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 IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF FORM AND DISSEMINATION OF CLASS NOTICE

Introduction

After nearly seven years of litigating this class action and many related lawsuits against various parties in the state and federal courts, three trips to the Ninth Circuit Court of Appeals, and substantial discovery efforts, the parties have reached a proposed settlement to resolve all claims related to Uponor's non-F1807 high-zinc brass plumbing components ("Wirsbo Non-F1807 YBFs") distributed, sold and/or installed in Las Vegas Valley structures. The proposed settlement provides class members with an enhanced and extended warranty for dezincification-related problems with Wirsbo Non-F1807 YBFs, substantial reimbursement for past and future damages and repairs covered under the enhanced warranty, and coverage for complete system replacement in structures experiencing multiple product failures.

For residences experiencing more than one leak, Uponor will pay 75% of the cost to refit or replace the entire system. Uponor will also pay to repair and possibly replace components and systems that have a significant reduction in water flow due to dezincification of Wirsbo Non-F1807 YBFs. For multi-unit structures, such as apartments and hotels, they will receive similar warranty coverage and benefits under the proposed settlement.

The settlement resolves all claims applicable to dezincification of Wirsbo Non-F1807 YBFs in Las Vegas Valley structures and would result in the resolution of this class action, the related *Fulton Park* and *Anthem Highlands* actions, and numerous actions pending in the Nevada state courts. The settlement extends Uponor's original 10-year warranty by five years for most class members, creates a two-year warranty for those whose warranties already

expired, and provides enhanced warranty benefits for all class members. For example, Uponor will pay all property damage caused by a leak up to a maximum of $100,000 for residences and $150,000 for non-residential properties. Uponor will also pay 75% of the costs associated with repairing failed Wirsbo Non-F1807 YBFs and replacing the system, if justified under the warranty. And unlike Uponor's original warranty, the enhanced warranty is fully transferrable.

In conjunction with this settlement, Uponor and the other participating parties seek to simultaneously buy their peace for all pending litigation related to Wirsbo Non-F1807 YBFs around the country. Therefore, the proposed settlement is contingent on the final resolution of the case styled as *George v. Uponor, Inc., et al.*, pending in the U.S. District Court for the District of Minnesota and a separate group of claims by California and Arizona homeowners (the "CA/AZ Claims"). *See* Ex. 1 at ¶ 165.[1] The *George* parties are contemporaneously seeking approval of a settlement before the Minnesota court, and Uponor has reached an agreement to resolve the CA/AZ Claims. Therefore, should this Court and the *George* court both grant final approval of the respective settlements—and those orders withstand any potential appeals—Uponor and the other participating parties will resolve all litigation involving Wirsbo Non-F1807 YBFs.[2]

The proposed settlement is an excellent result that merits this Court's preliminary approval. It provides all class members with substantial benefits and protections related to the alleged dezincification of Wirsbo Non-F1807 YBFs. For the past seven years, the parties extensively litigated this class action, as well as more than a dozen related actions and engaged in significant fact and expert discovery. After the Court ruled on multiple pending motions in

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[1] All references to "Ex." Mean the exhibits attached to the Affidavit of Michael J. Gayan, filed concurrently herewith.

[2] The members of either settlement class and the owners of the CA/AZ Claims have the right to opt out and pursue claims against any of the settling parties. Should a sufficient number of class members and claimants submit opt-outs, Uponor and the MCEs have the right to withdraw from all three settlements. *See* Ex. 1 at ¶ 59. MCE withdrawals will not impact the settlements unless Uponor loses a minimum level of the MCE funding. At that point, Uponor has the right to withdraw from all three settlements. *See* Ex. 1, ¶ 132.

late 2013, including the motion for class certification, the parties participated in nearly a year of arm's-length settlement discussions and mediations with a professional mediator that resulted in this settlement. Under the circumstances, the settlement falls "within the range of possible approval" and warrants preliminary approval by the Court.

Factual and Procedural Background

I. The Procedural History of this Class Action and Related Actions.

On July 28, 2008, several owners of Las Vegas Valley homes containing Wirsbo Non-F1807 YBFs filed the *Slaughter* class action in Nevada state court against Uponor and various other parties to recover damages for the allegedly defective Wirsbo Non-F1807 YBFs. Uponor removed the action to federal court, and the district court denied the plaintiffs' motion to remand. *See* Doc. 94. Thereafter, the *Slaughter* parties engaged in substantial motion practice, including motions to dismiss, the first motion to certify class, motions for class discovery and to defer ruling on class certification, various discovery motions, a motion to disqualify counsel, a motion for preliminary injunction, the plaintiffs' motion to voluntarily dismiss without prejudice, and the defendants' motions for attorney's fees and costs. After the Court dismissed with prejudice the uncertified class action and awarded the defendants their costs and a portion of their attorney's fees, the *Slaughter* plaintiffs appealed. *See* Docs. 349, 468–477. On appeal, the Ninth Circuit Court of Appeals reversed the with-prejudice dismissal, vacated the award of attorney's fees and costs, and remanded the case to the district court for further proceedings. *See* Docs. 555–556.

