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KELLY MERGENS
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9 **UNITED STATES DISTRICT COURT**
10 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

11 KELLY MERGENS, on behalf of
herself and all others similarly situated,

12 **Plaintiff,**

13 v.

14 SLOAN VALVE COMPANY, and
15 DOES 1-10, inclusive,

16 **Defendants.**
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Case No. 2:16-cv-05255-SJO-SK

The Honorable S. James Otero

**DECLARATION OF DAVID M.
BIRKA-WHITE IN SUPPORT OF
PLAINTIFF'S MOTION FOR
FINAL APPROVAL OF CLASS
ACTION SETTLEMENT AND
MOTION FOR ATTORNEYS'
FEES AND COSTS AND
INCENTIVE AWARD**

Date: September 18, 2017

Time: 10:00 a.m.

Dept.: Courtroom 10C

Action Filed: July 15, 2016

Related Case:

*United Desert Charities, et al. v.
Sloan Valve Company, et al.*
Case No. 2:12-cv-06878-SJO-SH

1 I, DAVID M. BIRKA-WHITE, declare as follows:

2 1. I am an attorney at law duly licensed to practice before this Court and
3 all courts of the State of California. I am counsel of record for Plaintiff Kelly
4 Mergens. I have personal knowledge as to the facts stated herein and, if called upon
5 to do so, could and would competently testify thereto.

6 2. I submit this declaration in support of Plaintiff's Unopposed Motion
7 for Final Approval of Class Action Settlement and Motion for Attorney Fees and
8 Costs and Incentive Award. Class Counsel request attorneys' fees of \$600,000,
9 reimbursement of costs in the amount of \$9,601.05, and a \$5,000 incentive award
10 to the Class Representative.

11 **BACKGROUND AND EXPERIENCE**

12 3. I have been practicing law for nearly 38 years. For almost 30 years,
13 my practice has been almost exclusively devoted to product failure and consumer
14 fraud class actions. During that time, I have served as lead or co-lead court-
15 appointed class counsel in dozens of class actions and related complex cases, some
16 of which are listed below:

- 17 a. *Allagas v. BP Solar International, Inc.*, No. CV14-00560-SI
18 (N.D. Cal.) (nationwide litigation class involving defective solar
19 panels) - \$67 million settlement;
- 20 b. *Kuffner v. Suntech*, No. C13-01328 (Contra Costa County
21 Superior Court) (multi-state litigation class involving defective
22 solar tiles) - \$11 million settlement;
- 23 c. *United Desert Charities, et al., v. Flushmate, et al.*, No. CV12-
24 06878 SJO (SHx) (C.D. Cal.) - \$18 million settlement;
- 25 d. *Cartwright v. Viking Industries, Inc.*, Case No. CV07-02159
26 (E.D. Cal.) (litigation class involving defective aluminum
27 windows);
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- 1 e. *Garner v. State Farm Mutual Automobile Insurance Company*,
2 No. CV08-01365 (N.D. Cal.) - \$15 million settlement;
- 3 f. *Richison v. American Cemwood Corp.*, Civil Action No. 005532
4 (San Joaquin County, California) (nationwide litigation class
5 involving defective shingles certified and upheld on writ review;
6 nationwide class settlement final approval granted in 2000 and
7 2003) - \$140 million settlement;
- 8 g. *Shake Roof Cases*, JCCP No. 4208 (Contra Costa County,
9 California) (nationwide class settlement involving defective
10 roofing shingles) - \$65 million settlement; and
- 11 h. *ABS Pipe Cases II*, JCCP No. 3126 (Contra Costa County,
12 California) (nationwide class settlement involving defective
13 pipes; final approval granted from 1998 through 2001) - \$100
14 million settlement.

15 My further qualifications are set forth in the Declaration of David M. Birka-
16 White in Support of Plaintiff’s Unopposed Motion for Preliminary Approval of
17 Class Action Settlement filed on March 1, 2017 (ECF No. 33-1 and Exhibit C),
18 which is incorporated herein by reference.

19 4. My office, Birka-White Law Offices (“BWLO”), has served as lead
20 counsel throughout the pendency of this litigation. We were appointed Class
21 Counsel¹ on April 10, 2017, as part of the Court’s Order Preliminarily Certifying
22 the Settlement Class and the granting of Plaintiffs’ Motion for Preliminary
23 Approval of the Class Action Settlement.

24 5. I have had a primary role in the management and performance of all
25 work associated with the prosecution of this case including, but not limited to,
26

27 ¹ Initial capitalized terms utilized herein have the same definitions as set forth in the Class
28 Action Settlement Agreement and Release filed March 1, 2017 (ECF No. 33-1, Exhibit A) unless
 otherwise indicated.

1 client retention, pleadings, mediation and settlement. Steven Oroza, of counsel, and
2 Mindy Wong, an associate attorney from my office, also provided invaluable
3 assistance throughout this case. Additional assistance was provided by John D.
4 Green of Farella Braun + Martel, LLP. Class Counsel intensively investigated the
5 factual and legal issues raised in this Action.

6 **UDC Action**

7 6. I am lead class counsel in the related action, *United Desert Charities,*
8 *et al., v. Flushmate, et al.*, No. CV12-06878 SJO (SHx) (the “UDC Action”).

