

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

Fond Du Lac Bumper Exchange, Inc., and
Roberts Wholesale Body Parts, Inc. on Behalf of
Themselves and Others Similarly Situated,

Plaintiffs,

v.

Jui Li Enterprise Company, Ltd., et al.,

Defendants.

Case No. 2:09-cv-00852-LA

Consolidated with:

Fireman's Fund Insurance Company, on
behalf of itself and all others similarly situated,

Plaintiff,

v.

Jui Li Enterprise Company, Ltd., et al.,

Defendants.

Case No. 2:13-cv-00987-LA

National Trucking Financial Reclamation Services,
LLC, individually and on behalf of itself and all others
similarly situated,

Plaintiff,

v.

Jui Li Enterprise Company Ltd., et al.,

Defendants.

Case No. 2:14-cv-1061-LA

**MEMORANDUM IN SUPPORT OF REPRESENTATIVE PLAINTIFFS'
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT AGREEMENT WITH GORDON AUTO BODY PARTS CO. LTD.**

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INTRODUCTION

After years of litigation and months of hard-fought negotiations, Fireman's Fund Insurance Company and National Trucking Financial Reclamation Services, LLC ("Representative Plaintiffs"), individually and on behalf of the Settlement Class (as defined in the Settlement Agreement and stated below),¹ and defendant Gordon Auto Body Parts Co. Ltd. ("Gordon" or "Settling Defendant"), entered into a Settlement Agreement (the "Settlement").²

In summary, the Settlement provides that: (1) Settling Defendant will pay \$2,500,000 for the benefit of the Settlement Class, with no less than USD \$2,000,000 being placed into an escrow account following payment of a mandatory 20% Taiwanese withholding tax; (2) Settling Defendant will work with Co-Lead Settlement Class Counsel to attempt to recover for the benefit of the Settlement Class all or part of the withholding taxes paid; (3) Settling Defendant shall provide cooperation designed to facilitate and aid Representative Plaintiffs in pursuing and advancing the Action against Non-Settling Defendants; and (4) in exchange for the above-mentioned benefits, Settlement Class members' claims against Settling Defendant will be released. All Settlement Class members will be eligible to submit a claim to receive a cash payment from the Settlement Fund.

As detailed herein, the Settlement is an excellent one and readily satisfies the standard of "within the range of possible approval." Accordingly, Representative Plaintiffs move this Honorable Court for entry of an Order: (1) granting preliminary approval of the Settlement Agreement; (2) approving the proposed Notice to the Settlement Class and the methods for

¹ The definitions in the Settlement Agreement are incorporated herein by reference.

² A copy of the Settlement Agreement ("SA") is attached as Exhibit A to the Declaration of Ben Barnow, filed herewith.

dissemination of Notice set forth in the Notice Program;³ (3) appointing Kurtzman Carson Consultants LLC (“KCC”) as Notice Specialist and Claims Administrator; (4) certifying the Settlement Class for settlement purposes only; (5) appointing Fireman’s Fund Insurance Company and National Trucking Financial Reclamation Services, LLC, as Representative Plaintiffs; (6) appointing Ben Barnow, Barnow and Associates, P.C., Michael L. Roberts, Roberts Law Firm, P.A., Daniel R. Karon, Karon LLC, Melissa H. Maxman, Cozen O’Connor, and Derek G. Howard, Minami Tamaki, LLP, as Co-Lead Settlement Class Counsel; (7) approving the Claim Form attached as Exhibit C to the Declaration of Ben Barnow, and the Summary Postcard Notice, Summary Publication Notice, and Detailed Notice attached as Exhibits 2–4, respectively, to the Declaration of Carla A. Peak on Gordon Auto Body Parts Co. Ltd. Settlement Notice Plan and Notice Documents; and (8) scheduling a Final Fairness Hearing to consider entry of a final order approving the Settlement and the request for attorneys’ fees, costs, expenses, and Representative Plaintiff incentive awards.

BACKGROUND

I. NATURE OF THE LITIGATION

Representative Plaintiffs allege that Defendants engaged in a lengthy conspiracy to fix the prices of Aftermarket Automotive Sheet Metal Products⁴ sold in the United States and to restrict the output of same. *See* Fireman’s Fund’s Amended Class Action Complaint (May 5, 2014) [Doc.

³ The Notice Program is set forth in the Declaration of Carla A. Peak on Settlement Notice Plan and Notice Documents, which is attached as Exhibit B to the Declaration of Ben Barnow.

⁴ “Aftermarket Automotive Sheet Metal Products” means any and all aftermarket automotive products comprised of any kind of sheet metal, including but not limited to, hoods, doors, bumpers, fenders, bonnets, floor panels, trunk assemblies, trunk lids, tailgates, roof panels, and reinforcement parts. SA ¶ 1. Original equipment manufacturer parts are not aftermarket automotive products and, as such, are not Aftermarket Automotive Sheet Metal Products. *Id.*

No. 471], Class Action Complaint, *Nat'l Trucking Fin. Reclamation Servs., LLC v. Jui Li Enterprise Co. Ltd. et al.*, No. 2:14:01061-LA (E.D. Wis. Aug. 29, 2014).⁵ As a result of reimbursing others for the purchase of Aftermarket Automotive Sheet Metal Products for end use, Representative Plaintiffs, on behalf of themselves and all others similarly situated, assert claims under federal antitrust law and the antitrust and consumer protection laws of 18 states. *See id.*

II. PROCEDURAL HISTORY

During the course of this litigation, Defendants have moved for dismissal of indirect purchaser claims on three separate occasions. [Doc. Nos. 245, 247, 487]. The Court denied two of Defendants' motions to dismiss. *See* Decision and Order (Sept. 5, 2012) [Doc. No. 305] (denying Defendants' motion to dismiss Indirect-Purchaser Plaintiffs' Second Amended Complaint)⁶; Decision and Order (Jan. 12, 2015) [Doc. No. 533] (denying Defendants' motion to dismiss Fireman's Fund's Amended Class Action Complaint). And, Defendants voluntarily withdrew the third motion after an opposition was filed. [Doc. No. 267] (withdrawing Defendants' motion to dismiss Indirect-Purchaser Plaintiffs' Second Amended Complaint for lack of subject matter jurisdiction). Gordon has answered Representative Plaintiffs' class action complaints. [See Doc. Nos. 542, 578].

