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

9 UNITED DESERT CHARITIES, *et*
10 *al.*,

11 Plaintiffs,

12 vs.

13 SLOAN VALVE COMPANY, *et al.*,

14 Defendants

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

**NOTICE OF MOTION AND JOINT
MOTION FOR FINAL APPROVAL OF
MODIFICATIONS OF SETTLEMENT
AGREEMENT AND PLAN OF
ALLOCATION; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

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-SK

Dimov v. Sloan Valve Co.

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

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 18, 2017 at 10:00 a.m., or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable S. James Otero, United States District Judge for the Central District of California, located at 350 W. First Street, Los Angeles, California 90012 - Courtroom 10C, Class Counsel¹ and Defendants will and hereby do jointly move the Court, in the exercise of its equitable jurisdiction, for entry of a Final Order approving the modifications to the class action settlement agreement and plan of allocation in the above-captioned consolidated class action to address the distribution of the substantial amount of unclaimed funds that remain in the settlement fund following the close of the claims period and to increase the incentive award for each Class Representative from \$1,000 to \$5,000.

This Motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on June 14, 2017. This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities and the Declarations of Arnold Rodio, Shannon Wheatman, David M. Birka-White and Steven H. Frankel that are filed concurrently herewith. This Motion is also based on the previously-filed Joint Motion for Conditional Approval of Modifications of Settlement Agreement and Plan of Allocation (ECF No. 154), the accompanying Special Master's Report and Recommendation (ECF No. 154-5) and the Declarations of David M. Birka-White (ECF No. 154-1), Steven H. Frankel (ECF No. 154-2), Michael Gembarski (ECF No. 154-3), Arnold Rodio (ECF No. 154-4), Shannon Wheatman (ECF No. 154-6) and William M. Audet (ECF No. 161), the Amended Order Conditionally Approving Modifications of Settlement Agreement and Plan of Allocation (ECF No. 164), and

¹ All Class Counsel join in this Motion with the exception of counsel in the related case, *Dimov v. Sloan Valve Co.*, 1:12-cv-09700 (N.D. Ill) (Audet & Partners, LLP and Wexler Wallace LLP), who have no objection to the Motion. See Declaration of William M. Audet (ECF No. 161).

1 such other and additional evidence and argument that may properly be presented in
2 support of the Motion.

3
4 Dated: June 30, 2017

Respectfully submitted,

5 BIRKA-WHITE LAW OFFICES

6 By: /s/ David M. Birka-White
7 David M. Birka-White

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[Counsel for Other Parties Listed on Signature
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On April 10, 2017, this Court conditionally approved modifications of the Settlement² and Plan of Allocation in the above-captioned consolidated class action to provide for (i) additional distributions of unclaimed funds that remain in the Settlement Fund Trust Account following the conclusion of the Claims Period to Settlement Class Members; (ii) an increase in the incentive awards for each Class Representative from \$1,000 to \$5,000; and (iii) a *cy pres* distribution to members of the proposed settlement class in the related case of *Mergens v. Sloan Valve Co.*, U.S. District Court, C.D. Cal., Case No. 2:16-cv-05255-SJO-SK (the “Mergens Action”).

The Court found that the proposed modifications were “a fair, reasonable and equitable solution for allowing distribution of some of the unclaimed settlement funds remaining in the Settlement Fund Trust Account following the close of the Claims Period to the Settlement Class.” (Amended Order Conditionally Approving Modifications of Settlement Agreement and Plan of Allocation (ECF No. 164) (“Amended Order”), ¶ 1.)³ The Court also found that “by proposing that some of those unclaimed funds also be utilized to resolve the claims of the proposed settlement class in the related *Mergens v. Sloan Valve Co.* case pending before this Court (Case No. 2:15-cv-05255-SJO-SKx) . . . the settlement funds [would be applied] to their next highest and best use in accordance with the *cy pres* doctrine.” (*Id.*)

Prior to the Court’s conditional approval, the proposed modifications were also reviewed by the court-appointed Special Master, the Hon. William J. Cahill (Ret.), Following his review, Judge Cahill stated that “[g]iven the substantial amount of unclaimed funds that remain in the Settlement Fund Trust Account following the

² Initial capitalized terms utilized herein have the same definitions as set forth in the Class Action Settlement Agreement and Release filed January 31, 2014 (ECF No. 119-1) unless otherwise indicated.

