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	)	

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 FEE

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"), have filed their 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 ("Distribution Motion") and supporting materials. Having reviewed the Distribution Motion, the Declaration of Irwin B. Levin ("Levin Dec.") and materials submitted therewith, and the Memorandum in support of the Distribution Motion, the Court now finds and orders as follows:

1. To date, the litigation efforts of Plaintiffs and Class Counsel have produced settlements with Defendants American Concrete Company ("American"), Shelby Materials, Inc. (including Phillip and Richard Haehl) (collectively "Shelby"), and Prairie Materials Sales, Inc. (including Gary Matney) (collectively "Prairie"). The settlement with Shelby ("Shelby

Settlement") provided for Shelby's payment of $4,700,000 into a Settlement Fund for the benefit of the Settlement Class. The Court granted final approval of the Shelby Settlement on April 4, 2008. The settlement with American ("American Settlement") provided for American's payment of $368,000 into a Settlement Fund for the benefit of the Settlement Class. The Court granted final approval of the American Settlement on April 4, 2008. The settlement with Prairie ("Prairie Settlement") provided for Prairie's payment of $19,000,000 into a Settlement Fund for the benefit of the Settlement Class. The Court granted final approval of the Prairie Settlement on August 7, 2008.

2. The payments under these Settlements compare very favorably with other price-fixing settlements, ranging from *all* of American's liquid assets, to 5.6% of Shelby's Class Period sales, to 22% of Prairie's Class Period sales. Levin Dec., ¶ 6. The Settlement Funds are presently held by First Wisconsin Bank & Trust pursuant to an agreement providing the security and treatment proposed by Class Counsel, and remain subject to the continuing jurisdiction of the Court. *Id.,* ¶ 13. As of December 31, 2008, the balance of the combined Settlement Funds with accrued interest was $24,389,894.37. *Id.*

3. Each Settlement Agreement provides for the settlement amount to be paid into a "Settlement Fund" to be administered for the benefit of the Settlement Classes by Class Counsel, and that "[a]fter the Effective Date, Plaintiffs and Class Counsel shall have the right to seek, and [Defendant] shall not oppose, Court approval of payments from the Settlement Fund for distribution to Settlement Class members or to reimburse Class Counsel for reasonable expenditures made or to be made by Class Counsel in the prosecution of the Action against the Other Defendants." American Settlement, ¶ 27; Shelby Settlement, ¶ 26; Prairie Settlement, ¶ 26.

4. Notice of the Settlements advised Settlement Class Members that distributions were not being made at the time of final approval, and that any proposed distribution would likely be in proportion to Settlement Class Members' purchases and would be submitted to the Court for approval. Shelby Settlement, Ex. "A," p. 4; American Settlement, Ex. "A," p. 4; Prairie Settlement, Ex. "A," p. 4.

5. With regard to the payment of attorneys' fees and litigation expenses, each Settlement provides that Class Counsel shall be reimbursed and paid solely out of the Settlement Funds for all fees and expenses. The Settlements also provide that Plaintiffs and Class Counsel have the right to seek, and Defendants will not oppose, the Court's approval of the payment of attorneys' fees in an amount not to exceed 33 1/3 % of the Settlement Amount and the reimbursement of reasonable expenses. American Settlement, ¶ 28; Shelby Settlement, ¶ 27; Prairie Settlement, ¶ 27. This provision was also brought to the attention of Settlement Class Members in the Notice. *See,* Shelby Settlement, Ex. "A," p. 7; American Settlement, Ex. "A," p. 7; Prairie Settlement, Ex. "A," p. 7. The Court finds that the deadline for objections to the Settlements has now passed and that no Settlement Class Member has objected to these provisions concerning the payment of attorneys' fees and reimbursement of expenses.