As is expected in an international antitrust action such as this case, discovery has been protracted, contested, and complex. That process has involved, among other things, Representative Plaintiffs issuing written discovery on Defendants; responding to Defendants' written discovery, including contention interrogatories; serving dozens of third-party subpoenas; reviewing

⁵ On September 12, 2014, the Court transferred National Trucking's claims to this consolidated litigation.

⁶ The claims of Arkansas Transit Homes, Inc., Olivia Lee, Patrick Torrey, and Mary Louis Fowler were voluntarily dismissed. [See Doc Nos. 472, 500, 517, 526].

hundreds-of-thousands of documents produced by Defendants and third parties—many of which were in Mandarin Chinese; and participating in 21 depositions—18 of which occurred in Taipei, Taiwan. Co-Lead Settlement Class Counsel and other attorneys from their firms also engaged in numerous conferences with counsel for Defendants, third parties, and the direct purchaser plaintiffs’ counsel to advance the discovery process. Additionally, since December 2013, Co-Lead Settlement Class Counsel have participated in the monthly status conferences held by the Court.

III. SETTLEMENT NEGOTIATIONS

The Settlement was reached as a result of several rounds of hard-fought, arm’s length negotiations. In August 2014, Co-Lead Settlement Class Counsel engaged in mediation with all Defendants before the Honorable Martin Quinn (Ret.) of JAMS in San Francisco, California. Discussions continued for weeks thereafter, but the parties were unable to reach agreement.

In early December 2014, counsel for the Settling Parties renewed settlement discussions. On April 21, 2015, after months of negotiations and with the aid of the mediator, Judge Martin Quinn (Ret.), Representative Plaintiffs and Tong Yang Industry Co., Ltd., as Successor-in-Interest to Taiwan Kai Yih Industrial Co. Ltd., and TYG Products L.P., executed a Memorandum of Understanding and on May 8, 2015, executed a Settlement Agreement (the “Tong Yang Settlement”. [See Doc. No. 666-1]. On May 29, 2015, the Court entered an Order granting preliminary approval to the Tong Yang Settlement. [See Doc. No. 670]. The Final Fairness Hearing on the Tong Yang Settlement is presently scheduled for November 5, 2015. [See Doc. No. 692].

After the execution of the Tong Yang settlement, negotiations continued between Representative Plaintiffs and Gordon and Representative Plaintiffs and Gordon executed a Settlement Agreement. See Barnow Decl., Ex. A.

IV. SUMMARY OF THE SETTLEMENT

A. The Settlement Class

Under the terms of the Settlement, the Settling Parties agreed to certification of the following Settlement Class for settlement purposes only:

Representative Plaintiffs and all third-party payors who indirectly paid or reimbursed others for the purchase of Aftermarket Automotive Sheet Metal Products for end use and not sale or resale, purchased anywhere in the United States between January 1, 2003, through the date notice is presented to the Settlement Class.

SA ¶ 8.⁷ Excluded from the Settlement Class are: (a) Defendants and their parents, subsidiaries, and affiliates; (b) all governmental entities; (c) any judicial officer presiding over the Action and the members of his/her immediate family and judicial staff; and (d) those Persons who timely and validly request exclusion from the Settlement Class. SA ¶ 8.

B. Settlement Benefits

The Settlement provides that Settling Defendant will pay \$2,500,000 for the benefit of the Settlement Class. SA ¶ 30. Under Taiwanese law, a withholding tax of 20% must be paid before the funds can be deposited into a United States based escrow account. After said taxes are paid, no less than USD \$2,000,000 will be deposited into the United States based Escrow Account. SA ¶ 30. The first payment (out of five payments) in the amount of \$1,120,000, will be made to the Escrow Account within 30 calendar days after the Court enters an Order granting preliminary approval of the Settlement. SA ¶ 30. After the first payment is made, there will be additional payments each in the amount of USD \$220,000 to the Escrow Account on or before each of the following dates: January 1, 2016, July 1, 2016, January 1, 2017, and July 1, 2017, subject to certain limited extensions. SA ¶ 30. Settling Defendant shall deposit into an escrow account in Taiwan all

⁷ References to particular paragraphs of the Settlement are prefixed by “SA ¶.”

of the amounts and fees that Taiwan counsel (counsel to be chosen by Co-Lead Settlement Class Counsel) estimates will be required to file and enforce the Stipulated Judgment if Settling Defendant misses any of the payments subsequent to the first payment. SA ¶ 42. Settling Defendant shall not be entitled to a dismissal with prejudice from the Action until all payments required by the Settlement are made; Settling Defendant will be subject to continued litigation if any payment is not timely made. SA ¶ 42.

To receive a payment from the Escrow Account, Settlement Class members need only complete and submit a timely claim form identifying the Aftermarket Automotive Sheet Metal Products that they purchased or reimbursed others for and the amounts they paid for such purchases and reimbursements, subject to reasonable documentation as required by the Claims Administrator. *See Proposed Claim Form*, attached as Exhibit C to the Declaration of Ben Barnow.

Settling Defendant shall assist Co-Lead Settlement Class Counsel to attempt to recover the withholding taxes paid (estimated to be USD \$500,000) to the Taiwanese government on behalf of the Settlement Class. SA ¶ 31. Any refunds of such taxes paid shall be deposited into the Escrow Account or such other similar account. SA ¶ 31.

