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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE READY-MIXED CONCRETE) Master Docket No.
ANTITRUST LITIGATION,) 1:05-cv-00979-SEB-JMS
)

THIS DOCUMENT RELATES TO:) August 17, 2010
ALL ACTIONS)

**Before the Honorable
SARAH EVANS BARKER, JUDGE**

OFFICIAL REPORTER'S TRANSCRIPT OF
FAIRNESS HEARING

Court Reporter: Laura Howie-Walters, CSR/RPR
Official Court Reporter
46 East Ohio Street
Room 217
Indianapolis, Indiana 46204

PROCEEDINGS TAKEN BY MACHINE SHORTHAND
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A P P E A R A N C E S

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(Open court.)

THE COURT: Nice to see you all. You may be seated.

MR. LEVIN: Thank you, Your Honor.

MS. WOODS: Thank you.

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

(Call to order of the Court)

THE COURT: Well, I think it's fair to say that we're rounding the bend here towards a conclusion of the Ready Mix Concrete Antitrust Litigation. According to the information you have placed before me, not because I went back and reviewed the docket, the parties have reached settlements in seven -- with seven corporate defendants to date, and the others are in the chute.

So today the Court addresses the issues in the case involving what's collectively referred to as the "Builder's defendants." The Court, on April 8, 2010, granted preliminary approval to the proposed settlement finding preliminarily that it was fair, reasonable and adequate, and that all the appropriate due process steps had been taken to tee it up or notice to the class as to the terms of the settlement to allow them to comment and intervene, if appropriate, or object, if appropriate, request exclusion.

So that process, according to the filings that have been made with the Court, has unfolded in due course, and so

1 today, the parties are before the Court with their client
2 representatives, as well as of course by counsel, to secure
3 from the Court the final approval of the settlement and an
4 order dismissing the claims of the settlement class members
5 against these defendants, and to approve the attorney's fees
6 request and the reimbursement of costs and expenses pursuant
7 to Rule 23(h) of the Federal Rules of Civil Procedure.

8 So that's my expectation with respect to the
9 business that you wish to have me conduct. So I'll call on
10 you, Mr. Levin, as usual, to state whatever you'd like to to
11 the Court preparatory to these rulings.

12 I do have a couple of questions, just to make sure I
13 have it well in mind, and some assurances I need to have from
14 you about any objectors or requested exclusions. I know as of
15 the time you filed these documents with me, which I've
16 reviewed, there were no objectors, although there were a few
17 people who requested to be excluded. But you go ahead and
18 tell me whatever it is you wish to state for the record prior
19 to the rulings.

20 MR. LEVIN: Thank you, Your Honor.

21 First, Your Honor, it's my pleasure to introduce
22 Mr. Galloway who's here on behalf --

23 THE COURT: Good morning, sir.

24 MR. LEVIN: -- of Boyle Construction Management
25 Corporation. Mr. Galloway has been here before, as has

1 Mr. Boyle from time to time. And it's a pleasure to bring
2 them back to court for this one last occasion.

3 Your Honor, before I go to the business --

4 THE COURT: I expect he'd like to hang up his suit
5 and go back to his business attire.

6 MR. LEVIN: Your Honor, before I get into the
7 business of today, I think I would be remiss if I didn't tell
8 Your Honor that on behalf of the plaintiffs, we have a lot of
9 thanks to give not just to Your Honor and to former Magistrate
10 Judge Magnus-Stinson, but really to the entire court staff
11 because this has been not a tremendously lengthy process if
12 you consider the fact that we had a stay because of the
13 criminal trials, but we had a lot of issues that had to be
14 dealt with.

15 It is always a delight to be in this court. It is
16 always a delight to know that when confronted by the Court for
17 some legal position that you might take, it's truly an
18 intellectual exercise seeking the truth as opposed to judge
19 chewing on some lawyers for pleasure.

20 But it's been my experience that the hard work goes
21 on behind-the-scenes, and that the courts benefit from those
22 people who work so hard so that the Court can look good and
23 make the right decisions and make them promptly. So I think I
24 would be remiss if I didn't thank you and thank Judge
25 Magnus-Stinson and Miss Schneeman, and the entire court staff

1 for all the efforts they've put forth over the past five
2 years.

3 THE COURT: Those are kind words, and I'll accept
4 them on behalf of the court staff and the magistrate judge
5 assigned to the matter and deflect them as to me, but they're
6 not lost on me as to the court staff. I, too, know how
7 efficient they are and how hard they work to move these cases
8 and all the other cases that have been assigned.

9 It's been particularly challenging, as Miss Woods
10 would know, too, these last few months when we've been short
11 of judicial resources as we've awaited the new judges'
12 arrivals.

13 So in that time period, the fact that we had your
14 case to resolve was just one of even more than usual, but the
15 compliments need to be returned to you and to Miss Woods and
16 her colleagues who have appeared in similar capacities in this
17 litigation because you make it easy to follow the history of
18 the case, and to understand what it is specifically you want
19 the Court to do at any particular time in reviewing what's
20 happened and what needs to be determined. So I return the
21 compliments to you, Counsel, and to you, Miss Woods, as well.

22 MR. LEVIN: Thank you very much, Your Honor.

23 Your Honor, with regard to the settlement before
24 you, as in -- in the first settlements, I sort of took a lot
25 longer than I have over time because --

1 THE COURT: Yes, I took a lot longer reading them
2 the first time through, too, but I started on this one very
3 early this morning, about 5:00. So I had enough time to
4 review it, but I saw that I was able to read more quickly than
5 before.

6 MR. LEVIN: Well, what's interesting, Your Honor, is
7 that I had a class member who I had talked to very early who
8 said to me, "You know, there are a lot of people who are not
9 going to make claims in this because they are afraid of
10 retaliation" or for whatever reason.

11 And I said, "I will promise you one thing, when
12 there's money on the table, those people will make claims."

13 And indeed, the claiming rate in this case has been
14 astronomical. And this has been a settlement, as you know,
15 Your Honor, that has really fairly historic proportions as far
16 as the return to the agreed members of the class.

17 We are now at a point, Your Honor, where some of the
18 people who opted out but then came back in and claimed, we're
19 now at a point with this final settlement that not only were
20 there no objections whatsoever, there were only three opt-outs
21 out of over 5,000 claimants.

22 THE COURT: I was going to ask the number.

23 MR. LEVIN: It's three, Your Honor.

24 And what that tells me, Your Honor, is that people
25 who look askance at our system sometimes, once they find out

1 that it actually worked, all of a sudden the people who
2 automatically say "I want to opt out of every class action
3 because I don't believe in them," now that they've seen the
4 system work, that didn't happen. The numbers were somewhat
5 higher. They were never really high, but that didn't happen
6 here.

7 THE COURT: Don't you think it's also in part
8 because it's such hard work to make the system work, that when
9 they can jump on the wagon and let somebody else do the
10 pushing and the steering and so forth, and derive benefit,
11 that there are incentives for doing that. We hope there are.
12 That's why the rules are set up the way they are.

13 MR. LEVIN: Right.

14 THE COURT: And I guess that falls fairly within
15 your characterization that the system works.

16 MR. LEVIN: Yeah, you know, there is a -- one of the
17 preeminent class action cases is a case called Schultz versus
18 Phillips Petroleum. And in that case, the United States
19 Supreme Court -- the argument by the defendant was it should
20 have been an opt-in class. And the Supreme Court said, "No,
21 we're not going to do opt-in classes other than in employment
22 cases and things which are familiar."

23 And they said "Because to do that" -- and I'm not
24 quoting, but it said "there are people out there who are too
25 timid, too poor, too ignorant, or just don't simply have the

1 time to participate in the system, and if we did that, the
2 system wouldn't work." And this is a case that I think we're
3 all --

4 THE COURT: In a profusion of information, it's hard
5 to be alert to what your rights are and so forth.

6 MR. LEVIN: Right. In this case, Your Honor, the
7 Court gave the history of the preliminary approval, the notice
8 was given. There were only three opt-outs, there were no
9 objectors. The settlement is very straight forward, although
10 a little different.

