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Case No. 15-CI-01623

CLERK OF THE COURT  
JEFFERSON CIRCUIT COURT  
DIVISION TWELVE (12)  
JUDGE SUSAN SCHULTZ GIBSON

SHERHONDA STEWART

and

BEVERLY SHEPPARD, *et al.*

v.

DERBY INDUSTRIES, LLC

and

GENERAL ELECTRIC COMPANY

PLAINTIFFS

DEFENDANTS

**PLAINTIFFS' BRIEF IN SUPPORT OF THE UNOPPOSED MOTION FOR  
PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND  
CERTIFICATION OF SETTLEMENT CLASS**

**I. INTRODUCTION**

This case was originally filed by Plaintiff, Alex Ruiz, on April 6, 2015, on behalf of those Plaintiffs who were subject to a shelter-in-place order as a result of a major fire that broke out on April 3, 2015, in Building 6at GE's Appliance Park (the "AP6 Fire"), and so were required to remain indoors with doors and windows closed and air conditioning systems off. On April 20, 2015, an Amended Class Action Complaint was filed, naming as Plaintiffs, Sherhonda Stewart and Beverly Sheppard, pursuant to Kentucky Rule of Civil Procedure 23 of the Kentucky Rules of Civil Procedure, on behalf of themselves and a class of similarly situated individuals, who were subject to the shelter-in-place order and/or sustained property damage, and alleging claims of nuisance, trespass, negligence, and strict liability.

## II. STANDARD OF REVIEW

The Manual for Complex Litigation (Fourth) (2004) §21.63 describes a three-step procedure for approval of Class Action Settlements:

- 1) Preliminary approval of the proposed settlement at an informal hearing;
- 2) Dissemination of mailed and/or published notice of the settlement to all affected class members; and
- 3) A “formal fairness hearing” or final settlement approval hearing, at which class members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented.

A class action may not be dismissed, compromised or settled on behalf of a certified class without the approval of the Court. *Kentucky Rule of Civil Procedure 23*. As described in the Manual for Complex Litigation (Fourth) (Fed. Judicial Center 2004) (“Manual”) §21.63, *et seq.*, Rule 23 prescribes defined procedures and criteria for settlement approval in class action settlements, including preliminary approval, dissemination of notice to settlement class members, and a fairness hearing. *See* Manual at §§ 21.632, 21.633, and 21.634.

A class action settlement should be approved so long as it is “fair, adequate and reasonable and is not the product of collusion between the parties.” *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977).

The purpose of the Court’s preliminary evaluation of a settlement is to determine whether it is within the “range of reasonableness,” and thus whether disseminating notice to the class and scheduling a formal fairness hearing is merited. *See* Herbert B. Newberg, *Newberg on Class Actions* §11.25 *et seq.*, and §13.64 (4th ed. 2002 and Supp. 2004). Preliminary approval does not require the Court to make an in-depth and final determination that a settlement is fair, reasonable, and adequate. Rather, that decision is made only at the final approval stage, after

notice of the settlement has been given to the settlement class members and they have had an opportunity to voice their views of the settlement or to exclude themselves from the settlement. See James Wm. Moore, Moore's Federal Practice – Civil §23.165[3] (3d ed.).

In determining whether the class action settlement is fair, reasonable, and adequate, the Fifth Circuit Court of Appeals held that the district court must consider the following six factors:

(1) existence of fraud or collusion behind the settlement; (2) the complexity, expense and duration of litigation; (3) the stage of 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 the class counsel, class representatives, and absent class members.

*Reed v. Gen. Motors Corp.*, 703 F.2d 170 (5th Cir. 1983) (the "Reed factors").

### III. FACTUAL BACKGROUND

This Settlement meets those factors. The Settlement provides the following benefits to the Class:

The Settlement shall result in the creation of a "Common Fund."

Defendants shall collectively deposit, or cause to be deposited by their insurers, no later than fifteen (15) days after the entry of the Preliminary Approval Order, a total sum of \$1,200,000 into an escrow account, held and managed by the Settlement Administrator, for the payment of all Settlement Class Member claims and all other costs and expenses associated with the Settlement, including, without limitation, the costs of settlement notice and administration and the payment of Plaintiffs' Counsels' attorney fees and costs.

Plaintiffs' Counsel, in consultation with the Settlement Administrator, shall design the plan of distribution of the Common Fund. In general, payments for claims that are not supported by documentary proof of out-of-pocket losses shall be for predetermined or set amounts for property damage, inconvenience, and nuisance damages resulting from the smoke from the fire and the shelter-in-place advisories issued between April 3 and April 5, 2015. Plaintiffs' Counsel, in consultation with the Settlement Administrator, propose a sliding scale for the predetermined cash payment based on the relative distances that the Settlement Class Members resided in or owned residential property from AP 6, (i) within a radius between 0 and 1.0 mile from AP6 (Zone 1); (ii) within a radius between 1.0 and 2.0 miles from AP6 (Zone 2); and (iii) within a radius between 2.0 and 3.0 miles from AP6 and **bounded by Fern Valley Road to the South and Route**

**150 to the Northeast (Zone 3).**<sup>1</sup> Zone 1 Claimants would get an estimated \$30 per Claimant, Zone 2 Claimants would get an estimated \$20 per Claimant, and Zone 3 Claimants would get an estimated \$10 per Claimant. In addition to the set amounts available to Settlement Class Members, Settlement Class Members who certify under oath that they (i) incurred out-of-pocket costs or expenses for property damage caused by the April 3, 2015, fire and (ii) incurred those costs or expenses no later than August 7, 2015, shall be eligible to make a claim for those out-of-pocket costs or expenses.