Settling Defendant shall also provide cooperation designed to facilitate and aid Representative Plaintiffs in pursuing and advancing the Action as set forth in the Confidential Letter Agreement executed by Settling Parties on June 4, 2015. SA ¶ 36.

All Settlement Class member payments, notice costs, costs of claims administration, and attorneys' fees, costs, expenses, and Representative Plaintiff incentive awards shall be paid from the Settlement Fund. SA ¶ 33. The costs of notice, claims administration, attorneys' fees, costs, and expenses, and Representative Plaintiff incentive awards (collectively "Administration Costs/Fees") shall be deducted prior to the distribution of the remainder of the Escrow Account.

Co-Lead Settlement Class Counsel intend to seek approval of the Court for payment, which is to be made on or before 30 days after the Effective Date of the Settlement from the Settlement Fund, of: (1) one-third of the \$2,500,000 Settling Defendant is paying for the benefit of the Settlement Class (\$833,333) for attorneys' fees; (2) reimbursement of reasonable costs and expenses; and (3) incentive awards for each Representative Plaintiff in the amount of \$5,000.

After deduction of Administration Costs/Fees from the Escrow Account, the distribution of the remainder of the Escrow Account shall occur as set forth herein.

Distribution Schedule:

1st Scenario (No Appeal): If there is no appeal regarding the Gordon Settlement, then there will be two (2) distributions. The first distribution from the Escrow Account to Settlement Class members shall be within 90 days after the settlement becomes final (as defined in SA ¶ 23). The second distribution shall be made on or before July 15, 2017, which is 14 days after the last payment into the Escrow Account is to be made.

Second Scenario: If there is an appeal and the Settlement becomes final on or before July 1, 2016, then there will be two (2) distributions: the first on or before July 15, 2016; and the second on or before July 15, 2017.

Third Scenario: If there is an appeal and the Settlement becomes Final on or after July 2, 2016, but before July 2, 2017, then there will be one (1) distribution (because the last payment into the Escrow account is July 1, 2017) on or before July 15, 2017.

Fourth Scenario: If there is an appeal and the Settlement becomes Final on or after July 2, 2017, then there will be one (1) distribution (because the last payment into the Escrow account is July 1, 2017) within 90 days of the settlement becoming final.

As to each of the above distribution dates, they shall be extended for an amount of time equal to an extension granted under the Settlement.

Explanation of how the two distributions will be calculated under the First and Second Scenarios.

In the event that there are two distributions, the amounts to be paid to each Settlement Class member will be paid as follows. The amounts to be paid to each Settlement Class member in the first distribution shall be calculated at the time of distribution as follows: (i) if the aggregate monetary value of all valid claims submitted does not exceed the funds existing in the Escrow Account, each Settlement Class member who submitted a valid claim shall receive the total amount claimed and, to the extent additional funds remain in the Escrow Account, such funds shall be distributed on a pro rata basis to all Settlement Class members who submitted a valid claim; (ii) if the aggregate monetary value of all valid claims submitted exceeds the funds existing in the Escrow Account, the funds existing in the Escrow Account shall be distributed to Settlement Class members who submitted valid claims on a pro rata basis. The amounts to be paid to each Settlement Class member in the second distribution shall be calculated at the time of distribution as follows: (i) if the Settlement Class member was previously mailed a check in the total amount claimed on the Settlement Class member's claim form, then the Settlement Class member shall receive a pro rata share of the funds existing in the Escrow Account at the time of the second distribution; (ii) if the Settlement Class member was previously mailed a check in an amount based on a pro rata calculation, then the Settlement Class member shall be mailed a check for the balance of the amount claimed on the Settlement Class member's claim form; but if there are not enough funds remaining in the Escrow Account to pay the balance of the amount claimed, then a pro rata calculation shall be made of the remaining funds and paid to Settlement Class members.

Payments to Settlement Class members shall be made by mailing checks to them at the address stated in their respective claim forms or such other current addresses as the Claims Administrator may become aware of. Settlement Class members are responsible for notifying the Claims Administrator of any change of address.

If any funds remain in the Escrow Account following the above-mentioned payments and distributions, including uncashed checks after 12 months from the date of issuance, such funds will be distributed pro rata to Settlement Class members who submitted valid claims, unless such remaining funds are *de minimis* in that they are insufficient to cover the costs of printing and mailing checks and related claims administration costs and to provide for the payment of \$5 or more to each Settlement Class member receiving a distribution, in which case such funds shall be distributed to Settlement Class members in connection with the next distribution to the Settlement Class, such as a distribution relating to a settlement with a Non-Settling Defendant or a judgment in favor of the Settlement Class. However, if such distribution does not occur, after the conclusion of the Actions, Co-Lead Settlement Class Counsel shall petition the Court for leave to contribute such funds to one or more non-profit organizations to be identified at that time dedicated to protecting and preserving competition in the United States.

All payments are to be made from the net fund, that is, the amount remaining after the payment of the award of attorneys' fees, costs, and expenses and the payment of notice costs.

ARGUMENT

I. PRELIMINARY APPROVAL OF THE SETTLEMENT IS APPROPRIATE

“Federal courts naturally favor the settlement of class action litigation.” *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996). Indeed, “[i]t is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement. In the class action context in

particular, there is an overriding public interest in favor of settlement.” *Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee*, 616 F.2d 305, 312-13 (7th Cir. 1980), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998) (quotations omitted). Evaluations of fairness, reasonableness, and adequacy require that the facts be viewed in a light most favorable to the settlement. *Isby*, 75 F.3d at 1199.

