IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE: READY-MIXED CONCRETE ANTITRUST LITIGATION,	)	Master Docket No. 1:05-cv-00979-SEB-JMS
THIS DOCUMENT RELATES TO: ALL ACTIONS	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND AWARD OF CLASS REPRESENTATIVES' INCENTIVE FEE FROM IMI SETTLEMENT

Plaintiffs, Kort Builders, Inc., Dan Grote, Cherokee Development, Inc., Wininger/ Stolberg Group, Inc., Marmax Construction, LLC, Boyle Construction Management, Inc., and T&R Contractor, Inc. (collectively "Plaintiffs"), by Settlement Class Counsel ("Class Counsel"), respectfully request that the Court approve and order the following from the Settlement Agreement With Defendants Irving Materials, Inc., Fred R. (Pete) Irving, Daniel Butler, John Huggins and Price Irving (Doc. No. 776-1) ("IMI Settlement"): (1) an award of attorneys' fees in the unopposed amount of 33 1/3 % of the Settlement Funds; (2) the reimbursement of litigation expenses incurred by Class Counsel; and (3) a class representative incentive award to each of the named Plaintiffs. The proposed awards are fair and reasonable under the relevant facts and circumstances of this case, and are consistent with precedent in this Circuit.

I. Background of the Litigation.

The Plaintiffs bring claims based upon a price-fixing conspiracy implemented by the Defendant companies and several of their principals in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. The Plaintiffs allege that the conspiracy caused direct purchasers of ready-mixed

concrete in the central Indiana area to pay artificially inflated or sustained prices from at least mid-2000 through May 2004 ("Class Period"). Most of the Defendant companies and their principals have pleaded guilty to price-fixing, or have been convicted of price-fixing by a jury. *See*, Memorandum in Support of Plaintiffs' Motion for Class Certification (Doc. 401) ("Class Mem."), p. 5. Shelby Gravel, Inc. d/b/a Shelby Materials was the Leniency Program applicant, thereby admitting the offense but avoiding a criminal conviction. *Id*. Only Prairie Material Sales, Inc., and American Concrete Company, Inc. – two of the six companies that have settled to date – were neither convicted nor sought amnesty for price-fixing, though both participated in the conspiracy.

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

Class Counsel began investigating the possibility of price-fixing in the Indianapolis area ready-mixed concrete market in September 2004. *Id*., ¶ 3. In May 2005, the first of several guilty pleas and/or indictments were announced by the United States Department of Justice. *Id*. Since mid-2005, Class Counsel have pursued this case on behalf of the Plaintiffs and a now-

certified class of direct purchasers of Defendants' ready-mixed concrete, seeking to recoup losses caused by the price-fixing conspiracy. *Id*., ¶ 5.

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

On August 1, 2007, the Plaintiffs filed their Motion for Class Certification, along with a supporting Memorandum and an extensive appendix of supporting exhibits. In addition to testimony from the Beaver trial, statements obtained by the FBI, and an affidavit from an FBI investigator, the Plaintiffs submitted the Declaration of John Beyer, Ph.D. *See*, Declaration of Irwin B. Levin, Exhibit 37 (Docket No. 398-55 (filed under seal)) ("Beyer Declaration"). The Beyer Declaration applied established economic analysis to show that if the Defendants conspired in the manner alleged by the Plaintiffs their conspiracy impacted all members of the proposed Class, which includes over 5,000 direct purchasers of ready-mixed concrete.

Following the submission of briefs and materials in opposition to class certification, and the submission by Plaintiffs of additional materials in support, the Court granted the Plaintiffs' motion for class certification on September 9, 2009, and certified a Plaintiff Class composed "all Persons who purchased Ready-Mixed Concrete directly from any of the Defendants or any of their co-conspirators, which was delivered from a facility within the Counties of Boone, Hamilton, Hancock, Hendricks, Johnson, Madison, Marion, Monroe, Morgan, or Shelby, in the State of Indiana, at any time during the period from and including July 1, 2000 through and including May 25, 2004, but excluding Defendants, their co-conspirators, their respective parents, subsidiaries, and affiliates, and federal, state, and local government entities and political subdivisions." (Doc. No. 738). On September 23, 2009, Builders, Beaver and IMI Defendants filed a Rule 23(f) Petition with the Seventh Circuit seeking permission to take an interlocutory appeal of the class certification order. The Seventh Circuit rejected that request, however, allowing the claims to proceed to trial as a class action.

By any measure, the motion practice, discovery and investigation in this case has been both difficult and exhaustive. A simple review of the docket in this case demonstrates the breadth of motion practice – the docket contains over 800 entries, many of them lengthy briefs and memoranda, and many of which include large compilations of exhibits. There can be no question that Plaintiffs and Class Counsel have devoted enormous time and resources prosecuting this case on behalf of direct purchasers.

