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' REPLY IN SUPPORT OF 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 FEE

The Non-Settling Defendants (the IMI Defendants, Builders' Defendants and Beaver Defendants) have filed a Response to Plaintiffs' Motion for Approval of Proposed Plan of Distribution of Settlement Funds (Doc. No. 726) ("Response"). The Response is an unabashed yet clumsy attempt to delay the distribution of the Settlement Funds – particularly the payment of fees and reimbursement of Class Counsel's expenses – and to inject additional briefing on the unrelated issue of certification of a litigation class. The Court has already found, and Defendants have already conceded, that they have no standing to address these issues in the context of the Settlements. Nevertheless, in their effort to cause delay, the Non-Settling Defendants have inaccurately presented the law and the factual record supporting the proposal by Plaintiffs and Class Counsel for distribution of the Settlement Funds.

The Non-Settling Defendants Continue To Lack Standing

The Non-Settling Defendants do not have standing to oppose or otherwise influence the distribution of the Settlement Funds. In fact, on August 6, 2008, the IMI Defendants filed a Submission stating that "IMI Defendants do not have standing to object to the Court's approval

of the Prairie settlement class as such will have no effect on the pending issue" of certification of a litigation class.[1] This statement was expressly premised on the Court's Order of January 15, 2008 denying the Non-Settling Defendants' attempt to set aside the Court's preliminary approval of the American and Shelby Settlements.[2] That Order found that the certification of settlement classes would not influence the certification of a litigation class and that the Non-Settling Defendants had established no plain legal prejudice and therefore lacked standing to oppose the Settlements. *Id.*

It is therefore somewhat incredible that the Non-Settling Defendants would now file a ten-page brief – after three settlement classes have been certified and three settlements have been preliminarily and finally approved – objecting to the proposed administration of the Settlement Funds. It is even more incredible that the Non-Settling Defendants would purport to protect the interests of the Settlement Class. As the Seventh Circuit has recognized, permitting defendants to influence whether "'the representative parties will fairly and adequately protect the interests of the class,' … is a bit like permitting a fox, although with a pious countenance, to take charge of the chicken house." *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, U. A.*, 657 F.2d 890, 895 (7th Cir. 1981). Here, of course, the "foxes" are convicted felons, and the Class members their admitted victims, which would seem to heighten the apparent conflict of interest. For this reason alone the Response should be ignored.[3]

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[1] IMI Defendants' Submission With Regard to Plaintiffs' Settlement With Defendants Southfield Corporation f/k/a Prairie Material Sales, Inc. and Gary Matney (Doc. No. 649), p. 2.

[2] Order Denying Motions to Reconsider (Doc. No. 507).

[3] The Non-Settling Defendants have not even tried to pretend that they risk plain legal prejudice from the Court's approval of the proposed distribution, and therefore have no more standing than when they first tried to derail the settlement approval process more than a year ago. See, *Quad Graphics, Inc. v. Fass*, 724 F.2d 1230, 1233 (7th Cir.1983) (non-settling party must demonstrate plain legal prejudice in order to have standing to oppose a partial settlement); *Agretti v. ANR Freight System, Inc.*, 982 F.2d 242, 247 (7th Cir.1992) ("doctrine of plain legal prejudice does not depend upon whether the settlement involves a class action or simply ordinary litigation"); *In re Bromine Antitrust Litigation*, 203 F.R.D. 403, 406 fn. 6 (S.D. Ind. 2001) (applying *Quad Graphics* and *Agretti* to preclude

Even the supposed basis for the Response – that the Plaintiffs' Distribution Motion demands a response regarding class certification – is entirely specious. The Plaintiffs' Distribution Motion is decidedly *not* a "vehicle … to argue … class certification." Response, p. 1. The Court need only refer to the two sentences cited by the Non-Settling Defendants (one from a 26-page Memorandum, the other from a 16-page Declaration) to conclude that the Non-Settling Defendants are grossly overplaying their hand. Accordingly, the Court should disregard Non-Settling Defendants' gratuitous briefing in its entirety.

