IN THE CIRCUIT COURT OF PLATTE COUNTY, MISSOURI

JASON STROHM, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	Case No. 16AE-CV01252
MISSOURI-AMERICAN WATER CO.,	)	
Defendant.	)	

PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

Plaintiff Jason Strohm, on behalf of himself and the Class, notifies the Court that the parties have agreed to settle the above-captioned class action. The settlement provides a cash payment to Class Members with valid claims, while protecting their due process rights. The settlement also removes the delay, risk of non-recovery, and expense to Class Members which is inherent in further litigation. The settlement proposed herein will provide a means for relief to over 9,000 Class Members.

In Missouri, preliminary approval of class action settlements is substantially guided by the appellate decision *State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369 (Mo. App. W.D. 1997). *Chadwick* requires a preliminary determination about whether it appears a settlement class should be tentatively certified, pending final approval at a fairness hearing. For the reasons set forth herein, the Court should grant preliminary approval to the settlement.

I. CERTIFICATION OF THE CLASS FOR SETTLEMENT PURPOSES

Initially the Court must determine whether it should preliminarily approve certification of the settlement class. Regarding the settlement of class actions, Rule 52.08(e) states:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed

> dismissal or compromise shall be given to all members of the class in such manner as the court directs.

In this case, the Court has already determined that the case should proceed as a class action under Rule 52.08, and the class satisfies the requirements of the Rule. *See* Order Granting Class Certification (December 5, 2017). In that Order, the Court certified the following Class:

> **All individuals, businesses, and other entities in Platte County, Missouri to whom Defendant provides water.**

Id.[1] The Court's Order also appointed Jason Strohm as the Class Representative, and appointed Williams Dirks Dameron LLC as Class Counsel. *Id.*

The Court's previous Order did not certify Plaintiff's claims under the Missouri Merchandising Practices Act (MMPA), or his claims for negligence and breach of the warranty of merchantability. For settlement purposes only, the Parties stipulate that the Settlement Class operates vis-a-vis Plaintiff's remaining claims.

II. THE SETTLEMENT IS PRESUMPTIVELY REASONABLE

This Court has the responsibility to review the Settlement Agreement to determine whether its terms are presumptively fair, adequate and reasonable. In determining whether a settlement is fair, adequate and reasonable, the following factors are taken into account:

> (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of class counsel, class representatives and absent class members.

Chadwick, 956 S.W.2d at 378, n.6; *Bachman v. A.G. Edwards, Inc.*, 344 S.W.3d 260, 266 (Mo. Ct. App. 2011). Each of these factors is addressed below, and they all weigh in favor of finding

[1] In a subsequent Order, the Court clarified that the Class includes all customers of MAWC in Platte County between the dates of April 28, 2011, and December 5, 2017. *See* Order (October 18, 2021).

the proposed settlement to be fair, reasonable, and adequate in this case.

A. The Class Members' Claims and Relevant History

This case involves claims for property damage that allegedly arises from excessive calcium scaling in the water provided by MAWC to Class Members. MAWC denies the factual allegations, and it disclaims any liability for Plaintiffs' legal claims.

The parties have been litigating this issue for several years. Strohm initiated his action against MAWC in April 2016 and the case has entailed extensive discovery, over thirty depositions, multiple expert proceedings (including depositions of each expert), discovery disputes, and lengthy briefing related to several questions in the litigation. Indeed, the parties have twice litigated the issue of class certification to the Supreme Court of Missouri through writ proceedings, as well as numerous motions and disputes considered by this Court and the Special Master. In sum, the parties have thoroughly litigated the case over the span of several years.

Class Counsel's work in similar cases and this case has led to an informed perspective regarding the strengths and weaknesses of the case, the risk and reward of trial, and the likely outcome of continued litigation. MAWC's counsel is also experienced in complex litigation. MAWC has asserted strong defenses on the merits, and both parties anticipated a spirited trial on the merits—a trial that was scheduled to occur less than two weeks after the parties reached a settlement.

Counsel for the parties has done substantial research, discovery and work in this and other cases to ascertain the merits of these claims and the likely results of protracted litigation. This work has allowed counsel for both sides to evaluate the case and this settlement.