More importantly, those efforts have been extremely successful. At the time of this filing, the Plaintiffs have reached settlements with all but one of the original seven corporate Defendants. Levin Dec., ¶ 6. Three of those Settlements have received final approval, resulting in the payment of settlement funds in excess of $24 million, and the Claims Administrator is

currently processing Claim Forms for the distribution of those funds to Settlement Class members. *Id*. The three remaining settlements, including the settlement with IMI that is the subject of the Plaintiffs' present Motion, have received preliminary approval from the Court. *Id*. The Plaintiffs have obtained certification of the originally proposed Plaintiff Class after years of contentious and complex litigation, and have succeeded in persuading the Seventh Circuit Court of Appeals to deny interlocutory review of that order. *Id*. The Plaintiffs and Class Counsel are now actively preparing for a trial by the certified Plaintiff Class against the remaining non-settling Defendants, Builder's Concrete & Supply Co., Butch Nuckols and John Blatzheim, scheduled to commence July 12, 2010. *Id*.

II. The IMI Settlement.

The IMI Settlement was preliminarily approved by the Court on December 28, 2009, and is scheduled for a final fairness hearing on March 29, 2010. (Doc. No. 781). The IMI Settlement resulted from negotiations between Class Counsel and counsel for IMI spanning at least two years. Levin Dec., ¶ 7. The negotiations leading to settlement took the form of a mediation session carefully planned with the assistance of Magistrate Jane Magnus-Stinson and conducted by mediator Eric D. Green. *Id*. The preparation for mediation included several meetings with Defendants' counsel, the review of data and discovery produced by all Defendants during the course of litigation, the production by Defendants of additional transactional data, and the preparation and in-person presentation of damages analyses by both Plaintiffs' and Defendants' experts. *Id*. The IMI settlement was reached following two days of arms' length mediation with the assistance of Mr. Green. *Id*. The written IMI Settlement Agreement presented to the Court for approval resulted from additional extensive negotiation between counsel for Plaintiffs and IMI and further assistance from Mr. Green. *Id*.

The terms of the IMI Settlement are straightforward, and consistent with those found in similar settlements for claims brought under Section 1 of the Sherman Act for price fixing, including the American, Shelby and Prairie Settlements. The key benefits of the IMI Settlement are as follows:

- The payment by IMI of $29,000,000 for the benefit of the Settlement Class;[1]
- Continuing cooperation and assistance of IMI and its officers in the Plaintiffs' prosecution of this action against the remaining Defendants, including as necessary affidavits and declarations under oath, trial testimony, and depositions if IMI's cooperation cannot be secured voluntarily;
- An agreement by the IMI Defendants not to oppose Settlement Class Counsel's request for Court approval of the payment of attorneys' fees in an amount not to exceed 33 1/3 % of the Settlement Amount, and reimbursement of reasonable expenses, to be paid from the Settlement Fund; and
- The release of claims that were or could have been asserted in this action against the IMI Defendants and related persons by the Plaintiffs and Settlement Class members, and a final judgment dismissing the Plaintiffs' and Settlement Class members' claims against the IMI Defendants.

Levin Dec., ¶ 8. The IMI Settlement does not result in a release or dismissal of the claims of the Plaintiffs and Settlement Class Members against any other Defendants. *Id*. Instead, the IMI Settlement is consistent with and recognizes the right of the Plaintiffs and Settlement Class members, under the Sherman and Clayton Acts, to continue to seek, from the Builder's

[1] The Settlement provided that should the Class Period purchases by "opt outs" total at least $34,000,000 and not more than $136,000,000, IMI may have received certain sums back from the Settlement Fund. Actual opt outs from the IMI Settlement were negligible, however, and did not trigger the return of any portion of the $29 million fund. *Id*.

Defendants, treble the damages resulting from all Defendants' – including the IMI Defendants' – participation in the conspiracy. *Id.*

The IMI Settlement provides for the settlement amount to be paid into a "Settlement Fund" subject to the jurisdiction of the Court and to be administered for the benefit of the Settlement Classes by Class Counsel. IMI Settlement, ¶¶ 22, 25. The IMI Settlement further provides that Plaintiffs and Class Counsel shall have the right to seek, and the IMI Defendants shall not oppose, Court approval of payments from the Settlement Fund for distribution to Settlement Class members or to reimburse Class Counsel for reasonable expenditures made or to be made by Class Counsel in the prosecution of the Action against the Other Defendants.[2] IMI Settlement, ¶ 26. The right of Class Counsel to seek the payment of such expenses from the IMI Settlement Fund was brought to the attention of Settlement Class members. IMI Settlement, Exhibit A (mailed Notice), ¶ 7 ("Class Counsel will seek Court permission to distribute the Settlement Fund to Class Members and to pay amounts approved by the Court for Class Counsel's attorneys' fees and reasonable expenses, reasonable future expenditures made or to be made by Class Counsel on behalf of Class Members to pursue the Lawsuit against the Defendants other than the IMI Defendants, notices to Class Members, and incentive payments to the class representatives").

