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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

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

Defendants.

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

The Honorable S. James Otero

MOTION FOR ATTORNEYS' FEES AND COSTS, AND INCENTIVE AWARD TO CLASS REPRESENTATIVE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 18, 2017, at 10:00 a.m., in the Courtroom of the Honorable S. James Otero, United States District Judge for the Central District of California, located at 350 W. 1st Street, Los Angeles, CA 90012 - Courtroom 10C, Class Counsel will move and hereby do move the Court for an order: (1) awarding Class Counsel attorney fees of $600,000; (2) awarding Class Counsel $9,601.05 as reimbursement of out-of-pocket costs and expenses incurred in prosecuting the litigation; and (3) awarding an incentive award in the amount of $5,000 to Plaintiff Kelly Mergens.

This Motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on June 14, 2017. The motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities in support thereof, the Settlement Agreement, Plaintiff's motion for final approval (ECF No. 47) and the accompanying declarations filed in support thereof, any reply papers, the argument of counsel, and all pleadings and records on file in this matter.

Dated: June 30, 2017

Respectfully submitted,

BIRKA-WHITE LAW OFFICES

By: */s/ David M. Birka-White*
David M. Birka-White

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I. INTRODUCTION

The events leading up to the filing of this action ("Mergens Action"), and ultimate Settlement,[1] presented unusual and difficult challenges for Class Counsel and Defense Counsel alike. As co-lead class counsel in the initial action, *United Desert Charities, et al. v. Sloan Valve Company, et al.*, Case No. 2:12-cv-06878-SJO-SH ("UDC Action"), Birka-White Law Offices, ("BWLO") assumed full responsibility for overseeing and monitoring the administration of the $18 million common fund settlement ("UDC Settlement Fund").[2] As claims in the UDC Action progressed, BWLO learned that claims were being made by individuals whose Series 503 Flushmate III Pressure-Assist Flushing Systems ("Flushmate Systems") were manufactured *after* the date which circumscribed the UDC Action's class definition, namely October 14, 1997 to June 30, 2009. By definition, these claims were outside of the scope of the UDC settlement and, therefore, denied.

This scenario was troubling and provoked further inquiry. Our investigation revealed that Flushmate units manufactured *after* June 30, 2009, were substantially similar to those manufactured during the UDC class period. Then on July 14, 2016, Sloan's division, Flushmate, and the Consumer Product Safety Commission ("CPSC") jointly announced an expanded voluntary recall of Flushmate Systems manufactured from July 1, 2009 through April 30, 2011. With the announcement of the Expanded Recall, BWLO thereafter filed the Mergens Action. Complicating matters, in July of 2016, the two year claims period in the UDC Action was winding down with an upcoming expiration date of September 24, 2016. It became apparent that the UDC Settlement Fund would have a remaining balance of more

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

[2] BWLO filed the first of numerous cases against Sloan and served as lead plaintiffs' counsel among the many nationwide plaintiffs law firms involved in the underlying UDC Action. Mr. Birka-White and Ms. Wong had the sole responsibility for overseeing the administration of the UDC settlement. This responsibility was assumed, without additional compensation.

than $7 million.

This application for fees and costs is presented to the Court in the framework of this unusual scenario. This unexpected situation raised a series of complicated questions which required BWLO, class counsel in the UDC Action, to at once formulate a procedure for properly distributing the unclaimed amounts in the UDC Settlement Fund, which would fully protect the interests of UDC class members, while fairly and adequately reaching a settlement in the Mergens Action - a scenario which can fairly be described as requiring a very high-level of legal analysis and skill from counsel for both sides.

