

This application seeks and order approving the payment of Class Representative incentive awards and the amount of reasonable attorneys' fees requested by Class Counsel in connection with this litigation. Specifically, Plaintiffs and Class Counsel seek a \$5,000.00 incentive award for each of the five Class Representatives in this case. As noted, Defendants do not contest and have agreed to separately pay these incentive awards such that they will not diminish the Class Settlement Fund if approved by this Court. Plaintiffs and Class Counsel also seek an award of reasonable attorneys' fees and expenses of \$150,000.00. The attorneys' fee equals 33% of the Class Settlement Fund of \$450,000.00, and 25% of the total Settlement of \$600,000.00, inclusive of the attorneys' fees amount. No reimbursement is being sought by Class Counsel for expenses incurred. Defendant is 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 has indicated that it does not oppose this Application and have agreed to separately pay Class Counsel's Court-awarded attorneys' fees, which will not reduce the amount of the Class Settlement Fund available to Settlement Class Members.

“There is no question the trial court ha[s] the authority to award attorneys' fees to [the] Class.” *Berry v. Volkswagen Group of Am., Inc.*, 397 S.W.3d 425, 431 (Mo. banc 2013). “The legislature statutorily authorized recovery of attorneys' fees in class actions brought under MMPA.” *Id.* Furthermore, fees may be awarded when the settlement agreement provides for an award of fees and expenses. *Id.*

Notice of the reasonable attorneys' fees 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. For the reasons stated herein, Plaintiffs respectfully request this Application be granted.

II. Incentive Awards

Plaintiffs seek the Court's approval of incentive awards of \$5,000 to each of the nineteen Class Representatives. Incentive awards are typical in class actions. *Newberg on Class Actions* §11:38 (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); *Paulson v. Dynamic Pet Products, LLC*, 560 S.W.3d 583, 593 (Mo. App. 2018) (affirming approval of class settlement that included, among other things, incentive awards in the amount of \$15,000). 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." *Califiuri*, 855 F.3d at 867. (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 in a substantial way based on the efforts of these Class Representatives. Further, the requested incentive awards are within the range approved by district courts in the Eighth Circuit. *See, e.g., Yarrington v. Solvay Pharms., Inc.*, 697 F.Supp. 2d 1057, 1069 (D. Minn. 2010) (\$5,000 to each of four class representatives); *Wineland v. Casey's Gen. Stores, Inc.*, 267 F.RD. 669, 677-78 (S.D. Iowa 2009) (\$10,000 to each of the named plaintiffs);

Zilhaver v. United Health Group, Inc., 646 F.Supp. 2d 1075, 1085 (D. Minn. 2009) (\$15,000 to two lead plaintiffs).

As noted earlier, the amount of incentive awards has been disclosed to and are agreed to by Defendants, subject to the approval of this Court, and will not reduce the \$450,000.00 Class Settlement Fund. Such awards for the five Class Representatives total \$25,000.00. Accordingly, the Court should approve the \$5,000.00 incentive awards for each of the Class Representatives.

III. Attorneys' Fees and Expenses

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

The Eighth Circuit has endorsed two approaches to analyzing a request for attorneys' fees: (1) the "percentage of the benefit" or "common fund" approach; and, (2) the lodestar approach. *Keil v. Lopez*, 862 F.3d 685, 701 (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 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); *Berry v. Volkswagen Group of Am., Inc.*, 397 S.W.3d at 431 (listing similar factors).

Application of these factors supports the conclusion that the percentage sought in this case (33% of the Class Settlement Fund/25% of the total Settlement) is reasonable. (*See* Ex. 1, Declaration on Class Counsel Thomas V. Bender). This case has required a significant amount of time over the course of more than two years, with Class Counsel expending, to date, more than 300 attorney hours on work related to Defendant's products that is directly attributable to this case as well as thousands of hours of other common time investigating and learning about the industry as a whole which could fairly be allocated to this case.

In addition, there will be hundreds of additional attorney and assistant hours spent through the completion of settlement administration. The case presented novel and difficult legal questions and class claims which required consultation with multiple expert witnesses and a high level of skill to move forward. All of the Law Firms representing the Settlement Class are relatively small in size such that the time and expense devoted to this case affected their ability to undertake other additional work. The customary fee for contingency cases is 33%, but often can be as high as 40% or 50% in complex matters. The fee in this case was contingent such that there were significant risks related with recovery by no means assured.

The amount of fee sought results in a percentage of recovery that is reasonable under the percentage of the benefit approach. The Eighth Circuit has noted that "courts have frequently awarded attorneys' fees ranging up to 36% in class actions." *Huyer v. Buckley*, 849 F.3d 395,399 (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 outstanding results for the Settlement Class Members. The Class Settlement Amount is \$450,000.00. Including the attorneys' fees which are to be paid separately rather than taken out of the fund available to Settlement Class Members, the total settlement is \$600,000.00. Thus, the fee award of \$150,000.00 is 25% of the total gross settlement and 33% of the net settlement available to benefit the Settlement Class Members. This result could not have been achieved without a demonstration by Plaintiffs and Class Counsel that they were ready and willing to proceed to class certification and trial. Given this result achieved and work performed, and in view 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 Missouri Supreme Court, 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. *See also Berry*, 397 S.W.3d at 431 (noting that in fact, “[w]hile an award of attorneys’ fees should have some relationship to the award, ‘there is no established principle that the fee may not exceed the damages awarded.’”)

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

Alternatively (or just as a cross-check), Class Counsel’s requested fee is also supported by the lodestar method and the requested fee amount totaling \$150,000.00 is fair and reasonable. As noted above, the recovery obtained for the Settlement Class is extremely favorable. Class Counsel negotiated and obtained a substantia Class Settlement Fund of \$450,000.00 which provided all Settlement Class Members the opportunity to receive up a 25% refund for all fluid they purchased

in the Class Period. Not only that, the Class Settlement Fund provides Class Members who experienced damage to their equipment as a result of the fluid the opportunity to make a claim for money associated with any such parts and repairs. That is an extraordinary result in a Class Action and justifies Class Counsel's fee under the lodestar approach as well.

Plaintiffs note that Class Counsel's lodestar will be approximately \$150,000 and thus the requested fee results in no lodestar multiplier. Lodestar multipliers less than three are well within the bounds of reasonableness. *See Berry*, 397 S.W.3d at 431 (affirming multiplier of 2); *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 fee with no lodestar is more than reasonable.

IV. Conclusion

These requests for an Order approving incentive awards for Class Representatives and for attorneys' fees are reasonable. Plaintiffs respectfully seek the Court's Order and Judgment approving the Parties' Settlement Agreement, including ordering that incentive awards of \$5,000.00 to each of the five Class Representatives (to be paid separately by Defendant and in

addition to the Class Settlement Fund) and ordering that Defendant to separately pay Class Counsel's requested fees totaling \$150,000.00 (to be paid separately by Defendant and in addition to the Class Settlement Fund).

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Respectfully Submitted,

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