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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FEDERAL INSURANCE COMPANY

Claimant-Plaintiff,

vs.

CALDERA MEDICAL, INC., and DENISE M. FLANIGAN, ROSIE JEAN BATES, TAMMY L. MCILROY, BRENDA DEYO, SUSAN STONE, KIMBERLY DURHAM, ELAINE TACK, SHARON PEER, ELIZABETH BAILEY, BARBARA COE, DOREEN ESPARZA, CLARA PERELKA, PEGGY GRUBBS, CONNIE WILLIAMSON, CHRISTINE MATHEWS, KATRINA BAKER, DAWN BURNHAM, NANCY ROBERTS, GLENDA THORNE, BENELLA OLTREMARI, PHYLLIS W. BROWN, JOANNE MONGEAU, SYBIL WASHINGTON, and CELINES RAMIREZ, and all others similarly situated

Claimants-Defendants.

Case No. 2:15-CV-00393-SVW-PJW

JOINT MOTION FOR FINAL SETTLEMENT APPROVAL AND CLASS CERTIFICATION

Date: June 13, 2016
Time: 1:30 p.m.
Dept: 6
Judge: Hon. Stephen V. Wilson

Complaint Filed: January 20, 2015
Pretrial Dates: None Set
Trial Date: None Set

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, Claimant-Plaintiff Federal Insurance Company ("Federal"), Claimant-Defendant Caldera Medical, Inc. ("Caldera"), all individuals asserting claims against Caldera who have been named as Claimant-Defendants in this action (the "Individual Claimant-Defendants"), and Celines Ramirez as the putative Class Representative of a proposed the Settlement Class have agreed to a non-opt-out class settlement. On June 13, 2016 at 1:30 p.m., or as soon thereafter as the matter may be heard, in Courtroom 6 of the above-entitled court, located at 312 North Spring Street, Los Angeles, CA 90012, the parties will and hereby do move for final approval of the Settlement and for final certification of the Settlement Class.

More specifically, the parties respectfully request that this Court adopt and enter the parties' [Proposed] Final Judgment And Bar Order and thereby give final approval to the terms of the Settlement; find that the Settlement was made in good faith and is fair, reasonable, adequate, and consistent with due process; certify the Settlement Class pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure; appoint Celines Ramirez as the Class Representative and David Bricker as Class Counsel; bar future litigation of claims released by the Settlement; set a further, post-approval hearing to consider a proposed plan for distributing settlement proceeds to the members of the Settlement Class; and retain jurisdiction to enforce and implement the Settlement.

This motion has been made and set for hearing in accordance with the Court's January 25, 2016 Order Granting Motion For Preliminary Settlement Approval, Preliminary Class Certification, And Class Notice (Docket No. 217) (the "Preliminary Approval Order"). The motion is based upon this Notice, the attached Memorandum of Points and Authorities, the Declarations and Exhibits submitted in support of the motion, all other filings in this action, and upon such other and further matters as may be presented at or before the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Court should approve the parties' Settlement, which presents the only mechanism by which thousands of injured women will ever recover any payments on their tort claims against Caldera. Other than the Federal insurance Policies, Caldera has no assets with which to pay settlements or judgments on these claims. It also has no net profits. Caldera's continuing operations generate barely enough income to cover its expenses. With such an impecunious defendant, a stark choice is presented. If the Settlement is approved, the approximately 4,000 members of the Settlement Class who submitted claim forms will receive something. If litigation continues, the Policies will be swiftly exhausted, Caldera will be forced into bankruptcy, and most or all of the claimants will receive nothing.

Not only is the Settlement the only practical solution to the myriad problems created by the gulf between Caldera's extensive potential liability and its limited funds, the Settlement and the proposed Settlement Class also satisfy all requirements of Rule 23 of the Federal Rules of Civil Procedure. Not even the few members of the proposed Class who object to the Settlement challenge this Court's prior determination that the Rule 23(a) prerequisites for class certification have been met. The Rule 23(b)(1)(B) requirements for certification of a mandatory, limited-fund class also have been fulfilled. The evidence presented by the parties establishes that the Federal Policies are the only asset available to pay the claims; the total value of the remaining Policy limits is $12.25 million; Federal will be required to pay this full amount in settlement; the entire payment will be devoted to claims against Caldera; and more than 95% of the settlement payment will be immediately distributed in accordance with a plan to be approved by the Court.

The parties also have made a substantial showing that the Settlement is fair and reasonable as required by Rule 23(e). It is undisputed that the Settlement is not the

result of collusion but, rather, is the product of vigorous, arms-length negotiations. The settlement payment represents the full amount available to fund any settlement; while continued litigation presents a substantial risk that the claimants ultimately will recover less than this amount – or nothing at all. Indeed, continued litigation presents two distinct risks. Caldera's defense costs automatically would erode the Policy limits. And Federal's pending motion for summary judgment would, if granted, result in rulings that further reduced or eliminated Caldera's coverage under the Policies.

The views of the claimants themselves, and of their settlement counsel, also weigh heavily in favor of approving the Settlement. Of the approximately 4,000 members of the Settlement Class, only 46 individuals – 1.15% of the Class – have submitted objections. Finally, the claimants' attorneys who have been working on this matter for years – and who spent more than 13 months on the series of negotiations that resulted in the Settlement – have concluded that the parties' agreement represents the best possible deal for the claimants under the circumstances.

II. BACKGROUND

A. The Claims Against Caldera, The Policies, And The Interpleader Action.

The underlying tort claims at issue in this action relate to injuries allegedly caused by Caldera's transvaginal mesh ("TVM") products. The claims regarding Caldera TVM products, asserted against Caldera and related "Stream of Commerce Defendants," were described in detail in the parties' Joint Motion For Preliminary Settlement Approval (Docket No. 209 at 3:8-4:15). Caldera has sought coverage from Federal for the TVM claims.

