IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CURTIS KLUG, LAWRENCE NOVER, and NELS ROE, on behalf of themselves and all others similarly situated, **Plaintiffs,** **v.** **WATTS REGULATOR COMPANY,** **Defendant.**	**8:15CV61** **PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS**
JOSEPH PONZO, DURWIN SHARP, KATHRYN MEYERS, and JOSHUA WHIPP, on behalf of themselves and all others similarly situated, **Plaintiffs,** **v.** **WATTS REGULATOR CO.,** **Defendant.**	**8:16CV200** **PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS**

Plaintiffs in the above-captioned cases, individually and on behalf of the Settlement Classes, respectfully file this Motion for Attorneys' Fees and Costs, and set forth the support for this Motion in the accompanying memorandum of law.

Dated: February 6, 2017

Respectfully submitted,

By: /s/ Shanon J. Carson

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FOR THE DISTRICT OF NEBRASKA

CURTIS KLUG, LAWRENCE NOVER, and NELS ROE, on behalf of themselves and all others similarly situated, **Plaintiffs,** **v.** **WATTS REGULATOR COMPANY,** **Defendant.**	**8:15CV61** **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS**
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I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 23(h) and as set forth in the parties' Settlement Agreement, Class Counsel respectfully seek the Court's final approval of attorneys' fees in the amount of $4,200,000.00 plus reimbursement of Class Counsel's out-of-pocket costs in the amount of $41,689.58.

Plaintiffs filed the *Klug, et al. v. Watts Regulator Company* class action in the United States District Court for the District of Nebraska in February 2015. In *Klug*, Plaintiffs allege that Watts manufactured and marketed a defective line of water supply connectors known as FloodSafe® Auto-Shutoff Connectors ("FloodSafe Connectors"). FloodSafe Connectors are used to supply water to common household fixtures and appliances including faucets, toilets, washing machines, dishwashers, and icemakers. FloodSafe Connectors incorporate a shut-off device intended to detect when water flow exceeds a preset flow rate (*i.e.*, evidence of a leak) and, upon such detection, prevent water from passing through. Plaintiffs alleged that FloodSafe Connectors are defective because they fracture and fail at the shut-off device, causing the damages sustained by Plaintiffs and the Settlement Class.

Plaintiffs filed the *Ponzo, et al. v. Watts Regulator Company* class action originally as three separate cases in two district courts in late 2014 and early 2015. After the case filed in the Northern District of Ohio was transferred to the District of Massachusetts, an Amended Complaint was filed consolidating the three cases in Boston in June 2015. In *Ponzo*, Plaintiffs allege that Watts manufactured and marketed certain water heater supply lines (the "Water Heater Connectors") that are defective. Plaintiffs allege the Water Heater Connectors are defective because their inner-tubing is made from a thermoplastic polymer that degrades when exposed to metallic ions present

in most household water supplies. The defect in the Water Heater Connectors causes them to fail and leak, eventually resulting in major water damage in Plaintiffs' and Class Members' homes.

Watts denied all allegations in the *Klug* and *Ponzo* actions but agreed to engage in alternative dispute resolution to determine if the cases could be resolved. Following a period for ADR-related discovery, the parties participated in two full-day in-person mediation sessions overseen by former Eastern District of Pennsylvania Magistrate Judge Diane M. Welsh, an experienced and respected mediator at JAMS in Philadelphia. Following these sessions, as well as extensive additional arms' length negotiations between counsel, Plaintiffs and Watts reached class-wide settlements in *Klug* and *Ponzo* which, pending the Court's final approval, fully and finally resolve Plaintiffs' claims. The total amount of the settlement in *Klug* is $4 million and in *Ponzo* is $10 million, for a Global Settlement Amount of **$14 million**. The settlement is fair, reasonable and adequate, and will benefit the members of the Settlement Classes. This Court granted preliminary approval of the Settlement on December 7, 2016. (*Klug* Dkt. No. 138; *Ponzo* Dkt. No. 144.)

