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

IN RE: PRE-FILLED PROPANE TANK ANTITRUST LITIGATION	)	**MDL NO. 2567**
	)	
	)	**Master Case No. 14-02567-MD-W-GAF**
	)	
	)	
This Document Relates To:	)	
Direct Purchaser Actions	)	
	)	

DIRECT PURCHASER PLAINTIFFS' SUGGESTIONS IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENTS

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 23, direct purchaser plaintiffs Morgan Larson LLC, Johnson Auto Electric, Inc., Speed Stop 32, Inc., and Yocum Oil Company, Inc. (collectively, "Plaintiffs") respectfully seek preliminary approval of (1) a Settlement Agreement with defendants Ferrellgas, L.P. and Ferrellgas Partners, L.P., also doing business as Blue Rhino (collectively, "Ferrellgas"); and (2) a Settlement Agreement with defendants AmeriGas Partners, L.P., AmeriGas Propane L.P., AmeriGas Propane, Inc., and UGI Corporation (collectively, "AmeriGas"). The Court should preliminarily approve the proposed settlements as fair, reasonable, and adequate because they provide cash payments of $6,250,000 from Ferrellgas and $6,312,500 from AmeriGas. The parties reached these respective settlements after arm's-length negotiations, drawing on the expertise of informed, experienced counsel who have been deeply involved in this litigation since its inception. The settlements reflect the risks associated with all parties continuing to litigate this case. If both settlements are finally approved by the Court, all defendants will have settled, and the direct purchaser actions can be terminated.

The combined $12,562,500 recovery for the proposed direct purchaser settlement class is a remarkable recovery after Plaintiffs' consolidated amended class action complaint was dismissed on statute of limitations grounds, affirmed on appeal by the Eighth Circuit, and only re-instated after a successful petition for rehearing *en banc* by Interim Co-Lead Counsel. After nearly five years of litigation, Plaintiffs are extremely knowledgeable about the strengths of this case and the challenges they face as the case proceeds to trial. Counsel for the direct purchaser plaintiffs have analyzed and catalogued approximately 50,000 documents produced from defendants' custodians, reviewed defendants' testimony in the Federal Trade Commission action, and engaged in lengthy motion practice and appeals. Plaintiffs also obtained defendants' confidential transactional data and information regarding their sales of Filled Propane Exchange

Tanks, and reviewed that information with a highly-respected economist and damages expert, which helped inform Plaintiffs' counsel of the potential damages at stake for Ferrellgas and AmeriGas and an appropriate settlement amount. Plaintiffs have also analyzed and considered public information regarding Ferrellgas's uncertain financial condition, which calls into doubt Ferrellgas's ability to pay a large judgment now or in the future. The settlements reached with Ferrellgas and AmeriGas are fair and appropriate based on the risks and rewards of litigating, in 2019 and beyond, claims predicated on an alleged agreement that was entered into in 2008.

Plaintiffs respectfully request an order providing: (1) preliminary approval of the proposed Settlement Agreements with Ferrellgas and with AmeriGas; (2) certification of the proposed Settlement Class; (3) appointment of Berger & Montague, P.C.; Cohen Milstein Sellers & Toll, PLLC; Susman Godfrey L.L.P., and Shaffer Lombardo Shurin, P.C. as Settlement Class Counsel; (4) appointment of JND Legal Administration as claims administrator; and (5) approval of the manner and form of notice and proposed Plan of Allocation to Settlement Class Members. A proposed order is attached to Plaintiffs' motion.

II. BACKGROUND

A. Factual and Procedural Background.

Named plaintiffs are retailers who purchased or exchanged pre-filled propane exchange tanks directly from defendants Ferrellgas and/or AmeriGas for re-sale to consumers. Each named plaintiff purchased or exchanged pre-filled propane exchange tanks from one or more of the defendants during the period in which plaintiffs allege defendants were engaged in an illegal agreement to inflate the price of pre-filled propane exchange tanks to supracompetitive levels.

Ferrellgas and AmeriGas are the largest distributors of pre-filled propane exchange tanks, which come in a standard size with a maximum effective capacity of 17.5 pounds. Plaintiffs allege that in the spring of 2008, Ferrellgas and AmeriGas agreed to reduce the fill level of each

pre-filled propane exchange tank from 17 pounds per tank to 15 pounds per tank while maintaining the same price per "full" tank in order to increase their margins on the sale of propane exchange tanks. Plaintiffs further allege that this collusion effectively raised the prices charged to Plaintiffs by more than 13% per pound. Plaintiffs further allege that Ferrellgas and AmeriGas also agreed to allocate customers and markets between themselves in furtherance of their conspiracy to maintain prices at supracompetitive levels and carry out the purpose of their anticompetitive scheme.

In March 2014, the Federal Trade Commission ("FTC") issued a complaint against Ferrellgas and AmeriGas alleging that they violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, based on conduct arising out of their 2008 fill-level changes. According to the FTC, defendants' anticompetitive agreement "restrained price competition and led to higher prices for sales of propane exchange tanks in the United States," and "was in effect a 13% increase in the price of propane." FTC Administrative Complaint ¶¶ 9, 33.

In October 2014, while denying any wrongdoing, defendants Ferrellgas and AmeriGas entered into separate consent decrees with the FTC in which they agreed to cease and desist and change various business practices in exchange for the FTC's dismissal of its complaint. In addition to mandating antitrust compliance programs and prohibiting the exchange of sensitive non-public business information, the FTC consent decrees also prohibit defendants from soliciting, offering, participating in, or entering into any type of agreement with any competitor in the propane exchange business to raise, fix, maintain, or stabilize the prices or price level of propane exchange tanks through any means, including by modifying the fill level of pre-filled propane tanks.

Plaintiffs and other direct and indirect purchasers of pre-filled propane exchange tanks

filed suit against Ferrellgas and AmeriGas in October 2014, and on January 29, 2015, Plaintiffs filed their consolidated amended class action complaint. In July 2015, this Court granted the defendants' motion to dismiss and held that Plaintiffs' claims were barred by the Sherman Act's four-year statute of limitations. In August 2016, a divided panel of the United States Court of Appeals for the Eighth Circuit affirmed. Plaintiffs successfully petitioned for rehearing *en banc*, and in June 2017, an *en banc* Eighth Circuit vacated the panel decision and held that Plaintiffs had adequately pleaded a continuing violation of antitrust law, thereby reinstating Plaintiffs' consolidated complaint.