³ Unless otherwise specified herein, the ECF docket references are to the docket in this action.

1 conclusion of the Claims Period and supplemental payments to UDC Settlement Class
 2 Members . . . the Special Master believes that the proposed modifications . . . are a fair,
 3 equitable, and reasonable solution for allowing distribution of those unclaimed
 4 settlement funds to UDC Settlement Class Members.” In addition, Judge Cahill found
 5 that the proposal to use some of those unclaimed settlement funds to resolve the claims
 6 of the proposed settlement class in the related Mergens Action put the settlement funds
 7 to their next highest and best use in accordance with the *cy pres* doctrine, and
 8 recommended that the Court approve the proposed modifications, subject to notice
 9 being provided to the Settlement Class (Special Master’s Report and Recommendation
 10 (ECF No. 154-5).)

11 The Settlement’s two-year Claims Period ended on September 25, 2016. As of
 12 June 15, 2017, over \$6 million in unclaimed funds remain from the \$18 million
 13 settlement fund Defendants established following the Court’s final settlement approval
 14 in August 2014. (Declaration of David M. Birka-White in Support of Joint Motion for
 15 Final Approval of Modifications of Settlement Agreement and Plan of Allocation
 16 (“Birka-White Decl.”) ¶ 5; Declaration of Arnold Rodio in Support of Joint Motion for
 17 Final Approval of Modifications of Settlement Agreement and Plan of Allocation
 18 (“Rodio Decl.”) ¶ 16.)⁴

19 Furthermore, to date, following completion of a robust Court-approved notice
 20 program, no comments regarding the proposed modifications have been received from
 21 any Settlement Class Members. (*See generally*, Declaration of Shannon R. Wheatman,
 22 Ph.D. on Implementation of the Notice Program (“Wheatman Decl.”); Birka-White
 23 Decl., ¶ 6; Declaration of Steven H. Frankel in Support of Joint Motion For Final
 24
 25

26
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 28 ⁴ This amount takes into account payment of the costs of notice from the Settlement
 Fund Trust Account that the Court approved at the April 10, 2017 hearing on the Joint
 Motion for Conditional Approval of the Settlement and Plan of Allocation. (Rodio
 Decl., ¶ 7; Amended Order, ¶ 3.)

1 Approval of Modifications of Settlement Agreement and Plan of Allocation (“Frankel
2 Decl.”) ¶ 2.)

3 Because the proposed modifications of the Settlement and Plan of Allocation
4 provide for the best possible use for the unclaimed funds, this Court should now finally
5 approve them in the sound exercise of its equitable discretion.

6 **II. FACTUAL BACKGROUND**

7 The background for this Motion is described in detail in the Joint Motion for
8 Conditional Approval of Modifications of Settlement Agreement and Plan of
9 Allocation and the Memorandum of Points and Authorities in Support thereof (“Joint
10 Motion for Conditional Approval”) (ECF No. 154), which is incorporated herein by
11 reference.

12 **A. Conditional Approval of the Proposed Modifications**

13 On April 10, 2017, after consideration of the Joint Motion for Conditional
14 Approval, the Court entered an Amended Order finding: (i) that the proposed
15 modifications of the Settlement and Plan of Allocation were a “fair, reasonable and
16 equitable solution for allowing distribution of some of the unclaimed settlement funds
17 remaining in the Settlement Fund Trust Account following the close of the Claims
18 Period to the Settlement Class”; and (ii) that the proposed *cy pres* distribution applied
19 the remaining settlement funds to “their next highest and best use” (Amended
20 Order.).

