UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA

IN RE:	**CASE NO. 15-81004**
LOUISIANA SAFETY ASSOCIATION OF TIMBERMEN - SELF INSURED FUND	**CHAPTER 7**
DEBTOR	

T. BRETT BRUNSON AS TRUSTEE FOR LOUISIANA SAFETY ASSOCIATION OF TIMBERMEN – SELF INSURED FUND	**ADVERSARY PROCEEDING No. 17-08003**

Versus

ASCENSION READY MIX, INC.,
O'NEALGAS, INC.,
E.A. HINTON WELL SERVICING INC., and
ALFORD MOTORS, INC.
(On behalf of themselves and others similarly situated)

MEMORANDUM IN SUPPORT OF JOINT MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

MAY IT PLEASE THE COURT:

T. Brett Brunson, in his capacity as trustee ("Trustee") of Louisiana Safety Association Of Timbermen – Self Insured Fund ("Timbermen" or "Fund"), and O'nealgas, Inc., E.A. Hinton Well Servicing, Inc., Alford Motors, Inc., Cardiovascular Surgery of Alexandria, LLC, Coastal Pipe Of Louisiana, Inc., and The Bank, on behalf of themselves and others similarly situated (collectively, the "Defendants"; Defendants and Trustee are collectively referred to herein as "parties" or "Movants") submit this memorandum in support of their Joint Motion for Final Approval of Class Action Settlement ("Final Approval Motion").

INTRODUCTION

The settlement agreement ("Settlement Agreement" or "Settlement") presented to this Court for final approval resolves the Trustee's claims against the Class[1] for unpaid liabilities of Timbermen. The Settlement provides a fair result for members of the defendant Class and readily satisfies the conditions for final approval set forth in Fed. R. Civ. P. 23(e)(2). As described more fully herein, the Settlement not only apportions liability much more equitably among Class members, but also provides a significant reduction in liability exposure for each Class member - the maximum liability amount due under the Settlement equates to roughly .03% of the principal sum asserted by the Trustee against Class members. Furthermore, Class members benefit from the Settlement by sharing costs of attorneys' fees, with each member being assigned a minimal fraction of the fees incurred to defend the Class.

I. BACKGROUND

A. FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural background of this defendant Class Action is set forth in detail in the *Joint Motion for Preliminary Approval* [Doc. 230] and is incorporated herein by reference. In 2017, the Trustee commenced this Class Action against Defendants, through which the Trustee sought a money judgment against the Class and each member of the Class in the full amount of all liabilities of Timbermen as of the filing of its Bankruptcy Case, plus all reasonable costs and expenses incurred in this Class Action, including any counsel fees and expert witness fees. At that time, Timbermen's liabilities totaled approximately $40 million.

[1] Capitalized terms not defined herein shall have the meanings ascribed to them in the Settlement Agreement [Doc. 230-4] to which this motion relates.

Through order entered on August 22, 2018, this Court certified the above-captioned adversary proceeding as a defendant class action. [Doc.143] Following litigation and discovery conducted in both the Class Action and Bankruptcy Case, the Trustee and Defendants negotiated terms for a settlement of this matter; and, on May 19, 2022, this Court granted preliminary approval of the Settlement Agreement [Doc. 234] ("Preliminary Approval Order") and directed notice thereof to the Class and other appropriate parties.

B. SUMMARY OF THE SETTLEMENT AGREEMENT

A more detailed description of the Settlement is set forth in the *Joint Motion for Preliminary Approval* [Doc. 230] and is incorporated herein by reference. Through the Settlement, the Trustee and Defendants have agreed to resolve all claims of the Trustee against Class members who participate in the settlement and comply with the terms and conditions set forth in the Settlement Agreement.

The Class consists of approximately 5,000 members and is defined as: all members of Timbermen who were members from January 1, 1998 through September 11, 2015, except those members with whom the Trustee has settled and granted a release of liability[2] ("Class") [Doc. 143].

