

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,) Case No. 18-00941-CV-W-BP
)
v.)
)
ORSCHELN FARM AND HOME LLC)
d/b/a ORSCHELN FARM AND HOME,)
et al.)

**PLAINTIFFS’ SUGGESTIONS IN SUPPORT OF
PRELIMINARY APPROVAL
OF CLASS ACTION SETTLEMENT**

COME NOW Plaintiffs, by and through their attorneys of record, and submit the following Suggestions in Support of Plaintiffs’ Unopposed Motion for Preliminary Approval of Class Action Settlement.

I. INTRODUCTION AND SUMMARY OF CLASS SETTLEMENT BENEFITS

Plaintiffs and Defendants have agreed to a class action settlement of this case which makes substantial relief available to approximately 215,000 Class Members who have purchased the following “303” Tractor Hydraulic Fluid products in the United States during the Class Period: (a) CITGO-Manufactured MileMaster 303 Tractor Hydraulic Fluid; (b) Orscheln Premium 303 Tractor Hydraulic & Transmission Fluid; (c) CITGO-manufactured H-K 303 Tractor Transmission Hydraulic Fluid; and (d) CITGO-manufactured SuperTech 303 Tractor Hydraulic Oil (referred to collectively as “303 THF Products”). The class action settlement is set forth in the Settlement Agreement and Release, including all exhibits thereto (“Settlement” or “Settlement Agreement”) which was attached as Exhibit 1 to Plaintiffs’ Unopposed Motion for Preliminary Approval of Proposed Class Action Settlement (“Motion”).

Settlement of a class action requires judicial approval, which usually consists of three major steps: (1) preliminary approval of the settlement and conditional approval of the settlement class; (2) dissemination of notice to the class; and (3) the holding of a formal fairness hearing to determine whether the settlement should be granted final approval as fair, reasonable and adequate.

In their Motion, Plaintiffs request this Court to enter the accompanying proposed order which:

- (a) grants preliminary approval of the Settlement;
- (b) conditionally certifies, for settlement purposes, the Class as defined in the Settlement Agreement and appoints the Named Plaintiffs as Class Representatives and Plaintiffs' attorneys as Class Counsel;
- (c) approves the Parties proposed form and method of giving Members of the Settlement Class notice of this action and the proposed Settlement;
- (d) directs that notice be given to Settlement Class Members in the proposed form and manner;
- (e) sets deadlines and procedures for persons and/or entities that fall within the class definition to exclude themselves and for Settlement Class Members to comment on the proposed Settlement; and
- (f) schedules a fairness hearing to determine whether the Settlement should be granted final approval and whether Plaintiffs' Counsel should be awarded reasonable attorneys' fees and expenses.

(See [Proposed] Preliminary Approval Order, Motion Exhibit 1-A.)

As described in detail in the Settlement Agreement, the Settlement provides significant payments of money damages to the Settlement Class in a way that addresses the fundamental issues underlying this case and compensates Settlement Class Members for actual damages suffered. The Third Amended Consolidated Class Action Complaint in this case alleges that the 303 THF Products were negligently and deceptively labeled, marketed and manufactured and that purchase and use of such products could cause damage to Settlement Class Members' tractors and other

equipment. The Settlement provides for a Class Settlement Fund of \$18,825,000.00, from which shall be paid (a) claims of Qualified Settlement Class Members, (b) all settlement administration and notice costs, and, (c) all incentive awards to Class Representatives as Ordered by the Court. Class Counsel's attorneys' fees and expenses are to be paid separately by CITGO and will not reduce the Class Settlement Fund.

The Class Settlement Fund is sufficient to provide each Settlement Class Member with an estimated automatic minimum payment and/or refund in an amount calculated to be 100% of the average purchase price paid for the units of the 303 THF Products purchased by each such Settlement Class Member during the Class Period. In addition, the Class Settlement Fund will provide additional monetary awards to Qualified Settlement Class Members who have incurred repair costs, parts purchases, and/or specific equipment damage as a result, in whole or in part, of use of the 303 THF Products in Settlement Class Members' equipment.

As noted, also paid out of the Class Settlement Fund are all settlement administration and notice costs, and all incentive awards to Class Representatives as Ordered by the Court. Settlement administration and notice costs for this nationwide class settlement are estimated to be \$750,000.00. (*See* Motion, Exhibits 2 and 3). Incentive awards in the amount of \$5,000.00 are requested for each of the 19 Class Representative, for a total of \$95,000.00 in incentive awards to the Class Representatives. Also as noted, CITGO has agreed to separately pay Class Counsel's reasonable attorneys' fees and expenses as awarded by the Court, subject to a maximum of \$5,900,000.00. The payment of Class Counsel's attorneys' fees and expenses will not detract from the Class Settlement Fund.

Further, as part of this Settlement, Defendants agree not to sell 303 THF Products or any other tractor hydraulic fluid manufactured or distributed by CITGO in the United States that is

labeled, or otherwise held out to customers and the public, as “303” or as meeting specifications of only John Deere 303. Defendants agree they will not list John Deere 303 on the label of a tractor hydraulic fluid product manufactured or distributed by CITGO sold in the United States unless the product meets a verifiable John Deere specification, such as JD20A/B or JD20C/D.

In short, the Settlement Agreement clearly addresses Plaintiffs’ litigation objectives, remedies the problems with the 303 THF Products and stops further sale of those products, provides legitimate and substantial relief to Settlement Class Members far beyond the relief typically provided in class actions and, therefore, falls well within the range of appropriate outcomes so as to warrant final approval. Its terms should therefore be preliminarily approved and submitted to Settlement Class Members for their consideration, and a fairness hearing scheduled to determine whether the Settlement warrants final approval. Based on the Settlement Agreement attached to the Motion as Exhibit 1, the accompanying documents, the Notice Plan and Declaration of the Settlement Administrator attached to the Motion as Exhibits 2 and 3, the Declaration of Lead Class Counsel attached hereto as Exhibit A, and the following Suggestions in Support, Plaintiffs respectfully submit this Court should grant its preliminary approval of the Settlement Agreement, certify the Settlement Class for settlement purposes, approve the dissemination of notice, and set a final fairness hearing and related dates.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Litigation History and Plaintiffs’ Claims

On May 30, 2018, Plaintiffs Shawn Hornbeck, Monte Burgess, Raymond Bieri, and Dan Chevalier initiated a class action lawsuit against certain Defendants in the Circuit Court of Cass County, State of Missouri, Case No. 18CA-CC00106. Claims for alleged Missouri Merchandising Practices Act violations, breach of warranty, fraudulent and negligent misrepresentations,

negligence, and unjust enrichment were asserted on behalf of a class of individuals who purchased certain 303 THF Products in the State of Missouri. On November 29, 2018, Defendants removed the above-referenced action to the United States District Court for the Western District of Missouri, Case No. 18-00941-cv-W-BP. In June 2019, Plaintiff James Kircher was added as a class representative and a Second Amended Complaint was filed in this action.

