

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION**

IN RE: PRE-FILLED PROPANE TANK  
MARKETING AND SALES PRACTICES  
LITIGATION

MDL Docket No. 2086

Master Case No. 09-2086-MD-W-GAF

THIS PLEADING RELATES TO:  
ALL CASES

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR  
APPROVAL OF ATTORNEYS' FEES, SERVICE AWARDS,  
AND REIMBURSEMENT OF EXPENSES**

Settlement Class Counsel obtained an outstanding settlement on behalf of a nationwide class of persons who purchased pre-filled propane tanks from Defendants Ferrellgas, Inc., Ferrellgas, L.P., and Ferrellgas Partners, L.P. (collectively, "Ferrellgas" or "Blue Rhino") between June 15, 2005 and October 13, 2011. Under the Settlement Agreement (Doc. 250-1), Blue Rhino will provide up to \$25,000,000 to pay class members' claims for cash refunds, as well as make additional payments for the costs of notice, administration, service awards, and attorneys' fees and expenses. Individual class members with proof of purchase may recover up to \$150 each, and class members with no proof of purchase can recover a \$7.50 cash payment. The settlement also requires Blue Rhino to implement or maintain several significant measures to prominently inform consumers of the actual net weight of propane in Blue Rhino pre-filled tanks, to refrain from marketing those tanks as "full," regardless of weight, and to provide antitrust compliance training for employees. In short, the settlement provides both significant immediate economic relief to the class and significant assurance that the pre-filled propane market—made up of primarily Blue Rhino and AmeriGas—will be barred from conduct underlying this multidistrict litigation.

As the record before this Court demonstrates, this favorable outcome is the result of the hard work and diligent efforts by Settlement Class Counsel, and the contributions of named

plaintiffs who were customers of Blue Rhino. *See generally* Declaration of Norman E. Siegel, attached hereto as Exhibit 1 and incorporated herein (“Siegel Decl.”); Declaration of Laurence D. King, attached as Exhibit 1 to Plaintiffs’ Memorandum in Support of Motion for Final Approval of Settlement (“King Decl.”). For the reasons set forth herein, Settlement Class Counsel now request that the Court award them \$7,250,000 for their attorneys’ fees and in reimbursement for their costs and expenses. This amount fairly and reasonably compensates Settlement Class Counsel for their time and effort as well as substantial unreimbursed expenses incurred by Settlement Class Counsel. Pursuant to the Settlement Agreement, Blue Rhino does not oppose this fee request. Counsel also request that the Court award named plaintiffs reasonable service awards for their time and effort on behalf of all class members who benefit by this resolution.

### **FACTUAL AND PROCEDURAL HISTORY**

Plaintiffs set forth in their memorandum in support of final approval and accompanying declaration (Doc. 258), and incorporate herein by reference, the detailed history of this litigation and the settlement. In summary, in 2009, the Court appointed Stueve Siegel Hanson LLP as Plaintiffs’ Liaison Counsel and Hagens Berman Sobol Shapiro LLP, Girard Gibbs LLP, and Kaplan Fox & Kilsheimer LLP as Plaintiffs’ Co-Lead Counsel. (Doc. 43). Plaintiffs filed their consolidated complaint against Blue Rhino in February 2010 (Doc. 79). Unlike AmeriGas, which chose to resolve this dispute early in the litigation, Blue Rhino took an aggressive litigation position. Upon filing of the consolidated complaint, Blue Rhino moved for a dismissal, arguing that as a matter of law its conduct was neither deceptive nor anticompetitive. (Doc. 116). On Plaintiffs’ motion, the Court converted Blue Rhino’s motion to a summary judgment motion, giving the parties leave to collect and present evidence in support of their respective legal positions. (Doc. 146). In preparing to meet Plaintiffs’ evidentiary burden on summary judgment as well as prepare their motion for class certification, Class Counsel conducted extensive discovery of Blue Rhino as well as third parties, including AmeriGas, as part of the

confirmatory discovery process. Aided by discovery conferences with the Court, Plaintiffs received and analyzed more than 45,000 pages of documents and voluminous transactional data from Blue Rhino. Class Counsel also analyzed more than 25,000 pages of documents and transactional data produced in response to 27 third-party subpoenas, took depositions of Blue Rhino employees, and consulted with experts. At the same time, Plaintiffs' counsel responded to written discovery to the named plaintiffs, and produced 17 of those plaintiffs for deposition in cities across the country. While Plaintiffs were still attempting to secure necessary discovery, Blue Rhino filed an additional motion for summary judgment, which Plaintiffs successfully opposed under Rule 56(d). (Docs. 221, 223, 224, 230, 233, 241).

