

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

SHAWN HORNBECK, et al. )  
each on behalf of himself )  
and others similarly situated; )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
ORSCHELN FARM AND HOME LLC )  
d/b/a ORSCHELN FARM AND HOME, )  
et al. )  
 )  
Defendants. )

Case No. 18-00941-CV-W-BP

**SUGGESTIONS IN SUPPORT OF PLAINTIFFS’  
APPLICATION FOR INCENTIVE AWARDS FOR CLASS REPRESENTATIVES, AND  
FOR AWARD OF ATTORNEYS’ FEES AND EXPENSES**

COME NOW PLAINTIFFS and set forth the following as their Suggestions in Support of Application for Incentive Awards for Class Representatives and for Award of Attorneys’ Fees and Expenses (“Application”):

**I. Introduction**

Class Representatives and Class Counsel devoted substantial time and effort in their prosecution of this case on behalf of the Class. The result of those efforts was a Class Action Settlement Agreement providing substantial economic relief to Class Members. In contrast to many class action recoveries that provide Class Members a fraction of what was lost, Class Counsel’s efforts in this case have provided Class Members with virtually full recovery for their losses. The Class Members will be able to recover 100% of their average purchase price of the units of 303 THF Products, as well as additional amount for repair costs for damage to the equipment in which those products were used. The damage awards are not capped, and in many

instances could total thousands of dollars. The Class Members will also not have the Settlement Fund diminished by attorneys' fees, as Defendants have agreed to payment of the same outside of and in addition to the Settlement Fund.

This application seeks approval for the payment of incentive awards and for an award of reasonable attorneys' fees in connection with this litigation. Counsel for Defendants, who are aware of the work that was done in this matter, have been consulted and have advised that they do not oppose the amounts sought.

Specifically, Plaintiffs and Class Counsel seek a \$5,000.00 incentive award for each of the nineteen (19) Class Representatives in this case. As noted, Defendants do not contest and have agreed to pay these incentive awards out of the Class Settlement Fund if approved by this Court.

Plaintiffs and Class Counsel also seek an award of reasonable attorneys' fees and expenses of \$5,900,000.00. This amount includes more than \$160,000.00 in litigation expenses and an attorneys' fee equal to approximately 30.5% (after expenses) of the Class Settlement Fund of \$18,825,000.00, and approximately 23% of the total Settlement of \$24,725,000.00, inclusive of the attorneys' fees and expense amount. Defendants are aware of the nature and extent of the work that went into this litigation and the work that went into settlement and the results achieved, and have indicated that they do not oppose this Application and have agreed to separately pay Class Counsel's Court-awarded attorneys' fees and expenses, which will not reduce the amount of the Class Settlement Fund available to Settlement Class Members.

Rule 23(h) provides that, "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by . . . the parties' agreement. The Rule further provides that "[a] claim for an award must be made by motion under Rule 54(d)(2)," notice of which must be "directed to class members in a reasonable manner" and that the Court "must

find the facts and state its legal conclusions under 52(a).” Fed. R. Civ. P. 23(h)(1) and (3). In turn, Rule 54(d)(2) requires a claim for fees to be made by motion, and specifies its timing and content, including, in relevant part, “the grounds entitling the movant to the award” and “the amount sought.” Fed. R. Civ. P. 54(d)(2)(B).

Notice of the reasonable attorneys’ fees, expenses and Class Representatives’ incentive awards was provided in the Direct Notice mailed to Settlement Class Members, the published Summary Notice, and on the settlement website. Accordingly, Plaintiffs now move for approval of the incentive awards to Class Representatives and for an award to Class Counsel of their reasonable attorneys’ fees and expenses. For the reasons stated herein, Plaintiffs respectfully request this Application be granted.

## **II. Incentive Awards**

Plaintiffs seek the Court’s approval of incentive awards of \$5,000 to each of the nineteen Class Representatives. Incentive awards are typical in class actions. *Newberg on Class Actions* §11:38 (4<sup>th</sup> ed. 2008). Courts routinely grant incentive awards to class representatives in class action settlements to promote the public policy underlying class action litigation by encouraging individuals to step up on behalf of a class to vindicate those collective rights. *Califiuri v. Symantech*, 855 F.3d 860, 867 (8<sup>th</sup> Cir. 2017). Factors in determining an appropriate incentive award include: “(1) actions the plaintiff took to protect the class’s interests, (2) the degree to which the class has benefitted from those actions, and (3) the amount of time and effort the plaintiffs expended in pursuing litigation.” *Id.* (citation omitted).