11 As we indicated in the last settlement that we had
12 with the Beaver defendants, we hired a CPA to actually look at
13 the books and records and make a recommendation to us as to
14 what they thought the defendant could pay because the
15 defendant claimed they did not have the resources to enter
16 into a settlement.

17 We engaged in that same process with the Builders
18 defendants. And the settlement provides that if the Court
19 were to see fit to grant final approval today, Builders would
20 have to make a payment of \$115,000 within five days.

21 THE COURT: That was one of my questions, too, when
22 is that effective date?

23 MR. LEVIN: The effective date is the date of --

24 THE COURT: Of the order?

25 MR. LEVIN: Yes, actually it's --

1 MS. WOODS: It's actually not. It's when the order
2 becomes final and non-appealable.

3 MR. LEVIN: Correct, 30 days after that.

4 THE COURT: So that was going to be part of my
5 question, too. Are you sure you want it on the date I issue
6 the order? And obviously you don't. You want to wait until
7 the time for the appeal to run.

8 MR. LEVIN: Actually, I would, but she's a very good
9 negotiator.

10 THE COURT: She's a good lawyer.

11 Okay, so that will be the effective date, 30 days
12 after the final date of the approval, right?

13 MS. WOODS: It's 35 days after the effective --
14 after the date of your order, Your Honor, or five days after
15 the effective date which is 30 days after. So it's
16 essentially 35 days from when you enter the order.

17 MR. LEVIN: Yes. The effective date is roughly 30
18 days, and then they get five days from that date to pay the
19 money into the account which we've designated.

20 THE COURT: It's good that we nail this down because
21 the consequences of default are really steep.

22 MR. LEVIN: They are, Your Honor. And I don't
23 think -- Ms. Woods and I won't have any quibbles over the
24 dates. The dates after the first payment are really very
25 simple. The second payment of \$1 million is due December 31.

1 THE COURT: You mean simple to understand, perhaps
2 not simple to pay.

3 MR. LEVIN: Correct.

4 And then every year on December 31 for the following
5 four years, there will be payments of \$1.1 million.

6 As the Court obviously knows, in the event of
7 default, in the event that those payments are not made timely,
8 and time is of the essence, there will be -- the class
9 counsel -- upon the filing of the declaration of default under
10 the terms of the agreement, the Court will then enter a
11 judgment in the amount of \$94,650,281 against the Builders
12 defendants.

13 That number, Your Honor, represents the high range
14 of treble damages under our expert's analysis less credit for
15 payments that have already been paid made by other defendants.

16 THE COURT: Will they get credit for what they have
17 paid?

18 MR. LEVIN: I'm sorry?

19 THE COURT: I guess there's such a disparity between
20 the numbers that that doesn't compute. For example, if they
21 make three payments of \$1.1 million three years, does that get
22 deducted from the overall amount that they're required to pay?

23 MS. WOODS: Yes, Your Honor. In fact, the
24 settlement agreement gives credit. The 96 million is the
25 maximum that the plaintiff's expert believe they could

1 recover.

2 Under the normal rules, with respect to the type of
3 joint and several liability, and contribution-type issues that
4 there are in a case of this nature, not only would there be
5 credit before anything paid, but it's a credit for all of the
6 amounts that have been paid.

7 THE COURT: So the 96 million is not just what the
8 Builders defendants are severably obligated to pay; is that
9 right?

10 MS. WOODS: It is a joint and several obligation
11 under the antitrust act as you know, but the \$96 million does
12 not represent just Builders portion of that, if that's what
13 you're asking.

14 MR. LEVIN: That is correct.

15 THE COURT: Yes.

16 MS. WOODS: That is everyone's liability together.

17 THE COURT: Does the settlement agreement provide
18 that if there's default, the judgment will enter for
19 96 million --

20 MR. LEVIN: Yes.

21 THE COURT: Less --

22 MR. LEVIN: No.

23 THE COURT: -- whatever's been paid?

24 MR. LEVIN: The judgment --

25 MS. WOODS: The judgment enters, but then there will

1 be subsequent issues as to what credits there may be against
2 that judgment.

3 THE COURT: Does the settlement agreement
4 contemplate the credits, is what I want to know?

5 MS. WOODS: I don't know that it does and we
6 probably should take a look at that.

7 MR. LEVIN: Your Honor, it does not contemplate the
8 credits. The credits are not mentioned. The judgment is for
9 the full amount, and that is the penalty for not paying the
10 agreed amounts which are set forth in the agreement.

11 As a practical matter, having looked at their
12 financials, I'm not sure that this is a -- this is a practical
13 discussion but it is a real one. But the settlement agreement
14 says what the settlement agreement says, and does not provide
15 for any credits.

16 THE COURT: There seems to be a disagreement between
17 the attorneys --

18 MR. LEVIN: Well --

19 THE COURT: Let me finish, and then you talk.

20 MR. LEVIN: You're right, it's a deal.

21 THE COURT: And I promise Miss Woods, she talks.

22 MR. LEVIN: Fair enough.

23 THE COURT: The settlement agreement, as written,
24 contemplates the \$96 million figure. I understand that.

25 That's what's written down.

1 What I'm trying to figure out is is that 96 million
2 no matter what else has been paid, so that if, for example,
3 Builders defendants was able to pay 96 million, upon default
4 they have to pay 96 million. They ought to know what their
5 obligations are.

6 MR. LEVIN: Yes, Your Honor, absolutely. And let me
7 read you from page 14 of the settlement agreement.

8 "In the event the Builders defendants fail to timely
9 make --

10 THE COURT: Don't read it so fast the court reporter
11 can't get it, please.

12 MR. LEVIN: In the event the Builders defendants
13 failed to timely make any of the payments required under
14 paragraph 22 above, the Court shall enter a judgment against
15 Builders defendants, jointly and severally, and in favor of
16 the class in the amount of \$94,650,281, and the Builders
17 defendants consent to the entry by the Court of the judgment
18 entry attached hereto and marked Exhibit F immediately upon
19 the submission by class counsel of a verified declaration
20 stating that the Builders defendants have failed to make any
21 payment required under paragraph 22 of this agreement, which
22 judgment entry shall not be subject to appeal or
23 reconsideration by the Builders defendants."

24 There is not -- this settlement agreement is
25 separate and apart from antitrust law. This settlement

1 agreement is an agreement between these parties as to how they
2 are going to conduct themselves. They have agreed that if
3 they don't make these payments, they're going to have a
4 judgment against them for \$94 million.

5 There are no credits set forth in the contract
6 between the parties as to what exists. So if there were
7 credits to be given, the credits would be set forth in the
8 contract between the parties that we're asking the Court to
9 approve. There are no credits set forth in here.

10 THE COURT: Well, it's clear from at least that
11 provision of the agreement what the parties contemplate, and
12 the Court's work would be quite simple. The Court would
13 simply enter a judgment. But what I'm trying to figure out is
14 does that agreement reflect the understanding of the parties
15 or is there some other agreement not -- a covenant not to
16 execute or something like that that wasn't written down?

17 I mean, that's sort of like a plea agreement, you
18 know, is this everything, which is my standard question for
19 defendants. I'm asking, is this everything?

20 MR. LEVIN: Your Honor, this is the agreement
21 between the parties. This is the agreement that both parties
22 submitted to the Court for preliminary approval. This is the
23 agreement which has been submitted to the entire class for
24 comment. This is the agreement of the parties.

25 THE COURT: Okay.

1 MR. LEVIN: And this is a contract.

2 THE COURT: Miss Woods, does the agreement reflect
3 you and your client's understanding?

4 MS. WOODS: No, it doesn't, not in that respect,
5 Your Honor. I will say the agreement -- I don't quarrel with
6 the words. The agreement says what it says, but when we were
7 negotiating this, we never contemplated that we were giving up
8 rights to contribution from other defendants, nor were we
9 contemplating that we would not receive credit for amounts
10 paid whether by ourselves or by someone else. And that is --

11 THE COURT: Where was that written down?

12 MS. WOODS: I'm sorry?

13 THE COURT: Where was that understanding written
14 down?

15 MS. WOODS: Well, I don't know that it --

16 THE COURT: How did you exchange that understanding
17 with the other side?

18 MS. WOODS: Well, we had numerous discussions about
19 this, and we never entered into this document and agreement
20 that we were giving up these rights. I mean, I never
21 contemplated that, and I must say --

22 THE COURT: But I'm asking you, Miss Woods, where
23 was that understanding --

24 MS. WOODS: Well, I'm just saying it's not in the
25 document --

1 THE COURT: Hold on, Miss Woods. You've got to wait
2 until I finish, and then you talk.

3 MS. WOODS: I apologize.

4 THE COURT: Where is that understanding written down
5 so that there's some reason to believe that it was shared with
6 the other side that they agreed to that? Because that isn't
7 what the agreement says. You agree with that, don't you?

