhibit "D."

Respectfully submitted,

Dated: March 28, 2008

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