B. The Proposed Settlement

The settlement creates a settlement fund of up to $6,000,000. *See* Settlement Agreement, attached as Exhibit 1. Under the settlement, Class Members will submit a Claim Form and

proper proof to receive payment from the settlement fund. Although the settlement limits the available amount per device, it does not create a cap or maximum for Class Members' claims with proper Type A Proof and/or Type B Proof. Class Members' claims for Specific Property Damage that rely solely on Type C Proof shall be limited to a total recovery of $300.00. Alternatively, if a Class Member does not file a claim for a specific device, the Class Member still may submit a claim for a payment of $50 for generalized property damage if they submit proof of such general damage under a declaration of perjury.

Additionally, according to the Settlement Agreement, the Parties agree to the following terms:

a. The Parties will utilize JND Legal Administration, 1100 2nd Ave., Ste. 300, Seattle, WA 98101—a third-party claims administration service (the "Claims Administrator") — to provide class notice and administer the settlement proceeds;

b. MAWC will pay the costs of notice and settlement administration;

c. Money in the Settlement Fund that is not paid to Class Members shall revert back to MAWC;

d. MAWC agrees to pay Plaintiff Jason Strohm an incentive award of $10,000, as well as payments of $2,000 to the eight Class Members who actively participated in the litigation (volunteered for depositions, written discovery, and prepared to testify at trial);

e. MAWC agrees not to oppose Class Counsel's request for attorneys' fees and expenses in the amount of $2,400,000.

III. NOTICE OF THE CLASS ACTION SETTLEMENT AND THE NOTICE PLAN

Missouri Rules of Civil Procedure 52.08(e) govern the settlement of class actions and provides, among other things, that notice of the proposed compromise shall be given to all members of the class as the court directs. Under Missouri Rules of Civil Procedure 52.08(e), the notice must satisfy due process and, thus, must "fairly apprise the prospective members of the class of the terms of the settlement and of the options that are open to them in connection with [the] proceedings." *Chadwick*, 956 S.W.2d at 385 (citing *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 122 (8th Cir. 1975)). "The information need only be general in nature and can refer the putative class members to the court or counsel for detailed information." *Id.* (citing *Grunin*, 513 F.2d at 122). The notice must be the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable efforts." Rule 52.08(c)(2)(B); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

Here, the parties have prepared two Notices: (1) a long-form notice that will be posted on the settlement website and distributed to Class Members via electronic mail, and (2) a postcard notice that will be sent via first class, U.S. mail to Class Members. Additionally, notice will be disseminated via electronic mail where available. Both notices direct Class Members to the settlement website to obtain copies of the Claim Form.

The proposed notices are sufficient because they contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the Class and be bound by a final Consent Judgment, or directs the recipient to a convenient location to obtain more detailed information. Moreover, the notices apprise the Class Members of the terms of the settlement and their options in connection with the proceedings, and refer them to Class Counsel and/or the settlement website for further detailed

information. Further, the proposed notices constitute due and sufficient notice of this Order to all persons affected by and/or entitled to participate in the settlement, in full compliance with the notice requirements of Rule 52.08. Accordingly, the proposed notices are the best notice practicable under the circumstances.

IV. RIGHTS OF CLASS MEMBERS

The Class Members' rights as set forth in the Settlement Agreement are summarized below; they also are explained in the notices.

A. Exclusions ("Opt-Outs") by Class Members

Any Settlement Class Member may submit an Opt-Out Request by mailing or delivering such request in writing to the Claims Administrator. Any Opt-Out Request must be postmarked no later than the last day of the Claim Period. Any Opt-Out Request shall contain the information set forth in the Settlement Agreement.

Any Settlement Class Member who submits a timely Opt-Out Request may not make a Claim or file an objection to the Settlement and shall be deemed to have waived any rights or benefits under the Settlement Agreement.

B. Objections by Settlement Class Members

Each Settlement Class Member wishing to object to the settlement shall submit a timely written notice of his or her objection to the Clerk of the Court with copies to counsel. Such notice shall state the information set forth in the Settlement Agreement. To be timely, written notice of an objection in appropriate form must be filed with the Court no later than the final day of the Claim Period.

The agreed-upon procedures and requirements for filing objections in connection with the Final Approval Hearing are intended to ensure the efficient administration of justice and the

orderly presentation of any Settlement Class Member's objections to the Settlement Agreement, in accordance with such Settlement Class Member's due process rights.

V. FACTORS SUPPORTING APPROVAL OF THE SETTLEMENT

The factors most commonly considered by courts prior to approval of settlement are (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of the plaintiff's success on the merits; (5) the range of possible recovery; and (6) the opinions of class counsel, class representatives, and absent class members. *See Chadwick,* 956 S.W.2d at 378, n.6. In this case, each factor weighs in favor of approval of settlement.

