

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

IN RE: SMITTY’S/CAM2 303 TRACTOR
HYDRAULIC FLUID MARKETING, SALES
PRACTICES, AND PRODUCTS LIABILITY
LITIGATION

MDL No. 2936

Master Case No. 4:20-MD-02936-SRB

ALL ACTIONS

**SUGGESTIONS IN SUPPORT OF PLAINTIFFS’
APPLICATION FOR INCENTIVE AWARDS FOR CLASS REPRESENTATIVES, AND
FOR AWARD OF ATTORNEYS’ FEES AND EXPENSES
RELATED TO CLASS SETTLEMENT WITH RETAILER DEFENDANTS**

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 Related to Class Settlement with Retailers (“Application”):

I. Introduction

Class Representatives and Class Counsel have devoted substantial time and effort in their prosecution of this case on behalf of the Class. Thus far, the results of those efforts include this Retailer Class Settlement Agreement which provides meaningful economic and non-economic relief to Class Members, especially in light of its partial nature and the continuing case against the primary defendants, the Manufacturers. The Class Members will receive an award from the Retailer Class Settlement based on (a) the units of 303 THF Products Class Members purchased; and (b) repair costs and other damage to the equipment in which those products were used. In addition to the monetary aspect of this Retailer Settlement Agreement, the four Retailer Defendants also agreed not to sell any tractor hydraulic fluid that is labeled, or otherwise held out

to customers and the public, as "303" or as meeting specifications of John Deere 303. The Retailer Defendants also agreed to monitor the quality of the tractor hydraulic fluid sold in their retail stores, to reasonably review customer complaints to identify problems with tractor hydraulic fluid products, and to consult with tractor hydraulic fluid vendors/manufacturers to help ensure those vendors/manufacturers are providing the retailers with products that meet product specifications and labeling/packaging requirements.

Finally, the Retailer Class Settlement Agreement provides for direct and published notice to be disseminated to Settlement Class Members through which each can be advised about Plaintiffs' allegations concerning the Manufacturer Defendants' 303 THF Products and the potential damage to their equipment, allowing those Settlement Class Members to stop using the defective fluid and flush the fluid from their equipment if they can afford it.

This application seeks approval for the payment of incentive awards and for an award of reasonable attorneys' fees and expenses in connection with this litigation. Counsel for Retailer Defendants, who are aware of the work that was done in this matter prior to entry of the Retailer Class Settlement Agreement, do not oppose the amounts sought. Specifically, Plaintiffs and Class Counsel seek a \$500.00 incentive award for each of the Class Representatives in this case. As noted, Retailer 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 \$400,000.00 in reasonable litigation expenses and \$2,040,000.00 in reasonable attorneys' fees. This fee amount equals 30% of the Class Settlement Fund of \$7,200,000.00. Retailer Defendants are aware of the nature and extent of the work that has gone into this litigation and the work that went into Retailer Class Settlement Agreement and the results achieved, and have indicated that

they do not oppose this Application and have agreed that Class Counsel's Court-awarded attorneys' fees and expenses are to be paid out of the Class Settlement Fund.

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 \$500.00 to each of the Class Representatives. Incentive awards are typical in class actions. *Newberg on Class Actions* §11:38 (4th 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 (8th 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, and in otherwise assisting the prosecution of this case. Thousands of Settlement Class Members benefited 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.R.D. 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 has been disclosed to and is agreed to by Retailer Defendants, subject to the approval of this Court, and is to come out of the \$7,200,000.00 Class Settlement Fund. Such awards for the 177 Class Representatives total \$88,500.00. Accordingly, the Court is asked to approve the \$500.00 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. This case has involved a variety of unique issues, including the nature of hydraulic fluids and hydraulic fluid specifications, the nature and function of lubricants within tractor systems 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 partial results that have been obtained from the Retailer Defendants.

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 (8th Cir. 2017), citing *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 244 (8th 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 (8th 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 (8th 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 (8th Cir. 1975), to assess a fee request in a percentage of the fund case. The *Texas Prison* Court identified the 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 (10th Cir. 1988) (holding that the *Johnson* factors are relevant to the percentage that should be awarded as fees). This Court recently applied those factors in approving class counsel's fee request in *Hartley v. Sig Sauer, Inc.*, 4:18-CV-00267-SRB, 2020 WL 3473652, at *4 (W.D. Mo. June 25, 2020).

Application of the factors identified in *Texas Prison* supports the conclusion that the percentage sought in this case (30% 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 several years, with Class Counsel having expended, up to the date of the Retailer Class Settlement Agreement's entry, more than 8,000 attorney hours on work related to this litigation. In addition, more than 1,000 hours of attorney and legal assistant time has been spent to date on settlement administration of this Retailer Class Settlement Agreement, with hundreds more hours of settlement administration activity to be spent over the next several months.

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 (8th 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 (8th 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 (8th 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 meaningful results for the Settlement Class Members in this partial

Settlement. The Retailer Class Settlement Agreement amount is \$7,200,000.00. Thus, the fee award of \$2,040,000.00 is approximately 30% of the total gross settlement. This result could not have been achieved without a demonstration by Plaintiffs and Class Counsel that they are ready and willing to proceed to class certification and trial. Given this result achieved and work performed, 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.

Alternatively (or just as a cross-check), Class Counsel's requested fee is also supported by the lodestar method and the requested fee amount totaling \$2,040,000.00 is fair and reasonable. As noted above, the partial recovery obtained from the Retailer Defendants for the Settlement Class is extremely favorable. Class Counsel negotiated and obtained a Class Settlement Fund of \$7,200,000.00 against the non-principal, non-manufacturer defendants, with the case against the principally liable Manufacturer Defendants still moving forward. This settlement provides all Settlement Class Members the opportunity to receive partial benefits based on the 303 THF Products they purchased in the Class Period and any damage to equipment they experienced as a result of the fluid—whether from leaks, hydraulic pump failures, seal problems, transmission problems, brake chatter, power-take-off problems or other common issues. If the equipment was damaged beyond repair, the Class Members had the opportunity to make a claim for money lost on that equipment.

Plaintiffs note that Class Counsel's lodestar – just through March 31, 2021 – is more than \$4,000,000.00, and thus the requested fee results in a lodestar multiplier of ½. 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 (8th 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, this is a partial settlement with the non-principal defendants, and thus there is a lodestar of less than 1.

Finally, as noted, also to be paid out of the Class Settlement Fund is a partial reimbursement for litigation expenses in the amount of \$400,000.00. (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 necessary to the administration of the settlement as well as the prosecution of the ongoing litigation. 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 Retailer Class Settlement Agreement, including ordering incentive awards of \$500.00 to the Class Representatives shall be paid out of the Class Settlement Fund and that Class Counsel shall be paid \$400,000.00 in expenses and \$2,040,000.00 in fees out of the Class Settlement Fund.

Date: December 15, 2021

Respectfully Submitted,

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**ATTORNEYS FOR PLAINTIFFS
AND 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 15th day of December, 2021.

 /s/ Dirk Hubbard