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	) Indianapolis, Indiana **March 29th, 2010**) 10:00 a.m.

Before the Honorable

SARAH EVANS BARKER, JUDGE

OFFICIAL REPORTER'S TRANSCRIPT OF
FAIRNESS HEARING

Court Reporter: Laura Howie-Walters, CSR
Official Court Reporter
United States District Court
Room 217
46 East Ohio Street
Indianapolis, Indiana 46204

PROCEEDINGS TAKEN BY MACHINE SHORTHAND
TRANSCRIPT PRODUCED BY ECLIPSE NT COMPUTER-AIDED TRANSCRIPTION

A P P E A R A N C E S

For Plaintiffs: Irwin B. Levin, Esq.
Scott D. Gilchrist, Esq.
Richard E. Shevitz, Esq.
Eric S. Pavlack, Esq.
COHEN & MALAD LLP
1400 One Indiana Square
Indianapolis, IN 46204

For IMI Defendants: Thomas E. Mixdorf, Esq.
Abigail B. Cella, Esq.
ICE MILLER
One American Square
Box 82001
Indianapolis, Indiana 46282-0002

For Duke Objectors: David C. Campbell, Esq
Briana L. Kovac, Esq.
Kenneth J. Munson, Esq.
BINGHAM MCHALE LLP
2700 Market Tower
10 W. Market Street
Indianapolis, IN 46204-4900

For F.A. Wilhelm: William J. Hancock
HARRISON & MOBERLY
10 West Market Street
Suite 700
Indianapolis, IN 46204

For Builder's Concrete & Supply: Judy L. Woods
BOSE McKINNEY & EVANS, LLP
111 Monument Circle
Suite 2700
Indianapolis, IN 46204

For Wininger Stolberg: Frederick W. Schultz
GREENE & SCHULTZ
320 West 8th Street
Suite 100
Bloomington, IN 47404

For Marmax: Brad A. Catlin
PRICE WAICUKAUSKI & RILEY
301 Massachusetts Avenue
Indianapolis, IN 46204

(Open court.)

THE COURT: Good morning, all. Go Butler, right? Even you out-of-towners have to say "yes" to that question. Even if you have divided loyalties because of someplace you went to school or something, we don't want to hear about it today.

UNIDENTIFIED SPEAKER: (Inaudible).

THE COURT: I only care about this morning, though. You can say what you want to otherwise. Otherwise it starts looking like a First Amendment violation or something if I go beyond my territory here.

So nice to see you all this morning. You may be seated.

Miss Schneeman, call the matter on the Court's calendar, please.

(Call to order of the Court)

THE COURT: Just by way of sort of giving a running start to today's proceedings, I'll note for the record that on December 18th, 2009, the Court entered an order preliminarily approving the settlement and certifying the settlement class and directing that notice be sent in accordance with the procedures there.

That order contemplated that we would have the hearing that's now before the Court with respect to approving the preliminary settlement, and giving final approval to the

agreement or not, depending on whether or not all the conditions have been satisfied. So the issue of the final approval of the settlement agreement with Irving Materials, Inc. is the matter before the Court today. And there have been a couple of objections interposed, one by Mr. Williams of the plaintiff class, and one on behalf of Duke with respect to the attorneys' fees. Actually, Mr. Williams also has to do with the attorneys' fees and not to the other substance of the agreement as I read the objection.

In any event, I have reviewed the filings that you've made as you would expect me to have done. And, Mr. Levin, you may step to the podium and present whatever you would like to in supplementation of these filings so that the Court can make the necessary findings today.

Nice to see you, Mr. Levin.

MR. LEVIN: Thank you, Your Honor. As a former bailiff, you always have to take care of the court staff. I know that.

THE COURT: Exactly right.

MR. LEVIN: Your Honor --

THE COURT: You should speak at the bar admission ceremony the next time and say just that.

MR. LEVIN: Happy to do that.

Your Honor, may I introduce the class representatives who are here today?

THE COURT: Yes.

MR. LEVIN: With us today are Allen Galloway of Boyle Construction Management, Inc.

THE COURT: Mr. Galloway, good morning to you, sir.

MR. LEVIN: Marshall Fletcher from Marmax Construction.

THE COURT: Mr. Fletcher, good morning to you, sir.

MR. LEVIN: Justin Reynolds from Kort Builders.

THE COURT: Mr. Reynolds, nice to see you, sir.

MR. LEVIN: Robert Salazar from T & R Contractor.

THE COURT: Good morning, Mr. Salazar.

MR. LEVIN: And Tim Toth from Cherokee Development.

THE COURT: Good morning to you, Mr. Toth.

MR. LEVIN: Your Honor, I know that you've read the papers and your invitation to supplement the record is what I'll limit my remarks to.

The Court did give preliminary approval on December 18th. The notice has gone out as required. The CAFA notices went out.

THE COURT: The CAFA notices to the state and federal government?

MR. LEVIN: Correct, Your Honor. And no Attorney General has indicated any concerns whatsoever with regard to any of these settlements.

There are -- the notices have gone out. There have

been two responses as you noted. The first from Mr. Williams. I talked to Mr. Williams personally. We had a really very delightful conversation. I explained to him the proceedings. I explained to him his rights. I explained to him what his claim was and how much he was going to get back. And at that point, he seemed pleased, and then in typical Hoosier fashion said, "I'll believe it when I see the check." And we sort of had a laugh about that, and he promised to have a beer with me if he really got that check.

THE COURT: I hope you have to buy it, Mr. Levin. I don't want any more disputes.

MR. LEVIN: That's right. That's right, Your Honor.

So I did talk to Mr. Williams. I wanted to let the record reflect that we had a conversation.

THE COURT: Thank you. I'm glad that you did.

MR. LEVIN: Thank you.

Today we're here with regard to the fourth --

THE COURT: Let me just pause for a minute and ask Miss Schneeman to state officially for the record if you've had any notice officially or unofficially by phone calls or e-mails of any objectors to this settlement?

COURT CLERK: I have not, Your Honor. Nothing by e-mail or telephone. Just the base documents in CM/ECF.

THE COURT: Okay, thank you. Go ahead, sir.

MR. LEVIN: This is the fourth settlement as Your

Honor knows. There are three settlements that are also in the pipeline. There is final approval on the Hughey and Beaver settlement on May 17th, and I'm happy to tell Your Honor that we should be filing the settlement with Builders this week as well.

So when we finally get that completed, if the Court sees fit to approve all those settlements, we will have completed this litigation.

The settlements in this case, Your Honor, are literally of historic proportions. We did do the research and could not find another case in which there was an Indiana conspiracy, not just central Indiana, but anywhere in Indiana that was of the magnitude of this conspiracy or that resulted in the settlements which I'll talk about in just a minute.

More significantly, Your Honor, we have not found the case in the United States which has returned almost a hundred cents on the dollar to class members for overcharges after deduction of the requested attorney fees and expenses. We think the results in these cases are extraordinary, and we're proud to have been appointed by the Court and discharged our duty in that regard.

This case, Your Honor, was filed originally, you might remember, in June of 2005. We had investigated the case for many months prior to that time. And as we sit here today, we put a little chart together to discuss the settlements that

we've achieved in toto in the IMI settlement. The total class period sales were $680 million. Those were the sales of concrete in the defined class area.

THE COURT: By all defendants?

MR. LEVIN: By all defendants. Our expert's overcharge estimate was that the overcharge was 5.9 percent. Those damages, according to his estimate, would have been a total of $37.9 million.

When all the settlements are complete, the total amount that we will have recovered on behalf of the class is $59.143 million.

With regard to IMI specifically, IMI's total sales during the class period were $279.6 million. The damages using our expert's 5.9 percent figure would have resulted in damages of $15.6 million attributable solely to IMI. Of course, there's joint and several liability, but their portion would have been $15.6 million.

We present to you today for final approval, Your Honor, a settlement with IMI in the amount of $29 million, which represents 10.4 percent of their sales during the class period.