For months, counsel for both parties struggled to achieve a solution. On the one hand, Defendant understandably wanted to avoid what it viewed as a potentially wasteful *cy pres* distribution of the unclaimed UDC settlement proceeds in that the Mergens putative class was separated from the UDC class merely by date of manufacture. Furthermore, Defendant argued, why give the UDC class members who timely made claims a windfall, when Mergens Class members ("Mergens Class Members") stood in the wings as the "highest and next best use" of the funds? On the other hand, BWLO was acutely aware that the UDC settlement funds were for the benefit of UDC class members. In that context, BWLO insisted that any settlement in the Mergens Action which contemplated the potential use of the unclaimed UDC settlement funds must first provide that UDC class members be made *whole* for all reasonable out-of-pocket installation costs incurred and property damage sustained.[3] Furthermore, UDC class members must retain full access to the

[3] Under the original settlement terms in the UDC Action, property damage claims were paid in full. However, claimants that filed non-Property Damage claims were limited to $50.00 for the first toilet and $25 for each additional toilet repaired or replaced at the same property. Subsequently, after the conclusion of the UDC Claims Period, the plan of allocation was amended to provide for distribution of up to $127.50 for the first toilet and up to $30 for each additional toilet repaired or replaced at the same location. If the claim exceeds those sums, the amount is reviewed by the Special Circumstances Committee for final disposition. During the extended UDC claims period, UDC class members will continue to receive up to $127.50 for the first toilet and $30 for each additional toilet repaired or replaced at

$18 million settlement fund. An overarching protection for the UDC settlement class was further achieved by extending the initial two year claims period for an additional year.

Furthermore, the parties implemented a new robust notice program that was designed to reach as many UDC class members as reasonably possible. Finally, the Mergens Class members would have to receive the same recovery as UDC class Members. Parenthetically, Defendant will have to replenish the UDC Settlement Fund with all sums necessary to fully pay all Mergens Class Members' valid claims in the event that the UDC Settlement Fund were exhausted prior to the close of the Claims Period. Put differently, Sloan would have to deposit all sums necessary to ensure that UDC class members have full access to the initial $18 million settlement fund.

In this sense, and somewhat ironically, the necessity to struggle with the doctrine of *cy pres* to create an equitable methodology for distributing the remaining sums in the UDC Settlement Fund, together with the necessity to protect the interests of UDC class members, drove up the settlement benefits for both UDC and Mergens class members. The resulting modification of the UDC settlement and the separate Mergens settlement, reflect a high-quality, fair and sophisticated solution to a nuanced problem, which was only achieved after months of contentious negotiations, two mediations, and skillful lawyering. The parties negotiated an agreement regarding class counsel fees and expenses only after reaching agreement on all other material terms of the agreement.

Accordingly, Class Counsel request $600,000 in attorney fees and reimbursement of costs in the amount of $9,601.05 associated with the Settlement. The lodestar and constructive common fund analysis that justify the fee is set forth hereinafter.

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the same property. Again, if the claim exceeds those sums, the amount will be reviewed by the Claims Administrator in the first instance, and then the Special Circumstances Committee for final disposition.

II. FACTUAL BACKGROUND.

A. Mergens Settlement Negotiations

The proposed Settlement is the product of contested, and arms-length settlement negotiations conducted by an experienced mediator, Hon. William J. Cahill (Ret.) of JAMS. *Birka-White Decl.*, ¶ 23. The first mediation session was held on September 14, 2016. *Id.* at ¶ 25. As class counsel in the UDC Action, it was imperative that the UDC class members receive the full benefit of the $18 million settlement fund. *Id.* Further painstaking negotiations continued for several weeks before an agreement was reached on all material terms on October 27, 2016. *Id.* A second mediation session was held with Judge Cahill on December 9, 2016, to discuss attorney's fees and costs. *Id.* at ¶ 27. The requested fees were contested and the parties reached a compromise and settlement of the attorney fee issue only after engaging in an extensive mediation process with Judge Cahill. *Id.* at ¶ 25. Following the December 9, 2016 mediation, negotiations regarding a definitive written agreement followed. *Id.* at ¶ 29. This process involved an additional three months of negotiations, telephone conferences and extensive back-and-forth with defense counsel over the Settlement, claims protocol process, and Notice Plan. *Id.* The parties executed the finalized Settlement in February 2017. *Id.*

