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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED DESERT CHARITIES, FRED EDE, III, EMILY WILLIAMS, BRUCE PRITCHARD, and JEAN STEINER, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

SLOAN VALVE COMPANY, AMERICAN STANDARD BRANDS AS AMERICA, INC., KOHLER CO., GERBER PLUMBING FIXTURES, LLC, MANSFIELD PLUMBING PRODUCTS, LLC, and HOME DEPOT, U.S.A., INC.,

Defendants.

Case No. CV12-06878 SJO (SHx)

CLASS COUNSEL'S APPLICATION FOR ATTORNEYS' FEES AND EXPENSES AND FOR SERVICE AWARDS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Action Filed: August 9, 2012

The Honorable S. James Otero

Date: August 25, 2014
Time: 10:00 a.m.
Dept.: Courtroom 1

Consolidated Cases:
Berube v. Flushmate
2:13-cv-02372-SJO-SH
Brettler v. Flushmate
2:13-cv-02499-SJO-SH
Kubat, et. al. v. Flushmate
2:13-cv-02425-SJO-SH
Patel v. Flushmate
2:13-cv-02428-SJO-SH

Related Case:
Dimov, et. al. v. Sloan Valve Co.
1:12-cv-09700 (N.D. Ill.)

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OTHER AUTHORITIES

I. INTRODUCTION

Class Counsel has presented to this Court a proposed Settlement Agreement ("Settlement") that confers significant monetary and non-monetary benefits upon the Class. This outstanding result was obtained only after motion practice, discovery on key issues, and intense mediation efforts by Class Counsel. Pursuant to this Court's Order (ECF No. 135), Class Counsel respectfully submit this application for attorneys' fees and reimbursement of litigation expenses, and ask the Court for a modest "service award" for the named plaintiffs in the settled actions.

As detailed below, the amount requested by Class Counsel is consistent with Ninth Circuit law, and indeed precisely follows the Ninth Circuit's benchmark of a 25% fee award out of the monetary benefits paid to a class. Further, as the payments will extend over a two-year period, Class Counsel will be only compensated in proportional installments as the Defendants make their sequenced deposits into the Settlement Fund Trust Account.[1] Thus, Class Counsel will be similarly situated to the Class for purposes of recovering a reasonable professional fee for Class Counsel's work and commitment in investigating, prosecuting, and successfully resolving these consolidated and related actions.

The fee request here gains further support from Class Counsel's lodestar incurred over the life of these cases. Class Counsel's timekeeping records report that we have collectively incurred, prior to the submission of this application, $4,018,936.05 in attorneys' fees at our reasonable and customary rates. Based on a cross-check from these records, a 25% fee award in this case yields a lodestar "multiplier" of less than 1.20, *i.e.*, 1.12.

[1] Capitalized terms used herein have the meaning ascribed to them in the Class Action Settlement Agreement and Release ("Settlement"), filed January 28, 2014 (ECF No. 116-1), unless otherwise specified.

Class Counsel's efforts over the approximately two years of this complex and unique class action litigation have been without compensation or reimbursement of any kind. The fees incurred and the costs advanced have been wholly contingent upon the result achieved. The requested fee is more than justified under the applicable law and the factual circumstances, which include the risks and challenges we faced with these cases and the substantial class-wide benefits our efforts produced.

The Settlement before the Court provides real, significant cash relief to consumers and businesses who own or owned toilets equipped with the Flushmate System. The cash payments available under the Settlement will substantially reimburse Class members for the repair or replacement of their Flushmate Toilets, as well as providing for a separate reimbursement for any related Property Damage.

The relief obtained by this Settlement must be seen as particularly valuable given the litigation risks. The viability of this case as a class action has always been uncertain in light of the complex issues of law and fact pressed by the Defendants.

Against the many risks, the Settlement contains several salutary features.

First, the Claims Period will last for two years after the Effective Date to enhance the ability of Class members to benefit from the Settlement for an extended period of time. Second, the Settlement provides for a potential further disbursement of unclaimed funds to eligible Class members at the close of the Claims Period. Third, the $18 million initial funding will increase if more money is required to satisfy Property Damage claims at certain thresholds (as noted in the Settlement, this amount is "uncapped"). Fourth, the Settlement is structured to provide an incentive for Class members to repair or replace their Flushmate Toilets, creating a tangible public safety benefit. Therefore, as this Court previously noted at the preliminary approval stage, the Settlement "will advance the public safety inasmuch it is structured to maximize Class members' incentive to repair or replace their Flushmate Toilets." (ECF No. 135 at 2.)

The strong result and recovery for the nationwide Class are largely attributable to Class Counsel's efforts and creativity, and were achieved only after a thorough investigation, vigorous motion practice, discovery, and intensive arms' length negotiations lasting almost a year. *See generally* Declaration of Kristen Law Sagafi ("Sagafi Decl."), Declaration of David M. Birka-White ("Birka-White Decl."), and Declaration of William M. Audet ("Audet Decl."). Accordingly, Class Counsel respectfully submit that the Court should award the requested attorneys' fee and litigation expense reimbursement. Class Counsel also request that the Court approve modest $1,000 service awards to compensate the Class representatives for the risk they assumed and their actions on behalf of the Class.

II. BACKGROUND

Class Counsel[2] expended thousands of hours and incurred necessary out-of-pocket expenses in investigating, developing, prosecuting, and resolving these consolidated and related actions. As a result of this collaborative effort, Class Counsel were able to overcome many obstacles to secure important benefits for the Class, as outlined in the Settlement.

A. Class Counsel Expended Considerable Time and Resources to Investigate, Litigate, and Settle This Complex Action.

1. Factual Investigation.

Before filing Plaintiffs' initial complaint, and continuing throughout this litigation, Class Counsel investigated the potential problems with the Flushmate System, including interviews and independent research into the alleged Flushmate defect and supply chain. (Sagafi Decl., ¶ 7; Birka-White Decl., ¶ 16(a); Audet Decl., ¶ 8.) Class Counsel retained a plumbing and engineering expert to investigate

[2] The following firms comprise the Court-appointed Class Counsel: Birka-White Law Offices, Lieff Cabraser Heimann & Bernstein, LLP, Audet & Partners, LLP, Parker Waichman LLP, Levin Fishbein, Sedran & Berman, LLP, Wexler Wallace, LLP, Holland Groves Schneller & Stolze LLC, and Geragos & Geragos, P.C. (ECF No. 135 at 4.)

the facts and assess the viability and strength of the claims. (Sagafi Decl., ¶ 7; Birka-White Decl., ¶ 16(b).) Class Counsel determined, among other facts, that more than 1.5 million Flushmate Toilets are estimated to remain in service across the United States. (Sagafi Decl., ¶ 7.) This investigation and discovery informed the motion practice and settlement negotiations. (Sagafi Decl., ¶ 8.)

2. Motion Practice.

Defendants attacked the pleadings multiple times, requiring Class Counsel to devote extensive resources to defend and replead the claims. Class Counsel's coordinated efforts in this regard included legal and factual research, drafting, editing, communicating regularly with one another, and determining sound strategies for advancing and pursuing the claims on behalf of Plaintiffs and the proposed Class. (Sagafi Decl., ¶ 9; Birka-White Decl., ¶ 12; Audet Decl., ¶ 14.)

