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11 *Class Counsel*

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 IN RE: ASPEN SERIES BB EVAPORATOR  
COIL LITIGATION

Case No.: A-14-710463-D  
Dept. No. XVI

**Order Granting (1) Joint Motion for Final  
Approval of Settlement and Related Relief and  
(2) Class Plaintiffs' Motion for Final Approval of  
Attorney's Fee Award, Cost Reimbursement,  
and Class Representative Service Awards**

Hearing Date: November 1, 2017  
Hearing Time: 10:00 a.m.

21 THESE MATTERS having come before the Court on November 1, 2017, with Class Plaintiffs  
22 and Defendant Aspen Manufacturing Holdings, Inc. fka Aspen Manufacturing, Inc. ("Aspen")  
23 appearing through their respective counsel of record on the parties' Joint Motion for Final Approval of  
24 Settlement and Related Matters ("Joint Motion") and on Class Plaintiffs' Motion for Final Approval of  
25 Attorney's Fee Award, Cost Reimbursement, and Class Representative Service Awards ("Motion for

1 Fees and Costs”). The Court having reviewed and considered the moving papers and any responses  
2 thereto, and having heard the arguments of counsel, with good cause appearing for the reasons stated  
3 on the record and there being no just reason for delay, enters the following findings of fact,  
4 conclusions of law, and order:

5 I.

6 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

7 **A. A Brief History of this Action.**

8 1. On December 1, 2014, Class Plaintiffs filed this class action against Aspen for all owners of  
9 homes in Nevada containing the Series BB evaporator coil units. In March 2015, Class Plaintiffs  
10 moved to certify the proposed class action. On May 21, 2015, this Court entered its order certifying  
11 this case as a statewide class action for all owners of homes containing Aspen Series BB units. This  
12 case was subsequently consolidated with two related matters<sup>1</sup> for discovery purposes only. After  
13 providing notice to the class members, Class Counsel received two opt-outs.<sup>2</sup>

14 2. The parties engaged in significant litigation and discovery efforts in this action and the related  
15 matters that were consolidated for discovery purposes—the *Seasons* and *Turner* matters—both of  
16 which had trial dates before this action. The litigation and discovery performed by Class Counsel  
17 during the coordinated efforts included but were not limited to the following: (a) prepared and filed  
18 numerous pleadings and other papers, including a successful motion for class certification; (b)  
19 prepared and served numerous sets of written discovery, reviewed the production of Aspen’s records  
20 related to the Series BB units and other records by both parties, issued subpoenas to non-parties (e.g.,  
21 Pulte and others) to gather relevant records, and made unsuccessful attempts at obtaining records from  
22 other non-parties due to dissolution or other factors; (c) coordinated, scheduled, and conducted more

23  
24 <sup>1</sup> The *Seasons* case (Case No. A-13-676550-D) and the *Stanton* case (Case No. A-13-689790-D).

25 <sup>2</sup> All owners of homes involved in the related *Seasons* and *Stanton* cases opted out and continued to pursue their separate actions.

1 than 275 inspections of potential class members' homes, had Class Plaintiffs' experts attend those  
2 inspections and photograph the relevant conditions, and collected samples from each class home for  
3 potential laboratory testing; (d) coordinated with a third-party laboratory to test more than 185 samples  
4 taken from the class homes; (e) retained a team of seven experts to review the evidence and provide  
5 opinions on all factual areas relevant to the class claims (e.g., HVAC contracting, mechanical  
6 engineering, materials and design engineering, industrial hygienist, warnings and consumer  
7 expectations, statistician), including preparation of reports, providing expert testimony at deposition,  
8 and preparing to provide trial testimony; and (f) reviewed the reports published by Aspen's team of  
9 experts and deposed those experts.

10 **The Parties' Settlement Efforts and the Settlement.**

11 3. After a mediation presided over by Jim Roberts, extensive settlement negotiations, and two  
12 mandatory settlement conferences presided over by the Honorable Jerry Wiese, Class Plaintiffs  
13 reached a global settlement agreement with Defendant Aspen ("Settling Defendant") to resolve all  
14 claims pending in this action.