As part of the Settlement, Defendant agreed "not to contest a motion by Class Counsel for an award of attorneys' fees in an amount up to, but not exceeding $600,000, plus reimbursement of costs and expenses." *Settlement*, Section VII, at 27; *Birka-White Decl.*, ¶ 70. Parenthetically, whatever the court orders as an attorney fee, that amount will be paid separately by the Defendant, and not deducted from the UDC Settlement Fund. *See Settlement*, Section VII, at 27 ("Any amount awarded by the Court shall be paid separately by Defendant and will not be deducted from the UDC Settlement Fund."); *Birka-White Decl.*, ¶ 73. As such, the requested fee will be paid with "new" money. Any benefits the UDC or Mergens class members would otherwise receive will be paid independent of the attorney fee

award. *Id.*

The only timekeepers associated with this fee application are David Birka-White, Steve Oroza, and Mindy Wong of BWLO, and to a much lesser extent, John Green of Farella, Braun Martel, who provided valuable assistance at various stages in the Mergens Action. *Id.* at ¶ 38. All time spent was necessary to complete the work and was performed by very experienced attorneys dedicated to achieving an excellent resolution of a complex set of circumstances in the most efficient manner possible. *Id.* at ¶ 39. No staff or contract attorneys were utilized. *Id*.

During the course of the settlement negotiations, Class Counsel worked at length with one of the country's premier notice providers, Shannon Wheatman, President of Kinsella Media LLC, to develop a customized plan for distribution of a joint notice concerning the modification of the UDC settlement and the Mergens Settlement. *Id.* at ¶ 30. Class Counsel also worked with Arnold Rodio, President of Class Litigation Administration Support Services ("CLASS"), the Court-appointed claims administrator in the UDC Action, regarding the administration and implementation of both the modifications to the UDC settlement and the Mergens Settlement. *Id.*

B. Modification of the UDC Settlement Agreement

Concurrently with the filing of this motion and the Motion for Final Approval of the Class Action Settlement in the Mergens Action, the parties are submitting a joint motion in the UDC Action seeking final approval to modify that settlement to (1) extend the claims period in the UDC Action for one year and (2) utilize the UDC Settlement Fund to pay notice and administration costs and the valid claims submitted by Mergens Class members. There were 11 plaintiffs' firms working on the UDC Action, all of which have been paid for their services through the prior UDC attorney fee award. Eight of those firms were appointed as class counsel in the UDC Action, but it was BWLO who performed all the necessary work to oversee the administration of the UDC Settlement Fund. No other firm

offered their services in any capacity to assist with the administration.[4] In a meaningful way, this turn of events provided additional benefits to the UDC settlement class in that there was absolutely no duplication of time spent on any aspect of the modification of the settlement agreement in the UDC Action or the filing and settling of the Mergens Action. *Id* at ¶ 66.

III. ARGUMENT

A. The Fee Request is Fair and Reasonable.

The key to any attorney fee request in the context of a class action is *reasonableness*. "Attorneys' fees provisions included in proposed class action settlement agreements are, like every other aspect of such agreements, subject to the determination whether the settlement is 'fundamentally fair, adequate, and reasonable.'" *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003); see also, *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). The reasonableness of the fee request is tied to *results*, namely the benefits conferred on the class. *In re Bluetooth Headset Prod. Liab. Litig.*, No. 07-ML-1822 DSF EX, 2012 WL 6869641, at *2 (C.D. Cal. July 31, 2012). Class Counsel submit that the $600,000 fee, agreed to be paid by Sloan is reasonable given the value of the settlement benefits conferred on the Class and the high quality of legal work.

Further, the Court is not limited by the actual amount of the claims to be paid. Rather, the Court should consider the monetary and non-monetary benefits to the Class and the economies involved in presenting the case. *Camden I Condo Ass'n, Inc. v. Dunkle*, 946 F. 2d 768, 775 (1991). For example, an essential nonmonetary element of the Settlement was to educate and incentivize Class members to reduce a safety risk by paying them the full value of out-of-pocket costs related to the installation a Repair Kit, replacement pressure vessel or

[4] All plaintiffs firms, including BWLO, received a multiplier of 1.1 pursuant to the attorney fee award in the UDC Action. *Id.* at ¶ 47. BWLO was not compensated to manage the administration of the UDC Settlement Fund. *Id*. This lodestar multiplier of 1.1 diminished as BWLO continued to represent the interests of the UDC class. *Id*.

replacement toilet.

Class Counsel transparently bases its fee application on an analysis which first applies the lodestar calculation method and then "crosschecks" that analysis according to the principles applicable to common funds, more aptly described in this case as "constructive common funds" or "putative funds."

