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	)	

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR APPROVAL OF
PROPOSED PLAN OF DISTRIBUTION OF SETTLEMENT FUNDS,
AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES,
AND AWARD OF CLASS REPRESENTATIVES' INCENTIVE FEES

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"), by Settlement Class Counsel ("Class Counsel"), request that the Court approve distribution of the combined American, Shelby and Prairie Settlement Funds (the "Settlement Funds") as proposed herein. As set forth below, Plaintiffs and Class Counsel propose a distribution of the Settlement Funds that includes: (1) a *pro rata* allocation of net Settlement Funds among Settlement Class Members according to the respective amount of their purchases of ready-mixed concrete from the Defendants; (2) an award of attorneys' fees in the unopposed amount of 33.33% of the Settlement Funds; (3) the reimbursement of litigation expenses incurred by Class Counsel; and (4) a class representative incentive award to each of the named Plaintiffs. The proposed distribution is fair and reasonable under the relevant facts and circumstances, and is consistent with precedent in this Circuit.

I. Background of the Litigation.

As the Court is aware, the Plaintiffs bring claims based upon a price-fixing conspiracy implemented by the Defendant companies and several of their principals in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. The Plaintiffs allege that the conspiracy caused direct purchasers of ready-mixed concrete in the central Indiana area to pay artificially inflated or sustained prices from at least mid-2000 through May 2004 ("Class Period"). Most of the Defendant companies and their principals have pleaded guilty to price-fixing, or have been convicted of price-fixing by a jury. *See*, Memorandum in Support of Plaintiffs' Motion for Class Certification (Doc. 401) ("Class Mem."), p. 5. Shelby Gravel, Inc. d/b/a Shelby Materials was the Leniency Program applicant, thereby admitting the offense but avoiding a criminal conviction. *Id*. Only Prairie Material Sales, Inc., and American Concrete Company, Inc. – two of the three companies that have settled to date – were neither convicted nor sought amnesty for price-fixing, though both participated in the conspiracy.

Despite widespread admissions (or convictions) of wrongdoing in the criminal cases, the Defendants have vehemently denied that the conspiracy was actually implemented on a systematic basis. Declaration of Irwin B. Levin ("Levin Dec."), ¶ 4. Like virtually all conspiracy participants who are caught, Defendants claim that few if any customers were actually harmed by their repeated agreements (over at least four years) to fix prices. *Id*. Considering that Defendants sold more than $700 million of ready-mixed concrete during the conspiracy, however, and face treble damages and joint and several liability, it is not surprising that Defendants are aggressively attempting to minimize their fault. *Id*. They have mounted a vigorous, albeit worn, defense, arguing that an absence of widespread impact defeats the Plaintiffs' request for class certification, and that damages in this case will be minimal. *Id*.

Class Counsel began investigating the possibility of price-fixing in the Indianapolis area ready-mixed concrete market in September 2004. *Id.*, ¶ 3. In May 2005, the first of several guilty pleas and/or indictments were announced by the United States Department of Justice. *Id.* Since mid-2005, Class Counsel have pursued this case on behalf of the Plaintiffs and a proposed class of direct purchasers of Defendants' ready-mixed concrete, seeking to recoup losses caused by the price-fixing conspiracy. *Id.*, ¶ 5.

In order to establish the existence, mechanics and widespread efficacy of the conspiracy, Plaintiffs have undertaken expansive discovery and motion practice, conducted numerous witness interviews, reviewed extensive data, documents and other information from the criminal proceedings and this action, and have submitted reports from two testifying economic experts. *Id.* To date, discovery in this case has included millions of pages of documents and a large volume of electronic transaction data. *Id.* Class Counsel have taken over 30 depositions, some of them lasting multiple days, including numerous Rule 30(b)(6) depositions of Defendant representatives, and depositions of Defendants' three experts. *Id.* Counsel have also defended seven depositions of the named Plaintiffs, and have served subpoenas for the production of documents on numerous non-parties. *Id.* The securing, management and review of electronic information alone in this case has required the assistance of multiple consultants in addition to the Plaintiffs' testifying experts. *Id.*

By any measure, the motion practice, discovery and investigation in this case has been both difficult and exhaustive. Even a cursory review of the docket in this case demonstrates the breadth of motion practice – the docket contains over 700 entries, many of them lengthy briefs and memoranda, and many of which include large compilations of exhibits. The extent of discovery and investigation to date is reflected in the volume of information reported in the

Plaintiffs' Class Memorandum and Reply in Support of Class Certification (Doc. 674), as well as in the expert reports of John C. Beyer, Ph.D. (Doc. 675-1) and Gordon Rausser, Ph.D. (Doc. 675-2). There can be no question that Plaintiffs and Class Counsel have devoted enormous time and resources prosecuting this case on behalf of direct purchasers.

II. The American Concrete, Prairie Materials, and Shelby Materials Settlements.

To date, the litigation efforts of Plaintiffs and Class Counsel have produced settlements with American Concrete Company, Shelby Materials, Inc. (including Phillip and Richard Haehl), and Prairie Materials Sales, Inc. (including Gary Matney). Levin Dec., ¶ 6. The funds recovered and cooperation obtained on behalf of Settlement Class members through these negotiations represent an exceptional result. *Id*. The payments under these Settlements compare very favorably with other price-fixing settlements, ranging from *all* of American's liquid assets, to 5.6% of Shelby's Class Period sales, to 22% of Prairie's Class Period sales. *Id*. The combined payments for class members under these Settlements now total $24,389,894.37 with accrued interest. Levin Dec., ¶ 13. These results were the product of aggressive litigation by Class Counsel, and followed lengthy and frequently contentious negotiations between the parties. *Id*.