Class Counsel now seek 30% of the $14 million dollar settlement as attorneys' fees ($4,200,000), plus reimbursement of their out-of-pocket expenses incurred in prosecuting these actions. The attorneys' fees requested will compensate Class Counsel for work already performed plus all of the work remaining to be completed in connection with the Settlement, including insuring that it is fairly administered and implemented, preparing for and attending the final fairness hearing, and obtaining dismissal of the actions after the parties' obligations under the Settlement are fulfilled. The requested attorneys' fees and costs are also in accordance with the law in this Circuit awarding and approving attorneys' fees and costs in similar cases.

II. LEGAL ARGUMENT

A. The Percentage Method is the Fair and Preferred Method of Calculating Attorneys' Fees in Common Fund Cases

Strong judicial policy favors the settlement of class actions. *Little Rock School District v. Pulaski County Special School District No. 1*, 921 F.2d 1371, 1388 (8th Cir. 1990); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1149 (8th Cir. 1999). A court may approve a proposed settlement pursuant to Rule 23(e) if it is "fair, reasonable, and adequate." *In re Life Time Fitness*, No. 15-3976, 2017 U.S. App. LEXIS 1843, at *4 (8th Cir. Feb. 2, 2017); *Marshall v. NFL*, 787 F.3d 502, 508 (8th Cir. 2015). The Settlement preliminarily approved by this Court in *Klug* and *Ponzo* is not only fair, reasonable and adequate, but provides an excellent result for Plaintiffs and Class Members. Settlement Class Members who submit claims for a "Replacement Remedy" will receive funds for replacement parts to compensate them for the amounts they paid to purchase the defective product(s). In addition, Class Members who have claims approved for the "Property Damage Remedy" shall receive funds based upon the damages caused by the failure of the defective product(s), in an amount not less than $25.00 and up to 25% of their reasonably proven property damage.

The Supreme Court has observed that without the possibility of recovering an attorneys' fee, most class actions would never be filed. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) (observing that '[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved person may be without any effective redress unless they may employ the class action device'). *Allapattah Servs. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1216-17 (S.D. Fla. 2006) (parallel citations omitted). The propriety of an award of attorneys' fees as a percentage of a fund established by a settlement is well-established in decisions issued by the Eighth Circuit and judges within this District. *See,*

e.g., *In re Life Time Fitness*, 2017 U.S. App. LEXIS 1843, at *7; *Petrovic*, 200 F.3d at 1157; *US Bancorp Litigation*; 291 F.3d 1035, 1038 (8th Cir. 2002); *Ramsey v. Sprint Communs., Co.*, No. 4:11-CV-3211, 2012 U.S. Dist. LEXIS 171145, at *17 (D. Neb. Dec. 3, 2012); *Desert Orchid Partners, L.L.C. v. Transaction Sys. Architects, Inc.*, Nos. 8:02CV553, 8:02CV561, 2007 U.S. Dist. LEXIS 15547, at *11 (D. Neb. Mar. 2, 2007). An award of attorney fees is within the sound discretion of the Court. Fed. R. Civ. P. 23(h); *In re Life Time Fitness*, 2017 U.S. App. LEXIS 1843, at *5-9; *Petrovic*, 200 F.3d at 1157.

The "common fund" doctrine is a well-established rule governing class action settlements in federal courts. "[A] lawyer who recovers a common fund for the benefit of persons other than…his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).[1] Federal courts, including this Circuit, have endorsed the percentage of the fund method as a fair way to calculate and award a reasonable fee when contingency fee litigation has produced a common fund. *Id.*; *see also Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (under common fund doctrine, "reasonable fee is based on a percentage of the fund bestowed on the class"). "Courts have also recognized that, in addition to providing just compensation, awards of attorneys' fees from a common fund serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future misconduct of a similar nature." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570,

[1] The common fund doctrine rests on the understanding that attorneys should normally be paid by their clients and that unless attorneys' fees are paid out of the common fund, where the attorneys' unnamed class member "clients" have no express retainer agreement, those who benefited from the fund without contributing to those who created it would be unjustly enriched. *Boeing*, 444 U.S. at 478; *see also Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970) ("A primary judge-created exception [to the American Rule on fees] has been to award expenses where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself.").