These Class Representatives spent a substantial amount of time in meeting and talking with Class Counsel, providing information, assisting in development of the case, reviewing pleadings, gathering documents, responding to document requests and interrogatories, preparing for

depositions, giving depositions, and in otherwise assisting the prosecution of this case. Thousands of Settlement Class Members benefited in a substantial way based on the efforts of these Class Representatives. Further, the requested incentive awards are within the range approved by district courts in the Eighth Circuit. *See, e.g., Yarrington v. Solvay Pharms., Inc.*, 697 F.Supp. 2d 1057, 1069 (D. Minn. 2010) (\$5,000 to each of four class representatives); *Wineland v. Casey's Gen. Stores, Inc.*, 267 F.RD. 669, 677-78 (S.D. Iowa 2009) (\$10,000 to each of the named plaintiffs); *Zilhaver v. United Health Group, Inc.*, 646 F.Supp. 2d 1075, 1085 (D. Minn. 2009) (\$15,000 to two lead plaintiffs).

As noted earlier, the amount of incentive awards have been disclosed to and are agreed to by Defendants, subject to the approval of this Court, and are to come out of the \$18,825,000.00 Class Settlement Fund. Such awards for the 19 Class Representatives total \$95,000.00. Accordingly, the Court should approve the \$5,000.00 incentive awards for each of the Class Representatives.

### **III. Attorneys' Fees and Expenses**

Plaintiffs undertook a complicated case under a novel theory against major defendants represented by very skilled counsel. The issues involved a variety of unique issues, including the nature of hydraulic fluids, the nature and function of lubricants and the testing and interpretation of data, proof of damages as well as the issues involving class certification. Plaintiffs are now seeking an award of attorneys' fees for the work that was performed and the results that were obtained. Defendants have agreed to pay that amount in addition to the Class Settlement Fund, so as to not diminish any recovery to the Class Members, and being advised as to the amount being sought herein, has no objection to such an award by this Court.

The Eighth Circuit has endorsed two approaches to analyzing a request for attorneys' fees: (1) the "percentage of the benefit" or "common fund" approach; and, (2) the lodestar approach. *Keil v. Lopez*, 862 F.3d 685, 701 (8<sup>th</sup> Cir. 2017), citing *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 244 (8<sup>th</sup> Cir. 1996); *Pollard v. Remington Arms Co., LLC*, 320 F.R.D. 198, 222 (W.D. Mo. 2017)(citing *Galloway v. The Kan. City Lansmen, LLC*, 833 F.3d 969, 972 (8<sup>th</sup> Cir. 2016)). It is within the discretion of the district court to choose which method to apply, as well as to determine what constitutes a reasonable attorneys' fee in a given case. *In re Life Time Fitness, Inc., Tel. Consumer Prot. Act (TCPA) Litig.*, 847 F.3d 619, 622 (8<sup>th</sup> Cir. 2017); *Pollard*, 320 F.R.D. at 222.

Plaintiffs respectfully suggest the percentage of the benefit approach is an appropriate approach for the Court to formally utilize in this settlement. The nature and extent of the work performed in this case fit within the factors recognized in other cases in which the percentage fee award was sought. In the case of *In re Texas Prison Litig.*, 191 F.R.D. 164 (W.D. Mo. 2000), the Court applied factors set forth in *Grunin v. International House of Pancakes*, 513 F.2d 114, 127 (8<sup>th</sup> Cir. 1975), to assess a fee request in a percentage of the fund case. The *Texas Prison* Court identified following factors to be considered:

- (1) The time and labor required;
- (2) The novelty and difficulty of the questions;
- (3) The skill requisite to perform the legal service properly;
- (4) The preclusion of other employment by the attorney due to acceptance of the case;
- (5) The customary fee for similar work in the community;
- (6) Whether the fee is fixed or contingent;

- (7) Time limitations imposed by the client or the circumstances;
- (8) The amount involved and the results obtained;
- (9) The experience, reputation, and ability of the attorneys;
- (10) The undesirability of the case;
- (11) The nature and length of the professional relationship with the client; and
- (12) Awards in similar cases.

*Id.* at 176 (internal quotations omitted), citing *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10<sup>th</sup> Cir. 1988) (holding that the *Johnson* factors are relevant to the percentage that should be awarded as fees).