Since that time, Plaintiffs have engaged in extensive discovery: drafting and responding to requests for production and interrogatories, reviewing and cataloguing defendants' voluminous document productions, reviewing defendants' sworn testimony from the FTC action, obtaining relevant sales data and information, and working with an expert to evaluate those materials and calculate damages on a class-wide basis—all in anticipation of Plaintiffs' motion for class certification and trial. In July 2019, this Court issued an amended scheduling order, setting a class certification briefing schedule for spring 2020 and a jury trial for October 11, 2021.

B. Summary of Proposed Settlements.

1. The Proposed Settlement Class.

The proposed Settlement Class includes:

> All entities in the United States who purchased for resale Filled Propane Exchange Tanks directly from Ferrellgas or AmeriGas, or paid to exchange a previously purchased Filled Propane Exchange Tank directly with Ferrellgas or AmeriGas, between July 21, 2008 and January 9, 2015.[1]

2. The Settlement Consideration.

[1] September 23, 2019 Ferrellgas-DPP Settlement Agreement (hereinafter "Exhibit A"), ¶ 3; October 2, 2019 AmeriGas-DPP Settlement Agreement (hereinafter "Exhibit B"), ¶ 3.

Ferrellgas has agreed to a lump-sum payment of $6,250,000 to the settlement fund.[2] AmeriGas has agreed to a lump-sum payment of $6,312,500 to the settlement fund.[3] These payments are the full amount owed under the Settlement Agreements, and are inclusive of any attorneys' fees, expenses, and service awards that might be ordered by the Court.[4]

As additional consideration, in the event that the Settlement Agreement with the other defendant is not finally approved, both Ferrellgas and AmeriGas have also agreed (i) to produce to Plaintiffs in this action any documents that it produces in the future to the indirect purchaser plaintiffs; (ii) to permit Plaintiffs to use in this action any deposition testimony of witnesses produced by it in the indirect purchaser action; (iii) to produce to Plaintiffs its structured transactional data responsive to plaintiffs' Request for Production No. 39; and (iv) to authenticate and lay a foundation, through affidavit or declarations, for admission into evidence of any of its produced documents and transactional data that appear on plaintiffs' trial exhibit list.[5]

3. Release of Claims.

Once the Ferrellgas Settlement Agreement is final and effective, Ferrellgas and its released agents shall be released from any claims, liability, or damages that relate to or arise out of conduct by Ferrellgas with respect to the sales of Filled Propane Exchange Tanks up to the date of the execution of this agreement, except that the released claims do not include (i) claims for product defect or personal injury; (ii) claims for breach of contract in the ordinary course of business that do not relate to conduct alleged in the Complaint or to competition in the sale of Filled Propane Exchange Tanks; or (iii) claims against parties other than Ferrellgas and its

[2] *See* Exhibit A, ¶ 7.
[3] *See* Exhibit B, ¶ 7.
[4] *See* Exhibit A, ¶ 16(b); Exhibit B, ¶ 16(b).
[5] *See* Exhibit A, ¶ 22; Exhibit B, ¶ 22.

released agents.[6] Plaintiffs and the Settlement Class also expressly waive and release any and all provisions, rights, and benefits conferred by § 1542 of the California Civil Code or any comparable statutory or common law provision of any other jurisdiction as to Ferrellgas and its released agents.[7]

Once the AmeriGas Settlement Agreement is final and effective, AmeriGas and its released agents shall be released from any claims, liability, or damages that relate to or arise out of conduct by AmeriGas with respect to the sales of Filled Propane Exchange Tanks up to the date of the execution of this agreement, except that the released claims do not include (i) claims for product defect or personal injury; (ii) claims for breach of contract in the ordinary course of business that do not relate to conduct alleged in the Complaint or to competition in the sale of Filled Propane Exchange Tanks; or (iii) claims against parties other than AmeriGas and its released agents.[8] Plaintiffs and the Settlement Class also expressly waive and release any and all provisions, rights, and benefits conferred by § 1542 of the California Civil Code or any comparable statutory or common law provision of any other jurisdiction as to AmeriGas and its released agents.[9]

4. Notice and Implementation of Settlements.

The Settlement Agreements provide for actual notice to the Settlement Class Members, as described below. Ferrellgas and AmeriGas have agreed as part of the Settlement Agreements to provide last-known email addresses for all potential Settlement Class Members to Class Counsel and the Claims Administrator to facilitate that actual notice. For efficiency and to preserve resources, if both Settlement Agreements are preliminarily approved, a single combined

[6] *See* Exhibit A, ¶¶ 12-13.
[7] *See id* at ¶ 14.
[8] *See* Exhibit B, ¶¶ 12-13
[9] *See id.* at ¶ 14.

Notice will be sent out for both Settlement Agreements, and will be sent out within 61 days of preliminary approval of both of the Settlement Agreements. Defendants have agreed to permit the use of a maximum of $300,000 of the Settlement Fund towards notice to the Settlement Class and the costs of administration of the Settlement Fund, which they agree is not recoverable and will be borne equally by Ferrellgas and AmeriGas if the settlements do not become final.[10]

5. Plan of Distribution.

Within thirty (30) days of execution of the Ferrellgas Settlement Agreement, Ferrellgas will wire (or cause to be wired) $6,250,000 to an account established by an escrow agent (the "escrow account").[11] Within thirty (30) days of execution of the AmeriGas Settlement Agreement, AmeriGas will wire (or cause to be wired) $6,312,500 to the escrow account.[12]

The funds will be held in an interest-bearing account that will be construed to be a "Qualified Settlement Fund" pursuant to applicable IRS regulations.[13] The Claims Administrator will be responsible for determining the monetary award that shall be awarded to Settlement Class Members from the Settlement Fund based on their *pro rata* share, which is calculated based on the total amount they paid for all qualifying purchases of Filled Propane Exchange Tanks from one or more defendants compared to the total amount paid by all Settlement Class Members for all qualifying purchases of Filled Propane Exchange Tanks from defendants.[14] The Claims Administrator's decisions shall be final and unreviewable.[15] Class Counsels' attorneys' fees and cost payments, and any service awards to the class representatives, are subject to court approval.[16]

[10] *See* Exhibit A, ¶ 20(a); Exhibit B, ¶ 20(a).
[11] Exhibit A, ¶ 16.
[12] Exhibit B, ¶ 16.
[13] Exhibit A, ¶ 17; Exhibit B, ¶ 17.
[14] *See* Plan of Allocation (hereinafter "Exhibit C").
[15] *See id.*
[16] *See* Exhibit A, ¶ 23; Exhibit B, ¶ 23.

