

**PROPOSED MODIFICATIONS TO PLAN OF ALLOCATION**

Subject to the Court's approval, the Plan of Allocation (ECF No. 134-7), as amended on January 27, 2017 ("Plan"), shall be modified as follows:

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Section I.A. of the Plan is modified and replaced with the following:

**I. THE SETTLEMENT FUND**

**A. Eligible Settlement Class Members**

Settlement Class Members who have (1) installed a Repair Kit, (2) installed a replacement pressure vessel, (3) installed a replacement toilet, and/or (4) sustained direct Property Damage as a result of a Leak or Burst of a Flushmate System at any time prior to the close of the Claims Period or the Extended Claims Period shall be eligible to submit a claim during the Claims Period or the Extended Claims Period.

To the extent reasonably available, and subject to the terms of the Settlement Agreement, Flushmate will supply to the Claims Administrator a list of the serial numbers and addresses for the Flushmate Systems that are subject to the Recall, including designation of the serial numbers for Flushmate Systems which have already received a Repair Kit or a replacement pressure vessel, or have been removed from service. Flushmate shall also supply to the Claims Administrator this information as determined by the parties from time to time throughout the Claims Period in Microsoft Excel format or other format acceptable to the Claims Administrator.

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Sections I.B.1. of the Plan is supplemented with the following:

**B. Distribution Among Settlement Class Members**

**1. Non-Property Damage Claims**

**Payments For Claims Submitted During the Extended Claims Period.**

During the Extended Claims Period, Settlement Class Members who submit evidence of unreimbursed out-of-pocket installation costs will receive up to \$127.50 for the first Flushmate Toilet repaired or replaced at the claimant's Property address, and up to \$30.00 for each additional Flushmate Toilet repaired or replaced at the same Property address.

In the event that Settlement Class Members claim to have incurred in excess of \$127.50/\$30.00 in unreimbursed out-of-pocket installation expenses during the Extended Claims Period, such Non-Property Damage claims will be reviewed by the Claims Administrator in the first instance, who will make recommendations regarding their disposition to the Special Circumstances Committee for final determination.

Settlement Class Members who file a claim attesting that they expended their own labor to repair or replace their Flushmate System during the Claims Period shall be paid \$25.00 per Flushmate Toilet repaired or replaced at the same Property address.

These amounts do not include Property Damage reimbursements which are based upon documented losses submitted by the Claimant.

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Section I.B.2. of the Plan is modified and replaced with the following:

## **2. Property Damage Claims**

Settlement Class Members who submit claims for unreimbursed out-of-pocket expenses associated with Property Damage caused by a Flushmate System or Flushmate Toilet that Leaked or Burst during the Claims Period or the Extended Claims Period shall receive a pro rata distribution from the Net Settlement Fund for the reasonable and necessary unreimbursed out-of-pocket expenses incurred for repairing or replacing direct Property Damage.

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Section I.B.3. of the Plan is modified and replaced with the following:

## **3. Supplemental Distribution/Cy Pres**

With respect to those settlement funds remaining unclaimed in the Settlement Fund Trust Account as of September 24, 2016, (1) supplemental payments to Settlement Class Members shall be made in accordance with the modified Settlement and Plan of Allocation; and (2) *cy pres* distribution shall be made to claimants in the Mergens Action (a related case, which addresses Flushmate III Pressure-Assist Flushing Systems manufactured from July 1, 2009 through April 30, 2011), pursuant to the Mergens Settlement Agreement and the Mergens Plan of Allocation.

If, following expiration of the Extended Claims Period and Mergens Claims Period, funds remain in the Settlement Fund Trust Account, then such funds shall be distributed in the following order:

- a. Mergens Settlement Class Members who submitted timely claims for having installed a Repair Kit, replacement pressure vessel or replacement toilet themselves shall be eligible to receive \$25.00 per Flushmate Toilet repaired or replaced at the same Property address after the conclusion of the Mergens Claims Period.
- b. If sufficient funds still remain in the Settlement Fund Trust Account after (a) above has been satisfied, then the Parties may agree to extend the Extended Claims Period and Mergens Claims Period for period(s) to be agreed upon, subject to approval by the Special Master.
- c. In the event funds still remain in the Settlement Fund Trust Account, but further distribution to Settlement Class Members and Mergens Settlement Class Members would be impracticable or yield a windfall after (a) and (b) above have been satisfied, such funds will be distributed *cy pres* in compliance with the standard articulated in *Dennis v. Kellogg Co.*, 697 F.3d 858, 865-66 (9th Cir. 2012) and any subsequent case law, subject to approval by the Special Master.