9 7. The UDC Action was filed on August 9, 2012. The only substantive
10 difference between the two related cases is the Series 503 Flushmate III Pressure-
11 Assist Flushing Systems (“Flushmate Systems”) that are the subject of this action
12 were manufactured at a later date. The UDC Action involves Flushmate Systems
13 manufactured from October 14, 1997 through June 30, 2009. This action involves
14 453,000 Flushmate Systems manufactured from July 1, 2009 through April 30,
15 2011.

16 8. This Court granted final approval of an \$18 million common fund
17 settlement in the UDC Action on August 25, 2014. The two-year claims period in
18 the UDC Action ended on September 24, 2016.

19 9. BWLO is an expert in overseeing and monitoring the administration of
20 class action settlements, and is well aware of the duties and responsibilities
21 attendant thereto. BWLO assumed full responsibility for overseeing and monitoring
22 the administration of the UDC Settlement Fund.

23 10. As the UDC claims progressed, BWLO learned that claims were being
24 made by individuals whose Flushmate Systems were manufactured *after* the date
25 circumscribed by the UDC class definition, namely October 14, 1997 to June 30,
26 2009. By definition, these prospective claims were outside the UDC class and,
27 therefore, denied.

28 11. Our investigation revealed that Flushmate units manufactured *after*

1 June 30, 2009, were substantially similar to those manufactured during the UDC
2 class period. Then on July 14, 2016, Sloan’s division, Flushmate, and the
3 Consumer Product Safety Commission (“CPSC”) jointly announced an expanded
4 voluntary recall of the Flushmate Systems. With the announcement of the
5 Expanded Recall, BWLO immediately filed the Mergens Action on July 15, 2016.

6 12. As the UDC settlement approached the end of the two year claims
7 period, it became apparent that the UDC Settlement Fund would have a remaining
8 balance of more than \$7 million.

9 13. This unexpected situation raised a series of complicated questions
10 which required BWLO, class counsel in the UDC Action, to at once formulate a
11 procedure for properly distributing the unclaimed amounts in the UDC Settlement
12 Fund, which would fully protect the interests of UDC class members, while fairly
13 and adequately reaching a settlement in the Mergens Action - a scenario which can
14 fairly be described as requiring a very high-level of legal analysis and skill from
15 counsel for both sides.

16 14. For months, counsel for both parties struggled to achieve a solution.
17 On the one hand, Defendant understandably wanted to avoid what it viewed as a
18 potentially wasteful distribution of the unclaimed UDC settlement proceeds in that
19 the Mergens Action putative class was separated from the UDC class period merely
20 by date of manufacture. On the other hand, BWLO was acutely aware that the UDC
21 settlement funds were for the benefit of UDC class members.

22 15. In that context, BWLO insisted that any settlement in the Mergens
23 Action which contemplated the potential use of the UDC Settlement Fund must first
24 provide that UDC class members be made *whole* for all reasonable out-of-pocket
25 installation costs incurred and property damage sustained. Furthermore, UDC class
26 members must retain full access to the \$18 million settlement fund. Also, the initial
27 two year claims period in the UDC Action would be extended for an additional
28 year.

1 16. After all valid claims in the UDC Action are paid pursuant to the terms
2 of the amended plan of allocation, and implementation of the Court-approved
3 notice plan, the UDC Settlement Fund will still have a remaining balance of more
4 than \$6 million

5 17. Concurrently with the filing of this Motion, a joint motion is being
6 filed in the UDC Action seeking final approval of modifications of that settlement
7 to (1) extend the claims period for one year, (2) seek use of the settlement fund to
8 pay claims in the UDC Action and this action (the “Mergens Action”) during the
9 respective claims or extended claims periods, and (3) pay costs of notice to class
10 members and claims administration in both actions (“Joint Motion”). As of
11 June 27, 2017, BWLO has incurred 62.5 hours (\$45,575.50) related to the Joint
12 Motion without compensation. A copy of BWLO’s lodestar related to the Joint
13 Motion is attached hereto as **Exhibit A**. The Settlement would not have been
14 possible but for our efforts related to the Joint Motion.

15 18. I have consulted with all lead class counsel in the UDC Action in
16 connection with the proposed modifications to the UDC settlement and proposed
17 settlement in the Mergens Action. All class counsel have either joined in the
18 motion to modify the UDC Settlement, or informed the Court that they have no
19 objection to the modifications. (UDC Action, ECF No.161).

20 19. There were 11 plaintiffs’ firms working on the UDC Action, all of
21 which have been compensated for their services by the attorneys’ fees award in that
22 case. Eight of those firms were appointed as class counsel in the UDC Action, but
23 it was BWLO who performed all the necessary work monitoring and managing the
24 administration of the UDC Settlement Fund. No other firm offered their services in
25 any capacity to assist with the administration. As of June 27, 2017, BWLO has
26 incurred 217.2 hours (\$111,767.00) monitoring the UDC Settlement Fund without
27 further compensation. I contributed 28.4 hours towards the administration. Mindy
28 Wong of my office contributed 188.8 hours towards the administration. A copy of

1 BWLO's lodestar related to the administration of the UDC Settlement Fund is
2 attached hereto as **Exhibit B**.

3 20. Based on the current and projected claims rate, notice costs, and
4 projected administration costs, the remaining balance in the UDC Settlement Fund
5 should be sufficient to pay all valid claims submitted in the UDC and Mergens
6 Actions.

7 21. Should the projections be incorrect, the UDC settlement class rights to
8 the remaining balance in the settlement fund remain unchanged, and Defendant will
9 deposit such additional sums as are needed to pay all valid claims submitted by the
10 Mergens Action settlement class during the Mergens Action claims period.