21 **B. Current Status of the Settlement Fund Trust Account**

22 On January 27, 2017, the Plan of Allocation was amended to allow for
23 supplemental distributions to be made to those Non-Property Damage claimants who
24 submitted valid claims prior to the close of the Claims Period so that they would be fully
25 reimbursed for all of their reasonable unreimbursed out-of-pocket installation expenses.
26 (Rodio Decl., ¶ 4; Rodio Declaration in Support of Motion for Conditional Approval
27 (ECF No. 154-4) (“Rodio Conditional Approval Decl.”), ¶ 9 and **Exhibit A1**.) Those
28 supplemental distributions are still in the process of being made to Settlement Class

1 Members, and the Claims Administrator continues to estimate that those distributions
 2 will not exceed \$1,091,695. (Rodio Decl., ¶ 5.) After payment of those supplemental
 3 distributions and the costs of the Court-approved Notice Plan, there will still be a
 4 remaining balance in the \$18 million settlement fund of approximately \$6 million.
 5 (Rodio Decl., ¶ 9.)

6 **C. Direct Mailed and E-Mailed Notice and Publication Notice to the**
 7 **Settlement Class Has Been Completed.**

8 In its Amended Order, the Court held that “[b]ecause the proposed modifications
 9 of the Settlement and Plan of Allocation provide many additional benefits to the
 10 Settlement Class, do not provide for a lesser recovery to the Settlement Class than was
 11 available under the original Settlement, and do not bargain away rights to enforce
 12 portions of that agreement, there is no requirement that supplemental notice be provided
 13 to the Settlement Class or that Settlement Class Members be afforded the opportunity to
 14 be heard on the proposed modifications under Rule 23(e) of the Federal Rules of Civil
 15 Procedure prior to their adoption.” (Amended Order, ¶ 2.) Nevertheless, in response to
 16 the parties’ request, “[t]he Court approve[d], as to form and content, draft Notices that
 17 were attached as **Exhibits 6-9** to the Wheatman Declaration, for dissemination to the
 18 Settlement Class” (Amended Order, ¶ 3.)

19 Direct notice by mail and e-mail to Settlement Class Members has been
 20 completed. (*See generally*, Wheatman Decl.) Specifically, notice was disseminated by
 21 direct mail to approximately 215,000 Settlement Class Members, and by e-mail to
 22 approximately 80,000 Settlement Class Members. (Wheatman Decl., ¶ 13; Rodio Decl.,
 23 ¶ 8.)⁵ Notice was also published in multiple paid media outlets, including *People* and
 24 *Parade*, in 8 newspapers in U.S. territories and possessions, on 10 trade publication
 25 websites, and through digital banner advertising on 4 online networks likely to be read
 26

27 ⁵ In addition, notice was also disseminated to approximately 72,603 plumbing and
 28 general contractors nationwide, and will be sent to an additional 33,190 plumbing and
 general contractors. (Wheatman Decl., ¶¶ 30, 31.)

1 by commercial, public and other owners of Flushmate Toilets. (Wheatman Decl., ¶¶
 2 19-26.) In addition, the Claims Administrator has maintained a dedicated 800 number
 3 and an interactive website (www.flushmateclaims.com) where Settlement Class
 4 Members could review the notice and obtain more information about the proposed
 5 modifications. (Wheatman Decl., ¶¶ 14, 33.) To date, no comments on the proposed
 6 modifications from Settlement Class Members have been received. (Frankel Decl., ¶ 2;
 7 Birka-White Decl., ¶ 6.)

8 **D. Current Settlement Terms**

9 The current Settlement terms are described in detail in the previously submitted
 10 preliminary and final approval motions (ECF Nos. 118-121; 139-144), are available for
 11 review in the Settlement (ECF No. 119–1), are summarized in the Joint Motion for
 12 Conditional Approval (ECF No. 154), and are incorporated herein by reference.