585 (S.D.N.Y. 2008) (citing *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002)). Additionally, "'one of the primary advantages of the [percentage of recovery] method is that it is thought to equate the interests of class counsel with those of the class members and encourage class counsel to prosecute the case in an efficient manner.'" *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 992 (D. Minn. 2005) (quoting *LaChance v. Harrington*, 965 F. Supp. 630, 647 (E.D. Pa. 1997)).

Substantial fee awards in successful cases, such as the present actions, encourage and support the filing and litigation of meritorious class actions to protect consumer interests. The continued viability of product liability cases depends on the ability of private litigants to muster resources sufficient to seek redress through litigation. The success of these lawsuits also depends on the availability and willingness of attorneys to pursue them. Fair and reasonable fee awards encourage reputable law firms with skilled, capable attorneys to take the risk of serving as "private attorneys general." "Absent an award of fees that adequately compensates Class Counsel, the entire purpose and function of class litigation under Rule 23 of the Federal Rules of Civil Procedure will be undermined and subverted to the interest of those lawyers who would prefer to take minor sums to serve their self-interest rather than obtaining real justice on behalf of their injured clients." *Allapattah Services, Inc.* 454 F. Supp. 2d at 1217 (approving a 31.33% award of attorneys' fees).

B. Plaintiffs' Fee Request Satisfies Each of the Criteria Applied to Determine Reasonable Attorneys' Fees

The Eighth Circuit has not established a precise set of criteria to calculate appropriate attorneys' fees in a common fund case. *Xcel Energy, Inc.*, 364 F.Supp.2d at 992-993. "There are two primary methods for determining a common fund fee award: the percentage-of-fund method and the lodestar method." *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. 05-1708 (DWF/AJB), 2008 U.S. Dist. LEXIS 17535, at *22 (D. Minn. Mar. 7, 2008). "'It is within

the discretion of the district court to choose which method to apply[.]'" *In re Life Time Fitness*, 2017 U.S. App. LEXIS 1843, at *5. District courts frequently rely on a twelve-factor test that considers: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the requisite skill required to perform the legal service properly; (4) preclusion of other employment by the attorney due to case acceptance; (5) customary fee for similar work in the community; (6) whether the fee is fixed or contingent; (7) the limitations imposed by client or circumstances; (8) amount involved and results obtained; (9) the attorneys reputation, experience and ability; (10) the case's undesirability; (11) nature and length of the professional relationship with the client; and (12) awards in similar cases. *Xcel Energy, Inc.*, at 993 (using twelve-factor test from *Johnson v. Georgia Highway Express*, 488 F.2d 714, 719-720 (5th Cir. 1974)). All twelve *Johnson* factors seldom apply in each case, and courts exercise their discretion in selecting factors for review in a particular case. *See Griffin v. Jim Jamison, Inc.*, 188 F.3d 996, 997 (8th Cir. 1999) ('[I]t is not necessary for district courts to examine exhaustively and explicitly . . . all the factors that are relevant to the amount of a fee award.')." *Zihaver v. UnitedHealth Group, Inc.*, 646 F.Supp.2d 1075, 1082-83 (D. Minn. Aug. 20, 2009). Accordingly, Plaintiffs address the applicable *Johnson* factors below.

1. Substantial Time and Labor was Involved and Class Counsel Assumed Great Risk

Class Counsel assumed a huge risk in filing and litigating these cases. Class Counsel took these cases on a fully contingent basis, investing time, effort and money with no guarantee of any recovery. Class Counsel also proceeded knowing that there was a chance that Watts would prevail and that, even if Plaintiffs prevailed, the case would likely take years to resolve. The risk of no recovery in product defect class actions is very real, as is the risk that plaintiffs' counsel in contingent fee class cases, after devoting thousands of hours of attorney time and advancing

significant sums in litigation expenditures, will receive no compensation whatsoever. *See, e.g.*, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) ("The risk of maintaining class action status throughout the trial" was an important factor in approving the class action settlement.").

