

Houze v. Brasscraft Manufacturing Company et al.

MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date of Hearing: August 27, 2018 c/f July 10, 2018 c/f June 14, 2018
Department: 11
Case No.: BC493276

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ORIGINAL FILED
Superior Court of California
County of Los Angeles

AUG 27 2018

Sherri R. Carter, Executive Officer/Clerk
By: V. Jaime, Deputy

TENTATIVE:

GRANT preliminary approval as follows:

- (1) The settlement appears to be in the range of reasonableness of a settlement that could ultimately be granted final approval by the Court;
- (2) Grant conditional class certification; and
- (3) Appoint Kasdan Lippsmith Weber Turner LLP as Class Counsel;
- (4) Appoint Miles Houze, Susan Houze, Kevin Ngai, and Marcia Price as Class Representatives;
- (5) Approve the notice;
- (6) Set the scheduled matters as indicated below; and
- (7) Plaintiff's counsel is file a proposed order consistent with this ruling by September 5, 2018

BACKGROUND

This proposed settlement with Defendant EZ-Flo International, Inc. does not materially differ from the settlement that Plaintiffs reached over similar products and claims in this case with Defendant BrassCraft Manufacturing Company. The Court granted preliminary approval of the BrassCraft settlement on March 22, 2016 and granted final approval of the BrassCraft settlement on September 26, 2016.

The proposed settlement, if approved, will resolve Plaintiffs' claims on behalf of millions of homeowners nationwide who allege that their homes are equipped with defective yellow brass plumbing components manufactured by EZ-Flo. Plaintiffs contend the EZ-Flo plumbing components are defective, including potable water plumbing system components and subcomponents made of yellow brass.

PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

As a "fiduciary" of the absent class members, the trial court's duty is to have before it sufficient information to determine if the settlement is fair, adequate, and reasonable. (7- Eleven Owners for Fair Franchising v. The Southland Corp. (2000) 85 Cal.App.4th 1135, 1151, citing Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801, 1802 ("Dunk").)

California Rules of Court, rule 3.769 governs settlements of class actions. Any party to a settlement agreement may submit a written notice for preliminary approval of the settlement. The settlement agreement and proposed notice to class members must be filed with the

motion, and the proposed order must be lodged with the motion. California Rules of Court, rule 3.769(c).

In determining whether to approve a class settlement, the court's responsibility is to "prevent fraud, collusion or unfairness to the class" through settlement and dismissal of the class action because the rights of the class members, and even named plaintiffs, "may not have been given due regard by the negotiating parties." (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 46, 60.)

FAIRNESS OF THE SETTLEMENT AGREEMENT

In an effort to aid the Court in the determination of the fairness of the settlement, *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 244-245 ("*Wershba*"), discusses factors that the Court should consider when testing the reasonableness of the settlement.

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 intelligently; 3) counsel is experienced in similar litigation; and 4) the percentage of objectors is small. (*Wershba* at 245, citing *Dunk* at 1802.) The test is not the maximum amount plaintiff might have obtained at trial on the complaint but, rather, whether the settlement is reasonable under all of the circumstances. (*Wershba* at 250.)

In making this determination, the Court considers all relevant factors including "the strength of [the] plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.'" (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128 ("*Kullar*"), citing *Dunk* at 1801.)

"The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." (*City of Detroit v. Grinnell Corporation* (2d Cir. 1974) 495 F.2d 448, 455; see also *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 ("[I]t is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.")

TERMS OF SETTLEMENT AGREEMENT

The *Class Action Settlement Agreement and Release as to Defendant EZ-FLO International, Inc.* is made and entered into by and between Plaintiffs Miles Houze, Susan Houze, Kevin Ngai, and Marcia Price ("Plaintiffs"), on behalf of themselves and the Settlement Class, and Defendant EZ-Flo International, Inc. only.

Settlement Class means: All Persons that own or have owned a Property Unit(s) located in the United States that contain or have ever contained a Covered Product manufactured up to ten (10) years before the Effective Date. (¶1.33.) The Effective Date is the first date by which any

Final Order and Judgment entered pursuant to the Settlement Agreement becomes final. (¶1.12.)

-Excluded from the Settlement Class are: a. Persons who validly and timely exclude themselves; b. Retailers, wholesalers, and claims aggregators or persons or entities who claim to be an assignee of rights associated with any of the Covered Products, except associations of homeowners may seek Settlement Benefits for common areas, only; c. Except as specified above, insurers and/or providers of extended service contracts or warranties for the Settlement Class Structures; and d. The Honorable Ann I. Jones and members of her family. (¶1.33.)