13 **E. Proposed Modifications**

14 Although the proposed modifications to the Settlement and Plan of Allocation are
 15 discussed in the Joint Motion for Conditional Approval and/or were discussed at the
 16 conditional approval hearing, they are briefly described below for ease of reference.⁶
 17 Those modifications were crafted by the parties with two primary goals in mind: (i) to
 18 provide more benefits to Settlement Class Members who have yet to submit claims by
 19 extending the Claims Period; and (ii) to provide for the next highest and best use of the
 20 unclaimed funds in accordance with the *cy pres* doctrine.⁷

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 24 ⁶ The proposed modifications are also set forth in **Exhibits A and B** to the
 Declaration of David M. Birka-White.

25 ⁷ In addition to the two primary goals discussed above, at the conditional approval
 26 hearing, this Court requested that the Incentive Awards to each Class Representative
 27 be increased from \$1,000 to \$5,000. The modifications to Section VIII of the
 Settlement, attached as **Exhibit A** to the Declaration of David M. Birka-White, reflect
 28 this change. (See Birka-White Decl., **Ex. A**, § VIII.) The Class Representatives have
 each already been paid Incentive Awards in the amount of \$1000. (Birka-White Decl.,
 ¶ 4.)

1. Additional Distributions to Settlement Class Members and Extension of Claims Period

1
2
3 The first goal of the proposed modifications is to provide Settlement Class
4 Members with an extended period within which to submit claims by extending the
5 Claims Period from September 25, 2016 to a period ending one year after final
6 Court-approval of the modifications (the “Extended Claims Period”). During the
7 Extended Claims Period, Settlement Class Members who (a) submit valid claims for
8 unreimbursed out-of-pocket installation costs will receive up to \$127.50 for the first
9 Flushmate Toilet repaired or replaced at the claimant’s Property address, and up to
10 \$30.00 for each additional Flushmate Toilet repaired or replaced at the same Property
11 address⁸; (b) submit valid claims for self-installation of a Repair Kit, replacement
12 pressure vessel or replacement toilet will receive \$25.00 per Flushmate Toilet repaired
13 or replaced at the same Property address; and (c) submit valid Property Damage claims
14 will receive payment for their reasonable and necessary unreimbursed out-of-pocket
15 expenses incurred in restoring the damaged property to its pre-damage condition. (See
16 Declaration of David M. Birka-White in Support of Joint Motion for Conditional
17 Approval (ECF No. 154-1) (“Birka-White Conditional Approval Decl.”), ¶¶ 13-14;
18 Birka-White Decl., **Ex. A** at § I (Definition of “Extended Claims Period”), **Ex. B** at
19 § I.B.1.)⁹

20
21
22 ⁸ During the Extended Claims Period, in the event that Settlement Class Members
23 claim to have incurred in excess of \$127.50/\$30.00 in unreimbursed out-of-pocket
24 installation expenses, such Non-Property Damage claims will be reviewed by the
25 Claims Administrator in the first instance, who will make recommendations regarding
26 their disposition to the Special Circumstances Committee for final determination.

27 ⁹ To the extent that, during the Extended Claims period, Defendants elect to resolve
28 certain Non-Property and Property Damage claims themselves, they will be reimbursed
for such amounts either through credits against future settlement payments due under
the Settlement, if any, or from payment by the Claims Administrator in accordance with
the modified Plan of Allocation. Those Non-Property Damage claims that exceed
\$127.50/\$30.00 will be processed in the manner set forth in Footnote 8.

1 **2. *Cy Pres* Distribution**

2 The second goal of the modifications, in accord with the terms of the Settlement,
3 is to provide for a *cy pres* distribution, pursuant to *Dennis v. Kellogg, Co.*, 697 F.3d 858,
4 865-66 (9th Cir. 2012) (Settlement Agreement, § V.C. (ECF No. 119-1)), by
5 distributing some of the remaining unclaimed funds in the Settlement Fund Trust
6 Account to another group who similarly claim to have sustained non-property and
7 property damages related to the Flushmate III Pressure-Assist Flushing System
8 manufactured from July 1, 2009 through April 30, 2011, that are not encompassed
9 within the Settlement.

