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5 Attorneys for Plaintiffs United Desert Charities, Fred Ede III, Emily Williams,
Bruce Pritchard, Jean Steiner and Settlement Class
6

7
8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

10 UNITED DESERT CHARITIES, FRED
EDE, III, EMILY WILLIAMS, BRUCE
11 PRITCHARD, and JEAN STEINER, on
behalf of themselves and all others
12 similarly situated,,
13

Plaintiffs,

14 vs.

15 SLOAN VALVE COMPANY,
AMERICAN STANDARD BRANDS AS
16 AMERICA, INC. KOHLER CO.,
GERBER PLUMBING FIXTURES,
17 LLC, MANSFIELD PLUMBING
PRODUCTS, LLC, and HOME DEPOT,
18 U.S.A., INC.,
19

Defendants.

Case No. 2:12-cv-06878 SJO (SHx)

**DECLARATION OF DAVID M.
BIRKA-WHITE IN SUPPORT OF
JOINT MOTION FOR FINAL
APPROVAL OF
MODIFICATIONS OF
SETTLEMENT AGREEMENT
AND PLAN OF ALLOCATION**

The Honorable S. James Otero

Date: September 18, 2017

Time: 10:00 a.m.

Courtroom: 10C

Consolidated Cases:

Berube v. Flushmate

2:13-cv-02372-SJO-SH

Brettler v. Flushmate

2:13-cv-02499-SJO-SH

Kubat, et al. v. Flushmate

2:13-cv-02425-SJO-SH

Patel v. Flushmate

2:13-cv-02428-SJO-SH

Related Cases:

Mergens v. Sloan Valve Co.

2:16-cv-05255-SJO-SKx

Dimov v. Sloan Valve Co.

1:12-cv-09700 (N.D. Ill)

1 I, David M. Birka-White, declare as follows:

2 1. I am an attorney duly licensed to practice law before all courts of the
3 State of California, and I am the senior attorney at Birka-White Law Offices,
4 counsel of record for Plaintiffs United Desert Charities, Fred Ede III, Emily
5 Williams, Bruce Pritchard and Jean Steiner. I am also one of the Class Counsel¹
6 appointed by the Court to represent the Settlement Class in this consolidated action.
7 I submit this declaration in support of the Joint Motion for Final Approval of
8 Modifications of Settlement Agreement and Plan of Allocation. I have personal
9 knowledge of all facts set forth herein, and, if called as a witness, I can and would
10 testify competently thereto under oath.

11 2. My office has had primary responsibility for overseeing the claims
12 administration process throughout the Claims Period, and sole responsibility for
13 management of the Settlement Fund Trust Account (“Settlement Fund”) since the
14 Court granted final approval of the Settlement on August 25, 2014.

15 3. As Class Counsel, I believe the interests of the UDC Settlement Class
16 are best protected by extending the Claims Period for an additional year.

17 4. To date, Defendants have paid a total of **\$18,000,000** into the
18 Settlement Fund under the terms of the Settlement. The Class Representatives have
19 each received \$1,000 Incentive Awards from the Settlement Fund Trust Account.

20 5. As of June 15, 2017, after payment of Class Counsel’s attorneys’ fees
21 and reimbursement of expenses, incentive awards to Class Representatives, notice
22 costs, claims administration costs and expenses, initial and some supplemental
23 distributions to Settlement Class Members, and the costs of notice approved in the
24 Court’s April 10, 2017 Amended Order Conditionally Approving Modifications of
25

26 _____
27 ¹ Initial capitalized terms utilized herein have the same definitions as set forth in
28 the Class Action Settlement Agreement and Release, filed January 31, 2014
(ECF No. 119-1) unless otherwise specified.

1 Settlement Agreement and Plan of Allocation, over \$6,000,000 in unclaimed funds
2 remained in the Settlement Fund Trust Account.

3 6. Pursuant to the Notice Plan, Settlement Class Members were given
4 the opportunity to comment on the proposed modifications to the Settlement and
5 Plan of Allocation by sending a letter to my attention. As of the date of this
6 declaration, I have received no such letter.

7 7. My 30 plus years of experience prosecuting class action cases informs
8 me that if there are no objections to the proposed modification, the parties and the
9 Court can be confident that the class members overwhelmingly approve.

10 8. Attached hereto as **Exhibit A** are the excerpted modifications to the
11 Class Action Settlement Agreement and Release (ECF 119-1), reflecting the
12 proposed changes to that agreement that the Parties have agreed to, and the Court
13 conditionally approved on April 10, 2017 (ECF 164).