6. Plaintiffs and Class Counsel have proposed that the Settlement Funds be applied in part to pay Court-approved attorneys' fees, costs of litigation advanced by Plaintiffs' counsel, and incentive payments to each of the named Plaintiffs. Levin Dec., ¶ 15. Additionally, the sum of $83,344 would be held back to cover the estimated costs of administration. *Id*. The remainder of the Settlement Funds, referred to herein as the "Net Settlement Funds," would be distributed to Settlement Class Members who submit timely Claim Forms, on a *pro rata* basis relative to the amounts of their Qualifying Purchases. A "Qualifying Purchase" is defined as a *direct* purchase

by a Settlement Class Member of Ready-Mixed Concrete[1] from a Defendant Company[2] at any time during the Class Period,[3] which was delivered from a facility within the Central Indiana Area,[4] and for which a Qualifying Claim[5] has been submitted. Custom Claim Form, p. 3. A summary of the proposed distribution has been provided by Plaintiffs and Class Counsel. *See*, Levin Dec., ¶ 15 and Ex. "B" ("Proposed Distribution").

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

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

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[1] For purposes of determining the amount of Class Members' Qualifying Purchases, "Ready-Mixed Concrete" is defined as a product comprised primarily of cement, sand, gravel and water. For purposes of determining the amount of each Class Member's purchases in the Claim Form, Ready-Mixed Concrete also includes additives or admixtures such as, but not limited to, calcium chloride, accelerators, retarding admixtures, plasticizers, colorants, and fly ash, ***but does not include taxes or the following extra service or product charges:*** (Service Charges) delivery charges, demurrage charges, hourly charges, minimum load charges, overtime, plant charges, same day service charges, truck cleanup charges, weekend/holiday/after hours charges, and winter charges; (Product Charges) truck/equipment rental costs, costs of building materials, concrete blocks, precast concrete products, equipment/tools, expansion joints, foam/Styrofoam, concrete forms, hardware, plastic, rebar, steel fiber, wire mesh, sealants, and test cylinders. *See*, Levin Dec., ¶ 15, "A" ("Custom Claim Form"), p. 3.

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

[3] "Class Period" is defined as the time period from and including July 1, 2000 through and including May 25, 2004. Custom Claim Form, p. 2.

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

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

Custom Claim Form, p. 5. Because the Sherman and Clayton Acts provide for joint and several liability among all co-conspirators, money recovered from *any* of the Defendants in settlements or judgments will be distributed to customers of *all* of the Defendants. *See, e.g., In re Brand Name Prescription Drugs Antitrust Litig.,* 1999 WL 639173,*4-5 (N.D. Ill.) (approving *pro rata* distribution using purchases from all defendants, including non-settling defendants).

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

9. Class Counsel have proposed a method of notice and claims administration to be administered by A.B. Data as the claims administrator ("Claims Administrator"). Class Counsel propose a claims process that makes use, for the benefit of Settlement Class Members, of existing electronic transaction data from most Defendants.

10. Class Counsel report that with minor exceptions, all of the Defendant Companies other than Carmel Concrete previously provided electronic records of all of their Ready-Mixed Concrete sales during the Class Period. Levin Dec., ¶ 16. The claims process will utilize this data by sending *customized* Claim Forms to known Settlement Class Members that include the amounts of their Qualifying Purchases, according to available data, from each of the Defendant Companies other than Carmel Concrete. *Id.* A Settlement Class Member will then be given an

opportunity to check this presumptive amount of purchases against their own records and either accept the presumptive amount or provide an alternative figure and supporting documentation. *Id.*; Custom Claim Form, pp. 10-11.

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

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

13. Both the General Claim Form and the Custom Claim Form (collectively the "Claim Forms") provide background information about the case and settlements, eligibility to receive a share of the Settlement Fund, how the Settlement Fund will be divided, and instructions for completion of Claim Forms. The Claim Forms also provide a toll-free telephone number and

the settlement website address from which potential Settlement Class Members can obtain additional information about the Settlements and the claims process, or to obtain assistance with completing and submitting Claim Forms. *See,* Claim Forms, pp. 1-8.