A. Existence of Fraud or Collusion Behind the Settlement

The Court is well-aware that the parties have engaged in protracted litigation for well over five years and reached an agreement less than two weeks before the trial date. For nearly six years the parties have litigated dispositive motions related to Plaintiffs' claims, class certification and decertification, and several discovery disputes before the Special Master and this Court. Additionally, the parties litigated several pretrial matters, such as motions *in limine* and motions to exclude experts. Further, the parties have engaged in extensive written discovery and over thirty depositions.

Similarly, the settlement is the product of extended negotiations with various starts and stops over the course of the litigation. The parties engaged in an initial mediation in August 2018 that did not resolve the matter. In early 2022—only after the denial of class decertification—the parties engaged in a second mediation that lasted nearly twelve hours. The parties did not reach a full agreement at the mediation session, and instead continued negotiating for several more days both directly and through the mediator. Finally, just moments before the pretrial conference on

January 11 (less than two weeks before trial), the parties reached an agreement on the material terms outlined in the Settlement Agreement. Thus, the settlement is the product of years of litigation that resolved less than two weeks before trial, and it is evident that the settlement was not the product of fraud or collusion between the parties.

B. The Complexity, Expense and Likely Duration of Litigation

The Settlement reflects the resolution of a case that already has involved long duration and complexity. Continued litigation would merely exacerbate these conditions with a rapidly approaching trial date. The settlement avoids the risk of trial and further appellate proceedings while providing a payment to members of the Settlement Class with valid claims.

C. Stage of Proceedings and Discovery Completed

This factor militates in favor of granting preliminary approval because the litigation has been pending for several years and the parties reached a settlement less than two weeks before trial, all after engaging in extensive discovery and motion practice. Put another way, the case is advanced enough for counsel to weigh the benefits and risks associated with settlement, as well as the risks associated with continued litigation. Counsel used the experience of this litigation as well as their experience with other cases that presented similar issues to bring about a fair and equitable result. Thus, this case is sufficiently developed to produce an informed decision regarding the propriety of resolution.

D. Probability of Plaintiff's Success on the Merits

MAWC adamantly denies the allegations in this case, and believes it has strong defenses to the substantive claims and the Court's previous Order granting class certification. However, Plaintiffs are equally resolute in that Plaintiffs believe MAWC's actions were unreasonable under the law. What the court and a jury would do with the facts and legal

arguments in this case is difficult to predict, and what the Missouri Court of Appeals or Supreme Court would do is also uncertain. Nevertheless, the Class will receive a significant benefit under the terms of the Settlement.

E. Range of Possible Recovery

The last material step in the litigation—an upcoming jury trial—could have led to a significant victory for Plaintiffs, but it also could have led to a loss without any value being conveyed to the Class. Similarly, the case could be reversed on appeal, or class certification could be reversed on appeal. Conversely, it could be tried to verdict with punitive damages and full attorneys' fees awarded under the MMPA. As such, the realistic range for this case is anywhere from no recovery at all to several times the value of the settlement as agreed. However, given that the settlement provides a payment to Class Members with valid claims, it provides meaningful and substantial recovery to the Class now without bearing those future risks.

F. Opinions of Class Counsel, Class Representatives and Absent Class Members

Class Counsel and Plaintiff agree: given the posture of the case, getting Class Members real relief now is a fair resolution.

VI. ATTORNEYS' FEES AND INCENTIVE AWARDS FOR THE CLASS REPRESENTATIVE AND PARTICIPATING CLASS MEMBERS

This Court has discretion under 52.08(e) to approve attorneys' fees included in the proposed settlement. Courts should look at a number of factors when determining the appropriateness of attorneys' fees, including the size of the total recovery on behalf of the class caused by class counsel's efforts, the time and effort spent by class counsel on the case, and the percentage of the total recovery comprised of attorneys' fees. *Chadwick*, 956 S.W.2d at 388. In this case, the fees sought by Class Counsel are not disproportionately high compared to the

benefits the Class Members will receive under the settlement and the time and resources that Class Counsel expended in prosecuting the case.

The Supreme Court has expressed a preference that the parties agree to the amount of the fee: "A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Here, the parties have done so because they have agreed upon a common fund settlement and Defendant has agreed that it will not oppose Class Counsel's fee request. When a settlement yields a common fund for class members, courts recognize that the fees come from the common fund. *Boeing Co. v. VanGemert*, 444 U.S. 472, 481, 62 L. Ed. 2d 676, 100 S. Ct. 745 (1980). This common fund doctrine is firmly rooted in American case law. *See, e.g., Trustees v. Greenough*, 105 U.S. 527 (1882); *Central R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Blum v. Stenso*n, 465 U.S. 886, 900 n.16 (1984).