15 4. The essential terms of the settlement are generally set forth as follows: (a) the settling parties  
16 agreed to slightly modify the class definition to include all owners of Nevada homes that contain or  
17 contained Aspen Series BB evaporator coil units except those owners that opted out or separately  
18 resolved, assigned, or released their claims against Aspen; (b) Aspen and/or its insurers will pay  
19 \$45,000,000 to Class Plaintiffs to settle all claims related to the Class Homes; (c) Aspen and/or its  
20 insurers will pay the settlement amount within approximately 30 days of this Court's order granting  
21 final approval of the Settlement; (d) in exchange for this payment, Class Plaintiffs and Aspen will  
22 mutually release each other for all claims related to the Aspen Series BB evaporator coil units installed  
23 in the Class Homes; (e) Aspen disclaims any right or obligation to direct, control, or comment on how  
24 the settlement funds are used; (f) all class notice costs and claims administration fees will be paid from  
25

1 the settlement fund;<sup>3</sup> (g) Aspen, Class Counsel, and the class representatives agree not to disparage  
2 each other; and (h) the enforceability of the Settlement is expressly conditioned upon this Court's full  
3 and independent approval pursuant to NRCP 23(e).

4 **B. The Preliminary Fairness Determination.**

5 5. On August 4, 2017, the parties filed the Joint Motion seeking this Court's preliminary approval  
6 of the settlement. On August 8, 2017, the parties filed an Errata to the Joint Motion, which provided,  
7 among other things, minor modifications to the settlement agreement. The Court received no  
8 opposition to the Joint Motion before the preliminary approval hearing.

9 6. The Court conducted a preliminary approval hearing with respect to the settlement on August  
10 9, 2017, found the settlement terms (including the requested award of attorney's fees and costs) to be  
11 fair and reasonable, certified a slightly modified class definition for settlement purposes, approved the  
12 form of the Notice of settlement, directed service of the Notice by mail and publication, and set the  
13 time and date for the Final Fairness Hearing. The Preliminary Approval Order was entered on August  
14 28, 2017.

15 7. On or before the appointed deadline, the court-appointed notice administrator, Total Class  
16 Solutions, LLC ("TCS"), caused the Notice to be sent by Standard U.S. Mail to the property addresses  
17 for all homes located in developments with at least one confirmed class home (totaling 36,403 pieces),  
18 as well as by First Class Mail to the alternate mailing addresses for those homes on file with the Clark  
19 County Assessor's office (totaling 12,076 pieces). TCS made efforts to forward any returned Notices,  
20 where possible. TCS also caused an abbreviated, one-page notice to be sent by First Class Mail to all  
21 readily identifiable HVAC service companies and Nevada home inspectors (totaling more than 1,100  
22 pieces). As required by the preliminary approval order, TCS caused the Notice to be published in the  
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24 <sup>3</sup> Due to unusual circumstances, Class Counsel agreed to pay the costs associated with the settlement  
25 notice under the terms and conditions described in the Agreement, which require reimbursement from  
the settlement fund.

1 Nevada Press Association's participating network of newspapers<sup>4</sup> as well as the El Mundo newspaper  
2 (in Spanish) once per week for eight consecutive weeks starting on September 3, 2017. TCS also  
3 caused the Notice to be published through digital impressions on the websites maintained by the Las  
4 Vegas Review-Journal (in English), the El Mundo (in Spanish), the Nevada Appeal (in English), the El  
5 Sol de Nevada (in Spanish, and the Reno Gazette-Journal (in English) for a period of six weeks  
6 beginning during the week of September 3, 2017. Finally, TCS caused the Notice to be published via a  
7 Digital Marketing Campaign (social media ad campaign and digital targeted ads) for a six-week period  
8 or when the budgeted funds were exhausted, whichever came first, beginning the week of September  
9 3, 2017 (resulting in more than 3,000 click-throughs).

10 8. On October 26, 2017, Class Plaintiffs filed a Notice of (1) Completion of the Court-Ordered  
11 Class Notice Program and (2) Class Member Responses to the Class Notice. This notice certified  
12 completion of the court-ordered notice program and identified the class members' responses, which  
13 included three (3) objections and one (1) letter supporting the settlement. Later that same day, Class  
14 Plaintiffs filed a response to the class member objections.

