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

BOYLE CONSTRUCTION MANAGEMENT, INC., Plaintiff, vs. IRVING MATERIALS, INC. and UNNAMED CO-CONSPIRATORS, Defendants.	CASE NO. 1:05-cv-0979-SEB-VSS

MOTION TO CONSOLIDATE, TO APPOINT INTERIM LEAD COUNSEL AND FOR ENTRY OF CASE MANAGEMENT ORDER NO. 1 AND BRIEF IN SUPPORT

Pursuant to Local Rule 42.2,[1] Plaintiffs in the related actions listed below ("Plaintiffs") submit this Motion and ask the Court to consolidate the related actions, appoint interim lead counsel for all of the plaintiffs in the consolidated action and enter their proposed Case Management Order No. 1, which is attached.

Plaintiffs in 11 of the 18 related class-action cases filed against Irving Materials, Inc. ("IMI"), join this motion and support entry of Case Management Order No. 1.[2] This includes all plaintiffs in the following cases:

[1] As required by Local Rule 42.2, Plaintiffs are filing this Motion in the first-filed related case and filing notices in the 17 related class actions and two individual actions (20 total).

[2] Several of the Plaintiffs had previously filed a motion supporting Susman as lead counsel as part of a support structure that included a plaintiffs' executive committee. They have withdrawn that motion and now join these Plaintiffs and counsel who support Susman as ***sole*** lead counsel in this Motion to promote efficiency in the management of the litigation as well as to signify their support of and confidence in Susman as the best person for this job.

- *Van Valkenburg Builders, Inc., individually and on behalf of a class of all those similarly situated v. Irving Materials, Inc.,* 1:05-CV-01005-SEB-VSS;
- *R. Shane Tharp v. Irving Materials, Inc. and Unnamed Co-Conspirators,* 1:05-CV-1045-SEB-VSS;
- *Siniard Concrete Services, Inc., individually and on behalf of a class of all those similarly situated v. Irving Materials, Inc.,* 1:05-CV-01056-SEB-VSS;
- *Environ, LLC, individually and on behalf of a class of all those similarly situated v. Irving Materials, Inc.,* 1:05-CV-01057-SEB-VSS;
- *Dan Grote, a sole proprietorship, individually and on behalf of a class of all those similarly situated v. Irving Materials, Inc.,* 1:05-CV-01055-SEB-VSS;
- *M&M Properties of Louisville, LLC, MDR Properties of Louisville, LLC, and 502 Properties, LLC, on behalf of themselves and all others similarly situated v. Irving Materials, Inc.*, *Price Irving, Fred R. "Pete" Irving, John Huggins and Daniel C. Butler,* 1:05-CV-1103-SEB-VSS;
- *Stacy M. Wissel, Trustee of Chapter 7 Debtor Grohoff Construction, Inc., individually and on behalf of a class of all those similarly situated,* 1:05-CV-01104-SEB-VSS;
- *Cherokee Development, Inc., individually and on behalf of a class of all those similarly situated v. Irving Materials, Inc.,* 1:05-CV-01105-SEB-VSS;
- *Scott Pentecost d/b/a A&K Concrete, individually and on behalf of a class of all those similarly situated v. Irving Materials, Inc.*, 1:05-CV-01133-SEB-VSS;
- *Craw-Con, Inc., individually and on behalf of all others similarly situated v. Irving Materials, Inc.,* 1:05-CV-01190-SEB-VSS.
- *Wininger/Stolberg Group, Inc. et al. v. Irving Materials, Inc. et al.*, 1:05-CV-01265-SEB-VSS.

Plaintiffs in each of these cases ("Plaintiffs") respectfully move this Court to enter the attached Case Management Order No. 1 for the reasons that follow.

