

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 9:16-cv-81911-ROSENBERG**

MATTHEW GOTTLIEB, individually and
on behalf of all others similarly situated,

Plaintiff,

v.

CITGO PETROLEUM CORPORATION,

Defendant.

**ORDER PRELIMINARILY APPROVING CLASS ACTION
SETTLEMENT AND CERTIFYING SETTLEMENT CLASS**

The Parties to the above-captioned action (“Action”) have agreed to settle the Action pursuant to the terms and conditions set forth in an executed Settlement Agreement and Release (“Settlement”). The Parties reached the Settlement through arm’s-length negotiations, including two private mediation sessions conducted by David Lichter, Esquire. Under the Settlement, subject to the terms and conditions therein and subject to Court approval, Plaintiff and the proposed Settlement Class will fully, finally, and forever resolve, discharge, and release their claims in exchange for CITGO Petroleum Corporation’s (“CITGO”) payment of \$8,000,000.00, inclusive of all attorneys’ fees and costs, to create a common fund to benefit the Settlement Class. In addition, CITGO has agreed to pay fees and costs associated with providing Notice to the Settlement Class and for administration of the Settlement up to \$300,000.00, subject to reimbursement from excess funds after the first round of claims payments.

The Settlement has been filed with the Court, and Plaintiff and Class Counsel have filed an Unopposed Motion for Preliminary Approval of Class Settlement (“Motion”). Upon considering the Motion, the Settlement and all exhibits thereto, the record in these proceedings,

the representations and recommendations of counsel, and the requirements of law, the Court finds that: (1) this Court has jurisdiction over the subject matter and the Parties to this Action; (2) the proposed Settlement Class meets the requirements of Federal Rule of Civil Procedure 23 and should be certified for settlement purposes only; (3) the persons and entities identified below should be appointed Class Representative and Class Counsel; (4) the Settlement is the result of informed, good-faith, arm's-length negotiations between the Parties and their capable and experienced counsel, and is not the result of collusion; (5) the Settlement is within the range of reasonableness and should be preliminarily approved; (6) the proposed Notice program and proposed forms of Notice satisfy Federal Rule of Civil Procedure 23 and constitutional due process requirements, and are reasonably calculated under the circumstances to apprise the Settlement Class of the pendency of the Action, class certification, the terms of the Settlement, Class Counsel's application for an award of attorneys' fees and expenses ("Fee Application") and request for a Service Award for Plaintiff, and their rights to opt-out of the Settlement Class or object to the Settlement, Class Counsel's Fee Application, and/or the request for a Service Award for Plaintiff; (7) good cause exists to schedule and conduct a Final Approval Hearing, pursuant to Federal Rule of Civil Procedure 23(e), to assist the Court in determining whether to grant Final Approval of the Settlement and enter the Final Approval Order, and whether to grant Class Counsel's Fee Application and request for a Service Award for Plaintiff; and (8) the other related matters pertinent to the Preliminary Approval of the Settlement should also be approved.

Based on the foregoing, **IT IS HEREBY ORDERED AND ADJUDGED** as follows:

1. As used in this Preliminary Approval Order, unless otherwise noted, capitalized terms shall have the definitions and meanings accorded to them in the Settlement.

2. The Court has jurisdiction over the subject matter and Parties to this proceeding pursuant to 28 U.S.C. § 1332.

3. Venue is proper in this District.

Provisional Class Certification and Appointment of Class Representative and Class Counsel

4. It is well established that “[a] class may be certified solely for purposes of settlement [if] a settlement is reached before a litigated determination of the class certification issue.” *Borcea v. Carnival Corp.*, 238 F.R.D. 664, 671 (S.D. Fla. 2006) (internal quotation marks omitted). In deciding whether to provisionally certify a settlement class, a court must consider the same factors that it would consider in connection with a proposed litigation class – *i.e.*, all Rule 23(a) factors and at least one subsection of Rule 23(b) must be satisfied – except that the Court need not consider the manageability of a potential trial, since the settlement, if approved, would obviate the need for a trial. *Id.*; *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

5. The Court finds, for settlement purposes, that the Federal Rule of Civil Procedure 23 factors are present and that certification of the proposed Settlement Class is appropriate under Rule 23. The Court therefore provisionally certifies the following Settlement Class.

All persons in the United States who had one or more CITGO Marketing Text Messages sent to their cellular telephone number.

The following are excluded from the Settlement Class: (1) the trial judge presiding over this case; (2) CITGO, as well as any parent, subsidiary, affiliate or control person of CITGO, and the officers, directors, agents, servants or employees of CITGO; (3) any of the Released Parties; (4) the immediate family of any such person(s); (5) any Settlement Class member who timely opts-out of the Settlement; and (6) Plaintiff’s Counsel and their employees.