8 MS. WOODS: Well, I agree that the document does not
9 say that, but nor does it say we don't get those things. It
10 is silent on the subject. And the understanding -- and I
11 think the important thing here is to understand the
12 \$96 million is the top dollar treble damage dollar amount that
13 the plaintiff's expert said that they could recover from
14 everyone. It is -- that is the maximum amount. We agreed to
15 that. We understand that. But any time that there is --

16 THE COURT: Wait, but the agreement says you not
17 only understand that and you agree to it but that you agree to
18 the entry of a judgment against Builders defendants only to
19 that amount.

20 MS. WOODS: Yes, because we would be liable for that
21 under the joint and several liability concepts in the
22 antitrust laws. I agree with that because that is the law.

23 THE COURT: So whatever contribution rights there
24 are or set off or anything else, that's reserved --

25 MS. WOODS: The agreement is silent.

1 THE COURT: That's reserved for another day, I
2 assume?

3 MS. WOODS: That's what I'm saying. The agreement
4 is silent on that. It does not say we give those up. It says
5 the judgment can be entered in this amount, but it does not
6 say that we would be waiving a right to contribution or a
7 right to credit for amounts paid. The agreement is silent in
8 that regard.

9 MR. LEVIN: Your Honor, you are right. That is an
10 issue for another day upon execution, but I would just point
11 out to the Court that, first of all, Ms. Woods can't show you
12 a document where that was anybody's understanding. This
13 document -- look, let's just put the cards on the table.

14 This document says "We're giving you a break. You
15 owe a lot more than \$5 million," okay? "If you don't pay
16 that, you're going to pay a big hefty sum, and this is the
17 number that we're going to come after you for." That's what
18 this document says.

19 And this document doesn't bear on any other law,
20 doesn't bear on what the antitrust law says. It doesn't even
21 bear on how that number was calculated. I could have made
22 that number up and it wouldn't have made a difference. If we
23 had agreed on \$10 million, that that would be the judgment,
24 then that would be the number --

25 THE COURT: Well, but --

1 MR. LEVIN: -- because it's the contract between the
2 parties.

3 THE COURT: That's not entirely true, Mr. Levin,
4 because the Court has to approve this. So there have to be
5 some anchor points into reasonableness and understanding so
6 that there's not duress or confusion or some sort of unfair
7 advantage being taken, whatever. So that's why -- I mean, I
8 can read that document. I understand that. I can read what's
9 there and I have read it.

10 I'm trying to figure out if -- what that means, and
11 if the parties agree as to what that means so that I can
12 understand what it means. If you have a disagreement, then I
13 have to look at it more closely and find out if it satisfies
14 the Rule 23 requirements.

15 MR. LEVIN: Yes, Your Honor. I would submit this:
16 This is an agreement which was entered into to avoid going to
17 trial by the defendant, not by the plaintiff.

18 The plaintiff was ready to go to trial. The
19 defendant wanted to settle the case, to resolve the case, and
20 they did. This agreement is the agreement.

21 You are right, Your Honor, that it is a matter for
22 another day as to whether or not she gets a set off. To the
23 extent you want to deal with this today, Your Honor, the
24 answer is there's a settlement before you that is, I submit,
25 fair, reasonable and adequate, okay?

1 This is, and I hate to be redundant, this is just a
2 contract between two people as to how to resolve a lawsuit.
3 That's all it is. It could be, you know, a fender bender and
4 it's the same thing.

5 THE COURT: Well, don't say it that way because
6 that's only partly true, Mr. Levin. If it's just a contract
7 between two parties, and they're resolved --

8 MR. LEVIN: Subject to the Court's approval.

9 THE COURT: That's it.

10 MR. LEVIN: Of course.

11 THE COURT: Which is why we've convened today, and
12 why I'm making these inquiries.

13 MR. LEVIN: Absolutely.

14 THE COURT: So I understand that that's what's
15 written in the document. I have to decide is that fair,
16 reasonable and adequate --

17 MR. LEVIN: Correct.

18 THE COURT: -- because it could be that that's not
19 reasonable to require them to face the liability for the
20 entire \$94 million.

21 MR. LEVIN: Well, Your Honor, the fair, reasonable
22 and adequate is not fair, reasonable and adequate for the
23 defendant. It's a question of whether it's a fair, reasonable
24 and adequate to the plaintiff class. Whether it's fair to the
25 defendant is of no motive.

1 THE COURT: And to the public.

2 MR. LEVIN: Well, that's always true, Your Honor,
3 but under Rule 23 case law, whether it's fair to the defendant
4 is irrelevant to the consideration because the Court may think
5 "Ah-ha, Plaintiffs really didn't have a cause of action" --

6 THE COURT: Yes, but it goes to the way in which the
7 agreement was negotiated, whether there was confusion about
8 terms, that sort of thing.

9 So, I mean, we're sort of quibbling about issues
10 here that under -- I should say underate the Court's
11 responsibility when you say it's just a private agreement
12 between yours, just something you can negotiate, and it
13 doesn't matter what it is, it doesn't have anything to do with
14 antitrust law, it has to do with Rule 23. It has to do with
15 the Court's obligations to protect the plaintiff class and to
16 make sure it's a fair, reasonable and adequate settlement.

17 MR. LEVIN: And to the extent, Your Honor -- when I
18 speak, and I apologize for this, I always assume that within
19 the context of my words is that "Subject to the Court's
20 approval, subject to the Court's approval, subject to the
21 Court's approval."

22 THE COURT: Yes, but it's not just -- it's approval
23 based on a judgment that it is a fair, reasonable and adequate
24 resolution of the matter, and that requires the usual kinds of
25 judicial balancing and so forth.

1 So I understand where we are here. It's written
2 this way. I do believe that whatever possibilities loom out
3 there with respect to collection of \$94 million, if it comes
4 to that, or where the \$94 million comes from, are not before
5 the Court today; that the agreement that was reached says
6 maybe Builders defendants will be held liable for 94 million.

7 That's to harken back to our criminal process.
8 That's like when I tell the defendant in a drug case he might
9 get life for a particular crime. It doesn't happen often. It
10 could happen, though.

11 So under this agreement, it could happen that
12 Builders defendants would get a judgment like that. That
13 would be tantamount to a life sentence, I suppose, for
14 Builders defendants. It might take them to the grave, an
15 early grave in a business sense.

16 But in any event, the agreement you've reached has
17 that potential. Where the money comes from, how you collect,
18 who else might have to pay, it's not written into the
19 agreement.

20 MR. LEVIN: Well, Your Honor, we didn't think that
21 it was necessary because there are no set-offs, there's no
22 anything. So from the plaintiff's standpoint, there was
23 nothing to write in.

24 We don't have to write in every possibility that
25 doesn't occur. So we put in the judgment that will be

1 entered, and there is nothing in here that provides for any
2 set-offs, nothing in here that applies to the application of
3 the antitrust law, nothing that would suggest that there are
4 any setoffs.

5 THE COURT: So as far as you're concerned, the
6 plaintiffs are concerned, it won't matter to you where
7 Ms. Woods gets the money, for her clients?

8 MR. LEVIN: Matters not.

9 THE COURT: Just so that they know that they might
10 have to come up with \$94 million.

11 MR. LEVIN: Correct.

12 THE COURT: And she can go scour the countryside
13 looking for contributions and setoffs and fairness and
14 reasonableness.