By any account, Your Honor, I think any reasonable person would consider that to be an extraordinary settlement. And, in fact, there has not been a single objection to the substance of the IMI settlement nor of any other settlement

that we have submitted to the Court.

I'd like to talk for just a minute about how we got to that settlement. The Court might remember that one of the first orders the Court issued was a verbal order, and it was in this courtroom. There were lots of lawyers here. And one of the first things the Court ordered was that IMI pay plaintiff's counsel reimbursement for the service fee because IMI had refused to sign the waiver of service.

Well, that was the tact that IMI took, and that sort of scorched-earth approach, within the rules -- don't misunderstand me -- within the rules was the approach that IMI took all the way through this litigation, as did several of the other defendants.

Your Honor, to achieve these settlements, we had to obtain data and documents. We literally received, reviewed and codified millions of documents and huge volumes of data.

This data, these documents, had to be organized, coded, and put into a database form that allowed us to do discovery, to do briefing, and if necessary, go to trial. Significantly, that data was crucial to our expert being able to come up with a $680 million number and the 5.9 percent data.

Absent the diligence it took to actually get that data, codify it and understand it, a far different result was probably likely.

The defendants, as you might imagine, resisted producing this documentation. We were required to do discovery just to really figure out what discovery we should do; that is, we had to take 30(b)6 depositions of all the defendants just to find out what their databases consisted of.

There was no agreement informally to provide us with that information or explain the systems, so we did it the hard way. And we went through and we deposed those people, and we determined with the assistance of experts what the data was and how we could get our hands around it.

And I might add that it wasn't just the work of the depositions. It wasn't just the hard work of the lawyers. It wasn't just the hard work of the experts, but the magistrate had an instrumental role in finally making sure that discovery dispute was resolved.

Now, in being able to achieve results like this that are on this chart, it required the plaintiffs to do an extensive amount of discovery. I just did a quick chart, Your Honor, of the depositions that were completed in this case. That deposition list, Your Honor, shows 42 depositions taken. Many of them were taken over multiple days. Fifteen of those depositions were taken of either IMI defendants or IMI experts.

The amount of preparation, the amount of document review, and the amount of time it took those depositions was

obviously substantial, but that's what it takes to get the kind of results that we proudly present to the Court today.

The Court is well aware of the extensive briefing that went on with regard to class certification, the challenges to the experts and so on and so forth. To say that this was an adversarial proceeding, Your Honor, is really an understatement. It was not until the --

THE COURT: It was adversarial with the Court at various points.

MR. LEVIN: It was.

Your Honor, it was not until the opening brief and our reply brief had been filed on the 23F petition by the defendants to appeal the class certification order that IMI indicated a willingness to engage in serious settlement negotiations. And again, that's their right. I don't suggest that there was anything improper about that, but it was the -- that was the status of the litigation.

Fortunately, we were able to come to a resolution after some rather difficult negotiations that took place over multiple days over the years of this litigation. Again, you've read the briefs. I'm not going to go through the General Electric factors, but I'd just like to sort of tie this up by saying that when the Court considers that IMI's settlement was actually 10.4 percent of its sales for the period, or almost double the expert's overcharge estimate, we

hope the Court will agree that this settlement, which was achieved against aggressive and very talented counsel, is not only fair, reasonable and adequate, but we would respectfully submit it's a home run, Your Honor. And we would ask that the Court approve the settlement as submitted.

THE COURT: And does the damage -- let me say it this way: Does the settlement amount that you've reached and the extent to which it exceeds the expert's estimate of damages reflect, in your judgment -- I'll ask the defendants this themselves -- but in your judgment, the apparent perceived exposure that they felt to treble damages?

MR. LEVIN: Your Honor, we -- I'm trying to think of an analogy, but suffice it to say that we pounded that pretty hard. And we explained to the defendants that -- at various times -- that we simply weren't going to go away for the 5.9 percent.

Some defendants had more money than others obviously, but the reflection, I think that that is an inescapable conclusion that one could draw.

THE COURT: Let me jump to the issue of attorneys' fees because it's been briefed, and you know that I'm going to hear from Mr. Campbell on behalf of the Duke objectors and I had some questions of my own in addition to the issues that they've raised.

MR. LEVIN: Your Honor --

THE COURT: Let me just ask those unless -- what, you want to make a --

MR. LEVIN: I have a presentation on fees. I didn't know if you wanted to do that separate or --

THE COURT: Go ahead and do it now so we can consider everything at once.

MR. LEVIN: Thank you, Your Honor.

Your Honor, the fees actually fall into two categories; the fee issue, which I'll probably just address right now, and then just talk about fees in general.

The first part is that there was a fee award that was aired by the Court, an extensive order after the first three settlements.

THE COURT: Yes, I remember that.

MR. LEVIN: Duke challenged it out of time. We agreed, subject to the Court's approval, to let them bring that just on the amount of the attorneys' fees, not on the extra issues and so forth.

THE COURT: That was your stipulation?

MR. LEVIN: Correct, Your Honor, and that's not appealable by either side. We agreed to whatever the Court would do.

Then Duke filed an objection which is really sort of a mirror image of the first objection with a little bit more thrown in. So I'd like to talk sort of generally about the

7th Circuit as opposed to going through everything that was in our brief.

The 7th Circuit is -- has taken, not surprisingly, given our knowledge of the 7th Circuit, a very, very technical, economical approach to fees. And their approach is what -- ex-ante, what would the plaintiff have been able to negotiate with a reasonable client at the beginning of the case, not later on. Okay?

So I think it's important, Your Honor, when you consider the fees to say "Okay, what would a reasonable lawyer have known when he was assessing the risk of this case, when he was assessing what would be a fair amount to charge in this case?" Well, the first thing a reasonable lawyer would know is that it would be financially impossible, frankly, for any given individual plaintiff to prosecute an antitrust action against these defendants. It had to be taken on a contingency basis.

A lawyer would also know that some of the defendants, but not all of the defendants, had entered guilty pleas, but that the guilty pleas that were entered were only to having conspired; that is, they got in a room and said, "Let's fix prices." Not a single defendant agreed -- first of all, later on we learned that even in the civil case not a single defendant would admit to that -- but not a single defendant agreed that they actually did fix prices, that they

actually did charge people in accordance with their agreement.

So the plea that had been entered by only some of the agreements only said, "Okay, yeah, we got in a room and we talked about it."

Now what else would a reasonable lawyer have known at the beginning of the case? It would have known that Prairie, which was the third biggest player in the market, not only was not charged and not convicted, but was considered by the Government to have been the white knight, to have been the whistle blower in the case. Without Prairie in the case, the damages were reduced by approximately 15 percent.

A plaintiff's lawyer going into the case would have known that some of the defendants had severe financial problems. A plaintiff in the case would have known that these defendants would have hired fine, aggressive law firms to represent their interests.

Another dynamic that we thought about and others thought about at the beginning of this case was the fact that if any of these people went to trial, as Beaver did, and a not guilty verdict had been rendered, that would change the dynamic of the case. We all know, as lawyers, that there's a difference in the word "approve" and so on and so forth, but it changes the dynamics of the case when one of the defendants is found by the jury to be not guilty.

A lawyer going into this case in assessing a fair

fee would know that proving damages in this case was going to be extremely difficult because not a single defendant said that a single price was raised as a result of their agreement. The defendants said that the conspiracy never worked and was limited to bid work, which is really a small portion of that $680 million.

The challenge for the plaintiff was to prove class-wide impact, which we did eventually through the use of their forms, of their price sheets.

A plaintiff's lawyer going into this would have known that the effort and cost of getting through class certification would require an enormous outlay of expense and an enormous outlay of time.

A reasonable lawyer going into this case, Your Honor, would know that this case would have to be the priority for their law firm for probably the next five years. That's the reality.

A lawyer going into negotiations with a real client knew that if the class was certified, that there would be a 23F appeal. That was probably a likelihood in a case like this, especially with the number of defendants. And if there was a survival of that appeal, and a trial was necessary, it would be expensive and it would be lengthy, and with a likely appeal.