After working to obtain transfer of related federal cases to this Court in favor of the first-filed *United Desert Charities* action ("UDC Action"), Class Counsel devoted substantial resources to researching the facts and viable claims that were pled in the Amended Class Action Complaint ("FAC"). (Sagafi Decl., ¶ 9(a).) In consultation with one another and with our experts, Class Counsel meticulously crafted the factual allegations, causes of action, and other sections of the FAC, filing it in this Court on October 5, 2012. (Sagafi Decl., ¶ 9(a); ECF No. 20.)

On October 22, 2012, Defendants filed a transfer motion pursuant to 28 U.S.C. § 1404. (ECF Nos. 43, 48, 51.) Plaintiffs in the UDC Action opposed such efforts. (Sagafi Decl., ¶ 9(b); Birka-White Decl., ¶ 16(d).) Class Counsel obtained declarations from each of the Class Representatives in the consolidated actions providing the locations and circumstances of their purchases, and fully briefed this critical issue. (Birka-White Decl., ¶ 16(d); ECF Nos. 54-1 through 54-4.) The Court denied the transfer motion. (ECF No. 64.)

While their transfer motion was pending, on November 5, 2012, Defendants moved to dismiss the FAC. (ECF Nos. 52, 53, 55, 60.) Class Counsel filed a 20-

page consolidated opposition brief. (Sagafi Decl., ¶ 9(c).) Extensive legal research informed Class Counsel's brief, and the drafting process entailed several rounds of edits and myriad communications before the brief was finalized and submitted on November 19, 2012. (Sagafi Decl., ¶ 9(c); Birka-White Decl., ¶ 16(f); ECF No. 57.)

On January 4, 2013, this Court denied in part and granted in part the motion to dismiss. (ECF No. 64.) Class Counsel immediately set to work to determine a repleading strategy. (Sagafi Decl., ¶ 9(d).) Among other things, Class Counsel spent considerable time developing a new theory to support the fraud claims against Sloan—which the Court dismissed with leave to replead—on the basis of Plaintiffs' actual reliance on "Advisors" in the toilet distribution chain. (Sagafi Decl., ¶ 9(d).) Relatedly, Class Counsel researched Sloan's representations to distributors, plumbers, and others that Flushmate Toilets were dependable and reliable. (Sagafi Decl., ¶ 9(d); Birka-White Decl., ¶ 16(e).) Class Counsel also worked to frame a new California claim for Negligent Recall, and sought leave to plead it. (Sagafi Decl., ¶ 9(d); ECF Nos. 72, 73.)

Defendants moved to dismiss the TAC on March 4, 2013. (ECF No. 76.) Class Counsel again marshalled significant resources to research, draft, discuss, edit, and file the opposition brief. (Sagafi Decl., ¶ 9(e); Birka-White Decl., ¶ 16(f); ECF No. 78.) Home Depot filed a separate motion to dismiss on March 4, 2013 (ECF No. 77), requiring Class Counsel to simultaneously oppose dismissal of the implied warranty claims against Home Depot. This entailed more legal research, analysis, communications, and drafting leading up to the filing of Class Counsel's opposition brief. (Sagafi Decl., ¶ 9(f); ECF No. 79.)[3]

The process of litigating Defendants' numerous motions over many months gave the parties insight into the strengths and weaknesses of the claims and

[3] Upon stipulation of the parties, the Court on March 25, 2013, postponed the reply briefing and the hearing on these two motions to dismiss, in order to allow the parties to focus on their mediation and settlement efforts. (ECF No. 81.)

defenses, and facilitated the arms' length settlement negotiations, as did the Court's order on the FAC. (Sagafi Decl., ¶¶ 10–11; Birka-White Decl., ¶ 12). In addition to the motion practice in the UDC Action, counsel involved in the related *Dimov v. Sloan* class action in Illinois Federal Court also engaged in motion practice. (Audet Decl., ¶ 13.)

3. Settlement Negotiations and Proceedings.

Class Counsel devoted substantial resources to prepare for, participate in, and follow up on the mediation sessions that ultimately led to the Settlement. (Sagafi Decl., ¶ 12; Birka-White Decl., ¶ 14; Audet Decl., ¶¶ 13–25). In total, the negotiations that produced this Settlement lasted more than nine months.

Among other negotiations, the parties participated in four all-day mediations before arriving at an agreement in principle to settle the claims.[4] Those mediations occurred on April 18 and 19, and May 13 and 14, 2013. A retired Superior Court Judge, the Honorable William J. Cahill of JAMS, supervised and facilitated the parties' negotiations. (Sagafi Decl., ¶ 12(a); Birka-White Decl., ¶ 13; Audet Decl., ¶ 19.) Several times these talks nearly broke down. (Sagafi Decl., ¶ 12(a).) On May 17, 2013, the parties, including Class Counsel representing Plaintiffs in the related out-of-District cases, were able to reach an agreement concerning the basic settlement terms. (Sagafi Decl., ¶ 12(b); Birka-White Decl., ¶ 13; Audet Decl., ¶¶ 15–16, 23.)

Painstaking negotiations regarding specific terms followed. The parties' initial exchange of drafts in June 2013 brought to light the need for further negotiations, necessitating another full-day mediation with Judge Cahill, on July 25, 2013. (Sagafi Decl., ¶ 12(c); Birka-White Decl., ¶ 14.) The parties continued to

[4] In granting preliminary approval, this Court found "that the Settlement was reached in the absence of collusion, is the product of informed, good-faith, arms-length negotiations between the parties and their capable and experienced counsel, and was reached with the assistance of a well-qualified and experienced mediator[.]" ECF No. 135 at 2.

negotiate after this fifth mediation session and were able to reach another agreement in principle on July 29, 2013. (Sagafi Decl., ¶ 12(d); Birka-White Decl., ¶ 15.)

On August 8, 2013, Sloan produced document discovery (Sagafi Decl., ¶ 12(f); Birka-White Decl., ¶ 16(k); Audet Decl., ¶ 17.) Also in August 2013, Class Counsel prepared a revised draft settlement agreement incorporating the agreement in principle. In September 2013, Class Counsel forwarded a separate draft claims protocol to Defendants' counsel, who provided comments to both drafts at an in-person meeting. (Sagafi Decl., ¶ 12(g).)

As more issues arose, counsel for the settling parties met in person again on October 8, 2013, to discuss remaining settlement issues. (Sagafi Decl., ¶ 12(h).) Counsel for the settling parties also met in person with a Claims Administrator, Class Litigation Administration Support Services, and its principal, Arnold Rodio, on October 25, 2013, in Lancaster, California to discuss settlement logistics. (Sagafi Decl., ¶ 12(i); Birka-White Decl., ¶ 16(j).) Further, counsel for the settling parties negotiated various claims administration details to ensure that the settlement protocols comported with Sloan's reporting obligations under the voluntary Recall. (Sagafi Decl., ¶ 12(j); Birka-White Decl., ¶ 15; Audet Decl., ¶ 21.)