Application of the factors identified in *Texas Prison* supports the conclusion that the percentage sought in this case (30.5% of the Class Settlement Fund/23% of the total Settlement) is reasonable. (See Ex. 1, Declaration on Class Counsel Thomas V. Bender). This case has required a significant amount of time over the course of more than two years, with Class Counsel expending, to date, more than 3,500 attorney hours on work related to Defendants' products that is directly attributable to this case as well as thousands of hours of other common time investigating and learning about the industry as a whole which could fairly be allocated to this case.

In addition, there will be hundreds of additional attorney and assistant hours spent through the completion of settlement administration. The case presented novel and difficult legal questions and class claims which required consultation with multiple expert witnesses and a high level of skill to move forward. All of the Law Firms representing the Settlement Class are relatively small in size such that the time and expense devoted to this case affected their ability to undertake other additional work. The customary fee for contingency cases is 33%, but often can be as high as 40%

or 50% in complex matters. The fee in this case was contingent such that there were significant risks related with recovery by no means assured.

The amount of fee sought results in a percentage of recovery that is reasonable under the percentage of the benefit approach. The Eighth Circuit has noted that “courts have frequently awarded attorneys’ fees ranging up to 36% in class actions.” *Huyer v. Buckley*, 849 F.3d 395,399 (8<sup>th</sup> Cir. 2017). Other courts have observed that attorneys’ fee awards in common fund cases have ranged between 19% and 45% of the fund. *In re Cell Pathways, Inc., Sec. Litig. II*, U.S. Dist. Lexis 18359, \*29 (E.D. Pa. September 24, 2002); *see also, e.g., Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8<sup>th</sup> Cir. 1999)(approving fee equal to 24% of settlement fund). Courts have widely approved awards of attorneys’ fees in the range of one-third of the class recovery. *See In re US Bancorp Litigation*, 276 F.3d 1008, 1010 (8<sup>th</sup> Cir. 2002)(approving 36% fee); *West v. PSS World Med., Inc.*, 2014 WL 1648741 (E.D. Mo. Apr. 24, 2014)(approving 33% fee); *Ray v. Lundstrom*, 2012 WL 5458425 (D. Neb. Nov. 8, 2012)(1/3 fee approved); *In re Iowa Ready-Mix Concrete Antitrust Litig.*, 2011 WL 5547159 (N.D. Ia. Nov. 9, 2011)(approving fee of 36.04%); *In re Combustion, Inc.*, 986 F. Supp. 1116 (W.D. La. 1997)(approving 36% fee); *In re Airline Ticket Comm’n Antitrust Lit.*, 953 F.Supp. 280, 285-86 (D. Minn. 1997) (approving 33.3% fee); *In Re Wedtech Securities Litigation*, M21-46 (LBS) MDL 735 (S.D.N.Y. July 30, 1992)(approving 33.3% fee). “Regardless of case size, fees average approximately 32 percent of the settlement” in common fund cases. *In re Charter Comms., Inc. Sec. Litig.*, U.S. Dist. Lexis 14772, \*45 (E.D. Mo. June 30, 2005).

The attorneys involved are experienced in class action matters, have pursued this case diligently and have obtained outstanding results for the Settlement Class Members. The Class Settlement Amount is \$18,825,000.00. Including the attorneys’ fees and expenses which are to be

paid separately rather than taken out of the fund available to Settlement Class Members, the total settlement is \$24,725,000.00. Thus, the fee award (less expenses) of approximately \$5,750,000.00 is approximately 23% of the total gross settlement and 30.5% of the net settlement available to benefit the Settlement Class Members. This result could not have been achieved without a demonstration by Plaintiffs and Class Counsel that they were ready and willing to proceed to class certification and trial. Given this result achieved and work performed, and supported by application of the above *Texas Prison* and *Johnson* factors, the percentage and overall amount of attorneys' fees requested here are well within the range that has been approved by the Eighth Circuit and Western District of Missouri in other class actions. As reflected above, the awards in similar cases support the award of an even higher percentage that sought here.

Further, as also noted above, the attorneys' fees awarded by the Court are to be paid separately by Defendant CITGO and thus do not take away from the \$18,825,000.00 Class Settlement Fund. "In a case whether the attorneys' fees are to be paid directly by defendant and, thus, money paid to the attorneys is entirely independent of money awarded to the class, the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interests between attorneys and class members." *Pearlman v. Cablevision Systems Corp.*, 2019 WL 3974358 at \*3 (E.D.N.Y. Aug. 20, 2019) (quotation and citations omitted). In *Pollard*, this Court noted that "[a]ny amount paid by Defendants to Plaintiffs' attorneys will not reduce any benefit to class members," that the fee award was "agreed to by the parties only after the substantive relief for the class members was agreed upon," and that "the fee award was negotiated by attorneys experienced and knowledgeable in these types of matters." *Pollard*, 320 F.R.D. at 221. Those same circumstances favor approval of the Application of Class Counsel in this case.