So those are the factors, I think, that one has to

think about when you say "Well, what would a lawyer charge in the open market in a case like this?"

Now, the 7th Circuit is defiantly proud of the ex-ante approach to attorney fees. In referring to the approach that Duke has set forth in their papers, Your Honor, the 7th Circuit in Synthroid said -- I'm not reading a lot -- "The 'consider everything' approach lacks a benchmark. A list of factors without a rule of decision is just a chop salad." And then the Court went on to say this --

THE COURT: Not to be confused with chop liver.

MR. LEVIN: Absolutely. Actually I was thinking that sounds like something Your Honor might say.

THE COURT: I wish I were that good.

MR. LEVIN: The Court went on to say "Any method, other than looking to prevailing market rates, assures random and potentially perverse results."

So what was the market? What was the market? And the Court has to look at the evidence that's before it. In the affidavit which was -- which I submitted which the 7th Circuit has recognized as evidence on this issue, we submitted private contracts with our clients. And what do those client contracts provide? 33 1/3 percent.

Now, Duke doesn't submit any type of client contracts in contravention of that. That was what a client in the open market would pay. And I'm going to address that

again in just a minute, Your Honor.

THE COURT: What was the reality of that? I mean, that wasn't going to happen. They weren't going -- the individual plaintiffs weren't going to pay or be required by you to pay a third of their recovery if they didn't get class certification.

MR. LEVIN: No, Your Honor. I would respectfully disagree with that. If class certification had been denied, it would be likely that I would probably talk to or ethically solicit, to be quite frank, since we'd done all the other work, the other members of the class who were large purchasers and small purchasers alike, create a mass action, and would have negotiated the same 33 1/3 percent fee. That fee would not have changed.

THE COURT: Was that uniform provision in all of their contracts?

MR. LEVIN: All of the contracts that my firm signed up were 33 1/3.

THE COURT: Right.

MR. LEVIN: Yes.

Subject to --

THE COURT: Okay. When you say your firm, do you also mean Susman & Godfrey?

MR. LEVIN: Your Honor, I don't have Susman & Godfrey's form, so I can't answer that off the top of my head.

THE COURT: Okay.

MR. LEVIN: And I'll come back to that in a minute, I think, and show you something that might be quite persuasive on this.

The second thing is the opinions of experienced counsel. I provided an affidavit. Duke hasn't challenged my experience thankfully, and I've been doing this for a long time. And I submitted to the Court my opinions as to what a fair and reasonable fee was on an ex-ante basis.

In addition to that, the third thing we did was we submitted to the Court a survey article done in 2008 by Professor Landey. And in that article, we actually took his figures. And those figures showed this. He took 40 of the largest antitrust settlements, it was limited to antitrust. And in cases that settled for less than a hundred million dollars, of 16 cases --

THE COURT: I read this, Counsel.

MR. LEVIN: You did? Okay.

Now, I would distinguish this, however, Your Honor, from what Duke submitted from there because what Duke did was it looked at cases that were over $500 million, okay, which is not the market of case that we're talking about whatsoever.

So what was the marketplace in this locale? Well, the first issue, what's the marketplace in this locale, is a case that received some prominence in the press around here,

and that was the Indiana Construction Industry Trust case which was a liquidation.

The State of Indiana did an auction and they, in the real world, sat down with five law firms and said, "Okay, what will you do this case for?" And that was a complex case and involved 8,600, 8,700 Hoosiers who had their insurance taken away from them. And what did they do? They awarded a one-third fee after interviewing five different firms. And I know that because they awarded -- because they awarded that representation to my firm.

And the reward for that one-third fee was that we collected $24 million on an $18 million claim. So if we want to look at what the real world marketplace is, I can't think of a better place to look than what the State of Indiana negotiated and was approved by a liquidation judge as being a fair and appropriate fee.

Your Honor, with your permission, I would like to hand up a document. I don't know if you want me to mark this as an exhibit.

THE COURT: What is it?

MR. LEVIN: Your Honor, what this is is a fee agreement for a class action case between plaintiffs in a case against Coca-Cola regarding ammonia-tainted beverages.

Now, why is this significant? Your Honor, it's significant because the fee amount in this class action that

was negotiated with a client was 33 1/3 percent. But what's more significant --

THE COURT: Wait a minute, where was it filed and when?

MR. LEVIN: I'll be happy to tell you that. It was filed in Marion County, Indiana in State Court in 1998. But the significance of this 33 1/3 percent provision is that this is an agreement not just between my firm and the plaintiffs on behalf of the plaintiff class, but it was between, and I'll read the first paragraph, "This will confirm our understanding concerning this firm's proceeding jointly with Bingham Summers Welsh and Spilman for class action litigation against Coca Cola." And it goes on and on.

This is Duke's counsel's firm. Duke's counsel's firm entered into a market rate agreement. True, it was in 1998. And the agreement that they signed, and they were a party to this agreement, was for a third. And significantly -- and I don't have the documents for this -- they were also co-counsel in another case, a class action case where Judge Gerald Zore was the class representative plaintiff against Ford Motor Company. And Duke's counsel entered into a 33 1/3 percent fee agreement with Judge Zore who certainly can't be called unsophisticated.

So I think, Your Honor, that when we look at what was the marketplace in the locale where this action is taken,

both the actions in the ICIT case and Duke's counsel's own decision of what the marketplace rate could -- should be is quite persuasive. I mean, otherwise the argument is 33 1/3 percent is okay when I'm the lawyer, but it's not okay when somebody else is the lawyer.

THE COURT: Well, that might not be the only variable.

MR. LEVIN: Might not.

THE COURT: Right. Let me ask you this question.

MR. LEVIN: Sure.

THE COURT: Because we've been doing these settlements seriatim, and each time, plaintiff's counsel correctly, properly, seeks to have the Court approve the fees for each part of the settlement. Some were grouped, it's true, but what I'm wanting you to tell me is whether when all of these are added up at the end, and you do the simple math of one-third of the settlement amounts before costs, will all of them equal one-third of the total value of the settlements?

MR. LEVIN: Yes.

THE COURT: Okay. So the fact that it's happening intermittently and seriatim, as I said, doesn't change the fact that plaintiff's counsel's remuneration is still one-third?

MR. LEVIN: That is absolutely correct.

THE COURT: So jointly and severally, it's

one-third?

MR. LEVIN: Absolutely.

THE COURT: All right. Now, I have a related question and I don't think I have enough information, so maybe you have to give me some more information. But with respect to costs, and I understand that it's -- the way in which the agreements have been reached, that the costs are to be born by the plaintiffs -- by the defendants, the settling parties.

MR. LEVIN: Your Honor, I'm not sure I understand.

THE COURT: Well, out of the settlement costs, let me say --

MR. LEVIN: The class bears it.

THE COURT: Hang on just a minute. Let me struggle to say what I'm trying to say.

Out of the settlement amount that the class is going to get, costs have to be paid separately from the fees.

MR. LEVIN: Correct.

THE COURT: And that the clients bear the costs. They don't come out of the attorneys' fees.

MR. LEVIN: That's correct.

THE COURT: The lawyers are not absorbing the costs.

MR. LEVIN: That's correct.

THE COURT: That's the arrangement you've made.

MR. LEVIN: Correct.

THE COURT: So what information can you provide the

Court to assure me that you haven't double counted on costs so that somebody's deposition that was taken in one part of the action for which fees have already been and costs assessed, that you haven't charged it again to the IMI? That's -- I need to know that the half a million dollars of costs that you want IMI to pay as a part of the settlement are new costs related to the IMI litigation.

MR. LEVIN: Well --

THE COURT: Can you tell me that?

MR. LEVIN: Oh, yes, absolutely. Well, let me put it to you this way. The costs which are submitted, the roughly half million dollars, were the costs that were incurred subsequent to the last settlement.

At the first settlement, we submitted a chart that listed out all of our costs, okay? And it was two million plus, okay? And the Court looked at that and the Court approved that. None of those costs have been duplicated. Everything that was paid for was paid for and not included. That is all new costs that we've paid out of our pockets.

