

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

ELLEN ALLICKS d/b/a ALLICKS)	
EXCAVATING, et al.,)	
on behalf of themselves)	
and others similarly situated,)	
)	
Plaintiffs,)	
)	Case No. 4:19-cv-01038
v.)	
)	
OMNI SPECIALTY PACKAGING, LLC,)	
et al.,)	
)	
Defendants.)	

**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”):¹

I. Introduction

Class Representatives and Class Counsel devoted substantial time and effort in their prosecution of this case on behalf of the Settlement Class. The eventual result of those efforts was the Amended Class Action Settlement Agreement (Doc. #: 22-1) providing substantial economic relief to Settlement Class Members. Class Counsel’s efforts in this case have provided Settlement Class Members with significant recovery. The Settlement Class Members will be able to recover 30.51%, 38.00%, or 41.00% (depending on the date and state of purchase) of the net sales price

¹ Unless otherwise noted herein, capitalized terms used in these Suggestions in Support have the meaning assigned to them in the parties’ Amended Settlement Agreement and Release (Doc. #: 22-1).

paid for each unit of O'Reilly 303 Tractor Hydraulic Fluid purchased during the Class Period. Further, the incentive awards to Class Representatives and the awards of Class Counsel's attorneys' fees and costs, if approved by the Court, will not diminish the funds available for distributions to Settlement Class Members, as Defendants have agreed to pay them (up to specified amounts) separately from, and in addition to, the Class Settlement Fund.

This application seeks approval for incentive awards to Class Representatives and for awards of Class Counsel's reasonable attorneys' fees and expenses in connection with this litigation. Class Counsel have conferred with counsel for Defendants in advance of filing this application. Defendants' counsel, who are generally aware of the work that was done in this matter through their involvement in the case as representatives of the Defendants, do not oppose the awards Plaintiffs seek.

Specifically, Plaintiffs and Class Counsel seek a \$5,000.00 incentive award for each of the sixteen (16) Class Representatives in this case. As noted, Defendants do not contest and have agreed to pay these incentive awards (if approved by the Court), not to exceed \$5,000 for each of the 16 Class Representatives, separately from the Class Settlement Fund, so that such awards would not reduce the amount available for distributions to Qualified Settlement Class Members.

Plaintiffs and Class Counsel also seek an award of Class Counsel's attorneys' fees in the amount of \$2,105,340.28, and an award of Class Counsel's expenses in the amount of \$25,000.00. Such awards will not reduce the Class Settlement Fund available to Settlement Class Members either, as Defendants have agreed to pay such awards (if approved by the Court) separately from, and in addition to, the Class Settlement Fund. Together, such awards represent 25% of the \$8,501,361.10 Class Settlement Fund, and approximately 20% of the total settlement amount of \$10,711,701.38 (inclusive of the Class Settlement Fund, payments to Class Representatives,

expenses of Class Counsel, and attorneys' fees of Class Counsel). Pursuant to this Court's Orders, \$100,000.00 of the amount awarded for Class Counsel's attorneys' fees would be paid to the Settlement Administrator, RG/2 Claims Administration, LLC, to be held for the benefit of Class Counsel until the Settlement Administrator files its Final Report regarding administration of the settlement.

Defendants' counsel, in their capacity as representatives of the Defendants, are generally 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. Pursuant to the terms of the Amended Settlement Agreement, Defendants have agreed to pay, separate from, and in addition to, the Class Settlement Fund, the amounts awarded for incentive awards to the Class Representatives and for Class Counsel's attorneys' fees and expenses, not to exceed the amounts requested herein.

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 this Settlement, including Class Counsel's intent to seek awards of its reasonable attorneys' fees, expenses and the Class Representatives' incentive awards, as set forth herein, was provided to the Settlement Class through Court-approved means, including through direct notice