15 **C. The Final Approval Hearing.**

16 9. Other than the three class member objections, the Court received no opposition to the Joint  
17 Motion or the Motion for Fees and Costs before the final fairness hearing.

18 10. On November 1, 2017, this Court held the final fairness hearing related to the settlement in  
19 accordance and compliance with NRCP 23(e).

20  
21 \_\_\_\_\_  
22 <sup>4</sup> The participating daily newspapers include the Las Vegas Review-Journal, the Las Vegas Sun, the  
23 Reno Gazette-Journal, the Nevada Appeal (Carson City), and the Elko Daily Free Press. The  
24 participating non-daily newspapers include Battle Mountain Bulge, Ely Times, Eureka Sentinel, The  
25 Humboldt Sun (Winnemucca), Lahontan Valley News (Fallon), Lincoln County Record (Caliente),  
Lovelock Review-Miner, Mineral County Independent-News (Hawthorne), North Lake Tahoe  
Bonanza (Incline Village), Pahrump Valley Times, The Record-Courier (Gardnerville), Sierra Sun  
(Truckee, CA), Sparks Tribune, Tahoe Daily Tribune (South Lake Tahoe), Wells Progress, and  
Wendover Times.

1 11. Class Counsel offered a presentation outlining, *inter alia*, the settlement terms and the notice  
2 provided to the class members. The Court received no opposition to the request for final approval of  
3 the settlement. Three class members sent Class Counsel written objections to the settlement, and Class  
4 Counsel did not receive any requests to appear at the final fairness hearing.

5 12. Counsel for the Settling Defendant and all others present at the hearing were offered the  
6 opportunity to present argument and voice objections, and no party or Class Member offered any  
7 opposition or objection to the Court's final approval of the settlement.

8 13. The Court finds that the distribution of the Notice as provided for in the Preliminary Approval  
9 Order constitutes the best notice practicable under the circumstances to all persons impacted by the  
10 settlement and fully meets the requirements of due process under the Nevada Rules of Civil Procedure.  
11 Prior to sending out the Notice, Class Counsel obtained the approval of this Court to the general form  
12 of the Notice, and the specific form of the Notice was provided to the Settling Defendant's counsel for  
13 review and comment prior to the distribution and publication of the Notice. Additionally, class  
14 members were provided abundant information with which to evaluate the settlement. The Notice was  
15 more than adequate to advise class members regarding the settlement, and not one party or person  
16 appearing at the Final Fairness Hearing filed or voiced a single objection about the form of the Notice.

17 **D. The Settlement is Fundamentally Fair, Adequate, and Reasonable.**

18 14. Nevada Rule of Civil Procedure 23(e) provides that a class action "shall not be dismissed or  
19 compromised without the approval of the court." NEV. R. CIV. P. 23(e). In approving a settlement, the  
20 court must determine whether, taken as a whole, the settlement is "fundamentally fair, adequate, and  
21 reasonable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *see also Class Plaintiffs*  
22 *v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). In determining whether a class action  
23 settlement should be finally approved and deemed fair and reasonable, the Court's discretion should be  
24 guided by the following factors: (1) the strength of the plaintiffs' case; (2) the risk, expense,  
25 complexity, and likely duration of further litigation; (3) the risk of maintaining class action status

1 throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and  
2 the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a  
3 governmental participant; and (8) the reaction of class members to the proposed settlement. *See*  
4 *Churchill Village, LLC v. Gen. Elec.*, 361 F.3d 556, 575 (9th Cir. 2004). “This list is not exhaustive,  
5 and different factors may predominate in different factual contexts.” *Torrise v. Tucson Elec. Power*  
6 *Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). In addition to these factors, courts may consider the procedure  
7 by which the parties arrived at the settlement to determine whether the settlement is truly the product  
8 of arm’s length bargaining, rather than the product of collusion or fraud. *See Chun-Hoon v. McKee*  
9 *Foods Corp.*, 716 F. Supp. 2d 848, 851 (N.D. Cal. 2010).