With regard to the payment of attorneys' fees, litigation expenses and incentive fees out of the IMI settlement amount, the IMI Settlement contains the following provision:

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

[2] The Plaintiffs' proposed method of distributing to Settlement Class Members the settlement funds from the American, Shelby and Prairie Settlements was approved by the Court in its March 31, 2009 Order Granting Plaintiffs' Motion for Approval of Proposed Plan of Distribution of Settlement Funds, Award of Attorneys' Fees and Reimbursement of Expenses, and Award of Class Representatives' Incentive Fees (Doc. No. 732) ("Distribution Order").

> not oppose, the Court's approval of the payment of attorneys' fees in the amount of 33 1/3 % of the Settlement Amount, reimbursement of reasonable expenses, and incentive payments to the Plaintiffs, to be paid from the Settlement Fund.

IMI Settlement, ¶ 27. The actual distribution of any such approved payments shall not occur until after the Effective Date of the IMI Settlement. *Id*.

The notice specifically advised Settlement Class Members that Class Counsel will seek the payment of attorneys' fees in the amount of one-third of the Settlement, as well as the reimbursement of expenses, and that the IMI Defendants will not oppose this request:

> Class Counsel will file a petition with the Court no later than seven days prior to the Fairness Hearing asking for payment of attorneys' fees in the amount of 33 1/3 % of the Settlement Amount, and the reimbursement of reasonable expenses, to be paid from the Settlement Fund, which petition will be available on the settlement website. The Court may consider whether to approve the payment of attorneys' fees and expenses in this amount during the Fairness Hearing, or at a later time determined by the Court.
>
> The IMI Defendants have agreed not to oppose a request by Class Counsel for a payment of attorneys' fees in the amount of 33 1/3 % of the Settlement Amount, and the reimbursement of reasonable expenses, to be paid from the Settlement Fund. If the Court approves these fees and expenses, they will be paid from the Settlement Fund. … .

IMI Settlement, Exhibit A (mailed Notice), ¶ 17. As stated in the Notice, the Motion, this Memorandum and the Levin Declaration will be posted on the settlement website. Levin Dec., ¶ 9.

III. The Court's Previous Award of Attorneys' Fees, Expenses and Incentive Fees.

On March 29, 2009, the Court entered an Order approving Class Counsel's proposed plan of distribution, request for attorneys' fees, request for reimbursement of expenses, and proposed award of incentive fees to the named Plaintiffs, to be paid from the American, Shelby and Prairie Settlement Funds. Distribution Order, p. 18. The Distribution Order set forth the Court's

analysis of Seventh Circuit precedent and record evidence, and its reasoning in granting Class Counsel's request. Distribution Order, ¶¶ 17-41.

In particular, the Court found that "Class Counsel are entitled to compensation under the common fund doctrine for their efforts in creating a settlement fund benefitting class members." Distribution Order, ¶ 18. The Court found that the settlements in this case are "paradigm examples of 'common funds' established for the benefit of a plaintiff class," and that "their creation by Class Counsel justifies application of the common fund doctrine to award attorneys' fees and reimburse expenses." *Id.*, ¶ 19.

The Court also observed the Seventh Circuit Court of Appeals' long-standing rule for determining an appropriate fee from a common fund:

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

Distribution Order, ¶ 20, quoting *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007), quoting *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("*Synthroid I*"). The Court next found that the Seventh Circuit favors application of the "percentage of the fund" approach to determining a reasonable fee. "[T]he Circuit Court has expressed a preference for the percentage of the fund approach, recognizing that 'there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration,'" and confirming that using a percentage approach alone is well within the discretion of the district court. Distribution Order, ¶ 21, quoting *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 566 (7th Cir. 1994) ("*Florin I*").