Settlement Class Members who provide supporting documentation of their out-of-pocket losses or expenses incurred as a result of property damage caused by the April 3, 2015, fire shall be eligible to make a claim for their documented out-of-pocket expenses, losses, or damages in an amount that exceeds the predetermined cash payment or a set amount of cash available to all Settlement Class Members based on the distance that they resided in or owned residential property from AP 6. The Settlement Administrator proposes to hold back \$150,000, in order to pay out-of-pocket losses to such Claimants. Thus, out-of-pocket losses shall be capped at \$150,000; if total out-of-pocket losses exceed \$150,000 and there are no additional funds after all Valid Claims are paid, such Claimants shall receive a pro rata share.

Allocation of Settlement: The Settlement has a value of \$1.2 million. The Settlement Administrator fees are approximately \$215,000. The Plaintiffs' Counsel Attorney Fees are estimated to be \$360,000, and legal expenses are estimated to be \$25,000. As discussed above, the Settlement Administrator proposes to set aside \$150,000, to compensate Settlement Class Members who file a claim for out-of-pocket expenses. There are an estimated 90,000 total putative Settlement Class Members in Zones 1, 2 and 3. In Zone 1, there are an estimated 20,000 putative Settlement Class Members. Estimating that approximately 25% (or 5,000 people) of Zone 1 will file a Valid Claim for the predetermined cash payment, the Settlement Administrator estimates that Zone 1 Claimants, who will receive an estimated \$30 each, will be paid a total of \$150,000. In Zone 2, there are an estimated 50,000 putative Settlement Class Members. Estimating that approximately 25% (or 12,500 people) of Zone 2 will file a Valid Claim for the predetermined cash payment, the Settlement Administrator estimates that Zone 2 Claimants, who will receive an estimated \$20 each, will be paid a total of \$250,000. In Zone 3, there are an estimated 20,000 putative Settlement Class Members. Estimating that approximately 25% (or 5,000 people) of Zone 3 will file a Valid Claim for the predetermined cash payment, the Settlement Administrator estimates that Zone 3 Claimants, who will receive an estimated \$10 each, will be paid a total of \$50,000.<sup>2</sup>

<sup>1</sup> The road boundaries for Zone 3 are important to note in describing this zone. To avoid confusion, a diagram depicting the Zones will be provided to putative Settlement Class Members.

<sup>2</sup> The payments to Claimants are based upon the Settlement Administrator's estimation that 25% of the putative Settlement Class will file a claim. The predetermined cash payment, \$30 each for Zone 1 Claimants, \$20 each for

Thus, the Settlement Administrator projects the following:

(i)	Settlement Value	\$1,200,000
(ii)	Plaintiffs' Counsel Attorney Fees	\$ 360,000
(iii)	Plaintiffs' Counsel Legal Expenses	\$ 25,000
(iv)	Settlement Administration Costs	\$ 215,000
(v)	Monies available for Claims	\$ 600,000
(vi)	Extraordinary Damages (Out-of-Pocket Expenses)	\$ 150,000
(vii)	Zone 1 at 25% take rate @ \$30 per Claimant (5,000 out of 20,000)	\$ 150,000
(viii)	Zone 2 at 25% take rate @ \$20 per Claimant (12,500 out of 50,000)	\$ 250,000
(ix)	Zone 3 at 25% take rate @ \$10 per Claimant (5,000 out of 20,000)	\$ 50,000
(x)	Remaining Monies	\$ <u>-0-</u>

The amount of compensation that any Settlement Class Member is eligible to receive under the Settlement for property damage shall be reduced dollar for dollar by the amount, if any, that Electric Insurance Company has paid, if any, to that Settlement Class Member as part of GE's neighborhood claims program in connection with the Fire. GE shall provide the Settlement Administrator with records of payments made by Electric Insurance, and the Settlement Administrator shall check claims made in this Settlement against Electric Insurance's claims records to ensure that no Settlement Class Member receives double recovery for his or her property damage.<sup>3</sup>

Any funds remaining in the Common Fund after the completion of the claims process, the payment of all Valid Claims, and the payment of all Settlement-related costs and expenses shall not revert to Defendants. Instead, the Settlement Administrator will make one or more *cy pres* distributions up to \$100,000 from any unclaimed settlement funds. The parties will consult with GE Appliances and Councilwoman Barbara Shanklin and other members of the Louisville Metro Council and shall identify as a *cy pres* recipient one or more projects or programs that will benefit the residents of one or more of the neighborhoods that border GE Appliance Park, subject to the approval of the Louisville Metro Council and this Court. Thereafter, any additional unclaimed funds remaining in the Common Fund after the *cy pres* distribution(s) shall be distributed pro rata to Settlement Class Members who made Valid Claims.

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Zone 2 Claimants and \$10 each for Zone 3 Claimants, may ratably increase or decrease depending upon the response from putative Settlement Class Members.

<sup>3</sup> Plaintiffs' Counsel asserts that such voluntary payments in excess of \$650,000 have been paid out to the Class. The voluntary claims fund was a result of and related to their litigation efforts. Therefore, their attorney fees in relation to the Common Fund should be viewed as approximately 20% of the total amounts paid out to the Class.