In addition to reviewing Sloan's production of documents referenced above, Class Counsel noticed and took two Rule 30(b)(6) "person most knowledgeable" depositions of Sloan in San Francisco, on December 9 and 10, 2013. (Sagafi Decl., ¶ 12(k); Birka-White Decl., ¶ 16(l); Audet Decl., ¶ 17.) The first deposition covered the issue of the nature of the Repair Kit, as well as warranty issues. (Birka-White Decl., ¶ 16(l); Sagafi Decl., ¶ 12(k).) The second deposition focused on the financials of the Sloan Defendants. (Audet Decl., ¶ 17.) As a result of taking these depositions and reviewing the documents, Class Counsel obtained key information regarding the Repair Kit and the overall costs associated with hiring a third party to install it (at a cost range of $100-200 for residential installations). (Sagafi Decl.,

¶ 12(k).)

During the course of the settlement negotiations, Class Counsel also worked at length with notice provider Kathy Kinsella to develop a customized plan to notify the Class of the Settlement effectively and efficiently. (Birka-White Decl., ¶ 16(g); Sagafi Decl., ¶ 13.) Class Counsel also searched for the appropriate candidate to serve as the administrator of the claims process. Ultimately, with the consent of Defendants, the parties recommended the appointment of Class Litigation Administration Support Services, whose principal, Arnold Rodio, is experienced in administering class action settlements involving plumbing issues and property damage claims. (Birka-White Decl., ¶ 16(g); Audet Decl., ¶ 20.) These discussions and the experts' recommendations, together with Class Counsel's class action experience, informed the Notice Plan, which was coordinated with the expanded Recall and which has now been fully implemented in accordance with the Preliminary Approval Order. (Sagafi Decl., ¶ 17; Audet Decl., ¶ 21.)

III. ARGUMENT

Class Counsel in this case showed determination in overcoming formidable hurdles to bring these claims to a favorable resolution. Absent Class Counsel's efforts, the Class likely would not be receiving any monetary compensation at all. In light of the Settlement achieved, which provides cash payments to all Class members who paid to repair or replace their toilets, and provides for an extraordinary two-year Claims Period, Class Counsel's requested 25% fee is reasonable, consistent with applicable law, well supported by the facts, and should be granted by this Court. *See* ECF No. 132 at 34 (Court found at the preliminary approval hearing that the fee request "appears to be reasonable."). Under well-established precedent, the Ninth Circuit has directed that 25% should be the normal or "benchmark" attorneys' fee where, as here, counsel's efforts have led to the creation of a common fund. *See generally Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047–48 (9th Cir. 2002). Consistent with the Settlement's fee provision,

moreover, the fee here will be deducted from the Settlement Fund Trust Account on a rolling basis as Defendants make their payments. (Settlement, § VII.)[5] Here, Class Counsel are not seeking immediate full payment of the amount of fees set forth under the Settlement, but instead, will be paid as the Settlement is funded. Class Counsel have agreed to limit the fee request to a 25% of the fund, plus expenses. In sum, given all the circumstances and risks, Class Counsel respectfully request that the Court award attorneys' fees in the amount of twenty-five percent, in addition to the reasonable costs and expenses incurred in furtherance of this litigation.

A. Class Counsel Are Entitled to an Attorneys' Fee From the Common Fund.

Well-established law holds that counsel who represent a class and produce a benefit for class members are entitled to compensation. The Supreme Court "has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or 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, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980); *see also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 393, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 123, 5 S. Ct. 387, 28 L. Ed. 915 (1885). In *Blum v. Stenson*, the Court held that a reasonable fee under the "common fund doctrine" may be based "on a percentage of the fund bestowed on the class." 465 U.S. 886, 900 n.16, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984).

The purpose of this doctrine is to avoid unjust enrichment and ensure that "those who benefit from the creation of the fund . . . share the wealth with the lawyers whose skill and effort helped create it." *In re Washington Public Power Supply System Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994). "The common fund

[5] This cap was agreed to only after the parties reached agreement on the overall Settlement terms. (Sagafi Decl., ¶ 12(e); Birka-White Decl., ¶ 34; Audet Decl., ¶ 24.)

doctrine provides that a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees." *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). This doctrine is firmly rooted in American law. *See, e.g.*, *Internal Imp. Fund Trustees v. Greenough*, 105 U.S. 527, 26 L. Ed. 1157 (1881); *Central R.R.*, 113 U.S. at 123.

Appropriate fee awards in common fund cases promote redress for wrongs caused to entire classes of persons, and deter future violations of a similar nature. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338–39, 100 S. Ct. 1166; 63 L. Ed. 2d 427 (1980). Adequate compensation to class counsel unquestionably promotes the availability of counsel for aggrieved persons. *See Muehler v. Land O'Lakes, Inc*., 617 F. Supp. 1370, 1375–76 (D. Minn. 1985).

B. The Could Should Award the "Benchmark"Attorneys' Fee of 25 Percent.

In the Ninth Circuit (and in other Circuits as well), courts awarding attorneys' fees apply either the percentage method or the lodestar approach to determine the appropriate amount of attorneys' fees. The so-called percentage method awards a portion of the total recovery of monetary and non-monetary benefits as an attorney fee award. The so-called lodestar approach "calculates the fee award by multiplying the number of hours reasonably spent by a reasonable hourly rate and then enhancing that figure, if necessary, to account for the risks associated with the representation." *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989). As courts have noted, the purpose of any fee award is "to reasonably compensate counsel for their efforts in creating the common fund."[6] *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D.

[6] Courts are encouraged to look to the private marketplace in setting a percentage fee. "The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client." *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992).

Cal. 2007) (citation omitted); *see also Washington Public Power*, 19 F.3d at 1296 ("[T]he fundamental principle [is] that fee awards out of common funds be '*reasonable under the circumstances*.'") (emphasis in original) (citation omitted).

Courts have generally found the percentage method to be superior in most cases, because "the measure of the recovery is the best determinant of the reasonableness and quality of the time expended." *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 660, 690 (M.D. Ala. 1988); *see also In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378–79 (N.D. Cal. 1989) ("[T]he better practice is to set a percentage fee . . . . This will encourage plaintiffs' attorneys to move for early settlement, provide predictability for the attorneys and the class members, and reduce the time consumed by counsel and court in dealing with voluminous fee petitions."); *In re Quantum Health Resources, Inc.*, 962 F. Supp. 1254, 1256 (C.D. Cal. 1997) (court noted drawbacks of relying on lodestar as the primary method for determining attorneys' fees in common fund cases).

This Court has likewise recognized that "[t]he use of the percentage-of-the-fund method in common-fund cases is the prevailing practice in the Ninth Circuit for awarding attorneys' fees and permits the Court to focus on a showing that a fund conferring benefits on a class was created through the efforts of plaintiffs' counsel." *In re Korean Air Lines Co. Antitrust Litig.*, MDL No. 1891, 2013 U.S. Dist. LEXIS 186262, at *3 (C.D. Cal. Dec. 23, 2013).