10 15. In considering whether a class action settlement is reasonable, the court must take into account  
11 the uncertainties and expense of trial and the difficulties in proving plaintiff’s case. *See In re Mego*  
12 *Fin. Sec. Corp. v. Nadler*, 213 F.3d 454, 459 (9th Cir. 2000). “[T]he very essence of a settlement is  
13 compromise, ‘a yielding of absolutes and an abandoning of highest hopes.’” *Officers for Justice v.*  
14 *Civil Service Comm’n of the City and County of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982)  
15 (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). Whether a settlement “could have  
16 been better” is not the question for the court; instead, the proper inquiry is whether it is “fair, adequate  
17 and free from collusion.” *Hanlon*, 150 F.3d at 1027; *see also Officers for Justice*, 688 F.2d at 625  
18 (“The proposed settlement is not to be judged against a hypothetical or speculative measure of what  
19 might have been achieved by the negotiators.”).

20 16. Having considered all the relevant factors, the Court finds the settlement to be fair, adequate,  
21 and reasonable, and the Court fully and finally approves it pursuant to Nevada Rule of Civil Procedure  
22 23(e).

23 17. The settlement is unquestionably the result of arm’s-length negotiations supervised by both a  
24 judicial officer and a separate, independent mediator. There is no evidence of collusion, and the  
25

1 participation of a judicial officer, a professional mediator, and the involvement of multiple counsel  
2 from different firms further evidences a lack of collusion.

3 18. The Settling Defendant has agreed to pay \$45,000,000 for Class Counsel to hold in trust for the  
4 benefit of the class members.

5 19. The settlement ensures that every Class Member has the ability to obtain substantial funds that  
6 can be put toward replacing the allegedly defective Aspen BB unit(s) installed in their homes. The  
7 evidence shows that the settlement amount represents a significant portion of the estimated cost to  
8 replace the allegedly defective Aspen BB units.

9 20. Given the risks, expense, and delay attendant to continued litigation against the Settling  
10 Defendant, the settlement amount is well within the range of reasonableness and is fair, adequate, and  
11 reasonable.

12 21. Risk and uncertainty in continued litigation are significant factors here. The Court must  
13 consider the strength and weaknesses of the Class Plaintiffs' case, the expense and complexity of  
14 proceeding through trial, and the likelihood of an appeal by the losing party. *See Churchill Village*,  
15 361 F.3d at 576. The Court has supervised this case for more than three years and is familiar with the  
16 parties' underlying disputes. The litigation against Settling Defendant has been hotly contested, and  
17 any additional benefits that might be gained through trial therefore would likely be substantially  
18 diluted by the delay inherent in acquiring them.

19 22. More importantly, the ability to be paid a full settlement payment now is far more valuable  
20 than the ability to pursue collection of a judgment in the future. Aspen's insurance carriers have at all  
21 times disputed any coverage for the class claims, resulting in multiple declaratory relief actions being  
22 filed to determine the extent, if any, of Aspen's available insurance coverage. The uncertainty  
23 surrounding Aspen's insurance coverage raised significant collectability concerns, as the judgment  
24 sought by the Class Plaintiffs could have forced Aspen into bankruptcy. Given the risks and delay  
25 attendant to continued litigation, the settlement is an exceptional result as it ensures that every one of



1 the class members an opportunity to obtain significant, quantifiable consideration in exchange for a  
2 release of their claims against the Settling Defendant.

3 23. Experienced, competent, and well-informed class counsel recommended the settlement.  
4 During the past few years, Class Counsel has undertaken substantial investigation at great expense on  
5 behalf of the Class. Their discovery efforts included the production and review of thousands of pages  
6 of documents and tens of thousands of photographs, written discovery, non-party discovery,  
7 inspections of hundreds of class and non-class homes, retaining a team of seven experts, preparation  
8 and publication of expert reports, and depositions of percipient and expert witnesses.

9 24. The timing of the settlement also weighs strongly in favor of approval. The settlement  
10 agreement was placed on the record more than three years after Class Plaintiffs filed the action, more  
11 than two years after class certification, after the close of discovery (which included extensive  
12 investigation and discovery by Class Counsel and all parties retaining experts), after the briefing of  
13 pretrial motions, and just days before trial. The parties completed all of this work before reaching the  
14 settlement, which provided each party with ample opportunity to investigate the claims and defenses.  
15 The facts in the case were well-developed and understood by all at the time the parties reached the  
16 settlement.

