

APR 10 2023

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

RANDALL SALLY, on behalf of himself)
and all others similarly situated,)
)
Plaintiff,)
)
vs.)
)
ADIDAS AMERICA, INC.)
)
Defendant.)

Cause No. 20SL-CC03903

Division 17

*Sp ordered
Jan 17
4/10/23*

**PLAINTIFF'S UNOPPOSED MOTION AND INCOPROATED MEMORANDUM OF LAW
IN SUPPORT OF PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

COMES NOW Plaintiff Randall Sally by his undersigned counsel, pursuant to Missouri Supreme Court Rule 52.08, and for Plaintiff's Motion for Preliminary Approval of Class Action Settlement states:

INTRODUCTION

Years after this case was filed, which included more than one (1) year of negotiations and another fourteen (14) months spent working together to secure a tax refund from the Missouri Department of Revenue ("MDOR") based on a refund of taxes Adidas America, Inc. ("Defendant" or "Adidas") collected on certain sales made via its website for shipment to Missouri delivery addresses, the Parties are pleased to report that they have reached a classwide settlement that favorably resolves this case. The Parties have entered into a Settlement Agreement,¹ under which Defendant has agreed to pay \$693,062.92 into a Settlement Fund to be distributed to Settlement Class Members who elect to participate in the Settlement. There is no claims process. Each

¹ Unless stated otherwise, capitalized terms used in this Motion are intended to have the meanings given to them in the Parties' Settlement Agreement (copy of which is attached hereto as Exhibit 1) and the Addendum to Settlement Agreement (copy of which are attached hereto as Exhibit 2) (combined hereinafter "Settlement Agreement").

Settlement Class Member will be entitled to receive a *pro rata* share of the Settlement Fund after deductions for Court-awarded Attorneys' Fees and Litigation Expenses, an Incentive Award to the Settlement Class Representative and the expenses associated with administering the Settlement.

By any measure, the Settlement and the relief it provides are a terrific outcome for the Settlement Class Members given the significant risks involved in continued litigation. Plaintiff brought this case against a Defendant with substantial resources, strong legal defenses, and a willingness to litigate through trial and appeals. While Plaintiff maintains that even absent a settlement, he would be able to secure class certification and prevail on the merits at trial, success is not assured, and Adidas has vigorously defended this case at every stage. Notwithstanding many challenges, Plaintiff and Class Counsel have secured a \$693,062.92 Settlement Fund and obtained a commitment from Adidas to amend its tax compliance methodology to conform to Plaintiff's theory that Missouri use tax applies to the types of transactions at issue in this litigation. If approved, the Settlement will bring meaningful relief to Missouri consumers as well as certainty and closure to what has been—and likely would continue to be—highly contentious, costly, and lengthy litigation.

With this Motion, Plaintiff seeks certification of the proposed Settlement Class for purposes of settlement under Missouri Supreme Court Rule 52.08, and preliminary approval of the Settlement Agreement, the proposed form and method of class notice, and the method of settlement administration. As explained in detail below, the terms of the Parties' Settlement are fair, reasonable, and adequate, and consistent with other consumer class settlements that have been approved in Missouri. Certification of the Settlement Class is in the best interests of the putative class members and proper under Missouri Supreme Court Rule 52.08.

Accordingly, Plaintiff respectfully requests that the Court enter an order (1) granting preliminary approval of the Settlement; (2) conditionally certifying the Settlement Class for

settlement purposes only; (3) appointing Plaintiff as Settlement Class Representative; (4) approving the proposed Notice Plan; (5) appointing Daniel J. Orłowsky of Orłowsky Law LLC and Adam M. Goffstein of Goffstein Law, LLC as Class Counsel; and (6) setting a date for the Final Approval Hearing.