All costs of Settlement Notices are presently estimated to be approximately \$32,505, and shall be paid from the Common Fund. All costs of Settlement Administration shall be borne by the Common Fund.

Attorneys' fees and costs of litigation are to be paid from the Fund, subject to Court approval, in an amount not to exceed \$360,000 (i.e., 30% of the Common Fund), plus reimbursement of Plaintiffs' Counsels' expenses, to be paid from the Common Fund. If Settlement Class Member claims against the Common Fund exceed the amount available after deduction of Settlement Administration and notice expenses, Class Counsel shall waive all recovery of expenses, to make additional funds available to pay the Settlement Class Members' claims. If Settlement Class Member claims against the Common Fund still exceed the amount available after the deduction of Settlement Administration and notice expenses, Class Counsel will reduce their percentage fee award by up to 5%, if necessary, to make additional funds available to pay the Settlement Class Members' claims.

This Settlement has a value of \$1,200,000 and is a claims-based settlement. Potential Claimants shall complete the proposed Claim Form in Exhibit 2. Plaintiff respectfully requests that this Honorable Court find the Claim Form to be fair and reasonable and approve it.

#### IV. DISCUSSION

##### A. **The Settlement Was Negotiated At Arms-Length And Is Beneficial To The Class**

The Settlement was negotiated at arms-length by Counsel for the Parties and is fair, just, reasonable, valid and adequate, subject to any objections that may be raised at a Fairness Hearing to be set by this Honorable Court. Plaintiffs' counsel engaged in pre-mediation discussions, conducted a day-long mediation in June 2016, and continued negotiations for months thereafter while conducting some discovery into the merits and potential class settlement issues.

While Plaintiffs are confident of a favorable determination on the merits of Plaintiffs' claims, Plaintiffs have determined that the proposed Settlement provides significant benefits to and is in the best interest of the Settlement Class in light of the uncertainty posed by this pending matter. Plaintiffs opine that the Settlement is appropriate in light of the expense and time

required to pursue the Litigation, as well as the uncertainty, risk, and difficulties of proof inherent in prosecuting claims like those asserted by Plaintiffs. Similarly, Defendants believe they have substantial and meritorious defenses to Plaintiffs' claims, but nonetheless have determined that it is desirable to settle the Litigation on the terms set forth in the Agreement. Accordingly, Plaintiffs move the Court for an Order preliminarily approving the proposed Settlement as fair, adequate and reasonable, and within the range of possible final approval and provisionally certifying the Settlement Class pursuant to *Kentucky Rule of Civil Procedure 23* for settlement purposes.

Plaintiffs also seek Court approval of the Notice Plan with findings that it constitutes the best notice practicable under the circumstances, and satisfies due process, Rule 23, and other applicable law. Lastly, Plaintiffs seek an Order setting the date and time for the Final Approval Hearing and setting Claims, Objection and Opt-Out deadlines.

For Settlement purposes only, Plaintiffs, Sherhonda Stewart, Beverly Sheppard, and Alex Ruiz, are submitted herein as the Settlement Class Representatives for the Settlement Class. Plaintiffs respectfully request that the Court designate Jasper Ward, Esq. and Alex C. Davis, Esq. of Jones Ward, PLC, as Settlement Class Counsel, and Ed Gentle of Birmingham, Alabama, as Settlement Administrator. Mr. Gentle has administered two other Class Action Settlements in Kentucky, and his resume is in Exhibit 6.

Plaintiffs respectfully request that the Court affirm the authority of Settlement Class Counsel to execute the Settlement Agreement on behalf of the Settlement Class Members.

Plaintiffs respectfully submit that the term "Settlement Class" is defined in the Agreement, as follows:

**All natural persons who, on April 3, 2015, resided in or owned residential property located (a) within a two-mile radius of the former AP6 facility at**

4000 Buechel Bank Road, Louisville, Kentucky, or (b) within a two- to three-mile radius of AP6 and bounded by Fern Valley Road to the South and Route 150 to the Northeast. Excluded from the Settlement Class are: (a) officers, directors, and employees of the Defendants, (b) insurers of Settlement Class Members, and (c) subrogees or all entities claiming to be subrogated to the rights of a Settlement Class Member.

The Settlement Class consists of more than 500 Settlement Class Members and is so numerous that joinder of all members is impracticable.

The Parties agree to settle the claims asserted for One Million Two Hundred Thousand Dollars (\$1,200,000). The proposed Settlement is inclusive of all claims, payment of notice costs, attorneys' fees, costs and expenses, Settlement Administration expenses, Named Plaintiff incentive awards, and all other items of liability. This is a full-distribution non-reversionary settlement to be paid into the Common Fund after the payment of notice costs, attorneys' fees, costs and expenses. No sums will revert to Defendants. The Parties submit that the proposed monetary benefits will directly benefit the Settlement Class Members and represent a reasonable compromise of the Settlement Class Members' claims against Defendants.