In May 2011, after two full days of in-person negotiation with an independent mediator, the parties reached a settlement in principle. After several additional months of negotiations over a final settlement, the parties executed the pending Settlement Agreement. After briefing, the Court granted preliminary approval on October 13, 2011, and ordered notice to the Settlement Class (Doc. 254).

The Court appointed Settlement Class Counsel and appointed as Representative Plaintiffs Daniel Bradley, Gina Calarco, Dennis Carroll, Michael D'Aloia, Suzanna De Night, David Desaire, J. Allen Downs, Bart Fraenkel, Jack Fuller, Ed Jaeggi, Jacob Knopke, Tom Miller, Gina Pennisi, Carson Ross, Daniel Scholtec, Mark Shawl, Victoria Shawl, Randy Shillingburg, Jeff Walker, Roy Wilder, and Larry Young. *See id.* The Court also ordered counsel to submit an application for approval of attorneys' fees and expenses on this date. *Id.* Pursuant to that Order, Plaintiffs submit their Unopposed Motion for Approval of Attorneys' Fees, Service Awards, and Reimbursement of Expenses and this Memorandum in Support.

## **ARGUMENT AND AUTHORITY**

### **I. THIS COURT SHOULD AWARD PLAINTIFFS' COUNSEL THEIR REQUESTED FEES, WHICH ARE FAIR AND REASONABLE.**

Plaintiffs are entitled to reasonable attorneys' fees to compensate their counsel for their work in recovering damages and substantial prospective relief on behalf of this nationwide class. The Settlement Agreement provides that Blue Rhino will not object to a request by Plaintiffs for an award of attorneys' fees and reimbursement of expenses of up to \$7,250,000. This Settlement Agreement between the parties is entitled to deference. The requested fee comprises 22.4% of the benefit made available to the Settlement Class, which is at or lower than the attorney fees typically awarded under a percentage of recovery analysis. Moreover, the time spent and expenses incurred by Settlement Class Counsel readily justify their request for \$7,250,000 for attorneys' fees and expenses. Because this amount is reasonable and well within the fee range approved by courts in similar litigation, Plaintiffs' request should be approved by the Court.

#### **A. The parties' negotiated Settlement Agreement is entitled to deference.**

The Settlement Agreement fully negotiated by the parties specifies that Blue Rhino would not oppose "an application for the award of Attorneys' Fees and Expenses in this Action not to exceed a total of \$7,250,000." Doc. 250-1, Settlement Agreement at ¶ 14.1; *see also* Siegel Decl. ¶ 10. The amount of attorneys' fees was negotiated at arm's length by experienced counsel on all sides with the assistance of a mediator only after the parties negotiated substantive relief to the class. *See id.* Because the agreement on fees and expenses was subject to rigorous arm's length negotiation, it deserves the same deference as the underlying settlement terms. As the Eighth Circuit observed in considering the award of attorneys' fees in a class action settlement: "We are mindful of the limited scope of our review. We are dealing, as before, with a settlement agreement and such agreements are presumptively valid." *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 921 F.2d 1371, 1391 (8th Cir. 1990). Thus, just as with the other proposed settlement terms, this Court should, at the outset, conclude that the

parties' agreement on the payment of attorneys' fees and expenses enjoys a presumption of fairness.

The award of attorneys' fees in this case will not reduce the benefits to the class under the settlement, and will be paid separately by Blue Rhino. *See* Siegel Decl. ¶ 11; *see also* Settlement Agreement at ¶¶ 14.1, 14.3. Because the fee award is entirely separate from the recovery for the class and was negotiated only *after* the settlement to the class was finalized, there was no potential conflict of interest with the class members. *See Little Rock School Dist.*, 921 F.2d at 1383 (“[T]he fee was discussed only after all other aspects of the agreement had been concluded, and . . . prospects of a fee did not influence counsel’s negotiating position on the substantive aspects of the case. The District Court made no finding of a conflict of interest, and no basis exists for such a finding.”).

Under these circumstances, the Court should conclude that the requested fee award in this case is fair and reasonable. *See Cohn v. Nelson*, 375 F. Supp. 2d 844, 861 (E.D. Mo. 2005) (“[W]here, as here, the parties have agreed on the amount of attorneys’ fees and expenses, courts give the parties’ agreement substantial deference.”); *Heilman v. Perfection Corp.*, 93 F. Supp. 2d 1311, 1312-13 (W.D. Mo. 2000) (approving class action fee award and finding it unnecessary to closely critique the award, which was agreed to in arm’s length bargaining between counsel).