III. ARGUMENT

Federal Rule of Civil Procedure 23 was amended in 2018 to codify the "preliminary approval" process that is customary in class settlements. Fed. R. Civ. P. 23, advisory committee's note to 2018 amendment. "As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice." *Id.*

In particular, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment of the proposal." Fed. R. Civ. P. 23(e).

Under Rule 23(e)(2), a court may finally approve a settlement binding class members "only after a hearing and only on a finding that it is fair, reasonable, and adequate after considering whether: (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate . . . ; and (D) the proposal treats class members equitably relative to each other." *Id.*

The requirement that a class action settlement be "fair, reasonable, and adequate" is nothing new, as "each circuit has developed its own vocabulary for expressing these concerns." Fed. R. Civ. P. 23, advisory committee's note to 2018 amendment. In the Eighth Circuit, courts have long described the inquiry as focusing on four factors, to be considered in the trial court's sound discretion: "the merits of the plaintiff's case, weighed against the terms of the settlement; the defendant's financial condition; the complexity and expense of further litigation; and the amount of opposition to the settlement." *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir.

1988).[17]

"A strong public policy favors agreements, and courts should approach them with a presumption in their favor." *Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist. No. 1*, 921 F.2d 1371, 1388 (8th Cir. 1990). Here, because it is likely the Court will be able to finally approve the Settlement Agreements under Rule 23(e)(2) and the *Van Horn* factors, and certify a class for purposes of judgment of the proposed settlements, the Court should grant plaintiffs' motion, preliminarily approve the Settlement Agreements, and direct notice to the Settlement Class.

A. The Settlement Agreements Are "Fair, Reasonable, and Adequate."

The Settlement Agreements satisfy both the Rule 23(e)(2) factors and the *Van Horn* factors and are fair, reasonable, and adequate. They should be preliminarily approved.

1. Named Plaintiffs and Class Counsel Have Adequately Represented the Class.

The Settlement Agreements are fair, reasonable, and adequate because they were entered into by named plaintiffs and class counsel that have adequately represented the settlement class. *See* Fed. R. Civ. P. 23(e)(2)(A). The class is represented by named plaintiffs Morgan Larson, LLC, Johnson Auto Electric, Inc., Speed Stop 32, Inc., and Yocum Oil Company, Inc. They operate in different states, in different regions, across the country. They purchased Filled Propane Exchange Tanks directly from one or more of the defendants, for resale, and paid inflated per-pound prices due to defendants' unlawful conspiracy. They have advanced the interests of the settlement class by consulting with class counsel and participating in discovery. No conflicts of interest exist, nor has any other deficiency in plaintiffs' proposed representation of the class been identified.

[17] "The fourth factor (opposition to the settlement) is irrelevant at this time, as notice has not been distributed." *Swinton v. SquareTrade, Inc.*, No. 418CV00144SMRSBJ, 2019 WL 617791, at *9 (S.D. Iowa Feb. 14, 2019). Opposition to the settlements, if any, can only be considered after notice and during the final approval process.

The Court has already appointed the four undersigned law firms as Interim Co-Lead Counsel and Interim Liaison Counsel for the direct purchaser actions. *See* ECF # 78 at 2-3 (noting Interim Co-Lead Counsel's filing of the first direct-purchaser action and ongoing investigative work). Berger & Montague, Cohen Milstein, Susman Godfrey, and Shaffer Lombardo Shurin are four of the most skilled and well-respected plaintiffs' law firms in the country, with substantial experience evaluating and litigating horizontal antitrust conspiracies, like this one, through class certification, trial, and appeal.

Since their appointment as Interim Co-Lead and Liaison Counsel, these law firms have continued to vigorously represent their clients and the interests of the Settlement Class Members, including through motions practice, a successful appeal, drafting and responding to discovery requests, substantial document and testimony review, and by engaging in arm's length settlement negotiations. In addition, Interim Co-Lead and Liaison Counsel have spent substantial time and resources on understanding the economic issues in the case, including the appropriate measure and amount of damages, which has advanced the proposed Settlement Agreements and will continue to ensure adequate representation going forward, if either Settlement Agreement is not finally approved.

2. The Settlement Agreements Were Negotiated at Arm's Length.

The Settlement Agreements are fair, reasonable, and adequate because they are the product of informed, arm's-length negotiations. *See* Fed. R. Civ. P. 23(e)(2)(B). The parties reached these settlements after plaintiffs reviewed and cataloged approximately 50,000 documents in addition to defendants' under-oath testimony in the FTC action. Plaintiffs also obtained defendants' confidential sales data and information regarding the sales and prices of Filled Propane Exchange Tanks, and reviewed those materials with highly-respected economists and a damages expert, which helped inform Plaintiffs of the potential damages at stake for

Ferrellgas and for AmeriGas. Plaintiffs also obtained information regarding Ferrellgas's negative and uncertain financial condition. The Settlement Agreements were only reached after months of independent negotiations between plaintiffs and Ferrellgas, and plaintiffs and AmeriGas.