The Settlement Agreement permits members of the Class to be released of all liability asserted through the Class Action by paying a fixed amount, significantly reduced from the amount originally asserted by the Trustee. Under the Settlement, such amount is based on the estimated amount of timely filed, allowed Proofs of Claim attributable to workers' compensation-related claims, and unearned premium (for Timbermen policies) claims of Class

[2] Through notice of the Certification Order, Class members were given the opportunity to "opt out" or exclude themselves from the Class. On August 4, 2020, Class Counsel identified a total of 30 Class members who had elected to opt out of the Class [Doc. 220]; and, on September 2, 2022, Class Counsel reported [Doc. 247] additional Class members who elected to opt out of the Class following dissemination of the Class Notice.

members incurred in the years in which the Class members were Timbermen members (collectively, the "Agreed Claims").

The Settlement Agreement includes two components of liability for Class members: the Claims Component and the Attorneys' Fees Component. With regard to the Claims Component, the liability of each Class member is based upon a Class member's virile share of the Agreed Claims amount, attributable to any year(s) between 1998 and 2015 in which the Class member was a Timbermen member. Each Class member's virile share has been calculated and is reflected in Exhibit SVS to the Settlement Agreement. With regard to the Attorneys' Fees Component, each Class member's liability is based upon its *pro rata* share of Class Counsel's fees and expenses. A Class member's Claims Component liability is used as the basis for determining the Class member's *pro rata* share of Class Counsel's fees and expenses.

Given the uncertainties surrounding how many Class members are still in operation, the Settlement provides that each Class member will pay two times the sum of its liability for the Claims Component and Attorneys' Fees Component ("Payment Amount"). The exact Payment Amount for each Class member cannot yet be calculated as the Bankruptcy Court has not yet approved fees and expenses for Class Counsel; however, based upon the amount sought to be approved for Class Counsel, *i.e.,* $500,000, the estimated range for Payment Amounts is between approximately $8.00 and $12,800.00.

C. APPROVED CLASS NOTICE

Consistent with this Court's Preliminary Approval Order, prior to July 1, 2022, the Trustee caused the Class Notice, in the form attached as Appendix A to said Preliminary Approval Order, to be sent by first class mail to all Class members for whom the Trustee had current addresses, less those addresses for which prior notices were returned. The Trustee

further caused the exact Class Notice (Appendix A to the Preliminary Approval Order) to be emailed to all identified Class members, for whom Timbermen had an email address on record, and who had not already opted out of the Class. This Class Notice was crafted to provide a thorough overview of the Class members' legal rights and options in connection with the Settlement; and, included, *inter alia*, (a) background information related to the Class Action; (b) definition of the Class; (c) a Settlement overview, including potential liability of Class members arising from the Settlement; (d) risks and benefits associated with the Settlement and opting out of the Class and Settlement; (e) deadlines for exercising Class member's legal rights; (f) how to participate in the Fairness Hearing; (g) how to opt out of the Class and Settlement; (h) information concerning Class Counsel and their fees; and, (i) how to obtain more information regarding the Settlement.

In addition, prior to July 1, 2022, the Trustee caused the Class Notice, in the form attached as Appendix B to the Preliminary Approval Order, to be published in each of the following Louisiana-based newspapers: *Winn Parish Enterprise; The Advocate; The New Orleans Advocate/The Times Picayune; The Daily Advertiser; The Shreveport Times*, also known as *The Times*; *The Town Talk*; and, *The Ouachita Citizen*. This published Class Notice was devised to be a concise but sufficiently comprehensive notice to Class members of the potential Settlement, informing them of, *inter alia*, how to: (a) obtain more information regarding the Settlement and Class Action; (b) protect their rights in connection with the Settlement; (c) request exclusion from or object to the Settlement; and, (d) determine their potential liability under the Settlement.

Furthermore, in accordance with the Preliminary Approval Order, the Trustee timely caused (i) the Class Notice; (ii) the Settlement Agreement, including all exhibits and attachments

thereto; (iii) the Preliminary Approval Order and related joint motion [Doc. 230]; and, (iv) Class Counsel's motion to approve fees and expenses [Doc. 237] to be displayed on the website dedicated to the Class Action (www.timbermenclassaction.com). Finally, Class Counsel established a dedicated telephone line and email account for Class members to obtain information about the Class Action and Settlement from them.