11 22. There was no duplication of time spent on any aspect of the
12 modification of settlement agreement in the UDC Action or the filing and settling
13 of the Mergens Action.

14 **Mergens Settlement Negotiations**

15 23. The proposed settlement is the product of contested, and arms-length
16 settlement negotiations conducted by an experienced mediator, Hon. William J.
17 Cahill (Ret.) of JAMS.

18 24. The parties were represented by counsel experienced in the
19 prosecution, defense, and settlement of complex class actions, including alleged
20 product defect cases such as this one.

21 25. The first mediation session was held on September 14, 2016. Further
22 painstaking negotiations continued for several weeks before agreement was reached
23 on all material terms on October 27, 2016. As class counsel in the UDC Action, it
24 was imperative that the UDC settlement class receive the full benefit of the
25 \$18 million settlement fund.

26 26. As stated previously, not only will UDC settlement class members
27 have access to the remaining balance in the settlement fund, but Defendant will pay
28 relief to Mergens settlement class members who file valid claims during the

1 Mergens claims period to the extent the UDC settlement fund is insufficient to do
2 so, consistent with the Plan of Allocation.

3 27. A second mediation session was held with Judge Cahill on
4 December 9, 2016, to discuss attorneys' fees and costs. The parties' negotiations
5 were contested and at arms' length.

6 28. The requested fees were contested and the parties reached a
7 compromise and settlement of the attorneys' fees issue only after engaging in an
8 extensive mediation process with Judge Cahill.

9 29. Following the December 9, 2016 mediation, negotiations regarding a
10 definitive written agreement followed. This process involved an additional three
11 months of negotiations, telephone conferences and extensive back-and-forth with
12 defense counsel over the Settlement, claims protocol process, and notice plan. The
13 parties executed the finalized Settlement in February 2017.

14 30. During the course of the settlement negotiations, Plaintiff's counsel
15 worked at length with one of the country's premier notice providers, Shannon
16 Wheatman, President of Kinsella Media LLC, to develop a customized plan for
17 distribution of a joint notice concerning the modification of the UDC settlement
18 agreement and settlement of the Mergens Action. Plaintiff's counsel also worked
19 with Arnold Rodio, President of Class Litigation Administration Support Services
20 ("CLASS"), the Court-appointed claims administrator in the UDC Action. These
21 discussions and the experts' recommendations, together with Plaintiff's counsel's
22 class action experience, informed the Notice Plan that accompanies this Settlement.

23 31. The Notice Plan approved by the Court on April 10, 2017, has been
24 fully implemented by the Parties, the Claims Administrator and the Notice Provider
25 in accordance with the Court's directives.

26 32. Because there are substantial funds available after all valid claims of
27 UDC settlement class members are paid, together with Defendant's commitment to
28 pay all valid claims of Settlement Class Members submitted during the Claims

1 Period in the Mergens Action if the UDC Settlement Fund is insufficient to pay
2 them, the Settlement has substantial value to the Class.

3 33. Given the strengths and weaknesses of Plaintiff's claims, it is the
4 opinion of Plaintiff's counsel that the Settlement is fair, reasonable, and adequate.
5 The Settlement provides relief to the class and avoids protracted and costly
6 litigation.

7 34. On behalf of Plaintiff and proposed class counsel, I respectfully
8 request that the Court grant final approval of this Settlement.

9 **Mergens Settlement Administration**

10 35. BWLO will spend considerable time in overseeing the administration
11 of the Settlement in the Mergens Action which will invariably overlap with the
12 oversight of the administration of the settlement in the UDC Action.

13 36. I estimate that BWLO will spend a minimum of 100 additional hours
14 on the administration of the Mergens settlement, which is approximately 50% of
15 the time spent overseeing the UDC Settlement Fund.

16 37. The proper implementation of the terms of the Settlement will require
17 careful attention to the nature of the claims and specifically whether they belong to
18 UDC or Mergens class members. This will require, as it has with the monitoring of
19 the UDC settlement agreement, regular interaction and conferring with the Claims
20 Administrator.

21 **TASK SUMMARY**

22 38. The only timekeepers associated with this fee application are myself,
23 Steve Oroza, and Mindy Wong of BWLO, and to a much lesser extent, John Green
24 of Farella, Braun + Martel, LLP, who provided valuable assistance at various stages
25 in the Mergens Action. BWLO has incurred 389.4 hours (\$272,990.08) related to
26 the Mergens Action. My firm lodestar is attached hereto as **Exhibit C**.

1 39. All time spent was necessary to complete the work and was performed
2 by very experienced attorneys dedicated to achieving an excellent resolution of a
3 complex set of circumstances in the most efficient manner possible. No staff or
4 contract attorneys were utilized.

5 40. The following is a general summary of the tasks which I, or members
6 of my office, undertook in this matter.

7 **David Birka-White**

8 41. BWLO filed the first of numerous cases against Sloan and served as
9 lead plaintiffs' counsel among the many nationwide plaintiffs law firms involved in
10 the underlying UDC Action. Mindy Wong and I had the sole responsibility of
11 overseeing the administration of the UDC settlement agreement. This responsibility
12 was assumed without additional compensation.

13 42. My office has served as lead counsel throughout the pendency of the
14 Mergens Action which was filed on July 15, 2016.