10 As described more fully in the Joint Motion for Conditional Approval, *Mergens v.*
11 *Sloan Valve Co.*, U.S. District Court, C.D. Cal., Case No. 2:16-cv-05255-SJO-SK (the
12 “Mergens Action”), is a putative class action that followed the July 14, 2016 expanded
13 voluntary recall of the Series 503 Flushmate III Pressure-Assist Flushing Systems
14 manufactured by Flushmate from July 1, 2009 through April 30, 2011 (the “Expanded
15 Voluntary Recall”). Like the Plaintiffs in this action, Mergens asserted on behalf of
16 herself and all others similarly situated that the Series 503 Flushmate III Pressure-Assist
17 Flushing Systems covered by the Expanded Voluntary Recall were defective, and
18 sought relief for those who sustained non-property and property damage. The Mergens
19 Action was denominated a related action to the UDC Action and assigned to this Court.
20 (Case No. 2:16-cv-05255-SJO-SK (ECF Nos. 3, 11, 15).)

21 On April 10, 2017, this Court preliminarily approved a nationwide class action
22 settlement in the Mergens Action. (Case No. 2:16-cv-05255-SJO-SK (ECF No. 44).)
23 That settlement proposes to resolve claims for non-property and property damage
24 allegedly sustained by Mergens Settlement Class Members¹⁰ on the same terms as those
25

26 _____
27 ¹⁰ The proposed modifications to the Settlement contain some newly defined terms, as
28 set forth in **Exhibit A** to the Birka-White Declaration. As used in this Motion, those
newly defined terms (shown with initial capitalization) have the same meaning as set
forth in the proposed modifications to the Settlement.

1 described herein for Settlement Class Members, but with all costs and expenses paid
2 from the Settlement Fund Trust Account (except for Mergens counsel’s attorneys’ fees
3 and expenses which, subject to Court approval, will be paid separately by Defendant
4 Sloan Valve Company (“Sloan”). In the unlikely event that the Settlement Fund Trust
5 Account is insufficient to pay the claims submitted by Mergens Settlement Class
6 Members during the one-year proposed claims period, Sloan has committed to
7 contribute such reasonable and additional funds as are necessary to pay such valid
8 claims, including the costs of administration, to ensure that UDC Settlement Class
9 Members get the full benefit of the \$18 million settlement, and the valid claims of
10 Mergens Settlement Class Members are also paid.

11 To enable resolution of the Mergens Action to proceed on this basis, the Court
12 should finally approve the modifications to the Settlement at Section V.C (Potential Pro
13 Rata Distribution to Class Members) to provide for the *cy pres* distribution to claimants
14 in the Mergens Action. (See Birka-White Decl., Ex. A.)

15 **3. Notice and Administration**

16 Pursuant to the proposed modifications, Settlement § III.B. (Cost of Notice) and
17 § V.E. (Costs and Reporting) would be modified to allow all reasonable and necessary
18 notice and administration costs be paid from the Settlement Fund Trust Account.¹¹
19 Through the Amended Order, the Court previously approved payment of the costs
20 associated with the Notice Plan from the Settlement Fund Trust Account. (Amended
21 Order, ¶ 3.)

22 **4. Distribution of Remaining Unclaimed Settlement Funds**

23 If, following expiration of the Extended Claims Period and Mergens Claims
24 Period, funds still remain in the Settlement Fund Trust Account, the proposed

25 _____
26 ¹¹ The granting of this motion is a condition precedent for the proposed Mergens
27 Settlement. (Mergens Class Action Settlement Agreement and Release, § IX.B,
28 attached as **Exhibit A** to the Declaration of David M. Birka-White accompanying
Plaintiff’s Unopposed Motion for Preliminary Approval of Class Action Settlement
(Case No. 2:16-cv-05255-SJO-SK, ECF No. 33-1).)