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

15. Class Counsel report that they have collaborated with the Claims Administrator to develop guidelines for processing claims. Levin Dec., ¶ 20 and Ex. "D." The guidelines were developed to promote the goal of a fair, accurate, efficient, and simple claims protocol. *Id*. The guidelines outline the steps to be taken if a Custom Claim Form or General Claim Form is incomplete, which include allowing the claimant an opportunity to correct any deficiencies. *Id*.

16. The Court finds that the proposed plan for administering the distribution of the Net Settlement Funds to Settlement Class Members is fair, efficient, accurate, and as simple as possible for Settlement Class Members. The Court therefore approves the proposed Claim Forms and proposed method of claims administration as fair, reasonable and adequate for the Settlement Classes.

17. Class Counsel have requested, and the settling Defendants do not oppose, an award of attorneys' fees in the amount of 33.33% of the Settlement Funds, or $8,129,151.79.

Levin Dec., ¶ 21. Class Counsel have also request the reimbursement of litigation expenses in the amount of $1,913,321.96. *Id*. Finally, Plaintiffs and Class Counsel have requested an incentive fee award to each of the named Plaintiffs in the amount of $5,000. Levin Dec., ¶¶ 34-35.

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

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

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

19. To date, Class Counsel have created combined Settlement Funds in the amount of $24,389,894.37 (including interest). *See*, American Settlement, ¶ 23; Shelby Settlement, ¶ 22; Prairie Settlement, ¶ 22. Distribution of the Settlement Funds for the benefit of American, Shelby and Prairie Settlement Class members is subject to the Court's approval, and none of the Settlements provides for the direct payment of attorneys' fees or expenses by a settling Defendant. Levin Dec., ¶ 22. Instead, Class Counsel and Plaintiffs may seek Court-approval for

the payment of attorneys' fees and reimbursement of costs and expenses to be paid out of the Settlement Funds. *See*, American Settlement, ¶¶ 27-28; Shelby Settlement, ¶¶ 26-27; Prairie Settlement, ¶¶ 26-27. The combined Settlement Funds are therefore paradigm examples of "common funds" established for the benefit of a plaintiff class, and the Court finds that their creation by Class Counsel justifies application of the common fund doctrine to award attorneys' fees and reimburse expenses.

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

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

Sutton v. Bernard, 504 F.3d 688, 692 (7th Cir. 2007), quoting *In re Synthroid Mktg. Litig.,* 264 F.3d 712, 718 (7th Cir. 2001) ("*Synthroid I*"). As stated by Judge Posner in *Cont'l Ill. Sec. Litig.,* "[I]t 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.

21. Class Counsel have proposed an award of attorneys' fees using a percentage of the fund approach. In the Seventh Circuit, "a district court may use the lodestar method, the percentage of recovery method, or some combination of the two." *Florin v. Nationsbank of Georgia, N.A.,* 60 F.3d 1245, 1247 n. 2 (7th Cir. 1995) ("*Florin II*"), citing *Florin I*, 34 F.3d at 565-66; *Harman v. Lyphomed, Inc.,* 945 F.2d 969, 974 (7th Cir. 1991). However, the Circuit

Court has expressed a preference for the percentage of the fund approach, recognizing that "there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration," and confirming that using a percentage approach alone is well within the discretion of the district court. *Florin I,* 34 F.3d at 566.

22. For reasons discussed below, the Court finds 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." *Sutton*, 504 F.3d at 692.

23. 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.

24. 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.

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

26. The Court finds that Class Counsel's risk of non-payment is also affected by the challenge of certifying a plaintiff class. Levin Dec., ¶ 24. The Court notes that the risks attending class certification existed at the outset of the case, that the Defendants' efforts to defeat

class certification have been lengthy, complex and expensive, *id*., and that the issue of class certification remains undecided. The Court also finds that the risk of nonpayment for Class Counsel at the time they undertook this matter was also tied to the risk of a defense verdict at trial. Levin Dec., ¶ 25. Class Counsel faced the task of establishing a conspiracy among seven corporate Defendants, class-wide impact on direct purchasers, and measurable damages, against Defendants who were mostly able to finance a lengthy defense. *Id.*

