

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE READY-MIXED CONCRETE
ANTITRUST LITIGATION

) Master Docket No.
) 1:05-cv-00979-SEB-JMS

THIS DOCUMENT RELATES TO:
ALL ACTIONS

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

Before the Honorable
SARAH EVANS BARKER, JUDGE

OFFICIAL REPORTER'S TRANSCRIPT OF
FAIRNESS HEARING

Court Reporter:

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

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

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1 (Open court.)

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

7 UNIDENTIFIED SPEAKER: (Inaudible).

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

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

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

16 (Call to order of the Court)

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

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

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

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

15 Nice to see you, Mr. Levin.

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

19 THE COURT: Exactly right.

20 MR. LEVIN: Your Honor --

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

23 MR. LEVIN: Happy to do that.

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

1 THE COURT: Yes.

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

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

5 MR. LEVIN: Marshall Fletcher from Marmax
6 Construction.

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

8 MR. LEVIN: Justin Reynolds from Kort Builders.

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

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

11 THE COURT: Good morning, Mr. Salazar.

12 MR. LEVIN: And Tim Toth from Cherokee Development.

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

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

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

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

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

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

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

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

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

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

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

16 MR. LEVIN: Thank you.

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

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

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

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

25 MR. LEVIN: This is the fourth settlement as Your

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

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

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

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

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

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

4 THE COURT: By all defendants?

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

9 When all the settlements are complete, the total
10 amount that we will have recovered on behalf of the class is
11 \$59.143 million.

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

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

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

1 that we have submitted to the Court.

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

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

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

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

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

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

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

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

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

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

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

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

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

10 MR. LEVIN: It was.

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

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

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

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

12 MR. LEVIN: Your Honor, we -- I'm trying to think of
13 an analogy, but suffice it to say that we pounded that pretty
14 hard. And we explained to the defendants that -- at various
15 times -- that we simply weren't going to go away for the
16 5.9 percent.

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

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

25 MR. LEVIN: Your Honor --

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

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

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

7 MR. LEVIN: Thank you, Your Honor.

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

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

14 THE COURT: Yes, I remember that.

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

19 THE COURT: That was your stipulation?

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

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

1 7th Circuit as opposed to going through everything that was in
2 our brief.

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

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

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

1 actually did charge people in accordance with their agreement.

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

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

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

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

25 A lawyer going into this case in assessing a fair

1 fee would know that proving damages in this case was going to
2 be extremely difficult because not a single defendant said
3 that a single price was raised as a result of their agreement.
4 The defendants said that the conspiracy never worked and was
5 limited to bid work, which is really a small portion of that
6 \$680 million.

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

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

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

18 A lawyer going into negotiations with a real client
19 knew that if the class was certified, that there would be a
20 23F appeal. That was probably a likelihood in a case like
21 this, especially with the number of defendants. And if there
22 was a survival of that appeal, and a trial was necessary, it
23 would be expensive and it would be lengthy, and with a likely
24 appeal.

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

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

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

10 THE COURT: Not to be confused with chop liver.

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

13 THE COURT: I wish I were that good.

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

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

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

1 again in just a minute, Your Honor.

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

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

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

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

19 THE COURT: Right.

20 MR. LEVIN: Yes.

21 Subject to --

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

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

1 THE COURT: Okay.

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

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

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

17 THE COURT: I read this, Counsel.

18 MR. LEVIN: You did? Okay.

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

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

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

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

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

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

20 THE COURT: What is it?

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

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

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

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

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

14 This is Duke's counsel's firm. Duke's counsel's
15 firm entered into a market rate agreement. True, it was in
16 1998. And the agreement that they signed, and they were a
17 party to this agreement, was for a third. And
18 significantly -- and I don't have the documents for this --
19 they were also co-counsel in another case, a class action case
20 where Judge Gerald Zore was the class representative plaintiff
21 against Ford Motor Company. And Duke's counsel entered into a
22 33 1/3 percent fee agreement with Judge Zore who certainly
23 can't be called unsophisticated.

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

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

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

8 MR. LEVIN: Might not.

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

10 MR. LEVIN: Sure.

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

19 MR. LEVIN: Yes.

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

24 MR. LEVIN: That is absolutely correct.

25 THE COURT: So jointly and severally, it's

1 one-third?

2 MR. LEVIN: Absolutely.

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

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

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

12 MR. LEVIN: The class bears it.

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

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

17 MR. LEVIN: Correct.

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

20 MR. LEVIN: That's correct.

21 THE COURT: The lawyers are not absorbing the costs.

22 MR. LEVIN: That's correct.

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

24 MR. LEVIN: Correct.

25 THE COURT: So what information can you provide the

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

8 MR. LEVIN: Well --

9 THE COURT: Can you tell me that?

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

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

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

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

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

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

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

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

23 MR. LEVIN: No.

24 THE COURT: Okay. So explain it.

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

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

3 THE COURT: Yeah, right.

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

9 THE COURT: So far.

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

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

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

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

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

5 MR. LEVIN: Yes?

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

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

14 THE COURT: Exactly.

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

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

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

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

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

9 But when I took a deposition against Builders --

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

13 MR. LEVIN: Reimbursement?

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

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

20 THE COURT: Right.

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

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

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

6 THE COURT: For everybody?

7 MR. LEVIN: For everybody who's left.

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

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

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

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

23 MR. LEVIN: Yes.

24 THE COURT: Okay.

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

1 double dipping.