The Court next found that "the 'percentage of the fund' approach favored by the Seventh Circuit is also the most accurate reflection in this case of 'the market price for legal services, in

light of the risk of nonpayment and the normal rate of compensation in the market at the time.'" Distribution Order, ¶ 22, quoting *Sutton*, 504 F.3d at 692. In order to determine the specific market rate for Class Counsel's services, the Court considered a number of factors approved by the Seventh Circuit. For example, the Court considered the very real risk of nonpayment undertaken by Class Counsel, Distribution Order at ¶ 25, a risk magnified by the possibility that a class would not be certified, *id*. at ¶ 26, the possibility of a defense verdict, *id.*, and the possibility of a low damages award. *Id*. The Court also considered the Plaintiffs' actual fee agreements with Class Counsel, and Class Counsel's opinion that a one-third contingency was the market rate for legal services in a case of this type. Distribution Order at ¶¶ 27-29. And the Court considered data concerning awards of attorneys' fees in other, similar cases. Distribution Order at ¶ 30, citing *Robert H. Lande & Joshua P. Davis, Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases,* 42 U.S.F. L. Rev. 879 (2008). Having conducted this analysis, the Court then concluded that "the 'market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time' is a contingent fee in the amount of 33.33% of the common fund recovered." Distribution Order, ¶ 33, quoting *Sutton*, 504 F.3d at 692.

The Court also applied Seventh Circuit precedent to Class Counsel's request for a reimbursement of expenses and the payment of incentive fees to the named Plaintiffs. Distribution Order, ¶¶ 33-41. The Court found that "Class Counsel's request for reimbursement of expenses is based upon an itemization and amounts that are consistent with market rates and practices," and approved Class Counsel's request for the reimbursement of expenses from the Settlement Funds in the amount of $1,913,321.96. Distribution Order, ¶ 36. The Court further

found that the requested incentive award of $5,000 to each of the named Plaintiffs was "highly reasonable in light of awards in other cases," and awarded the same. Distribution Order, ¶ 41.

The Court's Distribution Order has been challenged in some respects by Settlement Class Member Duke Construction pursuant to a stipulation by Class Counsel, which permits Duke to submit a late-filed objection in exchange for waiving the right to appeal this Court's determination as to that objection.[3] For reasons already brought to the attention of the Court by Class Counsel, those objections are unfounded and the Distribution Order should remain in force. *See*, Class Counsel's Response to Duke Construction's Objection to Class Counsel's Request for Attorneys' Fees and Reimbursed Expenses (Doc. No. 772).[4] More importantly, the analysis reflected in the Distribution Order is correct in every respect, and as discussed below fully supports the present request for fees, expenses and incentive fees from the IMI Settlement fund.

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

Class Counsel's unopposed request for an award of attorneys' fees in the amount of 33 1/3 % of the IMI Settlement Fund, or $9,666,667, is fair and reasonable in light of the benefits provided to Class Members under the IMI Settlement; the litigation efforts of Settlement Class Counsel to date; compensation levels in the relevant market for such legal services; and the substantial risk of nonpayment at the time Class Counsel undertook the representation of Plaintiffs in this litigation. Class Counsel's request for reimbursement of expenses in the amount of $463,887.93 is also reasonable given the complexity and scope of this litigation. Class

[3] *See* Stipulation of Settlement Class Counsel and Duke Construction Concerning Motion to Reconsider Court's Order of March 31, 2009 at ¶¶ 1,2 (Doc. No. 752) ("Stipulation"); Order Approving Stipulation … at ¶¶ 2,3 (Doc. No. 754) ("Stipulation Order").

[4] Nonetheless, because of Duke's objection, Class Counsel are yet to receive reimbursement for any expenses or the payment of any attorneys' fees, despite years of intense, expensive, yet highly successful litigation.

Counsel therefore request approval of their proposed award of attorneys' fees and reimbursement of expenses. Levin Dec., ¶ 10.

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

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

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

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

With the IMI Settlement, Class Counsel have created a Settlement Fund in the amount of $29 million. Distribution of the IMI Settlement Fund for the benefit of Settlement Class members is subject to the Court's approval, and the IMI Settlement does not provide for the direct payment of attorneys' fees or expenses by IMI. Levin Dec., ¶ 11. Instead, Class Counsel and Plaintiffs may seek Court-approval for the payment of attorneys' fees and reimbursement of costs and expenses to be paid out of the Settlement Funds. *See*, IMI Settlement, ¶¶ 26-27. The IMI Settlement Fund, like the funds created under the American, Shelby and Prairie Settlements

before it, is therefore a paradigm example of a "common fund" established for the benefit of a plaintiff class. Its creation by Class Counsel easily justifies application of the common fund doctrine to award attorneys' fees and reimburse expenses.

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

The Seventh Circuit has repeatedly held that the goal of a district court when awarding reasonable attorneys' fees is to estimate what the lawyers "would have received in an arms-length negotiation." *Cont'l Ill. Sec. Litig.*, 962 F.2d at 572. In *Sutton*, the court of appeals reiterated that in deciding fee levels in common fund cases, district courts must "do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton*, 504 F.3d at 692, quoting *Synthroid I*, 264 F.3d at 718. As stated by Judge Posner in *Cont'l Ill. Sec. Litig.*, "it is not the function of judges in fee litigation to determine the equivalent of the medieval just price. It is to determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order." *Cont'l Ill. Sec. Litig.*, 962 F.2d at 568 ("district judge … thought he knew the value of the class lawyers' legal services better than the market did").