**B. The Settlement Will Be Subject To a Final Fairness Hearing By This Court After Notice and Administration**

After the preliminary approval of this Settlement and administration thereof, the Court will have a fairness hearing to determine the ultimate fairness and reasonableness of the Settlement. This Fairness Hearing will address:

- a. To determine whether the proposed Settlement of the Litigation on the terms and conditions provided for in the Settlement Agreement is fair, reasonable, and adequate and should be approved by the Court under Kentucky Rule of Civil Procedure 23, and whether a Final Approval Order should be entered;
- b. To consider such other matters as may properly come before the Court in connection with



the certification of the Settlement Class, approval of the proposed Settlement Agreement, approval of Settlement Class Counsel's attorneys' fees and expenses, approval of the selection of the Settlement Administrator, approval of claims processing procedures, and other matters related to approval and implementation of the Settlement Agreement.

The Plaintiffs submit that, provided no interlocutory appeal is taken of the Preliminary Approval Order, Settlement Class Counsel, in collaboration with the Settlement Administrator, shall provide notice of the proposed Term Sheet to the Settlement Class Members as required by Kentucky Rule of Civil Procedure 23 of the Kentucky Rules of Civil Procedure and all applicable statutes as set forth in the notice plan described herein. If any interlocutory appeal is taken of the Preliminary Approval Order or any Party exercises its rights to terminate the Term Sheet, then such action will suspend the notice requirement until such time that a final, unappealable Preliminary Approval Order based on a valid Settlement Agreement is in place.

Class Counsel, in collaboration with the Settlement Administrator, shall facilitate Settlement Notice by notice to all Settlement Class Members as follows:

- a. E-mailing the Claim Form in Exhibit 2, together with this Order, to the Settlement Class Members represented by individual Counsel, in care of their Counsel.
- b. Mailing the Settlement Postcard Notice in Exhibit 3 to all other known putative Settlement Class Members, notifying them of this potential class action settlement, pursuant to Rule 23 of the Kentucky Rules of Civil Procedure and as recognized in the *Hillson v. Kelly Services, Inc.*, 201 U.S. Dist. LEXIS 8699 (E.D. Mich. 2017), sending the Settlement Postcard Notice to the remaining Settlement Class Members to their best known address as provided by Spirit Environmental, after a due diligence search for their addresses and informing them that the Claim Form and long form of the Notice and FAQ

in Exhibit 4 may be obtained from the Settlement website and filed by mail or by contacting the Settlement Administrator's office to request a Claim Form by mail or electronic mail. A Blue Settlement Postcard Notice will be mailed to the putative Settlement Class Members who resided in or owned residential property within a radius between 0 and 1.0 mile from AP6 on April 3, 2015 (Zone 1). A Green Settlement Postcard Notice will be mailed to the putative Settlement Class Members who resided in or owned property within a radius between 1.0 and 2.0 miles from AP6. (Zone 2). A Yellow Settlement Postcard Notice will be mailed to the putative Settlement Class Members who resided in or owned property within a radius between 2.0 and 3.0 miles from AP6, **and bounded by Fern Valley Road to the South and Route 150 to the Northeast**, on April 3, 2015 (Zone 3).<sup>4</sup>

- c. Publication of the Published Notice, attached hereto as Exhibit 5, on two separate days in the *Louisville Courier Journal* (Louisville paper), the beginning date being no earlier than fourteen (14) days after the date of the date of the Preliminary Approval Order, and the last date being no later than twenty-eight (28) days after the date of the Preliminary Approval Order.
- d. Posting a copy of the Notice and FAQ, attached as Exhibit 4, on the internet at a website with the address: [www.GEFireSettlement.com](http://www.GEFireSettlement.com). The Parties shall also post on the website a copy of the Term Sheet as set out in paragraph 5 of the Term Sheet.
- e. The Settlement Administrator shall make available his already-established toll-free phone number (1-855-711-2079 or 1-800-345-0837), and his regular telephone number (1-205-716-3000) to answer questions of the Settlement Class Members, and shall leave such

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<sup>4</sup> The Class Area Map, with Zone indicators, is depicted in the Settlement Postcard Notice, the Publication Notice, the Settlement Administrator's website, the Notice and FAQ, and as an attachment to the Claim Form.

toll-free line open until the deadline for submission of Claim Forms.

The Parties submit that the Notice Plan is the best practicable Notice under the circumstances, is reasonably calculated to apprise interested parties of the pendency of this action, affords such Settlement Class Members an opportunity to present their objections or exclude themselves from the Settlement Class, and complies in all respects with the requirements of *Kentucky Rule of Civil Procedure 23* and all the requirements of due process.

Settlement Class Members have the right to opt out of the Settlement Class or to object to the terms of the Settlement. Settlement Class Members who want to be excluded from the Settlement Class must send a written request for exclusion clearly evidencing their desire to opt out of the Term Sheet ("Opt-Out Request") and signed by them or their duly authorized representative with documentation of such representative authorization to:

The GE Fire Settlement  
Ed Gentle  
Settlement Administrator  
501 Riverchase Parkway East, Suite 100  
Hoover, Alabama 35244  
[egentle@gtandslaw.com](mailto:egentle@gtandslaw.com)  
205-716-3000  
855-711-2079  
800-345-0837

Such Opt-Out Request must be postmarked by ninety (90) days after the date of the Preliminary Approval Order. If more than 100 Settlement Class Members timely opt-out of the Settlement, Defendants shall have the right to withdraw from and terminate the Settlement.

Any Settlement Class Member who files an Opt-Out Request in the manner provided herein is excluded from the Settlement Class and will not be entitled to any benefit described in the Agreement or Notice, and will not be bound by any judgments adjudicating the claims of the Settlement Class Members.