17 25. The positive reaction of the class members also heavily weighs in favor of approval. The class  
18 representatives support the settlement. Notice of the settlement was served upon the class members via  
19 direct mailings and publications. The notice was mailed to more than 48,000 addresses and published  
20 in dozens of newspapers and electronic outlets. In response, Class Counsel received only three (3)  
21 written objections from the estimated 60,000 class members and did not receive any requests to appear  
22 at the final fairness hearing.

23 26. The settlement allows the Class to avoid significant expenses associated with continued  
24 litigation against the Settling Defendant. Absent the settlement, significant trial time would be required  
25 (by the parties' estimates, approximately 2–4 months). The Court also considered and weighed the risk

1 that Class Plaintiffs could continue to invest in the lawsuit and lose at trial. Although Class Counsel  
2 has had tremendous success at trial in similar cases, the risks of a defense verdict and non-collection  
3 remain serious considerations. The settlement balances money in hand today versus the possibility of a  
4 loss at trial or the inability to collect on a favorable judgment. The Court also notes that the trial may  
5 be followed by significant, lengthy appeals. The settlement avoids all of the expense, delay, and risk  
6 associated with a lengthy jury trial and a time-consuming appeal process.

7 **E. Attorney's Fee Award and Reimbursement of Litigation Costs to Class Counsel.**

8 27. The Court also finds that Class Counsel, Canepa Riedy Abele ("CRA") and Kemp, Jones &  
9 Coulthard, LLP ("KJC"), are entitled to an award of attorney's fees totaling \$15,750,000 and  
10 reimbursement of litigation costs totaling \$745,397.36 from the settlement funds based upon the  
11 findings and conclusions below.

12 ***1. Attorney's Fees.***

13 28. The Nevada Supreme Court has adopted the common-fund doctrine and percentage-based fee  
14 approach because it requires the benefitting parties "to help pay for the expenses incurred in  
15 recovering [their] own money," and it "encourag[es] attorneys to undertake and diligently pursue cases  
16 such as this with the assurance of prompt and direct compensation." *State v. Elcano*, 106 Nev. 449,  
17 794 P.2d 725, 726 (1990). Courts surveying the field have found the typical, percentage-based fee  
18 awards to fall within the range of 25 to 50 percent. *See, e.g., In re Combustion, Inc.*, 968 F. Supp.  
19 1116, 1133 (W.D. La. 1997) (noting typical fees as one-third of the fund); *In re Rio Hair Naturalizer*  
20 *Products Liability Litig.*, 1996 WL 780512 at \*16 (E.D. Mich. 1996) (noting common fund fee awards  
21 to range "from 20 to 50 percent of the fund"); *accord, Maywalt v. Parker & Parsley Petroleum Co.*,  
22 963 F. Supp. 310, 313 (S.D. N.Y. 1997) (same). When determining fees in common-fund cases,  
23 "courts must do their best to award counsel the market price for legal services, in light of the risk of  
24 nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Marketing*  
25 *Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) (collecting cases) (emphasis added).

1 29. The settlement creates a common fund because it provides mathematically ascertainable  
2 benefits to the class members. *Elcano*, 794 P.2d at 726; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478  
3 (1980).

4 30. Whatever approach is used for calculating the fee award from a common fund, the amount of  
5 the award must be reasonable. This Court looks to the factors enumerated by the Nevada Supreme  
6 Court in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31, 33 (1969), as guidelines  
7 for that reasonableness determination. Those factors include: (a) the qualities of the advocate: his  
8 ability, his training, education, experience, professional standing and skill; (b) the character of the  
9 work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility  
10 imposed and the prominence and character of the parties where they affect the importance of the  
11 litigation; (c) the work actually performed by the lawyer: the skill, time and attention given to the  
12 work; (d) the result: whether the attorney was successful and what benefits were derived. *Id.* The  
13 federal courts also typically consider (a) the risks faced by class counsel, (b) how the requested fee  
14 percentage compares to the market rates and/or rates contained in counsel's retainer agreements with  
15 the class representatives, and (c) the length of the litigation and whether class counsel undertook the  
16 action on a contingency basis and was required by the litigation to forego other work. *See Vizcaino v.*  
17 *Microsoft Corp.*, 290 F.3d 1043, 1048–50 (9th Cir. 2002).