-"Covered Products" means any and all potable water plumbing system components and sub-components made of yellow brass (copper alloys with a zinc content of 15% or greater by weight) and designed to be regularly in contact with water including, but not limited to, those product categories specifically identified in Schedule 1 (attached to the settlement agreement) which were manufactured, distributed, and/or sold by EZ-Flo on or before the Effective Date. (¶1.9.)

This is a claims-made settlement. (¶¶1.7, 6.5)

-EZ-Flo shall retain broad rights to audit any Settlement Class Member's compliance with the Claims Process. EZ-Flo's audit rights during the Claims Process include, but are not limited to (a) requiring a Claimant to submit additional information or photographs; (b) conducting examinations and testing of Covered Products and the plumbing system of a Claimant's Property Unit; and/or (c) requiring the submission of Covered Products to the Claims Administrator. Any procedures for auditing compliance with the Claims Process shall be done at EZ-Flo's sole expense. (¶6.6.)

-Exhibit 1 to the original Settlement Agreement filed March 21, 2018 includes the claim form and the affidavit that the settlement class members may return. The claim form includes boxes for the class members to check, as well as important deadlines.

Settlement Benefits

Proof of Eligible Conditions: Settlement Class Members with Settlement Claims for Eligible Conditions shall qualify for Settlement Benefits upon the timely submission to the Claims Administrator of the following items:

	Claim Process	Settlement Benefits
Exterior Meringue Deposits (¶¶5.1.c; 5.2.a)	Claims must be made within 1 year of the Effective Date (¶5.1.c.ii)	i. No more than fifteen (15) replacement parts per Property Unit; ii. Covered Products to be promptly shipped to each Claimant at EZ-Flo's sole expense; and iii. If any Claimant owner of a Property Unit seeks the replacement of more than five (5) Covered Products with Exterior Meringue Deposits, EZ-Flo reserves the right to require that each such Claimant

		<p>submit to the Claims Administrator all qualifying Covered Products above the first five (5) for which the Claimant seeks Settlement Benefits. (¶5.2.a)</p>
	<p>In order to recover the benefits (¶5.1.a-c) (1) A complete and valid claim form must be executed; and (2) Photographs, taken within ten (10) years of the Date of Manufacture of each in service Covered Product for which Settlement Benefits are claimed, that depict the EZ-Flo manufacturer and the Date of Manufacture stamp. (3) Photographs depicting the Exterior Meringue Deposits</p>	
<p>Leaks (¶¶5.1.d; 5.2.b)</p>	<p>-Claimants making Settlement Claims for Leaks must make any such claim within the later of three (3) years from the Effective Date or seven (7) years from the Date of Manufacture. For Leaks that occur after the Effective Date, Claims shall be made within one (1) year of the date of the Leak. (¶5.1.d.iii.)</p>	<ul style="list-style-type: none"> i. Cash reimbursement for all Replacement Part(s); ii. For Leak claims <i>without</i> property damage: cash reimbursement for the reasonable, out-of-pocket labor costs incurred to repair and/or replace the part(s) in accordance with the reasonable labor costs for plumbing professionals in the relevant market area not to exceed \$100 per Replacement Part with a maximum of \$500 per Property Unit; iii. For Leak claims <i>with</i> property damage: cash reimbursement for the reasonable, out-of-pocket labor and property damage costs incurred to repair and/or replace the part(s) and property damage in accordance with the reasonable labor and materials costs for plumbing and repair professionals in the relevant market area not to exceed \$3,500 per Property Unit; <ul style="list-style-type: none"> a. Claimants may not recover property damage costs covered and paid by insurers. Claimants may recover for deductibles not paid by insurance, but cannot recover for the difference between the amount insurance carrier actually paid and the amount the Claimant believes the insurance carrier should have paid; and b. Claimants with property damage exceeding \$3,500 may make a claim for the maximum of \$3,500 per