Any Settlement Class Member who does not file an Opt-Out Request in the manner provided herein will be bound by the Agreement if finally approved following the Fairness Hearing, including the terms of the Final Approval Order to be entered herein and the releases provided for in the Term Sheet.

Any Settlement Class Member who has not requested exclusion from the Settlement Class may file an objection to final approval of the Term Sheet and/or appear at the Fairness Hearing personally or by counsel, provided that an appearance is served and filed as hereinafter provided, to show cause, if any, (a) why the Term Sheet should not be approved as fair, reasonable, and adequate; (b) why an order should not be entered dismissing with prejudice and releasing all claims of the Settlement Class Representatives and all Settlement Class Members against the Released Persons; or (c) why the Court should not grant an allowance of reasonable fees, costs, and expenses to Settlement Class Counsel (to be payable from the Settlement Fund) for their services. Unless the Court directs otherwise, the Parties submit the procedures for lodging objections shall include the following:

- a. Each Settlement Class Member wishing to object to the Term Sheet shall submit a timely written notice of their objection postmarked by ninety (90) days after the date of the Preliminary Approval Order. **NOTE: TO OBJECT, A SETTLEMENT CLASS MEMBER CANNOT OPT-OUT.**
- b. Said objection shall set forth the reasons for the Settlement Class Member's objection. The objection must be signed by the Settlement Class Member, or the objector's duly authorized representative (including attorney), and provide information identifying the objector as a Settlement Class Member, the objector's address, whether the objector intends on appearing at the Fairness Hearing, and the reason or reasons for the objection,

along with whatever legal authority, if any, the objector asserts supports the objection.

c. Any objections must be filed with the Clerk of where the Action is filed. Additionally, one copy of the written objection shall be served upon the Settlement Administrator, and each of the following counsel:

- i. Settlement Class Counsel: Jasper D. Ward, IV, Esq. and Alex C. Davis, Esq. of Jones Ward, PLC, The Pointe, 1205 E. Washington Street, Suite 111, Louisville, Kentucky 40206;
- ii. Defendants Michael T. Williams, WHEELER TRIGG O'DONNELL LLP, 370 17th Street, Suite 4500, Denver, CO 80202.

Settlement Class Members who object in the manner provided herein remain Settlement Class Members and will be bound by the Term Sheet and Final Approval Order if finally approved following the Fairness Hearing. Any person who fails to object in the manner provided herein shall be deemed to have waived his or her objections and shall forever be barred from making any such objections in this lawsuit or in any other action or proceeding.

The Parties respectfully request that Mr. Ed Gentle, Esq. of Gentle, Turner, Sexton & Harbison, LLC, be appointed as the Settlement Administrator, under *Kentucky Rule of Civil Procedure 53*. The scope of Mr. Gentle's duties as Settlement Administrator are to be limited to the duties as set out in the Term Sheet and this Motion. All fees and expenses of the Settlement Administrator shall be paid exclusively from the Common Fund pursuant to the terms of the Term Sheet. In no event, regardless of whether the proposed Term Sheet is terminated or is otherwise not finally approved under Kentucky Rule of Civil Procedure 23, shall Defendants be responsible for any fees, costs or expenses of the Settlement Administrator.

The Parties request that the Court approve the Settlement Administrator budget of

\$214,691.40.

The Parties submit that the Litigation shall be stayed pending the final determination of whether the Settlement Agreement should be approved, except those proceedings necessary to carry out the terms of the Term Sheet.

**C. The Settlement Meets All of the *Reed* Fairness Factors And Should Be Approved**

An analysis of the *Reed* factors establishes that this settlement is fair, reasonable, and adequate.

The Court may presume that no fraud or collusion occurred between Counsel in the absence of any evidence to the contrary. 4 NEWBERG ON CLASS ACTIONS § 11.51 (4th ed.); *Liger v. New Orleans Hornets NBA L.P.*, No. 05-1969, 2009 U.S. Dist. LEXIS 85733, at \*10 (E.D. La. Aug. 27, 2009). There are no allegations involving fraud or collusion in the settlement of this action.

In addition, the facts here do not show any inference of fraud or collusion in the settlement of this matter. Plaintiffs and Defendants have vigorously prosecuted this action, and settled after arms-length negotiations efforts. The time and effort spent on negotiation, in consulting with the Class Representatives, indicates strongly that the negotiation was reached without collusion, but rather voluntarily in light of the risk to all Parties. "When the prospect of ongoing litigation threatens to impose high costs of time and money on the parties, the reasonableness of approving a mutually-agreeable settlement is strengthened." *Ayers v. Thompson*, 358 F.3d 356, 369 (5th Cir. 2004). An analysis of the complexity, expenses and duration of this litigation indicate strongly that this settlement is fair, reasonable, and adequate.

Significant discovery has been conducted in this matter, both informally and formally. Under the third *Reed* factor, the key issue is whether "the parties and the district court possess

ample information with which to evaluate the merits of the competing positions." *Ayers, supra.*, 358 F.3d at 369. All of the parties agree that considering discovery related to the remaining counts, that Class Counsel is more than able to determine the settlement's adequacy in relation to the probability of success on the merits were this litigation to continue.

The probability of success on the merits is the most important *Reed* factor. *Smith v. Crystian*, 91 F. App'x 952, 954 n.3 (5th Cir. 2004). "In evaluating the likelihood of success, the Court must compare the terms of the settlement with the rewards the class would have been likely to receive following a successful trial."