**B. Plaintiffs’ requested attorneys’ fees are fair and reasonable.**

“There are two generally accepted methods of calculating attorney fees: the lodestar method, and the percentage-of-the-fund approach.” *In re UnitedHealth Group Inc. S’holder Derivative Litig.*, 631 F. Supp. 2d 1151, 1158 (D. Minn. 2009); *see also Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 246 (8th Cir. 1996) (“It is within the discretion of the district court to choose which method to apply.”).<sup>1</sup> Under either approach the requested fee is fair and reasonable and should be approved.

---

<sup>1</sup> Courts within this District recently expressed a preference for the percentage of recovery approach. *See Wiles v. Southwestern Bell Telephone Co.*, No. 09-4263, 2011 WL 2416291, at \*4-5 (W.D. Mo. June 9, 2011), Report and Recommendation adopted by Laughrey, J., at Text Docket Entry # 47 (June 13, 2011);

1. *This request for fees is supported by a percentage of recovery analysis.*

An analysis of the benefits made available to the Settlement Class readily supports the requested fee. The settlement makes up to \$25 million available to the Settlement Class, excluding fees, and up to \$32.5 million available including fees. Thus, the requested fees and expenses comprise 22.4% of the total benefit made available to the Settlement Class, or 29% if fees are excluded altogether from the total relief. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 480-82 (1980) (a litigant or lawyer who recovers a common benefit is entitled to a reasonable attorney's fee from the fund as a whole, regardless of whether some class members fail to exercise their right to possession in the fund).

This percentage is well within the range typically approved in percentage of recovery applications, and does not value the significant prospective non-monetary relief achieved here. *See, e.g., In re US Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (“We have approved the percentage-of-recovery methodology to evaluate attorneys’ fees in a common-fund settlement such as this and we find no abuse of discretion in the district court’s awarding 36% to class counsel who obtained significant monetary relief on behalf of the class.”) (internal citations omitted); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999) (affirming district court’s finding that “the proposed fee constituted 24 percent of the monetary compensation to the class, and therefore that the fee was reasonable, particularly given that significant nonmonetary benefits are also being given to the class”); *In re Xcel Energy, Inc. Secs. Litig.*, 364 F. Supp. 2d 980, 998 (D. Minn. 2005) (collecting cases approving fees of 25 to 36 percent of benefit to class). This Court recently approved a 33 percent fee award, and found that a “lodestar crosscheck” resulting in a multiplier of 2.3 is “well within reason for class action litigation.” *Wiles*, 2011 WL 2416291, at \*4-5. Under these authorities, the Court should approve the requested fee as fair and reasonable.

---

*Sanderson v. Unilever Supply Chain, Inc.*, No. 10-0775, 2011 WL 6369395, at \*1 (W.D. Mo. Dec. 19, 2011) (Gaitan, C.J.).

2. *Counsel's lodestar further supports the requested fee.*

In considering a fee under a lodestar analysis, the Court considers: “(1) the number of hours spent by counsel; (2) counsel’s ‘reasonable hourly rate’; (3) the contingent nature of success; and (4) the quality of the attorneys’ work.” *In re UnitedHealth Group*, 631 F. Supp. 2d at 1158-59 (citing *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 127 (8th Cir. 1975)); *Cohn*, 375 F. Supp. 2d at 861 (citing *Dekro v. Stern Brothers & Co.*, 571 F. Supp. 97, 102 (W.D. Mo. 1983)). Application of these four factors supports Settlement Class Counsel’s request for their attorneys’ fees.

Through December 21, 2011, Settlement Class Counsel have spent 5,989 total hours on this litigation against Blue Rhino, and a total lodestar of \$2,566,842. *See* Siegel Decl. ¶¶ 12-13. These hours are split roughly equally between the four firms appointed Settlement Class Counsel, and reflect the time associated with the prosecution and settlement of the claims against Blue Rhino. AmeriGas time previously submitted to the Court is not included in this total. *See id.*<sup>2</sup> Settlement Class Counsel expect to spend substantial additional time preparing for the Fairness Hearing and administering the settlement. *See* Siegel Decl. ¶ 15.