I. BACKGROUND

On June 29, 2005, the Department of Justice issued a press release announcing that IMI pleaded guilty to working with its competitors to fix the price of ready-mixed concrete in the

Indianapolis metropolitan area. According to the DOJ press release, the price-fixing conspiracy took place from approximately July 2000 to May 2004. IMI agreed to pay a $29.2 million criminal fine, which is the largest fine ever levied in a domestic antitrust investigation. In addition, four of IMI's executives pleaded guilty to the same offense and, in addition to fines and jail time, have agreed to assist in the ongoing DOJ investigation.

In light of these announcements and after investigation, Plaintiffs, individually and on behalf of a proposed class, filed the above-captioned actions in this Court against IMI and its unnamed co-conspirators, alleging that since at least July 2000 until on or about June 2005, the exact dates being unknown to Plaintiffs, IMI and its co-conspirators engaged in a continuing agreement, combination, and conspiracy in restraint of trade to artificially raise, fix, maintain, or stabilize prices for ready-mixed concrete in the United States in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[3]

To date, 20 related actions have been filed against IMI alleging similar if not identical claims. IMI filed a motion asking the Court to appoint interim lead and liaison counsel for the plaintiffs in all of these cases in order to avoid unnecessary expense and duplication of effort by the Court and counsel. Plaintiffs agree entirely with the assertion in IMI's August 8, 2005, Motion for Appointment of Interim Class Counsel and to Defer Responsive Pleading and Other Proceedings Pending Such Appointment, Docket No. 26, that

> [i]n the absence of firm case management, this [case] is a recipe for wasted time, unnecessary expense and duplication of effort by both the Court and counsel. It was precisely to address such situations that 2003 amendments added Rule 23(g)(2)(A), authorizing the appointment of "interim counsel to act on behalf [of] the putative class before determining whether to certify the action as a class action."

Id. at 3 (quoting Fed. R. Civ. P. 23(g)(2)(A)).

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[3] Alone among the plaintiffs, Plaintiff Tharp has amended his complaint to name six ready-mixed concrete producers as additional defendants.

Given the substantial similarity of the parties and claims in each of the related actions, Plaintiffs have followed the guidance of the *Manual for Complex Litigation* (4th ed. 2004) ("*Manual*") and submit for the Court's approval a proposed form of Case Management Order No. 1. This proposed order provides for the consolidation of all related actions; establishes efficient procedures for the filing and docketing of papers; proposes the appointment of interim lead counsel for all plaintiffs in the consolidated action; sets a preliminary schedule of proceedings; and otherwise eliminates wasteful and duplicative litigation.

II. ARGUMENT

These related actions are precisely the type of complex, multi-party litigation envisioned by the *Manual* and Rule 23(g). No one opposes consolidation of these cases or invocation of the case-management devices described in this Motion or the similar motions filed by lead-counsel applicants at Cohen & Malad L.L.P. (proposing Irwin B. Levin) and Spector Roseman & Kodorf P.C. (proposing the Spector Roseman firm). What is disputed, however, is which lead counsel would best represent the class. Plaintiffs believe that the competition is not close.

The motions before the Court indicate that Stephen D. Susman of Susman Godfrey L.L.P. is the only applicant for lead counsel who has taken a price-fixing case to trial. He has done so twice. He also has led, tried, and won several of the largest antitrust cases in history. *See* section II.C.2, *infra*. While the other candidates point to their settlements, neither identifies leadership experience or results comparable to Susman's. And, crucially, neither points to a successful trial record – much less one similar to Susman's string of more than 50 verdicts in complex commercial litigation.

Susman also is the only applicant for lead counsel to propose terms for attorney fees and nontaxable costs, as Rule 23(g) suggests – including terms that eliminate any cost advantage of

having local counsel serve as lead class counsel. *See* section II.C.5, *infra*. His percentage-of-recovery proposal encourages efficiency and penalizes waste by removing the incentive plaintiffs' counsel might otherwise have to overwork the case or to postpone settlement in order to increase lodestars. This kind of "market-mimicking approach" has won the strong endorsement of the Seventh Circuit. *In re Synthroid Marketing Litig.*, 264 F.3d 712, 718-19 (7th Cir. 2001).