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Section I.B.4. of the Plan is supplemented with the following:

**4. Reimbursement To Defendants For Claims Resolved During the Extended Claims Period**

Defendants shall be reimbursed for Non-Property and Property Damage Claims submitted by Settlement Class Members during the Extended Claims Period that it elects to resolve itself either as credits against future settlement payments due under the Settlement Agreement, if any, or from payment by the Claims Administrator from the Net Settlement Fund in accordance with this Plan of Allocation. In the event that Defendants claim to have resolved Non-Property Damage claims for in excess of \$127.50/\$30.00 in unreimbursed out-of-pocket installation expenses during the Extended Claims Period, such Non-Property Damage claims will be reviewed by the Claims Administrator in the first instance, who will make recommendations regarding their disposition to the Special Circumstances Committee for final determination.

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Section II of the Plan is modified and replaced with the following:

**II. ADMINISTRATION OF NET SETTLEMENT FUND**

The parties propose that Class Litigation Administration Support Services (“C.L.A.S.S.”) be appointed as the Claims Administrator which will handle the distribution of the Net Settlement Fund to Settlement Class Members. Additional information about the Claims Administrator’s background and fees for services is available at [www.FlushmateClaims.com](http://www.FlushmateClaims.com).

The Claims Administrator shall be delegated the authority to administer and process Eligible Claims during the Claims Period and the Extended Claims Period and to disburse Settlement Benefits to Claimants who submit timely Eligible Claims. The Claims Administrator shall carry out its duties in strict accordance with this Plan. With good cause, Class Counsel and/or Defense Counsel may move the Court to replace the Claims Administrator.

All reasonable and necessary fees, costs and expenses associated with the implementation of this Plan by the Claims Administrator shall be paid from the Settlement Fund Trust Account maintained by Class Counsel as these costs are incurred. The Claims Administrator will submit invoices to Class Counsel for payment in intervals of approximately thirty (30) days. Class Counsel will review all invoices and, if necessary and appropriate, approve them for payment. The Claims Administrator shall provide to Class Counsel and Defense Counsel a report of all invoices paid on a quarterly basis as set forth in Section V.E. of the Settlement Agreement.

Any disputes regarding payment of invoices shall be resolved among the Parties and the Claims Administrator, or submitted for determination to the Special Master.

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Section III.B. of the Plan is modified and replaced with the following:

### **III. CATEGORY OF CLAIMS**

#### **B. Category 2 (Property Damage Claims)**

Subject to the limitations and qualifications stated herein, the Claims Administrator shall review all Category 2 claims using the following criteria:

1. Is the scope of the claimed Property Damage a direct result of a Flushmate System that has Leaked or Burst?
2. Are the claimed amounts to repair or replace the Property Damage reasonably necessary to repair or replace property damaged directly as a result of a Flushmate System that has Leaked or Burst?
3. Are the claimed labor and material costs reasonably necessary to repair or replace materials of like kind and quality in the geographic location where the Property Damage was sustained and at the time when the repair or replacement was completed?

The Claims Administrator shall make its determination using the most current pricing guides (e.g., Building Construction Cost Data Book, National Repair & Remodeling Estimator, Residential Remodeling Cost Estimator, and National Renovation & Insurance Repair Estimator) from R.S. Means or the Craftsman National Repair and Remodeling Estimator.

Any Property Damage Claim shall be reduced if the Claims Administrator makes any of the following determinations:

1. The amount claimed is in excess of the amount required to reasonably repair or replace the claimed direct Property Damage;
2. The amount claimed is for work unrelated to the direct Property Damage caused by a Flushmate System that has Burst or Leaked; or
3. Portions of the claimed amount are for upgrades, remodeling work or other costs that are not directly related to repair or replacement of direct Property Damage caused by a Flushmate System that has Burst or Leaked.

The Claims Administrator may request in writing additional documentation and information it deems necessary and appropriate regarding any Property Damage Claim and will consult with Flushmate, plumbing professionals or other construction professionals if necessary to determine the reasonableness of the repair work performed.

Section V of the Plan is modified and replaced with the following::

**V. SPECIAL CIRCUMSTANCES COMMITTEE**

A Special Circumstances Committee consisting of the Claims Administrator, a representative of Class Counsel, and an individual to be appointed by Flushmate shall be established to address the following issues:

1. Claims which involve more than twenty-five (25) Flushmate Toilets at a single Property address (*i.e.*, hotel, motel, apartment/condominium, office building, housing subdivision, etc.);
2. Property Damage claims in excess of \$7,500;
3. Non-Property Damage claims in excess of \$127.50/\$30.00 in out-of-pocket installation expenses during the Claims Period or Extended Claims Period;
4. Any other complex, previously reimbursed or unusual claims which may require additional input; and
5. Modification of the Plan of Allocation.

Any disputes which may arise from the Special Circumstances Committee, including, without limitation, disputes among or between the members of the Special Circumstances Committee and objections to any action taken by the Special Circumstances Committee, shall be referred to the Special Master for resolution.