The Seventh Circuit has also expressed a preference for the "percentage of the fund" approach to determining a reasonable attorneys' fee, recognizing that "there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration," and confirming that using a percentage approach alone is well within the discretion of the district court. *Florin I*, 34 F.3d at 566. Further, when using the percentage of fund method, the Seventh Circuit has held that district courts should *not* apply the "megafund rule" under which no recovery can exceed 10% of a "megafund," often defined as exceeding $75 million. *Synthroid I*, 264 F.3d at 718.

As this Court has already found, the "percentage of the fund" approach favored by the Seventh Circuit is also the most accurate reflection in this case of "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton*, 504 F.3d at 692. This is true for the reasons summarized by the Court when awarding attorneys' fees out of the American, Shelby and Prairie Settlements. Distribution Order, ¶ 22. Those reasons closely track specific considerations identified by the Seventh Circuit as relevant to a determination of "market price," and they apply with equal force to Class Counsel's present request for a fee award from the IMI Settlement Fund.

C. The attorneys' fees requested by Class Counsel are strongly supported by the relevant factors identified by the Seventh Circuit.

In determining the "market price" for legal services, the Seventh Circuit has instructed district courts to "balance the competing goals of fairly compensating attorneys for their services rendered on behalf of the class and of protecting the interests of class members in the fund." *Florin I*, 34 F.3d at 565 (citation omitted). "A court must assess the riskiness of the litigation by measuring the probability of success of this type of case *at the outset* of the litigation." *Id*. (citations omitted; emphasis original). By consulting the market for legal services, in light of the attorney's risk of nonrecovery, the court may estimate the "reasonable percentage" that the parties would have agreed to as a fee at the outset of the litigation. *Sutton*, 504 F.3d at 693.

In *Synthroid I*, a securities fraud class action, the Seventh Circuit offered some guidelines to district courts determining a reasonable fee using the "market approach." First, the court suggested an analysis of actual agreements to determine "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Synthroid I*, 264 F.3d at 719-20. Second, the court suggested that district courts could consider data from securities suits where large investors have chosen to hire counsel up front. *Id*. at 720.

In doing so, the court recognized that such data had become "widely available" following changes in securities law practices. *Id*. Third, the court suggested that district courts could find guidance from the result of lead counsel "auctions" common in securities practice. *Id*. While these suggestions are, in part, unique to securities class actions, the court also stated that "[t]he market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case." *Id.* at 721.

For the reasons discussed below, each of the factors identified by the Seventh Circuit weighs in favor of the award of attorneys' fees requested by Class Counsel. Taken together, these considerations confirm that an award of 33 1/3 % of the settlement fund accurately reflects "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton*, 504 F.3d at 692.

1. Risk of nonpayment.

Class Counsel's ability to collect fees for their work in this case has been, from the outset, "inescapably contingent." *Florin I*, 34 F.3d at 566. Although many of the Defendants have been successfully charged criminally for their participation in a conspiracy to fix the price of ready-mixed concrete, none of the Defendants actually admit a violation of the law in the civil action; indeed many of the Defendants have asserted the Fifth Amendment hundreds of times to avoid testifying that there even was a conspiracy. Levin Dec., ¶ 12. In addition, virtually all of the Defendants – including IMI – have asserted that damages from the conspiracy are negligible or nonexistent. *Id*., ¶ 12. Class Counsel's ability to recover a contingent fee in this matter was dependent on their ability to establish the elements required under the Sherman and Clayton

Acts, as well as damages, in the face of aggressive opposition. Levin Dec., ¶ 13. From the time Class Counsel agreed to provide services, this risk of the litigation has been substantial. *Id*.

Class Counsel's risk of non-payment was also affected by the challenge of certifying a plaintiff class. Levin Dec., ¶ 14. As the Court is aware, the Defendants' efforts to defeat class certification have been lengthy, complex and expensive. *Id*. On issues related to class certification, Class Counsel have conducted numerous depositions, retained and prepared two experts, conducted numerous conferences with the Court, obtained millions of pages of documents and data, and prepared hundreds of pages of briefing. *Id*. Even after the Plaintiff Class was certified by the Court, Defendants sought interlocutory review in an effort to reverse the order. *Id*. When interlocutory review was denied, Defendants promised to appeal the certification order after any judgment was entered. *Id*. In short, the risks associated with achieving and protecting class certification in this case have been substantial and continuing from the beginning.