In applying the percentage of the fund method, the Ninth Circuit has established 25% as a benchmark percentage, which may be adjusted depending on the circumstances of a case.[7] *Vizcaino*, 290 F.3d at 1047. In *Vizcaino*, an employment case, a 28% fee was upheld on the basis of five factors: (1) the positive results for the class, (2) the risk for its counsel, (3) whether any individual non-

[7] *See Powers v. Eichen*, 229 F.3d 1249, 1257 (9th Cir. 2000); *Hanlon v. Chrysler Group, Inc.*, 150 F.3d 1011, 1029 (9th Cir. 1998); *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993), *cert. denied*, 512 U.S. 1220 (1994).

monetary benefits were obtained, (4) whether the fee was at or below market rates,[8] and (5) the burden on class counsel of prosecuting the case. *Vizcaino*, 290 F.3d at 1048–50.

As the record here reflects, all of the attorneys appointed Class Counsel have prosecuted this action, with no guarantee of receiving *anything*, and have advanced all costs without reimbursement. (Sagafi Decl., ¶ 4; Birka-White Decl., ¶ 32; Audet Decl., ¶ 9.) To date, Class Counsel have expended over 6,400 hours in professional services and incurred $134,076.25 in unreimbursed out-of-pocket costs. (Sagafi Decl., ¶¶ 21, 23 & Ex. A; Birka-White Decl., ¶ 33; Audet Decl., ¶¶ 10–12.) In this case, as noted, Class Counsel have obtained a monetary benefit of no less than $18 million for the Class, as well as other potential benefits. As such, Class Counsel respectfully request that the Court award the fee benchmark of 25% for an amount of $4,500,000 (plus reimbursement of expenses).[9]

1. <u>The Result Achieved for the Class Is Excellent.</u>

As a result of Class Counsel's vigorous prosecution of this case and negotiation of the Settlement, Class Counsel secured an important, valuable benefit for the Class. Many authoritative decisions have deemed the result a central factor to be considered in determining a fee award. *See, e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 436, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (the "most critical factor is the degree of success obtained"); *A.D. v. California Highway Patrol*, 712 F.3d 446, 460 (9th Cir. 2013) ("[T]he reasonableness of the fee is determined primarily by reference to the level of success achieved by the plaintiff.") (citation

[8] The court in *Vizcaino* took care to note that "market rates" are "lawyers' reasonable expectations, which are based on the circumstances of the case and the range of fee awards out of common funds of comparable size." 290 F.3d at 1050.

[9] The percentage of recovery for fee computation purposes is based on the total amount of the fund made available to the Class, not the amount actually claimed. *Boeing*, 444 U.S. at 479–80; *Williams*, 129 F.3d at 1027; *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311–12 (9th Cir. 1990). This is not an issue with this settlement, however, because the Settlement requires the Defendants to pay the full $18 million, regardless of the claims rate.

omitted).

The Settlement here provides substantial cash relief for the benefit of owners of toilets equipped with the Flushmate System. The cash payments will meaningfully reimburse Class members for expenses connected with the repair or replacement of the affected toilets. The Settlement achieves the key goals of this litigation: providing compensation to owners of Flushmate Toilets, and furthering the safety of the general public and the Class.

Eligible for payment are all Class members who have incurred unreimbursed out-of-pocket expenses for having installed a Repair Kit (the efficacy of which Plaintiffs confirmed through discovery), a replacement pressure vessel, or a replacement toilet, or who sustained direct Property Damage because of a leak or burst of a Flushmate System at any time before the end of the Claims Period. The latter group of Property Damage claimants will receive full reimbursement for reasonable and documented Property Damages claims,[10] while the economic loss claimants will receive an estimated minimum payment of $50, plus $25 for each additional Flushmate Toilet at the same address. (Plan of Allocation, §§ I.B.1, B.2; Sagafi Decl., ¶ 14.) Some Class members may install the Repair Kit themselves free of charge; those who hire a plumber or third-party technician to do so will pay an estimated range of $100 to $200 for residential installations. (Sagafi Decl., ¶ 12(k).) The Claims Period will remain open for at least two years so that as many Class

[10] If any reasonable and documented Property Damage claims remain unpaid after Defendants' guaranteed payments totaling $18 million have been exhausted, and the total amount of paid Property Damage claims exceeds $1.5 million, Defendants will be required to pay such remaining Property Damage claims in full. (Settlement, § IV.A.4.) Hence, there is no cap on the relief available under the Settlement to reimburse for Property Damage, and the Settlement contemplates maintaining the 25% allocation for attorneys' fees with respect to any such additional payments. Property Damage claims arising after the conclusion of the Claims Period are not being released. Another key component of the Settlement provides that after each Eligible Claim for reimbursement has been paid, the remaining sum in the Settlement Fund Trust Account may be distributed to the claimants, if feasible based on the size of the residue and the number of claimants. (Settlement, § V.C; Plan of Allocation, § I.B.3.)

members as possible can obtain payments after having their Flushmate Toilets fixed or replaced.

That the Settlement here protects the interests of the Class members is demonstrated by the fact they will receive payments not *after* Class Counsel, but at the same time. *Cf. In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 109 F.3d 602, 608 (9th Cir. 1997) (stating that "the judge must look out for the interests of the beneficiaries, to make sure that they obtain sufficient financial benefit after the lawyers are paid."). This "pay as you go" structure makes perfect sense because payments into the Settlement Fund Trust Account will be made in installments over the course of the Claims Period. (Settlement, § IV.A (describing sequenced deposits); Settlement, § VII (providing that attorneys' fees will be proportionally deducted from the Settlement Fund Trust Account on a rolling basis as Defendants make their payments, which will protect the Class by preventing the fund from being depleted by fees).)

The Settlement not only provides tangible benefits to the Class, it promotes safety by creating an incentive for owners of the recalled Flushmate Systems to repair or replace them. This broader safety benefit is yet another benefit to the Class and the general public.

To date, no objection has been filed or raised to either the substantive Settlement terms or the fee request. This lack of any objection at this point is further evidence that the results achieved and the requested fee are reasonable and acceptable to the Class. *National Rural Telecomms. Coop.v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) ("It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable.")

Thus, this Settlement's commendable structure and the relief it provides favor awarding the benchmark of 25%.

2. This Was a Challenging, Risky Case.

It bears emphasis that consumer class action cases such as this one are inherently uncertain. In numerous contingency cases similar to this one, plaintiffs' counsel have expended thousands of hours and substantial amounts in litigation costs, only to receive no compensation at all. *See, e.g.*, *Dodaro v. Standard Pac. Corp.*, No. EDCV 09-01666, 2012 U.S. Dist. LEXIS 47099 (C.D. Cal. Mar. 26, 2012), *aff'd*, 552 F. App'x 666 (9th Cir. Jan. 14, 2014) (dismissing with prejudice complaint sounding in fraud).

Were this litigation to have continued, Class Counsel would have faced numerous obstacles and risks. To begin with, obtaining nationwide class certification under California law or the laws of multiple states would have been difficult. *See Mazza v. American Honda Motor Co.*, 666 F.3d 581, 590–94 (9th Cir. 2012); *In re Pharm. Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83, 94 (D. Mass. 2008) (stating that "[w]hile numerous courts have talked-the-talk that grouping of multiple state laws is lawful and possible, very few courts have walked the grouping walk."). The potentially individualized issue of Class members' reliance upon Sloan's representations or omissions would have presented challenges in winning certification of a fraud claim. *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 222–26 (2d Cir. 2008).