15 43. I have had a primary role in the management and performance of all
16 work associated with the prosecution of this case including, but not limited to,
17 initial factual investigation and analysis of legal issues, drafting of the complaint,
18 client contact, mediation, class notice, and settlement.

19 44. I have contributed more than 212.1 hours of my time to bring about the
20 settlement presented to this Court for approval. This includes 176 hours on the
21 prosecution of the Mergens Action and Settlement and 36.1 hours related to the
22 Joint Motion.

23 45. As in the UDC Action, BWLO will also take the lead role in
24 overseeing the administration of the Settlement in the Mergens Action. We are
25 actively working with the Court-appointed Claims Administrator regarding the
26 implementation and administration of the Settlement to ensure that claims filed in
27 the UDC Action and Mergens Action are properly recorded to ensure the UDC
28 class members receive the full benefit of the \$18 million settlement agreement.

1 46. As part of overseeing the UDC administration, Mindy Wong and I
2 have interacted with the court-appointed Claims Administrator on a frequent basis
3 and were active in every aspect of the implementation of the UDC settlement.
4 BWLO conducts regular conference calls with key members of the administration
5 staff, monitored claims, answers class member questions, and analyzes the overall
6 progress of the administration.

7 47. All plaintiffs firms in the UDC Action, including BWLO, received a
8 multiplier of 1.1 from the total attorney fee award in the UDC Action. However,
9 BWLO was not compensated to manage the administration of the UDC Settlement
10 Fund. Accordingly, the lodestar multiplier of 1.1 diminished as BWLO continued
11 to represent the interests of the UDC class.

12 **Steve Oroza**

13 48. Mr. Oroza has been practicing law for over 38 years. For more than
14 15 years, he has served as Of Counsel to BWLO. Mr. Oroza specializes in complex
15 litigation and has extensive experience and expertise in product liability and
16 consumer fraud class action cases. Mr. Oroza is an expert in warranty claims
17 analysis and conflict of law jurisprudence. He has also represented major creditors
18 and indenture trustees in some of the largest business and insurance insolvency
19 cases in the United States, including the successful prosecution and settlement of
20 class claims in national Chapter 11 cases. We have worked side by side in the
21 prosecution of many cases and have tried two lengthy class action cases together.

22 49. Mr. Oroza assisted with the legal and factual analysis of this case and
23 settlement. Mr. Oroza contributed 10 hours of highly experienced senior attorney
24 time to this case. His time and billing rates were approved in *Allagas v. BP Solar*
25 *International, Inc.*, U.S. District Court, Northern District of California, Case No.
26 No. CV14-00560-SI (Dkt. 201); *Kuffner v. Suntech*, Contra Costa County Superior
27 Court, Case No C13-01328 (March 7, 2016); *United Desert Charities, Inc., et al. v.*
28 *Sloan Valve Company*, U.S. District Court, Northern District of California, Case

1 No. 2:12-cv-06878-SJO-SH (Dkt. 148); *Garner v. State Farm Mutual Automobile*
2 *Insurance Company*, U.S. District Court, Northern District of California, Case No.
3 4:08-cv-01365-CW (Dkt. 284); *Cartwright v. Viking Industries, Inc.*, U.S. District
4 Court, Eastern District of California, Case No. 2:07-cv-02159-FCD-EFB (Dkt.
5 190).

6 **Mindy Wong**

7 50. Ms. Wong is an associate attorney who provided invaluable assistance
8 throughout this case. She joined BWLO in 2009. Since that time, Ms. Wong has
9 worked almost exclusively in consumer fraud and product liability class action
10 litigation. She is a member of the bars of the United States District Courts for the
11 Northern, Central and Eastern Districts. She received her J.D. from the University
12 of San Francisco, School of Law in 2009, and her B.A. in Sociology from the
13 University of California, Berkeley in 1999. She has also been selected as a
14 Northern California Super Lawyer “Rising Star” for 2015-2017 by San Francisco
15 Magazine in the practice area of class actions.

16 51. Ms. Wong was intimately involved in every aspect of this litigation
17 from the initial investigation and analysis, regular contact with the Class
18 Representative, drafting of the complaint, attendance and participation at mediation,
19 and drafting of the Settlement, Plan of Allocation, notices and related motions
20 regarding settlement, and regular interaction with the Notice Provider and Claims
21 Administrator regarding implementation of the Notice Plan. Ms. Wong is also the
22 primary contact in my office for class members regarding the Settlement and claims
23 process and has fielded dozens of telephone calls and numerous e-mail inquiries.

24 52. Ms. Wong has substantial responsibility for overseeing the
25 administration of the following class action settlement funds: *Allagas v. BP Solar*
26 *International, Inc.*, U.S. District Court, Northern District of California, Case No.
27 No. CV14-00560-SI (December 22, 2016); *Kuffner v. Suntech*, Contra Costa
28 County Superior Court, Case No C13-01328 (March 7, 2016); *United Desert*

1 *Charities, Inc., et al. v. Sloan Valve Company*, U.S. District Court, Northern
2 District of California, Case No. 2:12-cv-06878-SJO-SH (August 25, 2014); *Shake*
3 *Roof Cases*, Contra Costa County Superior Court, Case No. JCCP 4208.

4 53. My office will continue to have primary responsibility for overseeing
5 the administration of the UDC Settlement Fund and claims administration for both
6 the UDC Action and Mergens Action. Class Counsel estimates that it will spend a
7 minimum of 100 additional hours on the UDC Action/Mergens Action
8 administration.