Finally, as set forth in the Report of Trustee Regarding Notice [Doc. 248], the Trustee caused notice of the Joint Motion for Preliminary Approval [Doc. 230], including attachments thereto ("CAFA Notice"), to be transmitted *via* first class mail on April 11, 2022 to all proper parties in accordance with 28 U.S.C. §1715 of the Class Action Fairness Act.

In response to these notice efforts, over 200 Class members utilized the dedicated phone line to request additional information regarding the Settlement; and, approximately 30 members utilized the dedicated email account to request additional information. In addition, approximately two dozen other Class members contacted Class Counsel directly to inquire about the Settlement.

The Trustee and Class Counsel maintain that this comprehensive notice plan was designed to provide the best notice practicable under the circumstances and to comply with all requirements of due process and of Fed. R. Civ. P. 23.

II. LAW AND ARGUMENT

A. THE SETTLEMENT MEETS RULE 23 REQUIREMENTS FOR FINAL APPROVAL.

There is a general federal policy in favor of class action settlements; and, "a presumption is made in favor of the settlement's fairness, absent contrary evidence". *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 843 (E.D. La. 2007), citing *Smith v. Crystian, 91 Fed. App'x 952, 955 (5th Cir. 2004); see also In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf*

of Mexico, 295 F.R.D. 112 (E.D. La. 2013); *Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977)*; *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir.1982). In evaluating a class action settlement, "a court must reach 'an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated' and 'form an educated estimate of the complexity, expense, and likely duration of such litigation . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.'" *Jones v. Singing River Health Sys.*, 2016 U.S. Dist. LEXIS 188753, at *15-16 (S.D. Miss. June 2, 2016), quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25, 88 S. Ct. 1157, 20 L. Ed. 2d 1 (1968).

The requirements for approval of class action settlements are set forth in Federal Rule of Civil Procedure 23; and, provide that "the court must find that the proposed settlement is 'fair, adequate, and reasonable'." *Henderson v. Eaton*, 2002 U.S. Dist. LEXIS 20840, at *5-6, citing *Cope v. Duggins*, 203 F. Supp. 2d 650, 653 (citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)); *Dumont v. Charles Schwab & Co.*, 2000 U.S. Dist. LEXIS 10906 at *14 (*citing Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982)). "The court must also make an independent and thorough inquiry into the reasonableness of the attorney's fees proposed in the settlement agreement." *Id*., citing *Strong v. BellSouth Telecomm. Inc*., 137 F.3d 844, 849-50 (5th Cir. 1998).

The Fifth Circuit Court of Appeals has established the following factors, known as the *Reed* factors, for courts to consider when determining whether a class action settlement is fair, adequate and reasonable: "(1) the existence of fraud or collusion behind the settlement; (2) the probability of plaintiffs' success on the merits; (3) the range of possible recovery; (4) the complexity, expense and likely duration of the litigation; (5) the stage of the proceedings and the

amount of discovery completed; and (6) the opinions of class counsel, class representatives, and absent class members". *DeHoyos v. Allstate Corp*., 240 F.R.D. 269, 2007 U.S. Dist. LEXIS 12366 (W.D. Tex. 2007), citing *Reed v. General Motors Corp*., 703 F.2d 170, 172 (5th Cir. 1983). "In considering these factors, a court should keep in mind the strong presumption in favor of finding a settlement fair." *Henderson*, 2002 U.S. Dist. LEXIS 20840, at *7, citing *Cotton*, 559 F.2nd 1326, 1331.

In 2018, Rule 23 was amended to include the following factors that a court must consider in evaluating a proposed settlement:

"(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, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other."

Fed. R. Civ. P. 23(e)(2).

The Advisory Committee notes to the 2018 amendment are instructive:

"The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate. Courts have generated lists of factors to shed light on this concern…. *The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance* that should guide the decision whether

to approve the proposal." Fed. R. Civ. P. 23(e)(2) Advisory Committee's notes to 2018 amendment (emphasis added).