During the pendency of the *Slaughter* appeal, other Las Vegas Valley homeowners and associations filed separate defect actions against Uponor and others related to the Wirsbo Non-F1807 YBFs, some of which ultimately became venued in federal court (the "Defect Actions"). A few Nevada home builders filed actions against homeowners and associations seeking to compel the homeowners to individually arbitrate their Wirsbo Non-F1807 YBFs claims (the "Arbitration Actions"). The Defect Actions and Arbitration Actions involved extensive motion practice, including motions to dismiss, separate motions for class certification, and motions to

compel arbitration. The parties' appealed the Court's order and judgment in the Arbitration Actions, which they briefed and argued before the Ninth Circuit. On appeal, the Ninth Circuit affirmed in part and reversed in part, but it upheld the district court's order compelling certain class members to arbitrate their Wirsbo Non-F1807 YBFs claims. *See* Doc. 196 (Case No. 2:11-cv-01424).

Both during and after the *Slaughter* appeal, the Court consolidated all of the Defect Actions into the *Slaughter* case and all of the Arbitration Actions into the *Anthem Highlands* case. *See* Docs. 543, 673.[3] A number of the consolidated cases involved claims for multiple plumbing systems—the Wirsbo Non-F1807 YBFs system and a system by one of Uponor's competitors, Vanguard/Viega. To isolate the Uponor-related claims, the Court severed all of the Vanguard/Viega claims, consolidated them, and transferred them to another case number. *See* Doc. 718.

Following the Ninth Circuit's reversal of the with-prejudice dismissal in the *Slaughter* class action, the district court allowed the plaintiffs to amend the complaint, substitute plaintiffs (enter *Hartmann*), and prosecute the consolidated class action. The defendants filed motions to dismiss the amended complaint, and those motions were fully briefed. In January 2013, Plaintiffs moved to certify this as a class action. *See* Doc. 664. With leave of the Court, Plaintiffs amended that motion. *See* Docs. 691–692. At Defendants' request, the Court allowed approximately three months of additional class discovery and set the class certification hearing for August 2, 2013. *See* Doc. 828. With leave of the Court, Plaintiffs filed a consolidated amended class action complaint. *See* Docs. 740, 741–744. Once again, motions to dismiss were filed and briefed.

[3] After the *Slaughter* plaintiffs filed their complaint in July 2008, more than a dozen other actions involving Wirsbo Non-F1807 YBFs proceeded in Nevada state courts. The parties previously settled all but five of those cases, with the remaining cases being resolved in conjunction with the proposed settlement (*Barrett*, *Sturgiss*, *Coronado*, *Vegas Star*, and *Stonebrook*). *See* Gayan Aff., ¶¶ 3–4.

Before the class certification hearing, while the parties were engaged in class discovery, the Court recused itself and all other judges in the District of Nevada from presiding over the actions involving Wirsbo Non-F1807 YBFs and referred the matter to the Ninth Circuit to appoint an out-of-district judge. *See* Doc. 1120. In October 2013, the Chief Judge of the Ninth Circuit appointed an out-of-circuit judge, the Honorable Nancy D. Freudenthal, Chief Judge of the U.S. District Court for the District of Wyoming, to preside over this consolidated class action and all related cases pending in this district. *See* Doc. 1171.

II. The Status of the Litigation Prior to Settlement.

After receiving the Ninth Circuit's designation, this Court quickly sorted through hundreds of filings and dozens of pending motions and set an agenda for two days of hearings in November 2013. *See* Doc. 1179. The hearings included arguments on Uponor Corporation's motion to dismiss for lack of personal jurisdiction, whether Plaintiffs had complied with NRS 40.600, et seq., numerous motions to dismiss the claims for relief in Plaintiffs' then-operative complaint, HOA standing, motions to strike expert testimony under *Daubert*, and Plaintiffs' amended motion for class certification.

The Court took decisive action, conveyed tentative rulings from the bench on all pending motions, and entered written orders shortly after the hearings. The net result of these decisions was a certified liability class against Uponor—including Uponor Corporation—for breach of various implied warranties, denial of class certification against the non-Uponor defendants, a finding that NRS Chapter 40 claims were not viable against Uponor, and transfer of all non-Uponor defect claims into the related *Fulton Park* case. *See* Docs. 1206, 1207. Following a motion for clarification and/or reconsideration, Class Plaintiffs filed a Rule 23(f) request to appeal the Court's with-prejudice denial of class certification against the non-Uponor defendants. The Ninth Circuit denied that request.

Class Plaintiffs and Uponor continued with discovery efforts following the certification decision. After some discovery disputes arose between the parties, the Court issued an order regarding the scope and manner of certain discovery efforts and amending the case deadlines.