15 MR. LEVIN: I certainly can't stop her from raising
16 whatever issues she deems appropriate.

17 THE COURT: Anything else you want to say about
18 that, Ms. Woods?

19 MS. WOODS: I would like to speak, if I may, just
20 for a moment.

21 THE COURT: Well, let me finish -- I was just asking
22 about that point, then I will call on you.

23 MS. WOODS: Well, I would like to address that, but
24 I'll address it when I --

25 THE COURT: Okay. Go ahead with whatever else you'd

1 like to state.

2 MR. LEVIN: Your Honor, other than what we've set
3 for in the papers, we would ask the Court to enter the agreed
4 entry that we've provided to the Court. And I really don't
5 have anything else to present to Your Honor.

6 THE COURT: Let me ask you a couple of questions
7 based on my review, please.

8 MR. LEVIN: Certainly.

9 THE COURT: First, I want to note that there's no
10 one in the court beyond the parties and their counsel and the
11 Court's attaches signifying that there's an interested party
12 who's appeared today after having gotten notice of the
13 hearing.

14 Miss Schneeman, have you received any or has the
15 Clerk's Office received any request or objections or
16 indications of intent to be involved in this particular
17 hearing?

18 COURT CLERK: I am not aware of any, Judge.

19 THE COURT: Okay, thank you.

20 You certified that you gave notice to the
21 appropriate government authorities, and that you heard nothing
22 back from them within the required time. Is that the Attorney
23 General of Indiana to whom you gave notice?

24 MS. WOODS: Actually, Your Honor, we notified the
25 Attorney General of Indiana and the United States Attorney

1 General, Mr. Zoeller and Mr. Holder respectively, and we have
2 heard nothing from either of their offices.

3 THE COURT: Okay, very good.

4 MR. LEVIN: Generally that's an endeavor that the
5 defendant undertakes, Your Honor.

6 THE COURT: I didn't know how the mechanics played
7 out.

8 When you have provided that pay outs to the class
9 members will be proportionate to their respective purchases
10 between July 1st, 2000, and May 25th, 2004, explain to me in
11 an abbreviated summary fashion how you determined the
12 proportionate purchases of each of those class members.

13 MR. LEVIN: Okay. Let me start from the beginning
14 and sort of take you through it briefly.

15 We hired a firm called A.B. Data, which is --

16 THE COURT: I just want the method, not the process.
17 I want the method of how you're making that allocation.

18 MR. LEVIN: Okay. We got all the documents from the
19 defendants. We created a database we sent out to everybody.

20 THE COURT: Of all the purchasers?

21 MR. LEVIN: Of all the purchasers. We sent out a
22 claim form to everybody saying -- in the prior settlements,
23 "Here's what we have. If that's wrong, let us know." So we
24 tried to make it as user friendly as possible.

25 We got people back who said, "No, we think that's

1 wrong." So we went through that. And also people who were on
2 the database had the opportunity to submit. That all went to
3 A.B. Data. It took a long time to crunch that because we had
4 to compare what people were claiming and really get some proof
5 that the data we had was incorrect. We went through and we
6 did all that.

7 After we did all that, there's -- there was a
8 distribution. In May of this year, a distribution went out in
9 excess of \$14 million to class members. It was a great day,
10 got great phones calls. It was fun.

11 This time, we sent out claim forms again and said,
12 "If you were happy with your claim form last time, you don't
13 have to do anything. If you want to change it or anything,
14 you can do that." And we got a few changes, but not a whole
15 lot relatively.

16 My understanding is that A.B. Data takes all the
17 numbers. It's gross. It's not by defendant. It's total
18 purchases, takes it, and prorates according to the purchase
19 numbers, which have been proven up, if you will, at that
20 level. And that's how -- it's a spreadsheet basically that
21 takes it and distributes it pro rata.

22 THE COURT: So if there was a purchaser only of
23 concrete from Builders defendants, you would --

24 MR. LEVIN: It makes no difference.

25 THE COURT: What?

1 MR. LEVIN: It makes no difference, Your Honor.
2 Because of the joint and several liability, that's how we
3 decided to allocate it, and that's been disclosed in the
4 notices.

5 THE COURT: So you'll be using the same method on
6 Builders defendants' payouts as you have on all the others?

7 MR. LEVIN: Exactly.

8 THE COURT: Okay, thank you.

9 I know that you are seeking Court approval of your
10 fees request, which is unobjected to by the defendants of
11 one-third of the settlement amount and reimbursement of
12 reasonable expenses. We talked about this before, but I want
13 to make sure that you haven't been paid already for those
14 reasonable expenses from somebody else?

15 MR. LEVIN: Absolutely not. And Your Honor did ask
16 that, and I want to make it very clear. The total -- if Your
17 Honor sees fit to grant a third, then our total fees will be
18 one-third of the total amount that's been distributed -- that
19 has been accumulated. There's no double --

20 THE COURT: What I'm trying to figure out is does it
21 matter that it's going to be an installment payment plan into
22 the fund?

23 MR. LEVIN: No. As a matter of fact, Your Honor,
24 we're going to take our fees as those installments are paid.
25 We didn't present value it and try and take it up front or

1 anything like that. We get the fees as it's paid. If there's
2 a default --

3 THE COURT: So, for example, when that first payment
4 of -- let me see, I wrote it down. What's the first amount
5 followed by 1.1 million? 115,000?

6 MR. LEVIN: Yes, your Honor, and to be honest with
7 you, my recollection is that we don't plan on taking a fee
8 from that 115-.

9 THE COURT: Well, this is what I'm trying to have
10 you elaborate on.

11 MR. LEVIN: I know that we're going to take a third
12 out of the balance of those payments. On the 115-, frankly, I
13 just don't remember.

14 THE COURT: Out of each of them as it's made?

15 MR. LEVIN: Yes.

16 THE COURT: So when Builders defendants pay the
17 1 million on or before December 31, you will take a third of
18 that?

19 MR. LEVIN: Correct.

20 THE COURT: Then the next year, when they pay
21 1.1 million, you will take a third of that?

22 MR. LEVIN: Correct.

23 THE COURT: If they default, what's your intention?

24 MR. LEVIN: First of all, my intention is that they
25 don't default.

1 THE COURT: I know. That's mine, too.

2 MR. LEVIN: Secondly, Your Honor, I suppose my
3 intent would be to come back and request the Court for an
4 attorney fee. You know, part of that, I think, would depend
5 on how much we collect, how hard did it take to collect, did
6 we have to chase them all over the world to collect, that sort
7 of item. So that be would my intention.

8 THE COURT: So the one-third payout for attorney's
9 fees will be sequential like the installment payment?

10 MR. LEVIN: Absolutely.

11 THE COURT: And it anticipates compliance with the
12 agreement?

13 MR. LEVIN: It does.

14 THE COURT: So if there's some deviation from the
15 agreement for some reason, then you'll decide what to do then?

16 MR. LEVIN: I would say if there is a deviation up.
17 If the deviation is down, we'll probably still take a third of
18 whatever we get.

19 THE COURT: If they have to pay some sum besides the
20 installment payment based on a default, and that would entitle
21 you to a third of some larger number than the overall
22 settlement amount, the Court's not approving that.

23 MR. LEVIN: I understand completely.

24 THE COURT: You'd have to come back to the court.

25 MR. LEVIN: I understand. And I believe that's how

1 I answered, Your Honor. We would anticipate that if the
2 number would go up from that, we would have to come back and
3 talk to the court.

4 THE COURT: Right. So the amount I'm approving is
5 the one third of the overall value of the settlement as you've
6 reflected it here?

7 MR. LEVIN: Correct.

8 And actually, Your Honor, if we were to get to the
9 point where that judgment was entered, it would mean we would
10 have already collected less than one third of what's in the
11 agreement today.

12 THE COURT: Right, I understand.

13 You've also provided for a payment to each named
14 plaintiff of \$2,500 from this settlement, or this settlement
15 fund. Is that going to be paid in a lump sum upfront?