18 31. Based upon an application of the *Brunzell* factors, a fee of 35% of the settlement fund is  
19 reasonable in this case based on the findings and conclusions below.

20 a. The Qualities of Class Counsel: Class Counsel are highly experienced attorneys and  
21 have prosecuted many construction-defect and class-action lawsuits in this jurisdiction and elsewhere,  
22 including but not limited to (1) *In re Kitec*, a class with more than 32,000 members that resulted in  
23 settlements of more than \$250 million; (2) the Wirsbo and Viega/Vanguard plumbing-component  
24 classes with tens of thousands of members; and (3) *Forsyth v. Humana*, an 84,000-member class  
25 action against Humana, Inc. and Humana Insurance that resulted in a settlement of approximately

1 \$28.8 million. KJC was also involved in recent Syngenta matter involving approximately 100,000 U.S.  
2 farmers as well as the tobacco, breast implant, pedicle bone screw, and fen-phen litigation, all of  
3 which resulted in substantial recoveries.

4 b. The Character of the Work and Work Performed: In pursuing this litigation vigorously  
5 for the past three years, Class Counsel have protected and advanced the interests of the class, while  
6 handling complex issues. Class Counsel filed a successful motion for class certification, performed  
7 discovery to prepare the matter for trial, coordinated and conducted hundreds of home inspections and  
8 related laboratory testing, filed and responded to dozens of pretrial motions, prepared for jury selection  
9 and trial, and ultimately secured a favorable settlement that provides substantial funds for all class  
10 members. The quality of opposing counsel is also relevant in determining the skill required to perform  
11 the legal service. Here, the Settling Defendant has been defended vigorously by experienced and  
12 capable counsel with ample resources.

13 c. The Results Achieved: Class Counsel, despite the aggressive defense of the case,  
14 obtained a settlement totaling \$45,000,000 for the class members. Assuming every Class Member  
15 makes a claim on the fund, the settlement will provide approximately \$220 per Aspen Series BB unit.  
16 The settlement preserves the class members' rights and/or claims against the non-setting entities (e.g.,  
17 home builders, installers, suppliers), which could yield additional recoveries if pursued by the class  
18 members. This excellent result is the clearest reflection of Class Counsel's skill and expertise. As one  
19 court explained, absent the efforts of class counsel there would be no funds to distribute to the class  
20 members. *See In re Rio*, 1996 WL 780512 at \*17; *see also* Manual Complex Lit. § 14.121 (quoting  
21 NEWBERG ON CLASS ACTIONS § 14:6, at 547, 550 (4th ed. 2002)) (noting "the factor given the greatest  
22 emphasis is the size of the fund created, because 'a common fund is itself the measure of success and  
23 represents the benchmark from which a reasonable fee will be awarded'").

24 32. The additional *Vizcaino* factors support Class Plaintiffs' fee request. First, the litigation of  
25 contingent fee cases is fraught with substantial risks from the start, and those risks often increase as

1 the case develops. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011).  
2 Class Counsel filed this case with no promise of recovery or payment. For the past three years, Class  
3 Counsel carried all costs and faced significant financial risk in prosecuting this case on behalf of the  
4 class. This class action involved novel issues of law and years of hotly contested litigation. Class  
5 Counsel opposed many skilled defense attorneys. Despite the obstacles, Class Counsel secured a  
6 favorable recovery for the class members. Second, Class Counsel’s requested fee is less than the rate  
7 provided for in the contingency fee agreements with the class representatives. The contingency fee rate  
8 reflects the market rate for similar services in this jurisdiction. Third, Class Counsel’s substantial time  
9 invested in this action caused them to forego other work.

10 33. The qualities of Class Counsel, the character of the work they performed, and the tremendous  
11 results achieved all demonstrate that their “legal responsibility . . . [was] competently discharged, and  
12 their work skillfully performed,” to the significant benefit of numerous class members. *Brunzell*, 455  
13 P.2d at 34.

14 34. After considering the *Brunzell* factors and the additional *Vizcaino* factors, an attorney’s fee  
15 award of **\$15,750,000**—35% of the settlement fund—is fair and reasonable compensation for Class  
16 Counsel’s work and is consistent with contemporary class-action jurisprudence.