14 9. Attached hereto as **Exhibit B** are the excerpted modifications to the
15 Plan of Allocation (ECF 134-7), reflecting the proposed modifications to that plan
16 that the Parties have agreed to, and the Court conditionally approved on April 10,
17 2017 (ECF 164).

18 I declare under penalty of perjury, under the laws of the United States of
19 America, that the foregoing is true and correct.

20 Executed this 30th day of June 2017, at Lisbon, Portugal.

21
22 /s/ David M. Birka-White
23 DAVID M. BIRKA-WHITE

EXHIBIT A

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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

UNITED DESERT CHARITIES,
FRED EDE, III, EMILY WILLIAMS,
BRUCE PRITCHARD, JEAN
STEINER, DANIEL BERUBE,
JEFFREY BRETTLER, RANDY
KUBAT, JOHN SNYDER, AND
PANKAJ PATEL, on behalf of
themselves and all others similarly
situated,

Plaintiffs,

v.

SLOAN VALVE COMPANY
AMERICAN STANDARD BRANDS
AS AMERICA, INC., KOHLER CO.,
GERBER PLUMBING FIXTURES,
LLC, MANSFIELD PLUMBING
PRODUCTS, LLC, HOME DEPOT,
U.S.A., INC., and DOES 1-10,
inclusive,

Defendants.

Case No. 2:12-06878 SJO (SHx)

**PROPOSED MODIFICATIONS TO
CLASS ACTION SETTLEMENT
AGREEMENT AND RELEASE**

The Honorable S. James Otero

Consolidated Cases:

- Berube v. Flushmate
2:13-cv-02372-SJO-SH
- Brettler v. Flushmate
2:13-cv-02499-SJO-SH
- Kubat, et al. v. Flushmate
2:13-cv-02425-SJO-SH
- Patel v. Flushmate
2:13-cv-02428-SJO-SH

Related Cases:

- Mergens v. Sloan Valve Co.
2:16-cv-05255-SJO-SK:
- Dimov, et al. v. Sloan Valve Co.
1:12-cv-09700 (N.D. Ill)

1 Subject to the Court’s approval, the Class Action Settlement Agreement and
2 Release (“Agreement”) (ECF No. 119-1) shall be modified as follows:

3 **I. DEFINITIONS**

4 Section I of the Agreement is modified to include the following modified or
5 additional defined terms:

6 “Effective” or “Effective Date” means (1) the date of the Court’s Final Order
7 and Judgment approving this Agreement if no objections are timely filed or the date
8 of the Court’s Order approving modifications of this Agreement if no objections are
9 timely filed; (2) the expiration date of the time for filing a notice of appeal from the
10 Final Order and Judgment if objections are filed but no appeal is filed or the
11 expiration date of the time for filing a notice of appeal from the Court's Order
12 approving modifications to this Agreement if objections are filed but no appeal is
13 filed; or (3) if an appeal is filed, the latest of (i) the date of final affirmance of the
14 Final Order and Judgment or of the Order approving modifications to this
15 Agreement, (ii) the expiration of the time for filing a petition for writ of certiorari to
16 review the Final Order and Judgment or Order approving modifications if affirmed,
17 and if certiorari is granted, the date of final affirmance of the Final Order and
18 Judgment or of the Order approving modifications following review pursuant to
19 that grant, or (iii) the date of final dismissal of any appeal from the Final Order and
20 Judgment, from the Order approving modifications or the final dismissal of any
21 proceeding on certiorari to review the Final Order and Judgment or the Order
22 approving modifications that has the effect of confirming the Final Order and
23 Judgment or the Order approving modifications.

24 “Extended Claims Period” means the time period commencing on September
25 25, 2016 and concluding one (1) year after the modifications to this Agreement
26 become Effective during which time Settlement Class Members may file claims
27 with the Claims Administrator, in accordance with the Plan of Allocation.
28

1 “Mergens Action” means *Mergens v. Sloan Valve Company*, Case No. 2:16-
2 CV-05255-SJO (SKx), United States District Court, Central District of California.

3 “Mergens Claims Period” means the time period defined in the Mergens
4 Settlement Agreement during which Mergens Settlement Class Members may file
5 claims with the Claims Administrator, in accordance with the Mergens Settlement
6 Agreement and Plan of Allocation.

7 “Mergens Class” means the settlement class defined in the Mergens
8 Settlement Agreement.

9 “Mergens Plan of Allocation” means the procedure for submission,
10 processing, and resolution of eligible claims in the Mergens Action.

11 “Mergens Settlement Agreement” means the Class Action Settlement
12 Agreement and Release, including all exhibits thereto, entered into by the parties to
13 the Mergens Action.

14 “Mergens Settlement Class” means all Mergens Class Members who have
15 not properly executed and timely filed a Request for Exclusion with the Claims
16 Administrator.