16 MR. LEVIN: Yes, that would be paid out of the 115-.

17 THE COURT: Okay. And how many named plaintiffs are
18 there?

19 MR. LEVIN: Your Honor, I believe there are seven.

20 THE COURT: I have them here on this order. Let's
21 see, if these are all separate. Kort Builders is one?

22 MR. LEVIN: Yes.

23 THE COURT: Dan Grote is a second one?

24 MR. LEVIN: Correct.

25 THE COURT: Cherokee Development?

1 MR. LEVIN: Yes.

2 THE COURT: Winger Stolberg Group?

3 MR. LEVIN: Correct.

4 THE COURT: Marmax?

5 MR. LEVIN: Correct.

6 THE COURT: Boyle Construction?

7 MR. LEVIN: Correct.

8 THE COURT: And TR Contractor?

9 MR. LEVIN: Correct.

10 THE COURT: That's seven.

11 MR. LEVIN: That's right.

12 THE COURT: One of the reasons I asked is I didn't
13 know if Dan Grote was part of one of those business entities.

14 MR. LEVIN: No.

15 THE COURT: He's separate?

16 MR. LEVIN: Correct.

17 THE COURT: So those seven people entities will
18 receive \$2,500 each from the \$115,000 initial payment?

19 MR. LEVIN: That's correct.

20 THE COURT: With regard to the three persons who
21 asked to be excluded from the class, have you had
22 communications with them?

23 MR. LEVIN: You know, I have not, your Honor. I've
24 done that in the past. And in this instance, I simply
25 haven't, but I'm happy to do that.

1 THE COURT: Well, somebody needs to --

2 MR. LEVIN: I'm happy to.

3 THE COURT: -- so that they understand that their
4 rights have not been drawn into this or resolved or dealt with
5 in any way.

6 MR. LEVIN: Right.

7 THE COURT: And that they're free to do whatever
8 they want to do.

9 MR. LEVIN: Right.

10 THE COURT: So who are those three, if you know?

11 MR. LEVIN: Your Honor, I don't have them. I think
12 it's in a report to the Court. It's possibly in my
13 declaration. I don't know if we identified -- I'm sure we've
14 identified it to the Court but I'll be glad to give to the
15 Court the names.

16 THE COURT: I think we ought to know who they are so
17 we know if some post judgment request comes from them, whether
18 they were the three that we contemplated at this hearing who
19 were so far unnamed.

20 MR. LEVIN: Yes, Your Honor. It is in the record
21 somewhere, and I apologize for not being able to put my finger
22 on it, but I will make a separate submission that identifies
23 those people.

24 And with Your Honor's permission, I'd like to call
25 them before I submit that so that I can also report about the

1 conversation I had with them.

2 THE COURT: That's fine, just give me another
3 lawyer's affidavit. That will be fine.

4 What's your intention with respect to managing the
5 Internet site after the settlement is approved? When all of
6 this is over and done, are you going to keep it up for a
7 while --

8 MR. LEVIN: I think we should keep it up for a
9 while.

10 THE COURT: -- and make a report on how everything
11 resolved.

12 That would be my preference.

13 MR. LEVIN: After the distribution, although
14 frankly, we sort of talked about this and didn't come to a
15 conclusion internally. I don't know that we need to keep it
16 open for five years.

17 THE COURT: Oh, no, not five years.

18 MR. LEVIN: But I think we ought to see if the
19 payments are made and make sure -- for sure, make sure the
20 distributions are sent out before we contemplate that, and our
21 intention would be when we intend to shut it down, we would
22 ask the Court for permission to do that.

23 THE COURT: Please do that because we put it out
24 there expecting the many plaintiffs to use it and rely on it.
25 And they're entitled to the information even at this point as

1 to how the matter got resolved. So it will be sort of
2 pro forma, I hope, when you ask for the Court's approval to
3 shut it down, but at least it will raise it in terms of my
4 consciousness, and I can make sure that it's an appropriate
5 time.

6 MR. LEVIN: Yes, it's worked very well. I mean --

7 THE COURT: Yes, it's wonderful to have that
8 technology available. I was thinking about old class actions
9 I've supervised when we didn't have the Internet, and how much
10 harder it was to manage the logistics of it.

11 MR. LEVIN: Yes, and it's also a resource that
12 people can actually go back to.

13 THE COURT: Yes, that's my point. That's why I want
14 it to stay open for a while.

15 Okay. I'll say this while it comes up, although it
16 really goes to you, Ms. Woods and the defendants, that as part
17 of the agreement, that the defendants will continue to provide
18 assistance or perhaps start to provide assistance to the
19 plaintiffs with respect to other actions that are in the works
20 and unresolved.

21 MR. LEVIN: The reason that's in there is because at
22 the time we negotiated that, the Beaver settlement had not
23 been approved by Your Honor. So if that had not been approved
24 and we had to go to trial, then our settlement with Builders
25 would have required cooperation.

1 THE COURT: Okay. So the obligation's there, but
2 you don't expect them to have to deliver on that.

3 MR. LEVIN: We do not.

4 THE COURT: Okay.

5 MR. LEVIN: Hopefully not.

6 THE COURT: This is a matter of admittedly a small
7 moment, but would you look in your tendered order at paragraph
8 five, the way you've written "arms' length."

9 MR. LEVIN: Is it hyphenated or not hyphenated?

10 THE COURT: Well, you have it "one arm, apostrophe S
11 length." That didn't strike me this morning when I was
12 reading that as grammatically right. Would you just look at
13 that? Arms' length usually means both arms.

14 MR. LEVIN: Right.

15 THE COURT: And if you're going to put an apostrophe
16 in, you put it after the S.

17 MR. LEVIN: After the S, yeah.

18 THE COURT: Although I smile in memory of my old
19 friend, John Price, and he would say "No, Judge Barker, that's
20 right."

21 MR. LEVIN: You know what, Judge Price would give
22 you a hard time about that.

23 THE COURT: Yes, he would. I'd welcome his hard
24 time. Anyway, just look at that.

25 MR. LEVIN: Yes, I will.

1 THE COURT: That was probably Mr. Shevitz's
2 responsibility.

3 MR. LEVIN: I take responsibility for all of it.
4 Mr. Shevitz never makes an error.

5 MR. SHEVITZ: I don't know about that, Your Honor,
6 but I'm happy to follow this order.

7 THE COURT: Okay, fine. That completes the
8 questions that I had for you. So subject to Ms. Woods fine
9 input, I'll let you step aside.

10 MR. LEVIN: Thank you, Your Honor.

11 THE COURT: Miss Woods.

12 MS. WOODS: Thank you, Your Honor.

13 THE COURT: Tap the microphone and see if it's
14 working.

15 These microphones eat those batteries, so it could
16 be in the course of this one hearing, we exhausted them.

17 MR. LEVIN: It could be a defective battery.

18 THE COURT: I'm not going to give you any more class
19 actions to think about bringing.

20 Now we're in business.

21 MS. WOODS: Better?

22 THE COURT: Yes.

23 MS. WOODS: Thank you, Your Honor, and I also want
24 to extend on behalf of my clients, Mr. Nuckols and

25 Mr. Blatchiem and my colleagues at Bose McKinney and Evans,

1 including Mr. Jones who's worked very hard on this case, our
2 sincere thanks to Your Honor and the staff. I think this case
3 is an example of a very difficult and complex case. It took a
4 great deal of time. There were a lot of parties involved with
5 a lot of competing interests. But we have worked through
6 these issues, and we have reached a conclusion, which is how
7 the system is supposed to work. And it's important, as Your
8 Honor knows, and has done in this case, to recognize that
9 there are rights of many people involved in a class action,
10 including the rights of the defendant. And it's important
11 that we do reach a settlement that is fair, reasonable and
12 adequate to address all of the interests of justice, not just
13 those of the class members. And I know Your Honor's very
14 cognizant of that, and we appreciate the Court's efforts in
15 that regard.

16 THE COURT: Thank you for those words. I included
17 you in my return compliments earlier, but I want to
18 specifically say that the Court's always helped by good
19 counsel. In even small and seemingly insignificant matters,
20 they are made that way because the lawyers have taken control
21 of them and done their usual fine artistry to position them
22 before the Court so that a decision can be made.