This Court dismissed Plaintiffs' fraud claims under California law—and without leave to amend as to the toilet manufacturer Defendants. (ECF No. 65 at 4–14.) Establishing Sloan's liability for fraud would have been challenging, because no Plaintiff relied directly on a representation or omission allegedly made by Sloan. There could be no guarantee that the Court would accept the viability of Plaintiffs' theory of indirect reliance through "Advisors" and the distribution chain. *See Mirkin v. Wasserman*, 5 Cal. 4th 1082, 23 Cal. Rptr. 2d 101 (1993).

Sloan also would have mounted legal challenges to the express warranty claims. It would have argued that its limited warranty covering "defects in materials

and workmanship" does not extend to the alleged design defect. It would have further argued that the warranty claim lacks merit on the grounds that Plaintiffs did not satisfy all the conditions precedent, i.e., contacting Sloan to request warranty service and making their toilets available for inspection. In addition, Sloan would have attacked the warranty claims by arguing that the alleged defect did not manifest and/or was not substantially certain to manifest in most of the Flushmate Toilets.

Even if Plaintiffs could have prevailed against experienced defense counsel to overcome these and other obstacles, and even if Plaintiffs could have obtained a class certification order, successfully defended it on appeal under Fed. R. Civ. P. 23(f), defeated summary judgment, and proceeded to trial, victory before the trier of fact would have been uncertain, due in part to the express warranty. Such uncertainty, moreover, was compounded by the appeals virtually certain to have followed any verdict. *Cf. Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 248 (S.D. Ohio 1991) (rejecting the argument "that the Class should get more" because of the "very real potential that the Class could come away from a long expensive trial with nothing.").

In short, while Class Counsel believe that the claims are viable and strong, there can be no denying the array of serious class-wide risks, any one of which could have precluded the Class and its counsel from recovering anything at all. (Audet Decl., ¶¶ 9, 26–27; Birka-White Decl., ¶ 32.)

3. <u>The Legal Representation Was Contingent in Nature.</u>

As noted above, Class Counsel voluntarily undertook this litigation on a contingent fee basis, knowing from the beginning that there was a substantial possibility of the case yielding no recovery, leaving counsel uncompensated for substantial work and tens or hundreds of thousands of dollars in litigation expenses. (Sagafi Decl., ¶¶ 4–5; Birka-White Decl., ¶ 32; Audet Decl., ¶¶ 26–27.) *See Fischel v. Equitable Life Assur. Soc'y of the United States*, 307 F.3d 997, 1009 (9th Cir.

2002) (holding that "risk should be assessed when an attorney determines that there is merit to the client's claim and elects to pursue the claim on the client's behalf. This will likely occur before a lawsuit is filed."); *accord Skelton v. General Motor Corp*., 860 F.2d 250, 258 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989) (same).

Unlike civil defendants' counsel, who are normally paid an hourly rate and reimbursed for their expenses, Class Counsel have not been compensated for their time or expenses at any point during the approximately two years of this action's pendency. (Sagafi Decl., ¶ 4; Birka-White Decl., ¶¶ 23–24, 28; Audet Decl., ¶¶ 9–12, 26–27). Moreover, Class Counsel had to forego other work in order to devote the requisite amount of time, resources, and energy to handle this complex matter. (Sagafi Decl., ¶ 5; Birka-White Decl., ¶ 31.) *See Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 772 n.3 (11th Cir. 1991) (in awarding fees, courts consider "the preclusion of other employment by the attorney due to acceptance of the case") (citing *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714, 717–19 (5th Cir. 1974)); *see, e.g*., *Pelletz v. Weyerhaeuser Co*., 592 F. Supp. 2d 1322, 1328 (W.D. Wash. 2009) (approving 1.82 fee multiplier in part because "the demanding nature of this action precluded Class Counsel from accepting other potentially profitable work.").

The risk of receiving little or no payment for professional work is relevant to the determination of a fee award. *See Vizcaino*, 290 F.3d at 1048 (affirming that "[r]isk is a relevant circumstance" in determining an award of attorneys' fees). As the Ninth Circuit explained,

> Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose.

Washington Public Power, 19 F.3d at 1299–1300 (internal quotation marks and citations omitted); *see also Kakani v. Oracle Corp.*, No. C 06-06493 WHA, 2007 U.S. Dist. LEXIS 95496, at *12 (N.D. Cal. Dec. 21, 2007) ("Attorneys should be properly incentivized to take on worthwhile cases where the probability of payment is low or uncertain.").

Class Counsel's fee request falls at the *low end* of the average in the private marketplace, where contingency fee arrangements tend to provide for between 30 and 40 percent of a recovery. "In tort suits, an attorney might receive one-third of whatever amount the Plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery." *Blum*, 465 U.S. at 904 (Brennan, J., concurring) (citation omitted); *see also In re M.D.C. Holdings Sec. Litig.*, No. CV 89-0090 E (M), 1990 U.S. Dist. LEXIS 15488, at *22 (S.D. Cal. Aug. 30, 1990) ("In private contingent litigation, fee contracts have traditionally ranged between 30% and 40% of the total recovery").

4. <u>The Quality of Representation Has Been Excellent.</u>

The quality of Class Counsel's work is readily apparent from the case docket; from opposing the motion to transfer to applying for preliminary settlement approval, Class Counsel have consistently prepared thoughtful and thorough work on behalf of Plaintiffs and the Class. The excellent result obtained for them is further evidence of Class Counsel's skill. (Sagafi Decl., ¶¶ 3, 20 (discussing Class Counsel's experience in prosecuting consumer and other kinds of class actions); Birka-White Decl., ¶ 30; Audet Decl., ¶¶ 4–7.)

Class Counsel's collaborative efforts led to a global Settlement that efficiently resolved several actions around the country arising from the same facts, and involving both Property Damage and economic harm related to fixtures in residential, public, and commercial establishments. (Audet Decl., ¶¶ 14–16; Birka-White Decl., ¶ 46.) *See* ECF No. 132 at 25 (counsel informed the Court at the preliminary approval hearing that the affected toilets have been installed in roughly

equal numbers in homes and businesses). Class Counsel's effective and efficient work in resolving this complex matter should be appropriately rewarded.

The "'prosecution and management of a complex national class action requires unique legal skills and abilities.'" *In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, No. 02-ML-1475-DT(RCx), 2005 U.S. Dist. LEXIS 13627, at *39 (C.D. Cal. June 10, 2005) (citation omitted). Courts thus consider the quality of class counsel's work in determining an appropriate fee award. *Hanlon*, 150 F.3d at 1029. And it is particularly important to reward skilled attorneys for pursuing cases like this one that implicate the public interest; "the stated goal in percentage fee-award cases [is] ensuring that competent counsel continue to be willing to undertake risky, complex and novel litigation." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000) (internal quotation marks and citations omitted); *see also Torres v. Bank of Am.*, 830 F. Supp. 2d 1330, 1364 (S.D. Fla. 2011) ("[G]iven the positive societal benefits to be gained from lawyers' willingness to undertake difficult and risky, yet important, work like this, such decisions must be properly incentivized.").