THE COURT: So that doesn't make complete sense. Maybe you did it that way, but let me ask: When you have justified the costs of this litigation based on the work that you've done and been required to do, some of it gets amortized over the whole class. So when you were going through the initial discovery to decide who should be in the class, when

you were doing the class certification briefing and litigation, that sort of thing, some of those costs have already been assigned to other defendants, haven't they?

MR. LEVIN: No, Your Honor. The way we did this, and this is a discussion that you and I actually had a long conversation about in Bromey. What we did was -- remember, there's joint and several liability. For example, when Duke made its claim in the settlement for the first three defendants, it didn't just get to make a claim against the sales of those three defendants. It made a claim for all the concrete it bought against everybody.

So it made a claim for the amount that it bought from IMI. What we did was those $2 million of costs were all the costs we incurred both for those settling defendants and to go get money against those other defendants. And it worked out that way.

So the costs haven't been apportioned by defendants. The costs have been apportioned by the case. Is that helpful?

THE COURT: Yes, but let me ask you mechanically, you've got a ledger, and you've itemized all your costs and you've done simple math to assign those costs to each of the settling defendants; is that true?

MR. LEVIN: No.

THE COURT: Okay. So explain it.

MR. LEVIN: Okay, here's what we did. I'm not even

smart enough to do that. I had to do it a simpler way and that was --

THE COURT: Yeah, right.

MR. LEVIN: -- when I settled with the first three defendants, and I'm getting ready to gear up and get more money against the other defendants, I went to Your Honor and I said, "Your Honor, here are all costs I have in this case. It doesn't matter" --

THE COURT: So far.

MR. LEVIN: So far. "We'd like to be reimbursed." And the Court -- and I explained to the Court "We're going forward against these other guys, we've got expensive experts, we've born all the costs. We would like from the first settlement reimbursement of all of our costs to date." And the Court said, "Fine." And we obviously haven't been paid that because there's been an objection, but the Court said, "Fine."

From that point on, we incurred other costs. Most of those costs, I will tell you, had to do with experts and preparation for the mediation which we successfully did with IMI. That's what the majority of the $500,000 is.

Those expenses were incurred since the last settlement. They are not attributable to any one defendant. They are attributable to the case. Fortunately, since we have the advantage of looking backwards, it really -- I would

respectfully submit it's a moot point because we now have settlements with all of the defendants.

THE COURT: That's what I was going to ask next. So your trailing settlers --

MR. LEVIN: Yes?

THE COURT: -- do they get assessed costs as well?

MR. LEVIN: Well, no defendant got assessed costs. Let me explain it this way: When I settled with the first three guys for $24 million, there was no assessment of costs. They just paid $24 million. Then the Court had to award fees and costs. The costs and the reason the Court had to look at the costs was because it actually comes out of the recovery that comes to class members.

THE COURT: Exactly.

MR. LEVIN: And the beauty of this case is that one, the Court has to look at the costs, of course, to make sure they're reasonable, and that even after paying those costs, as I'll explain in a minute, the class members are still going to get at or above.

THE COURT: I know that. I'm not asking about that. I'm asking about the process by which the costs are calculated and assessed. And it stems from the fact that we've been doing settlements seriatim.

MR. LEVIN: Actually, it wouldn't make a difference, and let me explain why.

THE COURT: Yes, that's what I need help understanding.

MR. LEVIN: Okay. This case, it's particularly focused in this point, in this case, because all of the defendants are jointly and severally liable. That makes it easier in this case; arguably, in one case, you could have some costs against one defendant and some costs against another defendant.

But when I took a deposition against Builders --

THE COURT: That's the assumption of my question because we haven't entered into the settlements on that basis. When I approved the prior costs --

MR. LEVIN: Reimbursement?

THE COURT: Reimbursement -- we didn't know what the costs were going to be for IMI, right?

MR. LEVIN: We don't know the costs as -- it would be very difficult and require a really sophisticated accountant to try to break down the costs by defendant. Defendants don't pay costs. They just pay a gross amount.

THE COURT: Right.

MR. LEVIN: So if I wanted, from an accounting standpoint, to say what is Builders portion of the costs and what is IMI's portion of the costs and so on and so forth, reasonable accountants would probably disagree because although I took Builders' deposition --

THE COURT: So what does $500,000 represent in this settlement?

MR. LEVIN: It represents the gross amount of expenses which counsel have expended to prosecute the litigation since the last fee award.

THE COURT: For everybody?

MR. LEVIN: For everybody who's left.

THE COURT: Everybody? What does that mean? Everybody whose left before IMI or after IMI or what?

MR. LEVIN: No, I'm sorry. I mean the people who have already settled. I didn't do any more discovery or work against them. So there isn't any -- I can't think -- well, actually that's not quite true because when the experts do work, they have to do work on the $680 million figure.

So that $500,000 represents in large part the expert work which was done to be able to convince IMI and the other defendants to pay the money that they agreed to pay.

THE COURT: So is the amount of costs that's been incurred today, without regard to how it's being paid, if you're just running the tally, is it the 500,000 plus whatever the prior figure was that represents the law firm's investment in depositions and exhibit copying and all of that?

MR. LEVIN: Yes.

THE COURT: Okay.

MR. LEVIN: The total amount of expense, there is no

double dipping.

THE COURT: Okay. Well, that's what I'm trying to figure out because, of course, that would be wrong.

MR. LEVIN: That would be wrong. Not only wrong, that would be something you could lose your license over.

THE COURT: Right, and the Court would be well moved to impose sanctions.

MR. LEVIN: And I would agree with that.

THE COURT: So that's why I'm asking, in an effort to get clarity and to make sure you're not -- you, the law firms, the plaintiff's lawyers, are not making money through the back door. That would be unfairly awarded given the amount of attorneys' fees, et cetera.

MR. LEVIN: Your Honor, let me put it this way. Expert A gave an opinion and charged us a hundred dollars, and that was before the settlement, the first settlement, okay? And maybe that hundred dollars had to do with those three, and maybe it really only had to do with one of them, and maybe it had to do with IMI, too.

When we went to the first settlement, we asked for that hundred dollars back that we paid. Today, since that first settlement with the first three settling defendants, Expert A may have charged us another hundred dollars for doing more work getting ready for the mediation.

THE COURT: A day an expert charges you only a

hundred dollars, I want to be around.

MR. LEVIN: It was a pretty silly example, but it was one I could at least get my hands around. So I want to assure the Court that there is absolutely no double dipping whatsoever in either --

THE COURT: But the Court can reasonably assume that there will be additional costs with respect to the remaining settlements; is that right?

MR. LEVIN: I would say the additional costs will be very minor because there won't be any more expert reports. There will be some notice costs. It will be very minor.

THE COURT: Okay. Anything else?

MR. LEVIN: I do have some more comments if the Court would like to -- or if I've answered all the Court's questions, I'll get out of your way.

THE COURT: Well, let me just see -- I assume your comments have to do with the things that have been written in Duke's motion and so forth?

MR. LEVIN: Yeah. Your Honor, could I just address one more thing and then I'll sit down? And I appreciate your patience with me.

THE COURT: Yes.

MR. LEVIN: The one thing, and I'll respond to Mr. Campbell after he makes his argument, but the one thing about those papers that I found really troubling --

THE COURT: Those papers being?

MR. LEVIN: Mr. Campbell's papers -- was a suggestion that there was something wrong with this fee under Rule 1.5 of the Rules of Professional Responsibility.

And I looked at that very carefully, and there's a laundry list of the things that the Court looks at. Like, is it a contingent case? Who are the lawyers? Are they experienced? Are they able to charge a higher fee? Is it an easy case? Tough case? What kind of skill's required?

But again, I keep coming back to this even though it does not matter under the 7th Circuit ex-ante approach, but under the ethical approach, what was the amount involved and what were the results obtained.

And I think, Your Honor, that even if you use that approach that Duke espouses, there can be no other explanation, there can be no question that the fee which is -- which has been awarded by this Court and which we are respectfully requesting, is not fair, reasonable and adequate.

Thank you, Your Honor.