		<p>Property Unit, regardless of the amount of actual damages claimed in excess of \$3,500; or, alternatively, file a separate, individual lawsuit against EZ-Flo, waiving the benefits provided for in this Settlement Agreement. The party filing the lawsuit shall not be bound by the Release, and EZ-Flo shall retain all of its defenses with respect to any and all individual lawsuits for property damage; this Settlement Agreement shall not be admissible for any purpose in such lawsuit.</p> <p>(¶15.2.b.)</p>
	<p>In order to recover the benefits (¶15.1.a-b, d)</p> <p>(1) A complete and valid claim form must be executed; and</p> <p>(2) Photographs, taken within ten (10) years of the Date of Manufacture of each in service Covered Product for which Settlement Benefits are claimed, that depict the EZ-Flo manufacturer and the Date of Manufacture stamp</p> <p>(3) Upon receipt of a Claim Form and photographs presenting a Leak claim, and after confirming the Leak claim involves a Covered Product, the Claims Administrator will provide the Claimant with a return shipping authorization and pre-paid shipping label to be used to return to EZ-Flo the Covered Product(s) claimed to Leak, as per the instructions set forth on the Claim Form. Upon receipt of the return shipping authorization and pre-paid shipping label, a Claimant shall have sixty (60) days to return the subject Covered Product(s) to EZ-Flo or the Claims Administrator may deny the Leak claim</p> <p>(4) For labor and/or property loss claims, reasonable proofs of loss including, but not limited to, photographs depicting all alleged property damage, invoices, expense records or other verifiable indicia of out-of-pocket costs incurred</p>	
<p>Occlusions and Inoperable Valves (¶15.1.e; 5.2.c)</p>	<p>Claims must be made within 3 years of the Effective Date (¶15.1.e.ii.)</p>	<p>Replacement Parts for a maximum of three (3) Covered Products with Occlusions or Inoperable Valves per Property Unit to be promptly shipped to each Claimant at EZ-Flo's sole expense. (¶15.2.c.)</p> <p>In order to recover the benefits (¶15.1.a-b, e)</p> <p>(1) A complete, valid, and fully executed Claim Form, containing a sworn averment that the Covered Product has an Occlusion or Inoperable Valve as defined in the Settlement Agreement;</p> <p>(2) Photographs, taken within ten (10) years of the Date of Manufacture of each in service Covered Product for which Settlement Benefits are claimed, that depict the EZ-Flo manufacturer and the Date of Manufacture stamp</p>

Class Members shall not be permitted to receive more than one (1) Replacement Part for each separate Covered Product. (¶15.3.)

Eligible Conditions means the specific types of defined conditions associated with each Covered Product for which a Claimant may be entitled to Settlement Benefits as further defined in ¶1.13.

Any payments made by BrassCraft to claimants shall be issued by check, each of which shall become void if not cashed within 180 days of the date of issuance. For any first payment to a Claimant voided by the provision, the Claims Administrator will issue a second payment by check to that Claimant, which will become void if not cashed within 180 days of issuance. For any payment voided by this provision, the unpaid residue shall revert to EZ-Flo. (¶15.4 (as amended by the second amended stipulated first Addendum.)

Attorney Fees, Costs, And All Other Expenses and Enhancement Awards

EZ-Flo agrees to pay any amounts awarded by the Court to Class Counsel and the Class Representatives for Attorney Fees, Costs, and All Other Expenses, but only so long as the total amount in Attorney Fees, Costs, and All Other Expenses to Class Counsel awarded to them by the Court does not exceed the sum of \$2,000,000; Incentive Awards to the Class Representatives provided the total amount of Incentive Awards does not exceed \$1,000 per Property Unit owned by the Class Representatives (for a total of \$3,000 – Plaintiff’s Supplemental Briefing, pg. 14.); and the Court’s order is otherwise consistent with this Settlement Agreement. (¶10.1.)

-Class Counsel and EZ-Flo negotiated and agreed to the amounts of Attorney Fees, Costs, and All Other Expenses to Class Counsel or Incentive Awards to the Class Representatives only after reaching agreement on all other material terms of this Settlement Agreement. (¶10.2.)

-This amount does not include the costs for the Notice Plan, Claim Process and Special Master that EZ-Flo will pay in addition to any Attorney Fees, Costs, and All Other Expenses and Incentive Awards awarded by the Court. (¶10.1.) It is estimated that the costs of providing Notice of the class action settlement and administering claims made pursuant to the Settlement will cost an estimated \$425,784. (¶6.12, as amended.)

-Any Attorney Fees, Costs, and All Other Expenses to Class Counsel or Incentive Awards to the Class Representatives shall be paid by EZ-Flo to Class Counsel and the Class Representatives within ten (10) days of the Effective Date. (¶10.5.)

The Response Period Deadline to object or opt-out is 90 days after the date of final publication in *Good Housekeeping*, or February 11, 2019. (¶¶8.1, 8.5, as amended by the second amended stipulated first Addendum.)