1. The Class has been adequately represented.

In determining whether to approve a class action settlement, the Court first considers whether the class representatives and class counsel have adequately represented the class. Fed. R. Civ. P. 23(e)(2)(a). Such evaluation focuses on: whether "(1) the class representatives have common interests with members of the class and (2) whether the class representatives will vigorously prosecute [or defend] the interests of the class through qualified counsel". *Paxton v. Union Nat'l Bank*, 688 F.2d 552 (8th Cir. 1982).

Defendants have adequately represented the Class in this Class Action. First, Defendants' interest in refuting the Trustee's claims is common among all Class members. Like other Class members, Defendants were former members of Timbermen at some point during 1998 and 2015 and thus, are each exposed to liability for the claims asserted by the Trustee in this Class Action. In fact, two of the Defendants[3], Coastal Pipe of Louisiana, Inc. and E.A. Hinton Well Servicing, Inc., were members of Timbermen during each of the years between 1998 and 2015; thus, at least two Defendants had a direct stake in the ultimate liability imposed upon the Class for *all relevant years*. Because all Defendants have potential liability exposure to the Trustee, each Defendant was (and remains) highly incentivized to vigorously defend against the Trustee's claims and minimize any liability of the Class. Each Defendant is satisfied with the terms of the Settlement and have adequately represented the Class in defense of the Class Action and achievement of the Settlement.

[3] The Bank was a member of Timbermen during the years 1998-1999; O'nealgas, Inc. was a Timbermen member from 2011-2015; Alford Motors, Inc. was a Timbermen member from 2013-2015; and, Cardiovascular Surgery of Alexandria, LLC was a Timbermen member from 2002-2013.

In addition, as set forth in the Declarations of Class Counsel, Roedel Parsons, *et al*., and The Steffes Firm have significant experience, respectively, in class action matters and bankruptcy proceedings. Class Counsel have committed considerable resources to the Class Action and have diligently defended the claims asserted therein, through, among other actions, conducting extensive investigation of the Trustee's claims, reviewing substantial discovery, and litigating the extent of potential liability of Class members including through the claims administration process of the Bankruptcy Case. The parties submit that the Class has been adequately represented by both Class Counsel and Defendants.

2. <u>The Settlement is the result of arms' length negotiations</u>.

In considering approval of a class action settlement, the Court next examines whether the settlement was negotiated at arms' length. Fed. R. Civ. P. 23(e)(2)(B). "A strong presumption exists in favor of settlement if the [court] determines that the settlement resulted from arms-length negotiations between experienced counsel and was not tainted by fraud or collusion." *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830,844 ((E.D. La. 2007). Absent a finding of fraud or collusion, a court "should be hesitant to substitute its own judgment for that of counsel." *City of Omaha Police & Fire Ret. Sys. v. LHC Group*, 2015 U.S. Dist. LEXIS 26051 (W.D. La. 2015), citing *Ruiz v. McKaskle*, 724 F.2d 1149, 1152 (5th Cir. 1984). Among other numerous issues, the parties negotiated the liability of Class members, the releases granted to Class members and the form and substance of the proposed Class Notice. The significant reduction in liability exposure afforded to Class members is, itself, highly indicative of an arms' length negotiation process.

The Settlement resulted from arms' length negotiations after a careful assessment of the strengths of the Trustee's claims and the defenses urged by Defendants. Through experienced

counsel, the Trustee and Defendants agreed to terms for a settlement only after in-depth investigation and factual and legal research, motion practice, consultation with experts in the fields of self-insurance trusts and financial accounting, extensive discovery (formal and informal), including over 35,000 pages of documents and deposition transcripts, participation in nearly 20 status conferences with the Court during the course of the Class Action, and extensive arms' length negotiations.

The Settlement Agreement is the product of informed, non-collusive negotiations among qualified counsel. Accordingly, this factor weighs in favor of approving the Settlement.

3. <u>The relief provided to the Class through the Settlement is adequate.</u>

In evaluating a class action settlement, Courts must also consider whether "the relief provided for the class is adequate, taking into account… (i) the costs, risks, and delay of trial and appeal the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)". Fed. R. Civ. P. 23(e)(2)(C).

a) The costs, risks and delay of trial weigh in favor of settlement approval.