17 35. The reasonableness of the attorney’s fee award is also demonstrated by the fact that, after  
18 providing notice to the estimated 60,000 class members, only two (2) class members provided a  
19 written objection related to the requested attorney’s fee award. *See McCoy*, 569 F. Supp.2d 448, 476  
20 (D. N.J. 2008) (“lack of significant objections from the Class supports the reasonableness of a  
21 substantial fee request”); *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 515 (W.D. Pa. 2003).

## 22 **2. Reimbursement of Litigation Costs.**

23 36. “When the class action successfully recovers a fund for the benefit of a class, it is long-settled  
24 that the attorneys who created that class recovery are entitled to be reimbursed from the common fund  
25 for their reasonable litigation expenses.” NEWBERG ON CLASS ACTIONS § 14:2. Courts have

1 acknowledged that such expenses are reasonable and proper and should be reimbursed from a  
2 common-fund recovery. *See In re Microstrategy, Inc., Securities Litig.*, 172 F. Supp.2d 778, 791 (E.D.  
3 Va. 2001) (awarding 1.27% of a \$98.5 million settlement fund for reasonably incurred costs of  
4 “computer legal research, document reproduction, secretarial overtime, court reporting, expert  
5 witnesses and consultant fees, and travel, meals, and lodging”); *see also Mehling v. New York Life Ins.*  
6 *Co.*, 248 F.R.D. 455, 467 & n.21 (E.D. Penn. 2008) (awarding 30% in fees plus 15% in reimbursed  
7 costs from a common-fund recovery and noting expenses for travel and meals, transcripts,  
8 photocopying, website expenses, legal research fees, courier services, postage, filing and witness fees,  
9 overtime, mediation expenses, depositions, express mail, expert witness fees, and all costs associated  
10 with class and class-settlement notice, are customarily approved to be distributed from common fund  
11 recoveries); *In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403, 448 (S.D. Tex 1999) (awarding costs of  
12 more than \$7.9 million, or 4.2% of a \$164.2 million settlement fund); *In re Nasdaq Market-Makers*  
13 *Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D. N.Y. 1998) (approving class counsel’s request for full  
14 reimbursement of more than \$4.4 million in costs from a common settlement fund).

15 37. Class Counsel is entitled to a reimbursement of the expenses they advanced on behalf of the  
16 Class under the common-fund doctrine and based on their fee agreements with the class  
17 representatives. Class Counsel has requested **\$745,397.36**, approximately 1.7% of the settlement  
18 amount, as reimbursement of the costs they incurred in the prosecution of this class action. Based on  
19 the nature and size of this class action—a technical construction-defect class action with  
20 approximately 60,000 members—and the aggressive defense that lasted until just days before trial,  
21 these costs were reasonable, necessary, and connected to prosecuting this litigation.

22 **F. The Class Representative Service Award is Appropriate and Justified.**

23 38. Service or incentive awards to the class representatives are fairly typical in class action cases.  
24 *See* NEWBERG ON CLASS ACTIONS § 11:38. The awards are intended to compensate class  
25 representatives for work done on behalf of the class, to make up for financial or reputational risk

1 undertaken in bringing the action, and, sometimes, to recognize their willingness to act as private  
2 attorneys general. *See Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958-959 (9th Cir. 2009). “In  
3 general, courts have found that \$5,000 incentive payments are reasonable.” *Hopson v. Hanesbrands,*  
4 *Inc.*, No. 08–CV–0844–EDL, 2009 WL 928133, \*10 (N.D. Cal. Apr. 3, 2009) (citing *In re Mego*, 213  
5 F.3d at 463). In deciding whether a service award is warranted, “relevant factors include the actions  
6 the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted  
7 from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.”  
8 *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

9 39. While not binding on this Court, the Ninth Circuit has instructed the district courts to scrutinize  
10 incentive awards so that they do not undermine the adequacy of the class representatives. *Radcliffe v.*  
11 *Experian Info. Solutions, Inc.*, 715 F.3d 1157, 1163 (9th Cir. 2013). The district courts must determine  
12 whether there is a “significant disparity between the incentive awards and the payments to the rest of  
13 the class members” such that it creates a conflict of interest. *Id.* at 1165. In deciding whether an  
14 incentive award is warranted, “relevant factors include the actions the plaintiff has taken to protect the  
15 interests of the class, the degree to which the class has benefitted from those actions, and the amount  
16 of time and effort the plaintiff expended in pursuing the litigation.” *Cook*, 142 F.3d at 1016. The Court  
17 finds this guidance helpful in determining the appropriateness of service awards in this action.