On May 24, 2019, Plaintiff Adam Sevy initiated a class action lawsuit against some of the same Defendants in the United States District Court for the District of Kansas, Case No. 2:19-cv-02259. On June 6, 2019, Plaintiff Wayne Rupe initiated a class action lawsuit against some of the same Defendants in the United States District Court for the Southern District of Iowa, Case No. 4:19-cv-00163-RGE-RAW. On September 12, 2019, Plaintiff Randy Rohrscheib initiated a class action lawsuit against some of the same Defendants in Macon County, Illinois, Case No. 2019 L74. Each of these class actions involved nearly identical allegations, claims and damage related to Defendants' manufacture and sale of the 303 THF Products.

In January of 2020, the Kansas, Iowa, and Illinois actions were dismissed without prejudice, and on January 16, 2020, a Third Amended Consolidated Class Action Complaint was filed in this action which included the claims previously filed in Iowa, Kansas, and Illinois, and which also added Class Representatives and class claims for all purchasers of Defendants' 303 THF Products throughout the United States. Plaintiffs' Third Amended Consolidated Class Action Complaint includes claims against Defendants for negligence, unjust enrichment, breach of warranty, fraudulent and negligent misrepresentations, and consumer protection violations arising out of Settlement Class Members' purchase and use of these 303 THF Products.

Plaintiffs allege, among other things, that the labels for the 303 THF Products were deceptive and misleading for the reasons set forth in Third Amended Consolidated Class Action

Complaint. Plaintiffs also allege that use of the 303 THF Products in equipment causes damage to various parts of the equipment, including damage to the spiral gear in the drive, excess wear, seal leakage, high pump leakage, and damage from deposits, sludging and thickening. Plaintiffs seek various categories of damages on behalf of themselves and the putative class of purchasers based on claims and purported harms alleged in the Third Amended Consolidated Class Action Complaint, including: (i) Restitution/Return of Cost of Product; (ii) Benefit of the Bargain Damages; (iii) Cost of Common Remedial Measures; (iv) Other Repair and Parts Costs as Damages; (v) Punitive Damages; and (vi) Attorneys' Fees and Costs.

B. Discovery Conducted in Missouri Action

Prior to the Parties engaging in the settlement discussions that have culminated in the entry of this Settlement Agreement, Plaintiffs' Counsel conducted extensive discovery. Plaintiffs served on Defendants CITGO and Orscheln First Interrogatories and First Requests for Production of Documents. Plaintiffs also served Defendants CITGO and Orscheln First Requests for Admissions, Second Interrogatories, and Second Requests for Production of Documents. Extensive search terms were utilized for email discovery. All totaled, more than 100,000 pages of documents were produced by Defendants and reviewed and analyzed by Plaintiffs. Plaintiffs took seven depositions of Defendants' witnesses, with several other depositions scheduled when meaningful resolution talks began. Defendants took the depositions of two of the Class Representative Plaintiffs, with other Representative depositions set to take place when meaningful resolution talks began. Plaintiffs also retained and involved expert witnesses to analyze the 303 THF Products and manufacturing process.

Over many months, the Parties engaged in extensive and arm's length negotiations trying to resolve the issues and claims asserted by Plaintiffs in the class action complaints. On

March 21, 2019, the Parties mediated the case with experienced class-action mediator Phil Miller. The Parties, however, were unable to reach a resolution at that time. After extensive document and deposition discovery, the Parties resumed settlement discussions in September of 2019. An agreement in principle for this Settlement Agreement was reached on December 3, 2019. Further detailed negotiations of the full Settlement Agreement took place between December 3, 2019 and February 3, 2020, culminating in the signing of the Settlement Agreement attached as Exhibit 1 to Plaintiffs' Motion and for which this Court's Preliminary Approval Order is now sought.

Although Plaintiffs believe they will prevail on class certification and at trial, Defendants continue to assert that they have violated no laws and that they have meritorious defenses to class certification and liability. In light of these positions and the risks of litigation for both sides, the Settlement Agreement provides substantial monetary awards to Settlement Class Members and represents a reasonable resolution of the claims on a class-wide basis. Indeed, the Settlement Agreement will likely provide Settlement Class Members with full and complete relief for their actual damages suffered. Therefore, the Parties have agreed to resolve all claims through their proposed settlement.

C. The Proposed Settlement

1. The Proposed Settlement Class

Plaintiffs now seek preliminary approval of the Parties' proposed class action settlement. The Settlement Class under the Parties' Settlement Agreement consists of the same class pled in Plaintiffs' Third Amended Consolidated Class Action Complaint:

All Persons and other entities who purchased CITGO-manufactured MileMaster 303 Tractor Hydraulic Fluid in the United States from Orscheln Farm and Home LLC, Blain Supply Company, Fleet Wholesale Company, Inc., Mid-States Distributing Company, Inc., and/or other retailers at any point in time in the following package sizes during the following periods: (1) 3/2 gal. from January 23, 2017 to present; (2) 5 gal. from May 25, 2013 to

present; or (3) 55 gal. from May 25, 2013 to present;

-and-

All Persons and other entities who purchased CITGO-manufactured H-K 303 Tractor Transmission Hydraulic Fluid in the United States from Orscheln Farm and Home LLC, Blain Supply Company, Fleet Wholesale Company, Inc., Mid-States Distributing Company, Inc., and/or other retailers at any point in time in the following package sizes during the following periods: (1) 3/2 gal. from May 25, 2013 to April 30, 2016; (2) 5 gal. from May 25, 2013 to March 21, 2019;

-and-

All Persons and other entities who purchased Orscheln Premium 303 Tractor Hydraulic & Transmission Fluid in the United States from Orscheln Farm and Home LLC at any point in time from September 3, 2014 to August 16, 2017;

-and-

All Persons and other entities who purchased CITGO-manufactured SuperTech 303 Tractor Hydraulic Oil in the United States from Walmart Inc. and/or other retailers at any point in time from February 17, 2016 to February 10, 2018.

To represent the Settlement Class for purposes of the Settlement, Plaintiffs propose the Court appoint as Class Representatives the nineteen (19) Plaintiffs identified as Representative Plaintiffs in the Settlement Agreement, and also appoint Plaintiffs' Counsel as Counsel for the Settlement Class.

2. *Settlement Payments*

Under the terms of the Settlement Agreement, CITGO will establish a Class Settlement Fund in the amount of \$18,825,000.00. In addition to funding settlement administration/notice and incentive awards to Class Representatives, the Class Settlement Fund should be sufficient to provide each Settlement Class Member with full monetary compensation for actual damage suffered by way of payment in an amount equal to 100% of the average purchase price for the

units of the 303 THF Products purchased by each Settlement Class Member for whom purchase information is available as well as those who submit Claim Forms. In addition, the Class Settlement Fund will also provide a substantial additional fund to fully compensate Settlement Class Members for actual damage suffered to Settlement Class Members' equipment as a result of use of the 303 THF Products. The total settlement amount is intended to compensate each Settlement Class Member for any property damage, repairs, and/or remediation (such as flushing) necessary related to the equipment that used the 303 THF Products, as well as to provide each participating Qualified Settlement Class Member a full return of the purchase price.