"In determining the probability of plaintiffs' success on the merits, the court must compare the terms of the settlement with the likely rewards the class would have received following a successful trial of the case." *Henderson*, 2002 U.S. Dist. LEXIS 20840, *9, citing *Reed v. General Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983). "The court is not to decide the issues or try the case to assess this factor, however, because, 'the very purpose of the compromise is to avoid the delay and expense of such a trial.'" *Id*. (quoting *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971)).

The Trustee has already demonstrated an actionable claim against the Class because he successfully achieved class certification. The parties primarily disagree regarding the extent of Class member liability. Specifically, while the Trustee contends that all Class members are solidarily liable for the entire unpaid liabilities of the Fund, the Defendants maintain that any liability of a Class member would be limited to the Fund's liabilities attributable to the years in which the Class member held membership in Timbermen. Further, although the Trustee bases the Fund's liabilities on the amounts identified in the Proofs of Claim, the Defendants dispute the stated amounts for numerous Proofs of Claim filed by the Fund's creditors; and, those values remain subject to objection and adjudication in the Bankruptcy Case. Avoidance of such "sharply contested" issues is a central aim of settlement. *See Young*, 447 F.2d at 433.

When evaluating the possible range of recovery at trial, the court should be mindful that "compromise is the essence of a settlement." *Turner, Inc.*, 472 F. Supp. 2d 830, 850. Further, a "proposed settlement need not obtain the largest conceivable recovery for the class to be worthy of approval; it must simply be fair and adequate considering all the relevant circumstances." *Klein v. O'Neal, Inc*., 705 F. Supp. 2d 632, 649 (N.D. Tex. 2010). In the context of a defendant class, such as the one at issue here, the goal is, of course, to avoid or minimize liability of Class members. If the Trustee ultimately prevails on the merits of the case, each Class member could potentially face judgment for solidary liability in an amount exceeding $30 million (approximate current stated amount of Proofs of Claims). In turn, the Trustee would likely incur significant costs in enforcing such judgments against any or all of the approximately 5,000 members, and the delay associated therewith would almost certainly undermine the Trustee's goal of efficient administration of the Estate. Under the terms of the Settlement, the maximum liability for

compliant Class members ranges[4] from approximately $8 to $12,800 depending on (i) the year(s) in which the Class member was a Timbermen member and (ii) the legal fees of Class Counsel ultimately approved by this Court.

Other *Reed* factors further aid in the Court's evaluation of a settlement, *e.g.*, anticipated complexity, expense, and likely duration of the litigation, as well as the stage of the proceedings and the amount of discovery completed. In assessing these factors, courts consider the uncertainties of litigation and compare the settlement to possible future relief following potentially lengthy and costly litigation. *In re Shell Oil Refinery, 155 F.R.D. 552, 563 (E.D. La. 1993)*; *and Beaulieu v. EQ Indus. Servs., Inc., No. 5:06-CV-00400-BR, 2009 U.S. Dist. LEXIS 63574, 2009 WL 2208131, at *26 (E.D.N.C. July 22, 2009)* ('[T]he settlement terms reflect plaintiffs' counsel's consideration of the strength of their case, and the delay and cost of proceeding to trial balanced against the certainty, relative promptness, and amount of relief the settlement provides.')". *In re Oil Spill*, 295 F.R.D. 112, 147.

These factors further ask the Court to consider "whether the parties have obtained sufficient information to evaluate the merits of the competing positions." *In re Educ. Testing Serv., 447 F. Supp. 2d at 620* (quotations omitted). *Id*. Under such evaluation, " 'the question is not whether the parties have completed a particular amount of discovery, but whether the parties have obtained sufficient information about the strengths and weaknesses of their respective cases to make a reasoned judgment about the desirability of settling the case on the terms proposed . . . .'" *Id*., citing *In re Educ. Testing Serv., 447 F. Supp. 2d at 620*-621.