A. The Shelby Settlement.

The settlement with Shelby Gravel, Inc. d/b/a Shelby Materials, Richard Haehl, and Philip Haehl ("Shelby Settlement") was largely influenced by unique circumstances: (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. *Id.*, ¶ 7. Nonetheless, negotiations included numerous in-person meetings between counsel, the exchange of information, review by Class

Counsel of financial and transactional information related to Shelby's production and sale of ready-mixed concrete in the central Indiana area, and review by Class Counsel of Shelby's ability to pay a settlement or satisfy a judgment. *Id.* The settlement discussions also followed several in-person interviews of Shelby principals Richard Haehl and Philip Haehl pursuant to their agreement to provide substantial and truthful cooperation to the Plaintiffs and their counsel under the Leniency Program. *Id.*

The Shelby Settlement provided for Shelby's payment of $4,700,000 into a Settlement Fund for the benefit of the Settlement Class. *Id.*, ¶ 8. This sum represents approximately 5.6% of Shelby's revenue from the sale of ready-mixed concrete to Settlement Class members during the Class Period. *Id.* Shelby also agreed to provide reasonable, continuing and truthful 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. *Id.* The Court granted final approval of the Shelby Settlement on April 4, 2008. *Id.*

B. The American Settlement.

The settlement with American Concrete Company, Inc. ("American Settlement") was driven entirely by American's financial condition. *Id.*, ¶ 9. The settlement discussions included the review by Class Counsel of financial information related to American's ability to pay a settlement or judgment, which confirmed the sale by American, in 2005, of substantially all of its assets. *Id.* The discussions included several months of arms-length negotiations between Class Counsel and counsel for American, several in-person meetings between counsel, and in-person and phone mediation sessions with Magistrate Judge Jane Magnus-Stinson. *Id.*

Ultimately, financial documentation disclosed that the cash available to American totaled only $368,000, and American agreed to pay this sum for the benefit of the Settlement Class. *Id.*, ¶ 10. American also agreed to provide reasonable, continuing and truthful 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. *Id.* The Court granted final approval of the American Settlement on April 4, 2008. *Id.*

C. The Prairie Settlement.

The settlement with Prairie Material Sales, Inc. n/k/a Southfield Corporation and Gary Matney ("Prairie Settlement"), the most recent of the three Settlements, also followed several months of negotiations between Class Counsel and counsel for Prairie/Southfield. *Id.*, ¶ 11. The negotiations included several in-person meetings between counsel, in-person and phone negotiation sessions with counsel for Prairie, and the exchange of information and documents. *Id*. The settlement discussions included the review by Class Counsel of financial and transactional information related to the production and sale of ready-mixed concrete in the central Indiana area by Prairie and other Defendants. *Id.*

The Prairie Settlement provided for the payment by Prairie of $19,000,000 into a Settlement Fund for the benefit of the Settlement Class. *Id*., ¶ 12. This sum represents approximately 22% of Prairie's revenue from the sale of ready-mixed concrete to Settlement Class members during the Class Period. *Id*. The Prairie Settlement represents an exceptional recovery on behalf of the Class, substantially exceeding the previous settlements with the Shelby and American Defendants. *Id.* The Court granted final approval of the Prairie Settlement on August 7, 2008. *Id*.

D. The Combined Settlement Funds.

Each Settlement Agreement provides for the settlement amount to be paid into a "Settlement Fund" to be administered for the benefit of the Settlement Classes by Class Counsel, and that "[a]fter the Effective Date, Plaintiffs and Class Counsel shall have the right to seek, and [Defendant] shall not oppose, Court approval of payments from the Settlement Fund for distribution to Settlement Class members or to reimburse Class Counsel for reasonable expenditures made or to be made by Class Counsel in the prosecution of the Action against the Other Defendants." American Settlement, ¶ 27; Shelby Settlement, ¶ 26; Prairie Settlement, ¶ 26. Notice of the Settlements advised Settlement Class Members that distributions were not being made at the time of final approval, and that any proposed distribution would likely be in proportion to Settlement Class Members' purchases and would be submitted to the Court for approval.[1]

With regard to the payment of attorneys' fees and litigation expenses out of the Settlement Funds, each Settlement also contains substantially the following provision:

> Class Counsel shall be reimbursed and paid solely out of the Settlement Fund for all fees and expenses including, but not limited to, attorneys' fees and expenses. Plaintiffs and Class Counsel shall have the right to seek, and

[1] For example, the Shelby mailed Notice states:

> Because of the ongoing nature of the claims in the Lawsuit against the other Defendants, Plaintiffs and Class Counsel plan to defer distribution of the Settlement Fund to Class Members until a later date, and do not know at this time when they will seek permission from the Court to make distributions from the Settlement Fund to Class Members.
>
> In the event that Plaintiffs and Class Counsel seek to make a distribution of the Settlement Fund or any other funds recovered in the Lawsuit to Class Members, it is anticipated that the proposed distribution of amounts from the Settlement Fund will be in direct proportion to the amount of a Class Member's purchases of Ready-Mixed Concrete from the Defendants at any time from July 1, 2000 through May 25, 2004. In the event that Plaintiffs and Class Counsel seek to make a distribution of the Settlement Fund or any other funds recovered in the Lawsuit to Class Members, a Claim Form with information about the proposed distribution and instructions for submitting a claim will be provided to Class Members.

Shelby Settlement, Ex. "A," p. 4. *See also,* American Settlement, Ex. "A," p. 4; Prairie Settlement, Ex. "A," p. 4.

> [Defendant] shall not oppose, the Court's 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.