More specifically, the approximately \$18 Million of this Class Settlement Fund that will be available to compensate each Qualified Settlement Class Members is separated into the following two components of relief:

Purchase Price Relief (the "Reimbursement Fund")

Seventy Percent (70%) of the approximately \$18 Million Class Settlement Fund shall be used first to provide each Qualified Settlement Class Member with a reimbursement payment for their purchase of the 303 THF Products calculated as 100% of the purchase price of his/her/its purchases of 303 THF Products during the Class Period. The amount of each Settlement Class Members' reimbursement is based on an average purchase price of: \$18 for each 3/2-gallon jug purchased; \$27 for each 5-gallon bucket purchased; and \$200 for each 55-gallon drum purchased. If the total amount of valid claims for Purchase Price Relief exceeds the amount in the Reimbursement Fund, awards to Qualified Settlement Class Members will be decreased on a *pro rata* basis. Alternatively, if any unclaimed monies remain in the Reimbursement Fund after payment of Qualified Settlement Class Members' Purchase Price Relief, those remaining amounts shall be added to the Repair/Parts/Specific Equipment Damage Fund described below.

Repairs/Parts/Specific Equipment Damage Relief
(the “Repairs/Parts/Specific Equipment Damage Fund”)

Thirty percent (30%) of the \$18 Million Class Settlement Fund, plus any remaining monies after payment of Qualified Settlement Class Members’ Purchase Price Relief as set forth above, shall be used to pay claims submitted by Qualified Settlement Class Members for the costs of any repairs, parts, and specific equipment damage that the Settlement Class Member contends resulted from, in whole or in part, the use of the 303 THF Products during the Class Period. The Repairs/Parts/Specific Equipment Damage Fund is being established to reimburse Qualified Settlement Class Members for repairs, parts, and specific equipment damage that the Settlement Class Member contends resulted from, in whole or in part, the use of the 303 THF Products in said equipment during the Class Period. Such repairs, parts, and specific equipment damage may relate to, without limitation, damage to seals, pumps, filters, gears, and clutch and brake systems, power take-off (PTO) systems and/or losses incurred as a result of equipment being damaged beyond reasonable repair which the Settlement Class Member contends occurred as a result of damage and increased or excessive wear resulting from, in whole or in part, use of the 303 THF Products during the Class Period. Such increased wear and damage may include, without limitation, scratching, corrosive wear, rippling, ridging, pitting, spalling and scoring of gears and metal components, seal damage, spiral gear damage, metal abrasion, corrosion, surface wear, clutch wear and breakage, wet brake damage, pump failure, leakage, and damage from deposits, sludging and thickening. If the damage to equipment resulted in part from other causes and in part from the 303 THF Product’s use, then that damage is recoverable.

Under just the Purchase Price Relief set forth above, the Class Settlement Fund is sufficient to provide each Qualified Settlement Class Member with an estimated automatic minimum

payment in an amount calculated to be 100% of the average purchase price for the units of the 303 THF Products purchased by each such Settlement Class Member during the class period. Through the Repairs/Parts/Specific Equipment Damage Relief, additional amounts can be obtained by Qualified Settlement Class Members who have incurred repair costs, parts purchases, and/or specific equipment damage as a result, in whole or in part, of use of the 303 THF Products in the equipment during the Class Period.

3. *Notice and Administration Costs*

The Class Settlement Fund also pays the reasonable costs, fees, and expenses of the Settlement Administrator in providing notice to the Settlement Class and administering the Settlement. Those costs, fees, and expenses are estimated to be \$710,000.00.

The Parties estimate that there are 215,000 Class Members who purchased the 303 THF Products during the Class Period. It is estimated that retailer Defendant Orscheln will be able to locate purchaser contact information for more than 80,000 Settlement Class Members who purchased the 303 THF Products it sold during the time period September 3, 2014 through September 30, 2018. Those persons and/or entities for whom Orscheln has specific purchase data will receive a Mailed Class Notice with Purchase Data, sent to the last known mailing address contained in Orscheln's records. Those Qualified Settlement Class Members will receive automatic payment for those purchases which are on record and will not be required to submit a Claim Form in order to receive the Purchase Price Relief based on the number of units reflected in the data. They may submit a Request for Correction Form if the number of units purchased is not accurate or if they purchased a 303 THF Product during the Class Period but outside of the period for which Orscheln has purchase records. They may also submit a Claim Form for Repairs/Parts/Specific Equipment Damage Relief.

A Long Form Mailed Notice will be sent to Settlement Class Members for whom contact information is available but for whom specific, reliable purchase information data was not available, as well as to anyone requesting a Claim Form and Long Form Class Notice. Those Settlement Class Members will need to submit a Claim Form for all components of relief because specific purchase information was not available.

A settlement website will be created and maintained by the Settlement Administrator that:

- (i) contains downloadable copies of the Preliminary Approval Order, Long Form Class Notice, Settlement Agreement, Claim Form, Request for Correction Form, Repairs/Parts/Specific Equipment Damage Claims Review Process, and, when filed, Class Counsel's motion for reasonable attorneys' fees and expenses, and for incentive awards for the Class Representatives;
- (ii) will post any subsequent notices agreed upon by the Parties; and (iii) allows Settlement Class Members to submit Claim Forms and opt-outs. A toll-free phone number will be created to answer questions from Settlement Class Members.

As set forth in Exhibits 2 and 3 to the Motion, publication of this Settlement will be extensive and will occur in various forms and media.

4. Class Representatives' Incentive Awards

The Class Settlement Fund also pays the amount the Court awards Class Representatives in incentive awards, up to \$5,000.00 each for the Class Representatives. Class Counsel anticipates seeking a \$5,000.00 incentive award to each of the nineteen (19) Class Representatives, for a total of \$95,000.00. Defendants do not contest those amounts.

5. Class Counsel's Attorneys' Fees and Expenses

The original term sheet agreement entered into by the Parties did not include any agreement with regard to Class Counsel's attorneys' fees and expenses, other than to note that such fees and expenses would be paid separately and would not come out of the Class Settlement Fund. Instead,

it noted that CITGO would pay separately whatever amount of reasonable attorneys' fees and expenses were awarded by the Court. Subsequent to the Parties' agreement on the key terms for the Class Settlement Fund and relief described above, an agreement on reasonable attorney's fees and expenses was reached and included in the Settlement Agreement. Pursuant to the Settlement Agreement, Plaintiffs' Counsel will separately apply for an award of attorneys' fees and reimbursement of expenses. Defendants have agreed not to contest and CITGO will separately pay, in addition to the Class Settlement Fund, Class Counsel's reasonable attorneys' fees and expenses, if awarded by the Court, in the amount of \$5,900,000.00.