In sum, Class Counsel's pooling of resources, cooperative efforts and persistence in negotiating a favorable Settlement, despite the Court's partial dismissal of the complaint and the prospect that a multi-state litigation class would not be certified, reflects first-rate advocacy meriting a reasonable professional fee.

In evaluating the quality of Class Counsel's work it is also proper to consider the quality of opposing counsel and the resources they applied to this case. *See Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 449 (C.D. Cal. 2013) ("The quality of opposing counsel is important in evaluating the quality of Class Counsel's work."); *see, e.g., Wing v. Asarco Inc.*, 114 F.3d 986, 988–89 (9th Cir. 1997) (approving a 2.0 fee multiplier in part because of "the quality of the [defendant's] opposition"); *Nguyen v. Radient Pharms. Corp.*, No. SACV 11-00406 DOC(MLGx), 2014 U.S. Dist. LEXIS 63312 (C.D. Cal. May 6, 2014) (citing "the

quality of opposing counsel" as a factor supporting a 28% fee from a common fund). Defendants' counsels in this case include attorneys from prominent defense firms (Dentons US, King & Spalding, and others) who zealously litigated the claims and defenses and would have continued to do so absent their resolution. This factor, therefore, strongly supports the requested fee.

5. A 25 Percent Fee Is on Par With Awards in Similar Cases.

In view of the Ninth Circuit's 25% benchmark for attorneys' fees in common fund cases (*see Vizcaino*, 290 F.3d at 1047–48), it is not surprising that courts commonly award this percentage to class counsel who have secured a common fund for the benefit of a class of aggrieved persons.[11] *See, e.g.*, *In re Korean Air Lines Co. Antitrust Litig.*, MDL No. 1891, 2013 U.S. Dist. LEXIS 186262, at *1–2 (C.D. Cal. Dec. 23, 2013) (Otero, J.); *Eddings v. Health Net, Inc.*, No. CV 10-1744-JST, 2013 U.S. Dist. LEXIS 84811, at *18–20 (C.D. Cal. June 13, 2013); *Gallucci v. Boiron, Inc.*, No. 11-cv-2039 JAH, 2012 U.S. Dist. LEXIS 157039, at *24–25 (S.D. Cal. Oct. 31, 2012); *Lymburner v. U.S. Fin. Funding, Inc.*, No. C-08-00325 EDL, 2012 U.S. Dist. LEXIS 14752, at *9, 16–27 (N.D. Cal. Feb. 7, 2012).

The attorneys' fee requested here matches the 25% fee awarded in these and other comparable cases, and with the Ninth Circuit benchmark.

6. A Lodestar Cross-Check Establishes the Requested Fee Is Reasonable.

The propriety of the requested fee is confirmed by a "cross-check" using Class Counsel's reported lodestar, as was done in *Vizcaino*, 290 F.3d at 1051. Class

[11] In fact, it is not unusual for courts to award fees in excess of 30% where appropriate. *See, e.g., In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (approving fee of 33% of a $12 million settlement fund); *Activision*, 723 F. Supp. at 1377 ("This court's review of recent reported cases discloses that nearly all common fund awards range around 30%"); *see also In re Ampicillin Antitrust Litig.*, 526 F. Supp. 494, 498 (D.D.C. 1981) (45% award); *Gaskill v. Gordon*, 942 F. Supp. 382, 387–88 (N.D. Ill. 1996), *aff'd*, 160 F.3d 361 (7th Cir. 1998) (finding that 33% is the norm, but awarding 38% of the settlement fund).

Counsel's outlay of time and money has been considerable. In all, Class Counsel and our staffs have spent approximately 6,434 hours investigating, analyzing, researching, litigating, and negotiating a resolution of this case. (Sagafi Decl., ¶ 21 & Ex. A; Birka-White Decl., ¶ 33; Audet Decl., ¶¶ 9–11.)

Class Counsel's hourly rates, used to calculate the lodestar here, are in line with prevailing rates in this District, and have recently been approved by federal courts. (Sagafi Decl., ¶ 22; Birka-White Decl., ¶ 25; Audet Decl., ¶¶ 9–11.) *See, e.g.*, *Wehlage v. Evergreen at Arvin LLC*, No. 4:10-cv-05839-CW, 2012 U.S. Dist. LEXIS 144152, at *8 (N.D. Cal. Oct. 4, 2012) (approving LCHB's rates); *Pelletz*, 592 F. Supp. 2d at 1326–27 (approving LCHB's rates); *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 793–94 (N.D. Ohio 2010) (approving LCHB's rates); *In re: Uponor, Inc. F1807 Plumbing Fittings Prods. Liab. Litig.*, No. 0:11-cv-01684-ADM-JJK, ECF No. 51 (D. Minn. July 3, 2012) (approving Birka-White Law Offices' rates); *In re: Kitec Plumbing Sys. Prods. Liab. Litig.*, No. 09-md-2098, ECF No. 155 (N.D. Tex. Nov. 17, 2011) (approving Birka-White's rates); *Cartwright v. Viking Indus.*, No. 2:07-cv-02159-FCD-EFB, ECF No. 190 (E.D. Cal. Aug. 27, 2010) (approving Birka-White's rates); *Garner v. State Farm Mutual Auto. Ins. Co.*, No. 4:08-cv-01365-CW, ECF No. 284 (N.D. Cal. Apr. 22, 2010) (approving Birka-White's rates); *Yamada v. Nobel Biocare Holding AG*, No. CV10-04849 MWF (PLAx), ECF No. 199 (C.D. Cal. Feb. 4, 2014) (approving Audet & Partners' rates); *In re Apple I Phone 4 Antennae*, MDL No. 2188, ECF No. 79 (N.D. Cal. Sept. 13, 2012) (approving Audet's rates); *In re JP Morgan Chase Mortg. Modification Litig.*, No. 1:11-md-2290-RGS, ECF No. 433 (D. Mass. May 7, 2014) (approving Holland Groves' and Levin Fishbein's rates); *Eliason v. Gentek Bldg. Prods., Inc.*, No. 1:10-cv-2093-BYP, ECF No. 149 (N.D. Ohio Aug. 1, 2013) (approving Holland Groves' rates); *Christensen v. Volkswagen Grp. of Am., Inc.*, No. 1:10-cv-06484, ECF No. 65 (N.D. Ill. Feb. 22, 2012) (approving Holland Groves' rates); *Vought v. Bank of Am.*, No. 10-CV-2052, ECF No. 135

(C.D. Ill. Jan. 23, 2013) (approving Levin Fishbein's rates); *Gwaizdowski v. County of Chester*, No. 08-CV-4463, ECF No. 52 (E.D. Pa. Jan. 23, 2012) (approving Levin Fishbein's rates); *In re Wellbutrin SR Antitrust Litig.*, No. 04-5525, ECF No. 413 (E.D. Pa. Nov. 21, 2011) (approving Levin Fishbein's rates); *In re Navistar 6.0 L Diesel Engine Prods. Liab. Litig.*, No. 1:11-cv-02496, ECF No. 349 (N.D. Ill. Aug. 11, 2013) (approving Levin Fishbein's and Parker Waichman's rates); *In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, No. 1:09-md-02023-BMC, ECF No. 254 (E.D.N.Y. Nov. 8, 2013) (approving Parker Waichman's rates); *Kyurkjian v. AXA*, No. 2:02-cv-01750-CAS, ECF Nos. 370, 371 (C.D. Cal. Apr. 22, 2014) (approving Geragos' rates); *SEC v. Medical Capital Holdings, Inc.*, No. 8:09-cv-00818-DOC, ECF No. 1175 (C.D. Cal. Apr. 29, 2014) (approving Geragos' rates); *Ovasapyan v. City of Glendale*, No. 2:08-cv-00194-CAS, ECF No. 113 (C.D. Cal. Apr. 27, 2009) (approving Geragos' rates).