American Settlement, ¶ 28; Shelby Settlement, ¶ 27; Prairie Settlement, ¶ 27. This provision was also brought to the attention of Settlement Class Members in the Notice. *See, e.g.*, Shelby Settlement, Ex. "A," p. 7; American Settlement, Ex. "A," p. 7; Prairie Settlement, Ex. "A," p. 7.

As each of the Settlements was approved and became effective, the settlement amounts were placed in an account at Irwin Union Bank by Class Counsel, to be administered as the respective "Settlement Fund" provided under each such Settlement. Levin Dec., ¶ 13. At the request of Class Counsel, the Court entered an Order Approving Transfer of Settlement Funds on July 18, 2008 (Doc. 638), authorizing Class Counsel to transfer the $24,068,000 recovered from the three Settlements, with accrued interest (collectively the "Settlement Funds"), for deposit in an account at First Wisconsin Bank & Trust. Levin Dec., ¶ 13. This transfer allowed Class Counsel to take additional steps to protect the Settlement Funds, including: (i) the designation of the Settlement Funds as trust assets of the depository bank; and (ii) the collateralization of the Settlement Funds with short term United States Treasury Securities and money market funds comprised solely of short-term United States Treasury Securities. *Id*.

The Settlement Funds are presently held by First Wisconsin Bank & Trust pursuant to an agreement providing the security and treatment proposed by Class Counsel, and remain subject to the continuing jurisdiction of the Court. Levin Dec., ¶ 13. As of December 31, 2008, the balance of the combined Settlement Funds with accrued interest was $24,389,894.37. *Id*.

III. Plaintiffs' Proposed Distribution of Net Settlement Funds is Fair and Reasonable.

Class Counsel have worked closely with economists and database experts at Nathan Associates, Inc., and with third-party Claims Administrator A.B. Data – both of whom have

extensive experience in preparing and managing data for purposes of class settlement distributions – to develop a protocol for the distribution of the Settlement Funds. Levin Dec., ¶ 14. The proposed distribution plan is consistent with the Settlement Agreements and the Notice already provided to Settlement Class Members. The proposed distribution is also consistent with distributions made by courts in similar actions, and is intended to be fair, efficient, accurate, and – to promote broad participation – as simple as possible for Settlement Class Members. *Id*. The proposed distribution plan, definitions of all key terms, and detailed instructions for making a claim are set forth in the proposed Notice of Settlement Distribution and Claim Form. *See*, Levin Dec., ¶ 15 and Ex. "A" ("Custom Claim Form"). A summary of the proposed distribution, including the formula for determining Settlement Class Member payments, is also submitted for the Court's consideration. Levin Dec., ¶ 15 and Ex. "B" ("Proposed Distribution").

A. The Settlement Funds Will Be Distributed On A *Pro Rata* Basis To Class Members Who Submit Claims.

As set forth in the Settlement Agreements, Plaintiffs and Class Counsel have requested that the Settlement Funds be applied in part to pay Court-approved attorneys' fees, costs of litigation advanced by Plaintiffs' counsel, and incentive payments to each of the named Plaintiffs. Levin Dec., ¶ 15. Additionally, an estimated sum will be held back to cover costs of administration. *Id*. The remainder of the Settlement Funds, referred to herein as the "Net Settlement Funds," will be distributed to Settlement Class Members who submit timely Claim Forms, on a *pro rata* basis relative to the amounts of their Qualifying Purchases. A "Qualifying Purchase" is defined as a *direct* purchase by a Settlement Class Member of Ready-Mixed Concrete[2] from a Defendant Company[3] at any time during the Class Period, which was delivered

[2] For purposes of determining the amount of Class Members' Qualifying Purchases, "Ready-Mixed Concrete" is defined as a product comprised primarily of cement, sand, gravel and water. For purposes of determining the amount of each Class Member's purchases in the Claim Form, Ready-Mixed Concrete

from a facility within the Central Indiana Area,[4] and for which a Qualifying Claim[5] has been submitted. Custom Claim Form, p. 3.

Each Settlement Class Member's *pro rata* percentage of the Net Settlement Funds will be calculated by dividing the amount of their Qualifying Purchases by the total amount of Qualifying Purchases of all Settlement Class Members who submit Qualifying Claims, using the following simple formula:

$$\frac{\textbf{Class Member's Qualifying Purchases}}{\textbf{Total Qualifying Purchases}} = \textbf{Class Member's } \textbf{\textit{Pro Rata}} \textbf{ Percentage of Net Settlement Funds}$$

Custom Claim Form, p. 5. So, for example, if a Settlement Class Member's Qualifying Purchases from all of the Defendant Companies total $100,000, and the total amount of all Qualifying Purchases for which Qualifying Claims are made is $100,000,000, the Settlement Class Member would be entitled to 0.1% of the Net Settlement Funds:

$$\frac{\textbf{\$100,000}}{\textbf{\$100,000,000}} = \textbf{0.001 or 0.1\%}$$

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also includes additives or admixtures such as, but not limited to, calcium chloride, accelerators, retarding admixtures, plasticizers, colorants, and fly ash, ***but does not include taxes or the following extra service or product charges:*** (Service Charges) delivery charges, demurrage charges, hourly charges, minimum load charges, overtime, plant charges, same day service charges, truck cleanup charges, weekend/holiday/after hours charges, and winter charges; (Product Charges) truck/equipment rental costs, costs of building materials, concrete blocks, precast concrete products, equipment/tools, expansion joints, foam/Styrofoam, concrete forms, hardware, plastic, rebar, steel fiber, wire mesh, sealants, and test cylinders. Custom Claim Form, p. 3.

[3] "Defendant Companies" are defined as IMI, Prairie Materials, Builder's Concrete, Shelby Materials, American Concrete, Carmel Concrete, and Beaver Materials. Custom Claim Form, p. 2.