In *Armstrong v. Bd. of Sch. Dirs. Of City of Milwaukee*, the Seventh Circuit detailed the two-step process that district courts use to review class action settlements:

District court review of a class action settlement proposal is a two-step process. The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is “within the range of possible approval.” This hearing is not a fairness hearing; its purpose, rather, is to ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing. If the district court finds a settlement proposal “within the range of possible approval,” it then proceeds to the second step in the review process, the fairness hearing. Class members are notified of the proposed settlement and of the fairness hearing at which they and all interested parties have an opportunity to be heard.

616 F.2d at 314 (citations omitted).

When determining whether a settlement is within the range of possible approval, courts look to (1) the strength of plaintiff’s case compared to the amount of the defendants’ settlement offer; (2) the likely complexity, length, and expense of the litigation; (3) the amount of opposition to the settlement; (4) the opinion of competent counsel; and (5) the stage of the proceedings and the amount of discovery completed at the time of the settlement. *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006).

Analysis of these factors supports that the Settlement is well within the required range of possible approval.

A. The Strength of Settlement Class Members' Claims Compared to the Amount Offered by the Settlement

“The most important factor relevant to the fairness of a class action settlement is the first one listed: the strength of the plaintiffs’ case on the merits balanced against the amount offered in the settlement.” *Synfuel Techs., Inc.*, 463 F.3d at 653 (internal citation and quotes omitted). “Because the essence of settlement is compromise, courts should not reject a settlement solely because it does not provide a complete victory to plaintiffs.” *In re AT&T Mobility*, 270 F.R.D. at 330 (citation omitted).

The Settlement provides significant relief. Settling Defendant must pay \$2,500,000 for the benefit of the Settlement Class, which will result in an initial \$2,000,000 Settlement Fund after payment of the mandatory 20% Taiwanese withholding tax. SA ¶ 30. Settling Defendant shall assist Co-Lead Settlement Class Counsel in attempting to obtain a refund of those taxes paid (estimated to be \$500,000) to the Taiwanese government and any monies recovered as a result of such efforts will be deposited in the Escrow Account or a similar account for the benefit of the Settlement Class. SA ¶ 31. Settlement Class members are eligible to submit claims to receive payments from the Escrow Account.

The benefits of the Settlement go beyond the cash payments. The Settlement also includes a cooperation component that will aid Representative Plaintiffs in litigating their claims against Non-Settling Defendants. SA ¶ 36. The Settlement sends a strong message to Non-Settling Defendants that they must now defend Representative Plaintiffs’ claims without any further financial and litigation support from Settling Defendant. As Non-Settling Defendants know, the Settlement leaves them exposed to joint and several liability for all damages caused by the alleged conspiracy. *See Paper Sys. Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629, 633 (7th Cir. 2002); *see also In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003) (“the first

settlement in the litigation . . . should increase the likelihood of future settlements”). This term and commitment breaks the net of secrecy that so often prevents recovery in conspiracy situations, particularly with defendants located in distant jurisdictions.

Although Representative Plaintiffs and Co-Lead Settlement Class Counsel firmly believe the claims asserted in the litigation have merit, they are also cognizant of the risks involved in continuing the litigation against Settling Defendant. Throughout the litigation, Settling Defendant has aggressively maintained its position regarding liability and damages—it denies both. Co-Lead Settlement Class Counsel are mindful of the potential challenges of litigating indirect purchaser claims in this international price-fixing conspiracy against Settling Defendant through class certification, summary judgment, trial, and appeal. *See, e.g., Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989) (antitrust class actions are “notoriously complex, protracted, and bitterly fought”). They are also aware of the potential difficulties that could be encountered in collecting on a judgment entered against Gordon, a Taiwanese corporation.

A comparison of the strength of Representative Plaintiffs’ claims with the money and cooperation offered by the Settlement supports preliminary approval of the Settlement.

B. The Complexity, Time, and Expense of Continued Litigation

Prosecuting this litigation through trial and appeal would be lengthy and complex, and impose significant costs on all parties. *See, e.g., In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000) (recognizing that “[m]ost class actions are inherently complex and settlement avoids the costs, delays, and multitude of other problems associated with them”).

Continued proceedings would likely include substantial motion practice, continued fact discovery, class certification proceedings, trial, and appeal. Given the nature of the conduct at

issue, a battle of the experts at class certification and trial on the issues of antitrust impact and damages is almost a certainty, and continued proceedings would likely include substantial expert discovery and significant related motion practice.

The Settlement, in contrast, delivers a real and substantial remedy to the Settlement Class without the risk or delay inherent in prosecuting this matter through trial and appeal. Because a substantial part of such litigation would be specific to the claims against Settling Defendant, the Settlement avoids a considerable portion of the costs, commitments of time by Settling Parties and their counsel, and demands on the Court's resources. Thus, this factor favors preliminary approval of the Settlement. *See, e.g., Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) ("There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation."); *In re Sunrise Sec. Litig.*, 131 F.R.D. 450, 455 (E.D. Pa. 1990) (approving a class action settlement because, in part, the settlement "will alleviate . . . the extraordinary complexity, expense and likely duration of this litigation"). And here, the cooperation provided for by the Settlement facilitates a further recovery with greater efficiency.

C. The Views of Experienced Counsel

The opinion of competent counsel is a factor to be considered by the Court in determining whether the settlement is fair, reasonable, and adequate. *Isby*, 75 F.3d at 1200.

Co-Lead Settlement Class Counsel have extensive experience litigating complex class actions, including major antitrust matters, and are of the opinion that the Settlement is an excellent one, readily satisfying the standard of within the range of possible approval. Cumulatively, their experience is vast and the settlements they have achieved have been approved by numerous courts. *See* Barnow Decl. Exhibits D–H (resumes of Proposed Co-Lead Settlement Class Counsel). This factor weighs in favor of preliminary approval of the Settlement.