Non-Settling Defendants' Legal Arguments Are Meritless

Not only do the Non-Settling Defendants have no standing to raise objections to Class Counsel's fee request and request for reimbursement of expenses – unlike the thousands of Settlement Class members who received notice and did *not* object – they have made assertions to the Court concerning notice that are factually and legally incorrect. The Non-Settling Defendants' alleged concerns about notice and due process under Fed. R. Civ. P. 23(h) are incomplete and, more important, incorrect.

Prior to the final approval of each of the Settlements, a detailed notice was mailed to nearly 7,000 addresses identified for Settlement Class Members. The mailed notice set forth the following information regarding proposed attorneys' fees and expenses:

> [Settling Defendant] has agreed not to oppose a request for a payment of attorneys' fees by Class Counsel in the amount of 33 1/3 % of the Settlement Amount, and the reimbursement of reasonable expenses, to be paid from the Settlement Fund. The Court may be asked to approve the payment of attorneys' fees and expenses in this amount during the Fairness Hearing, and [Settling

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standing of non-settling defendants in antitrust settlement). See also, *In re Integra Realty Resources, Inc.*, 262 F.3d 1089, 1102-03 (10th Cir. 2001) (citing *Agretti* and denying non-settling defendants' standing to oppose partial settlement); *In re School Asbestos Litig.*, 921 F.2d 1330, 1332-33 (3d Cir. 1990); *Alumax Mill Prods, Inc. v. Congress Financial Corporation*, 912 F.2d 996, 1002 (8th Cir. 1990); *Waller v. Fin. Corp. of America*, 828 F.2d 579, 582-83 (9th Cir. 1987); *Bass v. Phoenix Seadrill/78, Ltd.*, 982 F.2d 1154, 1164-65 (C.A.Tex 1985); *Columbus Drywall & Insulation, Inc. v. Masco Corporation*, 2007 WL 2119022 (N.D. Ga. July 20, 2007).

> Defendant] will not oppose the request for approval. If the Court approves these fees and expenses, they will be paid from the Settlement Fund.

Shelby Settlement, Ex. "A," p. 7; American Settlement, Ex. "A," p. 7; Prairie Settlement, Ex. "A," p. 7. In addition, each of the mailed notices provided the following information concerning the use of settlement funds for the payment of expenses for pursuing this case against the Non-Settling Defendants:

> Under the Settlement, the Plaintiffs and Class Counsel may seek permission from the Court to receive payments from the Settlement Fund for distribution to Class members *or to reimburse Class Counsel for reasonable expenditures made or to be made by Class Counsel on behalf of Class Members to pursue the Lawsuit against the Defendants other than [Settling Defendant]*.

(Emphasis added.) Shelby Settlement, Ex. "A," p. 4; American Settlement, Ex. "A," p. 4; Prairie Settlement, Ex. "A," p. 4. All of the foregoing information was also included in a notice that, for each Settlement, was published twice in the *Indianapolis Star* (for a total of six published notices).

The mailed and published notices included the address of the Settlements' Internet site (www.concreteantitrustsettlement.com). Downloadable versions of the Settlement Agreements themselves, including the mailed and published notices, have been available on the Settlements' Internet site since January 29, 2008 – prior to the mailing and publication of any of the notices. A link to the Settlements' Internet site has been placed on the web site for the United States District Court for the Southern District of Indiana. An additional Internet page for the Settlements has been established on the Claims Administrator's Internet site (abdatalawserve.com), which also includes downloadable versions of the Settlement Agreements and notices.

Since March 3, 2009, the main page of the Settlements' Internet site has also reported that Plaintiffs and Class Counsel have filed the Distribution Motion and supporting materials.

The main page includes a direct link to the page hosting viewable or downloadable versions of the Motion, Memorandum, Levin Declaration and Exhibits, and the proposed Order. See, www.concreteantitrustsettlement.com/cdocs.aspx. Class Counsel have also provided copies of the Distribution Motion and supporting materials directly to Settlement Class members on request.