See Doc. 1294. The parties began settlement discussions in earnest as the expert-disclosure deadlines approached.

III. The Parties' Discovery Efforts.

Since filing the original *Slaughter* complaint in July 2008, the parties have engaged in extensive discovery efforts. Much of that work occurred in this consolidated class action, with early document productions and Uponor depositions (2008–2009) and significant additional document productions and expert work being done in the months leading up to, and following, the class certification hearing (2013–2014). In the years between, Class Counsel conducted massive amounts of discovery related to the Wirsbo Non-F1807 YBFs in various Nevada state court cases involving then-putative class members.

The discovery completed in this action and all other related matters—including document review, written discovery, depositions, removal and testing of fittings, and expert disclosures—informed Class Counsel regarding the class members' claims in this action. The parties produced more than 700,000 pages of documents plus another 115,000 photographs of Wirsbo Non-F1807 YBFs installed in Las Vegas Valley homes. *See* Gayan Aff., ¶ 5. The photographs were taken during more than 700 home inspections. Those inspections included removal of more than 3,500 Wirsbo Non-F1807 YBFs. Class Counsel maintained a separate warehouse to store and catalogue the removed fittings. *See id.* at ¶ 6. Class Counsel, through their experts, metallurgically tested nearly 750 of those fittings. The parties also exchanged written discovery requests to obtain additional information. Class Counsel participated in more than 1,000 depositions in cases involving Wirsbo Non-F1807 YBFs, which included depositions of Uponor's FRCP 30(b)(6) designees and the parties' designated experts, as well as hundreds of additional depositions in cases involving similar fittings from Uponor's competitors. *See id.* at ¶ 5. The years of discovery into the dezincification of Wirsbo Non-F1807 YBFs and other yellow brass plumbing components installed in the Las Vegas Valley substantially assisted the parties in developing their litigation and settlement positions.

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IV. The Parties' Arm's-Length Settlement Negotiations.

At times throughout this litigation, Class Counsel engaged in formal and informal discussions with various parties about resolving the class members' claims. Class Counsel's efforts included multiple formal mediation sessions and/or informal settlement discussions with Pulte/Del Webb, Carina, and other non-Uponor defendants. *See id.* at ¶ 8. Those mediations and discussion did not yield any settlements of claims in this consolidated class action. However, in conjunction with actions previously pending in Nevada courts, Class Counsel successfully mediated and resolved Wirsbo Non-F1807 YBF claims against Uponor and other parties for many homes throughout the Las Vegas Valley. *See id.* at ¶¶ 3–4. These prior discussions and settlements helped prepare the parties for the lengthy and hotly contested negotiations that resulted in the proposed settlement.

After the Court's class certification order and subsequent discovery order, Class Counsel and Uponor suspended the expert disclosure deadlines and pursued formal settlement negotiations with mediator Ross Hart, Esq. Those negotiations began immediately after the *George* parties signed a Memorandum of Understanding ("MOU") resolving that litigation. Class Plaintiffs and Uponor participated in numerous days of in-person mediations in Las Vegas, Nevada over the course of several weeks as well as scores of informal telephone and email conversations between counsel and/or the mediator. Although in February 2014 global preliminary settlement discussions began ,which included references to the class claims set forth in the instant litigation, it was not until mid-2014—after the parties to the related *George* action signed a Memorandum of Understanding ("MOU") resolving that litigation—that Class Counsel and the Uponor Defendants began more formal mediation efforts with mediator Ross Hart, Esq. focused solely on the class claims involved in this litigation. In August 2014, Class Plaintiffs and Uponor signed an MOU for the Las Vegas Valley claims containing all major deal points. *See id.* at ¶ 9.

After signing the Las Vegas Valley MOU with Class Plaintiffs, Uponor began mediating with the non-Uponor defendants and other non-Uponor entities interested in resolving the class

members' claims regarding the Wirsbo Non-F1807 YBFs (all participating non-Uponor parties are referenced in the settlement documents as the Materially Contributing Entities, hereinafter the "MCEs"). Uponor sought settlement contribution from the MCEs in exchange for class-wide releases. Due to the number of parties, counsel, and insurance carriers involved, the Uponor/MCE settlement negotiations continued for four months. *See id.* at ¶ 10. The Court held numerous status conferences during the course of the parties' settlement discussions. In November 2014—once Uponor reached a tentative agreement with the MCEs—Uponor and Class Counsel began drafting and negotiating the settlement documents. Class Counsel and Uponor agreed on a substantial amount of the language in the settlement documents and then solicited comments on the documents from the MCEs. Additional issues emerged at that point and threatened the settlement. *See id.* at ¶ 11. From January 2015 to March 2015, the parties participated in additional in-person mediation sessions and counsel attended several in-person meetings to work out the remaining settlement issues. The parties exchanged literally hundreds of calls and emails during this process before finalizing the proposed settlement. *See id.* at ¶¶ 9–11.