[4] "Central Indiana Area" is defined as the Indiana counties of Boone, Hamilton, Hancock, Hendricks, Johnson, Madison, Marion, Monroe, Morgan, and Shelby. Custom Claim Form, p. 2.

[5] "Qualifying Claim" is defined as a claim by a Settlement Class Member for a distribution from the Settlement Funds that is supported by a properly completed and timely-submitted Claim Form and which confirms one or more Qualifying Purchases by the Settlement Class Member. Custom Claim Form, p. 3.

Custom Claim Form, p. 5. Under this example, if the Net Settlement Funds were $14,000,000, the claiming Settlement Class Member would receive $14,000.

Because the Sherman and Clayton Acts provide for joint and several liability among all co-conspirators, money recovered from *any* of the Defendants in settlements or judgments will be distributed to customers of *all* of the Defendants. *See, e.g., In re Brand Name Prescription Drugs Antitrust Litig.,* 1999 WL 639173,*4-5 (N.D. Ill.) (approving *pro rata* distribution using purchases from all defendants, including non-settling defendants). Thus, purchases from all Defendants will be taken into consideration with equal weight when calculating the amounts of Settlement Class Members' Qualifying Purchases.

Additionally, the proposed *pro rata* distribution of the Settlement Funds is consistent with distribution plans approved in similar price-fixing litigation. *See, e.g., Brand Name,* 1999 WL 639173,*4; *In re Airline Tickets Commission Antitrust Litig.,* 953 F.Supp. 280, 284-85 (D. Minn. 1997) (*pro rata* distribution plan was "cost-effective, simple and fundamentally fair); *In re Corrugated Container Antitrust Litig.,* 556 F.Supp. 1117, 1129 (S.D. Tex. 1982) (approval of *pro rata* distribution based on valid claims of allowable purchases).

B. Determining Amounts of Qualifying Purchases.

Consistent with the overarching goal of distributing the Net Settlement Funds to Settlement Class Members in a way that is fair, efficient, accurate, and as simple as possible for Class Members, the claims protocol proposes to take advantage of robust available sales data from the Defendant Companies to determine the amounts of Settlement Class Members' Qualifying Purchases. Levin Dec., ¶ 16.

With minor exceptions, all of the Defendant Companies other than Carmel Concrete previously provided electronic records of all of their Ready-Mixed Concrete sales during the

Class Period. *Id*. The protocol will utilize this data by sending *customized* Claim Forms to known Settlement Class Members that include the amounts of their Qualifying Purchases, according to available data, from each of the Defendant Companies other than Carmel Concrete. *Id*. A Settlement Class Member will then be given an opportunity to check this presumptive amount of purchases against their own records and either accept the presumptive amount or provide an alternative figure and supporting documentation. *Id*.; Custom Claim Form, pp. 10-11.

In addition, because electronic data is not available for Carmel Concrete, or for IMI subsidiary Southside Ready-Mix Concrete ("Southside") during a portion of the Class Period, the Custom Claim Form will allow Settlement Class Members to indicate the amounts of their purchases from Carmel Concrete or from Southside during the relevant period. Levin Dec., ¶ 17; Custom Claim Form, p. 11. Settlement Class Members are directed to identify and submit the records upon which Carmel Concrete and additional Southside purchases are based. Custom Claim Form, p. 11.

A "General Claim Form" – without customer-specific information include – will also be made available to persons or entities that believe they made purchases of Ready-Mixed Concrete from the Defendant Companies during the Class Period, but for whom electronic data does not reflect purchases. Levin Dec., ¶ 18 and Ex. "C" ("General Claim Form"). The General Claim Form will be readily available upon request from the Claims Administrator and on the settlement website. Levin Dec., ¶ 18. Unlike the customized Claim Form, the General Claim Form does not provide any presumptive amounts of purchases. Instead, potential Settlement Class Members will be asked to provide the amounts of their purchases from each of the Defendant Companies, and to submit the records upon which those amounts are based. General Claim Form, pp. 10. Class Counsel and the Claims Administrator will work together to assess the validity of General

Claim Forms based on the records submitted by those claimants and, if available, alternative records of the Defendant. Levin Dec., ¶ 18.

Both the General Claim Form and the Custom Claim Form (collectively the "Claim Forms") provide background information about the case and settlements, eligibility to receive a share of the Settlement Fund, how the Settlement Fund will be divided, and instructions for completion of Claim Forms. The Claim Forms also provide a toll-free telephone number and the settlement website address from which potential Settlement Class Members can obtain additional information about the Settlements and the claims process, or to obtain assistance with completing and submitting Claim Forms. *See, e.g.,* Claim Forms, pp. 1-8. The Claim Forms have been designed to be as simple as possible.

C. Sending Claim Forms To Potential Settlement Class Members.

The Claims Administrator will send Custom Claim Forms to all known addresses of potential Settlement Class Members for which the Defendants' electronic records reflect Qualifying Purchases of Ready-Mixed Concrete. Levin Dec., ¶ 19. In addition, Class Counsel have obtained names and addresses for potential Settlement Class Members for whom there is no associated purchase data. *Id*. These addresses were compiled from various sources, including Carmel Concrete paper documents, and calls from persons and entities responding to the published notices of settlements in the Indianapolis Star and media coverage. *Id*. The Claims Administrator will send General Claim Forms to all of these addresses. *Id*.