1. The Requested Fee Award Is Appropriate Under A Lodestar Analysis.

Class Counsel assert that the utilization of the lodestar method of calculating a fee award is appropriate for a claims made settlement of this sort. *In re Bluetooth Headset Prod. Liab. Litig*. 2012 WL 6869641, at *2 ("As the settlement is not a common fund...the lodestar method is a more appropriate method of calculating a reasonable fee."). The "lodestar" amount is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate for the region and for the experience of the lawyer. *Id.*; *Staton*, 327 F.3d at 965. While the lodestar figure is presumptively reasonable, the court may adjust it by an appropriate multiplier to reflect the reasonableness of the fee award taking into consideration the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment. *In re Bluetooth Headset Prod. Liab. Litig*., 654 F.3d at 941–42 citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998); *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1170 (C.D. Cal. 2010).

Attorneys' fees in class action cases are calculated according to the "prevailing market rates in the relevant community...." *Etter v. Thetford Corp*., No. SACV1300081JLSRNB, 2017 WL 1433312, at *4 (C.D. Cal. Apr. 14, 2017) (internal citations omitted.) BWLO's hourly rates have been approved in *Allagas v. BP Solar International, Inc.*, U.S. District Court, N.D. Cal., Case No. No. CV14-00560-SI (Dkt. 201); *Kuffner v. Suntech*, Contra Costa County Superior Court, Case No. C13-01328 (March 7, 2016); *United Desert Charities, Inc., et al. v. Sloan*

Valve Company, U.S. District Court, N.D. Cal., Case No. 2:12-cv-06878-SJO-SH (Dkt. 148); *Garner v. State Farm Mutual Automobile Insurance Company*, U.S. District Court, N.D. Cal., Case No. 4:08-cv-01365-CW (Dkt. 284); *Cartwright v. Viking Industries, Inc.*, U.S. District Court, E.D. Cal., Case No. 2:07-cv-02159-FCD-EFB (Dkt. 190). *Birka-White Decl.*, ¶¶ 3, 49, 54.

Class Counsel have performed a total of 489.8 hours amounting to $350,402.08 in fees, for which no compensation has been received.[5] In addition, BWLO will spend considerable time in overseeing the *administration* of the Settlement.[6] *Birka-White Decl.*, ¶¶ 35, 45, 59, 62. The proper implementation of the terms of the Settlement will require careful attention to the nature of the claims and specifically whether they belong to UDC or Mergens class members. *Id.* at ¶ 37. This will require, as it has with the monitoring of the UDC settlement, regular interaction and conferring with the Claims Administrator.[7] *Id.* Class Counsel estimates that it will spend a minimum of 100 additional hours on Settlement administration. *Id.* at ¶ 36. The total time committed through June 15, 2017, is as follows:

Methodology I:

The simplest lodestar analysis is to divide the total time spent on the Mergens Action and the modifications of the settlement in the UDC Action and exclude the forthcoming administration time. This reveals a multiplier of **1.71**. ($600,000 ÷ $350,402.08 = 1.71).[8]

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[5] This does not include additional time which will be incurred related to preparation of the reply brief and attendance at the Fairness Hearing. *Id.*, ¶¶ 45, 69.

[6] BWLO are experts in administering class action settlements, and are well aware of the duties and responsibilities attendant thereto. *Birka-White Decl.*, ¶ 9.

[7] As part of overseeing the UDC claims administration, class counsel David Birka-White and Mindy Wong interacted with the court-appointed Claims Administrator on a frequent basis and were active in every aspect of the implementation of the UDC settlement agreement. *Birka-White Decl.*, ¶¶ 37, 46. In that connection, BWLO conducted regular conference calls with key members of the administration staff, monitored claims, fielded class member questions, and analyzed the overall progress of the administration. *Id.*

[8] The actual multiplier will be less as this does not include time spent drafting the

Matter	Hours	Fees
Mergens	427.3	$304,826.58
UDC Modification	62.5	$45,575.50
Total	**489.8**	**$350,402.08**

See, *Birka-White Decl.*, ¶¶ 19, 38, 59, 62, 69-70.