The *Reed* "range of possible recovery factor" requires the Court to "establish the range of possible damages that could be recovered at trial and, then, by evaluating the likelihood of prevailing at trial and other relevant factors, determine whether the settlement is pegged at a point in the range that is fair to the plaintiff settlers." *Maher v. Zapata Corp.*, 714 F.2d 436, 460 (5th Cir. 1983).

Litigating this complex matter through class certification and trial and subsequent appeal could take years and cost the Parties hundreds of thousands if not millions of dollars in litigation costs and expert fees. Both parties inevitably would face extensive discovery and motion practice.

Two recent examples of class actions in Kentucky may assist the court in evaluating the benefits of the proposed settlements. The first case involved a train derailment in West Point, Kentucky, in October 2012. Plaintiffs, through the undersigned counsel, filed suit on behalf of approximately 5,600 individuals who were required to evacuate their homes or shelter in place in Hardin and Jefferson counties. *Brown v. Paducah & Louisville Ry., Inc.*, No. 3:12-CV-00818-CRS, 2013 U.S. Dist. LEXIS 132608, at \*3 (W.D. Ky. Sep. 16, 2013). Judge Charles R. Simpson

III subsequently held a fairness hearing and on August 27, 2014, certified a class of individuals for settlement purposes that resulted in payments to affected individuals of \$3 million including fees and expenses. A similar approach to settlement was taken in regard to an earlier and unrelated train derailment in Bullitt County, Kentucky. *See also In re Bullitt County Train Derailment Litig.*, No. 3:07-cv-00024 (W.D. Ky. Aug. 14, 2008).

More recently, Plaintiffs represented by the undersigned counsel filed a class action lawsuit in Nov. 2014 on behalf of hundreds of individuals affected by a tire fire along Dixie Highway in Jefferson County. After extensive discovery and more than a dozen depositions in multiple states, Plaintiffs moved for class certification in Jefferson Circuit Court. *Betty Manning, et. al. v. Liberty Tire Services of Ohio, LLC*, NO. 14-CI-5731 (Ky. Ct. Cir. March 4, 2016). Judge Mitch Perry denied the motion, and *Manning* is currently on interlocutory appeal before the Kentucky Court of Appeals with oral argument set for September 12, 2017. While the undersigned counsel are confident in the ultimate outcome of *Manning*, on behalf of the plaintiffs, the procedural history illustrates the time-consuming and risky nature of class certification for all involved parties. These cases also illustrate the benefits of settlement for all parties in the form of cost and time savings, and the benefits to potential claimants in the class. Finally, the opinions of Class Counsel, Class Representatives and absent Settlement Class Members must be considered in the analysis of whether this proposed settlement is fair, reasonable and adequate.

The endorsement of Class Counsel is entitled to deference. In performing this balancing task, the trial court is entitled to rely upon the judgment of experienced counsel for the parties. *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977).

Plaintiffs are represented by counsel experienced in complex class action litigation and



complex litigation, including appointments to Lead Counsel in national, high profile multi-district litigation cases. *See* Exhibit 7. Plaintiffs note also that based on the posture of the litigation, and the risk involved Class Counsel are confident that this Settlement, while not the most desirable settlement, is fair, adequate and reasonable of the Class Representatives are also in favor of approval of this Class Action Settlement, and have been advised of the risks of continued litigation compared to the benefits of Settlement.

In sum, the *Reed* factors strong favor preliminary approval of this Class Action Settlement.

For any class certified, class members must be afforded the best notice practicable under the circumstances, which includes individual notice to all members who can be identified through reasonable effort. *See Philipps Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 (1985).

Notice shall be provided via (1) mailing a color-coded Settlement Postcard Notice notifying Settlement Class Members of the potential class action and the Settlement, substantially similar to that in Exhibit 3, to the last known address of the Settlement Class Member; (2) mailing the color-coded Settlement Postcard Notice substantially similar to that in Exhibit 3 to the last known address of the Settlement Class Member after due diligence is conducted in the event that an initial notice mailing is returned as undeliverable; (3) posting a copy of the Notice and FAQ substantially similar to that in Exhibit 4 on a dedicated Settlement Website, which will also provide a toll free 800 number which Settlement Class Members can use to obtain information about the Settlement; (4) posting a Publication Notice substantially similar to that in Exhibit 5 in a publication in Louisville, Kentucky; and (5) issuing the Settlement Postcard Notice via electronic mail for all Settlement Class Members for whom the Notices are returned by the U.S. Postal Service as undeliverable, to the extent the electronic mail

address can be identified.

Notice shall be provided to each individual Settlement Class Member who is identifiable, by mailing a copy of the Settlement Postcard Notice to said Settlement Class Member, thus satisfying the notice requirements of *Kentucky Rule of Civil Procedure 23. Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S. Ct. 2140 (1974). Notice by individual mail and publication have been deemed as satisfying all notice requirements pursuant to *Kentucky Rule of Civil Procedure 23. Parker v. Anderson*, 667 F.2d 1204, 2017 (5th Cir. 1982). Notice by postcards has been deemed as satisfying all notice requirements. *Hillson v. Kelly Services, Inc.*, 2017 U.S. Dist. LEXIS 8699,\*34-35 (E.D. Mich. 2017).