D. Processing Claim Forms.

Potential Settlement Class Members will be instructed to send their completed Claim Forms to the Claims Administrator, A.B. Data, postmarked by a date certain that is 60 days after the Claim Forms are first mailed to Settlement Class Members. Levin Dec., ¶ 20. The Claims

Administrator and Class Counsel have collaborated to develop guidelines for processing claims. Levin Dec., ¶ 20 and Ex. "D." The guidelines were developed to promote the goal of a fair, accurate, efficient, and simple claims protocol. *Id*. The Claims Administrator will follow these guidelines to determine: (1) whether each submitted Claim Form was completed, signed and timely submitted; (2) whether each submitted Claim Form provides the necessary information to support a Qualifying Claim, and, if so, the amount of the Qualifying Purchases; and (2) the amount payable to each Settlement Class Member that has submitted one or more Qualifying Claims. Levin Dec., ¶ 20. The guidelines outline the steps to be taken if a Custom Claim Form or General Claim Form is incomplete, which include allowing the claimant an opportunity to correct any deficiencies. *Id*.

IV. Settlement Class Counsels' Request for Attorneys' Fees and Expense Reimbursement is Fair and Reasonable.

Class Counsel's unopposed request for an award of attorneys' fees in the amount of 33.33% of the Settlement Funds, or $8,129,151.79, is fair and reasonable in light of the benefits provided to Class Members under the American, Shelby and Prairie Settlements; the litigation efforts of Settlement Class Counsel to date; compensation levels in the relevant market for such legal services; and the substantial risk of nonpayment at the time Class Counsel undertook the representation of Plaintiffs in this litigation. Class Counsel's request for reimbursement of expenses in the amount of $1,913,321.96 is also reasonable given the complexity and scope of this litigation. Class Counsel therefore request approval of their proposed award of attorneys' fees and reimbursement of expenses. Levin Dec., ¶ 21.

A. Class Counsel are entitled to compensation from the combined Settlement Fund.

Under the common fund doctrine, Class Counsel are entitled to compensation for their efforts in creating a settlement fund benefitting class members. *In re Cont'l Ill. Sec. Litig.,* 962 F.2d 566, 568 (7th Cir. 1992), citing *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980).

> When a case results in the creation of a common fund for the benefit of the plaintiff class, the common fund doctrine allows plaintiffs' attorneys to petition the court to recover its fees out of the fund. In such a case, the defendant typically pays a specific sum into the court, in exchange for a release of its liability. The court then determines the amount of attorney's fees that plaintiffs' counsel may recover from this fund, thereby diminishing the amount of money that ultimately will be distributed to the plaintiff class.

Florin v. Nationsbank of Georgia, N.A., 34 F.3d 560, 563 (7th Cir. 1994) ("*Florin I*"), citing *Skelton v. General Motors Corp.*, 860 F.2d 250, 252 (7th Cir.1988), *cert. denied*, 493 U.S. 810, 110 S.Ct. 53, 107 L.Ed.2d 22 (1989). The common fund doctrine "is based on the equitable notion that those who have benefited from litigation should share its costs." *Skelton*, 860 F.2d at 252.

To date, Class Counsel have created combined Settlement Funds in the amount of $24,389,894.37 (including interest). *See*, American Settlement, ¶ 23; Shelby Settlement, ¶ 22; Prairie Settlement, ¶ 22. Distribution of the Settlement Funds for the benefit of American, Shelby and Prairie Settlement Class members is subject to the Court's approval, and none of the Settlements provides for the direct payment of attorneys' fees or expenses by a settling Defendant. Levin Dec., ¶ 22. Instead, Class Counsel and Plaintiffs may seek Court-approval for the payment of attorneys' fees and reimbursement of costs and expenses to be paid out of the Settlement Funds. *See*, American Settlement, ¶¶ 27-28; Shelby Settlement, ¶¶ 26-27; Prairie Settlement, ¶¶ 26-27. The combined Settlement Funds are therefore paradigm examples of "common funds" established for the benefit of a plaintiff class. Their creation by Class Counsel

easily justifies application of the common fund doctrine to award attorneys' fees and reimburse expenses.

B. Seventh Circuit analysis for common fund attorneys' fees awards.

The Seventh Circuit has repeatedly held that the goal of a district court when awarding reasonable attorneys' fees is to estimate what the lawyers "would have received in an arms-length negotiation." *Cont'l Ill. Sec. Litig.*, 962 F.2d at 572. The court of appeals recently summarized this long-standing rule:

> In deciding fee levels in common fund cases, we have consistently directed district courts to "do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time."

Sutton v. Bernard, 504 F.3d 688, 692 (7th Cir. 2007), quoting *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("*Synthroid I*"). As stated by Judge Posner in *Cont'l Ill. Sec. Litig.*, "it is not the function of judges in fee litigation to determine the equivalent of the medieval just price. It is to determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order." *Cont'l Ill. Sec. Litig.*, 962 F.2d at 568 ("district judge … thought he knew the value of the class lawyers' legal services better than the market did").

In making this determination, "a district court may use the lodestar method, the percentage of recovery method, or some combination of the two." *Florin v. Nationsbank of Georgia, N.A.*, 60 F.3d 1245, 1247 n. 2 (7th Cir. 1995) ("*Florin II*"), citing *Florin I*, 34 F.3d at 565-66; *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 974 (7th Cir. 1991). However, the Circuit Court has expressed a preference for the percentage of the fund approach, recognizing that "there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration," and confirming that using a percentage approach alone is well

within the discretion of the district court. *Florin I*, 34 F.3d at 566.[6] Further, when using the percentage of fund method, the Seventh Circuit has held that district courts should *not* apply the "megafund rule" under which no recovery can exceed 10% of a "megafund," often defined as exceeding $75 million. *Synthroid I*, 264 F.3d at 718. For reasons discussed herein, the "percentage of the fund" approach favored by the Seventh Circuit is also the most accurate reflection in this case of "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton*, 504 F.3d at 692.[7]