18 40. Here, while the class representatives support the settlement, the one service award of \$10,000  
19 per home is not conditioned on their support and are proportionate to the expected payments to the  
20 class members. The service payments sought reflect and are proportionate to the risks and efforts by  
21 the class representatives in gathering and communicating information to counsel and acting as the  
22 public face of the litigation. The class representatives opened their homes up to inspections, assisted  
23 with the investigation and preparation of the lawsuit, and started preparing for trial. The class  
24 representatives stayed abreast of the case from the outset and have performed a valuable service to  
25 class members in helping to recover \$45,000,000 on behalf of the class. Without the class

1 representatives, the class members would have recovered nothing. A single service award is  
2 appropriate in light of the class representatives' time and effort to protect the interests of the class and  
3 the substantial benefits they helped achieve. Accordingly, the Court approves a single service award of  
4 \$10,000 to the class representatives Terence Moniz and Lisa Lee (because the class representatives  
5 jointly own one home, the request is for a single \$10,000 award).

6 **G. The Claims Administrator Will Benefit the Class.**

7 41. The Court has previously approved Total Class Solutions, LLC, a Texas Limited Liability  
8 Company ("TCS"), to administer numerous class-action settlements, including the dozens of Kitec-  
9 related settlements. TCS provides valuable services to the class members by ensuring the settlement  
10 funds are paid to all qualifying claimants in a timely and orderly fashion. In this case, TCS's services  
11 will include, but are not limited to, mailing final settlement notices and claim forms, processing and  
12 evaluating class members' claims, and distributing the settlement funds to the class members. For its  
13 services, TCS will be paid approximately \$50 per claim plus reasonable per-service fees for  
14 subsequent settlement notices and other administration duties. The Court approves setting aside  
15 \$1,900,000 (providing payment for an estimated 27,500 claims) from the settlement funds to  
16 compensate TCS for its claims administration services. TCS shall be paid from the settlement funds as  
17 its services are performed.

18 **II.**

19 **ORDER**

20 Based on the foregoing filings and conclusions, it is hereby ORDERED, ADJUDGED AND  
21 DECREED that:

22 The settlement and the settlement agreement and release are approved pursuant to NRCP 23(e)  
23 as fair, adequate, and reasonable.  
24  
25



1           The Settling Defendant and/or its insurers shall immediately tender all unpaid settlement funds  
2 or, if the due date for payment has not yet arrived pursuant to the settlement terms, on or before the  
3 due date.

4           All claims of any kind asserted by and between Class Plaintiffs and Aspen are dismissed with  
5 prejudice as to the Aspen Series BB units installed in the Class Homes.

6           The Court shall retain jurisdiction over this settlement and the settling parties to enforce the  
7 terms of the agreement and oversee the administration of the settlement funds.

8           Class Plaintiffs' request for an award of attorney's fees and costs is GRANTED. Class  
9 Plaintiffs are hereby awarded a total of \$15,750,000 in attorney's fees and \$745,397.36 in reimbursed  
10 expenses for a total fee and cost award of \$16,495,397.36 to be disbursed to Class Counsel from the  
11 settlement funds. Otherwise, the settling parties are to bear their own attorney's fees and costs.

12           Class Plaintiffs' request for one service award of \$10,000 to the class representatives Terence  
13 Moniz and Lisa Lee (a total of \$10,000) is GRANTED. This amount shall be disbursed from the  
14 settlement funds.

15 ///


19 ///

23 ///

1 Total Class Solutions, LLC is hereby appointed as the claims administrator for this settlement  
2 and shall be compensated for its service consistent with the manner described in the Joint Motion.

3 **IT IS SO ORDERED.**

4 DATED: November 1, 2017.

5  
6   
7 Judge Timothy C. Williams

8 Respectfully submitted by:

9 

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