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

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

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

8 MR. LEVIN: And I would agree with that.

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

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

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

25 THE COURT: A day an expert charges you only a

1 hundred dollars, I want to be around.

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

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

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

12 THE COURT: Okay. Anything else?

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

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

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

22 THE COURT: Yes.

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

1 THE COURT: Those papers being?

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

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

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

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

19 Thank you, Your Honor.

20 THE COURT: Thank you, Counsel.

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

24 MR. MIXDORF: Thank you, Your Honor.

25 THE COURT: Nice to see you, sir.

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

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

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

9 THE COURT: Nice to see you.

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

12 We also ask that the Court approve the settlement.
13 We have nothing to say about the attorneys' fees issues
14 although we've agreed in our settlement documents that
15 33 percent is right.

16 THE COURT: 33 1/3?

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

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

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

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

15 MR. MIXDORF: Yes, Your Honor.

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

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

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

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

5 Is that true, sir?

6 MR. MIXDORF: Yes, Your Honor.

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

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

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

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

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

1 I take people's words for it.

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

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

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

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

22 MR. MIXDORF: Thank you, Your Honor.

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

25 MR. MIXDORF: Thank you, Your Honor.

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

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

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

13 MR. LEVIN: Probably premium, too.

14 THE COURT: Imported.

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

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

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

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

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

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

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

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

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

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

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

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

9 MR. CAMPBELL: We have not discussed that.

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

15 In addition to that --

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

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

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

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

25 THE COURT: Why?

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

4 THE COURT: The representation to whom?

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

7 THE COURT: In the contracts?

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

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

13 MR. CAMPBELL: No, I misspoke.

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

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

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

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

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

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

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

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

9 MR. CAMPBELL: Yes.

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

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

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

16 MR. CAMPBELL: Yes, a couple of things.

17 THE COURT: Yes.

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

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

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

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

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

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

18 And the class counsel in their first fee award
19 actually told the Court the amount of hours and time that had
20 been incurred, and did make the comparison by talking about a
21 1.1 multiplier.

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

23 MR. CAMPBELL: We did object to that award.

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

1 Mr. Campbell --

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

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

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

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

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

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

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

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

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

3 THE COURT: What does "predominant" mean?

4 MR. CAMPBELL: Most. All.

5 THE COURT: Have you done the calculation?

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

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

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

1 settlement.

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

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

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

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

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

1 MR. CAMPBELL: Yes.

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

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

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

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

23 MR. CAMPBELL: Right.

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

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

6 So, isn't that what's happening?

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

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

12 MR. CAMPBELL: No, I --

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

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

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

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

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

4 MR. CAMPBELL: Okay, that's fine.

5 THE COURT: And there was class certification.

6 MR. CAMPBELL: Correct.

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

9 MR. CAMPBELL: Correct.

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

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

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

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

21 THE COURT: Seriatim.

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

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

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

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

7 MR. CAMPBELL: Thank you.

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

10 MR. LEVIN: No, Your Honor.

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

14 MS. WOODS: No, Your Honor.

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

17 MR. HANCOCK: Very briefly, Your Honor.

18 COURT REPORTER: Could you come forward?

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

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

22 THE COURT: Okay.

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

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

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

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

8 MR. HANCOCK: Yes, here and now.

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

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

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

25 THE COURT: Okay, thank you, sir.

1 MR. HANCOCK: Thank you.

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

3 MR. HANCOCK: Thank you very much.

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

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

7 THE COURT: Oh, good.

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

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

14 MR. SCHULTZ: Something.

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

17 MR. SCHULTZ: That would be great.

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

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

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

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

4 MR. SCHULTZ: Thank you.

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

6 Mr. Catlin? Is it Catin?

7 MR. CATLIN: Catlin.

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

10 MR. CATLIN: Nothing.

11 THE COURT: Okay, thank you.

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

16 UNIDENTIFIED SPEAKER: No.

17 THE COURT: Okay, very good.

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

25 So as my first declaration, I find that the

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

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

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

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

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

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

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

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

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

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

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

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

25 In my view, the approach that plaintiffs have taken

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

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

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

23 This is not new territory. The fact that it's 33
24 1/3 percent resonates with what this Court knows to be a
25 general rule of thumb in many settlement contexts, including

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

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

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

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

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

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

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

25 The Court specifically finds, because the issue was

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

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

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

15 MR. LEVIN: It's correct.

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

19 MR. LEVIN: Thank you.

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

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

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

7 We know that there was at least one appeal to the
8 7th Circuit here that plaintiffs' counsel has had to fend off,
9 and the fact that all of the plaintiffs stand to obtain, by
10 virtue of these settlements, an amount that is virtually equal
11 to their actual overcharges. It is true that the settlement
12 doesn't give a treble damage award. You could say it does,
13 but by the time the attorneys' fees and costs are deducted, it
14 comes back to an amount that's equal to the actual
15 overcharges. That's still a very fair, in some ways a
16 remarkable settlement, because ordinarily, you have to
17 negotiate some sort of concessions with respect to those
18 actual losses as well, but that hasn't happened here. So
19 that's another measure that the Court uses to decide finally
20 that the settlement is worthy of the Court's final approval.

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

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

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

14 MR. LEVIN: Thank you, Your Honor.

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

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

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

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

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

15 (Off-the-record discussion.)

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

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CERTIFICATE OF COURT REPORTER

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

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

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