9 54. To date, Ms. Wong has contributed more than 229.8 hours of time to
10 bring about the settlement presented to this Court for approval. This includes more
11 than 203.4 hours in associate time to the prosecution of this case and the Settlement
12 and 26.4 hours related to the Joint Motion. Her time and billing rates have been
13 approved in the following product liability class action cases: *Allagas v. BP. Solar*
14 *International, Inc.*, U.S. District Court, Northern District of California, Case No.
15 No. CV14-00560-SI (Dkt. 201); *Kuffner v. Suntech*, Contra Costa County Superior
16 Court, Case No C13-01328 (March 7, 2016); *United Desert Charities, Inc., et al. v.*
17 *Sloan Valve Company*, U.S. District Court, Northern District of California, Case
18 No. 2:12-cv-06878-SJO-SH (Dkt. 148); *In re: Uponor, Inc. F1807 Plumbing*
19 *Fittings Products Liability Litigation*, U.S. District Court, District of Minnesota,
20 Case No. 0:11-cv-01684-ADM-JJK (Dkt. 51); *Cartwright v. Viking Industries, Inc.*,
21 *U.S. District Court, Eastern District of California*, Case No. 2:07-cv-02159-FCD-
22 EFB (Dkt. 190).

23 55. My firm expended a total of \$9,205.04 in unreimbursed expenses. The
24 cost summary is attached hereto as **Exhibit D** and is an accurate record of the
25 expenses incurred in this case. This includes costs advanced in connection with
26 investigating the claims, engaging a mediator, travel, legal research, photocopying,
27 obtaining transcripts, and other customary litigation expenses.

28

1 56. All of the foregoing expenses were reasonable and necessarily
2 incurred. The costs are reflected on the books and records of my firm which are
3 maintained in the ordinary course of business.

4 **John D. Green**

5 57. Over the course of the past 23 years, I have worked with John D.
6 Green of Farella, Braun & Martel, LLP (“FBM”) in many product liability and
7 consumer fraud cases.

8 58. Mr. Green has been practicing law for over 28 years and specializes in
9 insurance coverage practice, complex settlements, as well as product liability and
10 consumer class actions. He has served as class counsel and insurance coverage
11 counsel in many class actions in numerous product liability and securities class
12 actions. Mr. Green has extensive experience in the prosecution and settlement of
13 class action litigation. Mr. Green’s resume is attached hereto as **Exhibit E**.

14 59. I first utilized Mr. Green and FBM in the UDC Action. After
15 Defendant agreed to go to mediation in the Mergens Action, Mr. Green provided
16 invaluable expertise during settlement negotiations. Mr. Green personally
17 contributed 34.5 hours of time to help bring about this settlement. Others in his
18 firm contributed an additional 3.4 hours for a total lodestar of \$31,836.50.

19 60. Mr. Green’s hourly rates have been approved in *Kuffner v. Suntech*,
20 Contra Costa County Superior Court, Case No C13-01328 (March 7, 2016); and
21 *United Desert Charities, Inc., et al. v. Sloan Valve Company*, U.S. District Court,
22 Northern District of California, Case No. 2:12-cv-06878-SJO-SH (Dkt. 148).

23 61. Throughout FBM’s involvement, I remained in regular contact with
24 Mr. Green and am personally familiar with the reasonableness and accuracy of his
25 lodestar.

26 62. FBM expended a total of \$396.01 in unreimbursed expenses, all of
27 which were reasonable and necessarily incurred, and for which reimbursement is
28 requested. FBM’s lodestar and costs are attached hereto as **Exhibit F**.

1 **GENERAL PRINCIPLES APPLICABLE TO THE AWARD OF**
2 **ATTORNEYS' FEES IN CLASS ACTIONS**

3 63. My firm's compensation for services rendered in this action is wholly
4 contingent. Any fees and reimbursement of expenses will be limited to such
5 amounts as may be awarded by the Court.

6 64. All attorneys at Birka-White Law Offices maintain contemporaneous
7 time records reflecting the time spent on this and other matters. The hourly rates
8 reflect the market rate for professionals of similar experience in California, where
9 my office is located.

10 65. All of the services performed by my firm were reasonably necessary.
11 The daily detail of all billable time is available upon the Court's request.

12 66. There has been no duplication of services for which Class Counsel
13 now seeks compensation.

14 **Skill of Required Counsel**

15 67. This case and resulting settlement was made possible by the efforts of
16 highly skilled and experienced attorneys. The use of *cy pres* funds in the UDC
17 Action to satisfy claims submitted in the Mergens Action was a complex issue. The
18 combined experience and skills of the firms appointed as Class Counsel was
19 necessary to achieve the Settlement in this case which provides substantial relief to
20 Class members and incentivizes them to reduce a safety risk by providing cash
21 reimbursement for installation costs incurred in repairing and/or replacing their
22 Flushmate Toilet.

23 **Risk of Litigation**

24 68. Class Counsel undertook this litigation on a contingent fee basis with
25 no guarantee of receiving anything in return, and have advanced all costs without
26 reimbursement. My office handles a small volume of complex/class action cases at
27 any given time. The litigation required counsel to assume a high risk of an adverse
28 outcome because of the novel and complex legal issues presented.