The total reported lodestar amount in this action and the related actions is $4,018,936.05. (Sagafi Decl., ¶ 21.)[12] The requested fee constitutes a multiplier of approximately 1.12, well within the acceptable range of multipliers awarded in complex cases. *See, e.g.*, *Vizcaino*, 290 F.3d at 1050–51 (upholding a 28% fee award that constituted a 3.65 multiple of lodestar). A survey of class action settlements showed that the mean multiplier in cases in the Ninth Circuit is 1.54. Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. Empir. L. Stud. 248, at 31 (2010). The multiplier in the present case is lower than those numbers, and again, establishes that the amount requested by class counsel is "reasonable" under any standard applied by this Court.

[12] The lodestar figure was calculated by multiplying the number of hours worked by the historical hourly rates of the attorneys and professional staff at each firm. A breakdown of the aggregate lodestar by firm is set forth at Exhibit A to the Sagafi Declaration.

C. Class Counsel's Expenses Were Reasonable and Necessary and Should Be Reimbursed.

Pursuant to the Settlement terms and settled precedent, Class Counsel are entitled to recover the out-of-pocket costs reasonably incurred in investigating, prosecuting, and settling this action. *See In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996) (citing *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391–92, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970)).

As documented with this Court, Class Counsel have incurred $134,076.25 in unreimbursed, out-of-pocket expenses. (Sagafi Decl., Ex. A.) This includes costs advanced in connection with investigating the claims, expert work, engaging a mediator, travel, legal research, photocopying, obtaining transcripts, telephone service, postage, and other customary litigation expenses.[13] (Sagafi Decl., ¶ 24.) These costs were both reasonable and necessary, and should be reimbursed in full. (Sagafi Decl., ¶ 24; Birka-White Decl., ¶ 28; Audet Decl., ¶ 12.)

D. The Court Should Also Award Each of the Class Representative $1,000 for Their Service on Behalf of the Class.

In addition, the Ninth Circuit has recognized that "named plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for

[13] The expenses include the cost of computerized legal research using Lexis, Pacer, and other resources. The use of such computerized tools was necessary if the Class was to receive representation on an equal footing with Defendants. Courts recognize that such tools create efficiencies in litigation and, ultimately, save clients and the Class money. *See Cont'l Ill.*, 962 F.2d at 570 (citing *Missouri v. Jenkins*, 491 U.S. 274, 286–87 (1989)). Travel and lodging expenses also were necessary to the prosecution and settlement of the action, were reasonable in amount, and are properly charged against the fund created. *See Thornberry v. Delta Air Lines*, 676 F.2d 1240, 1244 (9th Cir. 1982), *vacated on other grounds*, 461 U.S. 952 (1983); *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'") (citation omitted); *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1177–78 (S.D. Cal. 2007). Similarly, photocopying and scanning costs associated with ECF filings and comparable costs are ordinarily reimbursed in common fund cases. *See Harris*, 24 F.3d at 19; *Immune*, 297 F. Supp. 2d at 1177.

reasonable incentive payments." *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003); *Rodriguez v. West Pub'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (noting that such service awards "are fairly typical in class action cases."). Such awards are "intended to compensate class representatives for work done on behalf of the class [and] make up for financial or reputational risk undertaken in bringing the action." *Id*. Relevant considerations include: (1) the actions the class representatives took to protect the interests of the class; (2) the degree to which the class benefited from those actions; and (3) the amount of time and effort the class representatives expended in pursuing the litigation. *See Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

The service awards of $1,000 sought for each Plaintiff in the consolidated and related cases are reasonable and justified. *See* ECF No. 132 at 34 (at the preliminary approval hearing, this Court stated: "And the named plaintiffs are to receive 1,000 each as incentive awards. That appears to be reasonable."). In addition to lending their names to this case, and thus subjecting themselves to public attention and scrutiny, the Class representatives actively participated in the litigation, providing documentation and affidavits, in some cases allowing their toilets to be inspected, and consulting with Class Counsel on a regular basis. (Sagafi Decl., ¶ 25; Birka-White Decl., ¶¶ 37–45.)[14] The requested awards fall at the modest end of the spectrum. *See, e.g.*, *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 457, 463 (9th Cir. 2000) (approving service awards of $5,000); *Hughes v. Microsoft Corp.*, 2001 WL 34089697, at *12–13 (W.D. Wash. Mar. 26, 2001) (approving service awards of $65,000 to six class representatives).

[14] None of these Class Representative was ever promised a service award or told that such an award depended on his or her support for the Settlement. (Sagafi Decl., ¶ 25.)

In light of the Class representatives' willingness to step forward on behalf of the Class and oversee the process and the actions of Class Counsel, Class Counsel respectfully submit that the Court should grant the requested service awards.

IV. CONCLUSION

For the foregoing reasons, Class Counsel respectfully ask the Court to issue an Order awarding attorneys' fees in the amount of $4,500,000, reimbursement of expenses in the amount of $134,076.25, and service awards in the amount of $1,000 for each of the Class representatives in these consolidated and related actions.

Dated: June 30, 2014

Respectfully submitted,

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CERTIFICATION

Pursuant to Civil Local Rule 5–4.3.4(a)(2)(i), Kristen Law Sagafi, the ECF User whose identification and password are being used to file the foregoing document, attests that all other signatories listed, and on whose behalf the filing is submitted, concur in the filing's content and have authorized the filing.

Dated: June 30, 2014

/s/ *Kristen Law Sagafi*
Kristen Law Sagafi

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED DESERT CHARITIES, FRED EDE, III, EMILY WILLIAMS, BRUCE PRITCHARD, and JEAN STEINER, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

SLOAN VALVE COMPANY, *et al.*,

Defendants.

Case No. CV12-06878 SJO (SHx)

[PROPOSED] ORDER REGARDING MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARDS TO CLASS REPRESENTATIVES

Action Filed: August 9, 2012

The Honorable S. James Otero

Consolidated Cases:

Berube v. Flushmate
2:13-cv-02372-SJO-SH
Brettler v. Flushmate
2:13-cv-02499-SJO-SH
Kubat, et. al. v. Flushmate
2:13-cv-02425-SJO-SH
Patel v. Flushmate
2:13-cv-02428-SJO-SH

Related Case:

Dimov, et. al. v. Sloan Valve Co.
1:12-cv-09700 (N.D. Ill.)