6. Specifically, the Court finds, for settlement purposes, that the Settlement Class

satisfies the following factors of Federal Rule of Civil Procedure 23:

(a) Numerosity: In the Action, over 93,000 individuals, spread out across several states, are members of the proposed Settlement Class. Their joinder is impracticable. Thus, the Rule 23(a)(1) numerosity requirement is met. *See Kilgo v. Bowman Trans.*, 789 F.2d 859, 878 (11th Cir. 1986) (numerosity satisfied where plaintiffs identified at least 31 class members “from a wide geographical area”).

(b) Commonality: The threshold for commonality under Rule 23(a)(2) is not high. “[C]ommonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury,’” and the plaintiff’s common contention “must be 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. *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541, 2551 (2011) (citation omitted). Here, the commonality requirement is readily satisfied. There are multiple questions of law and fact, centering on CITGO’s class-wide practices, that are common to the Plaintiff and the Settlement Class, that are alleged to have injured all members of the Settlement Class in the same way, and that would generate common answers central to the viability of the claims were this case to proceed to trial.

(c) Typicality: The Plaintiff’s claims also are typical of the Settlement Class because they concern the same alleged CITGO practices, arise from the same legal theories, and allege the same types of harm and entitlement to relief. Rule 23(a)(3) is therefore satisfied. *See Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) (typicality satisfied where claims “arise from the same event or pattern or practice and are based on the same legal theory”); *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001) (named plaintiffs

are typical of the class where they “possess the same interest and suffer the same injury as the class members”).

(d) Adequacy: Adequacy under Rule 23(a)(4) relates to: (1) whether the proposed class representatives have interests antagonistic to the class; and (2) whether the proposed class counsel has the competence to undertake the litigation at issue. *See Fabricant v. Sears Roebuck*, 202 F.R.D. 310, 314 (S.D. Fla. 2001). Rule 23(a)(4) is satisfied here because there are no conflicts of interest between the Plaintiff and the Settlement Class, and Plaintiff has retained competent counsel to represent him and the Settlement Class. Class Counsel here regularly engage in consumer class litigation, complex litigation, and other litigation similar to the present Action, and have dedicated substantial resources to the prosecution of the Action. Moreover, the Plaintiff and Class Counsel have vigorously and competently represented the Settlement Class in the Action. *See Lyons v. Georgia-Pacific Corp. Salaried Employees Rel. Plan*, 221 F.3d 1235, 1253 (11th Cir. 2000).

(e) Predominance and Superiority: Rule 23(b)(3) is satisfied as well because the common legal and alleged factual issues here predominate over individualized issues, and resolution of the common issues for the members of the Settlement Class in a single, coordinated proceeding is superior to thousands of individual lawsuits addressing the same legal and factual issues. With respect to predominance, Rule 23(b)(3) requires that “[c]ommon issues of fact and law . . . ha[ve] a direct impact on every class member's effort to establish liability that is more substantial than the impact of individualized issues in resolving the claim or claims of each class member.” *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1170 (11th Cir. 2010) (internal quotation

marks omitted). The predominance requirement is satisfied here because common questions present a significant aspect of the case and can be resolved for all members of the Settlement Class in a single adjudication. In a liability determination, those common issues would predominate over any issues that are unique to individual members of the Settlement Class. Moreover, each member of the Settlement Class has claims that arise from the same or similar alleged CITGO practices as well as the same legal theories.

7. The Court appoints Plaintiff, Matthew Gottlieb, as Class Representative.

8. Subject to possible later additions in accord with the provisions of the Settlement, the Court appoints the following persons and firms as Class Counsel:

Jeff M. Ostrow, Esq.
Avi R. Kaufman, Esq.
Scott Edelsberg, Esq.
KOPELOWITZ OSTROW
FERGUSON WEISELBERG GILBERT
One West Las Olas Blvd., Suite 500
Fort Lauderdale, FL 33301

Andrew J. Shamis
SHAMIS & GENTILE, P.A.
14 N.E. 1st Ave., Suite 400
Miami, FL 33132

Preliminary Approval of the Settlement

9. At the preliminary approval stage, the Court's task is to evaluate whether the Settlement is within the "range of reasonableness." 4 *Newberg on Class Actions* § 11.26. "Preliminary approval is appropriate where the proposed settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason." *Smith v. Wm. Wrigley Jr. Co.*, 2010 WL 2401149, at *2 (S.D. Fla. Jun. 15, 2010). Settlement negotiations that involve arm's length, informed bargaining with the aid of experienced counsel support a preliminary finding of fairness. *See Manual for Complex*

Litigation, Third, § 30.42 (West 1995) (“A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm’s-length negotiations between experienced, capable counsel after meaningful discovery.”) (internal quotation marks omitted).