I. BACKGROUND

A. Factual Background

Defendant Adidas designs and markets apparel products and maintains an e-commerce website, www.adidas.com. *Petition* at ¶¶ 6, 27. Adidas provides shoes, apparel, and accessories for men, women, boys, girls, and infants and toddlers, as well as offers sports collections including basketball, football, and training shoes. *Id.*

Missouri law requires retailers and sellers of consumer goods to charge sales or use tax on the sales of their products to Missouri purchasers. *Id.* at ¶¶ 1, 23. Missouri state law mandates that retailers and sellers of consumer goods with tax nexus charge a use tax on sales of their products through remote means, including an internet website, telephone, catalog or other remote communications systems (collectively, “remote sales channel(s)”) to Missouri purchasers that are shipped from an out-of-state facility. *Id.* at ¶¶ 2, 12, 20-24. The state use tax rate for these sales is 4.225%. *Id.* at ¶¶ 3, 24, 28. There may also be additional local use taxes that are imposed on sales made through remote sales channels based on the delivery address of the Missouri purchasers. *Id.* at ¶ 2. The state use tax rate of 4.225% plus any applicable local use tax impositions is the cumulative use tax rate for any given location. *Id.* at ¶¶ 2, 12, 29.

In this suit, Plaintiff claims that, despite clear Missouri law to the contrary, Adidas charged excess “tax” on sales of its products through remote sales channels, including Adidas’ internet website, to Missouri purchasers that are shipped from an out-of-state facility to a Missouri delivery

address. *Id.* at ¶ 25. Plaintiff brought this class action on behalf of herself and all persons and entities who, during the five-year period before the filing of the *Petition*, purchased a product from Adidas for personal, family or household use through remote sales channels, including its internet website, that was delivered from an out-of-state facility to a Missouri delivery address and who were charged tax monies at a higher tax rate than the correct applicable use tax rate. *Id.* at ¶ 26.

On May 16, 2020, Plaintiff purchased a Golf Shoe Bag, a Golf Flag Hat, and an Ultimate365 Climacool Hyper Athletic Polo from Adidas' website, www.adidas.com, for delivery to 715 Lepere Ave., Unit G, St. Louis, Missouri 63132. *Id.* at ¶ 27. Plaintiff's purchase was shipped from Spartanburg, South Carolina. *Id.* at ¶ 28. 29. According to the Missouri Department of Revenue, the applicable use tax rate for sales of products through remote sales channels that are shipped by Defendant from an out-of-state facility for delivery to 715 Lepere Ave., Unit G, St. Louis, Missouri 63132 on May 16, 2020 is 5.725%. *Id.* ¶ 28. 30. When Plaintiff purchased the Golf Shoe Bag, Golf Flag Hat, and Ultimate365 Climacool Hyper Athletic Polo on May 16, 2020, Adidas required Plaintiff Sally to pay a 9.244% tax rate, resulting in the overcollection of monies. *Id.* at ¶ 30.

Plaintiff subsequently brought this suit on her own behalf and on behalf of a putative statewide class, asserting claims under four counts for: (1) violations of the Missouri Merchandising Practices Act ("MMPA") Mo. Ann. Stat. 407.010 *et seq.*, (2) unjust enrichment, (3) negligence, and (4) money had and received. *Id.* at ¶¶ 47-73.

B. Procedural History and The Parties' Settlement Negotiations

Plaintiff initiated this lawsuit on August 18, 2020. During the month of October 2020, the Parties began to actively discuss settlement. Over the course of the next year the Parties held numerous telephone conferences, and, in support of these settlement discussions, Adidas shared with Plaintiff's counsel—on a confidential basis and for settlement purposes only—certain data

about potential class members and the transactions at issue. During this time, the Parties reached agreement on a general, non-binding framework for settling their disputes, and they agreed to negotiate and jointly draft the Settlement Agreement. Ex 1. As part of that framework, Adidas agreed to file a Refund Claim with the MDOR, seeking the return of the amount of excess monies Plaintiff contends Adidas collected as tax on certain sales made via its website for shipment to Missouri delivery addresses, and use any refund received for the class, subject to the terms of the Settlement Agreement. *Id.* at ¶ 1.

During the more than year-long settlement discussions, the Parties negotiated the contours of the Settlement Agreement, including how they would work together during the Refund Claim process, the scope of the release, the form of class notice, the claims submission process, and the various provisions governing implementation of the Settlement Agreement. Once the negotiations concluded, Plaintiff and the Parties' counsel executed the final Settlement Agreement in October 2021, which is now being submitted to the Court for approval.