The Settlement Agreements also reflect non-collusive negotiations. None of the signs that courts have recognized as demonstrating that class counsel have allowed pursuit of their own or certain class members' self-interests to infect the negotiations is present here. *See, e.g.*, *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) (collecting cases from around the country). First, this is not a case where the class receives no monetary distribution but class counsel are amply rewarded: the Settlement Agreements provide for $12,562,500 to be paid into a Settlement Fund, distributed according to the Plan of Allocation, and Interim Co-Lead Counsel's fees must be approved by this Court (and are capped at 33 percent of the fund). Second, there is no "clear sailing" provision providing for the payment of attorneys' fees separate and apart from class funds; the Settlement Agreements requires payment of attorneys' fees solely out of the Settlement Fund, following court approval, and neither Ferrellgas or AmeriGas has any interest in any such award to Interim Co-Lead Counsel.[18] Third, there is no reversion provision providing that funds not awarded to Settlement Class Members will revert to Ferrellgas or AmeriGas, so long as the settlements are finally approved and not terminated by (i) Ferrellgas, in the event that a confidential opt-out threshold is triggered,[19] or (ii) AmeriGas, in the event that a confidential opt-out threshold is triggered.[20]

Both Settlement Agreements also contain a most-favored nation clause providing that if plaintiffs agree to a settlement with the other defendants for an amount less than $6,250,000, then subject to certain exceptions, the $6,250,000 payment shall be reduced, in the case of

[18] *See* Exhibit A, ¶ 17; Exhibit B, ¶ 17.
[19] *See* Exhibit A, ¶ 19.
[20] *See* Exhibit B, ¶ 19.

Ferrellgas, to the same dollar amount as the AmeriGas settlement with any greater amount being refunded to Ferrellgas;[21] and in the case of AmeriGas, by the dollar amount which the Ferrellgas settlement is lower than $6,250,000 with any greater amount being refunded to AmeriGas.[22] But that provision was necessary to break a stalemate in settlement negotiations across the defendants and obtain the $6,250,000 and other consideration from Ferrellgas, does not place the interests of plaintiffs or Interim Co-Lead Counsel above the proposed class, and is highly unlikely to be triggered. Crucially, the AmeriGas Settlement Agreement already provides for a payment of $6,312,500, which effectively moots the Ferrellgas most-favored nation provision, and even if the AmeriGas settlement were not preliminarily approved, plaintiffs will not settle with AmeriGas for less than $6,250,000 unless there were a material adverse change in the legal position of their case, as determined by this Court, in which case the Ferrellgas most-favored nation provision would not apply.[23] Likewise, because the Ferrellgas Settlement Agreement provides for a payment of $6,250,000, and plaintiffs will not settle with Ferrellgas for less than that amount unless there were a material adverse change in the legal position of their case, the AmeriGas most-favored nation provision likewise will not be triggered.[24]

3. The Settlement Agreements Provide Substantial Relief to Settlement Class Members.

The Settlement Agreements are fair, reasonable, and adequate because the combined $12,562,500 provided for Settlement Class Members is adequate, taking into account all relevant factors under Rule 23(e). As amended, Rule 23(e) now instructs the parties and the Court to consider the adequacy of the relief while taking into account "the costs, risks, and delay of trial and appeal"; "the effectiveness of any proposed method of distributing relief to the class,

[21] *See* Exhibit A, ¶ 16(c).
[22] *See* Exhibit B, ¶ 16(c).
[23] *See* Exhibit A, ¶ 16(c).
[24] *See* Exhibit B, ¶ 16(c).

including the method of processing class-member claims"; "the terms of any proposed award of attorney's fees, including timing of payment"; and "any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C).

The relief provided by the Settlement Agreements is more than adequate when considering the Rule 23(e) factors. In addition to the defendants' combined lump-sum payment of $12,562,500, the Settlement Agreements also require defendants to provide additional non-monetary consideration and cooperation to Plaintiffs and the proposed class in the event that the Settlement Agreement with the other defendants is not finally approved. In such circumstances, the Settlement Agreements also require the settling defendant to produce to Plaintiffs all documents it produces in the indirect purchaser actions; to permit Plaintiffs to use in this action all deposition testimony it gives in the indirect purchaser actions; to produce to Plaintiffs its structured transactional data regarding its sales of pre-filled propane exchange tanks; and to authenticate and lay a foundation for admission into evidence of any of its produced documents and data that appear on Plaintiffs' trial exhibit list.

Costs, Risks, and Delay of Trial and Appeal. Weighing the relief provided by the Settlement Agreements against "the costs, risks, and delay of trial and appeal" strongly favors preliminarily approving the Settlement Agreements. This Rule 23(e) factor overlaps with and/or subsumes the relevant *Van Horn* factors—including "the merits of the plaintiff's case, weighed against the terms of the settlement; the defendant's financial condition; and the complexity and expense of further litigation"—which also support preliminary approval. *See* 840 F.2d at 607.

The Settlement Agreements were the product of a thorough assessment of the strengths and weaknesses of Plaintiffs' case. Although Plaintiffs believe the class members have meritorious claims, juries can be difficult to predict. And defendants would almost certainly

appeal any adverse finding from the jury. In particular, as the Court is aware, the statute of limitations has been a hotly contested issue in this case. This Court initially dismissed plaintiffs' consolidated amended class action complaint on statute of limitations grounds, and an Eighth Circuit panel agreed and affirmed that dismissal. Although an *en banc* Eighth Circuit granted rehearing, reversed the dismissal, and held that plaintiffs had sufficiently alleged a continuing antitrust conspiracy, defendants continue to pursue that defense, and that statute of limitations issue undoubtedly injects uncertainty into the ultimate outcome of this case. Further, that defendants' alleged conspiracy was originally formed more than eleven years ago, in 2008, may also present evidentiary barriers to plaintiffs succeeding without settlement, as certain individuals may have died, left defendants' employment, or simply forgotten relevant events and conversations. Defendants have advanced this defense too. *See, e.g.*, ECF # 211 at 22-23.