23 It's what you've probably heard me say, Ms. Woods,
24 because you've been around a while, too. So I know nothing I
25 say is new. It just gets said to a different audience from

1 time to time, but one of the things I say to new young
2 lawyers, perhaps like Mr. Jones over there who is a little bit
3 younger than you and I are, although I shouldn't group you in
4 my category, I know that, is that you have to lawyer a case to
5 make it possible for the judge to understand it, and hopefully
6 decide in your favor.

7 When you do that, you do it in a lot of ways. You
8 do it by simplifying the issues and explaining them with
9 clarity, et cetera, and peeling away the parts that don't need
10 the Court's attention. And also by the credibility that the
11 lawyers bring to the process, because the Court soon comes to
12 know who's a dependable, reliable lawyer and whose analyses
13 and assessments you can count on, not that they escape the
14 adversarial cast, but that they are truthful. They are
15 representations of a person of integrity. That's what the
16 Court notices. So you are such a person, Miss Woods.

17 MS. WOODS: Thank you, Your Honor.

18 Well, it is with a bit of trepidation that I come
19 before you and ask you to approve this settlement. As you
20 know, the last few years have been extremely difficult in the
21 construction industry, and particularly here in central
22 Indiana. There's been a roughly 80 percent drop in the last
23 two years of housing starts. We've gone to near complete
24 shutdown of the residential housing market. And although we
25 anticipated at the beginning of 2010 when we negotiated this

1 settlement that some of the stimulus project -- programs and
2 things would result in an upturn in that market, so far that
3 hasn't happened. And I'm here to report to you that as of
4 July 2010, Builders Concrete has sold just over 103 cubic
5 yards of concrete.

6 And to put that in context, in 2005, they sold
7 440,000 plus cubic yards at that point. As of 2009 at this
8 point in the year, they had sold 126,000. So we're down
9 another 20 percent even over last year.

10 We have made significant cuts in the company. The
11 company is a fraction of the size of what it was when this
12 case started. The cash flow has gone from \$2.7 million a year
13 in 2005 to the last time we showed a positive was two years
14 ago, and we had \$500,000, and the last two years have been
15 operating at a loss. And those losses continue to increase.

16 So it is with some anxiety that we come before you
17 and ask you to approve this settlement because right now,
18 although we are working very hard and have been working very
19 hard since we signed this agreement last spring to try to
20 obtain financing, to try to obtain the wherewithal to make the
21 settlement payment, we do not have the settlement payment in
22 hand. And as of right now, we do not know where the
23 settlement payment will come from.

24 So I do want the Court to understand that we --
25 we're not here asking for reformation of the agreement, that's

1 not my purpose, but to have the Court understand the context
2 in which this settlement was negotiated. And it was
3 negotiated at a time that we thought that we could make those
4 payments.

5 There is no certainty that we will, in fact, be able
6 to make those payments. And so we will give it our best
7 effort, and we will make every effort to do so. I have
8 informed Mr. Levin of this fact, and he is aware of this. And
9 we will just have to see what the future brings.

10 We are paying \$15,000 of cost in connection with
11 this settlement. I think the Court should note that. That
12 will be paid in connection with the first payment that will be
13 due 35 days after Your Honor enters final order approving the
14 settlement.

15 I do want to address briefly this issue of waiver of
16 contribution and what happens if the \$96 million judgment gets
17 entered. I never in my wildest dreams anticipated that the
18 agreement's silence on that somehow was a waiver of all of our
19 rights under Indiana and Federal law with respect to what
20 happens when a judgment is entered.

21 Your Honor is certainly well aware that creditors
22 frequently take judgments. They take agreed judgments in a
23 certain amount, be it the principal amount or total amount of
24 the debt including principal and interest, whatever might be
25 appropriate, but whether that actual amount is the collectible

1 amount after all is said and done usually depends on many
2 different things which are usually not set out when the
3 parties agree to an agreed judgment. And I believe that was
4 my understanding when I agreed to this last spring, and it is
5 still my understanding. And that means that if there are
6 credits against that judgment, that those credits will be
7 given at the time it becomes relevant, whether we're doing a
8 proceeding supplemental or whatever it is we're doing to
9 determine collection of the agreed judgment amount.

10 And so if we need to address this, I suggest that we
11 do so in the final approval order that Your Honor will enter
12 and that we make clear that the \$96 million agreed judgment is
13 not an amount that is fixed in stone, that is to be
14 collectable irrespective of amounts that have already been
15 paid. And that would be amounts paid by all defendants in
16 this case. And I think it would be appropriate to do that
17 just as there is an issue with respect to Mr. Levin's
18 attorney's fees, if that contingency should come to fruition,
19 and that those would have to be addressed by Your Honor at a
20 future date as well.

21 I think it would be very simple to add that language
22 to the final approval order. I'd be happy to submit language
23 to Your Honor to address that, and Mr. Levin and I could talk
24 about that, but I think it's very important because the idea
25 that somehow we've given up all rights to contribution and

1 credits is not something that we contemplated.

2 You can say well, okay, there have been about 50
3 plus million collected in this case already and paid, so there
4 is a significant issue here. Whether my clients could pay the
5 remaining, you know, 46 million or not is probably just as big
6 a question as to whether they can pay 96 million.

7 THE COURT: 94 million?

8 MS. WOODS: Or 94, whatever the number ends up
9 being. The point is they probably can't pay that either, so
10 it may all be moot, but I think these are things that I want
11 to make clear.

12 We were not contemplating giving up all of our
13 rights. We were not contemplating a contribution bar, which I
14 believe would have to be specifically ordered by this Court
15 anyway. It can't be presumed. And so to the extent that
16 there's an ambiguity, we probably need to address that.

17 The settlement, as I said, and as Your Honor is so
18 well aware, has to be fair, reasonable and adequate under the
19 circumstances for everyone. Justice must be done. And to
20 allow a \$96 million judgment to be entered and fully collected
21 without regard to the 50 million plus that's already been paid
22 and collected in this case would not be fair, reasonable or
23 adequate. It would not serve the ends of justice, and I would
24 ask Your Honor to take that into consideration.

25 THE COURT: So in the Court's order, it sounds like

1 from your point of view, a line that simply said that that
2 provision of the agreement -- paragraph nine, was that what
3 you were reading to me, Mr. Levin?

4 MR. LEVIN: Paragraph 22, I believe.

5 THE COURT: Where you were reading about the entry
6 of the judgment?

7 MS. WOODS: I think --

8 MR. LEVIN: Your Honor, it's paragraph 25 on page
9 14, paragraph 25B.

10 THE COURT: Let me just find it here.

11 MS. WOODS: That's in the settlement agreement,
12 correct?

13 MR. LEVIN: Yes.

14 MS. WOODS: What I was suggesting is there is
15 nothing in the final order right now that addresses that.

16 THE COURT: Hang on just a minute. I'm trying to
17 peg it to that. Is that paragraph 25?

18 MR. LEVIN: That is of the settlement agreement.

19 MS. WOODS: 22.

20 THE COURT: Well, just give me the number of the
21 paragraph where it references the obligation for a judgment to
22 be entered.

23 MR. LEVIN: Yes, that's what I did, Your Honor.

24 THE COURT: Paragraph --

25 MR. LEVIN: Paragraph 25B on page 14 of the

1 settlement agreement.

2 THE COURT: Okay, that's good.

3 So referencing that provision of the settlement
4 agreement, it sounds like to me, Ms. Woods, what you're asking
5 the Court to consider entering as a part of its final approval
6 order is simply a line that says "The obligation of the
7 defendant under paragraph 25 of the settlement agreement does
8 not foreclose the defendant from pursuing whatever other
9 remedies it may have for contribution set-off and so forth."
10 You're not waiving those in other words?

11 MS. WOODS: That's correct, Your Honor, as far as --

12 THE COURT: Is that what you're --

13 MS. WOODS: Yes, it is, yes.

14 THE COURT: Do you have any objection to that,
15 Mr. Levin.

16 MR. LEVIN: Absolutely I object to that, Your Honor.
17 There is -- on another day, I may -- I don't know what
18 position I'm going to take if she takes that position, but we
19 presented an agreed entry. We presented an agreed judgment
20 entry subject to the Court's approval, Your Honor, okay? And
21 now counsel wants to reform that. Okay?