D. The Stage of Proceedings and the Amount of Discovery Completed

Co-Lead Settlement Class Counsel were well informed of the important facts and relevant legal issues when negotiating the Settlement. As stated above, the Settling Parties engaged in years of discovery before entering into the Settlement. That discovery process involved, among other things, Representative Plaintiffs issuing written discovery on Defendants; responding to Defendants' written discovery, including contention interrogatories; serving dozens of third-party subpoenas; reviewing hundreds of thousands of documents produced by Defendants and third parties—many of which were in Mandarin Chinese; participating in 21 depositions—18 of which occurred in Taipei, Taiwan; and participating in numerous conversations with counsel for Defendants, third parties, and direct purchaser plaintiffs. This factor favors preliminary approval of the Settlement.

II. CERTIFICATION OF THE SETTLEMENT CLASS

Courts favor the use of settlement classes “to foster negotiated conclusions to class actions.” *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995). A settlement class in complex litigation “actually enhances absent class members’ opt-out rights because the right to exclusion is provided simultaneously with the opportunity to accept or reject the terms of a proposed settlement.” *In re Prudential Sec. Ltd. P’ship Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y. 1995)

When granting preliminary approval of a class action settlement, it is appropriate for a court to certify a class for settlement purposes. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). The Settling Parties agreed to certification of the following Settlement Class for settlement purposes only:

Representative Plaintiffs and all third-party payors who indirectly paid or reimbursed others for the purchase of Aftermarket Automotive Sheet Metal

Products for end use and not sale or resale, purchased anywhere in the United States between January 1, 2003, through the date notice is presented to the Settlement Class.

SA ¶ 8. Excluded from the Settlement Class are: (a) Defendants and their parents, subsidiaries, and affiliates; (b) all governmental entities; (c) any judicial officer presiding over the Action and the members of his/her immediate family and judicial staff; and (d) those Persons who timely and validly request exclusion from the Settlement Class. SA ¶ 8.

A. The Settlement Satisfies the Requirements of Fed. R. Civ. P. 23(a)

Rule 23(a) sets forth the following prerequisites for certifying a class: “(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a). These requirements are satisfied here.

1. The Settlement Class Is so Numerous that Joinder Is Impracticable

Fed. R. Civ. P. 23(a)(1) requires a showing that “the class is so numerous that individual joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). No “magic number” is necessary. *See Swanson v. Am. Consumer Indus.*, 415 F.2d 1326, 1333 n.9 (7th Cir. 1969). Courts in this circuit have certified classes with less than 50 members. *Patrykus v. Gomilla*, 121 F.R.D. 357, 361 (N.D. Ill. 1988). As evidenced by the proposed Notice Program, it is believed that Settlement Class members number in the thousands. Thus, the Settlement Class is so numerous that joinder of all members is impractical.

2. There Are Questions of Law and Fact Common to the Class

Rule 23(a)(2) requires the existence of a question of law or fact that is common to all Class members and capable of class-wide resolution, the determination of which is central to the validity

of all class members' claims. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). In price-fixing cases, the first element of the plaintiffs' claims—whether there has been an antitrust violation—is by itself generally sufficient to satisfy the commonality requirement. See *Paper Sys. Inc. v. Mitsubishi Corp.*, 193 F.R.D. 601, 612 (E.D. Wis. 2000).

Questions of law or fact common to the Settlement Class include:

- a) Whether Gordon and the other Defendants engaged in an unlawful conspiracy to artificially fix, inflate, maintain, or stabilize the prices of Aftermarket Automotive Sheet Metal Products sold in the United States;
- b) Whether the conduct of Gordon and the other Defendants caused the prices of Aftermarket Automotive Sheet Metal Products sold in the United States to be artificially inflated;
- c) Whether Gordon and the other Defendants engaged in an unlawful conspiracy to restrict the output of Aftermarket Automotive Sheet Metal Products sold in the United States;
- d) Whether Gordon and the other Defendants' conduct caused injury to members of the Settlement Class and, if so, the proper measure of damages; and
- e) Whether Gordon and the other Defendants undertook actions to conceal the unlawful conspiracy as alleged.

These questions are common to each member of the Settlement Class. Therefore, the commonality requirement is satisfied.

3. Representative Plaintiffs' Claims Are Typical of the Claims of the Settlement Class

Typicality is satisfied when “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). Whether a plaintiff's claims are typical of those of the other class members is closely related to the commonality inquiry. *Keele v. Wexler*, 149 F.3d 589, 595 (7th Cir. 1998). A “plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his

or her claims are based on the same legal theory.” *Id.* Typicality does not require claims to be “identical,” and is generally “liberally construed.” *Gasper v. Linvatec Corp.*, 167 F.R.D. 51, 57 (N.D. Ill. 1996).

As alleged, Settlement Class members all suffered the same form of harm on account of paying artificially inflated prices for Aftermarket Automotive Sheet Metal Products as a result of Gordon and its co-conspirators’ conduct. Thus, Rule 23(a)(3)’s typicality requirement is satisfied.

4. Representative Plaintiffs Will Fairly and Adequately Represent the Interests of the Settlement Class

Representative parties must “fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). Adequacy requires that class representatives retain adequate counsel and have no conflicting interests with other class members. *Ready-Mixed Concrete*, 261 F.R.D. at 168; *Eggleston v. Chicago Journeymen Plumbers’ Local Union No. 130*, 657 F.2d 890, 896 (7th Cir. 1981) (requiring “competent and experienced counsel able to conduct the litigation”). When class representatives and members seek the common goal of the largest possible recovery for the class, their interests do not conflict. *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 208 (5th Cir. 1981); *see also Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004) (“There is no conflict between the class representatives and the other class members. All share the common goal of maximizing recovery.”).