Defendants also continue to vigorously dispute that Plaintiffs' action can be certified as a class action under Rule 23. *See, e.g.*, ECF # 312. While Plaintiffs disagree, defendants are represented by sophisticated law firms, with significant class action experience, and a motion for class certification is not without its risks. And merits aside, the fact that no class has yet been certified further increases the costs and risks of continuing without settlement. It is very expensive to litigate any complex antitrust case through class certification and trial—both in terms of attorney time and expert costs and expenses—and this case, which has already lasted five years with multiple appeals, will only become more costly as litigation progresses towards class certification and trial. *See, e.g.*, *Marshall v. Nat'l Football League*, 787 F.3d 502, 512 (8th Cir. 2015) (finding complexity and expense of further litigation heavily favored settlement approval because "parties had already spent three years in litigation and had not yet even achieved class certification").

Moreover, even if a class is certified, Plaintiffs defeat summary judgment, and a jury finds in their favor, it will take years to recover against the judgment—if at all from Ferrellgas. Under the current schedule, the hearing on class certification will not occur until June 11, 2020. If the proposed class is certified, it will likely be subject to an interlocutory appeal under Federal Rule of Civil Procedure 23(f). If Plaintiffs defeat the interlocutory appeal, and the current schedule holds, a jury trial will not occur until October 2021. And if a jury finds for the class, the verdict will surely be subject to post-trial motions and appeal, which will further delay any recovery.

Although such delays are not uncommon in complex antitrust class actions like this one, they present a heightened risk here in light of Ferrellgas's financial condition. *See Van Horn*, 840 F.2d at 607 (requiring court to consider "the defendant's financial condition"). Among other points, Ferrellgas has not turned a profit since fiscal year 2015 (*see* Maxx Chatsko, *Where Will Ferrellgas Partners Be in 1 Year?* (Nov. 25, 2018), https://www.fool.com/investing/2018/11/25/where-will-ferrellgas-partners-be-in-1-year.aspx), and its cash and cash equivalents are down to $11 million, from $120 million last year (*see Ferrellgas Partners (FGP) Posts Wider-Than-Expected Q4 Loss* (Oct. 16, 2019), https://finance.yahoo.com/news/ferrellgas-partners-fgp-posts-wider-133201557.html.) Its stock price has dropped to around $0.55 a share—down from nearly $30-a-share when this action was brought five years ago. *See* Yahoo! Finance (Oct. 23, 2019, 9:02 AM), https://finance.yahoo.com/quote/FGP/. Other entities, including the indirect purchaser plaintiffs, also seek to recover from and be paid by Ferrellgas. Accordingly, there is a substantial risk that Ferrellgas may not be able to satisfy the kind of treble damages award that may ultimately result if this case were litigated to judgment. The AmeriGas settlement amount is also fair and

reasonable given AmeriGas's relative market share during the Relevant Time Period. This is a strong basis to approve both Settlement Agreements and guarantee some monetary recovery to the Settlement Class at this juncture. *See, e.g.*, *In re Charter Commc'ns, Inc., Sec. Litig.*, No. 4:02-CV-1186 CAS, 2005 WL 4045741, at *8 (E.D. Mo. June 30, 2005) (applying *Van Horn* factors finding that defendant's "precarious financial condition" and staggering long-term debt supported approval of settlement, rather than risk the ability to collect any sizable judgment in the future).

Set against these costs, risks, and delays is the meaningful and certain $6,250,000 recovery from Ferrellgas Settlement Agreement and $6,312,500 recovery from the AmeriGas Settlement Agreement.

For these reasons, these factors and the relevant *Van Horn* factors "weighs in favor of approving the settlement[s] because 'the outcome of the litigation would be far from certain' if the case had not settled, whereas 'the settlement[s] provides substantial benefits to the class.'" *Keil v. Lopez*, 862 F.3d 685, 695 (8th Cir. 2017) (citations omitted).

The Effectiveness of Distributing Relief to the Class. "A plan of allocation need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *In re Charter Commc'ns, Inc., Sec. Litig.*, 2005 WL 4045741 at *10.

Here, the settlement funds will be distributed automatically, with no need for a claim form, to all Settlement Class Members. Since all Settlement Class Members purchased Filled Propane Exchange Tanks directly from one or more defendants, Settlement Class members can be located for notice and distribution through defendants' sales records. Both Ferrellgas and AmeriGas have agreed to provide such data as a condition of their Settlement Agreements. This method of processing class-member claims "is claimant-friendly, efficient, cost-effective,

proportional and reasonable under the particular circumstances of this case." *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079, at *5 (S.D. Ill. Dec. 16, 2018).

Further, each Settlement Class Member will receive a *pro rata* share of the Settlement Fund based on the total amount each class member paid for all qualifying purchases of Filled Propane Exchange Tanks from one or more defendants. "This type of pro rata distribution has frequently been determined to be fair, adequate, and reasonable." *Hefler v. Wells Fargo & Co.*, No. 16-CV-05479-JST, 2018 WL 6619983, at *12 (N.D. Cal. Dec. 18, 2018) (collecting cases); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 41 (E.D.N.Y. 2019) (approving *pro rata* distribution plan as fair, adequate, and effective under amended Rule 23(e)).

The Terms of Any Proposed Award of Attorneys' Fees. The Settlement Agreements require any award of attorneys' fees to Interim Co-Lead and Liaison Counsel to be approved by this Court.[25] Plaintiffs will submit their request for fees in a separate motion, not to exceed 33% of the Settlement Fund, in accordance with Eighth Circuit precedent. *See, e.g.*, *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017) (collecting cases showing that Eighth Circuit courts "have frequently awarded attorney fees between twenty-five and thirty-six percent of a common fund in other class actions"). This process is fair, adequate, and reasonable.

Other Agreements. The December 2018 amendment to Rule 23(e) mandates that "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal," and that the Court must then take into account any such agreements when determining whether the relief provided in the settlement is adequate. *See* Fed. R. Civ. P. 23(e)(2)-(3). The only other agreements that plaintiffs and Ferrellgas, and plaintiffs and AmeriGas, have entered into in connection with the Settlement Agreements are the Confidential

[25] *See* Exhibit A, ¶ 23; Exhibit B, ¶23.