17 “Mergens Settlement Class Members” means any Person included in the
18 Mergens Settlement Class.

19 “Plan of Allocation” means the procedure for the submission, processing, and
20 resolution of Eligible Claims by members of the Settlement Class referenced in
21 Section V below, including any written modification to the procedure for the
22 submission, processing, and resolution of Eligible Claims, as agreed to by the
23 Parties, subject to approval by the Court and/or Special Master.

24 “Property Damage” means direct damage to a Settlement Class Member’s
25 Flushmate Toilet, Property and/or personal property which occurs on or before the
26 last day of the Claims Period or Extended Claims Period as a result of a Burst or
27 Leak in a Flushmate System.
28

1 “Released Claims” means any and all claims, actions, demands, causes of
2 action, suits, obligations, damages, rights or liabilities, of any nature and
3 description whatsoever, known or unknown, present or future, concealed or hidden,
4 liquidated or unliquidated, fixed or contingent, anticipated or unanticipated,
5 whether statutory, in tort, contract, law, equity or otherwise, that have been, could
6 have been or might in the future be asserted by Plaintiffs and the Settlement Class,
7 or any of their respective heirs, spouses, executors, administrators, partners,
8 attorneys, subrogees, predecessors, successors, assigns, agents, and/or
9 representatives, and/or anyone acting or purporting to act on their behalf, arising
10 out of or related to the Recall or the Action. Released Claims include, but are not
11 limited to, all claimed or unclaimed compensatory damages, statutory damages,
12 consequential damages, incidental damages, punitive and exemplary damages,
13 fines, penalties, claims for disgorgement, or equitable, declaratory or injunctive
14 relief under any federal statute (including, but not limited to, the Magnuson-Moss
15 Warranty Act) or state statute (including, but not limited to, any state consumer
16 protection statutes) or common law or any other law whatsoever, to the extent such
17 claims are alleged to be caused by, arise out of, or relate to any claim asserted, or
18 that could have been asserted, in the Action relating to the Flushmate System and/or
19 Flushmate Toilets. Released Claims further include any claim for interest, costs
20 and fees arising out of any of the claims asserted, or that could have been asserted,
21 in the Action. Released Claims shall not include any claims for personal injury,
22 wrongful death and/or emotional distress caused by Flushmate Systems or
23 Flushmate Toilets which have Leaked or Burst. Released Claims also shall not
24 include claims for property damage caused by Flushmate Systems or Flushmate
25 Toilets which Leak or Burst after the expiration of the Extended Claims Period.
26 Notwithstanding the foregoing, nothing in this Agreement shall be deemed a release
27 of the Parties’ respective rights and obligations under this Agreement.
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3 **III. NOTICE PROGRAM FOR THE SETTLEMENT CLASS**

4 Sections III.B. and III.E.4 of the Agreement are modified and replaced by the
5 following:

6 **B. Cost of Notice**

7 All reasonable costs associated with the creation and implementation of the
8 Notice Plan described herein and in the Mergens Settlement Agreement, and all
9 reasonable costs associated with providing notice advising Settlement Class
10 Members of the modifications to the Settlement and the Plan of Allocation,
11 including the opportunity to be to be heard at, or submit written comments in
12 advance of, the final hearing, shall be paid out of the Settlement Fund Trust
13 Account, subject to Court approval.

14 **E. Objections**

15 4. The objection and/or any notice of intent to appear at the Fairness
16 Hearing must be mailed to:

17 **The Court**

18 Clerk of Court
19 United States District Court for the Central District of California
312 North Spring Street
Los Angeles, California 90012

20 **Class Counsel**

21 Birka-White Law Offices
22 65 Oak Court
Danville, CA 94526
23 Attn: David M. Birka-White
dbw@birka-white.com

24 AND

25 **Defense Counsel**

26 Dentons US LLP
27 1999 Harrison Street, Suite 1300
Oakland, CA 94612
28 Attn: Steven Frankel

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V. CLAIMS PROCESS

Sections V.B., V.C. and V.E. of the Agreement are modified and replaced by the following:

B. Eligibility of Settlement Class Members

Subject to a more detailed outline set forth in the proposed Plan of Allocation, to qualify for non-property damage Settlement Benefits, a Settlement Class Member must demonstrate proof of ownership of the Flushmate Toilet and timely submit a Claim Form. To qualify for Property Damage Settlement Benefits, the Settlement Class Member must demonstrate proof of ownership of the Property that contains or contained a Flushmate Toilet and timely submit a Claim Form. The Claims Administrator may permit a Settlement Class Member to remedy deficiencies in any Claim Form or related documents during the Claims Period or Extended Claims Period upon a showing of good cause to the Special Circumstances Committee (as defined in the Plan of Allocation).