III. ARGUMENT

A. The Class Action Settlement Approval Process

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, a class action may not be dismissed, compromised or settled without court approval. In considering granting its approval, the Court is to consider that the law favors settlement, especially in class action cases and other complex matters where significant resources can be conserved by avoiding the time, costs, and rigor of prolonged litigation. *Little Rock School Dist. v. Pulaski County Special School Dist.*, 921 F.2d 1371 (8th Cir. 1990). “[S]ettlement agreements are presumptively valid.” *Id.* at 1391. The standard for review is for abuse of discretion. *Id.* In reviewing decisions approving such settlements, the appellate courts simply ask “whether the District Court considered all relevant factors, whether it was significantly influenced by an irrelevant factor, and whether in weighing the factors it committed a clear error of judgment.” *Id.*

“In approving a class settlement, the district court is to ‘consider whether it is fair, reasonable, and adequate.’” *Pollard v. Remington Arms Co., LLC*, 896 F.3d 900, 907 (8th Cir. 2018) (quoting *Prof'l Firefighters Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 648

(8th Cir. 2012) and *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1176 (8th Cir. 1995)). ““Great weight is accorded [the district court’s] views because [the judge] is exposed to the litigants, and their strategies, positions and proofs. [The judge] is aware of the expense and possible legal bars to success. Simply stated, [the judge] is on the firing line and can evaluate the action accordingly.”” *Id.* (quoting *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975) and *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 34 (3d Cir. 1971)). The Eighth Circuit has noted, “We will set aside a judicially approved class action settlement ‘only upon a clear showing that the district court abused its discretion.’” *Id.*

The first step in the approval process is for the Court to make a preliminary fairness decision. “Preliminary approval does not require the court to decide the ultimate question whether a proposed settlement is fair, reasonable, and adequate. At this stage, the issue is whether the proposed settlement falls within the range of fairness so that notice of the proposed settlement should be given to class members and a hearing scheduled to consider final approval.” *Komoroski v. Utility Services Partners Private Label, Inc.*, Case No. 4:16-CV-00294-DGK, 2017 WL 3261030 at *1 (W.D. Mo., July 31, 2017).

At the preliminary approval stage, the Court should make a preliminary evaluation of the proposed terms. If that evaluation does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation for attorneys, and if it appears to fall within the range of possible approval, the settlement should be given preliminary approval. If the Court finds preliminary approval is warranted, the Court should direct that notice be provided to the class members and hold a formal fairness hearing where formal arguments can be made both in support of and in

opposition to the settlement if class members so choose. *See* Manual for Complex Litigation, Fourth, § 21.632.

At the preliminary approval stage, the Court does not make a final decision on the merits of the proposed settlement; rather, it merely evaluates whether (i) the Settlement Agreement was negotiated at arms' length, (ii) there has been sufficient investigation and discovery to enable counsel and the Court to act intelligently and (iii) there are any obvious deficiencies in the Settlement Agreement. *See*, NEWBERG ON CLASS ACTIONS, § 11.25.

Here, preliminary approval is appropriate under the new provisions of Federal Rule 23 (as amended in 2019) in that the monetary relief and other appropriate terms of this Settlement Agreement are such that "giving notice is justified by the Parties' showing that the Court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." This Court should determine that it "will likely be able to approve" this Settlement Agreement pursuant to Rule 23(e)(2) in that:

- (A) the Class Representatives and Class Counsel have adequately represented the class;
- (B) the proposal was negotiated at arm's length;
- (C) the relief provided for the class is adequate, taking into account:
 - i. the costs, risks and delay of trial and appeal;
 - ii. the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
 - iii. the terms of and proposed award of attorney's fees, including the timing of payment; and

- iv. any agreement required to be identified under Rule 23(e)(3); and
- (D) the proposal treats class members equitably relative to each other.

With further regard to (C)(iii), the Settlement Agreement provides that Class Counsel will submit their request for a fee and expense award amount to be awarded by the Court, up to the \$5,900,000.00 cap, and that whatever fees are awarded by the Court would be paid separately by CITGO. With further regard to (C)(iv), there are no agreements other than the Settlement Agreement being presented to this Court for approval.

This Court's review for preliminary approval should also include consideration of whether it appears the Settlement Class can meet the requirements of Rule 23(a) and (b)(3). The Court should conduct such review bearing in mind that it is only considering whether there is probable cause to believe that the class can be certified for purposes of settlement and that it is not making a determination as to whether the case could be maintained as a class action if the settlement fell through and litigation were required, nor is it making a final determination of certification for purposes of settlement. A final fairness hearing is the mechanism by which the Court finally evaluates the Parties' Settlement in light of the strong judicial and societal policy favoring settlements.

Finally, the Court should also consider Defendants' view of Plaintiffs' case and the probability of success on class certification and the merits. "An integral part of the strength of a case on the merits is a consideration of the various risks and costs that accompany continuation of the litigation." *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 309 (7th Cir. 1985). While Plaintiffs believe that they would have prevailed on the issues of class certification and liability in this matter, Plaintiffs nevertheless recognize there is risk and uncertainty in litigation. Further, Defendants' Counsel and Defendants were confident that they had viable defenses to class

certification and to liability. There was also the possibility of appeals even if the Plaintiffs' case was certified as a class action and then successful at trial. Thus, even if Plaintiffs were successful at class certification, trial, and appeal, it could be years before the Settlement Class Members received any benefits. In light of all of the considerations, the settlement benefits are fair and reasonable because each Settlement Class Member will be entitled to receive substantial monetary benefits without the delay of continued litigation.

B. Preliminary Approval of The Settlement is Appropriate

1. Adequate Investigation and Discovery was Conducted

Class Counsel conducted adequate discovery and performed a sufficient investigation into the underlying basis of the claims in order to make an intelligent evaluation of the possible outcome of the litigation and the Settlement terms. More than a year of extensive document and deposition discovery have been conducted in this case. Initially, Class Counsel obtained necessary factual information pursuant to informal discovery and Freedom of Information Act requests, including test results and other information from the Missouri Department of Agriculture and the States of Georgia and North Carolina. Class Counsel also consulted with multiple experts in the tractor hydraulic fluid field. Class Counsel also performed extensive research and analysis of the legal principles applicable to the claims against Defendants and class certification of those claims, as well as to the potential defenses to those claims and certification. Over 100,000 pages of documents and emails were ultimately produced by Defendants and reviewed and analyzed by Plaintiffs. Numerous depositions were also taken of key management officials of Defendants. Two of the Class representatives were produced for their depositions. Settlement was reached in this case only after extensive discovery and with adequate information. Plaintiffs' Counsel performed all necessary work to prosecute and evaluate the case prior to reaching a settlement with

Defendants. There should be no question that Plaintiffs had sufficient information when settlement was reached.

2. *The Settlement Resulted from Arms' Length Negotiation*

The Settlement Agreement before the Court is the product of intensive, arm's-length negotiations. The negotiations included an initial mediation with experienced class action mediator Phil Miller. When negotiations resumed approximately six (6) months after this initial mediation, they were informed by the informal discovery, formal discovery, depositions, documents produced, and other investigation and preparation undertaken by the Parties to that point. Negotiations were conducted by Plaintiffs' Counsel highly experienced in pursuing and resolving complex litigation and class action matters and Defendants' Counsel similarly experienced in defending such cases. Accordingly, the Settlement is entitled to a preliminary presumption of fairness. *See, e.g., In re BankAmerica Corp. Securities Litig.*, 210 F.R.D. 694, 700 (E.D. Mo. 2002) ("In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and reward of litigation; a presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery."); *In re Austrian & German Bank Holocaust Litig.*, 80 F.Supp. 2d 164, 173-74 (S.D.N.Y. 2000) ("If the Court finds that the Settlement is the product of arm's length negotiations conducted by counsel knowledgeable in complete class litigation, the settlement will enjoy a presumption of fairness. Once the settlement is presumed fair, it is not for the court to substitute its judgment as to a proper settlement for that of such competent counsel")

3. *The Proposed Settlement Provides Substantial Monetary Benefits to Class Members and Is Within the Range of Possible Approval*

The Settlement provides substantial monetary relief to Settlement Class Members and directly addresses the fundamental issues underlying the litigation and the alleged damaged caused by the 303 THF Products.

