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	))	

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO RECONSIDER ORDERS CERTIFYING SETTLEMENT CLASSES

Defendants Prairie Material Sales, Inc., MA-RI-AL Corp., Beaver Materials Corp., Rick Beaver, Chris Beaver and Gary Matney ("Defendants"), for their reply in support of their motion to reconsider orders certifying settlement classes as to American Concrete, Shelby Gravel, Inc. d/b/a Shelby Materials, Richard Haehl and Philip Haehl (Docket No. 455), state as follows:

1. Plaintiffs have failed to identify a single reason why this Court would not benefit, precisely as it did in the *Bromine Antitrust Litigation*, from having the "full argument in opposition to class certification" when it decides whether to certify settlement classes. *See Bromine Antitrust Litigation*, 203 F.R.D. 403, 406 (S.D. Ind. 2001). Although the standards for certifying settlement and litigation classes are not exactly the same,[1] the Defendants' arguments (and supporting evidence) in opposition to an identically-defined litigation class would assist the Court in determining whether Plaintiffs have satisfied the requirements for certification of a

[1] This Court noted in *Bromine*, however, that "[t]he same criteria are used to analyze both motions" (for certification of a settlement class and a litigation class), and that in fact, Rule 23 requires "heightened" analysis when a district court certifies a settlement class. 203 F.R.D. at 406 (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848-49 (1999)). This Court said the same thing in *Uhl v. Thoroughbred Tech. & Telecomm. Inc.*, 2001 WL 987840 (S.D. Ind. Aug. 28, 2001), *aff'd*, 309 F.3d 978 (7th Cir. 2002) – that a court asked to certify a settlement class "must apply Rule 23's protocol with particular care." *Id.* at *5.

settlement class, particularly where Plaintiffs make the same arguments and rely on the same materials they submitted in support of their motion for certification of a litigation class.

2. Plaintiffs argue that the Court should not vacate its orders certifying settlement classes because Defendants lack standing to object to the settlements and are not bound by the Court's orders certifying settlement classes. Defendants agree that certification of settlement classes as to American and Shelby does not preclude Defendants from opposing certification of a litigation class.[2] However, notwithstanding their arguments regarding standing and preclusion, Plaintiffs have failed (indeed they have not even attempted) to distinguish this case from the *Bromine Antitrust Litigation*, in which this Court, in response to a motion to reconsider filed by a non-settling defendant, vacated an order certifying a settlement class. The same standing and preclusion issues were present in the *Bromine Antitrust Litigation*, but were not a bar to vacating the Court's order certifying a settlement class.[3]

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[2] The Court, however, could be faced with ruling that the settlement class it certified on the basis of an incomplete record was not a proper litigating class based upon the evidence defendants will present in opposition to class certification. There is no reason for the Court to be put in this position.

[3] Defendants recognize that in *Bromine*, this Court stated non-settling defendants lacked standing to object to class certification for settlement purposes. 203 F.R.D. at 406 n.6. However, just a few weeks ago, the Seventh Circuit held, albeit based on circumstances different than those in the present case, that a party who does not oppose (and appeal from) a district court's first ruling on class certification may not appeal a subsequent class certification ruling, which may create a Catch-22 if this Court certifies a settlement class before it rules on Plaintiffs' motion to certify an identically-defined litigation class. *See Asher v. Baxter Int'l Inc.*, 505 F.3d 736 (7th Cir. 2007). Plaintiffs point out that a district court recently denied a request to defer consideration of a motion to certify a settlement class until the court ruled on the plaintiffs' motion to certify a litigation class. *Columbus Drywall & Insulation, Inc. v. Masco Corporation*, 2007 WL 2119022 (N.D. Ga. July 20, 2007). However, unlike this case, the settlement and litigation classes in *Masco* were defined differently. *Id.* at *5. Here, Plaintiffs seek approval of settlement classes defined in the same manner as their proposed litigation class.

Plaintiffs are simply incorrect that Defendants have not asserted any error in the Court's certification of settlement classes. Plaintiffs ignore Defendants' citation to *In re Community Bank of Northern Virginia*, 418 F.3d 277, 298-302 (3d Cir. 2005), where the Third Circuit held that the district court's verbatim adoption of the settling parties' findings and conclusions that the settlement classes met the requirements of Rule 23 was an abuse of discretion and inconsistent with the court's obligation under *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) to demonstrate that it had made an independent investigation of each of the Rule 23 factors. In the present case, the Court similarly entered orders identical to those tendered by Plaintiffs. Thus, if the orders stand, they will be subject to precisely the same attack on appeal as was successfully raised in *In re Community Bank*.

3. Finally, delaying a ruling on the motions to certify settlement classes will not result in any prejudice. Plaintiffs assert that a delay will be "detrimental to the interests of the American and Shelby settlement class members." Plaintiffs' Opposition at p. 10 (Docket No. 463). However, Plaintiffs' counsel stated that they "plan to defer distribution of the Settlement Fund to Class Members until a later date" when they sought settlement class certification. *See, e.g.*, Memorandum in Support of Plaintiffs' Motion for Preliminary Approval of Settlement Agreement with Defendants Shelby Gravel, Inc. d/b/a Shelby Materials, Richard Haehl, and Philip Haehl at p. 6 (Docket No. 447). If the settlement classes are sustained upon further evaluation by the Court, the class members will receive their settlement funds. The true prejudice would be if the settlement funds were distributed and the Court then determined after

hearing from non-settling defendants that the class was not proper. Creditors of the settling defendants who are actually entitled to those funds would never receive them.[4]

CONCLUSION

Precisely for the same reasons it did so in the *Bromine Antitrust Litigation*, the Court should vacate its orders certifying settlement classes and defer its ruling on those motions until it has the benefit of the full argument in opposition to class certification.

Respectfully submitted,

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[4] Although Shelby and American oppose Defendants' motion to reconsider, they simply joined in Plaintiffs' opposition and did not offer any additional argument. *See* American Concrete's Joinder in Opposition to Motions to Reconsider Preliminary Approval of Settlement and Certification of Settlement Class (Docket No. 467); Shelby Defendants' Opposition to Motions for Reconsideration of Order Granting Preliminary Approval to Settlement Agreement and Certifying Settlement Classes (Docket No. 466).

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2007, a copy of the foregoing Defendants' Reply in Support of Motion to Reconsider Orders Certifying Settlement Class 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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