Settlement Class Counsel’s time is billed at or below their normal and usual rates for such matters, using the same hourly rates this Court previously approved in the AmeriGas matter. These rates are also consistent with rates approved elsewhere in this District, and result in a blended hourly rate of \$429. *See* Doc. 144, p.7 (memo in support in AmeriGas matter; blended rate of \$495); Siegel Decl. ¶ 14, and Exhibit A thereto (Order in *In re H&R Block, Inc., Express IRA Marketing Litig.*, No. 4:06-md-01786 (Doc. 232) (W.D. Mo. May 17, 2010)). In addition to the time spent by Settlement Class Counsel, time and expenses were incurred by other law firms who were counsel in the underlying cases consolidated in this proceeding, and who contributed to prosecution in the MDL proceeding through substantial work on discovery. In total, these firms have reported expending approximately 2,420 additional hours on this

---

<sup>2</sup> Consistent with the Court’s request with respect to the AmeriGas settlement, Settlement Class Counsel will submit *in camera* their detailed time and expense records.

matter. *See* Siegel Decl. ¶ 16. When these firms' time is included with Settlement Class Counsel's time, the total time is approximately 8,409 hours constituting lodestar of \$3,467,195. *Id.*

In addition to the extensive time spent on this litigation against Blue Rhino, Settlement Class Counsel have incurred unreimbursed costs and expenses related to this matter totaling \$139,200. *See* Siegel Decl. ¶ 17. Additional plaintiffs' counsel have reported expenses of \$20,793, bringing the total expenses for all plaintiffs' counsel to at least \$159,993. *See* Siegel Decl. ¶ 18. If these combined expenses are subtracted from the total requested attorneys' fees, this reduces the total potential attorneys' fee award to \$7,090,007. *See* Siegel Decl. ¶ 18. This award reflects a multiplier of 2.76 if only Settlement Class Counsel's time is considered, and 2.04 if all plaintiffs' counsel's time is considered. *Id.*

In light of the favorable results obtained for the class, the skill displayed by Plaintiffs' counsel, their efforts in resolving the complex issues in the litigation, the considerable risk they bore in pursuing this matter, the need to spend substantial additional time completing the process of settlement administration, and the multipliers typically applied under similar circumstances, the fee sought here is plainly reasonable. *See, e.g., Wiles*, 2011 WL 2416291, at \*4-5 (multiplier of 2.3); *Nelson*, 2009 WL 2486888, at \*2 (citing cases within the Eighth Circuit approving lodestar multipliers of up to 5.6); *Cohn*, 375 F. Supp. 2d at 861 (approving a requested 2.9 multiplier and stating that "courts typically apply a multiplier of 3 to 5 to compensate counsel for the risk of contingent representation."). Moreover, as Settlement Class Counsel continue to administer the settlement, the overall lodestar multiplier will continue to drop. *See* Siegel Decl. ¶ 15. Importantly, this is not a case where a contested fee is being forced upon a third party or taxpayers, but rather an amount agreed upon by a sophisticated defendant after arm's length negotiations, which will not reduce the benefits made available to the Class under the settlement.

Settlement Class Counsel's request for \$7,250,000 in compensation for their time and effort and in reimbursement for expenses is fair and reasonable, and the Court should grant Plaintiffs' Motion.

3. *Settlement Class Counsel provided exceptional work in this litigation.*

Large scale, commercial class actions are, by their very nature, complicated and time-consuming. Here, unlike in the AmeriGas matter, Blue Rhino from the outset chose (as was its right) to take an aggressive litigation posture. In light of this, a major commitment of time and resources was required to obtain the result now before the Court. The result was by no means certain and Blue Rhino defended the case vigorously through multiple dispositive motions and extensive discovery. Blue Rhino denied and continues to deny all of Plaintiffs' allegations, and defense counsel advocated this position strenuously throughout the extensive settlement negotiations. *See* Siegel Decl. ¶¶ 6-8. At the time of settlement, the parties were in the process of preparing for extensive briefing on issues such as class certification and amendment of the complaint. *See id.* Had the parties not reached a fair and reasonable compromise, this litigation would no doubt have proceeded for the foreseeable future, delaying relief to class members, with the risk of obtaining no relief at all, and unnecessarily expending judicial resources. *See* Siegel Decl. ¶ 8; King Decl. ¶¶ 24-27; *Cohn*, 375 F. Supp. 2d at 862 (approving requested fee, stating "this Court looks favorably upon the skill of counsel in achieving benefits without burdening the judicial system."). In light of the legal and factual complexities and challenges presented by this case, this settlement is a very favorable result for Class.

Moreover, because Settlement Class Counsel prosecuted this case on a contingent basis, including advancing all fees and expenses during the litigation, counsel faced the very real risk of an unsuccessful outcome and no fee of any kind. *See* King Decl. ¶¶ 24-27 (describing risks of continued litigation). Settlement Class Counsel skillfully prosecuted and negotiated a fair resolution of class members' claims, which because of their individually small size could never practically be pursued on an individual, hourly-fee basis. *See* Siegel Decl. ¶ 8.

