UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CASE NO.: **CV 16-05255 SJO (SKx)** **DATE:** **September 18, 2017**

TITLE: **Mergens et al. v. Sloan Valve Company**

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz Courtroom Clerk	Not Present Court Reporter
COUNSEL PRESENT FOR PLAINTIFF:	**COUNSEL PRESENT FOR DEFENDANT:**
Not Present	Not Present

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PROCEEDINGS (in chambers): ORDER GRANTING MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT [Docket No. 47]**; ORDER GRANTING MOTION FOR ATTORNEYS'S FEES AND COSTS, AND INCENTIVE AWARD TO CLASS REPRESENTATIVE** [Docket No. 48]

This matter is before the Court on: (1) Plaintiff Kelly Mergens' ("Plaintiff" or "Mergens") Motion for Final Approval of Class Action Settlement ("Approval Motion"), filed June 30, 2017; and (2) Plaintiff's Motion for Attorney's Fees and Costs, and Incentive Award to Class Representative ("Fees Motion"), filed June 30, 2017. Defendant Sloan Valve Company ("Sloan" or "Defendant") has not opposed either the Approval Motion or the Fees Motion. Plaintiff supplemented the Approval Motion and Fees Motion by filing a Reply (the "Reply") on September 1, 2017. The Court heard oral argument from counsel on September 18, 2017. For the following reasons, the Court **GRANTS** Plaintiff's Approval Motion and **GRANTS** Plaintiff's Fees Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case centers on allegations that Defendant Sloan Valve Company ("Sloan" or "Defendant") violated California's unfair competition laws, the Song-Beverly Consumer Warranty Act, and the Magnuson-Moss Warranty Act. (*See generally* Compl., ECF No. 1.) This action is related to an earlier-filed consumer class action, *United Desert Charities et al. v. Flushmate et al.* ("*UDC*"), No. CV12-06878 SJO (SHx) (C.D. Cal. 2014).

A. Factual History

Plaintiff alleges the following in her Complaint, filed July 15, 2016. Defendant manufactures the Flushmate System, a high-pressure flushing system that operates by storing water under pressure in a plastic vessel made of two halves welded together and located in the toilet's water-storage tank. (Compl. ¶ 21.) When flushed, compressed air removes waste by pushing water out of the vessel and into the toilet. (Compl. ¶ 21.) Defendant hired public relations and marketing professionals to convince participants in the distribution chain—including toilet manufacturers, distributors, plumbing supply vendors, contractors, plumbers, and more ("Distributors")—that the

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Flushmate System is a reliable means of water conservation "free of defects in material and workmanship." (Compl. ¶¶ 47-59.) Based on these representations, Distributors sold toilets equipped with the Flushmate System ("units") to consumers at a higher price than traditional toilets. (Compl. ¶ 22.) Plaintiff and similarly situated individuals relied on these representations when buying such units. (Compl. ¶¶ 63-65.)

Each unit came with a lifetime warranty promising that the Flushmate System is "free of defects in material and workmanship." (Compl., Ex. B ("Express Warranty") at 2.) Defendant warranted to replace any unit found to be defective upon inspection within five (5) years from the date of installation. (Express Warranty at 2.) Defendant further promised to replace any replacement component found to be defective upon inspection and within ten (10) years from the date of installation. (Express Warranty at 3.) "All labor and transportation costs or charges incidental to warranty service are to be borne by the purchaser-user." (Express Warranty at 2-3.) Any implied warranty, including implied warranties of merchantability or fitness, are limited to a period of either five or ten years from the date of installation, depending upon the warrant received. (Express Warranty at 2-3.) This warranty can be found inside the toilet tank, on the Flushmate website, and in the owner's manual. (Compl. ¶ 40.)

Despite Defendant's assertions, "[p]ressure in the vessel exerts forces on the seam weld greater than the weld can withstand, leading to weld separations and a sudden release of pressure . . . [that] can lift the lid off the toilet's water storage tank and shatter the tank . . . result[ing] in serious property damage and personal injury." (Compl. ¶ 23.) Accordingly, on June 21, 2012, the Consumer Product Safety Commission ("CPSC") issued a recall affecting approximately 2.3 million units manufactured between October 14, 1997 and February 28, 2008 ("2012 Recall"). (Compl. ¶ 2.) The CPSC then expanded that recall to include an additional 351,000 units manufactured between March 1, 2008 and June 30, 2009 ("2014 Recall"). (Compl. ¶ 2.) On August 25, 2014, this Court entered a Final Judgment and Order in *UDC* ("UDC Final Judgment"), a consolidated class action related to the 2012 and 2014 Recalls, wherein the Court approved a settlement that created a common fund of $18 million to benefit consumers of the units at issue. (Compl. ¶ 3.)[1] On July 14, 2016, the CPSC again expanded the Flushmate System product recall to include approximately 453,000 units manufactured between July 1, 2009 and April 30, 2011 ("2016 Recall"). (Compl. ¶ 4.) It is these units that are at issue in the instant action.

In response to the aforementioned recalls, Defendant advised consumers to turn off the water supply to the toilet and cease use immediately until a "Repair Kit" could be installed. (Compl. ¶ 32.) The Repair Kit consists of (1) a "U-shaped metal strap ("U-Band")" that should be placed around the pressure vessel to restrain the two halves of the pressure vessel when it fails and (2) an external regulator that reduces the water pressure from the water supply line to the pressure vessel. (Compl. ¶¶ 33-34.) Although installation is difficult and usually requires a skilled

[1] Final J., *UDC*, No. 2:12-cv-06878-SJO-SHx, at ¶ 9 (C.D. Cal. Aug. 25, 2014), ECF No. 147.

laborer, Defendant has "consistently refused to pay" for the Repair Kit's installation. (Compl. ¶¶ 35-36.)

After the 2016 Recall, Plaintiff filed the instant action on behalf of:

> All persons in the United States who purchased toilets containing a Series 503 Flushmate ® III Pressure-Assist Flushing System manufactured from July 1, 2009 to April 30, 2011. All persons and entities in California who own toilets containing a Series 503 Flushmate ® III Pressure-Assist Flushing System manufactured from July 1, 2009 to April 30, 2011. All persons in California who purchased toilets containing a Series 503 Flushmate ® III Pressure-Assist Flushing System manufactured from July 1, 2009 to April 30, 2011. All persons who purchased toilets in California containing a Series 503 Flushmate ® III Pressure-Assist Flushing System manufactured from July 1, 2009 to April 30, 2011 who are consumers within the meaning of the Song-Beverly Consumer Warranty Act, Cal. Civ. Code § 1791, and the Consumer Legal Remedies Act, Cal. Civ. Code § 1761.

(Compl. ¶ 71.)

Excluded from the class definition are:

> (1) all Defendants and their subsidiaries and affiliates; (2) all persons who make a timely election to be excluded from the Class; and (3) the judge(s) to whom this case is assigned and any immediate family members thereof.

(Compl. ¶ 72.)

B. Procedural History

Plaintiff commenced the instant action on July 15, 2016. (*See generally* Compl.) The parties engaged in mediation on September 14, 2016, and settlement negotiations continued until the parties were able to file an Unopposed Motion for Preliminary Approval of Class Action Settlement ("Preliminary Approval Motion") on March 1, 2017. (Preliminary Approval Mot., ECF No. 33.) The Court issued an order granting preliminary approval of the settlement, class certification, and notice plan ("Preliminary Approval Order") on April 10, 2017. (Preliminary Approval Order, ECF No. 44.) The Court directed Class members to give the Court and counsel notice of any objections by August 21, 2017. (Preliminary Approval Order 5.)

1. Terms of the Settlement Agreement

The Settlement Agreement provides for cash reimbursement to members of the "Class," which includes "any Person who owns or owned a Flushmate System or Flushmate Toilet installed in the United States." (Decl. David M. Birka-White in Supp. Preliminary Approval Mot. Ex. A ("SA") § I, ECF No. 33-1.) The Flushmate System is defined as any Series 503 Flushmate III Pressure-Assist Flushing System manufactured by Flushmate between July 1, 2009 and April 30, 2011. (SA § I.) The Flushmate Systems are identified by their serial numbers, which are easily visible upon lifting the lid of the porcelain tank on any Flushmate Toilet. (Approval Mot. 3, ECF No. 47.)

The terms of the Settlement Agreement are as follows: (1) the leftover funds remaining in the settlement fund created for the *UDC* class (the "UDC Settlement Fund"), which totals over **$6 million**, will be used to pay notice, costs of administration and payment of eligible claims stemming from this action; (2) Defendant shall deposit a **minimum of $50,000** into the fund if the UDC Settlement Fund **drops below $50,000** and "such additional reasonable and adequate funds" necessary to satisfy unpaid qualified claims and additional administrative costs; (3) the Defendant shall pay attorney's fees, costs, and an incentive award **separately** and not from the UDC Settlement Fund; and (4) any funds in excess of the payment obligations set forth in the UDC Settlement Agreement left in the UDC Settlement Fund after the expiration of the eligible claim period for this action shall **revert** back to Defendant. (Approval Mot. 3-4; SA §§ IV, VII, VIII.)

On June 30, 2017, the *UDC* parties jointly filed a Motion for Final Approval of Modifications of Settlement Agreement and Plan of Allocation. (*See* Mot. for Final Approval of Modification Ex. B ("Plan of Allocation"), *UDC* No. 2:12-cv-06878-SJO-SHx, ECF No. 167.) The Plan of Allocation defines eligible claimants as:

> Settlement Class Members who have (1) installed a Repair Kit, (2) installed a replacement pressure vessel, (3) installed a replacement toilet and/or (4) sustained direct Property Damage as a result of a Leak or Burst of a Flushmate System at any time prior to the close of the Claims Period . . . .

(Plan of Allocation § I(B)(1).) The proposed Modified Settlement Agreement ("MSA") in the *UDC* action seeks to provide a system wherein the leftover $6 million would be (1) used to make supplemental payments to Settlement Class Members and (2) distributed per the *cy pres* doctrine to the *Mergens* class action settlement members pursuant to the terms of the *Mergens* Settlement Agreement and the *Mergens* Plan of Allocation. (*See* Mot. for Final Approval of Modification Ex. A ("MSA"), *UDC* No. 2:12-cv-06878-SJO-SHx, ECF No. 167.) If any funds remain in the *UDC* settlement fund after making such distributions, the MSA proposes that the funds be distributed in the following order: (1) to *Mergens* class action settlement members who **expended their own labor to install** a Repair Kit, replacement pressure vessel, or replacement toilet; (2) if funds still remain, the Parties may agree to extend for a second time the Extended Claims Period and the

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Mergens Claim Period; and (3) if funds still remain after the extended claims periods and distribution to UDC and *Mergens* class members would be impracticable or yield a windfall, the funds will be distributed *cy pres* pursuant to the same standard articulated in the Settlement Agreement. (MSA 6.)

With respect to the *Mergens* claims process, Class Litigation Administration Support Services ("CLASS") of Lancaster, California will serve as **Claims Administrator** and Hon. William J. Cahill (Ret.) of JAMS will serve as **Special Master**. (Preliminary Approval Order 6; SA § V(A).) The Settlement Agreement obligates Settlement Class Members (1) to demonstrate **proof of ownership** of a unit or of the Property that contains or contained a unit; and (2) to timely submit a **Claim Form** in order to receive non-property damage and property damage benefits, respectively. (SA § V(B).) Claimants without property damage are entitled to a reimbursement for out-of-pocket Repair Kit installation costs of up to $127.50 for the first toilet and up to $30 for each additional toilet. (SA § V(B)(1).) Claimants with property damage are entitled to reimbursement for the reasonable and necessary documented expense to restore the Property to its pre-damage condition. (SA § V(B)(2).)

The Settlement Agreement contains a broad provision requiring Plaintiff and each Class Member to (1) "fully, finally and forever releas[e], relinquish[ ] and discharg[e] the Released Parties from and against any and all liability for the Released Claims;" (2) "covenant and agree . . . not . . . [to] commence any lawsuit . . . seek[ing] to establish liability against any Released Party . . . [due to] any of the Released Claims;" and (3) waive all rights under California Code section 1542 or any similar federal or state statute or regulation.[2] (SA § VI.) The Settlement Agreement defines Released Claims as any "known or unknown, present or future, concealed or hidden, liquidated or unliquidated, fixed or contingent, anticipated or unanticipated [claim], whether statutory, in tort, contract law, equity, or otherwise, that have been could have been or might been or might in the future be asserted by Plaintiff and the Settlement Class," as well as any damages, interest, costs and fees arising out of any of the claims asserted. (SA § I.) The term "Released Claims" does not include claims for personal injury, emotional distress, wrongful death, or property damage caused by a defective unit after the expiration of the Claims Period. (SA § I.)

The Settlement Agreement also provides for a Notice Plan, which includes: (1) **direct mail** notice to Class Members for whom Defendant can obtain a street or email address; (2) publication of "**summary notice**"; (3) dissemination of a "**long-form notice**"; (4) creation of a **settlement website**; and (5) establishment of a **toll-free number** listed in the summary notice. (SA § III(A).)

[2] California Civil Code section 1542 provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the releases, which if known by him or her must have materially affected his or her settlement with the debtor." Cal. Civ. Code § 1542.

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Both notices shall inform Class Members of (1) the date of the fairness hearing; (2) the terms of the settlement as set forth in the Settlement Agreement; (3) their rights, "including the right to opt-out, comment upon, or object to the settlement . . ."; and (4) any other "relevant information regarding the settlement." (Settlement Agreement § III(A).)

Finally, the Settlement Agreement contains provisions regarding court approval, termination of the agreement, confidentiality among the parties, and other miscellaneous items. (SA §§ IX, XI, XII, XIII.) Of these, the only provision of note is the Termination provision, which gives Defendant "the right, at [its] option, to terminate and rescind" the Settlement Agreement "[i]f Settlement Class Members who own or owned in the aggregate 7.5 percent (7.5%) or more Flushmate Systems submit timely and valid Requests for Exclusion . . ." (SA § XI.)

2. Post-Issuance Activity

Since the issuance of the Preliminary Approval Order, the following events have occurred: (1) notice was given to Class Members in accordance with the Notice Plan; (2) Plaintiff filed the Fees Motion; and (3) Plaintiff filed the Approval Motion.

With respect to the Notice Plan, direct notice of the Settlement was disseminated by mail and/or e-mail to 16,350 Class Members and to approximately 105,793 plumbing and general contractors nationwide who may have installed Flushmate Toilets. (Reply 1, ECF No. 50; Supplemental Decl. Arnold Rodio in Supp. Approval Mot. ("Suppl. Rodio Decl.") ¶ 2, ECF No. 50-4; Decl. Shannon Wheatman in Supp. Approval Mot. ("Wheatman Decl.") ¶ 13, ECF No. 47-3.) Notice was also disseminated to Class Members through more than a dozen media outlets, and through posting of the settlement notice on the interactive claims website. (Reply 1; Wheatman Decl. ¶¶ 9, 14.) No Class Members opted out of the Settlement, and no objection to any aspect of the Settlement, either formal or informal, was submitted to Counsel. (Supplemental Decl. David M. Birka-White in Supp. Approval Mot. ("Suppl. Birka-White Decl.") ¶ 2; Suppl. Rodio Decl. ¶ 3.)

Plaintiff filed the Fees and Approval Motions on June 30, 2017, requesting final approval of the settlement and $600,000 in attorneys' fees, $9,601.05 for reimbursement of expenses, and a $5,000 service award for the Class representative. (*See generally* Approval Mot.; Fees Mot., ECF No. 48.) The Court discusses each motion in turn.

II. PLAINTIFF'S MOTION FOR FINAL APPROVAL

Federal Rule of Civil Procedure 23(e) ("Rule 23(e)") provides that "[t]he claims, issues, or defenses of a . . . class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). "Approval under [Rule] 23(e) involves a two-step process in which the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is

warranted." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.,* 221 F.R.D. 523, 525 (C.D. Cal. 2004). The Ninth Circuit has held that there is a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Class Plaintiffs v. City of Seattle,* 955 F.2d 1268, 1276 (9th Cir. 1992) (citations omitted); *see also Van Bronkhorst v. Safeco Corp.,* 529 F.2d 943, 950 (9th Cir. 1976) (stating that "there is an overriding public interest in settling and quieting litigation," and this "is particularly true in class action suits") (footnote omitted). The Court must evaluate the adequacy of the Settlement Agreement in light of Rule 23(e). *See id.* "Although Rule 23(e) is silent respecting the standard by which a proposed settlement is to be evaluated, the 'universally applied standard is whether the settlement is fundamentally fair, adequate and reasonable.'" *Class Plaintiffs,* 955 F.2d at 1276 (quoting *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983)).

After preliminary approval is granted and notice is given to putative class members, the Court will determine whether or not final approval is warranted at a fairness hearing. *Alberto v. GMRI, Inc.,* 252 F.R.D. 652, 659 (E.D. Cal. 2008). "At the fairness hearing . . . the court will entertain any [] objections to (1) the treatment of this litigation as a class action and/or (2) the terms of the settlement." *Id* (citations and quotations omitted). Overall, "[t]he initial decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge." *Officers for Justice*, 688 F.2d at 625.

A. Certification of the Class

"In order to approve a class action settlement, a district court must first make a finding that a class can be certified." *Vasquez v. Coast Valley Roofing, Inc.,* 266 F.R.D. 482, 485-86 (E.D. Cal. 2010) (citing *Molski v. Gleich*, 318 F.3d 937, 943, 946-50 (9th Cir. 2003), *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.,* 603 F.3d 571, 617 (9th Cir. 2010)). Pursuant to Rule 23, "approval of the class is appropriate where the plaintiff establishes the four prerequisites of [Rule] 23(a) – (1) numerosity, (2) commonality, (3) typicality, (4) adequacy of representation – as well as one of the three requirements of Rule 23(b)." *Id*. at 486 (citing *Horton v. USAA Cas. Ins. Co.*, 266 F.R.D. 360, 365 (D. Ariz. 2009)).

Here, the proposed class is comprised of "any Person who owns or owned a Flushmate System or Flushmate Toilet installed in the United States." (SA § I.) Excluded from the class are:

(1) Defendant, any entity which has a controlling interest in Defendant's legal representatives, assigns, and successors, any entity in which the Defendant has a controlling interest, and any retailers or wholesalers of the Flushmate System or Flushmate Toilets;
(2) the judge to whom this case is assigned and any immediate family members;

(3) all those who have **obtained a judgment** against the **Defendant with regards to the Released Claims on or before the date of preliminary approval**;
(4) all those who **received prior** to preliminary approval a **cash reimbursement** from Flushmate for property damage or for installation of a Repair Kit, replacement vessel, or replacement toilet;
(5) all those who **incurred damage** from a leak or burst of a Flushmate System that occurred **before July 15, 2012**, but who **did not bring a related civil action** on or before July 15, 2016;
(6) all those whose property **previously, but no longer, contains** a Flushmate System or Flushmate Toilet, and who **never experience** a leak or burst, **except** those who **replaced** their Flushmate System or Toilet in response to the Expanded Recall; and
(7) all those who **formerly owned property** containing a Flushmate System who **did not experience** a leak or burst during ownership and all **retailers and wholesalers** of the Flushmate System.

(SA § I.)

1. Numerosity

A proposed class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Courts have routinely found the numerosity requirement satisfied when the class comprises 40 or more members." *Vasquez*, 266 F.R.D. at 486 (citing *Ansari v. New York Univ.*, 179 F.R.D. 112, 114 (S.D.N.Y.1998)).

Plaintiffs must also establish impracticability of joinder. A court should consider "not only the class size but other factors as well, including the geographic diversity of class members, the ability of individual members to institute separate suits, and the nature of the underlying action and the relief sought." *Nat'l Ass'n of Radiation Survivors v. Walters*, 111 F.R.D. 595, 599 (N.D. Cal. 1986). The limited size of any individual plaintiff's recovery is also relevant. *See Edmondson v. Simon*, 86 F.R.D. 375, 379 (N.D. Ill. 1980).

Here, where the potential recovery by any individual plaintiff is presumably relatively small, as evidenced by the proposed $127.50 recovery per Settlement Class Member, the Court finds that individual members of the class would be likely be unwilling or unable to institute separate lawsuits. (Birka-White Decl. ¶ 20.) Moreover, the filing of individual suits by thousands of separate plaintiffs would create an enormous burden on judicial resources. In sum, the Court finds the numerosity requirement of Rule 23(a)(1) easily satisfied.

2. Commonality

Rule 23(a) also demands "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). To satisfy the commonality requirement, plaintiffs' "claims must depend upon a common contention . . . [whose] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541 (2011). "This does not, however, mean that every question of law or fact must be common to the class; all that Rule 23(a)(2) requires is a single significant question of law or fact." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013), *cert. denied*, — U.S. —, 135 S. Ct. 53 (2014) (emphasis and internal quotation marks omitted). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).

Here, several disputed issues are common to Plaintiff and the proposed Settlement Class, including whether the Flushmate System is subject to failure, whether the Flushmate System creates an unreasonable safety risk, and whether Flushmate knew or should have known that the Flushmate System was allegedly defective. Moreover, the Settlement does not preclude Class Members from bringing separate claims for personal injury, emotional distress, or wrongful death, which are by nature more fact-specific inquiries. The Court finds that the requirements of Rule 23(a)(2) have been satisfied.

3. Typicality

Typicality requires a showing that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The purpose of this requirement "is to assure that the interest of the named representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (internal quotation marks omitted). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Id.* (internal quotation marks omitted) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)).

Here, Plaintiff's claims are based on the same legal and remedial theories as those of the proposed Settlement Class Members. The claims of Plaintiff and of any proposed Settlement Class Member arise from the same course of events; namely, Defendant's allegedly defective product. The Court therefore finds the typicality requirement of Rule 23(a)(3) satisfied.

4. Adequacy

Rule 23(a)(4) permits certification of a class action if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Ninth Circuit applies a two-prong test to determine whether representation meets this standard: "(1) do the named

plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (quoting *Hanlon*, 150 F.3d at 1020).

Here, Plaintiff has no known interests antagonistic to the interests of other putative class members. Moreover, to the extent the $5,000 incentive award to Plaintiff can be viewed as creating disparate interests in the outcome of the litigation, not every conflict of interest between a class representative and class members prevents satisfaction of the adequacy prong; instead, only a fundamental conflict that goes to the heart of the litigation prevents certification, and speculative conflicts must be regarded at the certification stage. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997); 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 3.26, at 3-143 (3d ed. 1992).

The Court also finds that Plaintiff vigorously pursued this action on behalf of putative class members through her participation in mediation over the course of several weeks and her representation by experienced class-action attorneys. (*See* Birka-White Decl. ¶¶ 22-25.) Therefore, the Court finds Plaintiff to be an adequate representative of the proposed Settlement Class.

5. Certification under Rule 23(b)(3)

"In addition to fulfilling the four prongs of Rule 23(a), the proposed class must also meet at least one of the three requirements listed in Rule 23(b)." *Spann v. J.C. Penney Corp.*, 307 F.R.D. 514 (C.D. Cal. 2015) (citing *Dukes*, 564 U.S. at 345-46). Here, Plaintiffs seek conditional class certification under Rule 23(b)(3), (*see* Mot. 22-25), which requires the court to find "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

"A court evaluating predominance and superiority must consider: (1) 'the class members' interests in individually controlling the prosecution or defense of separate actions;' (2) 'the extent and nature of any litigation concerning the controversy already begun by or against class members;' (3) 'the desirability or undesirability of concentrating the litigation of the claims in the particular forum;' and (4) 'the likely difficulties in managing a class action.'" *Spann*, 307 F.R.D. at 519 (quoting Fed. R. Civ. P. 23(b)(3)).

a. Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods.*, 521 U.S. at 623. "Though there is substantial overlap between [the Rule 23(a)(2) commonality test and the Rule 23(b)(3)

predominance test], the Rule 23(b)(3) test is far more demanding[.]" *Wolin*, 617 F.3d at 1172 (internal quotation marks omitted). The "focus is on the relationship between the common and individual issues." *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 957 (9th Cir. 2009) (internal quotation marks omitted). "[I]f the main issues in a case require the separate adjudication of each class member's individual claim or defense, a Rule 23(b)(3) action would be inappropriate." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001) (internal quotation marks omitted).

In her Complaint, Plaintiff asserts the following causes of action: (1) violation of the Unfair Competition Laws ("UCL"), California Business & Professions Code sections 17200 *et seq.*; (2) breach of express warranty; (3) breach of express warranty pursuant to the Song-Beverly Consumer Warranty Act ("SBCWA"); (4) breach of express warranty pursuant to the Magnuson-Moss Warranty Act ("MMWA"); (5) breach of implied warranty pursuant to the SBCWA; and (6) breach of implied warranty pursuant to the MMWA. (*See* Compl. ¶¶ 82-135.) The Court must address the elements of each asserted cause of action. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011) ("Considering whether questions of law or fact common to class members predominate begins . . . with the elements of the underlying cause of action.") (internal quotation marks omitted). These are largely the same causes of action asserted in *UDC*, in which the Court found common issues to predominate over individual issues with respect to each cause of action. The Court reaches the same conclusion here.

b. Superiority

"[T]he purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy. Where recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification." *Wolin*, 617 F.3d at 1175–76 (citation and internal quotation marks omitted). In cases in which plaintiffs seek to recover relatively small sums and the disparity between litigation costs and the recovery sought may render plaintiffs unable to proceed individually, "[c]lass actions may permit the plaintiffs to pool claims which would be uneconomical to bring individually." *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir.), *cert. denied*, 534 U.S. 973, 122 S. Ct. 395 (2001) (further finding that "[i]f plaintiffs cannot proceed as a class, some—perhaps most—will be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to recover") (internal quotation marks and alteration omitted).

Here, each putative class member's claim for damages is for a relatively small amount of money: $127.50 for the first Flushmate Toilet or System owned at a property address and $30.00 for each subsequent Flushmate Toilet or System owned at the same property address. (*See* SA, Ex. B ("Plan of Allocation") § I(B)(1).) Because of this small sum, litigation costs render individual prosecution of such claims prohibitive. *Spann*, 307 F.R.D. at 532 (citing *Ortega*, 300 F.R.D. at

430; *Chavez*, 268 F.R.D. at 379 ("[T]he court determines that the class action is superior to maintaining individual claims for a small amount of damages[.]")).

Finally, any Settlement Class Member who wished to control his or her own litigation had the opportunity to decide not to opt into the class. *See* Fed. R. Civ. P. 23(c)(2)(b)(v). Accordingly, the Court finds that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

6. Conclusion

For the foregoing reasons, the Court finds that certification of the Settlement Class as defined in the Settlement Agreement is appropriate under Rule 23(b)(3).

B. Fairness, Adequacy, and Reasonableness of the Settlement Agreement

"Having determined that class treatment appears to be warranted, the court must now address whether the terms of the parties' settlement appear fair, adequate, and reasonable." *Alberto,* 252 F.R.D. at 664; *see also Class Plaintiffs,* 955 F.2d at 1276. The Ninth Circuit considers, to the extent applicable, the following eight (8) factors in determining whether a proposed class action settlement is fair, reasonable, and adequate:

(1) the strength of the plaintiff's case;
(2) the risk, expense, complexity, and likely duration of further litigation;
(3) the risk of maintaining class action status throughout the trial;
(4) the amount offered in settlement;
(5) the extent of discovery completed and the stage of the proceedings;
(6) the experience and view of counsel;
(7) the presence of a governmental participant;
(8) the reaction of the class members to the proposed settlement.

See Linney v. Cellular Alaska P'ship, 151 F.3d 1234, 1242 (9th Circ. 1998). Not all of these factors will apply to every class action settlement; however, "[u]nder certain circumstances, one factor alone may prove determinative in finding sufficient grounds for court approval." *DIRECTV*, 221 F.R.D. at 525-26 (citing *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993)). "Furthermore, '[d]istrict courts have wide discretion in assessing the weight and applicability of each factor.'" *Id*. (quoting 5 *Moore's Federal Practice*, § 23.85[2][a] (Matthew Bender 3d ed.)). "The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice*, 688 F.2d at 625. "The initial decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge." *Id.*

The Court addresses the relevant fairness factors in turn and concludes that the proposed settlement is sufficient to warrant final approval.

1. Strength, Risk, Expense, and Complexity of the Action

"An important consideration in judging the reasonableness of a settlement is the strength of the plaintiffs' case on the merits balanced against the amount offered in the settlement." *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 488 (E.D. Cal. 2010) (quoting *Nat'l Rural Telecom. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004). At the same time, settlement approval "is not to be turned into a trial or rehearsal for trial on the merits," for "it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Office for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

Where the plaintiffs' claims are somewhat tenuous or establishing liability would be difficult, this first factor favors settlement due to the "uncertainties associated with continued litigation." *DIRECTV*, 221 F.R.D. at 526; *see, e.g., In re Toys R Us-Delaware, Inc. FACTA Litig.* , 295 F.R.D. 438, 450 (C.D. Cal. 2014); *In re Portal Software, Inc. Sec. Litig.*, No. CV 03-05138 VRW, 2007 WL 4171201, at *3 (N.D. Cal. Nov. 26, 2007). In addition, "[t]he expense and possible duration of the litigation are major factors to be considered in evaluating the reasonableness of this settlement." *Milstein v. Huck*, 600 F. Supp. 254, 367 (E.D.N.Y. 1984) (citation omitted). Finally, the court must consider whether there is a risk that the class will be decertified. *See In re Toys R Us*, 295 F.R.D. at 452; *McKenzie v. Federal Exp. Corp.*, No. CV 10-02420 GAF, 2012 WL 2930201, at *4 (C.D. Cal. July 2, 2012) ("[S]ettlement avoids all possible risk [of decertification]. This factor therefore weighs in favor of final approval of the settlement.").

Plaintiff argues that there are "formidable class-wide risks" with regard to resolution of the action. (Approval Mot. 13.) First, nationwide class certification under California law or the laws of multiple states is rare and adds a layer of complexity to the action. *See Mazza v. American Honda Motor Co.*, 666 F.3d 581, 590-594 (9th Cir. 2012). Second, Plaintiff faces substantial challenges in establishing various elements of a claim for fraud, including reliance by the Class Members on Defendant's representations or omissions and actual knowledge by Defendant of the defect. (Approval Mot. 12.) Finally, Defendant had a number of viable defenses to the express warranty claims based on the interpretation of various clauses in the warranty and whether or not Class Members individually fulfilled the warranty's conditions precedent. (Approval Mot. 12.) The Court agrees that these factors add considerable risk and expense to the action and weigh in favor of settlement.

2. Amount Offered in Settlement

"In assessing the consideration obtained by the class members in a class action settlement, '[i]t is the complete package taken as a whole, rather than the individual component parts, that must be examined for overall fairness.'" *DIRECTV*, 221 F.R.D. at 527 (citing *Officers for Justice*, 688 F.2d at 628). To determine the qualified reimbursement amount of $127.50 for the first toilet and $30.00 for each additional toilet, the Claims Administrator used "his extensive plumbing expertise and familiarity with plumbing labor rates" to assess a fair and reasonable upper bound for plumber's fees for Repair Kit installation. (Approval Mot. 6; Decl. of Arnold Rodio in Supp. of Prelim. Approval Mot. ("Rodio Decl.") ¶¶ 9-10, ECF No. 33-2.) In addition, any Class Member with property damage as a result of a defective toilet will be reimbursed for reasonable and necessary repairs. The Settlement thus not only makes Class Members affected by the Expanded Recall whole, it "promotes safety by creating an incentive for owners to repair or replace toilets containing the recalled Flushmate Systems and payment in full of their reasonable unreimbursed out-of-pocket installation expenses to do so." (Approval Mot. 13.) The Court therefore finds that this factor weighs in favor of approval.

3. Extent of Discovery Completed and Stage of the Proceedings

"A court is more likely to approve a settlement if most of the discovery is completed because it suggests that the parties arrived at a compromise based on a full understanding of the legal and factual issues surrounding the case." *DIRECTV*, 221 F.R.D. at 528 (internal quotation marks and citation omitted). "A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair." *Id.* (citation omitted). Additionally, where the parties reach a settlement after conferring with a mediator, this "support[s] the conclusion that the settlement process was not collusive." *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA, 2012 U.S. Dist. LEXIS 166704, at *15 (citing *Satchell*, 2007 WL 1114010, at *4).

This factor supports final approval. While this action may technically be in its early stages, Plaintiffs benefit from the extensive and substantially related discovery conducted during the UDC action. In addition, the Settlement was reached over six months of investigation, arms' length negotiations and mediation proceedings.

4. Experience and Views of Counsel

"Significant weight should be attributed to the belief of experienced counsel that the settlement is in the best interest of the Class." *See, e.g., DIRECTV*, 221 F.R.D. at 528 ("Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation."). Plaintiff is represented by counsel whose practice has focused on product failure and consumer class actions for nearly thirty (30) years, and has served as lead

counsel in a substantial number of complex cases involving defective products. (Birka-White Decl. ¶¶ 3, 9, 24, 48-49, 54.) This factor weighs in favor of final approval.

5. Reaction of Class Members to Proposed Settlement

"In order to gauge the reaction of other class members, it is appropriate to evaluate the number of requests for exclusion, as well as the objections submitted." *In re Toys R Us,* 295 F.R.D. at 455-56 (citations omitted). "The absence of a single objection" to a proposed settlement weighs in favor of granting final approval because "[i]t 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 to the class members." *DIRECTV*, 221 F.R.D. at 529 (collecting cases); *see also Ontiveros,* 303 F.R.D. at 371-72 (citation omitted).

Direct notice of the Settlement was disseminated by postcard to approximately 231,253 potential Class Members, including 203,041 UDC Settlement Class Members and 16,350 Mergens Settlement Class Members. (Wheatman Decl. ¶ 13.) Notice was also sent to approximately 105,793 plumbing and general contractors nationwide who may have installed Flushmate Toilets. (Suppl. Rodio Decl. ¶ 2.) Each postcard had in bold print the settlement website address, which provided a detailed description of the Settlement Agreement and the process for filing a claim. (Wheatman Decl. ¶ 14.) Notice was also disseminated to Class Members through more than a dozen media outlets. (Reply 1; Wheatman Decl. ¶¶ 9, 15-29.) No Class Members opted out of the Settlement, and no objection to any aspect of the Settlement, either formal or informal, was submitted. (Suppl. Birka-White Decl. ¶ 2; Suppl. Rodio Decl. ¶ 3.) This factor weighs in favor of approval.

6. Conclusion

As all of the relevant factors weigh in favor of approval, the Court finds that the proposed settlement is fair, reasonable, and adequate.

II. PLAINTIFF'S MOTION FOR FEES

In the Fees Motion, Plaintiff requests $600,000.00 in attorneys' fees, $9,601.50 in costs, and a service award of $5,000 for the named Plaintiff. (Fees Mot. 16.) These fees are to be paid separately by Defendant and will not be deducted from the UDC Settlement Fund. (Fees Mot. 4; SA § VII.) Plaintiff uses a Lodestar Analysis to calculate the appropriate fees, with a crosscheck analysis according to the principles applicable to common funds. (Fees Mot. 7.)

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A. Legal Standard

Rule 23(h) provides that "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). "While attorneys' fees and costs may be awarded in a certified class action where so authorized by law or the parties' agreement . . ., courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011) (citations omitted).

"In order for a settlement to be fair and adequate, 'a district court must carefully assess the reasonableness of a fee amount spelled out in a class action settlement agreement.'" *Alberto*, 252 F.R.D. at 667 (quoting *Staton v. Boeing Co.*, 327 at 963 (9th Cir. 2003)). The Court has discretion to award attorneys' fees using either the lodestar or percentage-of-the-fund method. *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *see also Garcia v. Gordon Trucking, Inc.*, No. CV 10-00324 AWI, 2012 WL 5364575, at *8 (E.D. Cal. Oct. 31, 2012) ("The choice between lodestar and percentage calculation depends on the circumstances.") (citation omitted). The lodestar method takes into account counsel's reasonable hours and counsel's reasonable hourly rate and, if necessary, a multiplier thought to compensate for various factors. *See Franco*, 2012 WL 5941801, at *18 (citation omitted). A percentage analysis involves an award of a percentage of the class recovery. *State of Fla. v. Dunne*, 915 F.2d 542, 544-45 (9th Cir. 1990); *Powers v. Eichen,* 229 F.3d 1249, 1256 (9th Cir. 2000) (citations omitted) (establishing 25 percent of the recovery as the "benchmark"); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377 (N.D. Cal. 1989) ("[N]early all common fund awards range around 30%.")

In using either method, "[r]easonableness is the goal, and mechanical or formulaic application of either method, where it yields an unreasonable result, can be an abuse of discretion." *Garcia v. Gordon Trucking, Inc.*, No. CV 10-00324 AWI, 2012 WL 5364575, at *7 (E.D. Cal. Oct. 31, 2012) (citation omitted). "Because there is a strong presumption that the lodestar amount represents a reasonable fee, adjustments to the lodestar are the exception rather than the rule." *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 738 (9th Cir. 2016). That presumption, however, "may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may be properly considered in determining a reasonable fee." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 554 (2010). The factors that the court may consider (the "Kerr factors") include: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skills necessary to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *See Kerr v. Screen Extras Guild,*

Inc., 526 F.2d 67, 70 (9th Cir. 1975); *Chambers v. Whirlpool Corp.*, 214 F. Supp. 3d 877, 901 (C.D. Cal. 2016).

Plaintiffs are also entitled to recover reasonable litigation expenses as part of their overall award. *See* Fed. R. Civ. Proc. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."). Courts have discretion to reimburse for expenses such as travel, photocopying, computer legal research, postage, and consulting and expert witness fees. *See Rutti v. Lojack Corp., Inc.*, No. CV 06-00350 DOC, 2012 WL 3151077, at *12 (C.D. Cal. July 31, 2012); *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366–67 (N.D. Cal. 1996).

B. Plaintiff's Request for Attorneys' Fees is Reasonable Under the Lodestar Method

Under these circumstances, the Court employs the lodestar method. "Because the attorneys' fees will be paid separately by [defendant] without reducing the relief available to the Class, the lodestar method is appropriate." *Grays Harbor Adventist Christian School v. Carrier Corp.*, No. CV 05-05437 RBL, 2008 WL 1901988, at *1. In addition, the lodestar method is appropriate where, as here, the monetary amount to be paid out by claims to the common fund is difficult to ascertain. *See Hanlon*, 150 F.3d at 1029 (employing lodestar method in injunctive relief class actions when "there is no way to gauge the net value of the settlement or any percentage thereof); *Grays Harbor*, 2008 WL 1901988, at *1 ("Where, as here, Settlement relief will be paid on a claims made basis with no cap to the relief available, consideration of attorneys' fees lends itself more readily to the lodestar method.").

The documentation shows an unadjusted lodestar of $350,402.08. (Fees Mot. 8; Birka-White Decl. Ex. A-C.) This calculation is based on a total of 489.8 attorney hours spent on the Mergens action, the modification of the UDC Settlement, and administration of the UDC Settlement Fund. (Birka-White Decl. Ex. A-C.) The hourly rates for class counsel range from $395 to $890 and have been approved as reasonable in at least five prior cases, including the related UDC action. (Fees Mot. 7; Birka-White Decl. Ex. A-C.) Class counsel also anticipates that it will spend a minimum of 100 additional hours, or $56,000.00, finalizing and assisting with administration of the Mergens settlement if approved by the Court. (Fees Mot. 8; Birka-White Decl. ¶ 36.)

Plaintiff's request for $600,000 represents a multiplier of **1.71** of the unadjusted lodestar, or a multiplier of 1.48 of the unadjusted lodestar plus the anticipated future cost of administration. (Fees Mot. 8-9.) Plaintiff argues that this multiplier is warranted for several reasons. First, the administration and modification of the UDC action and the subsequent *cy pres* distribution presented several novel and complex issues that required class counsel to design creative solutions to achieve appropriate settlements in both actions. (Fees Mot. 1-3; 11.) Second, class counsel's experience and skill enabled them to achieve extraordinary results for class members,

providing complete relief for persons who incurred installation expenses or sustained property damage due to a defective Flushmate System. (Fees Mot. 10-11.) Finally, class counsel undertook the matter solely on a contingent basis, expending considerable time, effort and money with no guarantee of future recovery. (Fees Mot. 11.)

The Court agrees. The settlement and modification of the UDC action achieved by class counsel represent an efficient and creative way to resolve a number of issues in both actions and fairly distribute unused resources, and considerable skill and expense were required to achieve this result. Moreover, the lodestar multiplier of 1.71 is well within the range of reasonableness for similarly complex class actions. *See Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1051 n. 6 (9th Cir.) (noting that lodestar multipliers "ranging from one to four are frequently awarded"); *Chambers*, 214 F. Supp. 3d at 901-902 (awarding a 1.68 multiplier for a nationwide class action concerning overheating dishwashers); *Parkinson v. Hyundai Motor Am.*, 796 F.Supp.2d 1160, 1170 (C.D. Cal. 2010) (“Where appropriate, multipliers may range from 1.2 to 4 or even higher.”); *Van Vranken v. Atl. Richfield Co.*, 901 F.Supp. 294, 298–99 (N.D. Cal. 1995) (holding that a multiplier of 3.6 was “well within the acceptable range for fee awards in complicated class action litigation” and that “[m]ultipliers in the 3–4 range are common”).

The requested fee award is further supported when cross-checked via a percentage-of-the-fund analysis. Under this analysis, the Settlement Fund is calculated by projecting the value of the anticipated claims rate and adding in the reasonable value of administration and notice. (Fees Mot. 14; Birka-White Decl. ¶¶ 71-72; Rodio Decl. ¶¶ 7, 12, 15.) The projected Settlement Fund in this instance would be $2,700,000. (Fees Mot. 14.) The $600,000 fee award would be 22% of this amount, or 3% less than the commonly accepted benchmark of 25%. *See Powers,* 229 F.3d at 1256. In addition, the total theoretical payout if 100% of Flushmate System owners made claims would be $46,715,625.00. (Fees Mot. 13-14.) A $600,000 request for attorneys's fees would be a mere 0.01284% of this amount. (Fees Mot. 14.)

For these reasons, the Court **GRANTS** the award to Plaintiff for attorneys's fees of $600,000.

C. Plaintiff's Requested Reimbursement for Costs is Reasonable and Appropriate

The district court must also determine an appropriate award of costs and expenses. *See* Fed. R. Civ. Proc. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."); *Trans. Container Services v. Sec. Forwarders, Inc.*, 752 F.2d 483, 488 (9th Cir. 1985). "Expenses such as reimbursement for travel, meals, lodging, photocopying, long-distance telephone calls, computer legal research, postage, courier service, mediation, exhibits, documents scanning, and visual equipment are typically recoverable." *Rutti v. Lojack Corp., Inc.*, No. CV 06-350 DOC, 2012 WL 3151077, *12 (C.D. Cal. July 31, 2012). Courts also have discretion to reimburse consulting and expert witness fees. *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366-67 (N.D. Cal. 1996).

Here, Class Counsel aver they incurred $9,601.05 in litigation expenses. (Fees Mot. 15; Birka-White Decl. ¶¶ 55-56, 62.) According to Class Counsel, these costs include "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." (Fees Mot. 15; Birka-White Decl. ¶ 55.) The Court finds that reimbursement for these expenses is reasonable and appropriate.

D. Plaintiff's Requested Incentive Award

Finally, Class Counsel seek a $5,000 incentive award payment for Plaintiff Mergens based on her "willingness to step forward on behalf of the Class and oversee the process and the actions of Class Counsel." (Fees Mot. 16.) Incentive awards are payments to class representatives for their service to the class in bringing the lawsuit. *Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1162 (9th Cir. 2013). "[D]istrict courts must be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives." *Id*. Where a "settlement agreement is negotiated prior to formal class certification . . ., there is an even greater potential for a breach of fiduciary duty owed [to] the class." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). Nevertheless, "[i]ncentive awards are fairly typical in class action cases" and are discretionary. *Rodriguez v. W. Pub. Corp.*, 563 F.3d at 958 (emphasis removed).

Here, where the amount of the award is fixed and not a sliding scale based on the amount recovered, the incentive agreement has not disjoined the financial interests of the Plaintiff from that of the class. *Cf. Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 959 (9th Cir. 2009) (finding that a potential $75,000 incentive award with the potential to be lowered in fixed increments based on the size of the final amount awarded to the class did disjoin the interests of the named plaintiffs and the class). Furthermore, the Court finds that this award is not in excess, especially when compared to the amount of attorneys' fees requested and the potential pay-out to the class. Finally, in the Ninth Circuit, a $5,000 incentive award is "presumptively reasonable." *See Bellinghausen*, 306 F.R.D. at 266. Accordingly, the Court finds that the contemplated incentive award to Mergens does not undermine the adequacy of her representation nor does it evidence collusion.

III. RULING

For the foregoing reasons, the Court **GRANTS** Plaintiff Kelly Mergens' Motion for Final Approval of Class Action Settlement; and **GRANTS** Plaintiff's Motion for Attorney's Fees and Costs, and Incentive Award to Class Representative.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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CASE NO.: CV 16-05255 SJO (SKx) **DATE: September 18, 2017**