Methodology II:

An alternative approach to the lodestar analysis is to divide the requested fee by the total time spent on the Mergens Action, the modifications of the settlement agreement in the UDC Action, and future administration of the Mergens Settlement. This reveals a multiplier of **1.48**. ($600,000 ÷ $406,402.08 = 1.48).

Matter	Hours	Fees
Mergens	427.3	$304,826.58
UDC Modification	62.5	$45,575.50
Projected Mergens Administration	100.0	$56,000.00[9]
Total	**589.8**	**$406,402.08**

See, *Birka-White Decl.*, ¶¶ 19, 36, 38, 59, 62, 69-70.

Substantial additional work will be performed by Class Counsel as part of its ongoing responsibility to oversee the administration of the Settlement. That time will diminish the multiplier, and properly considered, should be included in the lodestar calculation. *See*, *Etter v. Thetford Corp*. at *4 ("Awarding the lodestar multiplier to Class Counsel appropriately reflects their continuing role in this class

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reply briefs or attendance at the upcoming Fairness Hearing.

[9] The Final Order and Judgment in the UDC Action was entered on August 25, 2014. *Birka-White Decl.*, ¶ 8. Since that time, BWLO has expended 218.7 hours ($112,492.50) overseeing the UDC Settlement Fund. *Id.* at ¶ 19. BWLO estimates that at least 50% of this amount will be spent on Mergens administration. *Id.* at ¶ 36.

action."). As fiduciaries of the Class, BWLO will have to represent the interests of Class members in the years to come without any additional compensation.

Moreover, Class Counsel's request for a multiplier of 1.48 or 1.71 is well within the range of reasonableness for similarly complex class actions. *Chambers v. Whirlpool Corp*., 214 F. Supp. 3d 877, 901–02 (C.D. Cal. 2016), judgment entered, No. SACV111733FMOMLGX, 2016 WL 5921765 (C.D. Cal. Oct. 11, 2016), and appeal dismissed sub nom. *Steve Chambers, et al.* v. *Whirlpool Corporation, et al*. (Nov. 10, 2016) (approving a 1.68 multiplier based solely on the lodestar method); *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d at 1170 ("Where appropriate, multipliers may range from 1.2 to 4 or even higher."); *In re: Cathode Ray Tube Antitrust Litig.*, 2016 WL 4126533, *10 (N.D. Cal. 2016) (multiplier of 1.96); *In re High–Tech Emp. Antritrust Litig*., 2015 WL 5158730, *10 (N.D. Cal. 2015) (multiplier of 2.2). See also, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052 (9th Cir. 2002) (tallying multipliers in dozens of class action suits); *Noll v. eBay, Inc*., 309 F.R.D. 593, 610 (N.D. Cal. 2015) (1.6 multiplier); *Willner v. Manpower Inc*., No. 11-CV-02846-JST, 2015 WL 3863625, at *7 (N.D. Cal. June 22, 2015) (2.1 multiplier); *In re Netflix Privacy Litig*., No. 5:11-CV-00379 EJD, 2013 WL 1120801, at *10 (N.D. Cal. Mar. 18, 2013) (1.66 multiplier).

a. Class Counsel's Experience and Skill Favor Approval.

Through their skill, reputation, and demonstrated high-level work in this action, Class Counsel were able to obtain a favorable settlement in the Mergens Action while also extending benefits to UDC class members. Due to their efforts, an outstanding result was obtained under challenging and unique circumstances.

b. Class Counsel Achieved Extraordinary Results for the Class.

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 Mergens Class. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (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 omitted). The Settlement provides complete relief for the benefit of persons who incurred out-of-pocket installation expenses or sustained property damage as a result of a Flushmate System. It is hard to imagine a better result could have been achieved at trial. Importantly, the Settlement promotes safety by creating an incentive for owners of Flushmate Systems - which pose a safety risk - to install a Repair Kit, replacement pressure vessel, or replacement toilet. To date, no objection has been filed or raised to the substantive Settlement terms, the fee request or the incentive award. Further, no comments have been received to date concerning the modifications to the UDC Settlement and Plan of Allocation.

c. The Difficulty and Complexity of the Action Support the Requested Fee Award.