Finally, the risk of nonpayment for Class Counsel at the time they undertook this matter was also tied to the risk of a defense verdict at trial. Levin Dec., ¶ 15. Class Counsel have faced the task of establishing a conspiracy among seven corporate Defendants, class-wide impact on direct purchasers, and measurable damages. *Id*. This risk has been substantial with respect to the Plaintiffs' claims against every Defendant, and continues with respect to the trial now scheduled against the Builder's Defendants. *Id*.

2. Class Counsel's contingency agreements.

Class Counsel's proposed attorney fee is also consistent with their actual agreements with Plaintiffs to provide services. *Synthroid I*, 264 F.3d at 719-20. While not binding on this Court, the retention agreement between each named Plaintiff and their initial counsel calls for the

payment of attorneys' fees and the reimbursement of litigation expenses to be contingent upon a recovery in this case, and to be paid out of such recovery. Levin Dec., ¶ 16. Some of the agreements specifically contemplate a request for fees of 33 1/3% of any fund established for the Plaintiffs and class members, while other do not recite a specific percentage. *Id*. It is the opinion of Class Counsel, based upon many years of experience and familiarity with the market for legal representation of the type provided by Class Counsel in this case, that the market rate for litigation such as this is a one-third contingency agreement with litigation expenses to be advanced by counsel and reimbursed out of any recovery made for the plaintiff and/or class. *Id*.

It is also the opinion of Class Counsel, again based upon experience and familiarity with the market for legal representation, that a contingency fee agreement is the only arrangement by which most class members could pursue relief in this case. Levin Dec., ¶ 17. Because the litigation requires a substantial advancement of time and expense, the measure of recoverable damages is uncertain, and the risk of non-payment or under-payment is significant, it would be financially impossible, or irrational, for any of the named Plaintiffs to have agreed to pursue this matter on any basis other than a contingency arrangement with expenses advanced by counsel. *Id*. The same would be true for virtually all other Settlement Class members. *Id*.

As observed by the Seventh Circuit, the terms of the Plaintiffs' actual agreements are directly relevant to "approximating the terms that would have been agreed to *ex ante*." *Id*. at 719. Obviously, the actual terms recited by the parties at the outset of this litigation are evidence of "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton*, 504 F.3d at 692. Moreover, Class Counsel's opinion, based on experience and familiarity with the market for legal services in cases like this one, is further evidence of the market rate for the type of services provided in this case. *See, e.g.,*

Berger v. Xerox Corp. Ret. Inc. Guar. Pl., 2004 WL 287902,*2-3 (S.D. Ill.) (relying on class counsel's affidavit to support conclusion that market rate for services was contingent rate of 29% or higher). The attorneys' fees requested by Class Counsel are therefore supported by the actual agreements with Plaintiffs and Class Counsel's opinion regarding customary market rates for matters of this type.

3. Evidence of agreements in similar litigation.

Although data disclosing the terms of client agreements in antitrust cases is not widely available, as it has become in securities fraud litigation, *Synthroid I*, 264 F3d at 720, data is available disclosing attorney fee awards in such cases. This information is not the same evidence of *ex ante* arrangements contemplated by the court in *Synthroid I*, but it is strong evidence of the reasonable expectations of Class Counsel when agreeing to represent the Plaintiffs in a contingency antitrust case. Levin Dec., ¶ 19. It also confirms the accuracy of Class Counsel's opinion regarding the market rate for services of the kind provided in this case.

In *Lande & Davis, supra*, the authors analyzed data from 40 private antitrust cases, including the fund recovered for victims and the amount awarded in attorneys' fees. Out of 16 cases resulting in recovery of less than $100 million, seven cases included attorney fee awards of 33.3% of the fund, one case included an attorney fee award of 33% of the fund, and three cases included attorney fee awards of 30% of the fund. *Lande & Davis* at 911, Table 7A. Out of nine cases resulting in recovery of between $100 million and $500 million, seven cases included attorney fee awards of between 30% and 33.3%. *Id*. at 911, Table 7B. Only in cases in which recovery exceeded $500 million did attorney fee percentages consistently depart from this range. *Id*. at 912, Table 7C.

This information, along with Class Counsel's experience in complex litigation, including antitrust matters, supports a reasonable expectation of a contingency fee of 33.3% of the Settlement Funds. Levin Dec., ¶ 19. It also supports the conclusion that the market rate for the services provided by Class Counsel in this matter is a contingency fee in this range. *Berger,* 2004 WL 287902,*2 ("the Court finds based on the evidence presented by Class counsel, and the Court's awareness of the market, that a 29% fee … is at or below the market rate for this and similar litigation"), citing *Synthroid I*. Evidence of fee awards in other, similar cases therefore supports the conclusion that the attorneys' fees requested by Class Counsel are consistent with "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton*, 504 F.3d at 692.