This case involved a substantial amount of work to bring it to a successful conclusion. Since these cases were filed in 2014, Plaintiffs successfully organized and coordinated cases filed in three separate districts, opposed Watts' motions to dismiss, and the parties conducted extensive ADR-related discovery. Class Counsel obtained and reviewed thousands of pages of documents and extensive claims data, engaged in numerous and intense negotiations with Defendant, attended two separate in-person mediations that finally produced a proposed Settlement, and also coordinated and negotiated separate settlements with certain subrogation insurers and their counsel. Specifically, following the filing of the Motion for Preliminary Approval, additional and extensive briefing and negotiation occurred concerning claims by certain subrogation carriers, with the end result being a full and complete settlement with respect to both the Class claims and related subrogation carrier claims.

Watts' counsel vigorously represented their client throughout the process. From the outset, Watts denied liability and continues to do so, maintaining that its products are not defective. While the risks of the case and litigation obstacles were great, Class Counsel achieved a very successful result as evidenced by the terms of the proposed Settlement. Thus, the first and second *Johnson* factors weigh strongly in favor of the fee award sought by Class Counsel.

2. Class Counsel Obtained an Excellent Result for the Class

The eighth *Johnson* factor considers the result obtained. The global cash value of the *Klug* and *Ponzo* settlements is $14 million dollars, which will provide substantial relief to the Settlement

Class Members. In addition, as a result of the efforts of Class Counsel and the negotiations with counsel for Watts and certain subrogation carriers, the common fund will not be negatively impacted as a result of settlements entered into between Watts and the subrogation carriers. The settlement compensates Class Members for both their product purchases, and, where applicable, a portion of the much more substantial costs of property damage. Many of these claims were far too small for individual Class Members or attorneys, to pursue individually against a large, national company like Watts.

3. The Case Required Significant Skill of Experienced Counsel to Bring to a Successful Conclusion

As detailed in Class Counsel's motion for the appointment of interim class counsel, Class Counsel are nationally recognized in product liability class actions and put all of their skill and experience to work in the service of Plaintiffs and Class Members. *Klug*, 8:15-cv-00061 (ECF No. 37). Class Counsel's highly-informed, diligent and efficient prosecution of this matter positioned Plaintiffs to successfully resolve this case, affording them redress, while avoiding the expense and risk attendant with a trial and possible appeal.

The quality of opposing counsel is also important in evaluating the quality of Class Counsel's work.[2] As the Court is aware, Watts is represented by experienced and skilled attorneys from multiple large, national law firms with excellent reputations, and who demonstrated vigorous advocacy in the defense of this case. Accordingly, the third and ninth *Johnson* factors strongly support the requested fee.

4. The Fee Requested is Consistent with Fees Awarded in Common Fund Cases in this Circuit

[2] *In re KeySpan Corp. Sec. Litig.*, No. CV 2001-5852 (ARR) (MDG), 2005 U.S. Dist. LEXIS 29068, at *35 (E.D.N.Y. Aug. 25, 2005) ("The quality of opposing counsel is also important in evaluating the quality of Class Counsel's work.").

Courts in this Circuit typically award fees between 25% and 36% in common fund cases. *In re Life Time Fitness*, 2017 U.S. App. LEXIS 1843, at *4 (affirming an award of 28% of the common settlement fund); *Xcel Energy, Inc.*, 364 F.Supp.2d at 998 (collecting cases awarding between 25% and 36% of the settlement fund). Thus, Plaintiffs' requested fee of 30% of the Settlement Fund is consistent with decisions by other courts in this Circuit, satisfying the fifth and twelfth *Johnson* factors.

5. The Reaction of the Settlement Class Supports the Requested Fee

The deadline for Class Members to submit Replacement Claims and Property Damage Claims for claims that arose between November 4, 2008 and November 4, 2014 is one year from the date the Court enters a Final Approval Order. The deadline for Class Members to submit Property Damage claims that arose after November 4, 2014 is four years from the date the Court enters a Final Approval Order. As of the date of this filing, Class Counsel has not received a single objection to the proposed Settlement or Class Counsel's fee request.[3] As such, this factor strongly supports Class Counsel's fee request.