Federal issued to Caldera Life Sciences Insurance Program Policy No. 7499-85-32 SFO, for the following policy periods: (1) August 1, 2008 to August 1, 2009 ("2008 Policy"), with limits of liability of $10,000,000; (2) August 1, 2009 to August 1, 2010 ("2009 Policy"), with limits of liability of $10,000,000; (3) August 1, 2010 to November 1, 2011 ("2010 Policy"), with limits of liability of $10,000,000; and (4)

November 1, 2011 to November 1, 2012 ("2011 Policy"), with limits of liability of $5,000,000; the 2008 Policy, 2009 Policy, 2010 Policy (including the extended reporting periods and extended occurrence period added thereto), and 2011 Policy (including the extended reporting periods added thereto) are collectively referred to herein as the "Policies"). 12/28/15 Johnson Decl. (Docket No. 209-2) at ¶3. [1]

The Policies provide "claims-made" insurance. Each Policy limits coverage in part to claims that are "first made against any insured during … the policy period; or … any Extended Reporting Period … ." Vatalaro Decl., Exh. H (2010 Policy at FIC000327). *See also* Federal's Separate Statement at ¶¶9-12. At least for the 2010 Policy, however, a supplemental extended reporting period ("SERP") stretches the deadline for bringing claims far past the expiration of the policy period. Vatalaro Decl., Exh. H (2010 Policy) at FIC000423-424, 443, and 447-448. It is undisputed that "the 2010 SERP is unlimited, and would … apply to claims made until the end of time." Federal's MSJ at 10:10-12.

The Policies also have "burning-limits" provisions, such that all sums paid by Federal as defense costs (or indemnity) under the Policies erode the limits available to pay judgments or settlements on the TVM claims. 12/28/15 Johnson Decl. at ¶3. *See also, e.g.,* Vatalaro Decl., Exh. H at FIC000109-111, 257-259, 405-407, 599-601, 749-751. Subject to the Policies' terms and conditions, the defense costs that reduce the Policy limits are not confined to those incurred by Caldera. The Policies also provide coverage for additional insureds and indemnitees – including "vendors" of Caldera products and third parties that Caldera is contractually obligated to defend or indemnify under "Insured Contracts." *Id.*, Exh. F at FIC000046-47 and 72; Exh. G at FIC000194-

[1] Federal submitted the Policies to the Court with its Motion for Partial Summary Judgment (Docket No. 113) ("MSJ"). The Policies, in their entirety, are appended to the 5/06/15 Declaration of Michele L. Vatalaro (Docket No. 113-4) ("Vatalaro Decl.") as Exhibits F, G, H, and I; and are summarized in Federal's 5/06/16 Statement of Uncontroverted Facts and Conclusions of Law in Support of Motion for Partial Summary Judgement (Docket No. 113-2) ("Federal's Separate Statement").

195 and 220; Exh. H at FIC000332-333 and 358; Exh. I at FIC000526-527, 552 and 704.

While Federal was paying defense costs, and the Policy limits were thereby being spent down, Federal filed this interpleader action. Subsequently, Federal filed its Motion for Partial Summary Judgment (Docket No. 113). Federal's Motion started from the undisputed premise that the maximum coverage available under the Policies for TVM claims was never more than $25 million because "[w]hether it be the 2008 Policy or … the 2009 Policy that applies, both Federal and Caldera are in agreement that only one of those two Policies provides coverage … ." Caldera's Response to Federal's Separate Statement (Docket No. 132 at ¶8; admitting this fact). Federal then asserted various coverage defenses which, if successful, could substantially reduce – or entirely eliminate – the remaining Policy limits. 12/28/15 Johnson Decl. at ¶5. Federal in part sought rulings that coverage under the 2008 (or 2009) Policy "is subject to a $50,000 per Batch deductible, which must be satisfied before any Loss is payable"; the 2008 (or 2009) Policy does not provide coverage for any claims made after the expiration of the Policy; "coverage under the 2010 Policy is subject to a $50,000 per Event deductible"; Caldera had failed to pay deductibles due on the 2010 Policy and that, therefore, "the 2010 Policy is cancelled effective April 16, 2015"; and "any coverage available under the 2011 Policy is subject to a $75,000 per Claim deductible." *See* Federal's MSJ at pp. i-iii. Federal also sought a ruling that the 2011 Policy did not provide coverage for claims relating to any of the Caldera TVM products at issue. *Id.* at 1:25-28 and 22:1-6.

Both the Individual Claimant-Defendants and Caldera Opposed Federal's Motion. Docket Nos.131-134. The parties fully briefed Federal's motion and the Court heard oral argument on June 9, 2015. Docket No. 159.

B. The Parties' Settlement.

While Federal's Motion was still pending, the parties went forward with a mediation under the auspices of Robert Kaplan. He ultimately presented a mediator's proposal, which all parties accepted on July 24, 2014. 5/16/16 Abrams Decl. ¶11. The parties then devoted months to the extensive further negotiations needed to prepare a complete, final settlement agreement. *Id*. ¶14. The parties filed a joint motion for preliminary approval of the Settlement in December of 2015 (Docket No. 209); and the Court subsequently entered its Preliminary Approval Order (Docket No. 217).

The parties previously submitted a copy of the Settlement (Docket No. 209-2, Exh. 1) and provided the Court with a detailed description of its terms (Docket No. 209 at 7:20-10:19). The parties here note only a few, significant terms of the Settlement.

The Settlement Class. The parties' Settlement is intended to resolve all known TVM claims relating to Caldera products and is conditioned on approval of a mandatory Rule 23(b)(1)(B) Settlement Class including all claims filed, made subject to tolling agreements, and/or as identified in Proof of Claim forms, prior to a May 2, 2016 TVM Claim Cutoff Date. Settlement ¶1.5; Docket No. 217 at 12.