The brief that IMI filed on September 6 suggests that the Court should solicit fee proposals. Docket No. 49. Plaintiffs respectfully disagree with IMI's effort to influence selection of class counsel and distort counsel's incentives. IMI's arguments are based largely on its misconception that plaintiffs' counsel must be compensated by a lodestar method, which would create inefficient incentives. That is simply not the case with the contingent-fee arrangement proposed by Susman. *See In re Synthrid Marketing Litig.*, 325 F.3d 974, 979-80 (7th Cir. 2003) (advocating advantages of contingent-fee arrangement in promoting efficiency). IMI similarly mistakes the appropriateness of a bidding process for class counsel. Susman has provided his proposal, and the other applicants have had the opportunity to do so as well, as Rule 23(g) contemplates. A further bidding process would cause delay and is unnecessary and inappropriate. *See id.* (rejecting district court's use of auction results to set class counsel fee); Third Circuit Task Force Report, *Selection of Class Counsel*, 208 F.R.D. 340 (2002) (discussing limitations and criticisms of auction approach and rejecting it as default method of compensating class counsel).

The inclusiveness of Susman's proposal provides another advantage. Susman is the only applicant for lead counsel to advocate a structure that is formally inclusive of counsel outside the group of his supporters. *See* section II.D, *infra*. Neither of the other proposals states a role for each other or for Susman. In contrast, Susman recognizes the value of Levin's involvement in this case by endorsing him as liaison counsel for the class.

Because they believe that Susman is "the applicant ***best*** able to represent the interests of the class"and because the rest of the content of their proposed Case Management Order No. 1 is uncontroversial, Plaintiffs respectfully submit that the Court should enter the proposed order. " Fed. R. Civ. P. 23(g)(2)(B) (emphasis added). The order will not only promote the orderly and efficient conduct of this action but, as described below, will also comply with Seventh Circuit precedent and the recommendations of the *Manual*, and the requirements of Rule 23(g).

A. Consolidation of Related Actions

According to the Federal Rules of Civil Procedure, "[w]hen actions involving a common question of law or fact are pending before the Court it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delays." Fed. R. Civ. P. 42(a). *See McCracken v. Grand Vict. Casino & Resort*, NA 02-143-C B/H, 2002 U.S. Dist. LEXIS 21977, at *5 n.2 (S.D. Ind. Nov. 8, 2002) (citing WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL §§ 2282-2284). Consolidation of the above-captioned actions and all related actions in this Court is demonstrably appropriate. And no one has contested this point. Each action involves common questions of law and fact, including allegations that IMI and its co-conspirators conspired to fix, raise, stabilize or maintain the price of ready-mixed concrete, the identity of each member of the conspiracy, the time period during which the conspiracy existed and whether the combination, agreement or conspiracy violated Section 1 of the Sherman Act. Consolidating these cases will expedite pretrial proceedings and reduce duplicative efforts. Moreover, consolidation will streamline and simplify the discovery phase, pretrial motions (including class certification), and administrative management, as well as generally reduce the waste, confusion and delay that would inevitably arise from prosecuting related actions separately.

B. Orderly Procedures for Captioning and Filing Documents

In addition to providing for consolidation, the proposed order establishes orderly procedures for the captioning, filing and docketing of papers in these related actions, and in any cases that may hereafter by filed in or transferred to this Court. These procedures include the establishment of a uniform caption and master docket for the filing of documents relating to the consolidated actions. Such procedures, designed to enhance efficiency, are particularly necessary and appropriate in complex class action litigation such as this**.** *See Manual* **§** 21:12.

