

**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
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 Defendant have agreed to a class action settlement of this case which makes substantial relief available to Class Members who have purchased the following “303” Tractor Hydraulic Fluid products in Missouri 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 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 Members of the Settlement Class 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 Members of the Settlement Class 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 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 Class in a way that addresses the fundamental issues underlying this case and compensates Settlement Class Members for actual damages suffered. The First Amended Class Action Petition in this case alleges that the 303 THF Products were negligently and deceptively labeled, marketed and manufactured and that purchase and use of such product could cause damage to Settlement Class Members' tractors and other equipment. The

Settlement provides for a Class Settlement Fund of \$450,000.00, from which shall be paid the claims of Settlement Class Members. In addition, all settlement administration and notice costs, all incentive awards to Class Representatives as Ordered by the Court, and Class Counsel's attorneys' fees and expenses as Ordered by the Court are to be paid separately by Defendant and will not reduce the Class Settlement Fund.

The Class Settlement Fund initially provides each Settlement Class Member with an automatic minimum 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 by each such Settlement Class Member during the class period. In addition, the Class Settlement Fund will provide additional monetary awards to 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, Defendant will also separately pay, in addition to this Class Settlement Fund, 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 approximately \$50,000.00. (*See* Motion, Exhibits 2 and 3). Incentive awards in the amount of \$5,000.00 are requested for each of the five Class Representative, for a total of \$25,000.00 in incentive awards to the Class Representatives. Also as noted, Defendant has agreed to separately pay Class Counsel's attorneys' fees and expenses as awarded by the Court, subject to a maximum of \$150,000.00. The payment of settlement administration and notice costs, incentive awards to Class Representatives, and Class Counsel's attorneys' fees and expenses will not detract from the Class Settlement Fund.

The Settlement Agreement clearly addresses Plaintiffs' litigation objectives, remedies the problems with the 303 THF 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 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 to these Suggestions 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 April 5, 2019, Plaintiffs Monte Burgess and Dan Chevalier initiated a class action lawsuit against Defendant in the Circuit Court of Cass County, State of Missouri, Case No. 19CA-CC00084. 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 the 303 THF Products in the State of Missouri. On March 9, 2020, Plaintiffs Burgess and Chevalier, along with Plaintiff Robert Caviness, Raymond Bieri, and James Kircher filed a First Amended Class Action Petition.

Plaintiffs allege, among other things, that the labels for the 303 THF Products were deceptive and misleading. 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 First Amended Class Action Petition, 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. Proceedings Leading to Settlement

Prior to the Parties engaging in the settlement discussions that have culminated in the entry of this Class Settlement Agreement, Plaintiffs' Counsel conducted extensive investigation and informal discovery. Documents and test results from the Missouri Department of Agriculture and other sources were obtained and analyzed. Plaintiffs also retained and involved expert witnesses to analyze Defendant's 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. An agreement in principle for this Class Settlement Agreement was reached in January 2020. Further detailed negotiations of the full Settlement Agreement took place over the next several months, 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, Defendant continues to assert that it has violated no laws and that it has 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 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' First Amended 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.

Also excluded from the Class are Defendant, including any parent, subsidiary, affiliate or controlled person of Defendant; Defendant's officers, directors, agents, employees and their immediate family members, as well as the judicial officers assigned to this litigation and members of their staffs and immediate families.

To represent the Class for purposes of the Settlement, Plaintiffs propose the Court appoint as Class Representatives the four 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, Defendant will establish a Class Settlement Fund in the amount of \$450,000.00. The Class Settlement Fund should be sufficient to provide each Settlement Class Member with monetary compensation for actual damage suffered by way of payment in an amount equal to 25% 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 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 Settlement Class Member a full return of the purchase price.

More specifically, the \$450,000.00 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")

80% of this Class Settlement Fund shall be used to provide each Class Member automatic damages equal to 25% of the estimated purchase price of his/her purchases of Defendant's 303 THF during the Class Period. The amount of each Settlement Class Members' reimbursement is based on an average purchase price of \$20 for each 5-gallon bucket 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")

20% of this Class Settlement Fund, plus any unclaimed awards from the Reimbursement Fund (after reimbursement to Martin of \$35,000 of settlement administration costs), will be used for claims for additional relief from Class Members for identifiable repairs/parts bills and/or damage to equipment related to use of the Defendant's 303 THF Product. Any unclaimed funds shall revert to the Reimbursement Fund described above, to be shared by Settlement Class Members *pro rata* based on purchases. In the event the monies in this repairs/parts/specific damage portion of the Class Settlement Fund are insufficient to fully pay all valid claims made by Class Members, payments shall be made on a *pro rata* basis.

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 Settlement Class Member with an estimated automatic minimum payment in an amount calculated to be 25% 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 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.