22 Whether she's waived it or not waived it is
23 something that I'm not prepared to agree to or not agree to.
24 I mean, she wants the Court to make a determination as to --
25 against me as to that she gets to file something. I don't

1 know that I agree with that. And she can file anything she
2 wants later, but I have to right to come in --

3 THE COURT: No, I don't hear her saying that,
4 Mr. Levin. I hear her saying that if that dreaded day arrives
5 when a judgment's entered for 94 million plus, because of the
6 default of her clients, she has not -- her clients have not
7 waived their right to seek contribution from some other source
8 to pay that amount.

9 It doesn't relieve them of the obligation of paying
10 it. It's just the way they get the money together. That's
11 what I understand.

12 MR. LEVIN: Your Honor, if you put that in that
13 order, and -- I almost can assure you that when we come back
14 to court, if we have to come back to court, Ms. Woods is going
15 to argue that "See, it really wasn't waived because Judge
16 Barker wrote in her order that we hadn't waived that." I want
17 to say it is waived. It is waived. By putting --

18 THE COURT: What's waived? What are you saying, Mr.
19 Levin?

20 MR. LEVIN: She can't -- as far as I'm concerned,
21 she can't come in and say "We get a setoff."

22 THE COURT: Now, wait a minute. That's not what she
23 said.

24 MR. LEVIN: Now she -- that's exactly what she's
25 saying. She's saying "I want the Court to say that by

1 entering into this agreement, I never waived the right to come
2 in and suggest that I get a setoff."

3 Now, I would -- if she wants to do that, you know,
4 maybe we should say -- and I haven't waived the right to come
5 in and ask for additional attorney's fees under the antitrust
6 laws.

7 THE COURT: She did say that.

8 MS. WOODS: That's exactly what I did say.

9 MR. LEVIN: No, no, no, no, no. Let's not confuse
10 each other. With regard -- what Your Honor said to me about
11 attorney's fees was, as I understood, Your Honor, was "Look,
12 Levin, if you get this big windfall down the road someplace of
13 \$90 million, don't just write yourself a check for \$30 million
14 and stick it in your pocket."

15 I get that. Why? Because that's not what our
16 agreement provides for. And I told Your Honor that's not what
17 the agreement provides for, and I agree with that. But to
18 tinker with the order and now say to her that I'm going to put
19 in this order for any judge who might ever see this 20 years
20 from now that I wrote in this order you haven't waived
21 anything; I don't know whether she has or she hasn't, and the
22 Court shouldn't -- in my opinion, Your Honor, the Court
23 shouldn't intervene into what she has or hasn't waived.

24 THE COURT: Well, I'm not going to impose a
25 requirement. I'm trying to see if there's an agreement here

1 for the Court to recognize and supplement the settlement
2 agreement.

3 MR. LEVIN: No, Your Honor, I am not -- I am not
4 here to agree to any -- we negotiated this agreement. And as
5 long as we're getting into this, Your Honor, I think I have to
6 respond just briefly. And if you want me to wait Your
7 Honor --

8 THE COURT: I do want you to wait.

9 MR. LEVIN: I'm happy to.

10 THE COURT: Go ahead, Miss Woods.

11 MS. WOODS: Well, I really just want to make very
12 clear what I'm asking for. And that is it's a simple sentence
13 that says this final approval order does not foreclose the
14 right of setoff or contribution with respect to other amounts
15 paid toward that \$94 million, and it also does not foreclose
16 Mr. Levin coming in and seeking additional attorney's fees,
17 whether it's a one third or whether it's under the antitrust
18 laws or whatever.

19 I'm not asking for Your Honor to decide either of
20 those issues today, but just to make clear that those issues
21 are reserved for another day, if and when the day comes before
22 the Court that we have to address that.

23 THE COURT: The Court wouldn't write it exactly that
24 way, and I know this is the weakness of drafting on your feet.

25 MS. WOODS: I understand, drafting on my feet, so --

1 THE COURT: So the question is whether the Court
2 should recognize that the defense has a right to request or
3 pursue a setoff or contribution, that -- in order to satisfy
4 the judgment. So it would put in contention your entitlement
5 to do that and let some judge decide that, the same way we
6 would do the attorney's fees. So instead of saying "Yes, you
7 get setoff, yes, you get contribution," it's simply the right
8 to go for it.

9 MS. WOODS: Exactly, and that's exactly all I'm
10 asking for. I'm not saying that we do or we don't. There
11 would be many factors that would be relevant there. And all
12 I'm saying is that it needs to be clear that the \$96 million
13 is not a fixed number, and it is not --

14 THE COURT: Wait a minute. It is a fixed number.

15 MR. LEVIN: It is.

16 MS. WOODS: Well, let my finish my sentence. It is
17 a fixed number in terms of the agreed judgment. I understand
18 that.

19 THE COURT: The question is how does it come down
20 to --

21 MS. WOODS: When it comes down to collection, how
22 does it get paid?

23 THE COURT: Yes, the obligation is absolutely clear.

24 MS. WOODS: Yes, I understand that part of it. I
25 was talking about the actual collection or satisfaction of

1 that judgment, and what credits are given. And that's where
2 there's an ambiguity. And quite honestly, that is not part of
3 the agreement one way or the other. We did not negotiate
4 that.

5 THE COURT: Then maybe we shouldn't say anything
6 about it. Maybe we should leave it a latent ambiguity.

7 MS. WOODS: Well, I think we would be better served,
8 as you say, to make things easier and simpler for the courts
9 to follow --

10 THE COURT: I can only do that if the parties agree
11 because the agreement's gone out.

12 MS. WOODS: But we don't need to change the
13 agreement, Your Honor. We only need to address this order.

14 THE COURT: You're clarifying the agreement. That
15 changes it.

16 MS. WOODS: No, we're just saying what's not in
17 there.

18 THE COURT: Well, then we don't have to put what's
19 not in there because there's a whole universe of things not in
20 there.

21 So the question is whether we further define the
22 rights of the parties with respect to how that's paid. And if
23 you can't reach an agreement with the other side, then I can't
24 include that in the order because I'm not going to adjudicate
25 the interests of the parties when they're before the Court on

1 a stipulated agreement. I can slow it down so you can talk
2 and see if you can reach an agreement, but I can't impose that
3 on either side.

4 MS. WOODS: Well, I would submit to Your Honor that
5 there is no way that it is fair and reasonable to impose a
6 \$94 million judgment on my clients that would be irrespective
7 of amounts already paid.

8 THE COURT: Well, then, just let it sit there the
9 way it is, and make your case if that eventuality occurs,
10 because that is what you agreed to.

11 If you want to say that -- now that that's not fair,
12 reasonable and adequate because it didn't say enough or it
13 didn't further define your entitlements to -- in terms of
14 paying that judgment, that's a different matter.

15 That's a matter you didn't negotiate. You think
16 it's not fair, reasonable and adequate, and Mr. Levin thinks
17 it is. So I'm not going to intervene and tell you what that
18 includes because I don't know exactly how this is all going to
19 unfold, and I don't know what your agreement means unless you
20 tell me what it means because it's your agreement. And what
21 you're asking me to do is refine your agreement.

22 The agreement that I see that you've reached is that
23 the defendants have consented to allow judgment to be entered
24 against them in the amount of \$94 million. That's it.

25 MS. WOODS: So the agreement is silent as to further

1 rights, and that's all.

2 THE COURT: Maybe you ought to just leave it there,
3 and say it didn't foreclose it, it didn't permit it. If it
4 comes to that, we've got another dispute on our hands.

5 MS. WOODS: Well, that is the current state. I
6 think everyone would agree to that.

7 THE COURT: Okay.

8 MS. WOODS: All right.

9 That's all. Thank you.

10 THE COURT: Thank you, Miss Woods.

11 Anything else from you, Mr. Levin?

12 MR. LEVIN: Your Honor, I've said my piece.
13 Sometimes the best thing is just to remain silent, so I think
14 that's what I'll do at this point.