THE COURT: Thank you, Counsel.

Let me recognize you next, Mr. Mixdorf, and you may place before the Court whatever considerations you'd like to bring to my attention.

MR. MIXDORF: Thank you, Your Honor.

THE COURT: Nice to see you, sir.

MR. MIXDORF: Nice to see you, ma'am. It's been a while.

For the record, my name is Tom Mixdorf. I'm here on behalf of the IMI defendants, which is Irving Materials, Fred Irving, Price Irving, Dan Butler and John Huggins, who just recently passed away within the last couple of months.

With me is Abby Cella who worked very hard on this case --

THE COURT: Nice to see you.

MR. MIXDORF: -- and came over to get a little closure.

We also ask that the Court approve the settlement. We have nothing to say about the attorneys' fees issues although we've agreed in our settlement documents that 33 percent is right.

THE COURT: 33 1/3?

MR. MIXDORF: 33 1/3. It's a good settlement. IMI believes it would ultimately prevail on the economic issues in this case. We think that ultimately when the Court heard plaintiffs' damages expert, it would say "Well, that isn't quite Dr. Buyer's promise that he said he could figure this out, but litigation has risks, and IMI is the strongest of the defendants, and it has a target. And it's not only what Your Honor pointed out in terms of treble damages that IMI had to think about, but also joint and several liability.

This litigation, this economy, as the Court has seen in other settlements, has caused hardship for a number of the producers. IMI's been fortunate. IMI is a good business. It's run very strongly. It's been able to weather this storm much better than others.

So that way -- the prospect that IMI faced was not only paying for its overcharge that plaintiff's expert had testified about, but everyone else's. And that's what entered into IMI's thinking.

THE COURT: You, on behalf of your client, went through pretty extensive negotiations and mediations in part before the magistrate judge whose efforts I know were substantial, but also from -- also with an independent mediator, Mr. Green; is that right?

MR. MIXDORF: Yes, Your Honor.

THE COURT: And you kept your client apprised of all of that. I assume the client was with you through all of that?

MR. MIXDORF: Yes, they -- the fourth factor is that they got tired of talking to us.

THE COURT: Probably. So I put those matters out on the record, and inquire of you because I am asking for the assurance and hoping that you can give it, either directly or indirectly, that by participating in this protracted process, you've been able to bring them along with you and have their

judgments as part of the process as to what a reasonable settlement is, and what the risks are that they would be assuming if they didn't settle, and what the advantages of closure in the form of a settlement are.

Is that true, sir?

MR. MIXDORF: Yes, Your Honor.

THE COURT: Is IMI prepared to make the financial commitment that's implicit in this agreement and make the payments within the time specified?

MR. MIXDORF: Yes. In fact, Your Honor, I think it's a one lump sum payment. It's this Thursday. And as far as I know, we're on track to make that payment into the bank account of the class.

THE COURT: There's a provision in the tendered order that if not by Thursday, then by some next date which I've forgotten, but it's pretty quick. So if there's slippage by Thursday, it's got to be only technical slippage because of the order that I'll issue that says if not Thursday, then soon thereafter.

And the plaintiffs, of course, are entitled to get the benefit of their bargain. So I just wanted to make sure that IMI has the capacity to make the payments that it's promised to make.

MR. MIXDORF: I think we've worked through the logistics. I'm not qualified to be able to do that myself but

I take people's words for it.

THE COURT: But you represent, as an officer of the court, that your client's ready, willing and able to do that?

MR. MIXDORF: Yes. We've had good cooperation with the class attorneys on getting those details worked out.

THE COURT: Well, settlements don't happen if only one party's working on it. So I commend your efforts as well, Mr. Mixdorf and Miss Cella for leading your client to a point where they can have a hand in resolving their own litigation without requiring either the court or a jury to make those determinations.

I don't have to give you a speech on the value of settlements, but I know that sometimes lawyers, and especially the good lawyers, have to work hard to make it clear that almost always a settlement is worth the efforts to negotiate something that's fair, and to sort of end the process of dispute so you can go on and run your business and do the things that you want to do as clients who run IMI, and are able to do best. I mean, I would say IMI's better at manufacturing and supplying concrete in the marketplace than it is in litigating. Just taking notice from over here, so --

MR. MIXDORF: Thank you, Your Honor.

THE COURT: So our compliments to you, Mr. Mixdorf, for your efforts, and our thanks as well.

MR. MIXDORF: Thank you, Your Honor.

THE COURT: Mr. Campbell, I want to hear from you now on behalf of Duke with respect to the objection that's been interposed to the attorneys' fees issues. Nice to see you, sir.

MR. CAMPBELL: Good morning. Thank you for giving us the opportunity to comment. I do want to distinguish myself from Mr. Williams in one small respect, and that is that Mr. Levin has not offered to buy me a beer, but maybe we can do that at some point.

THE COURT: You wouldn't settle for a beer. I think he knew that. You wanted a mixed drink of greater cost is what I heard.

MR. LEVIN: Probably premium, too.

THE COURT: Imported.

MR. CAMPBELL: The charge to the Court or at this point, you know, under Rule 23 is, of course, class counsel's entitled to a reasonable fee. And the question becomes, you know, what is a reasonable fee?

Rule 23 allows class members to object to a fee, which is what Duke has done. And at that point, because of the inherent conflict that class counsel has with the class over the fee issue, then the Court acts as a fiduciary on behalf of the class members.

I think it's important in reviewing the papers that have been filed with the Court that it is class counsel's

burden to establish the fee to which they're entitled. That burden does not fall on the class members.

Now, we agree with class counsel that the 7th Circuit uses a market-based approach. There are several factors that the 7th Circuit looks at in considering a market-based approach. And in the Synthroid marketing litigation, it talked about the risk of nonpayment. It discussed the quality of performance, the amount of work necessary to achieve the result, and the stakes of the case. Those are factors which we think the Court ought to consider here.

THE COURT: What do you think the fee should have been?

MR. CAMPBELL: I think the fee should have been something along the lines of what the federal judicial center study was, a range between 5 percent and 22 and a half percent.

Now, I know that's a wide range, but when you look at those ranges, and you look at also what the option results are, which is a more stair-stepped approach, which I think would work very well in this case, then I think the total fee should be in the area of 5 and 25 and 22 and a half percent.

THE COURT: Is it because Duke believes that they should get more than the amount of the settlement that they are going to get by virtue of the damage estimate, because

plaintiffs have represented that it's almost a hundred percent of the actual overcharges?

MR. CAMPBELL: Virtually -- I think they used the word "virtually" all of the overcharges. We don't know that because we're not privy to the expert reports. Those are covered by protective order.

THE COURT: Did you seek to have it lifted for you to review?

MR. CAMPBELL: We have not discussed that.

In addition, as the Court pointed out, under the antitrust laws, the defendant -- the injured party is also entitled to treble damages, plus interest; and in a case where the defendants plead guilty, that would seem to be a case ripe for a treble damage award.

In addition to that --

THE COURT: So the answer to my question is yes, that Duke seeks to have more of the pot?

MR. CAMPBELL: Yes, provided, though, that counsel gets a reasonable fee.

THE COURT: Okay. How about costs? Do you want them to be able to assess their costs?

MR. CAMPBELL: They should be entitled to assess their costs. We think those costs ought to be assessed as part of the award, not in addition to the award.

THE COURT: Why?

MR. CAMPBELL: Because the representation we believe at the time was that those costs would be included as part of the fee.

THE COURT: The representation to whom?

MR. CAMPBELL: I think we discussed that in our first brief, that the -- I think the Indiana --

THE COURT: In the contracts?

MR. CAMPBELL: Not in the contract. I think under the Indiana Rules of Professional Conduct, those costs are to come out of the fee as --

THE COURT: I thought you said that that was part of the agreement initially?

MR. CAMPBELL: No, I misspoke.

THE COURT: So you believe a proper interpretation of Rule 1.5 of the Professional Responsibility requires it?