Representative Plaintiffs’ interests are aligned with those of the other Settlement Class members. Representative Plaintiffs and all other Settlement Class members were injured by the same alleged conduct—Gordon and the other Defendants’ conspiracy to fix the prices of Aftermarket Automotive Sheet Metal Products and to restrict the output of same—and share a strong interest in establishing Gordon and the other Defendants’ liability and maximizing class-wide damages. Additionally, Co-Lead Settlement Class Counsel are highly capable and

experienced attorneys who have successfully prosecuted numerous class action cases, including major antitrust actions, and are capable of and committed to vigorously representing the interests of the Settlement Class. *See* Barnow Decl. Exhibits D–H (resumes of Proposed Co-Lead Settlement Class Counsel).

For these reasons, Rule 23(a)(4)’s requirements are satisfied.

B. The Requirements of Rule 23(b)(3) Are Satisfied

Rule 23(b)(3) requires that “questions of law or fact common to the members of the class predominate over any questions affecting only individual members of the class, 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). These requirements were added “to cover cases ‘in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.’” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (quoting Fed. R. Civ. P. 23(b)(3) Adv. Comm. Notes to 1966 Amendment).

Both of these requirements are satisfied here.

1. Common Questions of Law and Fact Predominate Over Individual Questions

Rule 23(b)(3)’s predominance element requires that “questions of law or fact common to class members predominate over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3). The requirement “is satisfied when ‘common questions represent a significant aspect of [a] case and . . . can be resolved for all members of [a] class in a single adjudication.’” *Messner*, 669 F.3d at 815 (quoting 7AA Wright & Miller, *Federal Practice & Procedure* § 1778 (3d ed. 2011)). “Predominance is a test readily met in certain cases alleging . . . violations of . . . antitrust laws.” *Amchem Prods., Inc.*, 521 U.S. at 625.

The existence, operation, and effect of Gordon and the other Defendants' alleged conspiracy to restrict output and to artificially fix, raise, and maintain the prices of Aftermarket Automotive Sheet Metal Products sold in the United States are central issues in this case that are common to all Settlement Class members. Furthermore, Representative Plaintiffs contend that the structural characteristics of the Aftermarket Automotive Sheet Metal Products industry facilitated the conspiracy and resulted in changes in pricing that had a common impact on all Settlement Class members. These issues could be proven with evidence common to all Settlement Class members. Here, questions of law or fact common to the Settlement Class predominate over any potential questions affecting only individual Settlement Class members. Therefore, the predominance requirement is satisfied in this case.

2. A Class Action Is the Superior Method to Fairly and Efficiently Adjudicate This Matter

Rule 23(b)(3) requires a class action to be “superior to other available methods for the fair and efficient adjudication of the controversy,” and sets forth the following factors:

The matters pertinent to the findings include: (A) the class members' interest in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). Where, as here, a court is deciding on the certification question in the context of a proposed settlement class, questions regarding the manageability of the case for trial purposes do not have to be considered. *See Amchem*, 521 U.S. at 619. “[A] class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all.” *Carnegie v. Household Int’l Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

A class action is not only the most desirable, efficient, and convenient mechanism to resolve the claims of the Settlement Class, but it is almost certainly the only fair and efficient means available to adjudicate such claims. *See, e.g., Phillips Co. v. Shutts*, 472 U.S. 797, 809 (1985) (“[c]lass actions . . . permit the plaintiffs to pool claims which would be uneconomical to litigate individually . . . [in such a case,] most of the plaintiffs would have no realistic day in court if a class action were not available”). Individual Settlement Class members likely would be unable or unwilling to shoulder the great expense of litigating the claims at issue against Gordon and the other Defendants, given the comparatively small size of each individual Settlement Class members’ claims. *See Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) (stating that the “policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action”). Thus, it is desirable to adjudicate this matter as a class action.

III. CO-LEAD SETTLEMENT CLASS COUNSEL ARE WELL QUALIFIED TO REPRESENT THE INTERESTS OF THE SETTLEMENT CLASS

“An order certifying a class action . . . must also appoint class counsel under Rule 23(g).” Fed. R. Civ. P. 23(c)(1)(B). In appointing class counsel, courts should consider (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action, (iii) counsel’s knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A).

The work of Ben Barnow, Barnow and Associates, P.C.; Michael L. Roberts, Roberts Law Firm, P.A.; Daniel R. Karon, Karon LLC; Melissa H. Maxman, Cozen O’Connor; and Derek G. Howard, Minami Tamaki, LLP, in this litigation and their experience prosecuting complex litigation matters, including antitrust class action matters, demonstrates that they are well qualified

to represent the Settlement Class and possess the necessary resources to do so. *See* Barnow Decl. Exhibits D–H (resumes of Proposed Co-Lead Settlement Class Counsel).

IV. THE NOTICE PROGRAM SATISFIES ALL APPLICABLE REQUIREMENTS

Pursuant to Rule 23(e)(1)(B), “[t]he court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement” Fed. R. Civ. P. 23(e)(1)(B). Pursuant to Rule 23(c)(2)(B), “the court must direct to class members the best notice that is practicable under the circumstances.” The purpose of notice is to “afford members of the class due process which, in the context of the Rule 23(b)(3) class action, guarantees them the opportunity to be excluded from the class action and not be bound by any subsequent judgment.” *Peters v. Nat’l R.R. Passenger Corp.*, 966 F.2d 1483, 1486 (D.C. Cir. 1992) (citing *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 173–74 (1974)). Further, notice must fairly describe the litigation and the proposed settlement and its legal significance. *See, e.g., Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1227 (11th Cir. 1998) (“[The notice] must also contain an adequate description of the proceedings written in objective, neutral terms, that, insofar as possible, may be understood by the average absentee class member[.]”); *Bennett v. Behring Corp.*, 96 F.R.D. 343, 353 (S.D. Fla. 1982), *aff’d*, 737 F.2d 982 (11th Cir. 1984) (“It is not the function of the settlement notice to fully inform the class of all the details of the settlement, but merely to put class members on notice of the general parameters of the settlement and to inform them of where information as to specifics may be obtained.”).