Courts routinely award in excess of one-third of the fund as attorneys' fees. *See Bachman*, 344 S.W.3d at 267, (Mo. Ct. App. May 31, 2011). Indeed, other courts have awarded forty percent of the common fund and recognized the reasonableness of such fees. *See McMillin v. Fogle Enterprises, Inc.*, Case No. 14AF-CC00154-01 (Christian County); *Chieftain Royalty Co. v. Laredo Petroleum, Inc.*, 2015 WL 2254606, at *3 (W.D. Okla. 2015) ("An award of forty percent of the settlement value is well within the range of acceptable fee awards in common fund cases."); *Vaszlavik v. Storage Tech. Corp*., 2000 WL 1268824 (D. Colo. 2000) (observing that the ordinary range for attorneys' fees in common fund cases is 20%-50%); *Cimarron Pipeline Constr., Inc. v. Nat'l Council on Compensation Ins.*, 1993 WL 355466 (W.D. Okla. 1993) ("Fees in the range of 30–40% of any amount recovered are common in complex and other cases taken on a contingent fee basis."); *Stagi v. Nat'l R.R. Passenger Corp*., 880 F. Supp. 2d 564, 571 (E.D.

Pa. 2012) ("Fee awards generally range between nineteen and forty-five percent of the common fund."); *Hegab v. Family Dollar Stores, Inc.*, 2015 WL 1021130, at *13 (D.N.J. 2015) (same). Thus, Class Counsel's fee request is well within the range of reasonableness.

Similarly, the incentive awards for the Class Representative and Participating Class Members are reasonable and proportional to the amount of time and resources they were forced to expend to pursue this case on behalf of the Class. Each Plaintiff engaged with counsel, participated in written discovery, and willingly participated in a deposition; additionally, each of them were prepared to voluntarily appear at trial and be available for its scheduled two-week duration. Thus, the incentive awards allocated to each participating Plaintiff is reasonable in consideration of the time and effort he or she expended in this case, and it is significantly lower than other incentive awards in comparable litigation.[2]

CONCLUSION

Accordingly, Plaintiff respectfully requests that this Court preliminarily approve the attached Settlement Agreement as being sufficiently fair, reasonable, adequate, and in the best interest of all Settlement Class members, as falling within the range of possible final approval, and as meriting submission to the Settlement Class members for their consideration.

[2] Again, this is consistent with other courts. *See Tussey v. ABB, Inc.*, 2012 WL 5386033 (W.D. Mo. Nov. 2, 2012) (approving $25,000 service awards for the three class representatives); *Wolfert v. UnitedHealth Group, Inc.*, No. 4:08CV01643(TIA), at *4 (E.D. Mo. Aug. 21, 2009) (approving an incentive award of $30,000); *Matheson v. T-Bone Rest.*, LLC, 2011 WL 6268216, at *9 (S.D.N.Y. Dec. 13, 2011) (approving $45,000 service award to named plaintiff after two and a half years of litigation); *Mentor v. Imperial Parking Sys., Inc.*, 2010 WL 5129068, at *5 (S.D.N.Y. Dec. 15, 2010) (approving $40,000 service award to named plaintiff after five years of litigation); *Willix v. Healthfirst, Inc.*, 2011 WL 754862, at *7 (E.D.N.Y. Feb. 18, 2011) (approving $30,000 service award to named plaintiff after three years of litigation); *Flores v. Anjost Corp.*, 2014 WL 321831, at *9 (S.D.N.Y. Jan. 29, 2014) (approving $25,000 service awards for five named plaintiffs after three years of litigation); *Duchene v. Michael Cetta, Inc.*, 2009 WL 5841175, at *3 (S.D.N.Y. Sept. 10, 2009) (approving $25,000 service award to named plaintiff after three years of litigation); *Capsolas v. Pasta Res. Inc.*, 2012 WL 4760910, at *9 (S.D.N.Y. Oct. 5, 2012) (approving $20,000 service award for named plaintiff after two years of litigation).

DATED: February 2, 2022

Respectfully submitted,

WILLIAMS DIRKS DAMERON LLC

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was filed with the Court's electronic filing system on February 2, 2022, which sends notification of the same to all counsel of record.

/s/ Matthew L. Dameron
Counsel for Plaintiffs