Releases. If the Settlement is approved, all parties will mutually release each other. Settlement ¶¶5.1-5.6. In addition, the Settlement Class will release claims against a defined set of "Insureds and/or Contractual Indemnitees" (Settlement ¶1.6) – but only to the extent that such claims are for injuries arising out of Caldera TVM products (Settlement ¶5.5A).

The Parties, in consultation, identified certain Stream of Commerce Defendants – Biomedical Structures, Encision, Coloplast (on its own and as a successor to Mpathy Medical Devices), Parker Hannifin, and J-PAC – as entities that either potentially qualify as insured "vendors" under the Policies, or potentially are (or at some time may have been) entitled to contractual indemnity under "Insured Contracts" under the Policies. 5/16/16 Johnson Decl. ¶3. Neither Caldera nor Federal was willing to run the

risk that any of these entities, if not included in the release, might later claim coverage under the Policies or damages against Caldera. *Id.* The Settlement does not include any release of any claims asserted against American Medical Systems, Inc. ("AMS") because those claims are not even potentially covered; this Court has already ruled that AMS is not an insured under any of the Policies. Docket No. 183.

The Settlement Sum. The total Settlement Sum is $12,250,000; and will be paid by Federal after final approval of the Settlement. Settlement ¶4.1. Of the $12,250,000 Settlement Sum, $1 million has been set aside as a "Holdback," out of which $500,000 is reserved to cover fees and costs related to class notice and settlement administration; and $500,000 is reserved for Caldera to use in paying defense costs, settlements, and/or judgments on future claims. Settlement ¶4.2.a. Any unused portions of the Holdback remaining at the end of five years will be distributed to the Settlement Class. *Id*.

C. Class Notice, Submission Of Claim Forms, And Submission Of Objections.

Notice of the Settlement has now been provided in accordance with the Court's Preliminary Approval Order. 5/16/16 Bricker Decl. at ¶4. By February 8, 2016 the settlement administrator had mailed the form of Class Notice approved by the Court to the attorney of record for each of the known members of the proposed Settlement Class. *Id*. By February 24, 2016 the settlement administrator had published the short-form Publication Notice in the *USA Today* newspaper and the *Wall Street Journal, National Edition* as directed by the Court. *Id*. In addition, the long-form Class Notice has now been posted on the administrator's website for more than ninety days. *Id*.

After distribution of notice, approximately 4,000 members of the Settlement Class submitted claim forms to the settlement administrator. *Id*. ¶5. Only 46 class members objected to the Settlement. The settlement administrator received ten objections submitted by individual claimants or their attorneys. *See* 5/16/16 Renneisen Decl., Exh. A-J. In addition, the law firm Kline & Specter, P.C. filed a request to appear at the final approval hearing that appended written objections asserted on behalf 36

claimants. Docket No. 229. The law firm of Mazie Slater Katz & Freeman, LLC ("Mazie Slater") wrote to the settlement administrator "to communicate multiple objections" – but did not identify any member of the settlement class on whose behalf these objections were purportedly asserted. 5/16/16 Renneisen Decl., Exh. K.[2]

III. DISCUSSION

A. The Parties Now Seek Final Approval Of The Settlement And Certification Of The Settlement Class.

"'[S]trong judicial policy ... favors settlements.'" *Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 576 (9th Cir. 2004) (citation omitted) ("*Churchill*"). In accordance with that policy, the parties devoted considerable efforts to resolving their disputes – including multiple mediations and settlement conferences, involving a sitting Superior Court Judge and two respected mediators, one of whom made a mediator's proposal forming the basis of the Settlement. 5/16/15 Abrams Decl. ¶¶7-11. The Court has granted preliminary approval to the Settlement and the Class has been notified of its terms; thus the Court now is called upon to "reach a final determination as to whether the parties should be allowed to settle the class action pursuant to the terms agreed upon." *Ontiveros v. Zamora*, 303 F.R.D. 356, 363 (E.D. Cal. 2014).

As the Ninth Circuit has recognized, judicial review of a class settlement "takes place in the shadow of the reality that rejection of a settlement creates not only delay but also a state of uncertainty on all sides, with whatever gains were potentially achieved for the putative class put at risk." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). Nevertheless, when reviewing a class settlement, "courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." *Id*. The Settlement fully satisfies both prongs of this two-step inquiry.

[2] AMS has filed "Objections." Docket No. 227. But AMS has no standing to object to the Settlement: it is not a member of the proposed Settlement Class; and as the Court has entered judgment against AMS "pursuant to Rule 54(b) dismissing AMS from this action" (Docket No. 193), AMS is not even a party to these proceedings. This motion therefore largely disregards AMS's contentions. The parties have separately filed a motion to strike AMS's "Objections."

B. The Proposed Mandatory Settlement Class Should Be Certified.

1. The Requirements of Rule 23(a) are Satisfied.

In approving the Settlement, the Court's "threshold task is to ascertain whether the proposed settlement class satisfies the requirements of Rule 23(a) of the Federal Rules of Civil Procedure applicable to all class actions, namely: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). The parties previously briefed these issues (Docket No. 209 at 12:1-14:16); and the Court has already found that all four Rule 23(a) prerequisites for class certification have been met (Docket No. 217 at 5-7). There is no reason for the Court to abandon its prior findings.

Numerosity. The Court previously ruled, "Here, the putative class contains no fewer than 2,710 claimants. Therefore, numerosity is satisfied." Docket No. 217 at 5. No objector has challenged this ruling; and the size of the Class has increased to include approximately 4,000 claimants.

Commonality. No objector has challenged the Court's conclusion that "[c]ommonality exists across the proposed class." *Id*. at 6. "In the underlying action, common questions include whether Caldera knew or should have known that its TVM products created an increased risk to consumers …"; and "[i]n the present interpleader action, all claimants have a joint interest in maximizing the insurance." *Id*.