At the time the Settlement was reached, the parties were able to evaluate the Class members' potential liabilities and conduct informed negotiations. Specifically, the parties had

[4] This estimated range is based on the smallest Class member claim liability (Class member who was a Fund member only in 2002), the largest Class member claim liability (Class member who was a Fund member from 1998-2015), and an attorneys' fees award of $500,000.

consulted with experts in the fields of self-insurance trusts and financial accounting, as well as gained information through formal discovery, which included depositions, interrogatories, and requests for production. In addition, extensive informal discovery was conducted, including during the claims administration process in the Bankruptcy Case. The parties have conducted wide-ranging investigations through both formal discovery and informal discovery, and the use of and/or consultation with experts.

"Extensive information allow[s] the [p]arties to assess their positions in great detail and make a reasonable decision on settlement, which is all that is required." *In re Oil Spill*, 295 F.R.D. 112, 149, citing *In re Combustion, 968 F. Supp. at 1127.* At the Settlement stage, fundamental issues concerning liability valuation remained in dispute. Resolving these issues would require litigation in the Bankruptcy Case, trial in the Class Action and, presumably, appeal(s), all of which would likely be costly and cause significant delay. Thus, in light of the foregoing circumstances, the costs, risks and delay of trial weigh in favor settlement.

c) All other factors set forth in Rule 23(e)(2)(C) support approval of the Settlement.

i. Plan of Allocation

The effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims is another consideration for the Court in assessing a proposed settlement. Fed. R. Civ. P. 23(e)(2)(C)(ii). With regard to a plan of allocation, the primary obligation of the Court is "simply to ensure that the fund distribution is fair and reasonable*." City of Omaha Police & Fire Ret. Sys*., 2015 U.S. Dist. LEXIS 26051, at *36. However, in the context of this *defendant* Class Action, settlement funds are not

distributed to, but rather collected from the Class. The basis for the Payment Amount to be collected from each Class member is set forth above and in the Settlement Agreement, § 2.

Concerning the mechanics of collection and distribution of the Payment Amounts, a summary of the procedures, developed by the parties, is set forth below:

- Upon Court approval of the Settlement and attorneys' fees and expenses, the Trustee shall issue a Demand for Payment to members of the Class to pay their respective Payment Amounts.

- The Trustee shall deposit all Payment Amounts received from Class Members into a segregated account, referred to as the Settlement Fund.

- Upon full payment of its Payment Amount pursuant to the Settlement Terms, a Class Member shall be deemed to be released from all claims asserted, or which could have been asserted, in this Class Action. Upon request of any compliant Class member, the Trustee shall furnish a written acknowledgement of the Settlement Release, which shall confirm the Class member's payment and release from liability.

- The Trustee shall pay from the Settlement Fund, in the following priorities:

a. Reimbursement to the Trustee of all expenses of Class Notices to the Class Members;

b. Payment of approved fees and expenses to Class Counsel, in excess of sums advanced by JSB;

c. Reimbursement to the Class Representatives of any net sums previously paid to Class Counsel;

d. Any amounts due JSB pursuant to the terms and conditions of the Court-approved settlement between the Trustee and JSB; and

e. Payment to the Trustee as an asset of the Estate, which shall be used to pay allowed Estate claims.

- If any funds remain in the Settlement Fund after all required payments are made, the Trustee shall refund such amount to compliant Class members on a pro rata basis.

ii. Class Counsel's Fees and Expenses

Consideration of the terms of any proposed award of attorney's fees is required for approval of a class action settlement. Fed. Rule Civ. Pro. 23(e)(2)(C)(iii). The reasonableness of attorneys' fees is evaluated for two key reasons. *Cope v. Duggins*, 203 F. Supp. 2d 650, 654 (E.D. La. 2002). "First, the Court reviews attorney fees to protect class members from unfair settlements and to minimize conflicts of interest that may arise between class members and their attorney representatives." *Id.*, citing *Strong*, 137 F.3d at 849. "Second, the Court examines counsel compensation to prevent promulgating a public perception that attorneys exploit the members of their class to obtain excessive fees." *Id*.