V. Summary of the Settlement Benefits for Class Members.

The Class Action Settlement Agreement and Release (the "Settlement Agreement"), contains the complete terms of the proposed settlement. *See* Ex. 1.[4] In accordance with the Settlement Agreement, the Class Representatives, individually and as representatives of the proposed settlement class, have agreed to settle, release, and dismiss all claims against Uponor and the MCEs related to the dezincification of Wirsbo Non-F1807 YBFs.

The key provisions of the Settlement Agreement include:

- Uponor will provide class members with an extended, enhanced warranty that covers dezincification-related leaks and/or occlusion in the Wirsbo Non-F1807 YBFs (the "Enhanced Warranty");

[4] Pursuant to the Court's order, Doc. 1323, the parties have redacted a limited number of financial terms from the Settlement Agreement solely for this Motion. Should the Court grant the Motion, the parties will publish a complete copy of the Settlement Agreement for the class members to review.

- 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/resultant damages claims and provides at least two years of warranty coverage for all class structures;
- The Enhanced Warranty is fully transferrable, so class membership runs with ownership rights in a covered home or structure;
- For eligible occluded fittings, Uponor will pay for 75% of the repairs and replacement of fittings needed to restore normal water flow in systems that have 50% differential in water flow between the hot and cold water lines supplying the same fixture and will refit or replumb the entire system where repairs and fitting replacements are unable to restore normal water flow to the system;
- Uponor will pay 100% of the resulting property damage from failed fittings up to a maximum of $100,000 per residential claim and $150,000 per non-residential claim;
- Uponor will pay 75% of the costs associated with replacing a failed fitting up to a maximum of $7,500 per residential claim and $2,500 per unit for non-residential claims with a $150,000 per-building maximum;
- For residential properties, should two fittings fail in the same residence, Uponor will pay 75% of the costs associated with refitting or replumbing the entire system/home up to a maximum of $7,500 per claim;
- For non-residential properties, should fittings fail in 30% of the units, Uponor will pay 75% of the costs associated with refitting or replumbing the entire building/structure up to a maximum of $150,000 per building/structure;
- All existing express warranties not otherwise addressed in the Settlement Agreement, from Uponor, the MCEs, and/or third-parties will remain in place;
- Uponor will deposit the agreed-upon amount into a claim fund to pay class members' claims and semi-annually replenish the claim fund to a minimum balance;
- The claim fund will remain in place and be administered by a neutral third-party for eight years and, thereafter, Uponor will directly administer and pay all eligible claims;
- The Enhanced Warranty has no overall monetary claim cap;
- All domestic Uponor entities and their successors will guaranty the Enhanced Warranty obligations;
- Uponor, Inc. will obtain and maintain for five years a letter of credit in the agreed-upon amount to further secure the class members' Enhanced Warranty rights;
- Uponor will fund the entire claim administration process and class notice;
- Uponor will pay attorney's fees and costs up to the amount identified in the Settlement Agreement, as awarded and approved by the Court;

- Uponor will pay up to $5,000 per home or association to the Class Representatives, as awarded and approved by the Court; and
- Pursuant to an addendum to the settlement agreement, the MCEs will contribute funding for the Settlement Agreement and the Minnesota Nationwide Class Action in the aggregate amount of approximately $18 million.

See generally Ex. 1. The Settlement Agreement provides all class members with 12 months to file claims regardless of the claim type. *See id.* at ¶¶ 108, 110, 112.

VI. Plan for Dissemination of Notice to Class Members.

Uponor sold and distributed the Wirsbo Non-F1807 YBFs throughout the Las Vegas Valley from approximately 1996 to approximately 2012. *See* Gayan Aff., ¶ 7. The settling parties do not know how many homes or buildings contain Wirsbo Non-F1807 YBFs or where they are located. Estimates based on information obtained during discovery shows the number of potential class homes and buildings may be in the approximate range of 100,000 to 150,000. *See* Gayan Aff., ¶ 7.

In February 2014, Class Plaintiffs provided class members with notice of the Court's order certifying a liability class against Uponor for the Wirsbo Non-F1807 YBFs. That notice included mailings to 165,217 potential class members, printing notice in two newspapers with estimated circulations of nearly 300,000, and online publication on sites with more than 6.5 million impressions. *See* Doc. 1287 at 2:22–3:9. Only about 100 opt-outs covering less than 1,000 homes were received. *See id.* at 3:26–27, 6:12–16.

With the prior class notice in mind, the parties propose a similar multi-faceted notice program to provide the best practicable notice of the settlement. Uponor has retained Rust Consulting ("RC") and Kinsella Media ("KM"), two knowledgeable and experienced class-notice consultants, to assist in designing and implementing the notice plan and to act as claims administrator. RC and KM propose a notice plan with the following components:

- Direct-mail notice to reasonably identifiable potential Settlement Class Members, with the class certification notice serving as the starting point and then supplementing it with new information available to the parties and non-residential property mailing lists;

- Publication notice via two print sources (*Las Vegas Review-Journal/Las Vegas Sun* and *Investor's Business Daily*) and numerous online sources with more than 6.5 million estimated impressions;
- Media efforts through a press release and the settlement website; and
- Notice to state and federal officials as required by the Class Action Fairness Act, 28 U.S.C. § 1715(a).