Typicality. Under Rule 23(a)'s "'permissive standards, representative claims are "typical" if they are reasonably coextensive with those of absent class members.'" *Staton*, 327 F.3d at 952 (quoting *Hanlon*, 150 F.3d at 1020). As the Court previously held, the claims asserted by the proposed Class Representative, Celines Ramirez, are typical because they "raise the same common questions" as those asserted by the unnamed members of the Settlement Class. Docket No. 217 at 6.

To the extent that there is any challenge to Plaintiff Ramirez's typicality, it is based on the contention that there is no basis for evaluating her alleged injuries and

claimed damages in comparison to those of the unnamed class members.[3] But, "'[t]ypicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought.'" *Parsons v. Ryan*, 754 F.3d 657, 685 (2014) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.1992)). A focus on the specific injuries or damages sustained by Ramirez is nether necessary or appropriate for a Rule 23(a) analysis.

It is likewise erroneous to suggest that individualized injury or causation questions raised by unnamed claimants could defeat certification of a class under Rules 23(a) and 23(b)(1)(B). This suggestion improperly seeks to "'blend[]' Rule 23(a)(2)'s commonality requirement with Rule 23(b)(3)'s inquiry into whether common questions 'predominate' over individual ones." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) ("*Wal-Mart*"). As the parties do not seek to certify a class under Rule 23(b)(3), only Rule 23(a) applies here. "So long as there is 'even a single common question,' a would-be class can satisfy the commonality requirement of Rule 23(a)(2)." *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013) (quoting *Wal-Mart*, 564 U.S. at 359). *See also Parsons*, 754 F.3d at 675. In this case, "Rule 23(a)'s commonality and typicality requirements … merge"; and the Court may find that both requirements are satisfied because "'the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Id.* at 685 (quoting *Wal-Mart*, 564 U.S. at 359 n. 5).

Adequacy. The Court already has held that Celines Ramirez and David Bricker meet the "adequacy" requirement to serve as the Class Representative and Class Counsel. Docket No. 217 at 7. The Court in part concluded, "there is no suggestion that either the named Plaintiff or class counsel pursued the case less than vigorously";

[3] These arguments are raised by AMS (Docket No. 227 at 19:3-21:15) and by Mazie Slater (5/16/16 Renneisen Decl., Exh. K at 2-3). Neither AMS nor Mazie Slater is a member of the Settlement Class or has standing to object to the settlement. Nevertheless, in the interest of completeness, the parties have expanded their discussion Rule 23(a) to address the contentions of AMS and Mazie Slater.

and "there are no apparent conflicts of interest." *Id*. No one "challenge[s] the competence of class counsel, and the record dispels any cause for concern." *Hanlon*, 150 F.3d at 1021. The vigorous prosecution of the litigation and the arms-length nature of the parties' settlement negotiations are similarly unquestioned. Indeed, no member of the Settlement Class objects to the adequacy of the Class Representative and Class Counsel or contends that they suffer from any conflict of interest.

AMS, however, argues that the interests of various members of the Settlement Class are divergent because the Proof of Claim form identifies five levels of injury, and a different quantum of relief presumably will be paid for those in each injury category. It further argues that no single plaintiff could serve as an adequate representative for all five injury levels.

"But the fact that it is *possible* to draw a line between categories of class members does not necessarily *require* separate representation for each category." *Shaffer v. Continental Cas. Co*., 362 Fed.Appx. 627, 630-631 (9th Cir. 2010) (citing *Staton*, 327 F.3d at 958). The Ninth Circuit does "not 'favor denial of class certification on the basis of speculative conflicts.'" *In re Online DVD-Rental Antitrust Litigation*, 779 F.3d 934, 942 (9th Cir. 2015) (quoting *Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003)). A named plaintiff will be deemed an inadequate representative of a settlement class only where an objector can identify a "fundamental conflict" that "goes to the specific issues in controversy." *Id*. (citations omitted). AMS has not done so. Its suggestion that Ramirez might be disregarding the interests of claimants in different injury categories is entirely speculative. Moreover, how the Settlement Sum should be distributed is a separate question from whether the Settlement should be approved. Any issues relating to the plan for allocating the proceeds of the Settlement may be addressed after final approval of the Settlement and certification of the Settlement Class. *See* Settlement ¶4.8 and Section III.E, below.

2. The Requirements of Rule 23(b)(1)(B) are Satisfied.

A mandatory Settlement Class should be certified under Rule 23(b)(1)(B). Pursuant to *Ortiz*, "mandatory class treatment through representative actions on a limited fund theory [is] justified with reference to a 'fund' with a definitely ascertained limit, all of which would be distributed to satisfy all those with liquidated claims based on a common theory of liability, by an equitable, pro rata distribution." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 841. All of the *Ortiz* requirements are satisfied.[4]

As this Court previously found, "While Caldera's potential liability on the TVM claims could exceed $100 million, Caldera does not have the funds to pay even a discounted fraction of such liability." Docket 217 at 9. No objector disputes the Court's holding, or the parties' prior showing, that Caldera faces potential liability of more than $100 million. Nor does anyone contend that Caldera has the resources to pay judgments or settlements on 4,000 claims litigated seriatim. Rather, objectors argue the "limited fund" should include more than the value of the Policies; and that "Caldera has failed to adequately demonstrate that … the complete and total available funds" have been contributed to the settlement. *See* Docket No. 229 at 54-56 (Kline & Specter).

The evidence refutes these arguments. Caldera has only enough cash on hand and net income to cover payroll and operating expenses; it has no net profits and no liquid funds to contribute to a settlement. 5/16/16 Merade Decl. ¶¶2-4. Also, Caldera has significant debt secured by the assets of the company and no ability to borrow additional funds. *Id*. ¶5. Caldera's non-insurance assets, including its intellectual property, are encumbered by debt; Caldera cannot sell them to raise funds. *Id*. Ex. 1, Moss Adams LLP Report at Note 5.