Supplemental Agreements establishing the confidential opt-out thresholds for each Settlement Agreement,[26] under which Ferrellgas and AmeriGas may terminate their respective Settlement Agreement in the event that Settlement Class Members representing an amount of sales of Filled Propane Exchange Tanks equal to or greater than a specified threshold opt out of that Settlement Agreement. If the Court desires to review these Confidential Supplemental Agreements, Plaintiffs will provide them to the Court for *in camera* review promptly upon request.

4. The Settlement Agreements Treat Class Members Equitably.

The Settlement Agreements are fair, reasonable, and adequate because they treat Settlement Class Members equitably relative to each other. *See* Fed. R. Civ. P. 23(e)(2)(D); *accord id.*, advisory committee's note to 2018 amendment ("Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief."). As already discussed, the Plan of Allocation treats Settlement Class Members equitably relative to each other and is fair and adequate because it distributes the settlement funds according to each Settlement Class Member's injury and *pro rata* share of total purchases of all price-inflated Filled Propane Exchange Tanks sold pursuant to defendants' unlawful conspiracy. Additionally, although Plaintiffs intend to move the Court at a later date to grant service awards of no more than $15,000 to each named plaintiff for its efforts in prosecuting this action and helping to obtain settlements that will benefit all class members, the granting of such service awards is routine and proper in the Eighth Circuit and helps "to promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits." *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017). Any such service award will be subject to this Court's approval, upon a

[26] *See* Exhibit A, ¶ 19(a); Exhibit B, ¶ 19(a).

motion, and after consideration of all relevant factors. *Id.*

B. The Proposed Settlement Class Satisfies Rule 23.

Preliminary approval of the Settlement Agreements is also warranted because the Court will be able to "certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). Although "[t]he ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement," Fed. R. Civ. P. 23, advisory committee's note to 2018 amendment, the record plainly supports a settlement class.

Under Rule 23, a motion for class certification involves a two-part analysis. First, under Rule 23(a), the proposed class must satisfy the "requirements of numerosity, commonality, typicality, and fair and adequate representation." *Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 372 (8th Cir. 2013).[27] Second, the proposed class must satisfy at least one of the provisions of Rule 23(b). *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). A class may be maintained under Rule 23(b)(3) if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

The proposed Settlement Class satisfies both Rule 23(a) and Rule 23(b)(3).

1. The Settlement Class Satisfies the Rule 23(a) Factors.

Numerosity. Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "No arbitrary rules regarding the necessary size of classes have been established," *Paxton v. Union Nat. Bank*, 688 F.2d 552, 559 (8th Cir.

[27] Although "[a] separate threshold ascertainability requirement is not the law in this circuit," *In re Dollar Gen. Corp. Motor Oil Mktg. & Sales Practices Litig.*, No. 16-02709-MD-W-GAF, 2019 WL 1418292, at *12 (W.D. Mo. Mar. 21, 2019), the proposed Settlement Class is also ascertainable: the class is defined objectively to include any entity that purchased Filled Propane Exchange Tanks for resale, directly from one or more of the defendants, during a defined time period. Indeed, all Settlement Class Members are readily identifiable from defendants' sales records.

1982), and the Eighth Circuit has affirmed certification of classes with as few as twenty members. *See, e.g.*, *Arkansas Ed. Ass'n v. Bd. of Ed. of Portland, Ark. Sch. Dist.*, 446 F.2d 763, 765-66 (8th Cir. 1971). The Settlement Class here has approximately 56,000 members. Because it would not be practical to join all 56,000 of these direct purchaser plaintiffs in one action, the numerosity requirement is satisfied by the proposed Settlement Class.

Commonality. Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "The rule does not require that every question of law or fact be common to every member of the class," *Paxton*, 688 F.2d at 561, but only that "their claims involve a common question or contention of such a nature that it is capable of classwide 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." *Postawko v. Missouri Dep't of Corr.*, 910 F.3d 1030, 1038 (8th Cir. 2018) (quotations and citations omitted). "[F]or purposes of Rule 23(a)(2) even a single common question will do." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) (brackets and quotations omitted).

Here, Plaintiffs' claims present myriad questions of law and fact common to the Settlement Class. Each Settlement Class Member alleges the same injury—paying inflated prices for Filled Propane Exchange Tanks—from the same unlawful conduct: defendants' conspiracy to eliminate competition and raise prices to supracompetitive levels through agreements to reduce the amount of propane they would put in their tanks and to allocate customers and markets between themselves. "Where an antitrust conspiracy has been alleged, courts have consistently held that 'the very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist.'" *In re High-Tech Employee Antitrust Litig.*, 985 F. Supp. 2d 1167, 1180 (N.D. Cal. 2013). Exemplary common questions of fact and law include whether

defendants entered into an illegal agreement to reduce fill levels and allocate customers and markets; whether defendants artificially inflated the prices of Filled Propane Exchange Tanks; and whether Settlement Class Members were injured as a result of that conduct and, if so, the appropriate measure of aggregate damages. In addition, defendants' statute of limitations defense also presents common questions of law and fact as to all members of the Settlement Class.

Typicality. Rule 23(a)(3) requires a showing that "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). Typicality just "means that there are 'other members of the class who have the same or similar grievances as the plaintiff.'" *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996). It is "fairly easily met," and "[f]actual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Postawko v. Mo. Dep't of Corr.*, 910 F.3d 1030, 1039 (8th Cir. 2018). "Thus, typicality in the antitrust context will be established by plaintiffs and all class members alleging the same antitrust violations by the defendants," and as such, "claims in antitrust price-fixing cases generally satisfy Rule 23(a)(3)'s typically requirement, even if members purchase different quantities and pay different prices." *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 241 (E.D.N.Y. 1998). Typicality is easily satisfied here because named plaintiffs and all Settlement Class Members allege the same injuries arising from common conduct: paying supracompetitive prices due to defendants' illegal agreement to reduce fill levels and allocate customers and markets.

