

**STATE OF MISSOURI
CIRCUIT COURT OF CASS COUNTY**

MONTE BURGESS,)	
DAN CHEVALIER,)	
ROBERT CAVINESS,)	
RAYMOND BIERI, and)	
JAMES KIRCHER,)	
on behalf of themselves and others)	
similarly situated,)	
Plaintiffs,)	
)	
v.)	Case No.19CA-CC00084
)	
MARTIN OPERATING PARTNERSHIP, LP)	
d/b/a MARTIN LUBRICANTS)	
)	
Defendant.)	

**PLAINTIFFS’ SUGGESTIONS IN SUPPORT OF
UNOPPOSED MOTION FOR FINAL 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 Final Approval of Class Action Settlement.

I. INTRODUCTION AND SUMMARY OF CLASS SETTLEMENT BENEFITS

On July 23, 2020, this Court granted preliminary approval of the parties’ class action settlement in this case which made substantial relief available to thousands of Class Members who have purchased the following “303” Tractor Hydraulic Fluid products in the United States during the Class Period: (a) Martin-manufactured Orscheln Premium 303 Tractor Hydraulic & Transmission Fluid; and (b) Martin 303 Tractor Hydraulic & Transmission Fluid (referred to collectively as “303 THF Products”).

The Class Representatives and Class Counsel now respectfully request the Court’s entry of its Final Approval Order of the class action settlement set forth in the Settlement Agreement and

Release, including all exhibits thereto (“Settlement” or “Settlement Agreement”), which was attached as Exhibit 1 to the Motion for Preliminary Approval of Proposed Class Action Settlement.

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.

The first two steps have occurred. This Court granted its Preliminary Approval on July 29, 2020. Notice has now been carried out and the claims period has ended. Thousands of Missouri Class Members are scheduled to receive monetary awards from this Settlement. There have been no objections to the Settlement, and only three (3) Class Members opted out. The Settlement Agreement is fair, reasonable and adequate. The Fairness Hearing is set for March 23, 2021. Accordingly, Plaintiffs respectfully request the Court grant final approval of the Settlement.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Litigation History and Plaintiffs’ Claims

Monte Burgess, Dan Chevalier, Robert Caviness, Raymond Bieri, and James Kircher initiated this class action lawsuit against Defendant in the Circuit Court of Cass County, State of Missouri, Case No. 19CA-CC00084. The Plaintiffs asserted claims for alleged Missouri Merchandising Practices Act violations, breach of warranty, fraudulent and negligent misrepresentations, negligence, and unjust enrichment on behalf of a class of individuals who purchased certain 303 THF Products in the State of Missouri.

Plaintiffs allege, among other things, that the labels for the 303 THF Products were deceptive and misleading for the reasons set forth in their Class Action Petition. 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, 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 Class Action Petition.

B. The Proposed Settlement

1. *The Settlement Class, Class Representatives, and Class Counsel*

The Settlement Class under the Parties' Settlement Agreement consists of the same Class definition pled in Plaintiffs' Class Action Petition:

All persons and other entities who purchased Martin 303 Tractor Hydraulic Fluid from any retailer in Missouri at any point in time from April 5, 2014 to the present, excluding purchases made for resale;

-and-

All persons and other entities who purchased Orscheln Premium 303 Tractor Hydraulic Fluid manufactured by Martin Lubricants from Orscheln locations in Missouri during the time period May 25, 2013 through and including September 2, 2014, excluding purchases made for resale.

To represent the Settlement Class for purposes of the Settlement, the Court's Preliminary Approval Order appointed as Class Representatives the five (5) Plaintiffs identified as Representative Plaintiffs in the Settlement Agreement. The Court also appointed Plaintiffs' Counsel as Counsel for the Settlement Class.

2. *Settlement Payments and Benefits to Class Members*

Under the terms of the Settlement Agreement, Defendant will establish a Class Settlement Fund in the amount of \$450,000.00. That amount will be due from Defendant approximately 45 days after this Court's Final Approval Order.

The Class Settlement Fund provides 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 Class Settlement Fund of \$450,000.00 will be used to pay the claims of Qualified Settlement Class Members. All incentive awards to Class Representatives and all of Class Counsel's attorneys' fees and expenses are to be paid separately by Defendant and will not reduce the Class Settlement Fund.