- If more than 500 class members opt out, EZ-Flo shall have the right to withdraw from the settlement, upon written notice to Class Counsel. For the purpose of counting exclusions, any association or owner of a Commercial Property Unit that excludes itself from the Settlement shall count as one (1) exclusion. (¶8.8.)

The claims administrator is KCC Class Action Services, LLC. (¶1.4)

- For Settlement Claims timely and completely submitted *before* the Effective Date of the settlement, the Claims Administrator shall use best efforts to resolve such claims within sixty (60) days of the Effective Date of the settlement. For Settlement Claim due, or otherwise timely and completely submitted *after* the Effective Date of the settlement, the Claims Administrator shall use best efforts to accept or deny such claims within ninety (90) days of the submission of the Settlement Claim. In either case, Settlement Benefits shall be provided to each Claimant making a valid Settlement Claim. (¶6.9.) Effective Date means the first date by which any Final Order and Judgment entered pursuant to the Settlement Agreement becomes final. (¶1.12.)
- In the event a Claimant's Settlement Claim is denied, the Claimant and Class Counsel will be informed in writing of the denial of the claim and the reasons for the denial. The deadline to appeal the denial is 45 days from the date of mailing the written denial. Any appeal will be adjudicated by the Special Master who shall independently determine the validity of the claim. The Settling Parties will receive notice of all appeals and have a reasonable opportunity to present statements and exhibits, to the Special Master setting forth their respective positions about whether the Settlement Claim should be deemed eligible or ineligible for inclusion in the Claims Process. All decisions of the Special Master within his or her jurisdiction pursuant to this Settlement Agreement shall be final and binding on all the Settling Parties. (¶6.11.)
- If required, Class Counsel and Defense Counsel will retain the services of a mutually agreeable Special Master or, if one cannot be agreed upon, as appointed by the Court. The Claims Administrator shall be responsible for and shall use reasonable efforts in effectuating the Claims Process. The Special Master, if any, shall be responsible for resolving all disputes arising as a result of the Claims Process, if any, and will be appointed by the Court.
- EZ-Flo shall pay all reasonable costs of the administration of the Settlement Claims, which is estimated to total \$425,784, including reasonable and necessary costs associated with the Special Master's review of Settlement Claims and appeals. EZ-Flo shall not be responsible for Claimants' or Class Counsels' attorney fees or costs incurred as a result of any Settlement Claim appeal. (¶6.12, as amended by the second amended stipulated first Addendum.)
- All class members who do not opt out will release certain claims, discussed in detail below.

ANALYSIS OF SETTLEMENT AGREEMENT

A. Does a Presumption of Fairness Exist?

1. Was the Settlement reached through arm's-length bargaining? Yes. Following years of work on the case, Plaintiffs and EZ-Flo engaged in several formal mediation sessions and/or informal settlement discussions in an effort to resolve the claims related to Covered Products. On October 29, 2015, Plaintiffs and EZ-Flo mediated with Hon. Howard B. Wiener (Ret.). The parties mediated in a similar fashion four more times on April 7, 2016; March 13, 2017; and July 25, 2017. During the July 25, 2017 mediation, Justice Wiener successfully steered the parties to an agreement on the core terms for the settlement benefits that would be afforded to class

members located throughout the United States. The parties agreed in principal on the key class benefit terms before negotiating and agreeing on the amount of attorney's fees and costs reimbursements that EZ-Flo would agree to pay in the settlement. For the rest of the summer and into early 2018, the parties exchanged more than several draft documents to effectuate the settlement terms. (Declaration of Graham Lippsmith, ¶¶18-19.)

2. Were investigation and discovery sufficient to allow counsel and the Court to act intelligently? Yes. Plaintiffs and their counsel first began their efforts on this case beginning in 2012. Since then, the parties have conducted discovery and engaged in motion practice. The discovery included, among other items, expert investigations and testing, written discovery, and document production and review. Defendant EZ-Flo produced several thousands of pages of documents, and Class Plaintiffs exchanged thousands of pages of documents and photographs. Class Counsel's discovery efforts included home inspections and the extraction of EZ-Flo yellow brass products ("Covered Products") from a number of those homes. Class Counsel's experts tested extracted Covered Products to confirm the presence and extent of the dezincification. Class Counsel maintained an evidence warehouse containing various exemplar extracted Covered Products. Class Counsel retained experts in the necessary disciplines to prosecute this action, including a metallurgist and master plumber. (*Id.* at ¶¶11-13.)