The complexity of this case and numerous challenges to obtain what is essentially an uncapped settlement fund on behalf of the Class supports the requested fee award. The use of *cy pres* funds to pay claims in the Mergens Action presented novel and complex issues that required substantial efforts by Class Counsel to design creative and appropriate solutions to achieve the Settlement.

d. Class Counsel Assumed Contingency Risk.

"The purpose of granting plaintiffs' attorneys a multiplier in a class action settlement is to reflect the risk that they assume in bringing a lawsuit." *Etter v. Thetford Corp.*, 2017 WL 1433312 at *4. See also, *Vizcaino v. Microsoft Corp.*, 290 F.3d at 1048 (affirming that "[r]isk is a relevant circumstance" in determining an award of attorneys' fees). Prosecution of this class action involved significant financial risk for Class Counsel, who undertook the matter solely on a contingent basis, with no guarantee of recovery. *Birka-White Decl.*, ¶ 68. Having already incurred $111,767.00 in unpaid fees overseeing the administration of the UDC

Settlement Fund, BWLO was now embarking on further litigation and risk in the Mergens Action. *Id.* at ¶ 19. Class Counsel have performed a great deal of complex work and incurred expenses on behalf of the Class. *Id.* at ¶¶ 55-56, 59, 62. This delay in payment, and risk assumed, also justifies the requested fee.

e. <u>There is No Evidence of Collusion Among the Parties</u>

The Settlement is not conditioned upon judicial approval of the agreed-upon fees. The Settlement provides: "In the event the court approves the settlement, but declines to award Class Counsel's fees and expenses in the amount requested by Class Counsel, the settlement will nevertheless be binding on the parties." *Settlement*, Section VII. The court in *Staton* properly took exception to the parties "conditioning the settlement on a set amount of attorney fees…" *Staton v. Boeing Co.*, 327 F.3d at 971. Under those circumstances, the district court was inhibited from "engaging in independent determinations of reasonable fees, as required by law." *Id.*

In the instant case, the parties made certain that the approval of a $600,000 attorney fee award was not a condition of the underlying Settlement. In this way, the parties further protected the Class and the Court from any concerns of collusion between Class Counsel and Defense Counsel. In other words, if the Court were not to approve the requested $600,000 fee, the Settlement goes forward. In that event, the fee request by Class Counsel would be fully litigated and adjudicated independent of Sloan's agreement to pay up to $600,000 in fees. Indeed, were that to happen, it is the view of Class Counsel that reasonable and principled arguments could be made for a fee in excess of $600,000, as was argued at mediation. As a practical matter, it must be acknowledged that one of the reasons to negotiate the attorneys' fees as part of an overall class action settlement is to avoid further litigation and compromise the issues associated with the potential range of fees that could be reasonably awarded by the Court.

2. The Requested Fee Award is Reasonable When Calculated as a Percentage of the Constructive Common Fund.

Alternatively, were this Settlement to be considered as a constructive common or putative fund, the Court can cross check the reasonableness of the fee request by evaluating the likely total benefit to be conferred to the Class. In this case, where the Settlement did not create a common fund, and the Defendant has agreed to pay the attorney fees separately, the Court, in its discretion, may analyze the value of the case as a "constructive common fund for fee setting purposes." *See Bluetooth*, 654 F. 3d at 940-41. To calculate appropriate attorneys fees under the construction common fund method, the court should look to, among other things, the maximum settlement amount that could be claimed.

In the Mergens Action, Sloan has agreed to pay all valid non-Property and Property Damage claims submitted during the Claims Period with no cap or fixed ceiling. This feature is an important distinction from settlements with a fixed ceiling in that it exposes Sloan to the potential of real increased risk while simultaneously providing substantial additional benefits to the Class.

While the Settlement is more appropriately described as a claims made settlement, to facilitate a constructive common fund "cross-check" analysis, the potential value of the Settlement must be considered. There are 453,000 Flushmate Systems that are included in the Settlement. *Rodio Decl*., ¶ 12. If 100% of the owners made claims, albeit extremely unlikely, the number of claims would be 453,000 units x 75% = 339,750 units; namely the approximate number of locations with one Flushmate Toilet versus locations with more than one Flushmate Toilet. *See*, *Rodio Decl.*, ¶ 11.