C. The Refund Claim

Following the execution of the Settlement Agreement, the Parties worked together over the last sixteen (16) months on a Refund Claim that Adidas, with Plaintiff's counsel's input, filed with the MDOR seeking a refund of the amount of tax Adidas charged on certain sales made via its website for shipment to Missouri delivery addresses, subject to the terms of the Settlement Agreement. Ex. 1 at ¶ 1. As part of the Settlement Agreement, Adidas agreed to contribute any refunded monies to the Settlement Class and executed a non-exclusive power of attorney limited to sales/use taxes for the Refund Claim that allowed the MDOR to discuss the refund claim with Plaintiff's counsel. *Id.*

Adidas gathered, researched and reviewed all transactional data made during the Class Period with input from Plaintiff's counsel in order to prepare the necessary amended Missouri use

tax returns to reflect the proper state and local use tax that Plaintiff contends should have been collected on remote sales of tangible personal property shipped by, or on behalf of, Adidas from a “ship-from” location outside the state of Missouri to a purchaser’s delivery address within the state of Missouri. Adidas engaged an accounting firm to assist with that process. A Missouri Form 472S, Refund Claim Form, the amended returns and other documentation required to support the refund claims were prepared and filed with the MDOR pursuant to §§ 144.190.1, 144.190.2 and 144.190.3. In lieu of Defendants completing the “Reason for Overpayment” section of the Form 472S, Refund Claim Form, counsel for the Parties drafted and submitted a separate cover letter articulating Plaintiff’s argument for why the transactions are subject to use tax rather than sales tax. The Refund Claim and all supporting documentation was filed with the MDOR on November 16, 2021.

After the Refund Claim was filed with the MDOR, counsel for the Parties traveled to Jefferson City, MO and held a meeting with appropriate MDOR management, including representatives from the General Counsel’s Office and the Division of Taxation, to discuss the class action case associated with the claim, the parties’ proposed settlement of the class action case, the substantive merits of the refund claim and the parties’ intended use of the refund claim monies to fund the payment of damages to members of the class. Over the course of the last sixteen (16) months, counsel for the Parties have been in constant communication with each other and the MDOR via email and held numerous meetings via telephone conferences and video in order to perfect the Refund Claim.

On January 19, 2022, Adidas received an initial refund payment from the MDOR. And on January 25, 2023, Adidas received the remaining refund amount. The total amount of the Refund Claim is \$674,317.11, which Adidas put into an escrow account that created the proceeds for the Settlement Fund. Ex. 2 at 1. Adidas also agreed to contribute an additional \$18,745.81 to the

Settlement Fund due to prompt payment incentives paid to Adidas. *Id.* Combined these amounts are the Settlement Fund and total \$693,062.92. *Id.*

II. THE PROPOSED SETTLEMENT

A. The Proposed Settlement Class Definition

The proposed Settlement would establish a Settlement Class defined as follows:

[A] persons who, from July 27, 2015 through October 31, 2020, purchased tangible personal property from adidas in a remote sales transaction in which: 1) such property was shipped by, or on behalf of, adidas from a "ship-from" location outside the state of Missouri to the purchaser's delivery address within the state of Missouri; and 2) the purchaser was charged Missouri tax at more than the proper Missouri state and local use tax rate applicable at the delivery address. Excluded from the class are: Defendant, any entity in which Defendant has a controlling interest or which has a controlling interest in a Defendant, and Defendant's legal representatives, predecessors, successors, assigns, and employees; Class Counsel and members of the immediate family of class counsel; and the judge and staff to whom this case is assigned, and any member of the judge's immediate family and any customers who returned the product for a full refund.

Ex. 1 at ¶ 4. A Qualifying Purchase is defined as follows:

B. Monetary Relief and the Settlement Fund

As part of the Settlement, Adidas has agreed to establish a Settlement Fund by depositing the Refund Amount of \$674,317.11 plus the additional \$18,745.81 amount that Adidas agreed to contribute for a total of \$693,062.92 into an escrow account. The entire amount of the Class Settlement Amount will be distributed pro rata to Settlement Class Members from the Settlement Fund after deductions for Notice and Administration Expenses and any Court-awarded Attorneys' Fees and Litigation Expenses and a Service Award payment to Plaintiff will also be distributed from the Settlement Fund.