Caldera may remain a going concern; but, as there is no evidence that its continuing operations are generating any net profits, they are irrelevant. Further, while

[4] The *Ortiz* requirements and the propriety of certifying a mandatory class are also discussed in detail in the Joint Opposition to and Motion to Strike AMS's Objection and Request for Stay, filed by the parties on May 16, 2016 (the "Motion to Strike").

Kline & Specter argues that "the asset here is Caldera itself" (Docket No. 229 at 55), the value of that asset can be no more than what a prudent buyer would pay to acquire Caldera. Caldera has received no offers to buy the company or its assets and there is no plan to sell Caldera after the Settlement is approved. 5/16/16 Merade Decl. ¶6. Thus, even with the resolution of known TVM claims, Caldera's fair-market value is negligible.

Accordingly, Caldera's insurance is the only asset available to pay for a settlement. Other than the Federal Policies, Caldera does not possess any additional insurance potentially applicable to the TVM tort claims at issue. 5/16/16 Cusack Decl. The value of the Federal Policies thus is the "definitely ascertained limit" of the fund. *Ortiz*, 527 U.S. at 841.[5] In its Motion for Partial Summary Judgment, and throughout this litigation, Federal contended that no more than $20 million in limits was ever potentially responsive to the TVM claims. 5/16/16 Johnson Decl. ¶4. As of December 28 2015, Federal had already paid more than $7,275,000 of these Policy limits to cover defense costs and one settlement – and has continued since that time to pay additional defense costs from the Settlement's $450,000 defense costs reserve. *Id*. The Settlement requires Federal to pay the full $12.25 million that remains of the Policy limits. *Id*.

The parties are not asking the Court to "simply accept[]" their assertions regarding the value of the Policies; with Federal's Motion fully briefed, the Court has all the information it needs to "undertak[e] an independent evaluation of potential insurance funds." *Ortiz*, 527 U.S. at 851. At a minimum, $12.25 million represents a fair calculation of the Policies' total face "value [as] discounted by [the] risk" that

[5] AMS contends that the available fund is not limited to the value of the Policies or any other asset owned by Caldera and that the assets of Stream of Commerce Defendants should also be considered. This argument should be disregarded. AMS cites no authority supporting the suggestion that the assets of entities that are not parties to a settlement are relevant in evaluating the settlement fund. *And see* discussion below at p.18.

Federal's Motion would result in a determination that little or no coverage remained under any of the Policies (*id*.), and as eroded by close to $8 million in prior payments.

In accordance with *Ortiz*, "the whole of the inadequate fund [is] to be devoted to the overwhelming claims." *Id*. at 839. A total of $11.75 million will be immediately distributed as payments to currently known claimants, counsel, and the settlement administrator. While $500,000 – about 4% of the Settlement Sum – is being reserved as a Holdback for Caldera, this money may be used only for future TVM claims. Settlement ¶4.2.a. Moreover, any portion of this Holdback not used within five years will be distributed to the Settlement Class. *Id*.

The final *Ortiz* requirement is also satisfied. The claimants will be "treated equitably among themselves." *Ortiz*, 527 U.S. at 839. The Settlement Class includes all known claimants, and all of their claims will be "be satisfied from the limited fund as the source of payment" (*id*.) in accordance with a distribution plan to be approved by the Court.

C. The Parties' Settlement Is Fair And Should Be Approved.

In the Preliminary Approval Order, this Court held, "the proposed settlement … appears fair and reasonable on its face"; and "is the fairest way of ensuring that those asserting TVM claims against Caldera will receive any compensation." Docket No. 217 at 9. In accordance with Rule 23(e), the Court should now confirm that the Settlement is "fair, reasonable, and adequate"; and grant final approval to it.

To determine the fairness of a Settlement under Rule 23(e), courts "look to the eight *Churchill* factors." *In re Online DVD-Rental Antitrust Litigation*, 779 F.3d at 944 (citations omitted). These factors are:

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

Churchill, 361 F.3d at 575. As a final factor, *Churchill* also provides, "the settlement may not be the product of collusion among the negotiating parties." *Id*. at 576. The *Churchill* factors are non-exclusive and not every factor will be applicable to every case. *Id*. at 576 n. 7. Here, all of the pertinent factors weigh in favor approving the Settlement.

The strength of the plaintiff's case and the risk of further litigation. While claimants have strong claims against Caldera, the strength of the underlying tort claims is largely irrelevant in light of Caldera's lack of funds.

The most immediate risks presented by the prospect of pursuing further litigation are raised by the Motion for Partial Summary Judgment filed by Federal in this interpleader action. That Motion is fully briefed and this Court presumably would rule on it before any claimant had a chance to advance her tort claims against Caldera. If granted, even in part, Federal's Motion could significantly reduce the coverage available under the Policies. 12/28/15 Johnson Decl. ¶5.

For example, Federal in part argues that – assuming the 2008 (or 2009) Policy applies at all – coverage under the Policy is subject to a "per batch" deductible; and claims potentially covered under the Policy relate to TVM products from at least 190 different batches. Docket No. 113 at 16:8-26. The per batch deductible applies to defense costs as well as indemnity payments. Vatalaro Decl., Exh. F at FIC000121-122; Exh. G at FIC000269-270. Thus, if Federal's arguments on this point were successful, the total deductible owed by Caldera on the 2008 (or 2009) Policy would be $9,500,000 (190 × $50,000). This sum is higher than the total defense costs paid to date and substantially greater than any amount that Caldera ever could pay. The deductibles owed by Caldera thus could preclude the Policy proceeds from being used to fund any payments to TVM claimants.

In addition to the risks relating to Federal's pending Motion, continuing the litigation presents a significant danger that Caldera will run out of money before most or all of the claimants can ever obtain any recovery. Other than the Policies, Caldera

has no resources with which to pay settlements or judgments on TVM Claims. 12/28/15 Merade Decl. ¶¶4-7. The limits of the Policies are eroded by all sums that Federal pays to cover defense costs incurred by Caldera or other insureds in litigating tort claims alleging injuries caused by Caldera products. 12/28/15 Johnson Decl. ¶5. Continuing litigation thereby reduces the Policy limits available for distribution to the members of the putative Settlement Class and increases the chances that Caldera will expend all of its funds and/or declare bankruptcy without ever paying them anything.