Distribution of Fee Award

1
2 69. I have been directly involved in all aspects of this litigation from the
3 filing of the complaint in July 2016, through settlement, design and implementation
4 of the administration, notice, and final approval. I have a complete understanding of
5 the relative roles of all attorneys that worked on this case. I am in a position to
6 distribute the attorneys' fee award among them based upon both lodestar and the
7 value of their contribution. To date, Class Counsel have performed a total of 489.8
8 hours amounting to \$350,402.08 in fees, for which no compensation has been
9 received. This includes 427.3 hours (\$304,826.58 fees) related to the Mergens
10 Action and 62.5 hours (\$45,575.50) related to the Joint Motion without
11 compensation. Class Counsel has also incurred \$9,601.05 in unreimbursed costs
12 related to the Mergens Action. Additionally, BWLO estimates a minimum of 100
13 hours will be spent monitoring the Mergens Administration, with an estimated
14 lodestar of \$56,000. This is based upon the 217.2 hours (\$111,767.00) incurred by
15 BWLO related to the administration of the UDC Settlement Fund.

16 70. Class Counsel seeks an award of \$600,000 in fees, plus reimbursement
17 of costs and expenses. Defendant has agreed not to oppose an award of this
18 amount. This agreement was reached only after the parties had reached an
19 agreement on the overall terms of the Settlement. Class Counsel's lodestar related
20 to the Mergens Action and UDC modification is \$350,402.08. If the future
21 administration of the Mergens Action is included, the lodestar is increased to
22 \$406,402.08. The requested fee applies a multiplier of 1.71 ($\$600,000 \div$
23 $\$350,402.08 = 1.71$) not including the projected time spent overseeing the
24 administration of the Settlement. If this time is included, the actual multiplier is
25 1.48 ($\$600,000 \div \$406,402.08 = 1.48$). It is the opinion of Class Counsel that the
26 appropriate method is to include the time that will be necessarily incurred
27 overseeing the Settlement, which results in a multiplier of 1.48.

1 71. There are 453,000 Flushmate Systems that are included in the
2 Settlement. The number of claims with one Flushmate Toilet has historically been
3 75%. Were claims to be made as to the 339,750 units ($453,000 \text{ units} \times 75\% =$
4 $339,750 \text{ units}$), Sloan's exposure would be \$43,318,125 ($339,750 \times \127.50). The
5 remaining 113,250 units are additional Flushmate Toilets at the same location and
6 would be entitled to \$30.00 per unit or \$3,397,500. Therefore, the total theoretical
7 value of the Mergens constructive common fund is \$46,715,625. The requested fee
8 of \$600,000, considered in that context, represents 0.01284% of the potential
9 exposure.

10 72. Alternatively, Arnold Rodio, President of CLASS, the court-
11 appointed Claims Administrator for both the UDC and Mergens Actions, opines
12 that given the anticipated claims rate of 2.4%, the Non-Property Damage and
13 Property Damage claims will be approximately \$1.7 million. 50% of the cost of the
14 \$1,000,000 Notice Plan is \$500,000 plus 50% of the projected \$1,000,000 in
15 additional administration costs to oversee both settlements is \$500,000. Under this
16 constructive common fund analysis, the minimum value of the Settlement is
17 \$2,700,000. The value of the requested fee in this instance would be 22%
18 ($\$2,700,000 \div \$600,000 = 22\%$).

19 73. Consistent with the terms of the Settlement, the requested fee of
20 \$600,000 and reimbursement of costs of \$9,601.05 will be paid separately by
21 Defendant and will not be deducted from the remaining balance in the UDC
22 Settlement Fund. Any benefits the UDC or Mergens class members would
23 otherwise receive will be paid independent of the attorney fee award from the UDC
24 Settlement Fund.

ADEQUACY OF SETTLEMENT

25
26 74. The remaining balance in the UDC Settlement Fund will be used to
27 pay valid claims submitted by class members in both the UDC Action and Mergens
28 Action. Defendant will deposit additional sums as need to ensure 100% of all valid

1 claims submitted by Class Members during the Claims Period are paid. In short, the
2 Class has access to an uncapped claims-made settlement fund.

3 75. To date, there have been no objections or opt-outs to the Settlement.
4 Further, no governmental entity has raised any objection or concern about any
5 aspect of the Settlement.

6 76. By any standard, this constitutes a favorable result made possible by
7 the dedication and skill of Class Counsel.

8 77. Moreover, the Settlement educates and motivates Class members to
9 reduce a safety risk by repairing and/or replacing their Flushmate Toilet.

10 **INCENTIVE AWARD TO CLASS REPRESENTATIVE**

11 78. Class Counsel seek an incentive award for the Class Representative
12 Kelly Mergens in the amount of \$5,000. There are no objections to date to the
13 requested Incentive Award.

14 79. I had the primary responsibility to provide status reports, confer and
15 interact with the proposed class representative in this case. Ms. Mergens performed
16 her responsibilities in exemplary fashion and demonstrated the highest degree of
17 responsiveness to the inquiries and requests from my office. There have been
18 numerous telephone calls and e-mails between my office and our class
19 representative over the past year.

20 80. Ms. Mergens has reviewed essential documents in this case including
21 the complaint, the proposed Settlement and claim protocols. She has also taken the
22 time to understand the complexities of this case including the modification of the
23 UDC settlement agreement, and the benefits offered by the Settlement. She
24 provided all necessary documents and information relating to the installation of her
25 Flushmate Toilet. Finally, Ms. Mergens remains available for any further actions
26 that may be necessary through final approval of the Settlement.

27 81. Throughout the litigation, Ms. Mergens has adequately represented the
28 Class. She understands her duties as Class Representative and has considered the

1 interests of absent Class members when reviewing and approving the Settlement,
2 and actively participated in this litigation.