Because the Settlement Fund is to be distributed to Settlement Class Members pro rata, the total payment to each Settlement Class Member will ultimately depend on the number of Qualifying Purchases that were made during the class period. Based on the direct notice program

developed with the assistance of the Settlement Administrator, Atticus Administration LLC, Plaintiff anticipates a payment per Settlement Class Member for the amount of excess monies collected on the Qualifying Purchases that is well within the range of class settlements approved in this State.

C. Non-Monetary Relief

In addition to the Settlement's monetary relief, the Settlement also provides meaningful prospective relief to every Settlement Class Member and Missouri consumers in general. Adidas represents that it has amended its tax compliance methodology to conform to Plaintiff's theory that Missouri use tax applies to retail transactions for the purchase of tangible personal property for which all of the following are true: (a) the transaction is made either via Adidas' website, www.adidas.com, or via another remote sales channel for which Adidas is responsible for calculating tax due on the purchase; (b) the purchased property was shipped by or on behalf of Adidas from a location outside the state of Missouri; and (c) the purchaser's delivery address is within the state of Missouri. *Id.* at ¶ 5.

D. Notice and Settlement Administration

The Parties have engaged Atticus Administration LLC, an industry-leading class action settlement administrator, to carry out the Notice Plan and Settlement Services subject to Class Counsel's supervision. Decl. of Bryn Bridley (hereinafter "Bridley Decl."). With assistance of Atticus Administration LLC, the Parties have developed a robust Notice Plan that will attempt to provide Direct Notice to each and every Settlement Class Member that made a Qualifying Purchase. *Id.* at ¶ 4, Exs. 3, 4, 5. Adidas will provide Class Member data identifying Settlement Class Members and provide it to the administrator that will provide the basis for the Notice Plan. Bridley Decl. at ¶¶ 7-12.

The Notice Plan, outlined in Exhibits 1 and 2, and the Bridley Decl. along with Exhibits 3, 4, and 5 attached thereto, consists of direct notice via email, with postcard notice being mailed to class members without email addresses. Bridley Decl. at ¶¶ 7-12; Ex. 3, 4, 5. Adidas will provide Atticus Administration LLC with a mail and email address for all class members. *Id.* Atticus Administration LLC will send a short form notice describing the Settlement via email (“Email Class Notice”) to Settlement Class Members. *Id.* at ¶ 9, Ex. 3. The Email Class Notice will include a link to the Settlement Website where Class Members will find the Settlement details, including the Settlement Agreement and Long Form Notice. Exs. 3, 4.

Email delivery attempts will be tracked, and if the email “bounces” or is undeliverable, Atticus will attempt to locate a new or alternative email address or will disseminate the same notice in the form of a mailed postcard (“Postcard Notice”) to the Class Member’s last known address. *Id.* at ¶ 9. Atticus Administration LLC will mail the Postcard Notice via First Class U.S. Mail to any class members without email addresses or whose email notices bounce back. *Id.*, Ex. 5. The Notice Program is expected to reach at least 64% to 98% of the class. Bridley Decl. at ¶ 8.

As discussed, the Settlement Agreement also provides for the establishment of a Settlement Website. All Notices will direct the Settlement Class Members to visit the Settlement Website, which will host copies of all relevant documents, including the Settlement Agreement and its exhibits, the Long Form Notice explaining the terms of the Settlement Agreement in plain language, and other important court filings. Exs. 3, 4, 5.

There is no claims process. Class members will automatically receive payment via PayPal to the email account that was used to make the Qualifying Purchase. Exs. 3, 4, 5. Class members may opt to receive a check in the form of a postcard by completing and submitting a Payment Method Selection Form online at www.MissouriTaxSettlementadidas.com. *Id.*

The costs of providing notice, communicating with Settlement Class Members, establishing the Settlement Website, and disbursing individual payments will be paid out of the Settlement Fund. Ex. 1 at ¶ 4.(a).

E. Exclusion and Objection Procedure

Settlement Class Members will have the opportunity to exclude themselves from the Settlement or object to its approval. The procedures and deadlines for filing opt-out requests and objections are explained on the Settlement Website and in the Detailed Notice which will advise Settlement Class Members of their rights: (a) to exclude themselves from this Settlement Agreement and forego its benefits but preserve any rights they may have to pursue claims against Adidas; and (b) to object to this Settlement Agreement personally or through counsel. Bridley Decl.; Exs. 2, 3, 4, 5. The settlement website will include a fillable online “Opt-Out Form” that Settlement Class Members may use to exclude themselves from the Settlement Agreement. *Id.* Further, any Settlement Class Member other than Plaintiff may object to this Settlement Agreement by mailing a letter via first class mail to the Settlement Administrator postmarked on or before the Objection/Exclusion Deadline. Ex. 2 at ¶¶ 20-28.