Courts around the country have also approved notice via electronic mail. *See Devi Khoday, et al., v. Systematic Corp*, Case No. 11-cv-180, April 5, 2016, United States District Court for the District of Minnesota (on April 5, 2016, the court preliminarily approved a \$60M settlement where defendants provided notice of the settlement to class members at their last known email address and by physical mailing to their last known physical address for members with an invalid or an unknown email address); *Perkins, et al., v. LINKEDIN Corporation*, Case No. 13-CV-04303-LHK, United States District Court for the Northern District of California (on June 11, 2015,, the court granted preliminary approval of a notice plan wherein notice was by electronic mail and website notice through the settlement website); *Slipchenko v. Bruno Energy, Inc.*, 2015 U.S. LEXIS 8177 (S.D. Tex. 2015) (electronic mail notice sent to those for whom defendants had email addresses was approved); *Fraley, et al., v. Facebook*, Case No. CV-11-01726 RS, United States District Court for the Northern District of California, San Francisco Division (on August 26, 2013, the court entered final approval where notice was made via electronic mail and by publication); *Browning v. Yahoo!, Inc.*, No. C04-01463 HRL, 2006

Westlaw 3826714, at \*8 (N.D. Cal. Dec. 27, 2006) (initial form notice by email approved); *Chavez v. Netflix*, 162 Cal. App. 4th 43, 58 (Ct. App. 2008); *Tadepalli v. Uber Tech*, 2015 U.S. Dist LEXIS 169 (N.D. Cal. December 17, 2015); *Steinfeld v. Discover Fin. Servs.*, 2014 U.S. Dist. LEXIS 44855 (N.D. Cal. March 31, 2014) (electronic mail to settlement class members approved where direct mail was sent to settlement class members who did not receive the email notice).

The Settlement's Notice Plan, as set forth above, is well-designed to give Settlement Class Members the best Notice practicable of the Settlement, the claims process and deadline, Class Counsel's fee application, and their opt-out and objection rights. The Notice Plan will be administered by the Settlement Administrator, who has significant experience in effectuating notice.

The Notice Plan shall be completed by the Settlement Administrator no later than thirty (30) days after entry of the Preliminary Approval Order.

The Settlement Administrator shall file a declaration of compliance with the notice requirements set forth in the Settlement Agreement within forty-five (45) days after entry of the Preliminary Approval Order.

Counsel will and has fairly and adequately represented the class as required by Kentucky Rule of Civil Procedure 23. Plaintiff's Counsel is qualified to vigorously pursue the interests of the class. *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997).

Plaintiffs' Counsel have prosecuted this claim vigorously, and has engaged in substantial discovery and motion practice, and have expended thousands of hours in prosecuting this claim. In addition, Plaintiffs' Counsel is familiar with and has experience in litigating similar complex claims.

Plaintiffs will fairly and adequately represent and protect the interests of the Class. Plaintiffs have retained able counsel with extensive experience in class action litigation, and have been active and vigilant in the prosecution of these claims. The interests of Plaintiffs are coincident with and not antagonistic to the interests of the other Settlement Class Members.

As such, Plaintiffs' Counsel respectfully requests that this Honorable Court appoint them as Class Counsel.

For settlement purposes, Plaintiffs respectfully request that the Court provisionally certify the Settlement Class as defined hereinabove. Provisional certification for settlement purposes allows notice of the proposed Settlement to issue to inform Settlement Class Members of the existence and terms of the proposed Settlement, their right to be heard on its fairness, their right to opt out, and the date, time and place of the formal fairness hearing. *See Manual for Compl. Lit.*, at §§ 21.632, 21.633.

Defendants waive their right to challenge class certification solely for purposes of this Settlement. For the reasons set forth below, provisional certification is appropriate under *Kentucky Rule of Civil Procedure 23*.

**D. The Settlement Meets The Requirements of Rule 23 Class Actions**

In order to certify a class action, the named Plaintiffs must satisfy an implicit ascertainability requirement, the four requirements listed in Rule 23(a), and the requirements listed in any of *Kentucky Rule of Civil Procedure 23*. *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014). "Ascertainability requires only that the court be able to identify class members at some stage of the proceeding." *Frey v. First Nat. Bank Sw.*, 602 F. App'x 164, 168 (5th Cir. 2015). The Defendants and the Plan have access to all of the names and last known addresses of the members of the Settlement Class. As such, the ascertainability requirement is met in this

case.

*Kentucky Rule of Civil Procedure 23* states that the Plaintiff must show that “the class is so numerous that joinder of all parties is impracticable.” *Kentucky Rule of Civil Procedure 23*. While, the number of members in a proposed class is not determinative of whether joinder is impracticable (see *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981)) the size of a class of 100 members generally satisfies the numerosity requirement. *Mullen v. Treasure Chest Casino, L.L.C.*, 186 F.3d 620, 624 (5th Cir. 1999), citing 1 Newberg on Class Actions § 3.05, at 3-25 (3d ed. 1992) (suggesting that any class consisting of more than forty members “should raise a presumption that joinder is impracticable”); cf. *Boykin v. Georgia-Pacific Corp.*, 706 F.2d 1384, 1386 (5th Cir. 1983) (finding that numerosity requirement would not be met by a class with 20 members but was met by a class with 317 members). Plaintiffs estimate that the Settlement Class is comprised of more than 500 members, and as such the numerosity requirement is met.