Alternatively (or just as a cross-check), Class Counsel’s requested fee is also supported by the lodestar method and the requested fee and expenses amount totaling \$5,900,000.00 is fair and reasonable. As noted above, the recovery obtained for the Settlement Class is extremely favorable. Class Counsel negotiated and obtained a substantial Class Settlement Fund of \$18,825,000.00 which provided all Settlement Class Members the opportunity to receive up to a full, 100% refund for all fluid they purchased in the Class Period. Not only that, the Class Settlement Fund provides Class Members who experienced damage to their equipment as a result of the fluid—whether that be leaks, hydraulic pump failures, seal problems, transmission problems, brake chatter, power-take-off problems or other common issues—the opportunity to make a claim for 100% of the money associated with any such parts and repairs. If the equipment was damaged beyond repair, the Class Settlement Fund provided Class Members the opportunity to make claim for money lost on that equipment. In short, Class Counsel’s efforts provided real (and in most cases complete) monetary relief to Settlement Class Members equaling up to 100% of the damages the Settlement Class Member contended resulted from, in whole or in part, the use of the 303 THF Products during the Class Period. That is an extraordinary result in a Class Action and justifies Class Counsel’s fee under the lodestar approach as well.

Plaintiffs note that Class Counsel’s lodestar will be approximately \$2,000,000.00 and thus the requested fee results in a lodestar multiplier less than three. Lodestar multipliers less than three are well within the bounds of reasonableness. See Nelson v. Wal-Mart Stores, Inc., 2:05CV000134WRW, 2009 WL 2486888, at \*2 (E.D. Ark. Aug. 12, 2009) (“a multiplier of 2.5... is reasonable in light of other fee awards by courts in the Eighth Circuit.”) Lodestar multipliers much higher than three have been considered reasonable by Eighth Circuit Courts. See, e.g., Rawa v. Monsanto Co., 934 F.3d 862, 870 (8<sup>th</sup> Cir. 2019)(“while a 5.3 lodestar multiplier is high, it does

not exceed the bounds of reasonableness”)(citing *In re Charter Commc’ns, Inc. Sec. Litig.*, No. 4:02-cv-1186-CAD, 2005 WL 4045741, at \*18 (E.D. Mo. June 30, 2005)(finding reasonable a 5.61 cross-check multiplier and noting that “[t]o overly emphasize the amount of hours spent on a contingency fee case would penalize counsel for obtaining an early settlement and would distort the value of the attorneys’ services)). Here, the value Class Members will receive as a of the settlement reached cannot be overstated and thus a multiplier of approximately three is more than reasonable.

Finally, as noted, included in the \$5,900,000.00 is reimbursement for more than \$160,000.00 in out-of-pocket expenses incurred in their prosecution of this case. (Ex. 1). Those expenses consist of filing and service costs, deposition costs, mediation expenses, expert fees, document management and hosting expenses paid to a third party, and contract assistants. Class Counsel do not seek to recover expenses relating to office or practice overhead. The expenses requested are those that private, fee-paying clients in the marketplace are ordinarily charged and ordinarily pay in addition to their attorneys’ fees for services. As such, those expenses are recoverable even if some are not ordinarily taxable as costs. As shown on the itemized list, the major expenses in this case consisted of deposition costs, expert fees, database charges and contract claim assistants.

#### **IV. Conclusion**

The requests for incentive awards for Class Representatives and for attorneys’ fees and expenses are reasonable. Plaintiffs respectfully seek the Court’s Order and Judgment approving the Parties’ Settlement Agreement, including ordering that incentive awards of \$5,000.00 to each of the 19 Class Representatives (to be paid out of the Class Settlement Fund) and ordering that

Defendant CITGO separately pay Class Counsel's requested fees and expenses totaling \$5,900,000.00 (to be paid in addition to the \$18,825,000.00 Class Settlement Fund).

Date: August 17, 2020

Respectfully Submitted,

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**ATTORNEYS FOR PLAINTIFFS  
AND SETTLEMENT CLASS MEMBERS**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that this document was filed electronically with the United States District Court for the Western District of Missouri, with notice of case activity to be generated and sent electronically by the Clerk of the Court to all designated persons this 17<sup>th</sup> day of August, 2020.

    /s/ Dirk Hubbard