mailed and emailed to certain Settlement Class Members, publication notice, in-store notice, and through the Settlement Website. Accordingly, Plaintiffs now move for approval of the incentive awards to Class Representatives and for awards to Class Counsel for 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 an incentive award of \$5,000 to each of the 16 Class Representatives, totaling \$80,000 altogether. 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, responding to requests for information and documents, 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, Defendants do not oppose the requested incentive awards at the amounts stated herein, and, subject to Court approval of the awards, Defendants have agreed to pay them separately from, and in addition to, the Class Settlement Fund. The incentive awards thus would not reduce the amount of the Class Settlement Fund available for distributions to Qualified Settlement Class Members. Accordingly, the Court should approve the \$5,000.00 incentive award to each of the 16 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 and expenses for the work that was performed and the results that were obtained. Defendants have agreed to pay those amounts in addition to the Class Settlement Fund, so as to not diminish any recovery to the Class Members. Defendants have been advised as to the amounts being sought for attorneys' fees and expenses herein, and have 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 (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, 127 (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 noted in its Order of September 22, 2020 that “[t]he amount of attorneys’ fees is reasonable.” (Doc. 19, p. 12). Counsel submits this initial statement of the Court is well-supported under application of the factors identified in *Texas Prison*, which supports the conclusion that the percentage sought in this case (representing, proportionately, 25% of the Class Settlement Fund and 20% of the total settlement amount) is reasonable. (*See also* 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 700 partner-level attorney hours on work related to Defendants’ product that is directly attributable to this case and the cases from other jurisdictions other than the initial *Miller* Missouri action. In addition, Class Counsel spent 1,350 partner-level attorney hours on that *Miller* Missouri action. Class Counsel received compensation for approximately 500 hours of that time in the *Miller* Settlement, and we advised the Court that much of our time was not being compensated in that settlement because it was spent on tasks that would be useful in all of the cases in other jurisdictions. Thus, Class Counsel have 850 hours of uncompensated time from *Miller* to add to the 700 additional hours incurred in this case and in the cases from other jurisdictions ultimately consolidated with this case. Class Counsel has also spent thousands of hours of other common time investigating and learning about the industry as a whole which indirectly benefitted the class

members in this litigation. In addition, there will be hundreds of additional attorney and assistant hours spent through the completion of settlement administration.

This 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, as a result of which 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)(33.3% 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 Fund is \$8,501,361.10. Including the attorneys’ fees, expenses, and incentive awards, which are to be paid separately rather than taken out of the Class Settlement Fund, the total settlement amount is \$10,711,701.38. Thus, the fee award of \$2,105,340.28 is approximately 20% of the total settlement amount and 25% of the Class Settlement Fund (which is available for distribution to Qualified 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. In fact, as reflected above, the awards in similar cases support the award of an even higher percentage than sought here.

Further, as also noted above, the attorneys’ fees awarded by the Court, up to the amount requested herein, are to be paid separately by Defendants and thus do not take away from the \$8,501,361.10 Class Settlement Fund available for distribution to Qualified Settlement Class Members. “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. As noted above, the recovery obtained for the Settlement Class is extremely favorable. Class Counsel negotiated and obtained a substantial Class Settlement Fund of \$8,501,361.10, which provided all Settlement Class Members the opportunity to receive a settlement distribution calculated as a percentage of the net sales price they paid for O’Reilly 303 THF purchased in the Class Period (*i.e.*, 30.51%, 38.00%, or 41.00%, depending on state and date of purchase). In short, Class Counsel’s efforts provide real monetary relief to Settlement Class Members.

Plaintiffs note that Class Counsel’s lodestar, for the 1550 hours identified above, is approximately \$775,000.00 (based on a rate of \$500 per hour; see Declaration attached as Exhibit 1) and thus the requested fee results in a lodestar multiplier of less than three. The additional time that will be incurred in continuing to process the claims and completion of the settlement will further reduce that lodestar multiple. But even without considering that additional time or other time spent, a lodestar multiplier of less than three is 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, 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.

IV. Conclusion

The amounts requested for incentive awards to Class Representatives, and for Class Counsel’s attorneys’ fees and expenses, are reasonable. Plaintiffs respectfully seek the Court’s Order approving the following awards, to be paid separately from the Class Settlement Fund: (a) a \$5,000 incentive award to each of the 16 Class Representatives; (b) an award of Class Counsel’s attorneys’ fees in the amount of \$2,105,340.28; and (c) an award of Class Counsel’s expenses in the amount of \$25,000.00. Pursuant to this Court’s Orders, \$100,000.00 of the amount awarded for Class Counsel’s attorneys’ fees would be paid to the Settlement Administrator, to be held for the benefit of Class Counsel until the Settlement Administrator files its Final Report regarding administration of the settlement.

Date: March 4, 2021

Respectfully Submitted,

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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 4th day of March 2021.

/s/ Dirk Hubbard