10. The Court preliminarily approves the Settlement, together with all exhibits thereto, as fair, reasonable and adequate. The Court finds that the Settlement was reached in the absence of collusion, is the product of informed, good-faith, arm’s-length negotiations between the Parties and their capable and experienced counsel. The Court further finds that the Settlement, including the exhibits thereto, is within the range of reasonableness and possible judicial approval, such that: (a) a presumption of fairness is appropriate for the purposes of preliminary settlement approval; and (b) it is appropriate to effectuate notice to the Settlement Class, as set forth below and in the Settlement, and schedule a Final Approval Hearing to assist the Court in determining whether to grant Final Approval to the Settlement and enter a Final Approval Order.

Approval of the Notice Program and the Claims Process

11. The Court approves the form and content of the Notice, substantially in the forms attached as Exhibits 1, 2 and 3 to the Settlement, and the Claim Form attached as Exhibit 4 to the Settlement. The Court further finds that the Notice program, described in the Agreement is the best practicable under the circumstances. The Notice program is reasonably calculated under the circumstances to apprise the Settlement Class of the pendency of the Action, certification of a Settlement Class, the terms of the Settlement, Class Counsel’s Fee Application and the request for Service Award for Plaintiff, and their rights to opt-out of the Settlement Class or object to the Settlement, Class Counsel’s Fee Application, and/or the request for a Service Award for Plaintiff. The Notice and Notice program constitute sufficient

notice to all persons entitled to notice. The Notice and Notice program satisfy all applicable requirements of law, including, but not limited to, Federal Rule of Civil Procedure 23 and the Constitutional requirement of Due Process.

12. The Court directs that: (a) Epiq Class Action & Claims Solutions, Inc. shall serve as the Settlement Administrator and the Escrow Agent; and (b) Hilsoft Notifications shall serve as the Notice Administrator.

13. The Settlement Administrator and Notice Administrator shall implement the Notice program, as set forth below and in the Settlement, using substantially the forms of Notice attached as Exhibits 1, 2 and 3 to the Settlement and approved by this Preliminary Approval Order. Notice shall be provided to the members of the Settlement Class pursuant to the Notice program, as specified in the Settlement and approved by this Preliminary Approval Order. The Notice program shall include Mailed Notice, Email Notice, Online Notice and Long-Form Notice, as set forth in the Settlement and below.

Mailed Notice Program

19. The Notice Administrator shall administer the Mailed Notice Program as contemplated in the Settlement. The Mailed Notice Program (which is composed of both the Initial Mailed Notice and the Notice Re-mailing Process) shall be completed no later than 45 days before the Final Approval Hearing.

Email Notice Program

23. The Notice Administrator shall administer the Email Notice Program as contemplated by the Settlement Agreement. The Email Notice Program shall be completed no later than 70 days before the Final Approval Hearing.

Online Notice Program

24. The Notice Administrator shall administer the Online Notice Program as contemplated by the Settlement Agreement. The Online Notice Program shall be completed no later than 70 days before the Final Approval Hearing.

Settlement Website

25. The Settlement Administrator shall establish a Settlement Website as a means for Settlement Class members to obtain notice of, and information about, the Settlement. The Settlement Website shall be established as soon as practicable following Preliminary Approval, but no later than before commencement of the Notice program. The Settlement Website shall include an online portal to file Claim Forms, hyperlinks to the Settlement, the Long-Form Notice, the Preliminary Approval Order, and other such documents as Class Counsel and counsel for CITGO agree to include. These documents shall remain on the Settlement Website at least until Final Approval.

26. The Notice Administrator is directed to perform all substantive responsibilities with respect to effectuating the Notice Program, as set forth in the Settlement.

Final Approval Hearing, Opt-Outs, and Objections

27. A Final Approval Hearing shall be held before this Court on November 29, 2017 at 11:00 a.m. to assist the Court in determining whether to grant Final Approval to the Settlement and enter a Final Approval Order, and whether Class Counsel's Fee Application and request for a Service Award for the Class Representative should be granted.

28. The Court directs that any person within the Settlement Class who wishes to be excluded from the Settlement Class may exercise their right to opt-out of the Settlement Class by following the opt-out procedures set forth in the Settlement and in the Notices at any time

during the Opt-Out Period. To be valid and timely, opt-out requests must be received by all those listed in the Long-Form Notice on or before the last day of the Opt-out Period , which is 30 days before the Final Approval Hearing (“Opt-Out Deadline”), and mailed to the addresses indicated in the Long Form Notice.