3 82. Having satisfied all duties and responsibilities in her role as Class
4 Representative, an incentive award for Ms. Mergens of \$5,000 is fair and
5 reasonable.

6 83. Class Counsel reached what by any standard is an excellent Settlement
7 in a case that involved many complex issues. I support this Settlement and believe
8 it is an excellent settlement for all Class members.

9 I declare under penalty of perjury, under the laws of the United States of
10 America, that the foregoing is true and correct.

11 Executed this 30th day of June, 2017, at Lisbon, Portugal.

12
13 */s/ David M. Birka-White*
14 DAVID M. BIRKA-WHITE
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EXHIBIT A

United Desert Charities, Inc., et al. v. Sloan Valve Company, et al.**Joint Motion to Modify Settlement****Lodestar through June 27, 2017**

2016 - Timekeeper	Title	Hours	Rate	Total
David M. Birka-White	Partner	0.5	855.00	\$427.50
Mindy Wong	Associate	0.6	510.00	\$306.00
	Subtotal	1.1	Fees	\$733.50
2017 - Timekeeper	Title	Hours	Rate	Total
David M. Birka-White	Partner	35.6	890.00	\$31,684.00
Mindy Wong	Associate	25.8	510.00	\$13,158.00
	Subtotal	61.4	Fees	\$44,842.00

Summary

	Hours	Fees
2016	1.1	\$733.50
2017	61.4	\$44,842.00
TOTAL	62.5	\$45,575.50

EXHIBIT B

United Desert Charities, Inc., et al. v. Sloan Valve Company, et al.**UDC Settlement Fund Administration****August 25, 2014 through June 27, 2017**

2014 - Timekeeper	Title	Hours	Rate	Total
David M. Birka-White	Partner	3.9	775.00	\$3,022.50
Mindy Wong	Associate	42.0	395.00	\$16,590.00
	Subtotal	45.9	Fees	\$19,612.50
2015 - Timekeeper	Title	Hours	Rate	Total
David M. Birka-White	Partner	3.5	825.00	\$2,887.50
Mindy Wong	Associate	65.1	450.00	\$29,295.00
	Subtotal	68.6	Fees	\$32,182.50
2016 - Timekeeper	Title	Hours	Rate	Total
David M. Birka-White	Partner	11.0	855.00	\$9,405.00
Mindy Wong	Associate	44.4	510.00	\$22,644.00
	Subtotal	55.4	Fees	\$32,049.00
2017 - Timekeeper	Title	Hours	Rate	Total
David M. Birka-White	Partner	10.0	890.00	\$8,900.00
Mindy Wong	Associate	37.3	510.00	\$19,023.00
	Subtotal	47.3	Fees	\$27,923.00

Summary

	Hours	Fees
2014	45.9	\$19,612.50
2015	68.6	\$32,182.50
2016	55.4	\$32,049.00
2017	47.3	\$27,923.00
TOTAL	217.2	\$111,767.00

EXHIBIT C

Kelly Mergens, et al. v. Sloan Valve Company, et al.
Lodestar through June 27, 2017

2016 - Timekeeper	Title	Hours	Rate	Total
David M. Birka-White	Partner	76.2	855.00	\$65,151.00
Stephen Oroza	Of Counsel	10.0	825.00	\$8,250.00
Mindy Wong	Associate	46.5	510.00	\$29,769.40
	Subtotal	132.7	Fees	\$103,170.40

2017 - Timekeeper	Title	Hours	Rate	Total
David M. Birka-White	Partner	99.8	890.00	\$88,822.00
Mindy Wong	Associate	156.9	510.00	\$80,997.68
	Subtotal	256.7	Fees	\$169,819.68

Summary

	Hours	Fees
2016	132.7	\$103,170.40
2017	256.7	\$169,819.68
TOTAL	389.4	\$272,990.08

EXHIBIT D

Birka-White Law Offices

All Transactions

Type	Date	Category	Description	Amount
Court Costs				
Credit	07/15/2016	Court Costs	COURTS/USDC-CA-C - Complaint filing fee.	400.00
Check	04/18/2017	Court Costs	Preliminary Approval Hearing Transcript	61.50
				<u>461.50</u>
Litigation Support				
Credit	12/01/2016	Litigation Support	Deadlines.com - Calendaring	165.00
				<u>165.00</u>
Mediation Fees				
Check	08/22/2016	Mediation Fees	JAMS - Invoice No. 0003813104-100 (Mediation Fees)	2,950.00
Check	11/29/2016	Mediation Fees	JAMS - Invoice No. 0003895408-100 (Mediation Fees - Dec. 9)	2,500.00
				<u>5,450.00</u>
Messenger Services				
Check	01/24/2017	Messenger	One Legal - Invoice No. 10776178 - Stipulation/Proposed Order	26.95
Check	01/24/2017	Messenger	One Legal - Invoice No. 10807146 - Revised Stipulation/Proposed Order	26.95
Check	03/23/2017	Messenger	One Legal - Invoice No. 10847845 - Ex Parte App to Exceed	26.95
Check	03/23/2017	Messenger	One Legal - Invoice No. 10854947 - Motion for Preliminary Approval	26.95
Check	03/23/2017	Messenger	One Legal - Invoice No. 10856479 - Stipulation to Shorten Time Prelim	26.95
Check	03/23/2017	Messenger	Wheels of Justice - Invoice No. W2675170 - Courtesy Copies - Stipulated Protective Order	110.00
Check	03/23/2017	Messenger	One Legal - Invoice No. 10854950 - Motion to Modify	26.95
Check	04/18/2017	Messenger	One Legal - Invoice No. 10898221	27.95
				<u>299.65</u>
Travel Expenses				
Check	10/13/2016	Travel	Emcarcadero Parking for Flushmate Mediation - MMW	36.00
Check	12/29/2016	Travel	Embarcadero Center Parking for Flushmate Mediation - MMW	21.00
Credit	04/06/2017	Travel	Southwest Airfare - MMW (Preliminary Approval)	467.96
Credit	04/07/2017	Travel	Omni Hotel - MMW (Preliminary Approval)	245.67
Credit	04/09/2017	Travel	Southwest Airfare - DBW (Preliminary Approval)	246.98
Credit	04/09/2017	Travel	Omni Hotel - DBW (Preliminary Approval)	246.98
Check	04/18/2017	Travel	Taxi from LAX to Hotel (Preliminary Approval Hearing - MMW)	67.98
Check	04/18/2017	Travel	Parking at SFO (Preliminary Approval Hearing - MMW)	66.00
Check	04/18/2017	Travel	Omni Hotel	77.00
Credit	04/25/2017	Travel	Southwest Airfare - MMW (Final Approval)	211.96