4. Other factors.

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

First, Class Counsel and their respective firms, Cohen & Malad, LLP and Susman Godfrey LLP, have well-established reputations for providing high quality, efficient and aggressive representation in complex matters. This factor supports the ability of Class Counsel to negotiate a contingent rate of one-third for their services.[5] Levin Dec., ¶ 18. Second, from the commencement of this action it has been apparent that the amount of work necessary to resolve the litigation would be extensive, requiring a very substantial time-commitment by many attorneys and their legal assistants. In light of the risk of non-payment, this factor also supports

[5] In private litigation in which Cohen & Malad, LLP has been counsel of record, involving levels of recovery similar to those in this case to date, we have negotiated contingency agreements providing for fees in an amount greater than one-third. Levin Dec., ¶ 18.

the ability of Class Counsel to command a contingent rate of one-third for their services. *Id.* Third, the stakes of the case are very high – the Plaintiffs allege that Defendants effectuated a conspiracy to inflate the price of nearly $700 million of ready-mixed concrete. Like the previous factor, the high stakes of this litigation ensure that the cost and effort required to obtain a favorable result will be – and to date, have been – very high. *Id.* This further supports the ability of Class Counsel to negotiate a one-third contingency rate.

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

Class Counsel have requested that the Court also approve an award of $463,887.93 from the IMI Settlement Fund to reimburse Class Counsel for litigation expenses. Levin Dec., ¶ 10. These expenses are in addition to the $1,913,321.96 in expenses for which reimbursement was awarded in the Distribution Order. Distribution Order, ¶ 36. Class Counsel, along with other associated firms operating under the direct supervision of Class Counsel, have incurred expenses in the requested amount (net of computer research costs)[6] between January 1, 2009 and February 28, 2010. Levin Dec., ¶¶ 20-22, Ex. "A." Reimbursement of expenses from the Settlement Funds is contemplated by Class Counsel's agreements with the Plaintiffs, *id.*, ¶ 22, and by the IMI Settlement. IMI Settlement, ¶¶ 26-27.

As with attorneys' fees, the Seventh Circuit directs district courts to take a market-based approach when considering requests for reimbursement of litigation expenses. *Synthroid I*, 264 F.3d at 722. Both the amount of specific expenses incurred, and "the amount of itemization and detail required," should be assessed by reference to the private market. *Id. See also, Cont'l Ill. Sec. Litig.*, 962 F.2d at 570 (court should allow reimbursement of expenses at market rates). As set forth in the Levin Declaration, Class Counsel's request for reimbursement is based upon categories of expenses that are customarily charged to clients in the market for legal services,

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

and are included in rates and amounts that are customary in the market. Levin Dec., ¶ 22 and Ex. "A." Moreover, these are expenses that are normally recovered from a settlement fund net of attorneys' fees, which is the arrangement set forth in Class Counsel's agreements with the Plaintiffs. Levin Dec., ¶ 22. Class Counsel's request for reimbursement of expenses is therefore reasonable and consistent with market rates and practices, and should be approved.

A substantial portion of the expenses incurred in this litigation to date have been for services provided by John Beyer, Ph.D. and other economists and specialists at Nathan Associates, Inc., as well as Gordon Rausser, Ph.D. and other economists and specialists at OnPoint Analytics, Inc. Levin Dec., ¶ 23. These expenses have been absolutely essential in achieving class certification, successfully negotiating the IMI Settlement, and preparing the case to proceed to trial against Builder's Concrete & Supply, Inc. *Id*. For example, the Declaration of John Beyer, Ph.D. was central to the Court's decision to certify a Plaintiff Class. *Id*. Moreover, Dr. Beyer and other economists and specialists at Nathan Associates provided essential services in the identification, review, understanding and analysis of electronic transaction data obtained from the Defendants. *Id*. This work with the transaction data has been the basis of analyses for class certification, damages, effective notice and settlement distribution. *Id*.

Further, although the Declaration of Gordon Rausser, Ph.D. originally submitted by the Plaintiffs in support of class certification was not considered by the Court at that time, all of the services originally provided by Dr. Rausser and other economists and specialists at OnPoint Analytics were a necessary step in preparing various damages analyses. *Id*. These have included an initial damages assessment to assist counsel in settlement discussions; a full damages assessment and report and the extensive, in-person participation by Dr. Rausser during the mediation with IMI leading to the IMI Settlement; and the preparation of a damages analysis and

report for trial, including extensive production of supporting data, work materials and other information and documents. *Id*. As stated in a recitation included in the IMI Settlement Agreement, "[O]ne consideration of the IMI Defendants in entering into this Agreement was the work performed by plaintiffs' experts, Dr. Gordon Rausser and Dr. John Beyer, after April 2008 relating to class certification and damages." IMI Settlement, p. 2; Levin Dec., ¶ 23.