C. <u>The Fee Sought is also Appropriate Under the Lodestar/Multiplier Method of Fee Calculation</u>

As shown above, Eighth Circuit law regards both the percentage and lodestar methods as acceptable ways to calculate fees for class counsel in class action settlements. *E.g., In re Life Time Fitness*, 2017 U.S. App. LEXIS 1843, at *8 (8th Cir. Feb. 2, 2017). Some courts use the lodestar to "check" the reasonableness of a fee request. Here, even if this Court were to apply a lodestar cross check on the percentage fee award sought, 30% of the Settlement Fund is an appropriate

[3] In the event that any objections are filed, Class Counsel reserve the right to respond.

and reasonable fee award in this case. *See Xcel Energy, Inc.*, 364 F.Supp.2d at 999 (performing a cross-check of lodestar in approving fee request); *In re Guidant Corp.*, 2008 WL 682174 at *14-16.

"The lodestar – the product of a reasonable hourly rate and the reasonable number of hours required by the case – creates a 'presumptively reasonable fee.'" *Morales v. Farmland Foods, Inc.*, No. 8:08CV504, 2013 U.S. Dist. LEXIS 56501, at *17 (D. Neb. Apr. 18, 2013) (citing *Perdue v. Kenny A.*, 559 U.S. 542 (2010) (granting Plaintiffs' Counsels' motion for fees). "Once a lodestar is determined, 'other factors may lead the district court to adjust the fee upward or downward, including the important factor of the results obtained.'" *Id.*, at *18. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally, this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) (holding that "where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced.").

Here, a lodestar cross-check confirms the propriety of the fee sought. Class Counsel are reporting their lodestar using a method by which hours expended by each attorney are multiplied by the attorney's hourly rate. Based on these figures, Class Counsel estimates that their current lodestar is approximately $2,253,341.20. *See* Declaration of Shanon Carson, ¶ 10. This figure does not include the costs of preparing papers for and appearing at the final fairness and approval hearing, or for work relating to claims administration and communicating with class members during the several years when the claims period will remain open. *Id.* The fee amount requested represents a modest lodestar multiplier of 1.86. Such a multiplier is routinely approved by courts

in this Circuit. *See, e.g.*, *Ray v. Lundstrom*, No. 4:10CV3177, 2012 WL 5458425, at *4 (D. Neb. Nov. 8, 2012) (approving lodestar multiplier of 1.96); *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 999 (D. Minn. 2005) (collecting cases approving lodestar multipliers in excess of four in securities class actions). Class Counsel respectfully submits that the requested fee is fair, reasonable and appropriate, and should be awarded.

D. Class Counsel's Expenses are Reasonable and Should be Reimbursed

In addition to being entitled to reasonable attorneys' fees, it is well-settled that "'[t]he common fund doctrine provides that a private plaintiff or plaintiff's attorney, whose efforts create, increase or preserve a fund to which others also have a claim, is entitled to recover from the fund the costs of litigation….'" *Zilhaver*, 646 F. Supp. 2d at 1084-1085 (*quoting In re GMC Pick-Up Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820 n.39 (3rd Cir. 1995)); *In re Life Time Fitness*, 2017 U.S. App. LEXIS 1843, at *8. "[B]ecause each common fund case presents its own unique set of circumstances, trial courts must assess each request for fees and expenses on its own terms." *In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999).

Class Counsel's out-of-pocket expenses incurred in this litigation currently total approximately $41,689.58. *See* Declaration of Shanon Carson, ¶ 22. The expenses are of the type typically billed by attorneys to paying clients in the marketplace and include such costs as copying fees, expert fees, computerized research and travel in connection with this litigation. All of the expenses were reasonable and necessary for the successful prosecution of this case and should be approved. Class Counsel respectfully requests that the Court approve reimbursement of these reasonable out-of-pocket expenses.

III. CONCLUSION

Based upon the foregoing reasons, Class Counsel respectfully requests that the Court approve their request for attorneys' fees in the amount of 30% of the $14 million settlement ($4,200,000) plus reimbursement of their out-of-pocket expenses in the amount of $41,689.58.

Dated: February 6, 2017.

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