MR. CAMPBELL: Suggests that those costs come out of, not in addition, to the fee unless it is clearly set out. And I don't know that it was -- I don't believe that it was clearly set out in the -- at least in the first notice that was given.

THE COURT: You don't know -- I mean, I'm just trying to figure out what your point is here. Are you unsure about that or are you saying that it wasn't --

MR. CAMPBELL: I think the notice said a request would be made for 33 1/3 percent. I don't believe in the

first notice -- I'd have to go back and look at that --

THE COURT: But every time it was said, my impression is it was attorneys' fees at 33 1/3 percent and costs -- not including costs. Now, do you have a different --

MR. CAMPBELL: I would have to go back and look at the notice to be sure.

THE COURT: Okay, but basically your position on behalf of Duke is that 33 1/3 is too much?

MR. CAMPBELL: Yes.

THE COURT: And your lesser concern is with respect to costs?

MR. CAMPBELL: I have no reason to question that the costs were not appropriate or were not incurred.

THE COURT: Okay. Anything else you want to say, sir?

MR. CAMPBELL: Yes, a couple of things.

THE COURT: Yes.

MR. CAMPBELL: One is there has been some criticism of our papers because of our reference to the Load Star. The plaintiffs, or class counsel, has referred to using a benchmark. And when he talked about chop salad, or whatever it was, their work papers referenced that there ought to be a benchmark.

It's our judgment that that benchmark ought to be the Load Star. In other words, compare what the 33 and one

third is to what was actually incurred to see if that is a reasonable reflection --

THE COURT: That's not what that case says, though. I don't think that's what Judge Easterbrook wrote in that opinion. I think he was saying that the ex-ante approach is the means by which you get a benchmark, that you look at the economics of it. What does a lawyer know coming into a litigation when the fee structure is set? What are the risks and the expectations and the amount of work that's going to be required to get a result. I believe that's what that case says.

And I'd be very surprised if the 7th Circuit is adopting a 9th Circuit approach to much of anything.

MR. CAMPBELL: Well, our point being that there ought to be a way to measure whether that 33 1/3 percent is reasonable. And by reviewing the Load Star, that is a way to do it.

And the class counsel in their first fee award actually told the Court the amount of hours and time that had been incurred, and did make the comparison by talking about a 1.1 multiplier.

THE COURT: But didn't you object to that?

MR. CAMPBELL: We did object to that award.

THE COURT: So, I mean, even when they put that in there, it didn't pass muster with you, with -- I mean you,

Mr. Campbell --

MR. CAMPBELL: I understand, but when you bring that forward to today, it makes it even more imperative. And the reason I think for that, Your Honor, and you mentioned these series of settlements, is that when the Prairie Materials matter was resolved and a fee request was made for 33 1/3 percent, which is approximately $8 million, there was a representation that that constituted a market rate fee for the work that had been performed.

Now, that settlement occurred about a year ago. In the interim year, not nearly as much work has occurred based upon what we can tell from the papers and the docket. Yet class counsel comes back and says "Well, we've -- we were compensated by the Prairie Materials request and now we want another $10 million approximately on top of that" really for work for which they have said they have already been or already will be compensated.

THE COURT: I don't think that's what Mr. Levin explained to the court when I asked those questions. Those were some of my questions, but his response was that if we had grouped all these settlements, and done them all in a fell swoop, there's one settlement hearing instead of, as I've been saying, seriatim -- it makes me feel so important to say it in Latin -- but if we had done it in one all tied up sort of ball of wax, it would still be one third.

MR. CAMPBELL: That's not what happened here. And in addition, during the class counsel's selection process, class counsel said they were prepared to litigate the case with no prearranged fee agreement, and to allow the Court to determine an appropriate award of attorneys' fees based upon the outcome achieved.

Our point is when you look back at -- their risk was reduced substantially by the Prairie Material's settlement, and by the $8 million fee that they requested. There was very little risk going forward at that point.

THE COURT: It may have been reduced substantially, but it wasn't erased, was it? There was still substantial risks.

MR. CAMPBELL: There was still a risk perhaps as to how much they would get; but at that point, they still had the major defendant who had pled guilty. They had other defendants who had agreed to participate in a leniency program. All of the time that they talked about that had been incurred in reviewing documents and taking depositions, the vast majority of that time was already covered by the settlement in the Prairie Materials case. So the risk at that point was substantially reduced and the risk of going forward actually moved to the class members.

THE COURT: I don't know what a term like "vast majority" means, Mr. Campbell. What does that mean?

MR. CAMPBELL: It means the predominant amount of work that had been done on the case --

THE COURT: What does "predominant" mean?

MR. CAMPBELL: Most. All.

THE COURT: Have you done the calculation?

MR. CAMPBELL: I've not done the -- no, I'm talking about when you look at the docket sheet, Judge, and when you look at the comparison of the two fee requests, we don't have access to the time records, but when you look to the comparison of the fee requests, it is apparent, and I can't put an exact percentage on it because I don't know, but it is apparent that 80 to 90 percent of the work that had been done on this case with respect to both liability and damages and expert reports had been accomplished at the time of the Prarie Material's settlement, and were included as part of the Prairie Material's fee request.

If you look at the docket sheet about what occurred in this case between the date that that fee request was made and the date of class certification in September, it appears that most of what was filed on the docket related to class counsel's request for fees and Duke's objection.

So I'm going based on a comparison of the fee request, a comparison of the class counsel's affidavits, and an examination of the docket sheet to say that the work -- key work was done at or about or before the Prairie Material's

settlement.

THE COURT: But you're not addressing my hypothetical, and that is, that we grouped all the settlements together and counsel went around, like plaintiff's counsel, went around like they've done and hammered out a settlement with each of the defendants and come up with an overall settlement amount based on the risk that each assumed, and the settlement amount each was willing to pay, and we just added them up and divided by a third, that it would be the same as what's being asked for each time in these settlement requests.

So the fact that there was a settlement involving the first three defendants of a lesser amount because IMI was the bigger player, that if you applied your rationale, then they'd only be entitled to one third of the lesser settlement amount because those three defendants were in the door first.

And therefore, there would be no basis for including, as part of the overall risk and part of the overall preparation for the entire lawsuit, what happened with respect to the IMI settlement that was hammered out later on. So I don't see the fairness of that or the reasonableness of that.

MR. CAMPBELL: One of the points we made in our papers, Your Honor, was to talk about auction cases and how those are stair-stepped. They're stair-stepped, I think --

THE COURT: But we didn't go through that process. I mean you raise it as a comparator to the Court --

MR. CAMPBELL: Yes.

THE COURT: -- but we don't have an exact match for that because we didn't go through an auction process. So we have to take the facts that we have of this case and that is, at the beginning, the lawyer was assessing the risk that he thought they were going to assume -- I should say the lawyers because there were two firms and lots of lawyers -- and determine whether that 33 1/3 percent is reasonable.

So there are other ways they could have done it. That's true. There are other ways it could have been processed through the Court. That's true. But it's not the Court's prerogative to say that they should have done it another way. The Court's obligation is to decide whether having done it this way, it generates a reasonable fee. So --

MR. CAMPBELL: I would go back just to point out that during the class counsel selection process, class counsel represented there was no prearranged fee agreement, and that the fee ought to be determined, and these are their words "Based upon the outcome achieved under this direction."

THE COURT: Well, isn't that what we're doing? Isn't that what I'm supposed to be doing today? They are submitting all of this.

MR. CAMPBELL: Right.

THE COURT: They have an agreement with their clients that they think reflects the overall settlement, but

the Court still has to make a decision. And I understood that provision to be we didn't ask for a sum certain, we're not betting on the come, we're assessing the risks and assuming the risks, and we'll ask the Court in the final approval of the settlement to make arrangements for a reasonable fee.

So, isn't that what's happening?

MR. CAMPBELL: I think that's why we're having this conversation.

THE COURT: So I don't think they made some admission that they're bound by early on in the case that's not being followed here, that they're in violation of.

MR. CAMPBELL: No, I --

THE COURT: So what's the relevance of your citing that to me, in other words?