C. Appointment of Interim Lead Plaintiffs' Counsel

Case Management Order No. 1 further implements the procedures suggested by the *Manual* and Rule 23(g) for complex, multi-party cases such as this by designating interim lead counsel for plaintiffs in the consolidated action. *See Manual* § 10.22; Fed. R. Civ. P. 23(g)(2)(A). Because of the number of cases already filed in this Court and the likelihood that additional suits will be filed, appointment of interim lead counsel is the most fair and efficient manner to proceed with this litigation. Such designations will promote the orderly progress of this litigation, avoid duplicative work and submissions to the Court, and ensure that plaintiffs are able to prosecute this litigation in an efficient and coordinated fashion.

Rule 23(g) of the Federal Rules of Civil Procedure lists factors for a court to consider in selecting interim and post-certification class counsel. These considerations include,

1. "the work counsel has done in identifying or investigating potential claims in the action;"

2. "counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action;"

3. "counsel's knowledge of the applicable law;"

4. "the resources counsel will commit to representing the class;" and "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."

Fed. R. Civ. P. 23(g)(1)(C)(i). The immediately following subsection, subsection (ii) of Rule 23(g)(1)(C), authorizes the court to

5. "direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs."

Id. 23(g)(1)(C)(ii); *see, e.g., In re Electronic Data Systems Corp. ERISA Litigation*, 224 F.R.D. 613, 633 (E.D. Tex. 2004) (applying the foregoing factors and appointing Barry C. Barnett of Susman Godfrey L.L.P. as lead counsel for the plaintiffs in that consolidated, multi-district litigation). These factors are addressed, by number, below.

Rule 23(g) requires the Court to appoint as lead counsel "the applicant ***best able*** to represent the interests of the class." Fed. R. Civ. P. 23(g)(2)(B) (emphasis added). The Advisory Committee notes on the 2003 amendments to this Rule state that the court should, when there are multiple applicants for appointment, "go beyond scrutinizing the adequacy of counsel and make a comparison of the strengths of the various applicants." In other words, the inquiry is not merely one of adequacy. It is a competition.

Here, the Court is faced with multiple applicants for the role of interim lead counsel and should appoint the best candidate after comparing the strengths of each. Comparing the applicants according to the Rule 23(g)(1)(C)(i) & (ii) factors, Plaintiffs believe the Court should appoint Susman as sole interim lead counsel for the reasons that follow:

1. Susman's work identifying and investigating potential claims in this action

Susman's and Susman Godfrey's work in identifying and investigating potential claims in this action resulted, on August 17, 2005, in the filing of an amended complaint in *R. Shane Tharp*

v. Irving Materials, Inc. and Unnamed Co-Conspirators, 1:05-CV-1045-SEB-VSS. That complaint named six additional ready-mixed concrete suppliers as participants in the conspiracy with IMI. See Declaration of Steven D. Susman ¶ 6 ("Susman Decl."), which is attached. Before that time, no other class action complaint had identified any of IMI's co-conspirators. To date, no other class action complaint includes all seven of the defendants in the amended complaint. *Id.*

The work that enabled Susman's client to discover and add five defendants involved substantial effort. It included

- consultations with an economics firm regarding market structure and the probability of cartel-like activity;
- research into the sales and solvency of co-conspirators;
- review and analysis of government reports on the ready-mixed concrete and cement industries;
- review and analysis of the Antitrust Division's press releases and filings with the Court;
- development of a chronology of events; and
- discussions with plaintiffs and potential class members.

Susman Decl. ¶ 7.

Susman and others at Susman Godfrey have also consulted extensively with defense counsel and other plaintiffs' counsel. These discussions have aimed at minimizing unnecessary work by streamlining and expediting this litigation while uncovering facts, documents, and witnesses crucial to preparing the antitrust claims for trial. Susman Decl. ¶ 8.

Other firms apparently have done less work on the merits despite earlier signs of price-fixing. On April 28, 2005, for example, the Antitrust Division filed in this Court a Plea Agreement in which the former president of a ready-mixed concrete supplier agreed to plead guilty to price-

fixing on sales of ready-mixed concrete in three Indiana counties outside of metropolitan Indianapolis, according to public records. Disclosure of the Plea Agreement and related proceedings should have caused local private lawyers to investigate potential claims against ready-mixed concrete suppliers in Indiana. But, as of one month after the Plea Agreement, no one had filed a civil complaint that alleged antitrust violations in the Indiana ready-mixed concrete industry. Susman Decl. ¶ 9.