See generally, Ex. 2. The parties expect this notice plan to reach more than 75% of potential class members. *See id.* at ¶ 11.

Standard of Review of Proposed Settlement

The Ninth Circuit employs a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned."[5] In a Rule 23 class action, the court must approve any settlement of class claims to ensure fairness to the absent class members.[6] Following formal class certification, as is the case here, the court's level of scrutiny need not be as high as if the settlement had been reached before class certification.[7]

Courts typically hold two hearings when asked to review proposed class settlements: a preliminary approval hearing to make a "preliminary determination on the fairness, reasonableness, and adequacy of the settlement" and then—after directing notice to the class members regarding the proposed settlement—a final fairness hearing to make a final determination on whether the settlement is fair, reasonable, and adequate.[8]

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[5] *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).

[6] FED. R. CIV. P. 23(e).

[7] *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011).

[8] *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 21.632–634, at 432–434 (West 2004) (hereinafter referred to as "MANUAL").

Legal Analysis

At the preliminary-approval stage, courts must determine whether the settlement falls "'within the range of possible approval.'"[9] Courts should preliminarily approve a class settlement and direct notice to the class members where "'the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval.'"[10] A proposed settlement need not provide ideal class relief to gain preliminary court approval but merely be fair and free of collusion.[11]

I. The Settlement Merits Preliminary Approval Because it is Presumptively Fair.

Before the proposed settlement binds any class members, the Court must make a preliminary determination of whether the settlement is "fair, reasonable, and adequate."[12] The Court's analysis should begin with the presumption that the settlement is fair and valid. A presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act

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[9] *In re Tableware Antitrust Litig.*, 484 F.Supp.2d 1078, 1080 (N.D. Cal. 2007) (quoting *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F.Supp.2d 561, 570 (E.D. Pa. 2001)); *see also* MANUAL § 21.632, at 432–433.

[10] *In re Tableware*, 484 F.Supp.2d at 1079 (quoting MANUAL (Second) § 30.44 (1985)).

[11] *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) ("Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion.").

[12] FED. R. CIV. P. 23(e); *Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 575–576 (9th Cir. 2004) (citing *Hanlon*, 150 F.3d at 1026). As described in the MANUAL:

> Fairness calls for a comparative analysis of the treatment of class members vis-à-vis each other and vis-à-vis similar individuals with similar claims who are not in the class. Reasonableness depends on an analysis of the class allegations and claims and the representativeness of the settlement to those claims. Adequacy of the settlement involves a comparison of the relief granted relative to what class members might have obtained without using the class action process.

MANUAL § 21.62, at 428.

intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.[13]

Before reaching the proposed settlement, all parties 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. Uponor produced more than 500,000 pages of documents. Class Counsel gathered and produced more than 200,000 pages of documents and more than 115,000 photographs related to the dezincification phenomenon. Class Counsel participated in more than 700 home inspections, removed and stored more than 3,500 fittings, metallurgically tested more than 700 of those fittings, participated more than 1,000 depositions in cases involving allegations of dezincifying yellow brass fittings with more than 300 depositions occurring in cases related to Wirsbo Non-F1807 YBFs, retained experts in this action and the related actions (metallurgists, master plumbers, building code experts, statisticians, warranty analysts, and others in the relevant disciplines), and disclosed dozens of expert reports in the related actions. *See* Gayan Aff., ¶¶ 5–6.

Over the years this litigation has been pending, the parties have engaged in substantial motion practice in this class action, the non-Uponor Defect Actions consolidated into the *Fulton Park* action, and the Arbitration Actions consolidated into the *Anthem Highlands* action. The parties have briefed 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, a writ petition, and a Rule 23(f) request. All of these efforts shaped the litigation and helped the parties reach the proposed settlement.

The parties negotiated the settlement in good faith and at arm's length. Class Plaintiffs and Uponor began formal mediation efforts with mediator Ross Hart, Esq. in July 2014, shortly

[13] *See* 4 NEWBERG ON CLASS ACTIONS § 11.41 (4th ed. 2002); *In re Tableware*, 484 F.Supp.2d at 1079 (quoting *In re General Motors Corp.*, 55 F.3d 768, 784 (3d Cir. 1995)); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) (analyzing the four factors); MANUAL § 21.662, at 446.