27. The Court also finds that Class Counsel's proposed attorney fee is also supported by their actual agreements with Plaintiffs to provide services. *Synthroid I,* 264 F.3d at 719-20. Class Counsel report that the retention agreement between each named Plaintiff and their initial counsel calls for the payment of attorneys' fees and the reimbursement of litigation expenses to be contingent upon a recovery in this case, and to be paid out of such recovery. Levin Dec., ¶ 26. Some of the agreements specifically contemplate a request for fees of 33 1/3% of any fund established for the Plaintiffs and class members, while other do not recite a specific percentage. *Id*. Class Counsel Irwin Levin has also submitted the opinion, 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.*

28. Class Counsel Levin has also submitted the opinion, and the Court agrees, that a contingency fee agreement is the only arrangement by which most class members could pursue relief in this case. Levin Dec., ¶ 27. Because the litigation requires a substantial advancement of time and expense, the measure of recoverable damages is uncertain, and the risk of non-payment or under-payment is significant, it would be financially impossible, or irrational, for any of the

named Plaintiffs to have agreed to pursue this matter on any basis other than a contingency arrangement with expenses advanced by counsel. *Id.*

29. The terms of the Plaintiffs' actual agreements are directly relevant to "approximating the terms that would have been agreed to *ex ante*." 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. Further, 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).

30. Class Counsel have also identified data concerning awards of attorneys' fees in other, similar cases. In *Robert H. Lande & Joshua P. Davis, Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases,* 42 U.S.F. L. REV. 879 (2008), the authors analyzed data from 40 private antitrust cases, including the fund recovered for victims and the amount awarded in attorneys' fees. Out of 16 cases resulting in recovery of less than $100 million, seven cases included attorney fee awards of 33.3% of the fund, one case included an attorney fee award of 33% of the fund, and three cases included attorney fee awards of 30% of the fund. *Id.* at 911, Table 7A. Out of nine cases resulting in recovery of between $100 million and $500 million, seven cases included attorney fee awards of between 30% and 33.3%. *Id.* at 911, Table 7B. Only in cases in which recovery exceeded $500 million did attorney fee percentages consistently depart from this range. *Id.* at 912, Table 7C.

31. The Court finds that this evidence of fee awards in other price-fixing cases 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. This data also supports the conclusion that the market rate for the services provided by Class Counsel in this matter is a contingency fee in this range. *Berger,* 2004 WL 287902,*2 ("the Court finds based on the evidence presented by Class counsel, and the Court's awareness of the market, that a 29% fee … is at or below the market rate for this and similar litigation"), citing *Synthroid I*; *Synthroid II*.

32. The Court also finds that Class Counsel's fee request is supported by 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. First, the Court notes that 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. 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. Third, the stakes of the case are very high – the Plaintiffs allege that Defendants effectuated a conspiracy to inflate the price of more than $700 million of ready-mixed concrete.

33. The Court therefore finds, based upon the foregoing, 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.

Sutton, 504 F.3d at 692. Class Counsel's request for a fee award in the amount of $8,129,151.79 is therefore approved.

34. Class Counsel have also requested that the Court approve an award of $1,913,321.96 from the Settlement Funds to reimburse Class Counsel for litigation expenses incurred to date. 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).

35. Class Counsel report that they, along with other associated firms operating under their direct supervision, have incurred expenses in the combined amount of $1,913,321.96 (net of computer research costs)[6] in the prosecution of this matter as of the close of 2008. Levin Dec., ¶¶ 31-33, Ex. "D." Class Counsel reports that their request for reimbursement is based upon categories of expenses that are customarily charged to clients in the market for legal services, and are included in rates and amounts that are customary in the market. Levin Dec., ¶ 33 and Ex. "D." Moreover, these are expenses that are normally recovered from a settlement fund net of attorneys' fees, which is the arrangement set forth in Class Counsel's agreements with the Plaintiffs. Levin Dec., ¶ 33. Reimbursement of expenses from the Settlement Funds is also contemplated by the Settlement Agreements. American Settlement, ¶ 28; Shelby Settlement, ¶ 27; Prairie Settlement, ¶ 27.