MR. CAMPBELL: The relevance is it goes back to this "Well, we entered into a one-third fee agreement with certain clients at the beginning of the case," or comments "Well, this is what we entered into at that time."

And we're just pointing out that that is -- that that comment is inconsistent with what was said during the class counsel's selection process. I don't think it's inconsistent with the process we're going through right now.

THE COURT: Well, first of all, what I understood Mr. Levin to say that he entered into those individual agreements with individual plaintiffs, some or all, I don't

remember which, but an appropriate number, a significant number; that that arrangement was going to come into play only if there was not class certification.

MR. CAMPBELL: Okay, that's fine.

THE COURT: And there was class certification.

MR. CAMPBELL: Correct.

THE COURT: And with respect to the class action, there was no prearranged agreement.

MR. CAMPBELL: Correct.

THE COURT: Okay. And now having done the work and reached these settlements, they're coming in to say that they seek a one-third attorney's fee as award. That's how I understand it.

MR. CAMPBELL: I think I agree with that, Judge.

THE COURT: Okay. Thank you, Mr. Campbell. Go ahead, did you -- I didn't want to cut you off if you had something else you wanted to bring to my attention.

MR. CAMPBELL: No, I believe we discussed it. We wanted the opportunity to comment on the use of the Load Star, the insuratum (phonetic), if I pronounced that correctly.

THE COURT: Seriatim.

MR. CAMPBELL: Seriatim settlements, and how that affected the risk, and the fact that there hasn't been any hourly information given to us over the -- ever since the first settlement motion.

THE COURT: Okay, Duke's not objecting to the settlement; is that correct?

MR. CAMPBELL: It is not, Judge. It's objecting to the fee request.

THE COURT: Okay. Very good. Thank you, Mr. Campbell. Good to see you today.

MR. CAMPBELL: Thank you.

THE COURT: Mr. Levin, do you want to respond to that?

MR. LEVIN: No, Your Honor.

THE COURT: Okay. Let me ask Ms. Woods back there, do you have anything you want to say on behalf of Builders today?

MS. WOODS: No, Your Honor.

THE COURT: Mr. Hancock, anything on behalf of Wilhelm?

MR. HANCOCK: Very briefly, Your Honor.

COURT REPORTER: Could you come forward?

THE COURT: Either you have to shout or you have to come forward.

MR. HANCOCK: I'll do both. I'll come here.

THE COURT: Okay.

MR. HANCOCK: For the record, with the Court's indulgence, I'm from Harrison & Moberly. We are devout supporters and season ticket holders of Butler basketball.

THE COURT: Oh, that's good. You said the right thing there, sir.

MR. HANCOCK: Mr. Levin came and introduced himself to me again this morning. He has not offered me a drink. I drink cabernet.

THE COURT: Do you want me to get him to make a judicial admission?

MR. HANCOCK: Yes, here and now.

In any event, I represent Wilhelm. We're one of the largest claimants. Don't hold Mr. Levin to it, but I think we're about three percent of the ultimate distribution pot to the claimants. So I did not take any position on the record to this point relative to fees. We're certainly not objecting to anything in particular in the settlement. I got into this case late. Wilhelm had sort of managed it on their own.

I was interested curiously as to what the effect of the hourly rates will be, and Mr. Campbell sort of drifted that direction. And I listened, I think, carefully to both sides. That was the one question I was hoping would be asked and answered.

But in the end, we agreed that the Court is in a fiduciary role on behalf of the class members, and we trust the Court's wisdom and justice and experience in reaching a determination on the fee.

THE COURT: Okay, thank you, sir.

MR. HANCOCK: Thank you.

THE COURT: Nice to have you in court, Mr. Hancock.

MR. HANCOCK: Thank you very much.

THE COURT: Mr. Schultz, anything for Wininger and Stolberg Defendants?

MR. SCHULTZ: Your Honor, I'm a Butler graduate.

THE COURT: Oh, good.

MR. SCHULTZ: The only thing I would ask the Court is I'm going to be spending this coming weekend with my mother-in-law instead of the Final Four. If you could help me with that --

THE COURT: Just anything I can do, I'd be happy to do. A court order? A jury summons? What would you like?

MR. SCHULTZ: Something.

THE COURT: A motion for continuance that your mother-in-law will recognize?

MR. SCHULTZ: That would be great.

No, Your Honor, we are proud representatives of this class, and very proud of the work that's been done. We think that counsel has done a fabulous job. We ask for the Court's approval.

THE COURT: All right. I hope wherever you're going, Mr. Schultz, that there's television available to you. There are some parts of Arkansas where it's not available I'm told.

MR. SCHULTZ: I'll ask my mother-in-law.

THE COURT: Yes, call and make sure that's a condition precedent to your visit --

MR. SCHULTZ: Thank you.

THE COURT: -- but don't tell her I suggested it.

Mr. Catlin? Is it Catin?

MR. CATLIN: Catlin.

THE COURT: Catlin? Yes, on behalf of Max Howard and Marmax?

MR. CATLIN: Nothing.

THE COURT: Okay, thank you.

I believe I've recognized all the lawyers present. I wanted to check with the people who came in after we got started to see if you're needing to be recognized in any way back there, sir.

UNIDENTIFIED SPEAKER: No.

THE COURT: Okay, very good.

Let me proceed with some findings. I've been helped by the colloquy today, as I always am when the lawyers come to respond to the Court's specific interests and concerns. And as I indicated earlier, I hope it almost goes without saying, of course, I've reviewed your submissions. So I think I'm prepared now to make the required findings to allow the case to move ahead and the settlement to be effectuated.

So as my first declaration, I find that the

settlement, as has been reached, the agreement struck between the plaintiffs and the IMI defendants is fair, reasonable and adequate. And the preliminary finding is now turned into a final determination to that effect, and is finally approved.

In addition, I hereby confirm the certification of the IMI settlement class under Rule 23 standards, and declare that it was and is and continues to be correct as a matter of law and as supported by the pleadings.

The settlement is fair, reasonable and adequate under the standards that are set out in page 14 of the Plaintiffs' memorandum. I think that's where I got that; Specifically the six factors as to fairness and adequacy of the settlement set out by the 7th Circuit in its 1997 holding, General Electric Capital Corp versus Lease Resolution Corp.

Specifically, the Court finds that the plaintiffs' case on the merits, when measured against the terms of the settlement, is strong. It justifies the Court's confidence in allowing a disposition to be made on behalf of plaintiffs against the defendants.

The complexity and length and expense of the continued litigation is substantial enough to warrant the Court's approval of a negotiated settlement and a negotiated settlement that was reached at arm's length through a substantial mediation process. That, in itself, was not inexpensive, but would be less expensive than continued

litigation; that the amount of opposition to the settlement affected -- the amount -- that the amount of opposition to the settlement among affected parties is negligible. In fact, none; that the only objections that the Court's been apprised of have to do with attorneys' fees. So not only are the IMI defendants agreeable to the negotiated settlement, as are the plaintiffs obviously, but there's no individual member or other objector who's come forward to make that known to the Court. And so the Court places considerable reliance on that fact.

The fourth factor that the Court considers under the General Electric six factors is the presence of collusion in gaining a settlement. I find no evidence of collusion. In fact, I find the opposite. I find diligence and hard-nosed negotiating, and strong advocacy on behalf of the respective parties' submissions and claims, all within the rules and all within the prerogatives that they're entitled to assume in the course of a litigation, but nonetheless, a process that has brought them to settlement.

The stage of the proceedings -- I suppose that may speak for itself because we've moved along and a lot of discovery has occurred, substantial motions practice and pleadings practice with the seeking of class action certification, and the related factor, number six, the amount of discovery completed.

As explained to the Court in the submissions and embellished today in the hearing, there has been substantial discovery undertaken. It's required a lot of expert analysis and opinion rendering, and just the number of the parties who had to be included in the deposition process and the number of documents that had to be reviewed, it's clear that there's been much discovery undertaken and completed prior to the completion of the settlement agreement.