The risk of maintaining class action status throughout the trial. While all parties agree that certification of the Settlement Class is appropriate, the Individual Claimant Defendants opposed Federal's motion seeking certification of a litigation class. Docket No. 138. Without the Settlement and the certification of the Settlement Class, each individual claimant has an interest, adverse to the interests of every other claimant, in quickly grabbing the largest possible share of Caldera's inadequate and diminishing funds. Given these conflicts, neither the Individual Claimant Defendants nor their attorneys were willing to represent a class in a non-settlement context. *Id*. There thus is no guarantee a litigation class could be maintained. And, even if such a class were certified over the objections of the Individual Claimant Defendants, it would not include any mechanism for ensuring that the available funds were fairly distributed among all claimants.

The amount offered in settlement. As discussed in detail in Section III.B.2, above, the $12,250,000 being paid by Federal as the Settlement Sum represents the total of all funds available to settle this matter.

The extent of discovery completed and the stage of the proceedings. With respect to this interpleader action – with Federal's Motion for Partial Summary Judgment, its motion for class certification, and numerous other motions fully briefed and argued – the proceedings are well advanced. The Court is in good position to "evaluate[] the merits and likelihood of success of the settling plaintiffs' [arguments on coverage

issues.]" *Churchill*, 361 F.3d at 576 (finding it significant that, at the time of settlement, "summary judgment motions were pending before the court").

The underlying tort litigation has been going on for years. The attorneys for the claimants conducted significant formal and informal discovery, including discovery relating to Caldera's financial condition, before agreeing to the Settlement. These discovery efforts in part involved review of Caldera's insurance policies, financial statements, and licensing agreements; and the deposition of Caldera's director of finance. 12/28/15 Menzies Decl. ¶¶8-9. As counsel previously testified, enough discovery was done to enable attorneys for claimants to conclude that "further litigation against Caldera would serve to diminish the already limited insurance coverage such that Plaintiffs, even if all of Caldera's assets were liquidated, would likely receive substantially less" through further litigation than through the Settlement. *Id*. ¶10.

The experience and view of counsel. An additional declaration has now been provided by Rachel Abrams – who is one of the lead attorneys in a joint coordinated proceeding involving hundreds of Caldera TVM claims, pending before Judge Highberger of the Los Angeles Superior Court and entitled *In Re Transvaginal Mesh Litigation*, No. JCCP 4733 (the "JCCP Action"); served as co-settlement liaison counsel with Karen Menzies; and coordinated with the small group of plaintiffs' firms (the "Steering Committee") actively involved in litigating the JCCP Action and pursing settlement negotiations. 5/16/16 Abrams Decl. ¶¶3-6.

Her declaration establishes that there was no way to get any other entity to contribute to the Settlement. Some objectors suggest that Caldera's officers and directors should have contributed to the Settlement. 5/16/16 Renneisen Decl. Exh. F (Jones). But, in the absence of alter ego claims exposing them to personal liability for Caldera's alleged torts, these individuals could not be compelled to make such contributions. No alter ego claims were alleged in the JCCP Action. Settlement counsel were not aware of alter ego claims pending in any other proceeding and, after

conducting legal and factual research, concluded that it was would be exceedingly difficult or entirely impossible to allege any alter ego clam strong enough to materially change the settlement posture of the case. 5/16/16 Abrams Decl. ¶15.

While AMS has suggested that Stream of Commerce Defendants released as "Insureds and/or Contractual Indemnitees" should have paid into the Settlement Sum, this was never a viable option. Despite efforts to convince them to do so, these entities refused voluntarily to attend any mediation or settlement conference conducted under the auspices of Judge Highberger. *Id*. ¶16. The Steering Committee eventually concluded that the Stream of Commerce Defendants potentially covered under the Policies were never going to contribute any of their own funds to a settlement while they had the option of hiding behind Caldera and Federal. *Id*.

Thus, the only way to have pressured the released Stream of Commerce Defendants to pay into a settlement fund would have been to continue pursing litigation until the Policies were exhausted and Caldera was forced into bankruptcy. Such a course would have considerably delayed any settlement and, by raising a host of bankruptcy issues, would have further complicated negotiations. The Steering Committee also determined that, as the released Stream of Commerce Defendants had defenses not available to Caldera, the settlement value of the claims asserted against them likely was less than the payment that could be obtained from Federal. *Id*. ¶17.

The terms to which the parties agreed represented the best deal available under the circumstances and the best way of getting any money for the Class. *Id*. ¶19. Settlement liaison counsel, together with Class Counsel and the other members of the Steering Committee, recommend that the Settlement be approved. *Id*. "'The recommendations of plaintiffs' counsel should be given a presumption of reasonableness.'" *Klee v. Nissan North. America., Inc*., No. CV1208238AWTPJWX, 2015 WL 4538426 at *9 (C.D. Cal. July 7, 2015) (citation omitted). As the Ninth Circuit has often held, "Parties represented by competent counsel are better positioned

than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *Rodriguez v. West Publishing Corp*., 563 F.3d 948, 967 (9th Cir. 2009) (quoting *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir.1995)).

The reaction of the class members. The members of the Settlement Class strongly approve of the Settlement. In response to Class Notice, approximately 4,000 individuals submitted claims. In contrast, objections were submitted on behalf of only 46 members of the Class – 36 of whom are represented by a single firm. 5/16/16 Renneisen Decl. ¶4. Given "the small number of objections … this factor weighs in favor of approval." *Klee*, 2015 WL 4538426 at *9.