Thus, the Class Settlement Fund is sufficient to provide each Settlement Class Member with monetary compensation for actual damage suffered. Each Settlement Class Member for whom purchase information is available and each Settlement Class Member who has submitted a valid Claim Form will receive payment of 25% of the average purchase price for the units of the 303 THF Products purchased by those Settlement Class Members. As noted and pursuant to the Settlement Agreement's terms, the claims for Purchase Price Relief are in the process of being evaluated, with final determinations as to valid claims will be made in the next 30 days. At present and subject to final claim evaluations and determinations, it appears there are approximately \$255,000.00 in valid bucket claims to be paid, including both automatic awards and submitted claims.

In addition to this Purchase Price Relief, the Class Settlement Fund will also provide substantial and additional compensation to Settlement Class Members for the actual damage suffered to Settlement Class Members' equipment as a result of use of the 303 THF Products. The Repairs/Parts/Specific Equipment Damage Relief Fund will 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.

At present, and prior to completion of the claim evaluation/determination process, there appear to be approximately fifty (50) valid Part B claims for relief from the Repairs/Parts/Specific Equipment Damage Fund. The amount of those valid claims (when reduced for each claimant's prior recovery in other 303 settlements, if any) is approximately \$170,000.00. The Part B Settlement Fund is funded at \$150,000 such that, based on initial determinations, each of the Class Members will receive approximately 88% of his/her valid repair, parts, or specific equipment damage claim.

Accordingly, the Class Settlement Fund is sufficient to provide thousands of Settlement Class Members with a payment and/or refund in an amount calculated to be 25% of the average purchase price paid for the units of the 303 THF Products purchased during the Class Period. In addition, the Class Settlement Fund will provide substantial 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. The benefits available and to be awarded to Class Members from this Settlement thus provide substantial relief to Class Members.

3. *Notice and Administration Costs*

Defendant has also separately paid, in addition to this Class Settlement Fund, all settlement administration and notice costs (subject to a partial reversion from funds remaining in the purchase price relief fund). Settlement administration and notice costs for this class settlement were estimated to be approximately \$50,000.00. Settlement Administrator RG-2 has indicated the costs will not exceed this estimated amount. (Ex. 2, 19).

4. *Class Representatives' Incentive Awards*

Defendant has also agreed to separately pay, in addition to the Class Settlement Fund, the amount the Court awards Class Representatives in incentive awards, up to \$5,000.00 each for the Class Representatives. Class Counsel has sought a \$5,000.00 incentive award to each of the five (5) Class Representatives, for a total of \$25,000.00. Defendants do not contest those amounts.

5. *Class Counsel's Attorneys' Fees and Expenses*

Pursuant to the Settlement Agreement, Plaintiffs' Counsel has separately applied for an award of attorneys' fees and reimbursement of expenses. Defendant has agreed not to contest the award sought and has agreed that Defendant 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 \$150,000.00. As noted, this amount is to be paid separately to Class Counsel and will not deplete the Class Settlement Fund.

III. ARGUMENT

A. Appropriate Notice Was Provided to Settlement Class Members

Due process requires that Class Members be provided the best notice practicable, reasonably calculated to apprise them of the pendency of the action and affording them the opportunity to object. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); Fed. R. Civ. P. 23(c)(2)(B). Here, as detailed in the Declaration of the Settlement Administrator, RG/2 Claims Administration, LLC ("RG/2"), attached as Exhibit 2 to the Joint Motion for Final Approval of Proposed Class Action Settlement, the Class was notified of the settlement by direct mail, by newspaper and other print media publication, and by digital publication.

Direct notice was mailed to thousands of Settlement Class Members whose contact information was maintained by retailer Orscheln. The initial mailed notice provided substantial information about the Settlement and provided the settlement website address and information. A

summary notice of the Settlement was also published in daily and weekly newspapers in various counties within the state of Missouri. A media notice campaign was also implemented that included Facebook and Google Ads where potential Class Members could click on the add and be linked to the case website.

The full form detailed notice, claim form, settlement agreement, and other key materials were also placed on a website maintained by the Settlement Administrator for purposes of providing additional information and documents to Class Members. The website included (i) a Homepage setting forth a brief summary of the Settlement and potential Class Members' rights under the Settlement; (ii) .pdf copies of the Court-Ordered Detailed Notice, and Claim Form, as well as a link to the Claims online filing portal; and, (iii) Court Documents that included the Settlement Agreement and Release, Preliminary Approval Order, and documents regarding the Application for Incentive Awards and Attorneys' Fees. In addition to the website and claims-filing portal, the Settlement Administrator maintained an email address and toll-free telephone number for the receipt of Settlement Class Member inquiries.

The substance and methods of notice were adequate and provided the Class with the material information regarding the Settlement and their rights pertaining to it. *See, e.g. Pollard v. Remington Arms Co., LLC*, 896 F.3d 900, 908 (8th Cir. 2018).