3. Is counsel experienced in similar litigation? Yes. (*Id.* at ¶¶3-10)

4. What percentage of class has objected? This cannot be determined until the fairness hearing. See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2011) ¶ 14:139.18 ("Should the court receive objections to the proposed settlement, it will consider and either sustain or overrule them at the fairness hearing.")

B. Is the settlement fair, adequate and reasonable?

1. Strength of Plaintiff's case. "The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." (*Kullar* at 130.)

The single claim at issue here on behalf of a putative California class is EZ-Flo's violation of California Civil Code §§ 896(a)(14)-(15), i.e., EZ-Flo yellow brass plumbing products violate these provisions which require that "[t]he lines and components of the plumbing system ... shall not leak" and "[p]lumbing lines ... shall not corrode as to impede the useful life of the systems."

As to the case merits, Plaintiffs' best case scenario is if EZ-Flo is found to violate Civil Code § 896 because the EZ-Flo product installed in their new homes was prone to corrosion. Plaintiffs' worst case scenario is that the Court agrees with EZ-Flo on any number of arguments, including but not limited to arguments that EZ-Flo yellow brass products are not defective and that § 896 violations require leaks.

The remedy for violations of Civil Code §§ 896(a)(14)-(15) is costs of repairing violations caused by the product. *Greystone Homes, Inc. v. Midtec, Inc.*, 168 Cal.App.4th 1194, 1213 (2008). In Plaintiffs' best case scenario—e.g., EZ-Flo products inherently violate § 896 because they corrode—each class member would be entitled to recover (1) replacement costs for EZ-Flo yellow brass products and (2) labor and property damage costs for EZ-Flo yellow brass products that caused other property damage. Worst case scenario, Plaintiffs get nothing because the Court or a jury sides with EZ-Flo on its defenses.

The EZ-Flo Settlement does not provide class members with their best case scenario remedy, but the benefits are closer to Plaintiffs' best case scenario remedies than their worst

case scenario remedies. While the Settlement does not provide replacement products for all EZ-Flo yellow brass products regardless of their condition, it provides replacement product for all EZFlo yellow brass products that exhibit dezincification properties, subject to high limitations of parts per home. Similarly, the Settlement does not pay for all property damage, but reimburses all property damage costs up to \$3,500 while narrowly tailoring the release to preserve Class Members' ability to separately pursue property damage claims worth more than \$3,500.

2. Risk, expense, complexity and likely duration of further litigation. Further litigation carried the possibility of non-certification and unfavorable rulings on the merits on the above legal issues.

3. Risk of maintaining class action status through trial. It would have been Plaintiffs' burden to maintain the class action through trial.

4. Amount offered in settlement. This is explained in the chart above, or paragraphs 5.1 to 5.4 of the settlement agreement. Further, Dr. Andrew Safir has reviewed the economic terms and conditions of the Settlement Agreement and was asked to estimate the monetary value of the Settlement to the Settlement Class. (Safir Decl., ¶12.) Dr. Safir has opined that the Settlement Agreement represented a monetary value to the Class that is between \$12.3 million and \$23.3 million. This estimate assumes the claims process works smoothly and forecasted damage claims are reasonable accurate and reliable. (*Id.* at ¶13.)

5. Extent of discovery completed and the stage of the proceedings. As stated above, it appears that Plaintiffs have completed sufficient discovery in order to make an informed decision.

6. Experience and views of counsel. As indicated above, Class Counsel is experienced in class actions. Class Counsel states that the settlement provides the proposed class with a variety of benefits depending on the problems that their Covered Products present and give them lasting protection for years to come. (Lippsmith Decl., ¶21)

7. Presence of a governmental participant. This factor is not applicable here.

8. Reaction of the class members to the proposed settlement. The class members' reactions will not be known until they receive notice and are afforded an opportunity to object or opt-out. This factor becomes relevant during the fairness hearing.