Adequate Representation. Rule 23(a)(4) requires a showing that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The focus of Rule 23(a)(4) is whether: (1) the class representatives have common interests with the

members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel." *Paxton*, 688 F.2d at 562–63. Here, named plaintiffs allege they suffered the same injuries as the rest of the Settlement Class, and together they share an interest in proving defendants' conduct violated antitrust laws and artificially inflated the prices they paid for Filled Propane Exchange Tanks. Plaintiffs do not have any conflicts of interest with the Settlement Class Members. Plaintiffs have also demonstrated a willingness to vigorously prosecute the interests of the class—by agreeing to be named plaintiffs and participating in discovery—and Interim Co-Lead Counsel are accomplished litigators with ample experience in complex antitrust class actions like this one. Plaintiffs have and will continue to fairly and adequately represent and protect the interests of the Settlement Class.

2. The Settlement Class Satisfies Rule 23(b)(3).

Common Questions of Fact or Law Predominate. In order to certify a Rule 23(b)(3) class, it must be shown "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). However, the predominance requirement is relaxed in the settlement context: "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, . . . for the proposal is that there be no trial." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *see also In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 68 (D. Mass. 2005). Indeed, manageability concerns that might preclude certification of a litigated class may be disregarded with a settlement class "because the settlement might eliminate all the thorny issues that the court would have to resolve if the parties fought out the case." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 660 (7th Cir. 2004); *see also In re Initial Public Offering Sec. Litig.*, 226 F.R.D. 186, 190, 195 (S.D.N.Y. 2005) (settlement class may be broader than litigated class because settlement resolves manageability /

predominance concerns); *In re Hyundai & Kia Fuel Economy Litig.*, 926 F.3d 539, 556-557 (9th Cir. 2019) (en banc) (observing that, because the case involved certification of a settlement-only class, the question of "manageability [wa]s not a concern . . . [since] by definition, there will be no trial.").

The Eighth Circuit has also stated that, "[c]ertification is appropriate if the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Stuart v. State Farm Fire & Cas. Co.*, 910 F.3d 371, 374–75 (8th Cir. 2018) (quotation and citation omitted). The test is not whether any individual issues exist, but is simply whether one or more of the central issues in the case is common to the class; indeed, "[a] class may be certified based on common issues 'even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" *Id.* (citation omitted).

"Predominance is a test readily met in certain cases alleging . . . violations of the antitrust laws." *Amchem Prod.*, 521 U.S. at 625. In horizontal price-fixing cases like this one, "courts repeatedly have held that the existence of the conspiracy is the predominant issue and warrants certification even where significant individual issues are present." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 308 F.R.D. 606, 620–21 (N.D. Cal. 2015); *accord, e.g.*, *In re Rubber Chemicals Antitrust Litig.*, 232 F.R.D. 346, 352 (collecting cases and recognizing that "the great weight of authority suggests that the dominant issues in cases like this are whether the charged conspiracy existed and whether price-fixing occurred."). That is because "the alleged violations of the antitrust laws at it issue here respecting price fixing . . . relate solely to Defendants' conduct, and as such proof for these issues will not vary among class members." *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 29 (D.D.C. 2001).

Here, because the key elements of plaintiffs' conduct claims relate to defendants' conduct—and do not vary from class member to class member or require any individualized proof—predominance is satisfied. The existence of common evidence to prove defendants' conspiracy cannot seriously be disputed. Plaintiffs allege that defendants conspired to inflate the prices of Filled Propane Exchange Tanks across the country by agreeing to reduce the amount of propane they included in those tanks, and by agreeing to allocate customers and markets between themselves to eliminate competition and maintain supracompetitive prices. The Eighth Circuit has already held that the alleged restraint "is a *per se* antitrust violation." *In re Pre-Filled Propane Tank Antitrust Litig.*, 860 F.3d 1059, 1067 (8th Cir. 2017). Proving this *per se* antitrust violation will be a central issue at trial and will be established through common evidence regarding what defendants did and said in pursuit of their illegal scheme.

In addition, issues concerning antitrust impact, or the fact of injury, are also common to the Settlement Class and predominate. Plaintiffs allege that defendants' illegal scheme had a common impact on all class members by artificially inflating the prices that class members paid for Filled Propane Exchange Tanks, an entirely fungible product. "If Plaintiffs can show this to be true, they will have satisfied the common impact requirement." *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 695 (D. Minn. 1995); *accord, e.g.*, *In re Plastic Cutlery Antitrust Litig.*, No. CIV. A. 96-CV-728, 1998 WL 135703, at *2 (E.D. Pa. Mar. 20, 1998) ("Class actions are widely-recognized as being particularly appropriate for the litigation of antitrust cases alleging a price-fixing conspiracy because price-fixing schemes presumably impact all purchasers in the affected market, so that common questions on the issue of liability predominate."). Plaintiffs can prove common, classwide impact through two types of common evidence. First, plaintiffs will use defendants' documents and testimony to show that the conspiracy inflated the prices of Filled

Propane Exchange Tanks—which was defendants' express purpose in entering into the conspiracy. Second, Plaintiffs' economics expert will use defendants' transactional sales data and utilize economic theory, documentary evidence, and standard statistical modeling and econometric analysis to confirm both that prices for Filled Propane Exchange Tanks were artificially inflated, and that this supracompetitive pricing impacted all or nearly all of the class. *See, e.g., In re Potash Antitrust Litig.*, 159 F.R.D. at 696 (holding that econometric analysis of transactional data "is not unique to each class member, but is common to the class and susceptible to class-wide proof").

Finally, not only will these common issues regarding Plaintiffs' claims predominate, but so too will defendants' statute of limitations defense. "[S]tatute of limitations can be applied to the class as a whole or to large groups of class members; this makes the issue a common, not individualized, one and supports a finding that common issues predominate." Newberg on Class Actions § 4:57. The Sherman Act's four-year statute of limitations applies equally to every member of the class; as does the continuing violation doctrine that restarts that statute of limitation each time defendants sold a price-fixed Filled Propane Exchange Tank. In order to prove a continuing violation and restart the statute of limitations, plaintiffs must prove: "(1) 'a price-fixing conspiracy;' (2) 'that brings about a series of unlawfully high priced sales' during the class period; and (3) 'sales to the plaintiffs' during the class period." *In re Pre-Filled Propane Tank Antitrust Litig.*, 860 F.3d 1059, 1068 (8th Cir. 2017). Here again, these first two elements will be proved solely through reliance on *defendants'* conduct; that is, what they said and did during the time period(s) in question. Proving a conspiracy that brought about artificially-inflated prices will not vary among class members. As to the third element, although it is theoretically possible that defendants may not have made sales to certain Settlement Class

Members during all relevant time periods, that too can be proved by reference to common evidence—defendants' sales data—and it is well settled that any such individualized accounting does not predominate or otherwise defeat class certification. *See, e.g.*, Newberg on Class Actions § 4:57 ("[I]f statute of limitations issues are somewhat individualized, courts deem that these concerns can be resolved during the damage phase of the case and need not preclude certification of liability issues.").