In terms of monetary relief, the Class Settlement Fund will provide each Qualified Settlement Class Member 100 percent of the average purchase price for the units of 303 THF Products purchased by each such Settlement Class Member during the Class Period (i.e., the Purchase Price Relief). If there is any amount remaining in the Reimbursement Fund after calculating the participating Qualified Settlement Class Members' distribution amounts, then those remaining monies will be added to the Repairs/Parts/Specific Equipment Damage Fund. Such repairs and/or parts purchases may include, without limitation, repairs, parts and equipment required to remedy damage to seals, pumps, filters, gears, and clutch and brake systems as a result of damage and increased or excessive wear resulting from use of the 303 THF Products during the Class Period. Such increased wear and equipment damage may include, without limitation, scratching, corrosive wear, rippling, ridging, pitting, spalling and scoring of the gears and metal components, seal damage, spiral gear damage, metal abrasion, corrosion, surface wear, clutch wear and breakage, wet brake damage, pump failure, leakage, and damage from deposits, sludging and thickening.

If the total amount of said repairs, parts, and specific equipment damages submitted as valid claims by Qualified Settlement Class Members exceeds the amount in this fund, plus the amount of any unclaimed funds from the Reimbursement Fund, then such awards will be decreased on a *pro rata* basis. If there remain any monies after repair, parts, and/or specific damage awards to all Qualified Settlement Class Members who apply, and after each Qualified Settlement Class

Member has received 100% return of average purchase price, then such monies will revert to CITGO.

Despite substantial obstacles to obtaining class-wide relief, this Settlement in fact provides this immediate and substantial monetary relief well beyond that which is typically seen in class action settlements. The class-wide financial relief is a significant victory for Settlement Class Members given the amount of money that will be available to each Qualified Settlement Class Member (which could reach into tens of thousands of dollars to certain individuals), and the uncertainty whether Plaintiffs would have prevailed on class certification, at trial, and on appeal. Although Plaintiffs believe they would have been able to make sufficient showings at class certification and would also have been able to do so at trial and on appeal, Defendants intended to vigorously contest this matter, including at class certification, summary judgment, trial, and on appeal of any appealable rulings in favor of Plaintiffs. Accordingly, if the claims asserted in the action were not settled by voluntary agreement among the parties, future proceedings (including appeals) would be protracted and expensive, involve highly complex legal and factual issues relating to, among other things, class certification, liability, and damages, and would involve substantial uncertainties, delays, and other risks inherent in litigation. In light of these positions and the risks of litigation for both sides, the Settlement Agreement provides substantial benefits to Settlement Class Members and represents a reasonable resolution of the claims on a class-wide basis. When these risks, as well as the uncertainties and risks inherent in any litigation, are balanced against the benefits provided by the Settlement – here substantial cash payments and other benefits to Settlement Class Members – Plaintiffs submit that the Settlement easily falls within the range of possible final approval.

Next, there is no unduly preferential treatment of segments of the Settlement Class. The Purchase Price Relief distribution amount for each Qualified Settlement Class Member is calculated pursuant to the established, uniform standard for each unit of 303 THF Product purchased by each such Settlement Class Member during the Class Period, plus the option to apply for greater relief from the Repairs/Parts/Specific Equipment Damage portion of the Class Settlement Fund.

Finally, the law favors settlement, especially in class actions and other complex cases. By their very nature, “[c]lass actions, in general, place an enormous burden of costs and expense upon parties.” *Marshall v. National Football League*, 787 F.3d 502, 512 (8th Cir. 2015) (internal quotations and citation omitted); *see also In re Uponor, Inc.*, 716 F.3d at 1063 (same). And in complex cases such as this one, “the enormity of the burden is obvious.” *Marshall*, 787 F.3d at 512. Here, the Settlement Class Members receive real value in exchange for the release of their claims. In addition, approval of the Settlement will avoid significant litigation costs that likely would have been incurred in hard-fought, complicated, and expensive litigation likely requiring years to complete. In addition to preserving both parties’ expenditure of fees and costs, the Settlement preserves the judicial resources of this Court.

4. *Defendants Receive a Reasonable Release of Liability*

In return for the consideration to be provided under the Settlement, Defendants receive a reasonable release of liability related to the manufacture and sale to Settlement Class Members in the United States of the 303 THF Products at issue. Paragraph 39 of the Settlement Agreement specifically provides as follows:

Plaintiffs and the Settlement Class Members, on behalf of themselves and their respective past, present, and future partners, heirs, executors, representatives, personal representatives, legal representatives, officers, directors, employees, agents, distributors, downstream retail customers and/or resellers, attorneys,

accountants, insurers, predecessors, successors, assigns, parent companies, subsidiaries, affiliates, stockholders, and shareholders (the “Releasing Parties”), hereby release and forever discharge Defendants, together with their respective past, present, and future partners, heirs, executors, representatives, personal representatives, legal representatives, officers, directors, employees, agents, distributors, downstream retail customers and/or resellers, attorneys, accountants, insurers, predecessors, successors, assigns, parent companies, subsidiaries, affiliates, stockholders, and shareholders (the “Released Parties”) from any and all claims, causes of action, suits, obligations, debts, demands, agreements, promises, liabilities, damages, losses, controversies, costs, expenses, and reasonable attorneys’ fees and expenses of any nature whatsoever that are asserted, or could have been asserted in the Missouri Action and/or the Related Actions, arising out of or relating to the sale advertising, marketing, labelling, promotion, manufacture, distribution, purchase or use of MileMaster 303 Tractor Hydraulic Fluid, Orscheln Premium 303 Tractor Hydraulic & Transmission Fluid, H-K 303 Tractor Hydraulic Fluid (made by CITGO), and SuperTech 303 Tractor Hydraulic Oil (made by CITGO), in any State in the United States during the Class Period (the “Released Claims”). With respect to all Released Claims, the Parties stipulate and agree that the Class Representatives and Settlement Class Members shall expressly waive and relinquish Released Claims to the fullest extent permitted by law, including claims covered by (a) Section 1542 of the California Civil Code, which provides:

A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.

and (b) any law of any state or territory of the United States, federal law, or foreign or international law, which is similar, comparable, or equivalent to Section 1542 of the California Civil Code. As of the Effective Date, the Releasing Parties shall be deemed to have, and by operation of the Final Approval Order and Judgment shall have, fully, finally and forever released, relinquished, and discharged all Released Claims against the Released Parties pursuant to the terms of this Settlement Agreement.