29. The Court further directs that any Settlement Class Member may object to the Settlement, Class Counsel’s Fee Application and/or the request for a Service Award for Plaintiff. Any such objections must be mailed to the Clerk of the Court, Class Counsel, and CITGO’s Counsel, at the addresses indicated in the Long-Form Notice. For an objection to be considered by the Court, the objection must be postmarked no later than 30 days before the Final Approval Hearing, as set forth in the Notice. To be valid, an objection must include the following information:

- a. the name of the Action;
- b. the objector’s full name, address and telephone number;
- c. an explanation of the basis upon which the objector claims to be a Settlement Class Member;
- d. all grounds for the objection, accompanied by any legal support for the objection known to the objector or his counsel;
- e. the number of times in which the objector has objected to a class action settlement within the five years preceding the date that the objector files the objection, the caption of each case in which the objector has made such an objection, and a copy of any orders related to or ruling upon the objector’s prior such objections that were issued by the trial and appellate courts in each listed case;

- f. the identity of all counsel who represent the objector, including any former or current counsel who may be entitled to compensation for any reason related to the objection to the Settlement or Fee Application;
- g. a copy of any orders related to or ruling upon counsel's or the counsel's law firm's prior objections made by individuals or organizations represented by that were issued by the trial and appellate courts in each listed case in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the preceding 5 years the objector's counsel;
- h. any and all agreements that relate to the objection or the process of objecting—whether written or oral—between objector or objector's counsel and any other person or entity;
- i. the identity of all counsel (if any) representing the objector who will appear at the Final Approval Hearing;
- j. a statement confirming whether the objector intends to personally appear and/or testify at the Final Approval Hearing;
- k. a list of all persons who will be called to testify at the Final Approval Hearing in support of the objection; and
- l. the objector's signature (an attorney's signature is not sufficient).

Further Papers in Support of Settlement and Fee Application

30. Plaintiff and Class Counsel shall file their Motion for Final Approval of the Settlement, Fee Application and request for a Service Award for Plaintiff, no later than October 15, 2017, which is 44 days prior to the Final Approval Hearing.

31. Plaintiff and Class Counsel shall file their responses to timely filed objections to

the Motion for Final Approval of the Settlement, the Fee Application and/or request a Service Award for Plaintiff no later than November 24, 2017, which is 15 days prior to the Final Approval Hearing.

Effect of Failure to Approve Settlement

32. In the event the Settlement is not finally approved by the Court, or for any reason the Parties fail to obtain a Final Approval Order as contemplated in the Settlement, or the Settlement is terminated pursuant to its terms for any reason, then the following shall apply:

(a) All orders and findings entered in connection with the Settlement shall become null and void and have no further force and effect, shall not be used or referred to for any purpose whatsoever, and shall not be admissible or discoverable in any other proceeding;

(b) Nothing contained in this Preliminary Approval Order is, or may be construed as, any admission or concession by or against CITGO or Plaintiff on any point of fact or law; and

(c) Neither the Settlement terms nor any publicly disseminated information regarding the Settlement, including, without limitation, the Notice, court filings, orders and public statements, may be used as evidence. In addition, neither the fact of, nor any documents relating to, either Party's withdrawal from the Settlement, any failure of the Court to approve the Settlement and/or any objections or interventions may be used as evidence.

Stay/Bar of Other Proceedings

33. All proceedings in the Action are stayed until further order of the Court, except as may be necessary to implement the terms of the Settlement. Pending final determination of whether the Settlement should be approved, Plaintiff, all persons in the Settlement Class, and persons purporting to act on their behalf are enjoined from commencing or

prosecuting (either directly, representatively or in any other capacity) against any of the Released Parties any action or proceeding in any court, arbitration forum or tribunal asserting any of the Released Claims.

37. Based on the foregoing, the Court sets the following schedule for the Final Approval Hearing and the actions which must take place before and after it:

<u>Event</u>	<u>Date</u>	<u>Timeline</u>
Deadline for the Email Notice Program	September 20, 2017	70 days before the Final Approval Hearing
Deadline for the Online Notice Program	September 20, 2017	70 days before the Final Approval Hearing
Deadline for Completion of Mailed and ReMailed Notice Program	October 15, 2017	44 days before the Final Approval Hearing
Deadline for filing Moton for Final Approval of the Settlement and Class Counsel’s Fee Application and expenses, and for a Service Award	October 15, 2017	44 days before the Final Approval Hearing
Deadline for Opting-out of the Settlement and for submission of Objections	October 30, 2017	30 days before the Final Approval Hearing
Deadline for Filings Responses to Objections	November 24, 2017	15 days before the Final Approval Hearing
Final Approval Hearing		November 29, 2017, at 11:00am
The last day that Settlement Class Claimants may submit a Claim Form to the Settlement Administrator	December 14, 2017	15 days after the Final Approval Hearing

DONE AND ORDERED in Chambers, Fort Pierce, Florida, this 14th day of August, 2017.

Copies furnished to:
Counsel of Record


ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE