IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

IN RE: WIRSBO NON-F1807 YBFs	Case No.: 2:08-cv-1223-NDF-(MLC)

MEMORANDUM OPINION AND ORDER GRANTING JOINT MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PAYMENT OF SERVICE AWARDS

On October 22, 2015, the undersigned United States District Court Judge heard oral argument on the Joint Motion for Final Approval of Class Action Settlement and the Motion for Award for Attorney Fees and Costs and Payment of Service Awards (collectively "Motions"). For the reasons set forth below, the Joint Motion for Final Approval of Class Action Settlement is GRANTED. The Court will also grant the payment of service awards. The Court takes under advisement the Motion for Award of Attorney Fees and Costs.

Background

This case concerns non-F1807 yellow brass fittings designed and/or sold by Defendants Uponor, Inc. and other related entities (collectively "Uponor Defendants") and installed in PEX plumbing systems ("Uponor Non-F1807 YBFs") in the Las Vegas Valley from approximately 1996 to approximately 2012. *See* Doc. 1334 at ¶ 7. Plaintiffs contend the Uponor Non-F1807 YBFs are uniformly defective. *See generally* Fourth Amended Complaint, Doc. 1343. The Uponor Defendants and the other settling parties, the Materially Contributing Entities ("MCEs"), deny these contentions. The cost per home to re-plumb and replace the existing plumbing

system, in an average home, can range from $4,000 to $7,000. *See* Ex. 6 at ¶ 9;[1] Doc. 1338 (Declarations of Tim Taylor and Andrew Peck). Although the Uponor Defendants and MCEs do not know precisely how many Las Vegas Valley structures contain Uponor YBFs or where those systems are located, the materials available allow for an estimate that there are approximately 152,000 structures containing these systems. *See* Affidavit of Michael Gayan at ¶ 3 ("Gayan Aff.").

Plaintiffs filed this case in 2008. *See* Doc. 1. Since then, the parties have engaged in extensive motion practice and discovery. Class Plaintiffs successfully appealed a with-prejudice dismissal, and the Court certified a liability class against the Uponor Defendants. The parties, Class Plaintiffs, and the Uponor Defendants in particular, performed substantial fact and expert discovery work in this action, the related actions resolved by the settlement, and many prior actions involving the alleged dezincification of high-zinc brass in the Las Vegas Valley. All of these efforts provided the parties and counsel with substantial information regarding the alleged defects and the claims asserted in this action.

Mediator Ross Hart, Esq. oversaw the parties' arms' length negotiations, which formally began in February 2014 and eventually involved Plaintiffs' counsel, counsel for the Uponor Defendants, counsel for the MCEs, insurance coverage counsel for the Uponor Defendants, the MCEs, and their respective insurers, and insurance company representatives. Doc. 1334 at ¶¶ 9–11. The parties ultimately reached agreement on the framework for the settlement of the class claims in August 2014. After arriving at agreement on the deal points which afforded benefits to class members, the parties engaged in further negotiations—with the mediator's assistance—

[1] References to "Ex." refer to the Exhibits submitted in support of the Joint Motion for Final Approval of Class Action Settlement and the Motion for Attorney's Fees, Reimbursement of Expenses, and Incentive Awards.

related to the fee and expense amounts and then signed a Memorandum of Understanding ("MOU") memorializing the full terms of the settlement. *Id.*

The settlement provides for substantial benefits to class members, as well as leaving to the Court's discretion an award of attorneys' fees, costs, and expenses up to an aggregate of $22,000,000 to be paid separately from the fund and other benefits available to class members. *See generally* Ex. 1 ("Settlement Agreement"). The Uponor Defendants also agreed to fully fund the cost of providing notice to the class, the claims administration cost, and class representative service awards. *Id.* The Uponor Defendants agreed to compensate the class representatives via service awards of up to $5,000 per home or association. *Id.*

On June 15, 2015, this Court issued an Order Granting Joint Motion for Preliminary Approval of Class Action Settlement and Approval of Form and Dissemination of Class Notice. *See* Doc. 1341 ("Preliminary Approval Order"). The Preliminary Approval Order set a final fairness hearing for September 10, 2015. Thereafter, Class Plaintiffs and the Uponor Defendants jointly moved to reschedule the final fairness hearing to permit supplemental class notice. On August 24, 2015, the Court entered an order granting the parties' request and rescheduling the final fairness hearing to October 23, 2015. *See* Doc. 1354. By minute order, the Court moved the hearing to October 22, 2015. *See* Doc. 1355.

The Settlement terms are outlined in a Class Action Settlement Agreement and Release dated May 2015 ("Settlement Agreement"),[2] which the Court preliminarily approved on June 15, 2015. The settlement provides significant benefits to homeowners with Uponor Non-F1807 YBFs. *See generally*, Ex. 1. While the Settlement Agreement sets out terms of the settlement in greater detail, key provisions include:

[2] Capitalized terms not otherwise defined herein shall have the same meaning as ascribed to them in the parties' Settlement Agreement.

All Class Members will receive an extended, enhanced warranty for their Uponor Non-F1807 YBF systems that provides coverage for dezincification claims. The enhanced warranty extends 25 years from the system-installation date for fitting-replacement and low-flow claims and 15 years from the system-installation date for property damage claims and provides at least two years of warranty coverage for all class members. The enhanced warranty is fully transferrable.

For both past and future property damage claims, Class Members may receive up to $100,000 per claim for residential units and $150,000 per claim for non-residential units and common areas. For non-low flow fitting replacement claims, Class Members with residential units can recover 75% of covered costs up to $7,500 per unit for one failure and 75% of costs to complete re-fit of all Uponor Non-F1807 YBFs up to $7,500 for two or more failures. For non-residential and common areas, the benefits are 75% of covered costs up to $2,500 per unit (maximum recovery: $150,000 per building) for one failure and 75% of costs to complete re-fit of all Uponor Non-F1807 YBFs up to $2,500 per unit (maximum recovery: $150,000 per building) for failures in 30% of units. For low-flow claims, Class Members will receive 75% of covered costs, up to $7,500 per unit for residential and up to $2,500 per unit (maximum recovery: $150,000 per building) for non-residential and common areas.

After preliminary approval of the Settlement, the parties carried out the notice program, hiring experienced consulting firms to design and implement the plan. *See generally* Ex. 2–3 (Declarations of Shannon R. Wheatman and Joel Botzet) ("Wheatman Dec." and "Botzet Dec."). The plan consisted of direct mail notices to known or suspected owners of class structures containing Uponor Non-F1807 YBFs (including 257,666 potential Class Members), notice publications in Las Vegas Valley publications and leading consumer magazines designed to

target home and property owners, Internet advertising featuring banner advertisements, and paid media efforts through a settlement website, www.brassfittingsclass.com/nationwide. Botzet Dec. ¶¶ 4–10; Wheatman Dec. ¶¶ 7–17. The plan reached over 75% of the class members. *See* Doc. 1334 at p. 82. The actual reach and frequency were 88.1% and 3.4 times. *See* Doc. 1351 at pp. 28–29 (Supplemental Declaration of Shannon Wheatman).

Class member reaction has been positive. *See generally* Wheatman Dec. and Botzet Dec. Out of approximately 152,000 potential class members, no objections were received. Botzet Dec. ¶ 15. Only four requests for exclusion were received. *Id.* ¶ 13. On the other hand, more than 800 requests for inclusion were received from those who previously opted out when the class was certified. *Id.* ¶ 14. Moreover, although claims processing has not yet started, the claims administrator has already received 285 claim forms. Botzet Dec. ¶ 12.

Discussion

The threshold issue is whether the settlement class satisfies the requirements of Federal Rule of Civil Procedure 23(a) and at least one prong of Rule 23(b). Upon determining that the class satisfies Rule 23, the Court will then analyze the settlement itself.

I. Settlement Class Certification

Rule 23(a) requires as a prerequisite for class certification that the following be shown: (1) the class is so numerous that joinder is impracticable; (2) questions of law or fact are common to the class; (3) the representative parties' claims or defenses are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the class interests. Fed. R. Civ. P. 23(a)(1-4). Once the Rule 23(a) prerequisites are met, the class action may be maintained if the court determines that a Rule 23(b) factor is met, including that

questions of law common to the class predominate over individual member questions and that a class action is the superior method for adjudicating the controversy. Fed. R. Civ. P. 23(b)(3).

The Court previously certified a liability class in this matter and later determined the amended class definition also satisfies all Rule 23(a) and 23(b)(3) requirements for certification. *See* Docs. 1206–1207, 1340. The Court reaffirms those prior orders and finds common questions of law predominate the Class Members' claims against Uponor and the MCEs and a class action here is the fairest and most effective way of resolving more than 150,000 potential individual controversies involving members of this class.

The class settlement here was reached after arms-length negotiation and years of discussion, discovery, motion practice, and trial preparation. There is no suggestion of collusion between Class Counsel, the Uponor Defendants, or the MCEs in connection with the settlement. The fact that similarly situated class members receive the same remedies for past and future damage claims is an important factor which makes class certification appropriate and class action the superior method of resolving this litigation.

II. Settlement Approval

The Ninth Circuit employs a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). Under Rule 23, a class action settlement agreement must be "fair, reasonable, and adequate" in order to be approved. Fed. R. Civ. P. 23(e)(2); *Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 575–576 (9th Cir. 2004) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). In considering final approval of a proposed settlement, the Court's discretion is guided by the following factors:

> (1) the strength of the plaintiffs' 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 views of counsel; (7) the presence of a governmental participant; and (8) the reaction of class members to the proposed settlement.

Churchill Vill., 361 F.3d at 575. "This list is not exhaustive, and different factors may predominate in different factual contexts." *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). In addition to these factors, the Court may consider the procedure by which the parties arrived at the settlement to determine whether the settlement is truly the product of arm's length bargaining, rather than the product of collusion or fraud. *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 851 (N.D. Cal. 2010).

A. Strengths of Plaintiffs' Case vs. Risks of Further Litigation

In evaluating the strength of the plaintiffs' case, the Court should assess "objectively the strengths and weaknesses inherent in the litigation and the impact of those considerations on the parties' decisions to reach those agreements." *Adoma v. University of Phoenix, Inc.*, 913 F.Supp.2d 964, 974 (E.D. Cal. 2012) (quoting *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F.Supp. 1379, 1388 (D. Ariz. 1989).

Although the parties believe in the merits of their respective positions, the Court finds Class Plaintiffs face significant risk, uncertainty, and expense should they continue this lengthy litigation. The Court previously held that Chapter 40 did not apply to Uponor, dismissed most of Class Plaintiffs' claims against Uponor, certified a liability class against Uponor for certain implied warranty claims, invited further briefing on certification of the damages portion of the case, dismissed the class allegations against the non-Uponor parties, and severed and consolidated the non-Uponor claims in the *Fulton Park* action. While the Court's decisions

provided greater certainty for the parties, significant risk and uncertainty remained with the prospect of additional litigation and inevitable appeals of these and other interlocutory orders.

The Settlement terms here are generous, offering Plaintiffs the only conceivable remedies they could expect—prospective replacement or repair of their plumbing systems, as well as restoration of property damaged by leaks. Additional expenses, such as attorneys' fees, administration costs, and notice costs, are all shouldered by the Uponor Defendants and do not diminish the class members' recovery. *See* Ex. 1 (Settlement Agreement). While the merits of Plaintiffs' claims here have not been finally determined, the Settlement terms reflect reasonable compromises and obviate the need for lengthy litigation which would inure to no one's benefit. The quality of settlement terms from class members' perspective, weighed against the uncertainty, extensive time, and exorbitant costs inherent in complex litigation and trial, merits approval of this Settlement.

B. The Amount Offered in Settlement

The Settlement ensures class members receive substantial relief directly related to the Uponor Non-F1807 YBFs dezincification allegations and claims. The Uponor Defendants will provide an extended, enhanced warranty to all class members which provides for payment of 75% of the costs, up to a designated sum, toward replacement of any dezincified Uponor Non-F1807 YBFs subject to low-flow and fitting-replacement claims and 100%, up to a designated sum, of any resulting property damage.[3] Class members' contribution of 25% toward fitting replacement and/or system replacement costs is reasonable and fair because many Uponor Non-

[3] In class actions involving allegedly defective products, a settlement that requires replacement of products exhibiting problems and reimbursement for related repairs provides class members with "'fundamentally fair, adequate, and reasonable' relief." *In re NVIDIA GPU Litig.*, 539 Fed.Appx. 822, 824 (9th Cir. 2013) (quoting *Torrisi*, 8 F.3d at 1375).

F1807 YBFs have already been in service for 5–10 years or more.[4] The individual settlement claim caps—$7,500 to refit or replumb a single-family residence, $2,500 per unit to refit or replumb a multi-unit structure, and $100,000 for property damage—provide reasonable relief to the class members because these amounts fall in line with or exceed the average amounts of such claims in similar Las Vegas Valley actions. *See* Gayan Aff. at ¶ 5; Ex. 6; Doc. 1338 (Taylor and Peck Declarations).

Because the settlement has no limited fund or cap, all class members will receive the same benefits for qualifying claims regardless of when they file claims during the claims period. The Uponor Defendants will separately pay costs associated with the class notice and claims administration as well as any court-awarded attorney's fees and expenses (up to $22 million). These costs will not reduce the class members' recoveries under the enhanced warranty. The settlement provides a reasonable, adequate, and fair result for the class members because it guarantees significant protection against every dezincification-related harm alleged in the complaint and avoids the substantial risk, delay, and expense of further litigation.

C. The Settlement Follows Years of Litigation and Thorough Discovery

Before reaching the settlement, Class Plaintiffs, the Uponor Defendants, and many of the MCEs engaged in extensive factual investigation and thorough discovery over the course of several years both in this class action and in the many related actions filed in the Nevada state courts. The parties produced and reviewed hundreds of thousands of documents, inspected hundreds of class members' homes, had their experts test hundreds of Uponor Non-F1807 YBFs

[4] Ninth Circuit courts have held that class settlements are "not per se . . . inadequate or unfair" merely because they provide for a fraction of the maximum potential recovery. *In re Mego*, 213 F.3d at 459 (quoting *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982)). The *In re Mego* court, recognizing numerous litigation difficulties, affirmed a settlement providing for one-sixth of the class members' potential recovery. *See id.*

removed from the class members' homes, participated in hundreds of depositions related to Uponor Non-F1807 YBFs, and retained experts who authored reports on the relevant issues.

Since Class Plaintiffs filed the lead action in 2008, the parties have engaged in substantial motion practice in this class action and in the related actions pending in this court. The parties briefed and argued the motion to remand, dozens of motions to dismiss, *Daubert* motions, multiple motions for class certification, motions to compel arbitration, and scores of other motions. The parties also engaged in appellate practice on several key issues, including briefing and arguing two appeals to the Ninth Circuit, a writ petition to the Nevada Supreme Court, and a Rule 23(f) request to the Ninth Circuit. All of these efforts shaped the litigation and helped guide the parties in their settlement negotiations.

D. Experienced Counsel Recommend the Settlement

The attorneys on all sides of this action have extensive experience with similar plumbing system litigation in Nevada, including other cases involving Uponor Non-F1807 YBFs. Class Counsel, who possess substantial experience in prosecuting class actions and plumbing defect actions in this jurisdiction and elsewhere, recommend the settlement. Courts have indicated this factor weighs in favor of finding a settlement to be fair, adequate, and reasonable. *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) *aff'd*, 661 F.2d 939 (9th Cir. 1981) (citing cases and authorities).

E. The Class Members Reacted Positively to the Settlement

There is no opposition to the settlement. In addition to the lack of objectors, 811 prior class members opted into the settlement and only 4 class members opted out. *See* Botzet Dec. at ¶ 13. A court may appropriately infer that a class settlement is fair, adequate, and reasonable when few class members object to it. *See Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178

(9th Cir. 1977); *Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

F. The Settlement Procedure

The Settlement resulted from extensive arm's length negotiations between Class Plaintiffs, the Uponor Defendants, and the MCEs that were supervised by the independent mediator, Ross Hart, Esq. Negotiations did not commence until after the parties participated in substantial motion practice, including a contested class certification hearing, a case-dispositive appeal to the Ninth Circuit, and numerous motions to dismiss, and engaged in extensive fact and expert discovery over several years of litigation. Doc. 1334 at ¶¶ 5–6. The parties' settlement negotiations continued for approximately a year before the Court's involvement. *Id.* at ¶¶ 9–11. Therefore, the Court finds no signs of collusion or fraud in the procedure used by the parties to reach this Settlement.