In determining the "market price" for legal services, the Seventh Circuit has instructed district courts to "balance the competing goals of fairly compensating attorneys for their services rendered on behalf of the class and of protecting the interests of class members in the fund." *Florin I*, 34 F.3d at 565 (citation omitted). "A court must assess the riskiness of the litigation by measuring the probability of success of this type of case *at the outset* of the litigation." *Id.*

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[6] Under either approach, however, "the district court must consider how much compensation class counsel should receive for incurring the risk of nonpayment when it took the suit." *Id.* For example, when applying the lodestar method "a risk multiplier is not merely available in a common fund case but *mandated*, if the court finds that counsel had no sure source of compensation for their services." *Id.* at 565 (emphasis added), citing *Cont'l Ill. Sec. Litig.*, 962 F.2d at 569. "Moreover, we have observed that the need for such an adjustment is particularly acute in class action suits. The lawyers for the class receive no fee if the suit fails, so their entitlement to fees is inescapably contingent." *Florin I*, 34 F.3d at 566; *Cont'l Ill. Sec. Litig.*, 962 F.2d at 569. Thus, when applying the lodestar method to class counsel's request for fees from a common fund, a risk multiplier is required as a matter of law. *See, e.g., Florin II*, 60 F.3d at 1247 (rejecting multiplier of 1.01 as a finding that class counsel faced no risk).

[7] In accordance with criteria set forth by Class Counsel at the commencement of this case, any law firms performing services in this matter have submitted to Class Counsel a summary report of the services performed – including the attorneys, hours worked, hourly rate, and services performed – on a monthly basis. These reports have been received, reviewed and maintained by Cohen & Malad, LLP. Levin Dec., ¶30 Disclosing the details of these reports at this time would necessarily raise work product concerns for Class Counsel, given that this litigation continues against three corporations and their principals. *Id*.

Nonetheless, a lodestar approach would also easily justify the requested fees. *Id*. According to their monthly billing records, Class Counsel and associated firms have billed nearly 20,000 hours of attorney, law clerk and paralegal time as of the close of 2008. *Id*. When the lodestar is determined by applying historic hourly rates, Class Counsel's requested attorneys' fees award of $8,129,151.79 represents a "risk multiplier" of little more than 1.1. *Id*. Under Seventh Circuit precedent, a risk multiplier is *mandatory* if counsel's fees are contingent, and a multiplier of 1.01 has been rejected as a finding that counsel faced no risk at all. *Florin II*, 60 F.3d at 1247. The percentage of the fund approach proposed by Class Counsel avoids the necessity of determining an appropriate multiplier at this time. *Id*.

(citations omitted; emphasis original). By consulting the market for legal services, in light of the attorney's risk of nonrecovery, the court may estimate the "reasonable percentage" that the parties would have agreed to as a fee at the outset of the litigation. *Sutton,* 504 F.3d at 693.

In *Synthroid I*, a securities fraud class action, the Seventh Circuit offered some guidelines to district courts determining a reasonable fee using the "market approach." First, the court suggested an analysis of actual agreements to determine "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Synthroid I*, 264 F.3d at 719-20. Second, the court suggested that district courts could consider data from securities suits where large investors have chosen to hire counsel up front. *Id*. at 720. In doing so, the court recognized that such data had become "widely available" following changes in securities law practices. *Id*. Third, the court suggested that district courts could find guidance from the result of lead counsel "auctions" common in securities practice. *Id*. While these suggestions are, in part, unique to securities class actions, the court also stated that "[t]he market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case." *Id.* at 721.

C. The attorneys' fees requested by Class Counsel are authorized by the Seventh Circuit.

The award of attorneys' fees requested by Class Counsel accurately reflects "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton*, 504 F.3d at 692. Each of the factors identified by the Seventh Circuit weighs in favor of the requested attorneys' fees.

1. Risk of nonpayment.

Class Counsel's ability to collect fees for their work in this case has been, from the outset, "inescapably contingent." *Florin I*, 34 F.3d at 566. Although many of the Defendants have been successfully charged criminally for their participation in a conspiracy to fix the price of ready-mixed concrete, none of the Defendants actually admit a violation of the law in the civil action; indeed many of the Defendants have asserted the Fifth Amendment hundreds of times to avoid testifying that there even was a conspiracy. Levin Dec., ¶ 23. In addition, virtually all of the Defendants – including the settling Defendants – have asserted that damages from the conspiracy are negligible or nonexistent. Levin Dec., ¶23. Needless to say, Class Counsel's ability to recover a contingent fee in this matter is dependent on their ability to establish the elements required under the Sherman and Clayton Acts, as well as damages, in the face of aggressive opposition. *Id*. From the time Class Counsel agreed to provide services, this risk of the litigation has been substantial. *Id*.

Class Counsel's risk of non-payment is also affected by the challenge of certifying a plaintiff class. Levin Dec., ¶ 24. As the Court is aware, the Defendants' efforts to defeat class certification have been lengthy, complex and expensive. *Id*. On issues related to class certification, Class Counsel have conducted numerous depositions, retained and prepared two experts, conducted numerous conferences with the Court, obtained millions of pages of documents and data, and prepared hundreds of pages of briefing. *Id*. Although Class Counsel expects that, as in most anti-trust cases, the proposed class of direct purchasers will be certified, class certification does add an additional level of risk for the Class and Class Counsel. *Id*.

Finally, the risk of nonpayment for Class Counsel at the time they undertook this matter was also tied to the risk of a defense verdict at trial. Levin Dec., ¶ 25. Class Counsel faced the task of establishing a conspiracy among seven corporate Defendants, class-wide impact on direct

purchasers, and measurable damages. *Id*. This task was likely to be complicated by the ability of most Defendants to finance a lengthy defense. *Id*.