As noted, this release is not overly broad and only releases Settlement Class Members’ claims related to the purchase and use of the 303 THF Products during the Class Period.

5. *Plaintiffs’ Counsel and the Class Representatives Support the Settlement*

Through their informal investigation, the substantial document production and review in this litigation, the depositions taken in this case, consultation with the Class Representatives, as well as through their consultations with experts, Plaintiffs’ Counsel have gained a comprehensive

knowledge of the facts relating to the respective claims and defenses and have sufficient evidence on which to base an intelligent assessment of the settlement proposal. Based on their knowledge of the case and the applicable law, as well as their experience in similar complex litigation and class actions, Plaintiffs' Counsel believe the Settlement is fair, reasonable and adequate. The Class Representatives in this action have also approved the Settlement.

6. *The Requirements of Fed. R. Civ. P. 23(a) and (b)(3) are Satisfied for Settlement Purposes*

This Court's review for preliminary approval also considers whether the requirements of Rule 23(a) and (b)(3) are satisfied for purposes of certifying the Settlement Class and administering the Settlement. The Settlement Class satisfies these requirements for settlement purposes. There are approximately 215,000 members of the proposed Settlement Class. The claims of those persons arise from the purchase and use of the defined 303 THF Products in the United States during the Class Period. Each of the nineteen (19) Class Representative Plaintiffs bought and used these 303 THF Products within those parameters. They are members of the Settlement Class asserting claims typical of Settlement Class Members, and they do not have interests that are contrary to, or in conflict with, interest of the Settlement Class Members for purposes of settlement. The Representative Plaintiffs have also retained experienced counsel and will protect fully and adequately the interests of the Settlement Class members in the settlement.

7. *The Proposed Method and Content of Class Notice are Appropriate*

Due process and Rule 23 require that the court "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Similarly, Rule 23(e)(1) calls for notice to be provided in a "reasonable manner to all class members who would be bound by the proposal[.]" Fed. R. Civ. P. 23(e)(1)(B). The notice must contain specific information in plain,

easily understood language, including the nature of the action and the rights of class members. Fed. R. Civ. P. 23(c)(2)(B)(i)-(vii).

To ensure that the notice satisfies the requirements of due process and Rule 23 in both form and content, the Parties have worked closely with RG/2 Claims Administration, LLC (“RG/2”), which specializes and has substantial experience in providing notice and administrative services in class-action litigation, to develop a comprehensive and substantial Notice Plan. The Parties propose that the Court appoint RG/2 to serve as the Settlement Administrator. The Notice Plan developed by the Parties and RG/2 is attached as Exhibit 2 to the Motion, and RG/2 Declaration is attached as Exhibit 3. The Notice Plan is comprised of several parts.

First, direct-mail and email notice of the Settlement will be provided to the Settlement Class Members for whom Orscheln has name and contact information. To accomplish this, Orscheln will provide the Settlement Administrator, to the extent available, the name and last known mailing, emailing address, and phone number of Settlement Class Members.

The Parties estimate that there are 215,000 Settlement Class Members who purchased the 303 THF Products during the Class Period. It is estimated that retailer Defendant Orscheln will be able to locate purchaser contact information for more than 80,000 Settlement Class Members who purchased the 303 THF Products it sold during the time period September 3, 2014 through September 30, 2018. Those persons and/or entities for whom Orscheln has specific purchase data will receive a Mailed Class Notice with Purchase Data, sent to the last known mailing address contained in Orscheln’s records. Those Settlement Class Members will receive automatic payment for those purchases which are on record and will not be required to submit a Claim Form in order to receive Purchase pPprice Relief based on the number of units reflected in the data. They may submit Request for Correction Form if the number of units purchased is not accurate or if they

purchased a 303 THF Product during the Class Period but outside of the period for which Orscheln has purchase records. They may also submit a Claim Form for Repairs/Parts/Specific Equipment Damage Relief. A Long Form Class Notice will be sent to Settlement Class Members for whom contact information is available but for whom specific, reliable purchase information data was not available, as well as to anyone requesting a Claim Form and Long Form Class Notice. Those Settlement Class Members will need to submit a Claim Form for all components of relief because specific purchase information was not available. Between (4) four and (8) eight weeks after the Mailed Notices, email notifications and reminders will be sent to those Settlement Class Members for whom email addresses are provided to the Settlement Administrator.

Second, publication notice of the Settlement will be provided to the remainder of the Settlement Class for whom the Settlement Administrator is unable to reasonably ascertain name and address information. To accomplish this notice to this segment of the Settlement Class, the Settlement Administrator shall cause the Summary Class Notice to be published in numerous newspapers, magazines, and other publications in locations where these 303 THF Products were sold.

Third, electronic Settlement notifications will occur through various digital media, including targeted Facebook advertising, general email, press releases, and other means. Radio and television air time in select locations may also be utilized to provide notice.

Fourth, electronic information regarding the Settlement will be provided through a dedicated, interactive settlement website. To accomplish this notice, the Settlement Administrator will create and maintain an operating website that: (i) contains downloadable copies of the Preliminary Approval Order, Long Form Class Notice, the Settlement Agreement, Claim Form, Repair/Parts Fund Claim Review Process, and, when filed, Class Counsels' motions for attorneys'

fees, costs, and for incentive awards for the Class Representatives; (ii) will post any subsequent notices agreed upon by the Parties; and (iii) allows members of the Settlement Class to submit claims.

As set forth in more detail in the Declaration of RG/2, filed with the Motion as Exhibit 3, the comprehensive proposed Notice Plan is calculated to reach a substantial number of the Settlement Class Members, and provides the best notice practicable under the circumstances, thus satisfying the requirements of the Due Process Clause of the United States Constitution and Fed. R. Civ. P. 23.

The content of the proposed notices also satisfies Rule 23's requirement. The Mailed Notice with Purchase Data and the Long Form Class Notice plainly describe the proposed Settlement Class, explain the material terms of the Settlement Agreement (including the benefits it provides to the Class), disclose Plaintiffs' Counsel's application for attorneys' fees and expenses, give notice of the time and place of the final approval hearing, and set forth procedures and deadlines for opting out of the Settlement Class and submitting comments and objections. The Mailed Class Notice with Purchase Data and the Long Form Class Notice also fulfill the requirement of neutrality in class notices. They summarize the proceedings to date, and make clear that the Settlement does not constitute an admission of liability by Defendants and that the Court has not ruled on the merits of the action. Accordingly, the Mailed Class Notice with Purchase Data and the Long Form Class Notice display the fairness, completeness, and neutrality required of a class-action settlement notice.

The Summary Class Notice likewise satisfies Rule 23's requirements. The Summary Class Notice describes the litigation and Settlement fairly and neutrally. It refers Class Members to the Long Form Class Notice, available on the settlement website or in print if requested, for a more

complete description of these matters, tells them how they can obtain copies of that notice, and provides a toll-free number to call and a website to visit to obtain more information. The Summary Class Notice will more than adequately provide the Class with the material information regarding the Settlement and their rights pertaining to it.