The absence of collusion. Because this matter was settled "[p]rior to formal class certification," this final *Churchill* factor takes on particular importance and the Settlement is subject to a "higher level of scrutiny for evidence of collusion or other conflicts of interest." *In re Bluetooth Headset Products Liab. Litig*., 654 F.3d 935, 946 (9th Cir. 2011) ("*Bluetooth*"). Here, this factor supports approval of the Settlement. Even under heightened scrutiny, there is no hint of collusion.

The Settlement was the result of "lengthy, arms-length negotiations." Docket No. 217 at 7. The parties' efforts included an unsuccessful, November 2014 mediation; an unsuccessful, January 2015 settlement conference ordered by Judge Highberger; the July 2015 mediation that was conducted by Robert Kaplan and resulted in a mediator's proposal accepted by all parties; and the extensive post-mediation negotiations needed to finalize and memorialize all terms of the Settlement. Abrams Decl. ¶¶8-11, 14. The "assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive." *Clesceri v. Beach City Investigations & Protective Servs., Inc.*, No. CV-10-3873-JST RZX, 2011 WL 320998 at *10 (C.D. Cal. Jan. 27, 2011).

No objectors have contended that the Settlement was in any way collusive. Nor does the Settlement itself contain any suggestion of collusion. *Bluetooth* identifies three signs suggesting that a settlement agreement may have been collusive: payment of

a "disproportionate" share of the settlement to counsel as fees; "a 'clear sailing' arrangement providing for the payment of attorneys' fees separate and apart from class funds"; and an arrangement whereby "fees not awarded … revert to defendants" rather than to the class. *Bluetooth*, 654 F.3d at 947. The parties' Settlement does not include any of these potentially problematic elements. Class Counsel requests only a modest common benefit award – less than 6% of the funds otherwise available for distribution to the Class. Docket No. 224 at 16:25-17:5. Any award for common benefits fees and costs will paid out of the Settlement Sum and will be paid only with the Court's approval. Settlement ¶4.10. Federal has no reversionary interest in sums not awarded as fees. *Id*. Finally, the parties have agreed that "the Court's approval of the Settlement is in no way conditioned upon" approval of the fee petition. *Id*.

D. The Objectors Have Not Asserted Any Valid Reason For Rejecting The Parties' Settlement

In challenging the settlement, the objectors primarily attack the Settlement Sum as "inadequate to reasonably compensate" the TVM claimants. 5/16/16 Renneisen Decl. Exh. D (Gulk). *See also e.g. id.*, Exh B (Ewers). But the question presented by this motion is not whether the Settlement Sum is objectively adequate. Rather the question is whether it is reasonable in light of the coverage available under the burning-limits Federal Policies and Caldera's lack of other resources. The absence of any additional monies to fund a settlement and the basis for certifying a limited-fund class under Rule 23(b)(1)(B) have already been addressed. Other objections raised by members of the Settlement Class are discussed below.

Opt-Out requests. Kline & Specter asserts that "[i]f the Court were to approve the proposed settlement, claimants should be allowed to opt out … and have their day in Court." Docket No. 229 at 58. Other objectors seek an individual right to opt out of the Settlement. *See* Renneisen Decl. Exh. H (Wilder), Exh. J (Zampieri). However, the parties request certification of a "mandatory" class under Rule 23(b)(1) which, "[i]n

contrast to class actions brought under subdivision (b)(3)[,] … does not provide for absent class members to receive notice and to exclude themselves from class membership as a matter of right." *Ortiz*, 527 U.S. 834 n 13 (citation omitted). There is no basis for grafting an opt-out procedure onto a Rule 23(b)(1) class. The Court cannot compel Federal or Caldera to accept a procedure to which they did not agree. And neither would have accepted any settlement proposal that did not resolve all known TVM claims and require certification of a non-opt-out class.

Policy-Period issues. As a corollary to its demand that all members of the Settlement Class be afforded opt-out rights, Kline & Specter argues, "Logically, the 2008-2011 Federal Policies only apply to women implanted with Caldera's TVM products between 2008 and 2011; and "claimants not subject to the policies during that time period should be able to opt-out ... ." Docket No. 229 at 56. *See also* Renneisen Decl. Exh. J (Zampieri). Kline & Specter misunderstands the scope of the Policies. The 2008, 2009, and 2010 Policies all have the same, early retroactive date – which extends coverage otherwise available under those Policies to apply, subject to the Policies' other terms and conditions, to injuries occurring at any time back to August 1, 2003. Vatalaro Decl., Exh. F (2008 Policy at FIC000023); Exh. G (2009 Policy at FIC000171); and Exh. H (2010 Policy at FIC000309). In addition, the 2010 and 2011 Policies include extended occurrence periods and extended reporting periods that push forward the timeframe during which an injury can occur and still be potentially covered, subject to the Policies' terms and conditions. *Id*. Exh. H (2010 Policy at FIC000409-412, 423-424, 443, 447-448); and Exh. I (2011 Policy at FIC000603-606). A request that the class be limited to "women implanted with Caldera's TVM products between 2008 and 2011" is neither consistent with the terms of the Policies nor a proper basis for objecting to the Settlement.

Demands that Caldera be punished. Some objectors contend that the Settlement is unfair because "Caldera is virtually without punishment" (Docket No. 229 at 57) or is

not being "stopped" from continuing its business (Renneisen Decl. Exh.B (Ewers)). Neither Kline & Specter nor any individual objector has provided any authority for the proposition that "lack of punishment" is a proper objection to a settlement.

Seeking to drive Caldera out of business or to otherwise punish it would not have been productive as a negotiating posture. And, as a matter of litigation strategy, deliberately forcing Caldera to declare bankruptcy would have required the Steering Committee to abandon settlement efforts and to wait for the Policy proceeds to be ground away by rulings on Federal's Motion for Partial Summary Judgment and/or by Federal's ongoing payment of defense costs. 5/16/16 Abrams Decl. ¶18. In the end, such a course would have precluded anyone from recovering anything from Caldera.