All that changed on June 29, 2005, when the Department of Justice's Antitrust Division announced Plea Agreements by IMI and four IMI executives. Every one of the 20 antitrust cases now pending in this Court against IMI was filed on the heels of the Antitrust Division's announcement. Susman Decl. ¶ 10.

2. Susman's experience in handling class actions, other complex litigation, and claims of the type asserted in the action

Susman has served as lead counsel in dozens of class actions, in dozens of other kinds of complex litigation, and in dozens of antitrust cases. Susman Decl. ¶ 11. He has tried, as lead counsel, two class actions that alleged the kind of price-fixing behavior at issue in this litigation. *Id.* He has also tried, as lead counsel, at least nine other antitrust cases and more than 50 complex commercial cases. *Id.*

As sole lead counsel in the *In re Corrugated Container Antitrust Litigation,* MDL No. 310 (S.D. Tex.), Susman obtained, in 1980, the largest jury verdict of its time – a $550 million award in favor of the plaintiff class. The civil trial followed an unsuccessful criminal prosecution by the Antitrust Division. Susman Decl. ¶ 12. Susman served as one of three co-lead counsel in the *In re Vitamins Antitrust Litigation*, MDL No. 1285 (D.D.C.). That prosecution of price-fixing claims produced, in 2003, a jury verdict of nearly $150 million after trebling plus settlements worth more

than $1 billion on behalf of classes of direct purchasers of vitamins and vitamin products. Susman Decl. ¶ 13. Another class action for price-fixing, *Louie Alakayak, et al. v. All Alaskan Seafoods, Inc., et al.*, No. 3AN-95-4676 (Alaska Sup. Ct.), resulted in a defense verdict after a trial lasting more than three months in 2003. Susman was lead counsel in that case also. Susman Decl. ¶ 14. Like this case, *Corrugated Container*, *Vitamins*, and *Alakayak* involved conspiracies to fix prices for key commodities, as did four other cases in which Susman served as lead counsel. Susman Decl. ¶ 15.

Other antitrust cases Susman has tried as lead counsel include

- *Masimo Corporation v. Tyco Health Care Group, LP*, Case No. CV 02-4770 MRP (AJWx) (C.D. Cal.) ($140 million jury award before trebling for client).
- *Electronics in Medicine, Inc., et al. v. Picker International, Inc.*, C.A. Nos. H-88-1400 and H-89-3283 (S.D. Tex.) (defense verdict for client).
- *Arkansas Gazette Co. v. Camden News Publishing Co., et al.*, No. LR-C-84-1020 (E.D. Ark.) (defense verdict against clients).
- *Coastal Distributing Company, Inc. v. NGK Spark Plug Co., Ltd., et al.*, C. A. No. H-81-1421 (S.D. Tex.) ($2 million verdict for client, later set aside).
- *Affiliated Capital v. Gulf Coast Cable, et al.*, Case No. H-79-1331 (S.D. Tex.) ($6.3 million verdict for client).
- *Texas Federal Pilots, Inc., et al. v. Sabine Pilots Association*, C. A. No. B-79-63 CA (S.D. Tex.) (directed verdict for client).
- *Beer Wholesales, Inc., et al. v. Hillman Distributing Co., Inc., et al.*, C. A. No. 74-4-1002 (S.D. Tex.) (defense verdict for client).
- *Stitt Spark Plug Co. v. Champion Spark Plug Co.*, C. A. No. B-76-534 (S.D. Tex.) (settled before verdict).
- *Computer Statistics, Inc. v. Blair*, C. A. No. 73-H-1727 (S.D. Tex.) (judgment for plaintiff client).