3. Notice and Administration Costs

In addition, Defendant will separately fund 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 approximately \$50,000.00.

Retailer Orscheln will provide the purchaser contact information it has for Settlement Class Members who purchased the 303 THF Products it sold during the Class Period. 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 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 reimbursement 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 the fluid during the Class Period but outside of the period for which Orscheln has purchase records. They may also submit a Claim Form for the Part B additional relief for Repairs/Parts/Specific Equipment Damage.

A Long Form Mailed Notice will be sent to other potential Settlement Class Members requesting a Claim Form and Notice. Those 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 Class Members.

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

4. Class Representatives' Incentive Awards

Defendant will also separately pay 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 four Class Representatives, for a total of \$20,000.00. Defendant does not contest those amounts.

5. Class Counsel's Attorneys' Fees and Expenses

Defendant will also separately pay Class Counsel's reasonable attorneys' fees and expenses, if awarded by the Court, in the amount of \$150,000.00.

III. ARGUMENT

A. The Class Action Settlement Approval Process

Pursuant to Rule 52.08(e) of the Missouri 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 Rule 52.08 as well as under the new provisions of Federal Rule 23 (as amended in 2019) 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.” 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 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 \$150,000.00 cap, and that whatever fees are awarded by the Court would be paid separately by Defendant. 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 52.08(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 Defendant's 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, Defendant's Counsel and Defendant 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 Class Members received any benefits. In light of all of the considerations, the settlement benefits are fair and reasonable because each 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. 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. 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 Defendant and class certification of those claims, as well as to the potential defenses to those claims and certification. Class counsel also consulted with the Class Representatives regarding their information and experiences. Settlement was reached in this case only after discovery and exchange of adequate information. Plaintiffs' Counsel performed all necessary work to prosecute and evaluate the case prior to reaching a settlement with Defendant. 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 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”)

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 Class Members and directly addresses the fundamental issues underlying the litigation and the alleged damaged caused by Defendant’s 303 THF Products.

In terms of monetary relief, the Class Settlement Fund will provide each Settlement Class Member 25 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 Class Settlement Fund after calculating the participating Settlement Class Members’ distribution amounts, then those remaining monies will be added to the fund for equipment repair costs, parts purchases, and/or specific equipment damage caused by use of the 303 THF Products. 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. 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 Class Members who apply, then such monies will return to the Reimbursement Fund to be shared *pro rata*.

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 Class Member, 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, Defendant 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 to Settlement Class Members – Plaintiffs submit that the Settlement easily falls within the range of possible final approval.

Next, there is no undue preferential treatment of segments of the Class. The Purchase Price Relief distribution amount for each 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 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. *Defendant Receives a Reasonable Release of Liability*

In return for the consideration to be provided under the Settlement, Defendant receives a reasonable release of liability related to the manufacture and sale to Settlement Class Members in

Missouri of the 303 THF Products at issue. 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.

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

Through their informal investigation, document production and review in this litigation, 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 Mo. R. Civ. P. 52.08(a) and (b)(3) are Satisfied for Settlement Purposes*

This Court's review for preliminary approval also considers whether the requirements of Rule 52.08(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. It is estimated that there are several thousand members of the proposed Settlement Class. The claims of those persons arise from the purchase and use of the defined 303 THF Products in Missouri during the Class Period. Each of the five 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 52.08 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." Mo. R. Civ. P. 52.08(c)(2)(B). Similarly, Rule 52.08(e)(1)(B) calls for notice to be provided in a "reasonable manner to all class members who would be bound by the proposal[.]" The notice must contain specific information in plain, easily understood language, including the nature of the action and the rights of class members. Mo. R. Civ. P. 52.08(c)(2)(B)(i)-(vii).

To ensure that the notice satisfies the requirements of due process and Rule 52.08 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 each member of the Settlement Class.

The Parties estimate that there are several thousand 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 approximately 2,000 Settlement Class Members who purchased the 303 THF Products it sold during the Class Period. 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 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 reimbursement 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 the fluid during the Class Period but outside of the period for which Orscheln has purchase records. They may also submit a Claim Form for the Part B additional relief for Repairs/Parts/Specific Equipment Damage.

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 Notice. Those Class Members will

need to submit a Claim Form for all components of relief because specific purchase information was not available.

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 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.

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 an 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, Fed. R. Civ. P. 23, and Mo. R. Civ. P. 52.08.

The content of the proposed notices also satisfies the Missouri and Federal Rules' requirements. 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, 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 Defendant 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 all 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 Notice and, if necessary, submit a Claim Form in order to receive a

monetary award based on the Class Member's purchase history as well as seek an additional award from the repair/parts 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: July 23, 2020

Respectfully submitted,

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**ATTORNEYS FOR PLAINTIFFS AND ALL
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 23rd day of July, 2020.

/s/ Dirk Hubbard