Misunderstanding the claims being released. Objectors Jones and Arnold protest that the Settlement will interfere with their ability to pursue anti-kickback claims, insurance fraud claims, causes of action under the false claims act, and claims against physicians implanting Caldera TVM devices. Renneisen Decl., Exh. F (Jones), Exh. A (Arnold, Amendment 1). The Settlement will not release or bar any of these claims. It releases only claims for damages allegedly arising out of Caldera TVM products. Settlement ¶¶5.5.A-B and ¶2.6. Moreover, each member of the Settlement Class expressly "does not … release any claims … against any physicians, hospitals, clinics, and other … healthcare providers … based upon negligence or professional malpractice … or any other theory." Settlement, Exh. B (Docket No 209-2 at 63).

Misunderstanding the entities being released. Objector Klopstein asserts that liability for damages should attach to Herniamesh, AMS, Baxter Healthcare Corporation, and Synovis. Renneisen Decl. Exh. G. Again, the release is narrower than the objector fears that it is. No release applies to these entities. Settlement, Exh. B (Docket No 209-2 at 60). Other than Federal and Caldera, the only parties released are Biomedical Structures; Encision; Coloplast; Mpathy Medical Devices; Parker Hannifin; and J-PAC. *Id*. at 61. Even as to these "Insureds and/or Contractual Indemnitees," the

members of the Settlement Class reserve all claims relating to products manufactured by entities other than Caldera. *Id*. at 63.

Guirola's objections. Objector Guirola through her attorneys objects to the Settlement on the grounds that Caldera somehow acted in bad faith by entering into a tolling agreement with Guirola and then negotiating the Settlement. Renneisen Decl., Exh. C. Guirola also objects that she was not represented at the mediation sessions and did not participate in the Settlement. These objections are baseless and were addressed in Caldera's briefs relating to the notice of stay it filed in Guirola's lawsuit in the Southern District of Mississippi. 5/16/16 Stuart Decl., Exh. A, B. As with all other tolling claimants, Caldera asked Guirola to toll her case in good faith to preserve limited settlement funds while exploring settlement. Caldera invited Guirola to participate in global mediation but Guirola declined and chose to remain uninformed regarding the Settlement. This cannot be grounds to object to a class settlement.

Mazie Slater objections. Any member of the Class who wished to object to the Settlement was required to provide, at a minimum, her name, address, and telephone number. Settlement, Exh. D (Docket No 209-2 at 88). The objection submitted by the Mazie Slater firm was not signed by – and does not otherwise identify – any actual claimant purporting to challenge the Settlement. Renneisen Decl., Exh K. The objection thus is invalid and need not be addressed.

Further, to the extent that Mazie Slater asserts any substantive challenges to the Settlement they are duplicative of objections raised by the properly submitted objections of known claimants. Mazie Slater's one, unique objection is procedural – and wrong. Mazie Slater suggests that delay is warranted because key filings in the case were not available. But the materials of apparent concern to Mazie Slater, the motion for preliminary approval (Docket No. 224) and the motion for common benefit fees (Docket No. 224), were publically filed and easily accessible well in advance of the deadline for submitting objections.

E. The Court Should Approve The Settlement Now And Schedule A Later Hearing On The Proposed Plan of Distribution.

The parties' Settlement provides that "distribution of the Settlement Sum to the members of the Settlement Class shall be subject to a plan of allocation to be proposed by Class Counsel and approved by the Interpleader Court." Settlement ¶4.8. Disregarding the $500,000 portion of the Settlement Sum reserved to cover future claims against Caldera, the immediately available Settlement Sum totals $11.75 million – of which $500,000 is reserved to cover administrative costs (Settlement ¶4.2.a) and $670,020 is sought to cover common benefit fees and costs (Docket No. 224). Thus, after Settlement approval, approximately $10.5 million will be distributed to the Class. In accordance with the Settlement, Class Counsel is working with the settlement administrator to prepare a "plan of allocation … provid[ing] for payment to each member of the Settlement Class who file[d] a Proof of Claim … ." Settlement ¶4.8.

However, the settlement administrator received far more Proof of Claim forms than anticipated. 5/16/16 Bricker Decl. ¶6. At the time the parties moved for preliminary approval of the Settlement, Class Counsel expected that there would be around 2,700 claims. *Id.* In the end, approximately 4,000 claims were submitted. *Id.* To finally and accurately assign each individual who submitted a Proof of Claim form to one of the five injury levels identified on that form will require the settlement administrator to review the form and medical records submitted for each member of the Settlement Class. This will be a substantial effort and will require several hundred thousand dollars' worth of work by the settlement administrator. *Id*. ¶8.

When the parties file their reply papers on this motion, they also will submit a preliminary distribution plan and estimated allocation amounts. But Class Counsel cannot direct the settlement administrator to prepare a final plan of distribution until he knows he will be paid for that work. *Id*. ¶¶9-10. The parties therefore request that the Court now approve the Settlement, including its provisions allocating funds to pay

settlement administration costs, and simultaneously schedule a post-approval hearing at which Class Counsel will be able to present a final distribution plan for the Court's consideration. Such a procedure would be fully consistent with Settlement ¶4.8, which states, "The plan of distribution is a matter separate and apart from the Settlement between the Parties, and no decision by the Interpleader Court concerning the plan of distribution shall affect the validity … or finality of the proposed Settlement in any manner."

IV. CONCLUSION

For all of the foregoing reasons, the parties respectfully request that this Court grant final approval to the parties' Settlement; certify the Settlement Class; appoint Celines Ramirez as the representative of the Class; appoint David Bricker as Class Counsel; enter final judgement; retain continuing jurisdiction to enforce and implement the Settlement; and exercise such continuing jurisdiction to set a schedule for approving a plan for allocating payments to the Settlement Class.

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