SCOPE OF RELEASE

Upon the entry of the Final Order and Judgment, the Releasing Parties release and forever discharge (as by an instrument under seal without further act by any person, and upon good and sufficient consideration), the Released Parties from each and every one of the Released Claims. (¶4.3)

Released Claims means, "any and all claims, demands, rights, liabilities, and causes of action of every nature and description whatsoever, that have been, might have been, are now, or could be brought in the Litigation or Related Actions, arising from or in any way related to a Covered Product alleged to have an Eligible Condition (as defined in Paragraph 1.13 of the settlement agreement), whether known or unknown, suspected or unsuspected, matured unmatured, contingent or non-contingent, concealed or hidden from existence, asserted or unasserted, or based upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct which is negligent, intentional, with or without

malice, or a breach of any duty, law or rule, without regard to the subsequent discovery or existence of different or additional facts, claims sounding in tort, contract, warranty, construction defect, and the consumer protection laws of the United States or of any state or other jurisdiction within the United States, as well as under the unfair or deceptive trade practices, trade regulation, consumer fraud, and false advertising laws of the United States or any state or other jurisdiction within the United States, including but not limited to, any claims of alleged diminished value of or the need to replace a Covered Product. The Released Claims expressly do not include claims for personal injury. The Released Claims expressly do not include claims for products other than claims concerning a Covered Product alleged to have an Eligible Condition as defined in Paragraph 1.13 of the settlement agreement. The Released Claims expressly do not include claims concerning Replacement Parts. The Released Claims also expressly do not include any claims against any other product manufacturer besides EZ-Flo.” (¶1.26.)

Litigation means *Houze, et al., v. BrassCraft Manufacturing Company, et al.*, State of California, County of Los Angeles Case No. BC493276. (¶1.16)

Related Actions means all actions or proceedings in any court in the United States relating to allegations of a failure of the brass alloy of any Covered Products that have not been reduced to judgment as of the Effective Date. (¶1.25)

Replacement Part means a current EZ-Flo product offering of like kind to a Covered Product. (¶1.29)

The Settlement Class Members expressly and intentionally waive any and all rights and benefits which they now have or in the future may have under the terms of the law (whether statutory, common law, regulation, or otherwise) of any other state or territory of the United States as related to matters arising from or in any way related to, connected with, or resulting from the Released Claims. (¶4.5)

Each of the Releasing Parties hereby does, and shall be deemed to, have considered the possibility that the number or magnitude of all claims may not currently be known concerning the Covered Products; nevertheless, each of the Releasing Parties assumes the risk that claims and facts additional to, different from, or contrary to the claims and facts that each believes or understands to exist may now exist or may be discovered after this Settlement Agreement becomes effective. Each of the Releasing Parties agrees that any such additional, different, or contrary claims and facts shall in no way limit, waive, or reduce the foregoing release, which shall remain in full force and effect. (¶4.7)

If, notwithstanding the intention of the Settling Parties expressed herein, any release given by the Releasing Parties is not given its full effect by operation of law, then the Releasing Parties shall be deemed to have and do hereby transfer and assign to the Released Parties all claims, if any, that were deemed not released, to the extent necessary to effectuate the intent of the release. (¶4.9)

To effectuate the foregoing releases, among other things and in addition to entry of judgment effectuating this Settlement Agreement, within five (5) days of the Effective Date of the settlement, the Settling Parties shall dismiss with prejudice all other Related Actions (or portions relating to Released Claims, if other claims are alleged) and all other actions that are part of the Litigation. Except as provided in this Settlement Agreement, there shall be no fee or

cost recovery, to any party, in any Related Action or any other action that is part of this Litigation. (¶14.10)

The release appears to be proper.

CONDITIONAL CLASS CERTIFICATION

A. Standards

A detailed analysis of the elements required for class certification is not required, but it is advisable to review each element when a class is being conditionally certified. (*Amchem Products, Inc. v. Windsor* (1997) 521 U.S. 620, 622-627.) The trial court can appropriately utilize a different standard to determine the propriety of a settlement class as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement cases. (*Dunk* at 1807, fn. 19.) Because a settlement eliminates the need for a trial, when considering whether to certify a settlement class, the court is not faced with the case management issues present in certification of a litigation class. (*Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 859.) Finally, the Court is under no “ironclad requirement” to conduct an evidentiary hearing to consider whether the prerequisites for class certification have been satisfied. (*Wershba* at 240.)

B. Analysis

1. Numerosity. Class Counsel estimates that EZ-Flo sold and distributed thousands, if not millions, of Covered Products in the United States. (LippSmith Decl., ¶14.) Numerosity is sufficiently established.

2. Ascertainability. The Class is defined as stated above. The class definition “is precise, objective and presently ascertainable.” (*Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 919.) However, Class Counsel admits that EZ-Flo does not have records that allow the parties to identify where the Covered Products were installed in the United States because EZ-Flo sold the product through distributors rather than directly to homeowners. However, the information available to Class Counsel suggested Covered Products were installed in at least thousands of home and buildings throughout the United States. (LippSmith Decl., ¶14.) According to the claims administrator, the Notice Program is expected to reach approximately 70% of likely class members an average of 2.2 times each. (Declaration of Carla Peak, ¶17.)