If there is more than one Settlement Class Member with respect to a Property, apportionment, if any, of the Settlement Benefits between or among those Settlement Class Members will be made by agreement among those Settlement Class Members or, if necessary, by the Claims Administrator, whose decision may be appealed to the Special Master.

If a Settlement Class Member's Property contains more than one Flushmate Toilet, the Settlement Class Member shall be entitled to timely file non-property damage claims for each Flushmate Toilet located at the Property. To the extent necessary, the Claims Administrator may develop a protocol to efficiently handle claims involving multiple Flushmate Toilets located at the same Property address, subject to approval of the Special Circumstances Committee, and if necessary, by the Special Master and/or the Court.

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2 **C. Potential Pro Rata Distribution to Class Members**

3 With respect to those settlement funds remaining unclaimed in the Settlement
4 Fund Trust Account as of September 24, 2016, (1) supplemental payments to
5 Settlement Class Members shall be made in accordance with the modified
6 Settlement and Plan of Allocation; and (2) *cy pres* distribution shall be made to
7 claimants in the Mergens Action (a related case, which addresses Flushmate III
8 Pressure-Assist Flushing Systems manufactured from July 1, 2009 through April
9 30, 2011), pursuant to the Mergens Settlement Agreement and the Mergens Plan of
10 Allocation.

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

14 a. Mergens Settlement Class Members who submitted timely claims for
15 having installed a Repair Kit, replacement pressure vessel or replacement toilet
16 themselves shall be eligible to receive \$25.00 per Flushmate Toilet repaired or
17 replaced at the same Property address after the conclusion of the Mergens Claims
18 Period.

19 b. If sufficient funds still remain in the Settlement Fund Trust Account
20 after (a) above has been satisfied, then the Parties may agree to extend the Extended
21 Claims Period and Mergens Claims Period for period(s) to be agreed upon, subject
22 to approval by the Special Master.

23 c. In the event funds still remain in the Settlement Fund Trust Account,
24 but further distribution to Settlement Class Members and Mergens Settlement Class
25 Members would be impracticable or yield a windfall after (a) and (b) above have
26 been satisfied, such funds will be distributed *cy pres* in compliance with the
27 standard articulated in *Dennis v. Kellogg Co.*, 697 F.3d 858, 865-66 (9th Cir. 2012)
28 and any subsequent case law, subject to approval by the Special Master.

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2 **E. Costs and Reporting**

3 All reasonable and necessary expenses incurred in administering this
4 Agreement and the Mergens Settlement Agreement, including the costs of
5 implementing and administering the Plan of Allocation under those Agreements,
6 and including during the Extended Claims Period, shall be paid from the Trust
7 Accounts. The Claims Administrator shall, under the supervision of the Court,
8 administer the Settlement Benefits provided by this Agreement by processing and
9 resolving claims in a rational, responsive, cost-effective, and timely manner. The
10 Claims Administrator shall maintain reasonably detailed records of its activities
11 under this Agreement in a computerized database. The Claims Administrator shall
12 maintain all such records until expiration of the term of this Agreement, and then
13 destroy unless Class Counsel and Defense Counsel otherwise agree and/or the
14 Court otherwise directs. The Claims Administrator shall provide Class Counsel and
15 Defense Counsel with a detailed written summary of the charges for its services on
16 a quarterly basis.

17 Class Counsel, in conjunction with the Claims Administrator, shall submit an
18 annual report to the Court summarizing the work performed by the Claims
19 Administrator, including a report of all amounts paid to Settlement Class Members
20 during the prior year.

21 Defendants and Defense Counsel shall have the right, at their sole expense,
22 during the term of this Agreement to independently review the documents
23 supporting the performance and findings of the Claims Administrator.

24 Upon reasonable request by Flushmate, the Claims Administrator shall
25 provide Class Member information gathered in connection with Claims Processing
26 to Flushmate sufficient to permit Flushmate to add Class Member names, street
27 addresses and Flushmate System serial numbers to its warranty database.
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the date received, addressed and transmitted by first class United States mail and e-mail as follows:

If to Plaintiffs or the Class to:

Birka-White Law Offices
65 Oak Court
Danville, CA 94526
Attn: David M. Birka-White
dbw@birka-white.com

If to Defendants to:

Dentons US LLP
1999 Harrison Street, Suite 1300
Oakland, CA 94612
Attn: Steven Frankel
steven.frankel@dentons.com

EXHIBIT B

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:

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.

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.

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.

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.

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.

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.

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.

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.