before the expert disclosure deadlines and immediately after the *George* parties finalized the MOU resolving that litigation. After several in-person mediations and numerous other meetings and telephone conferences, Class Plaintiffs and Uponor reached an agreement on the initial deal terms. At that point, Class Plaintiffs and Uponor negotiated the amount of attorney's fees and costs. Those efforts culminated in Class Counsel and Uponor signing the Las Vegas Valley MOU. *See id.* at ¶ 9. After signing the MOU, Uponor spent the next several months mediating with the MCEs and those parties' respective insurance carriers to seek their participation in and contribution towards the proposed settlement. Uponor, the MCEs, and their carriers participated in several days of mediation with Ross Hart. Those complex negotiations—involving literally dozens of parties, attorneys, and insurance carriers—yielded an agreement, which the parties now reference as the Addendum to the Settlement Agreement. Even after agreeing to all major deal points, Class Counsel, Uponor, and the MCEs engaged in days of in-person conferences, scores of telephone conferences, and hundreds of emails to complete their negotiations and finalize the settlement documents. *See id.* at ¶¶ 9–11. Mediator Hart remained involved throughout the process to resolve major disputes that arose. *See id.* at ¶ 11.

The attorneys involved on all sides of this action have extensive experience with similar plumbing system litigation in Nevada, including prior cases involving Wirsbo Non-F1807 YBFs and other similar systems. The Court considered Class Counsel's experience during the class certification proceedings, so that information need not be repeated here. Counsel for all parties—who are experienced plaintiffs' class action and defense attorneys—have fully evaluated the evidence and the strengths and weaknesses of the parties' respective positions and have done so in light of their experience in similar litigation. Courts and commentators have noted this factor as support for the fairness and reasonableness of a class action settlement.[14]

In addition, the settlement does not give undue preferential treatment to the class representatives or other members of the proposed settlement class. All class members must

[14] *Ellis*, 87 F.R.D. at 18 (citing cases and authorities).

present claims through the same process and, if approved, those claims will entitle all similarly situated class members to the same benefits. *See generally* Ex. 1.

Finally, the settlement provides for reasonable attorney's fees and costs based on the amount of work performed and the results achieved. Uponor has agreed to pay attorney's fees and expenses up to the amount provided for in the Agreement. Class Counsel, through the final-approval process and their application for Court approval of fees and expenses, will demonstrate this is a reasonable fee request based on the scope and duration of this litigation, the work already completed, and the work that will be done to finalize this settlement and the claims process.[15]

In light of the significant amount of work done by Class Counsel over the nearly seven years this litigation has been pending,[16] the amount of risk and costs associated with the myriad cases and forums, and the substantial benefits provided to the Settlement Class, the parties' agreement on fees and costs is well within the range of reasonableness. Therefore, on preliminary evaluation, the settlement is presumptively fair and should be preliminarily approved.

II. Other Factors Support the Conclusion that the Settlement is a Fair, Reasonable, and Adequate Resolution of the Settlement Class Members' Claims.

In addition to being presumptively valid, the proposed settlement satisfies all of the Ninth Circuit's additional fairness factors. These factors include "[1] the strength of the plaintiffs' case; [2] the risk, expense, complexity, and likely duration of further litigation; [3] the risk of maintaining a 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; . . . and [7] the reaction of the class members to the proposed

[15] *In re NVIDIA GPU Litig.*, 539 Fed.Appx. 822, 826 (9th Cir. 2013) (affirming award of fees proportional to time spent in vigorous, lengthy litigation).

[16] In compliance with this Court's order, Class Counsel has filed under seal their historical and monthly time and expense reports demonstrating the vast amount of work performed in this case. *See* Doc. 1208.

settlement."[17] These factors are not exhaustive, and district courts must consider the fairness, reasonableness, and adequacy of the settlement "taken as a whole, rather than the individual component parts . . . ."[18] To survive appellate review, the district court must demonstrate that it explored these factors before approving a class settlement.[19]

The Court entered an order permitting Class Plaintiffs to discuss the likelihood of success at trial and other topics in an *ex parte* filing rather than in this publicly filed motion. *See* Doc. 1323. Due to the need for candor with the Court and the nature of these topics, Class Plaintiffs have contemporaneously filed *ex parte* papers with their positions on these issues. Although the parties believe in the merits of their positions, they recognize the significant risks, expenses, and duration of continued litigation and propose this settlement as a compromise of their differences. For these reasons—and based on the discussions in the parties' *ex parte* papers—the proposed settlement satisfies the first three fairness factors.

The proposed settlement provides class members with substantial relief directly related to the dezincification-related allegations and claims. Uponor will pay 75% of the costs to replace any dezincified Wirsbo Non-F1807 YBFs causing problems—leaks or substantial water flow restriction—and pay 100% of any resulting property damage.[20] That class members must contribute 25% toward fitting replacement and repair costs recognizes the fact that—should failures occur—most fittings will have been in service for 10 years or more.[21] In addition,

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[17] *In re Mego Financial Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000) (quoting *Hanlon*, 150 F.3d at 1026); *see also Churchill Village*, 361 F.3d at 575–576 (citing *Hanlon*, 150 F.3d at 1026 and noting courts only need to consider applicable factors).