Susman Decl. ¶ 16. Many other antitrust cases that Susman has handled as lead counsel involved favorable settlements or dismissals before trial. For instance:

- In 2004, Microsoft paid Susman's client, Novell, $536 million in cash to resolve antitrust claims relating to Novell's NetWare business.
- Also in 2004, the Eleventh Circuit upheld dismissal of $1.5 billion antitrust claims against Susman's client, Clear Channel Communications.
- During 2003, Microsoft settled antitrust claims by Susman's client, Be, Inc., for more than $23 million.
- In 2000, Susman's client, Caldera, received a settlement from Microsoft for over $250 million.

Susman Decl. ¶ 17. Other complex litigation in which Susman has acted as lead counsel includes cases involving everything from securities fraud that affected large classes of shareholders to disputes between members of wealthy families, from repudiation of agreements to pay for enormous amounts of natural gas to an executive's claim for an investment banking fee, and from a fight over the F-18 fighter to former House Speaker Jim Wright's battle to remain in office. Susman Decl. ¶ 18.

3. Susman's knowledge of the applicable law

Susman's work in unfair competition cases has made him intimately familiar with substantive antitrust law. Bar and other legal institutions have recognized his knowledge in this area by appointing him to key positions, including:

- Visiting Professor of Law (teaching antitrust and federal courts) at the University of Texas Law School, 1975.
- Special Assistant for Antitrust to the Attorney General of Texas, 1975.
- Editor: "ABA Civil Antitrust Jury Instructions" (1985).
- State Bar of Texas (Chairman, Section on Antitrust and Trade Regulation, 1976-77).

- American Bar Association, Section of Antitrust Law (member of Council, 1989-91) and Section of Litigation (currently member of Trial Advisory Board and Federal Practice Task Force and formerly co-chair of Task Force on Training the Advocate, chairman of Task Force on Fast Track Litigation, and member of Committee to Improve Jury Comprehension).

- Member, American Law Institute.

- ALI-ABA Advisory Group on Antitrust.

- Witness before Antitrust Modernization Commission, Hearing Regarding Civil Remedies Issues (July 28, 2005).

Susman Decl. ¶ 19. Susman has also written and spoken extensively about procedural aspects of complex litigation and about ways to streamline and expedite it. These include, most recently, a chapter on "Techniques for Expediting and Streamlining Litigation" for the forthcoming second edition of the ABA Section of Litigation's treatise, *Business and Commercial Litigation in Federal Courts* (Robert L. Haig ed., 2005). Susman Decl. ¶ 20. At the ABA's annual convention in August 2005, Susman spoke in the program "Advice from the Experts: Successful Strategies for Winning Commercial Cases," and on September 15, 2005, Susman will make a presentation for the Houston Bar Association on "Electronic Technology: Before and During Trial." *Id.* Susman also currently serves as an Adviser to the American Law Institute's project on Principles of the Law of Aggregate Litigation as well as many other panels, committees, and associations. *Id.*

4. Susman's resources committed to representing the class

Susman Godfrey has 68 lawyers in Houston, Dallas, Los Angeles, and Seattle. Susman Decl. ¶ 21. The firm and its lawyers have won many awards. These include being named in 2005 by *The American Lawyer* as one of the top two litigation boutiques in the country. At least 28 of the lawyers have been recognized as "Super Lawyers" or "Rising Stars". Susman Decl. ¶ 22.

If the Court selects Susman as sole lead counsel, he pledges to commit the resources of Susman Godfrey and the other firms supporting his appointment as lead counsel to litigate and try this case as quickly and cost-effectively as possible. Susman Decl. ¶ 23. Susman will personally attend all significant hearings and lead the trial team, on which Susman Godfrey partner Barry Barnett, associate Jonathan Bridges, and senior legal assistant Mark Anderson from the firm's Dallas office will work under his direction. *Id.*

Susman plans to assign substantial work, as appropriate, to professionals from Findling Garau Germany & Pennington, Hagens Berman Sobol Shapiro, Schiffrin & Barroway, John R. Price & Associates, Kohn Swift & Graf, Preti Flaherty Beliveau Pachios & Haley, The Mogin Law Firm, P.C.[4] and others according to the individuals' expertise, qualifications, and appropriateness for the particular task, and will also assign work, as needed, to those firms that did not support his selection as lead counsel. Susman Decl. ¶¶ 23-24.