8. *The Distribution and Claims Process is Appropriate.*

The agreed process for distributing, and processing claims on, the Class Settlement Fund is reasonable, appropriate, and provides substantial benefits directly to Settlement Class Members. Each such Settlement Class Member will be able to review the Mailed Class Notice with Purchase Data or the Long Form Class Notice and, if necessary, submit a Claim Form in order to receive a monetary award based on the Settlement Class Member's purchase history as well as seek an additional award from the Repairs/Parts/Specific Equipment Damage Fund. The Claim Forms can be submitted to the Settlement Administrator via United States mail, fax, e-mail, or through the settlement website.

IV. CONCLUSION

Based on the above and foregoing, Plaintiffs respectfully ask that the Court grant preliminary approval of the proposed Settlement and enter the proposed preliminary approval order.

Date: February 12, 2020

Respectfully submitted,

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**ATTORNEYS FOR PLAINTIFFS AND ALL
CLASS MEMBERS**

EXHIBIT A

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,)	
)	Case No. 18-00941-CV-W-BP
v.)	
)	
ORSCHELN FARM AND HOME LLC)	
d/b/a ORSCHELN FARM AND HOME,)	
et al.)	

DECLARATION OF THOMAS V. BENDER
IN SUPPORT OF APPROVAL
OF CLASS ACTION SETTLEMENT AGREEMENT

I, Thomas V. Bender, declare as follows:

1. I am an attorney licensed to practice in the state of Missouri and in the United States District Court for the Western District of Missouri.

2. I am lead counsel in the above-captioned litigation, and I make this Declaration in support of the Plaintiffs’ Unopposed Motion for Preliminary Approval of Proposed Class Action Settlement. I have actively participated in all aspects of this litigation, including negotiation of the Settlement Agreement and Release (“Settlement” or “Settlement Agreement”) which was attached as Exhibit 1 to Plaintiffs’ Unopposed Motion for Preliminary Approval of Proposed Class Action Settlement.

3. In May of 2018, consumers Shawn Hornbeck, Monte Burgess, Raymond Bieri, and Dan Chevalier filed their case in Cass County Circuit Court for alleged Missouri Merchandising Practices Act violations, breach of warranty, fraudulent and negligent misrepresentations, negligence, and unjust enrichment. These Plaintiffs asserted such claims individually and

purportedly on behalf of a putative class of Missouri purchasers. Defendants thereafter removed the Cass County Circuit Court action to the United States District Court for the Western District of Missouri. In June 2019, Plaintiff James Kircher was added as a class representative and a Second Amended Complaint was filed in this action.

4. On May 24, 2019, Plaintiff Adam Sevy initiated a class action lawsuit against some of the same Defendants in the United States District Court for the District of Kansas, Case No. 2:19-cv-02259. On June 6, 2019, Plaintiff Wayne Rupe initiated a class action lawsuit against some of the same Defendants in the United States District Court for the Southern District of Iowa, Case No. 4:19-cv-00163-RGE-RAW. On September 12, 2019, Plaintiff Randy Rohrscheib initiated a class action lawsuit against some of the same Defendants in Macon County, Illinois, Case No. 2019 L74. Each of these class actions involved nearly identical allegations, claims and damage related to Defendants' manufacture and sale of the 303 THF Products.

5. On January 16, 2020, a Third Amended Consolidated Class Action Complaint was filed in this action which included the claims previously filed in Iowa, Kansas, and Illinois, and which also added Class Representatives and class claims for all purchasers of Defendants' 303 THF Products throughout the United States. Plaintiffs' Third Amended Consolidated Class Action Complaint includes claims against Defendants for negligence, unjust enrichment, breach of warranty, fraudulent and negligent misrepresentations, and consumer protection violations arising out of Settlement Class Members' purchase and use of the following "303" tractor hydraulic fluid products throughout the United States during the Class Period: (a) CITGO-Manufactured MileMaster 303 Tractor Hydraulic Fluid; (b) Orscheln Premium 303 Tractor Hydraulic & Transmission Fluid; (c) CITGO-manufactured H-K 303 Tractor Transmission Hydraulic Fluid;

and (d) CITGO-manufactured SuperTech 303 Tractor Hydraulic Oil (hereinafter referred to collectively as “303 THF Products”).

6. In their Third Amended Consolidated Class Action Complaint, Plaintiffs allege, among other things, that the labels for the 303 THF Products were deceptive and misleading for the reasons set forth in Third Amended Consolidated Class Action Complaint. Plaintiffs also allege that use of the 303 THF Products in equipment causes damage to various parts of the equipment, including damage to the spiral gear in the drive, excess wear, seal leakage, high pump leakage, and damage from deposits, sludging and thickening. Plaintiffs seek various categories of damages on behalf of themselves and the putative class of purchasers based on claims and purported harms alleged in the Third Amended Consolidated Class Action Complaint, including: (i) Restitution/Return of Cost of Product; (ii) Benefit of the Bargain Damages; (iii) Cost of Common Remedial Measures; (iv) Other Repair and Parts Costs as Damages; (v) Punitive Damages; and (vi) Attorneys’ Fees and Costs.

7. Plaintiffs’ counsel is not aware of any other litigation, class or otherwise, past or present, relating to these 303 THF Products. There are no competing class actions and no known individual lawsuits relating to these 303 THF Products or these issues.

8. From the inception of this litigation, Plaintiffs’ counsel has aggressively prosecuted this case and vigorously represented the best interests of the Plaintiffs and putative Class. The case was prosecuted by attorneys and staff from three Kansas City area Law Firms: Tom Bender and Dirk Hubbard of Horn, Aylward & Band, LLC; Gene Graham, Bill Carr, and Bryan White from White, Graham, Buckley & Carr, LLC; and Clayton Jones of Clayton Jones Law. In addition, Law Firms from Iowa and Illinois assisted in the prosecution of this litigation: the Lundberg Law Firm from Sioux City, Iowa, and the Law Firm of Bolen Robinson & Ellis LLP from Decatur,

Illinois. Pursuit of this case has included investigating the facts, performing legal research, reviewing and analyzing documents, assembling and drafting pleadings, propounding discovery, reviewing documents, taking depositions, producing Class Representatives for depositions, working with experts, and communicating with counsel for Defendants.

9. Discovery and investigations have included requesting and reviewing information from the Missouri Department of Agriculture, Georgia Department of Agriculture, and North Carolina Department of Agriculture; exchange of information between the parties; meeting and conferences with Class Representatives; review of more than 30,000 pages of documents produced by Defendants, taking depositions of key management officials of Defendants, meeting and conferences with representatives of Defendants; and retention and consultation with experts.

10. The Parties engaged in numerous discussions and serious settlement negotiations. The Parties initially engaged in extensive and arm's length negotiations trying to resolve these issues and claims.

11. After reaching an agreement on key terms for the benefit of the Class on or about December 3, 2019, the Parties negotiated extensively to complete the full Settlement Agreement and the details of proposed implementation of the Settlement. The Parties continued to negotiate and exchange information regarding settlement details.

12. Plaintiffs and Defendants have thus agreed to the terms of a Class Action Settlement of this case which provides substantial relief to approximately 215,000 Class Members who have purchased these 303 THF Products in the United States during the stated periods of time.