Notwithstanding this finding of no collusion or fraud, the Court would note that the Settlement contains a clear sailing clause by which the Uponor Defendants agree not to contest the class lawyer's petition for attorneys' fees and costs up to a maximum amount of $22 Million. The Settlement also provides the Uponor Defendants a reversionary interest in the settlement funds. Further, the Settlement presents difficult valuation problems in ascertaining the settlement value to the class. With this said, the Court has been assured by counsel, as well as mediator Ross R. Hart, Esq., that at no time during the negotiation of fees and costs did counsel for the Uponor Defendants or MCEs demand the reversionary provision or any other settlement term from Plaintiffs in return for the clear sailing provision of the Settlement. Doc. 1371. However, because of the valuation problems, the Court will require quarterly reports from the parties for the first two years of claims administration.

The Court has considered the interests of absent class members and the arguments of class representatives, counsel, and the Uponor Defendants, and finds this Settlement fair, reasonable, and, adequate as required by Rule 23, and issues concerning settlement value do not alter this conclusion.

III. Class Representative Incentive Award

In addition to the final approval of the settlement agreement, Plaintiffs have also filed a Motion for Award for Attorney Fees and Costs and Payment of Service Awards. At this time, the Court is taking the attorney fees award under consideration and proper evaluation. However, the Court finds that it is proper to provide for the payment of the service awards at this time. In the Ninth Circuit, courts routinely approve service award payments to class representatives for their assistance to a plaintiff class. *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009); *Hopson v. Hanesbrands, Inc.*, No. 08–CV–0844–EDL, 2009 WL 928133, at *10 (N.D. Cal. Apr. 3, 2009) (citing *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000)); *In re SmithKline Beckman Corp.*, 751 F.Supp. 525, 535 (E.D. Pa. 1990); *Alberto v. GMRI, Inc.*, No. 07-CV-1895, 2008 WL 2561106, at *11–13 (E.D. Cal. June 24, 2008)). The Ninth Circuit has instructed district courts to scrutinize incentive awards so they do not undermine the class representatives' adequacy under Rule 23(a). *Radcliffe v. Experian Info. Solutions, Inc.*, 715 F.3d 1157, 1163 (9th Cir. 2013) (reversing settlement where incentive awards conditioned on individual support for settlement). This scrutiny includes determining whether there is a "significant disparity between the incentive awards and the payments to the rest of the class members" such that it creates a conflict of interest. *Id.* at 1165.

In this case, the class representatives have spent considerable effort in gathering information, opening up their properties for inspection and investigation, gathering documents,

and assisting class counsel. The Settlement occurred before depositions were conducted of class representatives, and before they needed to testify at trial. The incentive awards are not conditioned on individual support for the settlement, although all class representatives have submitted sworn statements indicating their support for the settlement. *See* Ex. 10. Further, the requested incentive award amount ($5,000) falls within the range of settlement benefits available to all other class members under the enhanced warranty. Gayan Aff. at ¶ 5; Ex. 6; Doc. 1338 (Taylor and Peck Declarations). Given the extent of the class representatives' performance and assistance in procuring the Settlement, the Court finds that the proposed service award of $5,000 per home or association to the Class Representatives is appropriate.

As the Court has previously mentioned, it is taking the remainder of the attorney's fees award under consideration and will issue a separate order and judgment for the attorney fees.

Conclusion

Based upon the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED:**

1. The Joint Motion for Final Approval of Class Action Settlement is GRANTED.
2. Rust Consulting, Inc. is appointed as the Claims Administrator both for purposes of administering the claims received from Class Members and for purposes of administering, and making payments from, the Qualified Settlement Fund established in connection with this Settlement. The parties, with the assistance of Rust Consulting, Inc. shall file quarterly reports to include: the number of claims filed, by type (property damage or low flow), the number of claims approved; the number of disputed claims, and the total amounts paid to Settlement Class Members. The first quarterly report shall be filed on or before April 15, 2016, with subsequent reports

filed on or before July 15, 2016, October 15, 2016, January 15, 2017, April 15, 2017, July 15, 2017, October 15, 2017, and January 15, 2018.

3. The Motion for Incentive Awards is GRANTED.

    a. Class representatives Michael Mahany and Raina Musser-Mahany, Wendy Stockett, Christian and Bobbi LeCates, Michael and Tricia Crowder, Christian and Laurie Jensen, Leon Turner, and the Fulton Park Unit Owners' Association are awarded service awards of $5,000 per home or association.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: October 26, 2015

BY THE COURT:

NANCY D. FREUDENTHAL
CHIEF UNITED STATE DISTRICT JUDGE