These facts more than satisfy the third and fourth factors that the Court examines in determining the amount to award in attorneys' fees and expenses. The contingent nature of the case and the quality of the lawyering are evident in the record and the result. Settlement Class

Counsel therefore respectfully request that the Court grant their request for an award of \$7,250,000 for their attorneys' fees and expenses.

## **II. THE NAMED PLAINTIFFS ARE DESERVING OF SERVICE AWARDS.**

In light of their efforts resulting in a favorable settlement on behalf of a nationwide class of thousands of individuals, plaintiffs to be identified to the Court in advance of the February 24, 2012 Fairness Hearing are deserving of modest service awards. *See* Siegel Decl. ¶¶ 19-21. The Settlement Agreement provides that, subject to Court approval, Blue Rhino will pay \$1,500 each to Plaintiffs in the Litigation who were deposed by Blue Rhino, and \$750 each to Plaintiffs in the Litigation who were not deposed. Blue Rhino will pay these amounts in addition to and separate from the amounts it will pay to Class members under the settlement. *See* Settlement Agreement at ¶ 14.2; *see also* Siegel Decl. ¶ 19. The Court should approve these service awards for those Plaintiffs who pursued cases as named plaintiffs and were subject to substantial discovery ultimately resulting in a favorable settlement on behalf of a nationwide class.

The time an individual devotes to a lawsuit that inures to the common benefit of the class warrants entitlement to an award greater than what the typical class member will receive. *See In re US Bancorp Litig.*, 291 F.3d at 1037 (approving incentive awards of \$2,000 to five representative plaintiffs whose efforts in the litigation resulted in a class fund of approximately \$3.5 million); *In re Aquila ERISA Litig.*, No. 04-00865-CV-DW, 2007 WL 4244994, at \*3 (W.D. Mo. Nov. 29, 2007) (awarding incentive awards between \$5,000 and \$25,000 for named plaintiffs because they “rendered valuable service to the Plan and all Plan Participants. Without this participation, there would have been no case and no settlement.”). The size of the service awards sought here is modest compared to the amounts awarded in the cited cases.

Plaintiffs request modest \$1,500 or \$750 awards for providing assistance to counsel in investigating and litigating this matter. Their conduct has inured to the substantial benefit of the class: without their efforts, this case would not have been brought and this settlement would not have been achieved. *See* Siegel Decl. ¶¶ 19-21.

**CONCLUSION**

For the reasons set forth herein, Plaintiffs respectfully request that the Court grant their Unopposed Motion for Approval of Attorneys' Fees, Service Awards, and Reimbursement of Expenses.

Dated: December 27, 2011

Respectfully submitted,

/s/ Norman E. Siegel

Norman E. Siegel  
STUEVE SIEGEL HANSON LLP  
460 Nichols Road, Suite 200  
Kansas City, MO 64112  
(816) 714-7112  
(816) 714-7101 (fax)

*Liaison Counsel, Member of the Executive  
Committee, and Settlement Class Counsel*

Elizabeth A. Fegan  
HAGENS BERMAN SOBOL SHAPIRO LLP  
1144 W. Lake Street, Suite 400  
Oak Park, IL 60301  
(708) 628-4960  
(708) 628-4950 (fax)

*Settlement Class Counsel and Member of the  
Executive Committee*

Laurence D. King  
KAPLAN FOX & KILSHEIMER LLP  
350 Sansome Street, Suite 400  
San Francisco, California 94104  
phone (415) 772-4700  
fax (415) 772-4707

*Settlement Class Counsel and Member of the  
Executive Committee*

Eric H. Gibbs  
GIRARD GIBBS LLP  
601 California Street, Suite 1400  
San Francisco, CA 94108  
(415) 981-4800  
(415) 981-4846 (fax)

*Settlement Class Counsel and Member of the  
Executive Committee*

Christopher Burke  
SCOTT+SCOTT LLP  
600 B Street, Ste. 1500  
San Diego, CA 92101  
Tel.: (619) 233-4565  
Fax: (619) 233-0508

*Member of the Executive Committee*

Edward M. Gergosian  
Robert J. Gralewski, Jr.  
GERGOSIAN & GRALEWSKI LLP  
655 West Broadway, Suite 1410  
San Diego, CA 92101  
Tel.: (619) 237-9500

*Member of the Executive Committee*

**CERTIFICATE OF SERVICE**

I hereby certify that on December 27, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will automatically send a notice of electronic filing to counsel of record.

/s/ Norman E. Siegel  
Norman E. Siegel