2. Class Counsel's contingency agreements.

Class Counsel's proposed attorney fee is also consistent with their actual agreements with Plaintiffs to provide services. *Synthroid I*, 264 F.3d at 719-20. While not binding on this Court, the retention agreement between each named Plaintiff and their initial counsel calls for the payment of attorneys' fees and the reimbursement of litigation expenses to be contingent upon a recovery in this case, and to be paid out of such recovery. Levin Dec., ¶ 26. Some of the agreements specifically contemplate a request for fees of 33 1/3% of any fund established for the Plaintiffs and class members, while other do not recite a specific percentage. *Id*. It is the opinion of Class Counsel, based upon many years of experience and familiarity with the market for legal representation of the type provided by Class Counsel in this case, that the market rate for litigation such as this is a one-third contingency agreement with litigation expenses to be advanced by counsel and reimbursed out of any recovery made for the plaintiff and/or class. *Id*.

It is also the opinion of Class Counsel, again based upon experience and familiarity with the market for legal representation, that a contingency fee agreement is the only arrangement by which most class members could pursue relief in this case. Levin Dec., ¶ 27. Because the litigation requires a substantial advancement of time and expense, the measure of recoverable damages is uncertain, and the risk of non-payment or under-payment is significant, it would be financially impossible, or irrational, for any of the named Plaintiffs to have agreed to pursue this matter on any basis other than a contingency arrangement with expenses advanced by counsel. *Id*. The same would be true for virtually all other Settlement Class members. *Id*.

As observed by the Seventh Circuit, the terms of the Plaintiffs' actual agreements are directly relevant to "approximating the terms that would have been agreed to *ex ante*." *Id*. at 719. Obviously, the actual terms recited by the parties at the outset of this litigation are evidence of "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton*, 504 F.3d at 692. Moreover, Class Counsel's opinion, based on experience and familiarity with the market for legal services in cases like this one, is further evidence of the market rate for the type of services provided in this case. *See, e.g., Berger v. Xerox Corp. Ret. Inc. Guar. Pl.,* 2004 WL 287902,*2-3 (S.D. Ill.) (relying on class counsel's affidavit to support conclusion that market rate for services was contingent rate of 29% or higher). The attorneys' fees requested by Class Counsel are therefore supported by the actual agreements with Plaintiffs and Class Counsel's opinion regarding customary market rates for matters of this type.

3. Evidence of agreements in similar litigation.

Although data disclosing the terms of client agreements in antitrust cases is not widely available, as it has become in securities fraud litigation, *Synthroid I,* 264 F3d at 720, data is available disclosing attorney fee awards in such cases. This information is not the same evidence of *ex ante* arrangements contemplated by the court in *Synthroid I*, but it is strong evidence of the reasonable expectations of Class Counsel when agreeing to represent the Plaintiffs in a contingency antitrust case. Levin Dec., ¶ 29. It also confirms the accuracy of Class Counsel's opinion regarding the market rate for services of the kind provided in this case.

In *Robert H. Lande & Joshua P. Davis, Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases,* 42 U.S.F. L. REV. 879 (2008), the authors analyzed data from 40 private antitrust cases, including the fund recovered for victims and the amount awarded in attorneys'

fees. Out of 16 cases resulting in recovery of less than $100 million, seven cases included attorney fee awards of 33.3% of the fund, one case included an attorney fee award of 33% of the fund, and three cases included attorney fee awards of 30% of the fund. *Id*. at 911, Table 7A. Out of nine cases resulting in recovery of between $100 million and $500 million, seven cases included attorney fee awards of between 30% and 33.3%. *Id*. at 911, Table 7B. Only in cases in which recovery exceeded $500 million did attorney fee percentages consistently depart from this range. *Id*. at 912, Table 7C.

This information, along with Class Counsel's experience in complex litigation, including antitrust matters, supports a reasonable expectation of a contingency fee of 33.3% of the Settlement Funds. Levin Dec., ¶ 29. It also supports the conclusion that the market rate for the services provided by Class Counsel in this matter is a contingency fee in this range. *Berger,* 2004 WL 287902,*2 ("the Court finds based on the evidence presented by Class counsel, and the Court's awareness of the market, that a 29% fee … is at or below the market rate for this and similar litigation"), citing *Synthroid I*; *Synthroid II*. Evidence of fee awards in other, similar cases therefore supports the conclusion that the attorneys' fees requested by Class Counsel are consistent with "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton*, 504 F.3d at 692.

4. Other factors.

The Seventh Circuit's other factors relevant to the *ex ante* market rate for a law firm's services, including "the quality of its performance," "the amount of work necessary to resolve the litigation," and "the stakes of the case," *Synthroid I,* 264 F.3d at 721, also support Class Counsel's fee request in this matter. For many of the reasons already stated, these factors support the fee requested by Class Counsel.

First, Class Counsel and their respective firms, Cohen & Malad, LLP and Susman Godfrey LLP, have well-established reputations for providing high quality, efficient and aggressive representation in complex matters. This factor supports the ability of Class Counsel to negotiate a contingent rate of one-third for their services.[8] Levin Dec., ¶ 28. Second, from the commencement of this action it has been apparent that the amount of work necessary to resolve the litigation would be extensive, requiring a very substantial time-commitment by many attorneys and their legal assistants. In light of the risk of non-payment, this factor also supports the ability of Class Counsel to command a contingent rate of one-third for their services. *Id*. Third, the stakes of the case are very high – the Plaintiffs allege that Defendants effectuated a conspiracy to inflate the price of more than $700 million of ready-mixed concrete. Like the previous factor, the high stakes of this litigation ensure that the cost and effort required to obtain a favorable result will be – and to date, have been – very high. *Id*. This further supports the ability of Class Counsel to negotiate a one-third contingency rate.