[18] *Hanlon*, 150 F.3d at 1026 (citing *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982)).

[19] *See In re Mego*, 213 F.3d at 458 (citing *Hanlon*, 150 F.3d at 1026; *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998)).

[20] 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*, 539 Fed.Appx. at 824 (quoting *Torrisi v. Tucson Electric Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993)).

[21] 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

because the settlement has no limited fund or cap, all class members will receive the same benefits regardless of when they file claims. Attorney's fees and expenses, cost of claims administration, and the cost of notice will all be borne by Uponor. These costs are being paid separate from, and will not reduce, the class members' recoveries. The settlement, by any measure, provides an excellent result for the class members. Additional litigation and the associated risks would serve no purpose in this case.

As already discussed, the parties have performed years of thorough discovery in this case and the related actions. In the class action context, sufficient information provides the basis to make settlement decisions.[22] The parties' discovery efforts—including document review, product testing, and depositions of 30(b)(6) witnesses and experts—provided them with more than enough information to make informed decisions during the lengthy settlement negotiations.

Experienced class action and defense attorneys used that information and their experience to negotiate the proposed settlement. No party has questioned Class Counsel's substantial experience in litigating class actions, product defect cases, and construction defect actions. *See* Doc. 692 (Amended Motion to Certify) at 24:20–25:18. And after the notice gets disseminated, the class members will have a chance to react to the settlement by either opting out or objecting.

All fairness factors weigh heavily in favor of approving the Settlement Agreement. The settlement provides all class members with immediate and substantial relief and avoids all of the risks, expenses, and resources associated with continuing to litigate this complex class action. Accordingly, the proposed settlement falls well within the range of reasonableness for this type of case.

F.3d at 459 (quoting *Officers for Justice*, 688 F.2d at 628). The *In re Mego* court, recognizing number litigation difficulties, affirmed a settlement providing for one-sixth of the class members' potential recovery. *See id.*

[22] In class actions, "'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement." *Linney*, 151 F.3d at 1239 (quoting *In re Chicken Antitrust Litig.*, 669 F.2d 228, 241 (5th Cir. 1982)).

III. The Court Should Approve the Content and Distribution of the Proposed Notice to the Settlement Class.

The parties negotiated that Uponor will pay for the cost of the notice plan. *See* Ex. 1 at ¶ 157. The Wirsbo Non-F1807 YBFs were sold, distributed, and installed throughout the Las Vegas Valley from approximately 1996 to approximately 2012. *See* Gayan Aff., ¶ 7. Uponor and the MCEs do not have a complete address list for all Settlement Class structures. However, Class Counsel and Uponor have assembled a lengthy address list of potential class members based on the reasonably available information.

A. The Notice Program Provides the Best Practicable Notice Under the Circumstances.

Before approving a proposed settlement, Rule 23(e)(1) requires courts to "direct notice in a reasonable manner" to the class members. The settlement notice protects class members' due-process rights by providing an opportunity to request exclusion from any subsequent judgment.[23] Constitutional due-process requires courts to provide absent class members with the best notice practicable, reasonably calculated to apprise them of the pendency of the action, and affording them the opportunity to opt out or object.[24] The "best notice practicable" does not mean actual notice to all class members.[25] However, individual notice must be given where reasonable.[26] And where addresses of known or potential class members are reasonably available, direct-mail notice should be provided.[27] Notice by publication, particularly when done in conjunction with direct-mail notice to reasonably identifiable potential class members,

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[23] *Peters v. Nat'l R.R. Passenger, Corp.*, 966 F.2d 1483, 1486 (D.C. Cir. 1992) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173–174 (1974)).

[24] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *Hanlon*, 150 F.3d at 1025.

[25] *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994).

[26] *In re NVIDIA*, 539 Fed.Appx. at 825 (citing FED. R. CIV. P. 23(c)(2)(B)).

[27] *See Eisen*, 417 U.S. at 175–176; MANUAL § 21.311, at 395.

is sufficient to satisfy the absent class members' due-process requirements where names and addresses cannot be identified by reasonable efforts.[28]

The proposed notice plan contains direct-mail, online, and media components that mirror the successful, court-approved notice campaign used following the class certification decision.[29] Based on information obtained since the initial class notice, the parties have supplemented the direct-mail address list to include new addresses for potential class members.[30]

After consulting with the retained notice experts, the proposed notice plan has the following components:

- Direct-mail notice to more than 165,000 reasonably identifiable potential Settlement Class Members;
- Publication notice via two print sources (*Las Vegas Review-Journal/Las Vegas Sun* and *Investor's Business Daily*) and numerous online sources with more than 6.5 million estimated impressions;
- Media efforts through a press release and the settlement website; and
- Notice to state and federal officials as required by the Class Action Fairness Act, 28 U.S.C. § 1715(a).

See generally, Ex. 2. The parties expect this notice plan to reach more than 75% of potential class members. *See id.* at ¶ 11.