The Settlement Website also informs Settlement Class Members that there will be a final approval hearing, which will be their opportunity to appear and have their objections heard. Bridley Decl.; Exs. 2, 3, 4, 5. Finally, the Settlement Website and Detailed Notice also explains that all Settlement Class Members will be bound by the release contained in the Settlement Agreement unless they properly exercise their right to exclude themselves. *Id.*

F. Release of Liability

In exchange for the relief described above, Settlement Class Members who do not exclude themselves will provide Defendant and its affiliated entities and other Releasees a full release of all claims arising out of, related to, or connected with the alleged facts, circumstances, and

occurrences underlying the claims in this matter, as detailed in Section 10 of the Settlement Agreement. *Id.* at ¶ 6.

G. Incentive Award

Plaintiff Randall Sally requests an incentive award of up to \$5,000 for his services as class representative.

H. Attorneys' Fees

Class Counsel intends to request an award of attorneys' fees of 36% of the \$693,062.92 Class Settlement Amount. This percentage falls well within the range of attorneys' fees awarded in similar settlements. The Eastern District of Missouri recently granted preliminary approval to attorneys' fees of 36% of the settlement amount in a case with identical claims that was settled in the same manner as this matter. Courts in the Eighth Circuit and in Missouri "have frequently awarded attorneys' fees ranging up to 36% in class actions." *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017); *see also In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (affirming fee award representing 36% of the settlement as reasonable); *In re Xcel Energy, Inc. Sec. Derivative and ERISA Litig.*, 364 F. Supp. 2d 980, 998 (D. Minn. 2005) (collecting cases and observing that district courts routinely approve fee awards between 25% and 36%).

While Class Counsel plans to request a fee award based on a percentage of the Class Settlement Amount being made available to the Settlement Class, it is important to note that any percentage should also reflect the additional value of the prospective relief that Adidas will be implementing pursuant to the Settlement. Ex. 1 at ¶ 5. Indeed, Adidas amended its tax compliance methodology so that it applies Missouri use tax to retail transactions made by Missouri consumers via remote sales channels that are shipped from outside the state to a Missouri delivery address. *Id.* As a result, Adidas is no longer charging excess "tax" on these types of transactions which provides a significant benefit to all Missouri consumers going forward. And, because the majority

of Adidas shoppers are repeat customers, the prospective relief will continue to benefit Class Members in the future, increasing the value of the Settlement to the Settlement Class.

CONCLUSION

The parties believe that the settlement of this action on the terms and conditions set forth in the Class Settlement Agreement is fair, reasonable and adequate, and is in the best interests of the Class.

WHEREFORE, the parties request that this Court enter an order which:

- a) Grants this Motion;
- b) Grants preliminary approval of the proposed settlement;
- c) preliminarily approves the settlement set forth in the Settlement Agreement as fair, reasonable, and adequate within the meaning of Missouri Rule of Civil Procedure 52.08, subject to final consideration at the final fairness hearing provided for below;
- d) Certifies the proposed settlement class for settlement purposes only;
- e) Appoints Randall Sally as class representatives and Daniel J. Orlowsky of Orlowsky Law, LLC and Adam M. Goffstein of Goffstein Law, LLC as Class Counsel;
- f) Approves Atticus Administration, LLC as the settlement administrator;
- g) Approves the class notice and notice plan as set forth in the Settlement Agreement;
- h) Provides class members an opportunity to object to or opt-out of the proposed settlement, as is provided in the Settlement Agreement;
- i) Makes the other findings as are set forth in the proposed preliminary approval order;

- j) Schedules a date for hearing on final approval of the settlement and a hearing on Plaintiff's application for attorney's fees and costs; and
- k) Grants such further relief as the Court deems reasonable and just.

Respectfully submitted,

Orlowsky Law, LLC

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2023, the foregoing was filed electronically with the Clerk of Court and served via the Court's CM/ECF system to all attorneys of record.

/s/Daniel J. Orlowsky