Birka-White Law Offices

All Transactions

Type	Date	Category	Description	Amount
Credit	04/25/2017	Travel	Omni Hotel - MMW (Final Approval)	311.83
Credit	06/06/2017	Travel	Southwest Airfare - DBW (Final Approval)	171.96
Credit	06/08/2017	Travel	Omni Hotel - DBW (Final Approval)	363.97
				<u>2,535.29</u>

Internal photocopying costs: 1,468 @ \$0.20 per page. 293.60

TOTAL 9,205.04

EXHIBIT E



John D. Green
Partner
415.954.4492
jgreen@fbm.com

John Green is a commercial litigator with almost three decades of experience in recovering money from insurance companies under insurance policies such as commercial general liability, directors' and officers' liability, professional E&O, technology E&O, cyber liability, commercial property and builders-risk policies. He has litigated, arbitrated or mediated high stakes coverage matters and has helped clients obtain over \$1 billion in insurance recoveries. Mr. Green is a fellow in the American College of Coverage and Extracontractual Counsel.

Mr. Green recently won an important victory for insureds in *Scottsdale Ins. Co. v. Coapt Systems, Inc., et al.*, 2013 WL 3146781 (N.D. Cal. June 18, 2013), where a medical device company and 13 directors and officers were sued by over 60 plaintiffs for injuries allegedly sustained as a result of clinical trials and off-label uses of a dermal filler. Mr. Green obtained summary judgment in the case, finding the claims were covered by the Scottsdale D&O policy. This ruling determined that Coapt's development, testing, marketing, and sales activities were not excluded by the "professional services" exclusion and also established that the claims were not excluded by the policy's "bodily injury" exclusion.

Mr. Green also recently litigated a multi-site environmental coverage action for a mining and chemical company in San Francisco Superior Court, involving over 80 insurance policies issued over a 30 year period of time. He obtained a recovery of over 90% of the client's past and projected future costs for soil and groundwater clean-up at these sites. The final settlement came only one day before jury selection.

Mr. Green was insurance counsel to the claimants in the Broadcom stock option backdating case, which resulted in an insurance recovery of \$118 million. The settlement was groundbreaking, as it was the first case in which a "Side A Only" insurance tower made a significant contribution to the settlement of a derivative case where the company was not insolvent. This set an important industry precedent and led to Farella Braun + Martel being named one of Law360's "Insurance Law Firms of the Year."

Mr. Green regularly handles coverage disputes relating to consumer law and product class actions, and has obtained hundreds of millions of dollars from insurers for the settlement of over a dozen multi-state and national class actions.

Mr. Green has written and lectured extensively on insurance coverage issues. He has been recognized among Northern California Super Lawyers, and is a former chair of Farella's Insurance Coverage Practice Group.

Affiliations

- ABA Section of Litigation; Insurance Litigation Section; Tort and Insurance Practice Section

Practices

Antitrust
Insurance Recovery
Product Liability and Stewardship

Education

University of California, Berkeley, School of Law (J.D., 1985), first in class; Order of the Coif
University of California, Berkeley (A.B., 1979), high honors

Bar Admissions

California

EXHIBIT F

Kelly Mergens, et al. v. Sloan Valve Company, et al.
Farella Braun + Martel, LLP

LODESTAR

2016 - Timekeeper	Title	Hours	Rate	Total
John D. Green	Partner	27.9	855.00	\$23,854.50
Amanda D. Hairston	Associate	3.4	620.00	\$2,108.00
	Subtotal	31.3	Fees	\$25,962.50

2017 - Timekeeper	Title	Hours	Rate	Total
John D. Green	Partner	6.6	890.00	\$5,874.00
	Subtotal	6.6	Fees	\$5,874.00

Summary

	Hours	Fees
2016	31.3	\$25,962.50
2017	6.6	\$5,874.00
TOTAL	37.9	\$31,836.50

COSTS

Date	Category	Description	Amount
7/12/2016	Computerized Research - Interface charges	Westlaw	\$295.50
8/15/2016	Word Processing	IMANAGETIM	\$100.51
		TOTAL	\$396.01