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[28] *Silber*, 18 F.3d at 1453 (affirming notice by publication); *see also Fidel v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 105 F.3d 664, *1, 5 (9th Cir. 1996).

[29] *See* Doc. 1287, Status Report Regarding Class Notice and Opt-Outs Received. Class Plaintiffs mailed notice to 165,217 potential class members and published notice via print and online publications.

[30] Class Counsel added addresses for developments where information suggests that Wirsbo Non-F1807 YBFs were installed in at least one home in the development. And through the notice experts, Uponor purchased mailing lists for non-residential properties in the Las Vegas Valley.

B. The Notice Contains All Essential Settlement Terms and Information.

Adequate class notice should explain the settlement will bind all class members who do not timely opt out, disclose whether the class has been certified only for settlement purposes, and include the following additional information: (1) the class definition; (2) the class members' options and the applicable deadlines; (3) the essential terms of the proposed settlement, including the scope of the release by the class members; (4) any benefits received by the class representatives; (5) any attorney's fees and costs requested; (6) the time and location of the final fairness hearing; (7) the methods for opting out of or objecting to the settlement; (8) the procedures for distributing settlement funds to the class members; (9) the basis for valuing any non-monetary components of class relief; and (10) display the name, address, and phone number of class counsel and explain how to make settlement inquiries.[31]

Here, the proposed Notice contains all the necessary information regarding the settlement, class membership, and the class members' options. It informs class members of their right to opt out of or object to the proposed settlement. The notice plan includes mailings to the individuals who opted out of the certified liability class and allows them the opportunity to opt back into the class to receive the settlement benefits.

IV. The Court Should Set Dates for the Final Approval Process.

As explained in the proposed Notice and discussed with the Court during prior hearings, the parties contemplate that after providing the Settlement Class with notice and an opportunity to review the settlement terms, the Court will hold a final approval hearing to make a final determination on whether the settlement is fair, reasonable, and adequate. At the parties' request and by order, the Court approved the following schedule:

Class Notice (Direct Mailing and Publication)	Completed by June 15, 2015
Objection and Opt-Out Deadlines	Received by July 31, 2015

[31] *See* MANUAL § 21.312, at 400.

Parties to File Motion for Final Approval and Motion for Attorney's Fees and Costs	August 24, 2015
Final Fairness Hearing	September 10, 2015 at 9:00 a.m. PST

See Doc. 1323. The parties ask the Court to confirm these dates and deadlines in the preliminary approval order.

V. The Court Should Stay and Enjoin All Lawsuits that Could Impede Final Approval of the Proposed Settlement.

A federal court has the power to enjoin or stay other court proceedings under the All Writs Act (28 U.S.C. §1651) and the Anti-Injunction Act (28 U.S.C. §2283) in order to protect its jurisdiction.[32] Should the Court preliminarily approve the proposed settlement, it should exercise this authority and enter an order staying all existing claims and enjoining all prospective claims involving Wirsbo Non-F1807 YBFs to protect the integrity of this Court's jurisdiction to preside over the settlement class and approval process.[33] Without such an order, competing claims could interrupt or even derail this Court's consideration of the proposed settlement to the parties' substantial detriment. The parties recognized these issues and agreed to request such an order related to all Settlement Class Members' claims involving Wirsbo Non-F1807 YBFs. *See* Ex. 1 at ¶ 62(g).

Conclusion

All evidence presented to the Court demonstrates the proposed settlement merits preliminary approval. After nearly seven years of hotly contested litigation and in-depth fact

[32] *Hanlon*, 150 F.3d at 1025 (". . . the temporary approval of the nationwide settlement stayed the state class actions"); *Liles v. Del Campo*, 350 F.3d 742, 746 (8th Cir. 2003) (a district court may enjoin proceedings in related litigation pending final approval of a class settlement in order to "preserve the settlement fund, eliminate the risk of inconsistent or varying adjudications that would deplete the fund, to avoid confusion among the class members, and to save scarce juridical resources").

[33] *Hanlon*, 150 F.3d at 1025 (holding Rule 23 "vests a district court with authority and discretion to protect the interests and rights of class members and to ensure its control over the integrity of the settlement approval process." (citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981))).

and expert discovery, which culminated in the Court certifying a liability class against Uponor and dismissing class claims against the non-Uponor defendants, experienced counsel on all sides negotiated the proposed settlement at arm's length through a professional mediator during repeated in-person mediations and countless other communications spanning nearly a year. The class members receive substantial, tangible benefits and protections, while Uponor and the MCEs obtain releases and resolution of all Wirsbo Non-F1807 YBFs litigation.

The parties respectfully request that the Court enter the proposed Order to preliminarily approve the proposed Settlement Agreement, endorse the form and content of the proposed Notice, direct the dissemination of the Notice to the Settlement Class, enter the requested injunction, and confirm the schedule for the final approval process.

DATED this 26th day of May, 2015.

Respectfully submitted by:

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