Were claims to be made as to the 339,750 units, Sloan's exposure would be $43,318,125 (339,750 x $127.50). The remaining 113,250 units are "second" Flushmate Toilets at the same location and would be entitled to $30.00 per unit or $3,397,500. Therefore, the total theoretical value of the Mergens constructive

common fund is $46,715,625. The requested fee of $600,000, considered in that context, represents 0.01284% of the potential exposure. The benchmark common fund percentage is 25%.

Yet another more realistic way to access the value of the constructive common fund is to look to the declaration of Arnold Rodio, President of CLASS, the court-appointed Claims Administrator for both the UDC and Mergens Actions. Mr. Rodio opines that given the anticipated claims rate of 2.4%, the non-Property Damage and Property Damage claims will be approximately $1.7 million. *Birka-White Decl.*, ¶ 71; *Rodio Decl.*, ¶ 12. 50% of the cost of the $1,000,000 Notice Plan is $500,000 plus 50% of the projected $1,000,000 in additional administration costs to oversee both settlements is $500,000. *Birka-White Decl.*, ¶ 72; *Rodio Decl.*, ¶¶ 7, 15. Under this constructive common fund analysis, the minimum value of the Settlement is $2,700,000.

Anticipated cost of 2.4% Claims Rate	$1,700,000.00
Notice Costs	$500,000.00
Administration Costs	$500,000.00
Total	**$2,700,000.00**

The cost of notice and administration are an integral part of the benefits to the Class. *Staton v. Boeing Co.*, 327 F.3d at 975 ("The post-settlement cost of providing notice to the class can reasonably be considered a benefit to the class.") The notice educates the class, while administration inplements the settlement. The cross-check value of the constructive common fund is 22% ($2,700,000 ÷$600,000 = 22%) which is well within the commonly accepted benchmark of 25%. *In re Online DVD–Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015). Furthermore, the Settlement has, as a significant component, the nonmonetary value of reducing the safety risk, upon which no realistic value can be placed, but is an

essential part of the analysis of the reasonable value of the attorney fee request.

In summary, the lodestar analysis when cross-checked with the constructive common fund analysis provides the same result. The high quality of legal work and safety benefits conferred upon the Class demonstrates that the requested fee of $600,000, paid separate from the class benefits, is more than reasonable.

B. Class Counsel's Expenses Were Reasonable and Necessary.

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 (1970)).

As documented with this Court, Class Counsel have incurred **$9.601.05** in unreimbursed, out-of-pocket expenses. *Birka-White Decl.*, ¶¶ 55-56, 62. This includes costs advanced in connection with investigating the claims, engaging a mediator, travel, legal research, photocopying, obtaining transcripts, telephone service, postage, and other customary litigation expenses. *Id.* at ¶ 55. These costs were both reasonable and necessary, and should be reimbursed in full. *Id.* at ¶ 56.

C. Payment of an Incentive Award to the Class Representative is Appropriate.

In addition, the Ninth Circuit has recognized that "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 at 977 (9th Cir. 2003); *Rodriguez v. West Pub'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (noting that 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 award of $5,000 sought for Plaintiff is reasonable and justified. *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.) At the preliminary approval hearing, the Court stated, "These are involved cases. There are certain obligations that the named plaintiffs have, and we want to, I think, in terms of just general policy, incentivize persons to become named plaintiffs with compensation that makes some sense." *Transcript of Proceedings - April 10, 2017*, 15:12-19. In addition to lending her name to this case, and subjecting herself to public attention and scrutiny, the Class Representative actively participated in the litigation, reviewing the complaint, settlement documents, and consulting with Class Counsel on a regular basis. *Birka-White Decl.*, ¶¶ 79-81. It is hard to imagine a better result could have been achieved on behalf of the Class had it proceeded to trial, a result which would not have been possible without Plaintiff's participation.

In light of the Class Representative's willingness to step forward on behalf of the Class and oversee the process and the actions of Class Counsel, Class Counsel respectfully submits that the Court should grant the requested Incentive Award.

IV. CONCLUSION

For the foregoing reasons, Class Counsel respectfully ask the Court to issue an Order awarding attorneys' fees in the amount of $600,000, reimbursement of expenses in the amount of $9,601.05 and a service award in the amount of $5,000 for the Class representative.

Dated: June 30, 2017

Respectfully submitted,

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