On June 3, 2022, Class Counsel filed their *Motion for Award of Attorneys' Fees and Litigation Expenses* [Doc.237] ("Fee Motion"), which matter is scheduled to be heard at the Fairness Hearing. As set forth more fully in the Fee Motion, Class Counsel has maintained detailed time entries for work performed, which, as of the Fee Motion filing, totaled over 1,900 hours. Details of Class Counsel's experience and services performed in this Class Action are set forth in the Fee Motion and supporting declarations, which are incorporated herein by reference.

Under the terms of the Settlement, Class members shall share responsibility for Class Counsel's fees and expenses in proportion to the claims liability assessed among each other. Depending on such claims liability, the total liability of a Class member for Class Counsel fees and expenses is estimated to range between $1 and $880 (based upon a total award of $500,000

for Class Counsel fees and expenses). Class Counsel and the Trustee submit that such amount due from each Class member is fair and reasonable and undoubtedly well below any amount which would have otherwise been incurred by a Class member to retain independent counsel in defense of the Trustee's claims. The deadline for objections to the Fee Motion has now passed; and, no objections to the Fee Motion have been filed.

iii. Agreements related to the Settlement

Finally, in approving a settlement, Courts must consider any agreement required to be identified under Rule 23(e)(3). The only agreement related to the Settlement Agreement is Exhibit N thereto, *i.e.*, the form of a promissory note ("Note") available to certain Class members. Under the Settlement, the Note is provided as a payment option for those Class members whose Payment Amount exceeds $6,000. After paying 20% of the Payment Amount, those applicable Class members are permitted to pay, with interest, the remaining balance of the Payment Amount in monthly installments as set forth in the Note.

4. The Settlement treats Class members equitably relative to one another.

In approving a settlement, Courts must determine whether the Settlement Agreement treats members of the Class equitably relative to each other. Fed. R. Civ. P. 23(D). As set forth above, under the Settlement, each Class member bears responsibility only for those years in which the Class member was a Timbermen member. In any such applicable year, the Claims Component liability is equally divided among applicable Class members. With regard to the Class members' liability for Class Counsel's fees and expenses, under the Settlement, each Class member is liable only for its *pro rata* share of such fees and expenses, as approved by the Court. Thus, the Settlement provides for Class members to be treated equitably relative to one another.

C. Opinions of Class Counsel and the Class also support Settlement approval.

"Counsel are the Court's 'main source of information about the settlement'". *Turner,* 472 F. Supp. 2d 830, citing Manual for Complex Litigation § 21.641. The Fifth Circuit has consistently recognized that the opinion of class counsel should be given great weight. *Klein v. O'Neal,* Inc., 705 F. Supp. 2d 632, (N.D. Tex. 2010); see *Cotton,* 559 F.2d at1330 ("[T]he trial court is entitled to rely upon the judgment of experienced counsel for the parties."). This Court appointed Roedel Parsons, *et al*., and The Steffes Firm as Class Counsel in recognition of their significant experience in class action matters and bankruptcy proceedings, respectively. After thorough discovery (formal and informal), motion practice, consultation with an expert in the field of self-insurance trusts and participation in extensive arms-length negotiations, Class Counsel have determined that the proposed settlement is fair, adequate, and reasonable for the Class.

Additionally, the "attitude of absent class members, expressed either directly or indirectly by their failure to object after notice or high level of participation in the proposed settlement program, is an additional factor on which district courts generally place heavy emphasis", *City of Omaha Police & Fire Ret. Sys*., 2015 U.S. Dist. LEXIS 26051, at *24. In this case, no Class member has objected to the terms of the Settlement or the Class Counsel fees proposed. Instead, only a *minimal* number of objections were filed by Class members, each of which relate solely to liability issues specific to the objecting Class member. "The absence or small number of objections may provide a helpful indication that the Settlement is fair, reasonable and adequate." *Claudet v. Cytec Retirement Plat, et al*., 2020 U.S. Dist. LEXIS 103040 (E.D. La. 2020). While no Class Member has objected to the substance of the Settlement itself, the Trustee has addressed certain of the objections in the *Trustee's Responses to Objections*, attached to the *Motion for*

Final Approval as **Exhibit A**. As set forth in the *Trustee's Responses to Objections*, the Trustee has agreed to modify the portion of the Payment Amount attributable to certain of the objectors' Agreed Claims-related liability.