15 THE COURT: You have a right to remain silent. It's
16 a right we recognize in this courtroom.

17 MR. LEVIN: Sometimes that right should be
18 exercised, Your Honor. I think this is one of those times.

19 THE COURT: All right. Having benefited from the
20 colloquy with counsel this morning, and having also reviewed
21 all the submissions, the Court is prepared and does hereby
22 state officially that the settlement deserves final approval
23 from the Court, that it is fair, reasonable and adequate, that
24 it satisfies the six factors that were laid out in the
25 submissions as required by 7th Circuit law that must be

1 satisfied for the Court to determine that the agreement is
2 fair, reasonable and adequate.

3 The Court has considered and folds into this
4 judgment without necessity of further elaboration, because I
5 accept the undisputed contentions the parties, particularly
6 the plaintiff's extrapolation of these factors, that the
7 strength of the plaintiffs' case on the merits is such that
8 the settlement terms are fair and warranted; that is to say,
9 that the plaintiff as it -- the plaintiffs, as they have shown
10 in each of the cases that have comprised this litigation on
11 the price-fixing conspiracy, is a strong case and that the
12 complexity and length and expense of the continued litigation
13 are a virtual certainty had there not been a settlement; that
14 the negligible, almost nonexistent amount of opposition to the
15 settlement upon the affected parties underscores the fairness
16 and the reasonableness of the agreement that's been reached.

17 There's no indication before the Court that there
18 was any collusion between or among the parties in reaching
19 this settlement. In fact, the mediation that preceded the
20 final settlement discussions and conferences that culminated
21 in that agreement underscore the fairness of the process.

22 The proceedings are far enough along that the merits
23 can be fairly well determined as to the dispute between the
24 parties. There was enough discovery completed for that to be
25 known, and the plaintiffs have utilized expert assistance in

1 the form of CPAs to help get a bead on the precise money
2 values at stake here and the potential damages.

3 The Court understands that the defendant -- the
4 defendants, both in the course of this litigation and as a
5 part of the settlement, as a backdrop of the settlement, and
6 even now today possess a limited ability to pay a substantial
7 judgment, and that that factor has dominated not only the
8 parties' agreements and negotiations that culminated in the
9 agreements but the Court's analysis of the merits as well.

10 The amount of attorney's fees requested is in line
11 with the prior approvals that the Court has given in the cases
12 that comprise this body of litigation. The Court has also
13 approved of a one-third settlement amount many times over the
14 course of supervising all kinds of litigation, including other
15 class cases. So that, as a concept, is fair and as it's
16 applied here is also fair and reasonable.

17 The reimbursement of expenses is a routine request
18 and also reasonable, and so the Court will permit that. And
19 the \$2,500 to each of the named plaintiffs is also reasonable,
20 and reflects their involvement and their continued assistance
21 in supervising the course of the litigation, and being the
22 plaintiffs' counsel's touchstone as plaintiffs' counsel has
23 negotiated the interests of a class of many hundreds, perhaps
24 thousands even.

25 So in all respects, legal and factual and

1 procedural, leading up to this settlement, the Court concludes
2 that final approval is warranted and that the settlement is
3 fair and reasonable and adequate.

4 An order will issue to that effect, and in that
5 order, the Court will dismiss the claims of the settlement
6 class members against the Builders defendants, the Builders
7 defendants, yes, and authorize the attorney's fees and costs,
8 reimbursements and expense reimbursements as requested
9 pursuant to Rule 23H.

10 I believe that the tendered order covers all of
11 these elements because I can't think of any way in which I
12 made any material changes as a result of the colloquy today,
13 but would you lawyers, Ms. Woods and Mr. Levin, read through
14 it one more time and make sure that the order that you've
15 tendered covers all the bases with the accuracy and clarity
16 that we all hope to achieve by this order.

17 And as soon as you get it to me, and you give me a
18 green light, I'll execute the order, and that will start the
19 clock running on the schedule of payments, and in particular,
20 the due date for the \$115,000 initial payment by the
21 defendants. So I know of nothing that the Court has not
22 addressed that you place before it today, but if you think
23 there is something, Mr. Levin, will you tell me now, please?

24 MR. LEVIN: Your Honor, if I understand the Court's
25 order with regard to -- the Court's comments with regard to

1 the order -- those are the same comments that the Court gave
2 us the last round, to look at the order. You're not looking
3 for material changes.

4 THE COURT: Right.

5 MR. LEVIN: Okay.

6 THE COURT: I just want to make sure after our
7 hearing today, which has been an hour and a half, hour and 15
8 minutes, that it still passes muster with you lawyers.

9 MR. LEVIN: That's fine, Your Honor.

10 THE COURT: I'll review it, too, of course.

11 MR. LEVIN: In this instance, Your Honor, would it
12 be fair for me to ask you that you put a deadline on us to get
13 back to the Court, say by -- today's the --

14 THE COURT: This afternoon, I expect it to be done
15 right away.

16 MR. LEVIN: By the end of the day.

17 THE COURT: I want to issue the order this
18 afternoon.

19 MR. LEVIN: Fine.

20 MS. WOODS: Your Honor, with all due respect, I have
21 to leave here to go to a mediation. I won't be able to look
22 at it till after close of business.

23 THE COURT: How about Mr. Jones? It's just a
24 read-through, an almost pro forma read-through. As I said, I
25 can't think of anything else that needs to be tweaked except

1 maybe arm's length; but other than that, I think it's okay.

2 I don't think this should take you more than about
3 ten minutes, Ms. Woods. What time are you due at your next
4 appointment?

5 MS. WOODS: 11:30.

6 THE COURT: Nearby?

7 MS. WOODS: Across the street.

8 THE COURT: Well, of course do it over your lunch
9 hour or whatever. I hope you don't have to go without lunch
10 today, but Mr. Jones can go make the first read-through
11 because truly, I expect it to be one last look-see to make
12 sure there's something -- it implicates many people's rights.
13 That's why it's so important, and we ought to be cautious.

14 So okay?

15 MR. LEVIN: Yes, Your Honor. Lest the Court --
16 pardon me, lest the Court end this hearing and walk out the
17 door, there is something that I'd like to share with the
18 Court. It has nothing to do with this case.

19 THE COURT: Will you trust him to talk to me about
20 something that doesn't have anything to do with your case, Ms.
21 Woods?

22 MS. WOODS: Yes.

23 THE COURT: You're a trusting person. I'll just
24 make a brief comment, mindful of your schedule, but I do want
25 to thank and compliment the lawyers one more time for their

1 work in ushering this matter through all the underbrush and
2 the friction that inevitably marks a dispute of this
3 magnitude. But also to say to the parties that are here,
4 Mr. Nuckols and Mr. Blatchiem and Mr. Galloway, how important
5 it is for you in your business roles, and also in a personal
6 sense, to have hammered out an agreement that reflects your
7 own sense of what an outcome of such dispute can be and ought
8 to be.

9 Nobody ever comes away from a dispute such as this
10 with a full sense of being the winner in the sense that you
11 didn't have to pay a price to get here. But at least it's a
12 reasonable accommodation of each other. We always say about
13 the lawsuits around the courthouse that if both sides are
14 unhappy a little bit, that's a good settlement, because you
15 don't wind up getting everything. It's hardly ever an
16 all-or-nothing proposition.

17 But good leaders, good business leaders, and I have
18 every reason to believe that you all fall into that category,
19 apply their skills to -- not only to the business that they
20 conduct day to day and brings value to our society, and
21 hopefully will be better with the -- with an improved economy
22 in the not to distant future, that's everybody's hope, but you
23 bring those same skills to bear when you're resolving disputes
24 when things sort of get wobbly on you in the way in which the
25 business has unfolded.

1 So I'm always comfortable when good business people
2 are working to resolve the problems, not just the lawyers,
3 because you bring a practical, workable sense, and a sense of
4 your own standards of fairness to the outcome, and that always
5 matters. That's always an important ingredient in any of the
6 resolutions that the Court hammers out.

7 So thank you for your efforts and accept the Court's
8 compliments as well to each of you.

9 I have an offer from Miss Schneeman to call your
10 mediator if you want her to, Ms. Woods.

11 MS. WOODS: I'm fine.

12 THE COURT: But I'm finished and we'll be in
13 adjournment.

14 MR. LEVIN: Thank you, Your Honor.

15 (Court adjourned at 11:32 p.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 October 1st, 2010

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