D. Class Counsel's request for reimbursement of expenses is fair and reasonable.

Class Counsel have requested that the Court also approve an award of $1,913,321.96 from the Settlement Funds to reimburse Class Counsel for litigation expenses incurred to date. Class Counsel, along with other associated firms operating under the direct supervision of Class Counsel, have incurred expenses in this combined amount (net of computer research costs)[9] in the prosecution of this matter as of the close of 2008. Levin Dec., ¶¶ 31-33, Ex. "D." Reimbursement of expenses from the Settlement Funds is contemplated by Class Counsel's

[8] In private litigation in which Cohen & Malad, LLP has been counsel of record, involving levels of recovery similar to those in this case to date, we have negotiated contingency agreements providing for fees in an amount greater than one-third. Levin Dec., ¶28.

[9] *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 409-10 (7th Cir. 2000).

agreements with the Plaintiffs, *Id.*, ¶ 33, and by the Settlement Agreements. American Settlement, ¶ 28; Shelby Settlement, ¶ 27; Prairie Settlement, ¶ 27.

As with attorneys' fees, the Seventh Circuit directs district courts to take a market-based approach when considering requests for reimbursement of litigation expenses. *Synthroid I*, 264 F.3d at 722. Both the amount of specific expenses incurred, and "the amount of itemization and detail required," should be assessed by reference to the private market. *Id*. *See also, Cont'l Ill. Sec. Litig.*, 962 F.2d at 570 (court should allow reimbursement of expenses at market rates). As set forth in the Levin Declaration, Class Counsel's request for reimbursement is based upon categories of expenses that are customarily charged to clients in the market for legal services, and are included in rates and amounts that are customary in the market. Levin Dec., ¶ 33 and Ex. "D." Moreover, these are expenses that are normally recovered from a settlement fund net of attorneys' fees, which is the arrangement set forth in Class Counsel's agreements with the Plaintiffs. Levin Dec., ¶ 33. Class Counsel's request for reimbursement of expenses is therefore reasonable and consistent with market rates and practices, and should be approved.

V. The Request for an Incentive Fee for the Named Plaintiffs is Fair and Reasonable.

Class Counsel's request that the Court award the named Plaintiffs $5,000 each as a class representative incentive fee is supported by the law and the circumstances of this case.

> Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit. In deciding whether such an award is warranted, relevant factors include the actions the plaintiff has taken to protect the interest of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.

Cook v. Niedart, 142 F.3d 1004, 1016 (7th Cir. 1998) (citations omitted) (affirming $25,000 incentive award to plaintiff). *See also, Lively v. Dynegy, Inc.*, 2008 WL 4657792 (S.D. Ill.) (awarding $10,000 to each of three plaintiffs); *Meyenburg v. Exxon Mobil Corp.*, 2006 WL

2191422 (S.D. Ill.) (awarding $3,000 incentive fee); *Morlan v. Universal Guar. Life Ins.*, 2003 WL 22764868 (S.D. Ill.) (awarding $25,000, $20,000, $20,000 and $5,000 respectively to class representatives); *Gaskill v. Gordon*, 942 F.Supp. 382 (N.D. Ill. 1996) (awarding $6,000 to each plaintiff); *Spicer v. Chicago Board Options Ex., Inc.*, 844 F.Supp. 1226 (N.D. Ill. 1993) (collecting cases awarding incentive fees ranging from $5,000 to $100,000; awarding $10,000 each to named plaintiffs).

As members of the proposed Plaintiff Class, the named Plaintiffs could have simply awaited the outcome of the litigation and received the same benefits as any other class member. Instead, they committed to participate actively in what promised to be a lengthy and hard fought lawsuit against their corporate suppliers on behalf of a large group of potential class members. From the beginning, the named Plaintiffs have been made aware that an incentive fee is not a foregone conclusion but was a possibility, and would be left to the Court's discretion. Levin Dec., ¶ 34. Now that a substantial interim recovery has been made for the Settlement Class, however, the Plaintiffs' valuable services and commitment to date should be recognized.

The named Plaintiffs in this case, Kort Builders, Inc., Dan Grote, Cherokee Development, Inc., Wininger/Stolberg Group, Inc., Marmax Construction, LLC, Boyle Construction Management, Inc., and T&R Contractor, Inc., have each made substantial contributions on behalf of Settlement Class members. Levin Dec., ¶ 34. Each Plaintiff, through one or more representatives, has participated in multiple in-person and telephone conferences, including extensive meetings to prepare discovery responses. Each Plaintiff, through one or more representatives, has prepared for and submitted to a deposition. Levin Dec., ¶ 35. Each Plaintiff has provided answers to interrogatories, has reviewed their current and archived records, has produced documents responsive to requests, and has allowed Class Counsel's consultants to

access their computer systems and servers and download data for production. *Id*. Some of the Plaintiffs have conferenced by phone with the Plaintiffs' expert, and at least two have appeared before the Court and the Magistrate during proceedings. *Id.* Each Plaintiff has provided invaluable assistance and demonstrated an ongoing commitment to protecting the interests of Class members. *Id*.

An incentive award is supported in this case by "the actions the plaintiff has taken to protect the interest of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Cook*, 142 F.3d at 1016. Class Counsel therefore respectfully requests that the Court award each Plaintiff an incentive award in the amount of $5,000.

V. Conclusion.

For the foregoing reasons, the Plaintiffs and Class Counsel respectfully request that the Court approve the distribution of the combined American, Shelby and Prairie Settlement Funds (the "Settlement Funds") as proposed herein.

Date: March 3, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2009, a copy of the foregoing document, 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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