B. Standard for Final Settlement Approval

A class action may not be settled without the Court's approval and the Court must ensure that "the proposed settlement is fair, reasonable and adequate." *In Re Texas Prison Litigation*, 191 F.R.D. 164, 173 (W.D. Mo. 1999). The law favors settlement, especially in class actions and other complex cases where significant resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation. *See 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. Approval of a class settlement is in the Court’s wide discretion. *Id.* In reviewing decisions approving class settlements, the appellate courts simply ask whether the 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.* “Strong public policy favors agreements, and courts should approach them with a presumption in their favor.” *Id.* at 1388; *see also Rawa v. Monsanto Co.*, 934 F.3d 862, 869 (8th Cir. 2019).

Both the Missouri Rules and Federal Rules require the Court to review a class settlement agreement “to ensure that the agreement is not the product of fraud or collusion and that, taken as a whole, it is fair, adequate, and reasonable to all concerned.” *Rawa v. Monsanto Co.*, 2018 WL 2389040 ((E.D. Mo. May 25, 2018); *see also, In re Target Corp. Customer Data Security Breach Litig.*, 892 F.3d 968, 977 (8th Cir. 2018); *Pollard*,, 896 F.3d at 908; *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 934 (8th Cir. 2005). A Settlement meets the standard for final approval as it is fair, reasonable and adequate. In making this determination, the Court should consider the following factors:

1. The merits of the Plaintiffs’ case, weighed against the terms of the settlement;
2. The Defendant’s financial condition;
3. The complexity and expense of further litigation; and
4. The amount of opposition to the settlement.

Van Horn v. Trickey, 840 F.2d 604, 606 (8th Cir. 1988); *see also Keil v. Lopez*, 862 F.3d 685, 695 (8th Cir. 2017). “The first factor is the `single most important factor.’” *Huyer v. Njema*, 847 F.3d 934, 939 (8th Cir. 2017) (quoting *Van Horn*, 840 F.2d at 607).

It is left to the Court’s discretion to determine that the Settlement is not the product of fraud or collusion and that it is fair, reasonable, and adequate:

“Such a determination is committed to the sound discretion of the trial judge. Great weight is accorded his views because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly.”

Van Horn, 840 F.2d at 606-07; *see also Rawa*, 934 F.3d at 869; *Pollard*, 896 F.3d at 907.

“The district court need not make a detailed investigation consonant with trying the case; it must, however, provide the appellate court with a basis for determining that its decision rests on ‘well-reasoned conclusions’ and is not ‘mere boilerplate.’” *Wireless Fee Litig.* 396 F.3d at 932-33 (quoting *Van Horn*, 840 F.2d at 607). “In evaluating the settlement, the Court ‘should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation.’” *In re BankAmerica Corp. Sec. Litig.*, 210 F.R.D. 694, 700 (E.D. Mo. 2002) (quoting Fed. Judicial Ctr., *Manual for Complex Litig.* § 30.42 at 240 (3d ed. 1997)). “Courts may rely on the judgment of experienced counsel on the merits of a class action settlement.” *Daniels v. Greenkote IPC, Inc.*, 2013 WL 1890654, at *2 (E.D. Mo. May 6, 2013) (citation omitted).

Applying these factors, the Court should grant the Settlement final approval.

C. The Settlement Meets the Standard for Final Approval

1. The Merits of the Case, Weighed Against the Terms of Settlement

The most important factor in determining the fairness, reasonableness and adequacy of a class settlement is “the strength of the case for Plaintiffs on the merits, balanced against the amount offered in settlement.” *In re Wireless*, 396 F.3d at 933. Although Plaintiffs believe they would have prevailed in class certification and on the merits if this case had proceeded to trial, Plaintiffs nonetheless recognize the difficulties presented by class certification issues and the risk and uncertainty in this litigation. Defendant’s counsel was confident that Defendant had several, strong defenses to class certification and to the claims asserted on behalf of the Class. It was expected

that Defendant would strongly oppose class certification. The Parties discussed those defenses in detail throughout the settlement negotiations.

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. In connection with this case, Class Counsel performed substantial informal discovery including obtaining documents and test results from the Missouri Department of Agriculture and the states of Georgia and North Carolina, as well as consulting with numerous experts in the tractor hydraulic fluid and lubricant fields. Class Counsel further 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.

Through their investigation, document and test results review, and other discovery, as well as through their consultations with experts, Class 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. 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 have also approved the Settlement.