Under *Kentucky Rule of Civil Procedure 23*, Plaintiffs must demonstrate that “there are questions of law or fact common to the class” and “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” *Kentucky Rule of Civil Procedure 23*. Both typicality and commonality “serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.” *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982).

Commonality requires Plaintiffs “to demonstrate that the class members ‘have suffered the same injury.’” *Walmart Stores, Inc. v. Dukes*, 131 S.Ct 2541, 2551 (2011) (quoting *Falcon*,

supra., 457 U.S. at 156). There should be some “common contention” of that shared injury that is applicable to the Claims of all Settlement Class Members. See *Id.* “That common contention, moreover, must be of such a nature that it is capable of class-wide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Id.*

Under the Supreme Court’s decision in *Wal-Mart*, Rule 23(a)(2)’s commonality requirement demands more than the presentation of questions that are common to the class because ‘any competently crafted class complaint literally raises common questions.’ “[T]he members of a proposed class do not establish that ‘their claims can productively be litigated at once,’ merely by alleging a violation of the same legal provision by the same defendant...” *Wal-Mart*, 131 S. Ct. at 2551. “Thus, the commonality test is no longer met when the proposed class merely establishes that there is at least one issue whose resolution will affect all or a significant number of the putative class members.” *Id.* (emphasis, citation, and internal quotation marks omitted). “Rather, Rule 23(a)(2) requires that all of the class member’s claims depend on a common issue of law or fact whose resolution will resolve an issue that is central to the validity of each one of the class member’s claims in one stroke.” *Id.* (alteration, emphasis, citation, and internal quotation marks omitted.)

In the instant action, the legal and factual questions which are and shall be advanced by Plaintiffs and Defendants, and which are integral to resolving issues which are central to each and every one of the class member’s claims in one stroke.

Directly in line with the United States Supreme Court’s opinion in *Wal-Mart*, all of the claims in this matter contain a common contention and a common allegation of wrongful conduct — all imposed upon class members by the same defendants. All of the central and key legal and

factual determinations which must be determined and adjudicated are common to all members of the class.

Typicality is not a difficult standard to meet and is satisfied if the representatives' claims share essential characteristics with the class members' claims or if the claims arise from a similar course of conduct and share the same legal theories. *James v. City of Dall.*, 254 F.3d 551 (5th Cir. 2001).

Plaintiffs have alleged an injury typical of the injuries of putative class members. As such, Plaintiffs claim is typical of the claims of the members of the class.

In sum, the named Plaintiffs meets the typicality requirement as indicated in detail *infra*, and there are no unique defenses which could be logically and/or reasonably asserted separately against any of the named Plaintiffs in this matter.

Finally, the proposed representatives will fairly and adequately represent the class as required by *Kentucky Rule of Civil Procedure 23*. In order to satisfy this requirement, Plaintiffs must show that (1) the class representatives share common interests with the class members; and (2) Plaintiffs' Counsel is qualified to vigorously pursue the interests of the class. See *Amchem Prods. v. Windsor*, 521 U.S. 591, 613 (1997); *Steering Comm. v. BP Expl. & Prod. (In re Deepwater Horizon)*, 785 F.3d 1003 (5th Cir. 2015).

All of the Class Representatives share common interests with the Settlement Class Members. They do not have any adverse interests to those of the Settlement Class Members at large, and seek to recover but a fraction of what they assert the class should have received, but for the wrongful acts alleged. The interests of Plaintiffs are coincident with and not antagonistic to the interests of the other Settlement Class Members.

As noted above, Plaintiffs' Counsel are familiar with and have experience in litigating

similar claims. Plaintiffs will fairly and adequately represent and protect the interests of the Class as Plaintiffs have retained able counsel with extensive experience in class action litigation.

As such, Plaintiffs do and shall satisfy the fair and adequate representation requirement of Kentucky Rule of Civil Procedure 23.

This matter is properly certified under Kentucky Rule of Civil Procedure 23(b)(3) which requires that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3). Common questions of law or fact applicable to the class as a whole must predominate over those issues subject to individualized proof. *Applewhite v. Reichhold Chems., Inc.*, 67 F.3d 571, 573 (5th Cir. 1995).

Common questions of law or fact applicable to the class as a whole predominate over any issues that would require individualized proof.

As such, Plaintiffs respectfully requests preliminary certification pursuant to Kentucky Rule of Civil Procedure 23(b)(3).

#### V. CONCLUSION

For the reasons set forth above, Named Plaintiffs respectfully request that this Honorable Court:

1. Preliminarily approve the proposed Settlement;
2. Conditionally certify the Settlement Class;
3. Approve the Settlement Notice Program described herein;
4. Approve Settlement Class Counsel;
5. Approve the Settlement Administrator;



6. Conduct a "formal fairness hearing" or final settlement approval hearing, at which Settlement Class Members may be heard regarding the Settlement, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the Settlement may be presented; and
7. Ultimately grant final approval of the class settlement, certify the Settlement Class, and grant all further relief.

Respectfully submitted,



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CERTIFICATE OF SERVICE

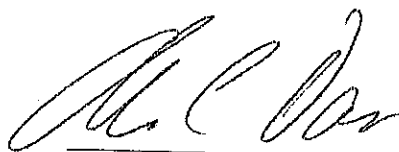
This will certify that a copy of the foregoing was served by U.S. mail and electronic mail to those email addresses listed below on this the 14<sup>th</sup> day of September, 2017, to:

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