Pursuant to Fed. R. Civ. P. 23(h), 54(d), and 52(a), Class Counsel have filed an application for attorneys' fees and expenses and for service awards (the "Application"). The Application duly came on for hearing on August 25, 2014. Having reviewed the papers, pleadings and files in these consolidated and related cases (collectively, the "Action"), and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

Class Counsel's Application for an award of attorneys' fees of $ 4,500,000, an amount equal to twenty-five percent (25%) of the $ 18,000,000.00 Settlement fund, established pursuant to the Class Action Settlement Agreement and Release ("Settlement") with Defendants, is fair, appropriate and reasonable. The Court awards the above amount, in addition to $ 134,076.25 in costs and expenses, plus $ 1,000 incentive awards to each Class representative which shall be paid in accordance with Sections VII and VIII of the Settlement. In support of this Order, the Court makes the following findings of fact and conclusion of law.

1. Capitalized terms used in this Order have the same definition as used in the Settlement.

2. The Class was provided with due and adequate notice, in compliance with the requirement of constitutional due process and Rule 23 of the Federal Rules and Civil Procedure, pursuant to the Notice Program approved by the Court in its Order Granting Plaintiffs' Motion for Preliminary Approval of Settlement ("Preliminary Approval Order"). The Class Notice informed the Class that Class Counsel intended to apply for an award of attorneys' fees in an amount not to exceed twenty-five percent (25%) of the Settlement and for costs and expenses incurred by Class Counsel during the prosecution of the Action.

3. The Settlement confers substantial benefits on the Class. The requested attorneys' fees are fair, appropriate, and reasonable whether as a percentage of the Settlement, or as considered under a cross-check based on the

total lodestar reported by Class Counsel.[1] The use of the "percentage-of-the-fund" method in common-fund cases is the prevailing practice in the Ninth Circuit for awarding attorneys' fees. This approach permits this Court to focus on a fund conferring benefits on a class that was created through the efforts of Class Counsel. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990).

4. Under well-established precedent, the Ninth Circuit has directed that twenty-five percent (25%) of the class benefit should be the "benchmark" attorneys' fee where, as here, counsel's efforts have led to the creation of a common fund. That benchmark may be adjusted by the Court depending on the circumstances of the case. *Vizcaino*, 290 F.3d at 1047–48.

5. The Court finds and concludes that the fees requested by Class Counsel are fully justified by, *inter alia*, (a) the results achieved by the Settlement; (b) the substantial risks and complexity of the litigation; (c) the contingent nature of the fees and the financial burden carried by Class Counsel; (d) the length of time that the litigation has been pending; (e) fee awards made in similar cases in this Court; (f) percentages in standard contingency-fee agreements; (g) the additional benefits obtained in the Settlement beyond the Settlement fund; (h) the reaction of the Class; (i) the work and labor of Class Counsel as well as the attorneys' fee lodestar incurred in prosecuting the Action; and (j) the cooperation of all Class Counsel with pending related actions.

6. The Court finds that the Settlement was reached following extensive arm's length negotiations between the parties, and further finds that the settlement was negotiated in good faith and in the absence of collusion.

[1] The following firms comprise the Court-appointed Class Counsel: Birka-White Law Offices; Lieff Cabraser Heimann & Bernstein, LLP; Audet & Partners, LLP; Parker Waichman LLP; Levin Fishbein, Sedran & Berman, LLP; Wexler Wallace, LLP; Holland Groves Schneller & Stolze LLC; and Geragos & Geragos, P.C.

7. Efforts by Class Counsel in this complex class action litigation have been without compensation or reimbursement of any kind. The fees incurred and the costs advanced, as noted in the record, have been wholly contingent upon the result achieved. The requested fee is more than justified under the applicable law.

8. As a result of Class Counsel's prosecution of this case and subsequent negotiation of the Settlement, Class Counsel secured a valuable benefit for the Class. *Hensley v. Eckerhart*, 461 U.S. 424, 436, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (the "most critical factor is the degree of success obtained"). The cash payments will meaningfully reimburse Class members for expenses connected with the repair and/or replacement of the affected toilets. The Settlement achieves the key goals of this litigation: providing compensation to owners of Flushmate Toilets, and furthering the safety of the general public and Class members.

9. Section IV.A.4 of the Settlement requires the Defendants to make payments in excess of $ 18 million to satisfy Property Damage claims if they exceed $ 1.5 million and certain conditions are met. Consistent with the other findings set forth in this Order, the Court finds that, in such an event, the 25% fee percentage should be maintained and, as a result, Class Counsel will receive 25% of the additional payments.

10. Class Counsel's collaborative efforts in the Action led to a global settlement that efficiently resolved several actions around the country arising from the same facts, and involving both property and economic damage stemming from fixtures in residential, public and commercial establishments. Simply put, counsel did a fine job with a relatively novel case whose prosecution and successful settlement were clearly in the public interest. Class Counsel's effective and efficient work in resolving this complex matter should be appropriately rewarded.

11. The propriety of the requested fee is further confirmed by a "cross-check" using Class Counsel's reported lodestar. *Vizcaino*, 290 F.3d at 1051. Class

Counsel and their staffs have spent in excess of 6,400 hours investigating, analyzing, researching, litigating, and negotiating a resolution of the Action. The Court finds that Class Counsel's hourly rates (used to calculate the lodestar here) are consistent with prevailing rates in this District, and have been approved by other federal courts.

12. The total reported lodestar amount in the Action is $ 4,018,936.05. The requested fee constitutes a multiplier of approximately 1.12. *See Vizcaino*, 290 F.3d at 1050–51 (upholding a 28% fee award that constituted a 3.65 multiple of lodestar). The low multiplier in the present case supports the Court's finding that the amount requested by Class Counsel is reasonable.

13. In addition, under applicable case law and the terms of the Settlement, Class Counsel are entitled to recover the out-of-pocket costs and expenses reasonably incurred in investigating, prosecuting, and settling this Action. As documented with this Court, Class Counsel have incurred $ 134,076.25 in unreimbursed, out-of-pocket expenses. The Court finds that these costs and expenses were both reasonable and necessary, and shall be reimbursed as set forth in accordance with Section VII of the Settlement.

14. Finally, "named plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments." *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003). The incentive awards of $ 1,000 for each Class representative are reasonable and justified given the circumstances here. *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 457, 463 (9th Cir. 2000) (approving service awards of $ 5,000).

CONCLUSION

For the foregoing reasons, Class Counsel's Application for an award of attorneys' fees in the amount of $ 4,500,000, reimbursement of expenses in the amount of $ 134,076.25, and incentive awards in the amount of $ 1,000 for each Class representative is GRANTED. Further, to the extent that the Defendants

make Settlement Payments in excess of $ 18 million as provided in Section IV.A.4 of the Settlement, Class Counsel shall be awarded twenty-five percent (25%) of any additional Settlement Payments so made. Class Counsel's attorneys' fees, reimbursement of expenses, and the incentive awards shall be paid in accordance with the schedules set forth in Sections VII and VIII of the Settlement.

IT IS SO ORDERED.

Date:_____

The Honorable S. James Otero
UNITED STATES DISTRICT JUDGE