The class-wide financial and non-financial relief is a significant victory for Settlement Class Members given the uncertainty of whether Plaintiffs would have prevailed on class certification, at trial, and on appeal. When these risks, as well as the uncertainties and risks inherent in any litigation, are balanced against the benefits provided by the Settlement – here significant cash payments and other benefits to Settlement Class Members beyond what is typically

seen in many consumer class actions – Plaintiffs submit that the Settlement is fair and adequate and should receive final approval. In light of these positions and the risks of litigation for both sides, the Settlement provides substantial benefits to Settlement Class Members and represents a reasonable resolution of the claims on a class-wide basis. Even if the Plaintiffs were successful on class certification and at trial, there was a very strong likelihood that Defendant would appeal the result and thus, it could be years before the Class Members would receive any benefits.

The Settlement of this case provides immediate relief to thousands of Class Members. It provides substantial benefits to each of these Class Members: payment in an amount calculated to be 25% of the estimated purchase price paid for the 303 THF Products. Qualified Settlement Class Members who submitted valid claim forms for Part B Relief are also receiving significant monies for repairs, parts, and equipment damage that resulted from use of the 303 THF Products.

No Class Member has objected to the Settlement or his/her/its award, and only three (3) Class Members have opted out of the Settlement.

In return for the consideration to be provided under the Settlement, Defendant receives a reasonable release of liability from the Settlement Class Members related to the purchase and use of the 303 THF Products. Paragraph 39 of the Settlement Agreement specifically provides as follows:

Release. 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 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 Action, arising out of or relating to the sale advertising, marketing, labelling, promotion, manufacture, distribution, and purchase in Missouri of Martin 303 Tractor Hydraulic & Transmission Fluid and Martin-manufactured

Orscheln Premium 303 Tractor Hydraulic & Transmission Fluid during the Class Period (the “Released Claims”). 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.

The benefits provided by the Settlement, weighed against the merits of the case, support this Court’s grant of final approval. Indeed, the Settlement Agreement provides Settlement Class Members with substantial relief for their actual damages suffered.

2. *The Defendant’s Financial Condition*

There is no indication that the financial condition of Defendant is such to have been unable to pay any judgment that might have been entered in this case. Therefore, this is not a factor in approving the Settlement. Even though Defendant “could likely afford a greater settlement, the result is quite favorable.” *See Wiles v. Sw. Bill Tel. Co.*, 2011 WL 2416291, at *3 (W.D. Mo. June 9, 2011) (citation omitted). “Although it appears that the defendant bank has the ability to withstand a greater financial judgment ... given the substantial risks and obstacles faced by the classes in proceeding to trial . . . such factor does not weigh against approving the settlement.” *BankAmerica Corp.*, 210 F.R.D. at 702.

3. *The Complexity and Expense of Further Litigation*

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.

“Class actions, in general, place an enormous burden of costs and expense upon parties.”

Keil, 862 F.3d at 698 (quoting *Marshall*, 787 F.3d at 512). With resolution occurring in this case at an early stage, this Court should therefore find that this factor weighs heavily in favor of final approval. *See Keil*, 862 F.3d at 698 (noting that this factor favors settlement where “plaintiffs believe that the claims in the litigation have merit,” but “class counsel recognize and acknowledge the expense and length of continued proceedings necessary to prosecute the litigation through summary judgment, class certification, and appeals.”)

4. *The Amount of Opposition to the Settlement*

The reaction of Class Members to the Settlement has been positive, with only three (3) opt outs and no objection filed. Accordingly, this factor strongly favors approval. *See Wiles*, 2011 WL 2416291, at *4 (“Having no objectors demonstrates strong support for the value and benefits delivered by the settlement” and so this “factor weighs heavily in favor of approval of the settlement.”); *McClellan v. Health Sys. Inc.*, 2015 WL 12426091, at *6 (W.D. Mo. June 1, 2015)(finding “final factor strongly favors approval” where “[n]o Class Member filed an objection ... and only fourteen individuals opted out.”)

5. *The Settlement Resulted from Arms’ Length Negotiation*

The Settlement Agreement before the Court is the product of intensive, arm’s-length negotiations. The negotiations took place over an extended period of time, and they were informed by the informal discovery, documents, 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 Defendant’s 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”)

IV. CONCLUSION

Based on the above and foregoing, Plaintiffs respectfully ask that the Court grant final approval of the Settlement and enter the proposed Final Approval Order.

Date: March 9, 2021

Respectfully submitted,

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CLASS MEMBERS**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document was filed electronically with the Missouri CaseNet, with notice of case activity to be generated and sent electronically by CaseNet to all designated persons this 9th day of March, 2021.

/s/ Dirk Hubbard