Although one would not know it from the Non-Settling Defendants' Response, courts have addressed the requirements of "reasonable" notice of an attorney fee request under Fed. R. Civ. P. 23(h). The common theme of these decisions is that the "reasonable" notice of an attorneys' fee request, as required by Rule 23(h), is easily satisfied by the type of notice program employed in this case.

For example, in *Wilson v. Airborne, Inc.*, 2008 WL 3854963, at *4-5 (C.D. Cal. Aug. 13, 2008), in which a settlement class member actually objected, the court found that a class settlement notice – including a detailed mailed notice and a summary publication notice – satisfied Rule 23(h) by stating that attorneys' fees in an amount "up to 25 percent of the proposed settlement fund" could be awarded by the court. *Id*. A similar conclusion was reached by the court in *Bessey v. Packerland Plainwell, Inc.*, 2007 WL 3173972, at *3 (W.D. Mich. Oct. 26, 2007), which held:

> Although no separate notice of class counsels' motion for attorney's fees was sent to class members, reasonable notice of the maximum amount counsel intended to seek was included in the Class Notice describing the settlement. Specifically, the Class Notice's language indicating that class counsel "will ask the Court for attorneys' fees plus reasonable out-of-pocket case costs and expenses costs up to 33 % of the settlement fund" provides a fair estimate of the amount counsel would seek, consistent with the requirement of Fed.R.Civ.P. 54(d)(2)(B). Class members were notified that they could object; none did. Under the circumstances, notice of the request for attorney's fees was provided to the class in a reasonable manner.

Id. (citation omitted). See also, *Stair v. Thomas & Cook*, 254 F.R.D. 191, 203 (D.N.J. 2008) (suggesting Rule 23(h) would be satisfied by certification notice that included "upper limit" of fees that class counsel intends to request in the future).

In *In re Bisys Securities Litigation*, 2007 WL 2049726, *1 (S.D. N.Y. July 16, 2007), a class member raised an objection to class counsel's fee request under Rule 23(h). Like the several notices issued in this case, the settlement notice in *Bisys* "did not specify the precise amount of attorneys' fees that lead counsel sought, but stated instead that counsel intended to "apply to the Court to award attorneys fees ... in an amount not greater than one-third (33%) of the settlement fund and for reimbursement of their expenses." *Id*. Also as in this case, "[t]he actual application for fees was not filed until after the deadline for objections had elapsed. As a result, no class member was on notice of the actual attorneys' fees requested at the time objections were due." *Id*. The court nonetheless found that Rule 23(h) was satisfied:

> [M]embers of the class were plainly on notice that the attorneys' fees might be as much as one-third of the fund and so had every reason to raise an objection if they thought this was excessive. While it might have been a better practice to provide them with more information relevant to evaluation of this request, not a single class member other than Zorn raised any objection-even though the class included numerous institutional investors who presumably had the means, the motive, and the sophistication to raise objections if they thought the one-third maximum fee was excessive, or short of that, if they thought the information given them as to the fees was inadequate. This in itself is a strong indication that the information about attorneys' fees was presented in a "reasonable manner." Nor is such a manner of notification unusual in this context. *See, e.g., In re Elec. Carbon Prods. Antitrust Litig.*, 447 F.Supp.2d 389, 411 (D.N.J. 2006); *Allapattah Servs. v. Exxon Corp.*, 454 F.Supp.2d 1185, 1194 (S.D.Fla. 2006); *Hicks v. Morgan Stanley & Co.*, 2005 U.S. Dist. LEXIS 24890, at *10; (S.D.N.Y. 2005). Overall, in the context of this case, the Court finds that there has been adequate compliance with Rule 23(h).

Id. See also, *In re Int'l Air Transport Surcharge Antitrust Litig.*, 2008 WL 4766824, at *3 (N.D.Cal. Oct. 31, 2008) (where attorneys' fees and costs sought by class counsel were not

included in settlement notice, because they were negotiated later, it was sufficient for purposes of Rule 23(h) to post notice of the fee and cost request on the settlement website).