Representative Plaintiffs selected KCC to be the Notice Specialist and Claims Administrator for the Settlement and request that the Court’s approval and appointment of KCC as Notice Specialist and Claims Administrator. KCC has significant experience as a class action notice provider and administrator. *See* Declaration of Carla A. Peak on Gordon Auto Body Parts

Co. Ltd. Settlement Notice Plan and Notice Documents ¶¶ 1–2 and Exhibit 1 (“Peak Decl.”), attached as Exhibit B to the Declaration of Ben Barnow.

The Notice Program includes individual direct notice to potential Settlement Class members, publication notice in selected trade journals, and an informational website dedicated to the Settlement with an easy to remember domain name. Peak Decl. ¶¶ 7, 9, 11, 15–17. The estimated reach of the direct mailings portion of the Notice Program is 95%, which is well above the 70% reach that the Federal Judicial Center recognizes as reasonable. *See* Peak Decl. ¶ 19; Federal Judicial Center, *Judges’ Class Action Notice and Claims Process Checklist and Plain Language Guide*, at 3 (2010). The Notice Plan readily satisfies the “best practicable” standard.

A. Contents of the Notice Program

The Notice documents were designed to provide information about the proposed settlement, along with clear, concise, easily understood information about Settlement Class members’ legal rights. Peak Decl. ¶¶ 5–8, 18. The Notice documents will include information about both the Gordon Settlement and the Tong Yang Settlement. Peak Decl. ¶¶ 5–6. Not only will this method allow Settlement Class members to be informed about both settlements at once, it is a significant cost-saving measure, which allows more of the money from the Settlement Funds to be saved for distribution to Settlement Class members. Peak Decl. ¶¶ 5–6.

The Notice documents include Postcard Notice, Summary Publication Notice, and a Detailed Notice which will be available on the Settlement website (the Summary Publication Notice, Detailed Notice, and Claim Forms also will be provided by the Claims Administrator to claimants who request them). *See* Peak Decl. at Exhibits 2–4. The Notice documents collectively include a fair summary of the Settling Parties’ respective litigation positions; the general terms of the Settlement; instructions for how to opt out of or object to the Settlement; the Settlement website

address; the process and instructions for making a claim; and the date, time, and place of the Final Fairness Hearing. *See id.*

The Notice documents contain information that a reasonable person would consider material in making an informed, intelligent decision of whether to opt out or remain a member of the Settlement Class and be bound by a final judgment, and they direct individuals to a convenient location to obtain more detailed information. *See id.*; Peak Decl. ¶ 18. Altogether, the Notice documents fairly apprise the Settlement Class Members of the terms of the Settlement and the options that are open to them in connection with the Actions.

1. Opting Out

Any member of the Settlement Class wishing to opt out of the Settlement Class must individually sign and timely submit to the designated mailing address established by the Claims Administrator written notice clearly manifesting their intent to be excluded from the Settlement Class. To be effective, the written notice must be postmarked no later than 45 days after the first publication of Notice.

2. Objecting

A Settlement Class Member desiring to object to the Settlement will be required to submit a timely written notice of their objection, including: (i) the objector's full name, address, and telephone number; (ii) information identifying the objector as a Settlement Class member, including documentary proof that they are a member of the Settlement Class, (iii) a written statement of all grounds for the objection, accompanied by any legal support for the objection; (iv) the identity of all counsel representing the objector; (v) the identity of all counsel representing the objector who may appear at the Final Fairness Hearing; (vi) all other cases in which the objector (directly or through counsel) or the objector's counsel (on behalf of any person or entity) has filed

an objection to any proposed class action settlement, or has been a named plaintiff in any class action or served as lead plaintiff class counsel, including the case name, court, and docket number for each; (vii) a list of all persons who will be called to testify at the Final Fairness Hearing in support of the objection; (viii) a statement confirming whether the objector intends to personally appear and/or testify at the Final Fairness Hearing; and (ix) the objector's signature or the signature of the objector's duly authorized attorney or other duly authorized representative (along with documentation setting forth such representation). To be timely, written notice of an objection in appropriate form must be filed with the Clerk of the United States District Court for the Eastern District of Wisconsin, at the address where filings are accepted by the Clerk, 45 days after first publication of Notice, and also served upon (a) Ben Barnow, Barnow and Associates, P.C., One North LaSalle Street, Suite 4600, Chicago, IL 60602, and also on (b) Yi-Chin Ho, Latham & Watkins, 355 South Grand Avenue, Los Angeles, CA 90071, counsel for the Settling Defendant.

B. Scope of Notice

Notice of the Settlement will be effectuated as prescribed by the Notice Specialist. The Claims Administrator shall establish a single dedicated website for both the Gordon Settlement and the Tong Yang Settlement and shall maintain and update the website throughout the relevant time period, with forms of Postcard Notice, Summary Publication Notice, Detailed Notice, and the Claim Form approved by the Court, as well as the Settlement Agreement. Peak Decl. ¶ 16. The Claims Administrator will setup and staff a toll-free help line for Settlement Class members to call with questions regarding the both settlements and provide copies of the Detailed Notice, Claim Forms, and Settlement Agreements, upon request. Peak Decl. ¶ 17.

The Notice Program provides for Summary Postcard Notice to be sent directly to approximately 177,748 insurance companies and transportation services companies identified as

potential Settlement Class members. Peak Decl. ¶ 11. Before the mailing, the addresses will be checked against the National Change of Address (NCOA)⁸ database, maintained by the United States Postal Service (USPS), certified via the Coding Accuracy Support System (CASS),⁹ and verified through Delivery Point Validation (DPV).¹⁰ Peak Decl. ¶ 12. Notices returned as undeliverable will be remailed to any address available through postal service information. Peak Decl. ¶ 13. Factoring in returned undeliverable mail, KCC estimates that the individual mailings alone will reach approximately 95% of the Settlement Class. Peak Decl. ¶ 14.