3. Community of interest. “The community of interest requirement involves three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) As for the first factor, the class members share common questions of law fact regarding whether the Covered Products are defective, whether they violate Cal. Civ. Code § 896, or whether they comply with the applicable warranties. (Motion for Preliminary Approval, pg. 10.) Second, the class representatives have claims typical of the class, as they own property containing the covered products. (Motion for Preliminary Approval, pg. 10; Miles Houze, Susan Houze, Kevin Ngai, & Marcia Price ¶¶3, 6.) Finally, the class representatives can adequately represent the class because their interests are identical to those of the proposed class and their interests in this

action do not appear to be antagonistic to the interests of the class. (Mot. for Prelim. Approval, §IV.D.)

4. Adequacy of class counsel. As indicated above, Class Counsel is experienced in class actions, including cases involving wage and hour violations.

5. Superiority. Given the relatively small size of the individual claims, a class action appears to be superior to separate actions by the class members.

Since the elements of class certification have been met, the class may be conditionally certified at this time.

NOTICE TO CLASS

A. Standard

California Rules of Court, rule 3.769(e) provides: "If the court grants preliminary approval, its order must include the time, date, and place of the final approval hearing; the notice to be given to the class; and any other matters deemed necessary for the proper conduct of a settlement hearing." Additionally, rule 3.769(f) states: "If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court. The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement."

B. Form of Notice

Copies of the Long Form Notice and Published Notice are attached as Exhibits 2 and 3 to the *Second Amended Stipulated First Addendum to Class Action Settlement Agreement and Release as to Defendant EZ-Flo International, Inc.* It contains all necessary information, including a definition of the class, a discussion of the litigation and the terms of the settlement, the different options for responding to the notice, and information about when and where the fairness hearing will be held. The proposed Class Notice also contains information about the different types of issues, claims, and benefits for the covered products. Class Members are also informed about the attorney's fees and other expenses that will be requested from the settlement fund, and it identifies that names and contact information for all counsel.

The Court finds the notice acceptable.

C. Method of Notice

The Notice Administrator or person(s) under the control and supervision of the Notice Administrator shall publish the Notice on the Settlement Website and shall make the Notice reasonably available, including by U.S. Mail, to any potential Class Member upon request. (¶7.4.)

The Notice Administrator shall also publish the Claim Form together with the Notice on the Settlement Website and shall make the Claim Form reasonably available, including by U.S. Mail, to any potential Class Member upon request. The Notice Administrator shall publish the Notice and Claim Form to the Settlement Website **within twenty (20) days** of the entry of the Preliminary Approval Order. (¶7.5.) The settlement website is www.EZ-Flosettlement.com. The notice of final judgment will be posted on this website. (Supplemental Declaration of Carla Peak Regarding Notice Plan, ¶6.)

The Long-Form Notice indicates that the Notice will be available in Spanish on the Settlement Website, stating “*Para una notificación en Español, llama o visita nuestro website.*”

In the event that any Notice and Claim Forms are returned to the Notice Administrator by the United States Postal Service with a forwarding address for the recipient, the Notice Administrator shall re-mail the notice to that address, and the forwarding address shall be deemed the updated address for that Settlement Class Member. In the event that subsequent to the first mailing of the Notice and Claim Form, the Notice and Claim Form are returned to the Notice Administrator by the United States Postal Service because the address of the recipient is no longer valid, and the name of the Settlement Class Member is known, the Notice Administrator shall perform a standard skip trace in an attempt to ascertain the current address of the particular Settlement Class Member in question and, if such an address is ascertained, the Notice Administrator will promptly re-send the Notice and Claim Form; if no Updated Address is obtained for that Settlement Class Member, the Notice and Claim Form shall be sent again to the last known address. In either event, the Notice and Claim Form shall be deemed received by the Settlement Class Member once it is mailed for the second time. (¶7.6.)