For the reasons discussed above, the discussion of Rule 23(h) by the Non-Settling Defendants is legally and factually inaccurate. As suggested by the 2003 Advisory Committee Note to Rule 23(h), the settlement notices in this case – which were sent to Settlement Class members on three occasions and published a total of six times – provided Settlement Class members with the same attorneys' fees and expense information found to be reasonable by the courts in the cases discussed above. The Settlement notices outlined the upper range of fees to be requested by Class Counsel, stated that expenses of litigation would be requested, and confirmed that any award of fees or expenses would be paid from the Settlement Funds. Moreover, the Distribution Motion and supporting materials have been available for viewing and downloading on the Settlements' Internet site since they were filed, a factor found to be significant by some courts.

Following the mailing, publication and posting of notice of Class Counsel's intent to seek fees (in an amount up to 33.33%) and expenses from the Settlement Funds, not a single Settlement Class member has objected to the proposed fees – either formally in filings to the Court or informally in communications with Class Counsel. In fact, many Settlement Class members have been appreciative and complimentary to Class Counsel for their efforts to date, and given the economy are understandably anxious for a distribution to be made.

Finally, the Non-Settling Defendants' suggestion that there is a "colorable objection" to Class Counsel's request for the reimbursement of expenses incurred after the parties' execution of the Prairie Settlement, Response, p. 4, is wrong.[4] Most importantly, the mailed and published

[4] The Non-Settling Defendants may not like it that Settlement Funds will be used to advance the litigation against them, but this does not confer upon them standing to object to the proposed distribution. See, *In re Integra Realty*

notices clearly stated that, under the Settlements, Class Counsel could request a Court-approved distribution from the Settlement Funds for "reasonable expenditures made or to be made by Class Counsel on behalf of Class Members to pursue the Lawsuit against the Defendants other than [Settling Defendant]." Shelby Settlement, Ex. "A," p. 4; American Settlement, Ex. "A," p. 4; Prairie Settlement, Ex. "A," p. 4. In other words, the Settlements specifically provide that Settlement Funds can be used to prosecute the litigation against the Non-Settlement Defendants. No Settlement Class member objected to this provision.

As this Court has recognized, using settlement funds to further the litigation against non-settling defendants benefits class members. In *Bromine Antitrust Litigation*, 203 F.R.D. 403 (S.D. Ind. 2001), the Court considered preliminary approval of a settlement with some, but not all, of the defendants in a price-fixing case. In response to questions about the plaintiffs' intended distribution of the settlement funds, the Court reports that:

> [W]e were informed that it is quite possible that a large amount of the fund will in fact be used for litigation costs. However, members of the class against the Dead Sea Defendants are the same as members of the class against Great Lakes. *The settlement with the Dead Sea Defendants provides Plaintiffs with funding to pursue their perhaps more lucrative claims against Great Lakes, which is not an impermissible use of the settlement fund.* Furthermore, as noted in Paragraph D.4 of the Settlement Agreement, use of the fund to cover litigation costs must be approved by the Court.

Id. at 416 (emphasis added). The proposed litigation class sought by Plaintiffs in this case is also the same as each of the Settlement Classes. As in *Bromine*, use of a portion of the Settlement Funds (with the Court's approval) to defray the costs of continued litigation against the Non-Settling Defendants provides a direct benefit to the Settlement Classes. The "colorable objection" is therefore unsupported.

Resources, Inc., 262 F.3d 1089 (10th Cir. 2001) (non-settling defendant's lacked standing to object to proposed interim settlement distribution that would create "war chest" for plaintiffs).

Conclusion

The Court should disregard the Non-Settling Defendants' "Response" to the Distribution Motion. Aside from having no standing to file such a brief, the Non-Settling Defendants have inaccurately stated the facts and law supporting the Settlement distribution proposed by the Plaintiffs and Class Counsel. For the additional reasons set forth above, the Distribution Motion is sound and well-supported by the law and factual submissions, and should be approved.

Date: March 27, 2009

Respectfully submitted,

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I hereby certify that on March 27, 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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