5. Susman's proposed terms for attorney fees and nontaxable costs

Susman proposes that class counsel be compensated for representing the class on a percentage basis plus reimbursement of reasonable nontaxable costs. Susman Decl. ¶ 25. This general arrangement is appropriate for a common fund case like this because it best 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.'" *Taubenfeld v. Aon Corp.*, 415 F.3d 597, 599 (7th Cir. 2005) (quoting *In re Synthroid Marketing Litig.*, 264 F.3d 712, 718 (7th Cir. 2001)). And, as the Seventh Circuit emphasized in *Synthroid*, district courts should establish the fee structure at the

[4] Including their co-counsel, Bonsignore & Brewer; Greene & Schultz and Mallor Clendening Grodner & Bohrer, whose clients include some of the largest builders in Southern Indiana.

beginning of a common fund case, not at the end. *Synthroid*, 264 F.3d at 719 (criticizing district court for "let[ting] the opportunity slip away" to "design a fee structure that emulates the incentives a private client would put in place").

Contingent fee arrangements with individual plaintiffs in cases like this normally range from one-third to one-half of the gross recovery – depending on a variety of factors, including the individual plaintiff's purchases, the duration of the price-fixing, the extent to which the price-fixing raised prices above the competitive level, the solvency of the defendants, and the likelihood of a prompt and firm trial date. Susman Decl. ¶ 26. In a class case, lawyers must consider the same factors but should adjust aggregate class damages to account for potential opt outs and consider costs attending procedures for class certification, class notice, claims administration, and the like. *Id.* Susman suggests the Court should set in advance the percentage fee it will approve for class counsel out of any recovery in this case and suggests that a 25% fee would be appropriate. *Id.* By setting such a percentage in advance, the Court can eliminate any incentive by plaintiffs' counsel to overwork the case or to defer settlement to run up their lodestar. The Court need not concern itself with hourly rates or lack of efficiency on the part of class counsel because counsel will be paid for result, not effort.

If the Court appoints Susman as sole lead counsel, Susman Godfrey will not seek reimbursement for nontaxable costs that relate to travel that would be unnecessary if he and Susman Godfrey were located in Indianapolis or include in the fee petition reference to any hours Susman Godfrey's professionals spent in such travel without working on this case. Susman Decl. ¶ 27.

In short, Susman's experience and the results he has achieved in litigating and trying complex, high-stakes antitrust cases such as this one are unparalleled, and his participation in and commitment to this litigation are exemplary. Plaintiffs are convinced that his experience and

success in ***trying*** complex antitrust cases, not merely "litigating" them, is an essential ingredient to the best representation available in this case. Plaintiffs believe that Susman is the most-qualified and best-possible lead counsel for this case and, therefore, that he should be appointed as sole interim lead counsel.

D. Appointment of Interim Liaison Counsel

The *Manual* also suggests that the Court may appoint liaison counsel for the class, charging such counsel with "essentially administrative matters, such as communications between the court and other counsel (including receiving and distributing notices, orders, motions and briefs on behalf of the group), convening meetings of counsel, advising parties of developments, and otherwise assisting in the coordination of activities and positions." *Manual for Complex Litigation (4th)*, § 10.221 at 35-36 (2004). Should the Court decide to appoint an interim liaison counsel, Plaintiffs recommend Irwin B. Levin to serve in that capacity.

CONCLUSION

For these reasons, Plaintiffs respectfully ask this Court to enter the enclosed Case Management Order No. 1.

DATED: September 7, 2005.

Respectfully submitted,

/s/ Stephen D. Susman

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