As further indication of the Class members' favorable opinion of the Settlement, only 12 (twelve) Class members elected to exclude themselves from the Class and Settlement in accordance with the prescribed form ("Opt Outs"). Three (3) additional Class members appear to have attempted to Opt Out; however, their elections did not satisfy the form requirements set forth in the Class Notice. *Movants respectfully request that this Court review and consider whether to accept or reject such attempted Opt Outs*. Lastly, one Class member, *i.e.*, Intertrust Armored Service, Inc., which previously submitted an Opt Out on April 14, 2020, has requested that its prior Opt Out be rescinded. *Movants believe that Intertrust should be permitted to rescind its prior Opt Out and participate in the Settlement; and, request this Court's approval of such action*. Copies of the attempted Opt Outs and Opt Out recission are included in the *Report of Class Counsel on 2022 Opt Outs. See* **Exhibit B** to the *Motion for Final Approval*.

D. NOTICE OF THE SETTLEMENT SATISFIES DUE PROCESS AND RULE 23

The Class has been provided with adequate notice of the Settlement. The Class Notice plainly informed Class members of: (a) the terms of the Settlement; (b) the nature and extent of Class member liability and conditions for release of claims asserted against Class members; (c) maximum attorneys' fees that will be sought; (d) the opportunity to opt out of and/or object to the settlement; and, (e) the time, date and place of the Fairness Hearing. Movants assert that the Class Notice satisfied the requirements of Fed Rule Civ. Pro. 23 as it was the "best notice…practicable under the circumstances" and "directed in a reasonable manner to all class members who would be bound by the" Settlement. Fed. R. Civ. P. 23(c)(2)(B) and (e)(1)(B).

Further, the Class Notice satisfied due process as it was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *In re Integra Realty Resources, Inc.,* 354 F.3d 1246 (10th Cir. 2004), citing *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 36, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

The parties maintain that the combination of individual first-class mail and email to Class members, supplemented by a dedicated phone line and email account, notice in appropriate news publications and publication on the Class Action website was the "best notice practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). In *Integra*, the Tenth Circuit found the notice to class members via mail and publication to satisfy due process requirements; and, in doing so, recognized that "imposing a requirement of actual notice to every class member would place an impossible constraint on defendant class action litigation". *Integra*, 354 F.3d 1246, 1261, citing *Integra Realty Resources, Inc., et al. v. Fidelity Capital Appreciation Fund*, 262 F.3d 1089, 1110 (10th Cir. 1983). Finally, notices comparable to the notice provided to the Class members in this Class Action have been found by Courts in this Circuit to meet the requirements of due process. *See City of Omaha Police & Fire Ret. Sys*, 2015 U.S. Dist. LEXIS 26051 , *14, citing *Enron Corp. Securities & ERISA Litigations*, 2003 WL 22494413, *3 (S.D. Tex. July 24 2003); and, *In re OCA, Inc. Securities and Derivative Litigation*, 2008 U.S. Dist. LEXIS 84869, 2008 WL 4681369, *14-16 (E.D. La. Oct. 17, 2008).

III. CONCLUSION

Movants submit that the Settlement is fair, adequate and reasonable; and, in the best interest of all parties. Through the Settlement, Class members will, *inter alia*, significantly limit their liability exposure for the Fund's unpaid workers' compensation liabilities, ensure fair and

equitable apportionment of liability among Class members, and minimize attorneys' fees that would otherwise be incurred by each Class member in the defense of the Trustee's claims against such members individually. The Settlement was negotiated at arm's length after discovery and motion practice (in the Class Action and the Bankruptcy Case) and consultation with experts in the fields of self-insurance trusts and financial accounting, all of which permitted the parties to evaluate the strengths and weaknesses of their claims and defenses. As set forth herein, there is no indication of collusion between the parties, or any preferential treatment provided to the Class Representatives or any segment of the Class. Movants respectfully submit that the Settlement satisfies the requirements for final approval by this Court.

Respectfully submitted,

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