Publication notice will be used to supplement and enhance the direct notice effort. Summary Notice advising of both the Gordon Settlement and the Tong Yang Settlement will appear once in ten hard-copy trade journals. Peak Decl. ¶ 15.

An informational website will be established that will allow Class Members the ability to obtain additional information and documents about the Settlement. Peak Decl. ¶ 16. The website address will be prominently displayed in the Postcard Notice, Publication Notice, and Detailed Notice. Peak Decl. ¶ 16. A toll-free number will also be established, allowing Settlement Class Members to learn more about the Settlement by speaking directly with a live operator. Peak Decl. ¶ 17. The toll-free number will be prominently displayed in the Post Card Notice, Publication Notice, and Detailed Notice. Peak Decl. ¶ 17.

⁸ The NCOA database contains records of all permanent change of address submissions received by the USPS for the last four years. The USPS makes this data available to mailing firms and lists submitted to it are automatically updated with any reported move based on a comparison with the person's name and last known address. Peak Decl. n.2.

⁹ Coding Accurate Support System is a certification system used by the USPS to ensure the quality of ZIP+4 coding systems. Peak Decl. n.3.

¹⁰ Records that are ZIP+4 coded are then sent through Delivery Point Validation to verify the address and identify Commercial Mail Receiving Agencies. DPV verifies the accuracy of addresses and reports exactly what is wrong with incorrect addresses. Peak Decl. n.4.

The Notice documents and the Notice Program are the best notice practicable under the circumstances, constitute due and sufficient notice to the Settlement Class, and comply with Fed. R. Civ. P. 23 and due process requirements. *See* Peak Decl. ¶ 20. Therefore, the Notice documents and Notice Program should be approved.

V. PROPOSED SCHEDULE OF EVENTS

The Proposed Order submitted herewith sets forth the following procedure and schedule for disseminating the Notice to the Settlement Class and final approval of the Settlement:

(1) No later than 10 days after the filing of this motion for preliminary approval, Settling Defendant shall cause notice of the Settlement to be provided to the Attorney General of the United States and the attorneys general of the states in which any Settlement Class member resides, in compliance with 28 U.S.C. § 1715(b) (SA ¶ 45);

(2) Subject to the advice of the Notice Specialist, Notice shall be given as soon as practicable after entry of the Order granting preliminary approval (SA ¶ 19);

(3) If not separately set forth or otherwise covered by Representative Plaintiffs' motion for final approval, Representative Plaintiffs' motion for attorneys' fees, costs, expenses, and incentive awards must be filed no later than 20 calendar days before the deadline for Settlement Class members to request exclusion from the Settlement Class or object to the Settlement (SA ¶ 19);

(4) The Opt Out/Objection Deadline shall be no later than 45 calendar days after the first publication under the Notice Program (SA ¶ 19);

(5) The Claims Administrator or Co-Lead Settlement Class Counsel must provide Settling Defendant with the list of Opt Outs and those who have objected to the Settlement no later than five calendar days after the Opt Out/Objection (SA ¶ 19);

(6) The list of Opt Outs requesting exclusion from the Settlement Class shall be filed no later than five calendar days after the Opt Out/Objection Deadline (SA ¶ 19);

(7) The motion and all documents in support of final approval shall be filed no later than 15 calendar days after the Opt Out/Objection Deadline (SA ¶ 19); and

(8) The final fairness hearing shall be set as soon as practicable considering the Notice Plan and the Court's schedule and discretion after filing of the Motion for Final Approval (SA ¶ 19).

This proposed schedule is consistent with time periods approved by courts in this Circuit. *See, e.g., AT&T Mobility*, 270 F.R.D. at 354.

CONCLUSION

As the above demonstrates, the Settlement readily meets the standard for preliminary approval. Accordingly, Representative Plaintiffs, individually and on behalf of the Settlement Class, by and through counsel, respectfully request that this Honorable Court enter an order:

- (A) granting preliminary approval of the Settlement Agreement;
- (B) approving Notice to the Settlement Class and methods for dissemination of Notice as set forth in the Notice Program;
- (C) appointing Kurtzman Carson Consultants LLC as Notice Specialist and as Claims Administrator;
- (D) certifying the Settlement Class for settlement purposes only;
- (E) appointing Fireman's Fund Insurance Company and National Trucking Financial Reclamation Services, LLC, as Representative Plaintiffs;
- (F) appointing Ben Barnow, Barnow and Associates, P.C.; Michael L. Roberts, Roberts Law Firm, P.A.; Daniel R. Karon, Karon LLC; Melissa H. Maxman, Cozen O'Connor; and

Derek G. Howard, Minami Tamaki, LLP, as Co-Lead Settlement Class Counsel;

- (G) approving the Claim Form attached as Exhibit C to the Declaration of Ben Barnow, and the Summary Postcard Notice, Summary Publication Notice, and Detailed Notice attached as Exhibits 2–4, respectively, to the Declaration of Carla A. Peak on Settlement Notice Plan and Notice Documents;
- (H) scheduling a Final Fairness Hearing to consider entry of a final order approving the Settlement and the request for attorneys’ fees, costs, expenses, and Representative Plaintiff incentive awards; and
- (I) entering any such other relief as the Court may deem just and appropriate.

Dated: July 27, 2015

Respectfully submitted,

s/ Ben Barnow

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2015, I caused a true and correct copy of the foregoing document to be served upon counsel of record via the Court's ECF filing system.

/s Ben Barnow

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