[EZ-Flo does not maintain data specifying Settlement Class Members' names and addresses and cannot provide any data specifying potential Class Members' names, addresses, or any other contact information. Should EZ-Flo become aware of any data specifying potential Class Members' names, addresses, or any other contact information, EZ-Flo shall make reasonable efforts to provide the Notice Administrator with all reasonably available data. The Notice Administrator will process all address data through the National Change of Address database (where a specific owner is known), the Coding Accuracy Support System and Delivery Point Validation system for the purpose of verifying and updating the addresses. (*Ibid.*)]

The Notice Administrator shall design and implement a plan for notification of this settlement through publication, which shall satisfy the due process rights of Settlement Class Members. (¶7.7.) Carla Peak (from KCC Class Action Services) states that a Summary Notice will be placed in the national print and digital editions of *Good Housekeeping* and *People* magazines. KCC will also implement an internet banner campaign. KCC will purchase 210 million internet impressions to be distributed over leading networks, such as the Google Display Network and Yahoo! Ad Network, as well as the social media site Facebook. The online ads will be targeted to adults 25 years of age and older and will include an embedded link to the case website. (Declaration of Carla Peak, ¶¶14-17.)

According to Carla Peak, if Preliminary Approval is granted on or shortly after June 14, 2018, the Notice Plan may commence on or before July 16, 2018 and be completed by August 15, 2018. (Supplemental Declaration of Carla Peak Regarding Notice Plan, ¶10.)

Within fifteen (15) days after the deadline to publish the Notice and Claim Form to Settlement Class Members in Paragraph 7.2, the Notice Administrator shall provide declarations to the Court, with a copy to Class Counsel and Defense Counsel, attesting to the measures undertaken to provide Notice and Claim Forms to the Settlement Class. (¶7.9.)

D. Cost of Notice

The settlement administration costs are estimated to be \$425,784. (Sherwood Decl., ¶2.) This amount appears reasonable. However, prior to the time of the final fairness hearing, the Claims Administrator must submit a declaration attesting to the total costs incurred and anticipated to be incurred to finalize the settlement for approval by the Court.

ATTORNEY FEES AND COSTS

California Rules of Court, rule 3.769(b) states: “Any agreement, express or implied, that has been entered into with respect to the payment of attorney fees or the submission of an application for the approval of attorney fees must be set forth in full in any application for approval of the dismissal or settlement of an action that has been certified as a class action.”

Ultimately, the award of attorney fees is made by the Court at the fairness hearing, using the lodestar method with a multiplier, if appropriate. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095-1096; *Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615, 625-626; *Ketchum III v. Moses* (2000) 24 Cal.4th 1122, 1132-1136.) In common fund cases, the Court may utilize the percentage method, cross-checked by the lodestar. (*Laffitte v. Robert Half Int’l, Inc.* (2016) 1 Cal.5th 480, 503.)

This is a “claims made” settlement agreement, not a common fund. Thus, the fee award is dependent on multiple factors, including the complexity of the case, the time spent, etc. The fee award will also be dependent on the claims made, and the actual benefit conferred onto the class.

Despite any agreement by the parties to the contrary, “the court has an independent right and responsibility to review the attorney fee provision of the settlement agreement and award only so much as it determined reasonable.” (*Garabedian v. Los Angeles Cellular Telephone Company* (2004) 118 Cal.App.4th 123, 128.)

The question of whether class counsel is entitled to \$2,000,000 (which includes attorney’s fees, costs, and all other expenses) will be addressed at the fairness hearing when class counsel brings a noticed motion for attorney fees.

Counsel should also be prepared to justify any costs sought by detailing how such costs were incurred.

PROPOSED SCHEDULE OF SETTLEMENT PROCEEDINGS

The following schedule is proposed by the Court:

Preliminary Approval Hearing – xx

Deadline for the Notice to be published to the Settlement Website – xx (within 20 days of preliminary approval)

[Note: The entire Notice Plan may commence on or before September 11, 2018 and be completed by November 13, 2018 (if preliminary approval is granted on or shortly after August 27, 2018). (Third Supp. Decl. of Carla Peak, ¶13.)]

Deadline for Objecting or Opting Out – xx (90 days after the date of the publication of Notice in *Good Housekeeping*, or February 11, 2019)

Deadline to submit claim forms –

- For Exterior Meringue Deposits: Within 1 year of the Effective Date.
- Within the later of three (3) years from the Effective Date or seven (7) years from the Date of Manufacturer. For Leaks that occur after the Effective Date, Claims shall be made within one (1) year of the date of the Leak.
- For Occlusion and Inoperable Valves: Within 3 years of from the Effective Date.

Deadline for Class Counsel to File Motion for Final Approval of Settlement and Motion for Attorney Fees (and respond to any objections)– FEBRUARY 21, 2019

Final Fairness Hearing and Final Approval –_MARCH 8, 2019 at 10:00 a.m. in Department SS11.