36. The Court finds that Class Counsel's request for reimbursement of expenses is based upon an itemization and amounts that are consistent with market rates and practices. Class

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

Counsel's request for the reimbursement of expenses from the Settlement Funds in the amount of $1,913,321.96 is therefore approved.

37. Finally, Class Counsel have requested that the seven named Plaintiffs be awarded $5,000 each as a class representative incentive fee. In this Circuit such fees may be awarded under appropriate circumstances:

> 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).

38. As Class Counsel point out, the named Plaintiffs are part of the Settlement Classes and the proposed Plaintiff Class, and could have simply awaited the outcome of the litigation and received the same benefits as any other class member. Levin Dec., ¶ 34. 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. *Id*. Class Counsel report that the named Plaintiffs were 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*.

39. Class Counsel report that the named Plaintiffs in this case, Kort Builders, Inc., Dan Grote, Cherokee Development, Inc., Wininger/Stolberg Group, Inc., Marmax Construction, LLC, Boyle Construction Management, Inc., and T&R Contractor, Inc., have each made substantial contributions on behalf of Settlement Class members. Levin Dec., ¶ 34. Each Plaintiff, through one or more representatives, has participated in multiple in-person and telephone conferences, including extensive meetings to prepare discovery responses. Each

Plaintiff, through one or more representatives, has prepared for and submitted to a deposition. Levin Dec., ¶ 35. Each Plaintiff has provided answers to interrogatories, has reviewed their current and archived records, has produced documents responsive to requests, and has allowed Class Counsel's consultants to access their computer systems and servers and download data for production. *Id*. Some of the Plaintiffs have conferred 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 valuable assistance and demonstrated an ongoing commitment to protecting the interests of Class members. *Id*.

40. The Court agrees that an award for each of the Plaintiffs is appropriate to provide an incentive for their participation, and that the requested awards are supported 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.

41. The Court also finds that the requested incentive award of $5,000 is highly reasonable in light of awards in other cases. *See, e.g., Id. (*affirming $25,000 incentive award to plaintiff); *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). Class

Counsel's request for a class representative incentive award to each named Plaintiff in the amount of $5,000 is therefore approved.

IT IS THEREFORE ORDERED by this Court that:

1. The 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 is hereby granted;

2. The proposed plan of distribution of Settlement Funds, as set forth in the Memorandum in support of the Distribution Motion, the Affidavit of Irwin B. Levin, and Exhibit "B" to the Levin Declaration, including the appointment of A.B. Data as Claims Administrator, is hereby approved, and Class Counsel and the Claims Administrator are authorized and directed to effectuate the proposed plan of distribution as soon as practicable;

3. Class Counsel's request for an award of attorneys' fees in the amount of $8,129,151.79 is hereby granted and the Claims Administrator is authorized and directed to pay this sum to Class Counsel from the Settlement Funds as soon as practicable;

4. Class Counsel's request for the reimbursement of litigation expenses in the amount of $1,913,321.96 is hereby granted and the Claims Administrator is authorized and directed to pay this sum to Class Counsel from the Settlement Funds as soon as practicable;

5. Class Counsel's request for an award of incentive fees in the amount of $5,000 each to the named Plaintiffs is hereby granted, and the Claims Administrator is authorized and directed to issue a check in this amount from the Settlement Funds to each named Plaintiff and deliver the same to Class Counsel for distribution as soon as practicable; and

6. The Court retains jurisdiction over the parties, the Settlement Classes, the Settlement Funds and the Claims Administrator for purposes of effectuating the terms of the

Settlements, the proposed distribution of Settlement Funds approved herein, and the terms of this Order.

SO ORDERED.

Date: ______________

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The Honorable Sarah Evans Barker, Judge
United States District Court,
Southern District of Indiana