13. As described in detail in the Settlement Agreement, the Settlement provides significant payments of money damages to the Class Members in a way that addresses the fundamental issues underlying this case and compensates Class Members for actual damages

suffered. The Settlement provides for a Class Settlement Fund of \$18,825,000.00. In addition to funding settlement administration/notice and incentive awards to Class Representatives, the Class Settlement Fund should be sufficient to provide each Settlement Class Member with full monetary compensation for actual damage suffered by way of payment in an amount equal to 100% of the average purchase price for the units of Defendants' 303 THF Products purchased by each Settlement Class Member for whom purchase information is available as well as those who submit claim forms. In addition, the Class Settlement Fund will also provide a substantial additional fund to fully compensate Settlement Class Members for actual damage suffered to class members' equipment as a result of use of the 303 THF Products. The total settlement amount is intended to compensate each Settlement Class Member for any property damage, repairs, and/or remediation (such as flushing) necessary related to the equipment that used Defendants' 303 THF Products, as well as to provide each participating Settlement Class Member a full return of the purchase price.

14. Class Counsel's attorneys' fees and expenses are to be paid separately by Defendants and do not come out of the Class Settlement Fund. The original term sheet agreement entered into by the Parties did not include any agreement with regard to Class Counsel's attorneys' fees and expenses, other than to note that such fees and expenses would be paid separately and would not come out of the Class Settlement Fund. Instead, it noted that Defendants would pay separately whatever amount of fees and expenses were awarded by the Court. Subsequent to the Parties' agreement on the key terms for the Class Settlement Fund and relief described above, an agreement on attorney's fees was reached and included in the Full and Final Settlement Agreement. Pursuant to the Settlement Agreement, Plaintiffs' counsel will separately apply for an award of attorneys' fees and reimbursement of expenses. Defendants have agreed not to contest

and to separately pay, in addition to the Class Settlement Fund, Class Counsel's attorneys' fees and expenses, if awarded by the Court, in the amount of \$5,900,000.00.

15. Throughout this litigation and the mediation and negotiation efforts, and in advising our clients of the proposed Settlement, Plaintiffs' counsel have at all times considered the fairness, reasonableness and adequacy of the Settlement for the Class, taking into account: the strength of Plaintiffs' case; views and experience of the Class Representatives; the risk, expense, complexity and likely duration of further litigation and of seeking class action status; the amount offered in settlement and the experience and views of Plaintiffs' counsel. With all of Plaintiffs' counsel's collective experience in prosecuting complex class actions, we have considered the claims set forth in the Third Amended Consolidated Class Action Complaint and our continued confidence in the merit of those claims, the scope of relief offered in the settlement compared to the potential relief at the conclusion of the litigation, and the risks and costs of continued litigation. Taking these factors into account, it is my opinion that the proposed Class Action Settlement is fair, reasonable and adequate, well within the range of possible approval, and therefore deserving of the Court's preliminary approval.

16. Preliminary approval is appropriate under the new provisions of Federal Rule 23 in that the monetary relief and other appropriate terms of this Class Settlement Agreement are such that "giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Based upon the factor listed below, we believe this Court should determine that it "will likely be able to approve" this Class Settlement Agreement pursuant to Rule 23(e)(2) in that:

- (A) the putative class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm's length;
- (C) the relief provided for the class is adequate, taking into account:
 - i. the costs, risks and delay of trial and appeal;
 - ii. the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
 - iii. the terms of any proposed award of attorney's fees, including the timing of payment; and
 - iv. any agreement required to be identified under Rule 23(e)(3), and
- (D) the proposal treats class members equitably relative to each other.

With regard to (c)(iii), the Settlement Agreement provides that Class Counsel will submit their request for a fee award amount to be awarded by the Court, up to the \$5,900,000.00 cap, and that whatever fees are awarded by the Court would be paid separately by Defendants. With further regard to (C)(iv), there are no agreements other than the Class Settlement Agreement being presented to this Court for approval.

17. The Parties have selected RG/2 Claims Administration, LLC ("RG/2"), a qualified and reputable third-party administrator, to issue Notice to Class Members, receive exclusion requests, process claims, respond to inquiries, issue settlement checks to Class Members, and conduct other activities relating to class notice and administration. Estimated costs for the class notice and administration are \$710,000.00.

18. RG/2 has developed a comprehensive and substantial Notice Plan. In addition to the direct mailed notice, publication notice of the Settlement will be provided to the majority of

the Settlement Class. To accomplish publication notice, the Settlement Administrator shall cause the Summary Class Notice and other notifications to be published in numerous newspapers and magazines. Radio and television notifications may also be utilized.

19. Electronic notice of the Settlement will be provided through a dedicated, interactive settlement website as well as target Facebook advertising and other digital means. The Settlement Administrator will create and maintain an operating website that: (i) contains downloadable copies of the Preliminary Approval Order, Long Form Class Notice, the Settlement Agreement, Claim Form, Repairs/Parts/Specific Equipment Damage Claim Review Process, and, when filed, Class Counsels' motions for an attorneys' fee award and for incentive awards for the Class Representatives; (ii) will post any subsequent notices agreed upon by the Parties; and (iii) allows members of the Settlement Class to submit claims.

20. As set forth in more detail in the Notice Plan and the Declaration of RG/2, filed as Exhibits 2 and 3 to Plaintiffs' Unopposed Motion for Preliminary Approval of Class Settlement, the comprehensive proposed Notice Plan is calculated to reach a substantial number of the Settlement Class Members and provides the best notice practicable under the circumstances, thus satisfying the requirements of the Due Process Clause of the United States Constitution and Federal Rule of Civil Procedure 23. The content of the proposed notices also satisfies the new provisions of Rule 23 in that this Class Settlement provide the most appropriate content and format of notice for these circumstances.

21. The Class Representatives have expended time and effort in prosecuting this case on behalf of the purchasers of these 303 THF Products. Pursuant to the Settlement Agreement, Plaintiffs' counsel will separately apply for incentive awards for the Class Representatives in the

amount of \$5,000.00 each. This amount is appropriate based on the time, effort and impact of each Class Representative in achieving this Settlement for thousands of Class Members.

22. Plaintiffs' counsel have diligently investigated and prosecuted this matter, dedicating substantial time, effort, resources, and expertise to the investigation and prosecution of the claims at issue in the action, and have successfully negotiated the Settlement of this matter to benefit the Class. Class Counsel has also agreed to limit their request for reasonable attorneys' fees and expenses to a total of \$5,900,000.00. As noted, Defendants have agreed to separately pay whatever amount is awarded by the Court to Class Counsel for reasonable attorneys' fees and expenses, subject to a cap of \$5,900,000.00.

23. Having reached full agreement on the terms and conditions of a Class Action Settlement, the Class Representatives and Plaintiffs' Counsel seek the Court's preliminary approval. As noted herein, such preliminary approval is appropriate as there is a solid record supporting that the proposed settlement will likely earn final approval.

24. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 11, 2020

/s/ Thomas V. Bender
Thomas V. Bender