The amount of work that preceded this settlement is also evidenced in the fact that there was enough data collected for the plaintiff's expert to make a reasonable computation of the overcharge estimate as to IMI and its related principals, and therefore, what a reasonable damage expectation might be. And that expert's opinion was, I infer, sufficiently compelling that it provided a basis for the IMI defendants to enter into the settlement.

So that completes the six factors that the Court is required to analyze and has analyzed, and on which I've made findings to base the determination that the settlement is fair, reasonable and adequate.

With respect to the issue of attorneys' fees, having taken into account Mr. Williams' objections, on which I rule, as well as Duke's objection, as briefed by Mr. Campbell and his colleagues in his firm, that objection is overruled.

In my view, the approach that plaintiffs have taken

and the one-third settlement or the one-third fees amount that's being assessed is reasonable. There are other ways, as I've said earlier, that it could have been done, but it wasn't done that way, and it's not the Court's prerogative or responsibility to say that it should have been. I make a determination as to the reasonableness of the decisions that were made coming into the litigation at the end of the process here.

My decision is reflective of 7th Circuit guidance; Judge Posner's directive that the district court should determine what a lawyer would receive as selling his services in the market rather than by court order, and the fact that the 7th Circuit has expressed a marked preference for the percentage of fund approach as a reasonable and -- a reasonable approach and a reasonably-administered approach.

The assessment of the risk that Mr. Levin has laid out in his written submissions and his oral statement today seems to me to have been a reasonable process. This Court knows Mr. Levin to be an experienced counsel, as well as his co-counsel, the Susman & Godfrey firm, to know both the means by which these cases are litigated, and also how to assess a reasonable fee.

This is not new territory. The fact that it's 33 1/3 percent resonates with what this Court knows to be a general rule of thumb in many settlement contexts, including

major litigation such as securities fraud cases and other large class actions, and in lesser amounts or lesser -- cases of lesser value as well.

So there's nothing out of line in that sense. And the way in which the settlements have been reached, that is to say, in a sequential fashion, which has not changed the overall effect of the 33 1/3 percent assessment of fees, assures the Court that that's fair in addition to reasonable. It's not excessive in other words.

When the Court reviews the likelihood of risk or the assessment of risk that was made by the plaintiff's counsel in terms of what it takes to litigate a case such as this, including the possibility of the nonpayment that the firm might suffer if there was not sufficient money to pay the actual losses in the case by the defendant businesses, when the Court takes into account the quality of the performance of the lawyers, which has been of the highest sort, it's very dependable lawyering, and the Court knows that Mr. Levin crosses the Ts and dots the Is, and prepares the Court to make the decisions that are necessary in deciding whether a settlement is fair, reasonable and adequate, and finds nothing in the performance of plaintiff's counsel to date in the handling of the litigation or the negotiation of the settlements that suggests that he has departed from his usual high quality performance for which he enjoys superb

reputation, not just in the bar of this Court but in the -- in this community and in this state, and I think probably nationally as well, although I have a less clear sense of that from this perch that I occupy.

I know it's taken a huge amount of work to do it, and I know the stakes in the case are also substantial as measured by the amounts of the settlements.

I do not find the fees to be excessive. I find the method of assessing them reasonable. It is also reasonable it's one way to do it, it's not the only way, but it is a reasonable way to have the costs born by the parties and not by the law firm who secured these recoveries for them. So to have an award that provides for attorneys' fees separate from the costs out of the settlement pot is an acceptable way to do this.

In addition, the incentive fees that have been allowed for -- allowed to the named plaintiffs of $10,000 is reasonable as well. The amount of the expenses, since it is joint and several liability for those expenses, and there has not been double counting to the best of my knowledge and belief, the costs that have been asserted as the costs accrued in litigating this case can be recovered by the plaintiff's counsel consistent with the Court's acceptance of the settlement as fair, reasonable and adequate.

The Court specifically finds, because the issue was

raised in the objections by the Duke plaintiffs, that there appears to be no ethical violation in the way in which the settlement agreement was negotiated or reached or administered by the plaintiff's firm under the Indiana Rules of Professional Responsibility. So I want to make sure that that matter is specifically addressed.

The Williams' objection is sort of folded into the Court's findings that I've just announced, and so it is overruled as well.

There is a motion pending by the plaintiffs to approve the proposed plan distribution of additional funds to class members. Did I say it -- my note here has it by abbreviation, and so I'm not sure I got the title of the motion exactly right. Did I?

MR. LEVIN: It's correct.

THE COURT: In any event, I grant that motion so that you can use the same plan distribution for additional funds to class members as circumstances suggest and require.

MR. LEVIN: Thank you.

THE COURT: So as I said, I grant that motion.

Circling back as to the Court's prior findings, let me add that the settlement is fair, reasonable and adequate based on the fact that there were not just multiple parties, but many parties that had to be corralled by the plaintiffs in structuring their lawsuit and in handling the discovery.

I think I alluded to the fact that the discovery was extensive, but I want to say that explicitly. The scope and duration of the conspiracy were also factors that a reasonable plaintiff's counsel would have to take into account in trying to figure out how to manage a class action, and the risks that would be presented and incurred by the firm in doing so.

We know that there was at least one appeal to the 7th Circuit here that plaintiffs' counsel has had to fend off, and the fact that all of the plaintiffs stand to obtain, by virtue of these settlements, an amount that is virtually equal to their actual overcharges. It is true that the settlement doesn't give a treble damage award. You could say it does, but by the time the attorneys' fees and costs are deducted, it comes back to an amount that's equal to the actual overcharges. That's still a very fair, in some ways a remarkable settlement, because ordinarily, you have to negotiate some sort of concessions with respect to those actual losses as well, but that hasn't happened here. So that's another measure that the Court uses to decide finally that the settlement is worthy of the Court's final approval.

So that is the ruling of the Court today on the pending matters. I had, I think, your tendered order, Mr. Levin will suffice, although on the last line, and so you can put this back in your word processor and send it back to Miss Schneeman if you would, where you note that there is no

basis -- let me get it here -- where you say "There being no just reason for delay, let judgment be entered accordingly," in the Court's parlance, because I'm issuing the order, it should read "There being no just reason for delay, judgment is entered accordingly." And then I'll sign the tendered order.

It behooves you, though, and so I ask you to do this, to read through it yourself one more time to make sure that the final written version of the order and final judgment approving settlement conforms to the findings that the Court's made here orally. I'll do the same but I'll be helped to have you flyspeck the matter one more time, and that will increase, I suppose, our shared level of comfort with what's actually issued. I'll do that today if you can get it to me today.

MR. LEVIN: Thank you, Your Honor.

THE COURT: That's the Court's ruling on the matters that are pending. Is there anything else anybody needs to raise with the Court?

MR. LEVIN: Your Honor, if there's nothing else, I do want to let the Court know that I was informed that at the JP&L hearing in San Diego last week, at the Toyota hearing, at least one lawyer, and possibly more remarked to the panel that in a case like this, they were hoping that wherever the case was sent for MDL purposes, it would be handled as efficiently well as Judge Barker handled the Bridgestone/Firestone case, so I thought I'd share that.

THE COURT: Well, thank you very much for that compliment. I couldn't accept that compliment without acknowledging again the substantial assistance of Judge Shields and now Judge Lynch who were huge helps to the Court. They were the Court in getting it done, but thank you for that compliment.

So parties? Parties' plaintiff? It's always nice to have you in court. You give a sense of reality to what we do. So often the lawyers come faithfully representing their clients, but it's always helpful to have a face with the name, and to have the reminder that your presence being here provides, that we do this work for real people.

So that concludes the matter. I will step to the well of the Court to say off the record --

(Off-the-record discussion.)

(Court adjourned at 11:40 a.m.)

CERTIFICATE OF COURT REPORTER

I, Laura Howie-Walters, hereby certify that the foregoing is a true and correct transcript from reported proceedings in the above-entitled matter.

/S/LAURA HOWIE-WALTERS May 24th, 2010

LAURA HOWIE-WALTERS, RPR/CSR
Official Court Reporter
Southern District of Indiana
Indianapolis Division