Class-Wide Resolution is Superior. In order to certify a class under Rule 23(b)(3), the court must also find "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). That requirement is easily satisfied here given the common proof of conspiracy, antitrust injury, damages, and continuing violation described herein. *Accord, e.g.*, Wright, Miller & Kane, Federal Practice and Procedure: Civil Procedure § 1781, at 254–55 (3d ed. 2004) ("[I]f common questions are found to predominate in an antitrust action, . . . courts generally have ruled that the superiority prerequisite of Rule 23(b)(3) is satisfied."). Without a class action approach, a significant number of individual lawsuits could be filed, and "[s]eparate proceedings would produce duplicate efforts, unnecessarily increase the costs of litigation, impose an unwarranted burden on this Court and other courts throughout the country, and create the risk of inconsistent results for similarly situated parties." *In re Potash Antitrust Litig.*, 159 F.R.D. at 699. Moreover, "the cost associated with individual claims may require claimants with potentially small claim amounts to abandon otherwise valid claims simply because pursuing those claims would not be economical. This in turn would result in unjustly enriching the Defendants; precisely the result antitrust laws are designed to remedy." *Id.* Finally, any theoretical difficulties in managing a class action need not be considered for this settlement-only class certification. *See Amchem Prod.*, 521 U.S. at 620

("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems.").

C. The Court Should Reaffirm the Appointment of Class Counsel.

Rule 23(c)(1)(B) provides that an order certifying a class action "must appoint class counsel under Rule 23(g)." Fed. R. Civ. P. 23(c)(1)(B). The court must 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 Court has already appointed the four undersigned law firms as Interim Co-Lead Class Counsel and Interim Liaison Counsel . *See* ECF # 78 at 2-3. Since entry of that Order, these law firms have continued to vigorously represent their clients and the interests of the proposed Settlement Class, including substantial document review, motions practice, serving and responding to discovery requests, a successful appeal to an *en banc* Eighth Circuit to reinstate Plaintiffs' previously-dismissed consolidated class action complaint, and a defeat of defendants' petition for certiorari in the United States Supreme Court. In addition, Interim Co-Lead and Liaison Class Counsel have spent substantial time and resources on understanding the economic issues in this case, including the appropriate measure and scope of damages. And after litigating this case for nearly five years—at their own expense and without any guarantee of recovery of either their time or costs—they have also negotiated and achieved a substantial monetary recovery for the Settlement Class in this once-dismissed action.

In sum, undersigned counsel are well-qualified to serve as settlement Class Counsel in this case, and respectfully request the Court to appoint them accordingly.

D. The Proposed Notice and Plan of Dissemination Meets the Strictures of Rule 23.

Rule 23 provides that class members must receive "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). It also provides that "the court must direct notice in a reasonable manner to all class members who would be bound by the propos[ed] [settlement]." Fed. R. Civ. P. 23(e)(1).

Rule 23(c)(2)(b) contains specific requirements for the notice, namely, that the notice must state in clear, concise, plain, and easily understood language:

> (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B); *accord, e.g., In re Uponor, Inc., F1807 Plumbing Fittings Prod. Liab. Litig.*, 716 F.3d 1057, 1065 (8th Cir. 2013) ("Valid notice of a settlement agreement 'may consist of a very general description' of settlement terms"). "The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means." *Id.*

The Proposed Notice[28] here meets those requirements. The parties' intent is to have the Claims Administrator provide actual notice where possible to each Settlement Class Member. Both defendants have agreed to provide contact information for all Settlement Class Members from their sales records and databases. The Claims Administrator, JND Legal Administration, will be responsible for providing notice to potential Settlement Class Members consistent with Rule 23(c)(2)(B). The Claims administrator will email notice to Settlement Class Members where possible, and send postcard notice if email notification is not possible. In addition, the detailed long-form notice will be available on the website, in addition to relevant case documents

[28] *See* Exhibit D.

such as the complaint and settlement agreements themselves. With this motion, plaintiffs provide proposed forms for email notice, postcard notice, and a proposed plan of distribution.

E. Proposed Schedule for Final Approval and Dissemination of Notice.

Below is a proposed schedule for providing notice, filing objections, and holding a fairness hearing:

EVENT	DUE DATE
Claims Administrator receives Ferrellgas and AmeriGas data on potential class members	60 days from Order preliminary approving Settlements.
Notice mailed and posted on internet	31 days after Claims Administrator receives the data.
Deadline for motion for attorneys' fees, costs, and service awards	31 days after Notice mailed.
Objections deadlines	45 days after Notice mailed.
Exclusions deadlines/end of opt-out period	45 days after Notice mailed.
Claims Administrator files Affidavit of Compliance with Court regarding notice requirements	14 days after opt-out deadline.
Final Fairness Hearing	90 days after Notice mailed, or at the Court's convenience.

IV. CONCLUSION

Based on the foregoing, plaintiffs respectfully request that this Court certify the proposed Settlement Class; preliminarily approve the proposed Settlement Agreements; appoint the undersigned Interim Co-Lead Counsel and Interim Liaison Counsel as Settlement Class Counsel; appoint JND Legal Administration the Claims Administrator; and approve the Notices to be issued to the Proposed Settlement Class.

DATED: November 8, 2019 Respectfully submitted,

By: /s/ Richard F. Lombardo

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Richard F. Lombardo
Richard F. Lombardo