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

Class Counsel's request that the Court award the named Plaintiffs $10,000 each as a class representative incentive fee, in addition to the $5,000 previously awarded, Distribution Order, ¶ 41, is also supported by the law and the circumstances of this case.

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

Cook v. Niedart, 142 F.3d 1004, 1016 (7th Cir. 1998) (citations omitted) (affirming $25,000 incentive award to plaintiff). *See also, Lively v. Dynegy, Inc.*, 2008 WL 4657792 (S.D. Ill.) (awarding $10,000 to each of three plaintiffs); *Meyenburg v. Exxon Mobil Corp.*, 2006 WL 2191422 (S.D. Ill.) (awarding $3,000 incentive fee); *Morlan v. Universal Guar. Life Ins.*, 2003 WL 22764868 (S.D. Ill.) (awarding $25,000, $20,000, $20,000 and $5,000 respectively to class representatives); *Gaskill v. Gordon*, 942 F.Supp. 382 (N.D. Ill. 1996) (awarding $6,000 to each plaintiff); *Spicer v. Chicago Board Options Ex., Inc.*, 844 F.Supp. 1226 (N.D. Ill. 1993) (collecting cases awarding incentive fees ranging from $5,000 to $100,000; awarding $10,000 each to named plaintiffs).

As members of the proposed Plaintiff Class, the named Plaintiffs could have simply awaited the outcome of the litigation and received the same benefits as any other class member.

Instead, they committed to participate actively in what promised to be a lengthy and hard fought lawsuit against their corporate suppliers on behalf of a large group of potential class members. Levin Dec., ¶ 24. From the beginning, the named Plaintiffs have been made aware that an incentive fee is not a foregone conclusion but was a possibility, and would be left to the Court's discretion. *Id*. Now that an additional substantial recovery has been made for the Settlement Class, however, the Plaintiffs' valuable services and commitment to date should be recognized.

The named Plaintiffs in this case, Kort Builders, Inc., Dan Grote, Cherokee Development, Inc., Wininger/Stolberg Group, Inc., Marmax Construction, LLC, Boyle Construction Management, Inc., and T&R Contractor, Inc., have each made substantial contributions on behalf of Settlement Class members. Levin Dec., ¶ 25. In doing so, the Plaintiffs undertook a business risk not faced by other Class members, that litigation against the Defendants would damage their relationship with these necessary suppliers. *Id*.

Each Plaintiff, through one or more representatives, has participated in multiple in-person and telephone conferences, including extensive meetings to prepare discovery responses. Each Plaintiff, through one or more representatives, has prepared for and submitted to a deposition. Levin Dec., ¶ 26. Each Plaintiff has provided answers to interrogatories, has reviewed their current and archived records, has produced documents responsive to requests, and has allowed Class Counsel's consultants to access their computer systems and servers and download data for production. *Id*. Some of the Plaintiffs have conferenced by phone with the Plaintiffs' expert, and at least two have appeared before the Court and the Magistrate during proceedings. *Id.* Each Plaintiff has provided invaluable assistance and demonstrated an ongoing commitment to protecting the interests of Class members. *Id.*

At this stage of the litigation – with settlements exceeding $50 million achieved, a Plaintiff Class certified, and the matter proceeding to trial against the remaining Defendant – the importance and value of the named Plaintiffs' service to the Settlement Class has become particularly clear. Indeed, many Settlement Class members will receive benefits vastly exceeding those that will be received by the named Plaintiffs, as a direct result of the efforts and contributions of the named Plaintiffs. Levin Dec., ¶ 27. It is not an exaggeration to say that the named Plaintiffs have performed a central role in obtaining tens of millions of dollars for Central Indiana construction businesses. *Id*.

For these reasons, an additional incentive award is supported in this case by "the actions the plaintiff has taken to protect the interest of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Cook*, 142 F.3d at 1016. Class Counsel therefore respectfully requests that the Court award each Plaintiff an additional incentive award in the amount of $10,000.

V. Conclusion.

For the foregoing reasons, the Plaintiffs and Class Counsel respectfully request that the Court approve and order the following to be paid from the IMI Settlement Fund: (1) an award of attorneys' fees in the amount of 33 1/3 % of the IMI Settlement Fund; (2) the reimbursement of litigation expenses of $463,887.93, incurred by Class Counsel between January 1, 2009 and February 28, 2010; and (3) a class representative incentive award of $10,000 to each of the named Plaintiffs.

Date: March 2, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2010, 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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