1 modifications allow funds to be distributed to Mergens Settlement Class Members who
2 submitted timely claims for having self-installed a Repair Kit, replacement pressure
3 vessel or replacement toilet in the amount of \$25.00 per Flushmate Toilet repaired or
4 replaced at the same Property address. If sufficient funds still remain in the Settlement
5 Fund Trust Account after those claims have been satisfied, the Extended Claims Period
6 and Mergens Claims Period could be extended for period(s) to be agreed upon, subject
7 to approval by the Special Master.

8 Alternatively, if funds remain, and further distribution to Settlement Class
9 Members and Mergens Settlement Class Members would be impracticable or yield a
10 windfall, such funds would be distributed *cy pres* in compliance with *Dennis v. Kellogg*
11 *Co.*, 697 F.3d 858, 865-66 (9th Cir. 2012), subject to the Special Master's approval.

12 **F. Expected Status of Settlement Fund Trust Account After**
13 **Implementation of Proposed Modifications**

14 As noted previously, after making the supplemental distributions to UDC
15 Settlement Class Members pursuant to the January 27, 2017 Amendment to the Plan of
16 Allocation and paying for the costs of notice, there will be a remaining balance of
17 approximately \$6,000,000 in the Settlement Fund Trust Account. (Rodio Decl., ¶ 9).
18 The Claims Administrator expects that the balance will be more than sufficient to pay
19 all timely submitted claims of UDC Settlement Class Members during the Extended
20 Claims Period, to pay all timely submitted claims of Mergens Settlement Class
21 Members during the Mergens Claims Period, and to pay all notice and administration
22 costs. (Rodio Decl., ¶ 16.) Indeed, based on current estimates, the Claims
23 Administrator anticipates that there could be approximately \$1,000,000 remaining in
24 the Settlement Fund Trust Account following the close of the Extended Claims Period
25 and Mergens Claims Period. (*Id.*) However, in the unlikely event that the Settlement
26 Fund Trust Account is insufficient to pay the claims submitted by Mergens Settlement
27 Class Members during Mergens Claims Period, Sloan has committed to contribute such
28 reasonable and additional funds as are necessary to pay such valid claims, including the

1 costs of administration. (Birka-White Conditional Approval Decl., ¶ 12.)

2 **III. ARGUMENT**

3 **A. The Modifications of the Settlement and Plan Of Allocation**
4 **Should Be Finally Approved Because They Confer Substantial**
5 **Additional Benefits Upon Settlement Class Members and Provide**
6 **for the Next Best Use of Remaining Settlement Funds**

7 The Claims Period has been closed for months, and millions of unclaimed funds
8 remain in the Settlement Fund Trust Account. There are no better uses for the
9 unclaimed funds than those that are proposed by this Motion. Indeed, the proposed
10 modifications will further benefit Settlement Class Members, allowing those who have
11 not yet submitted claims over one more year to do so. With respect to Non-Property
12 Damage claims, Settlement Class Members who submit valid claims will receive up to
13 \$127.50 per Flushmate Toilet and up to \$30.00 for each additional Flushmate Toilet
14 repaired or replaced at the same Property address — an amount selected by the Claims
15 Administrator, a nationally recognized plumbing expert — to fully reimburse
16 Settlement Class Members for their unreimbursed out-of-pocket installation expenses.
17 (Rodio Conditional Approval Decl., ¶¶ 1-6, 11.) In the event that Settlement Class
18 Members incurred unreimbursed out-of-pocket installation expenses in excess of those
19 amounts, those claims will be reviewed by the Claims Administrator, who will make a
20 recommendation to the Special Circumstances Committee for final disposition. (Rodio
21 Conditional Approval Decl., ¶ 9.) Those Settlement Class Members who elect to repair
22 or replace their Flushmate Toilets themselves will be paid \$25.00 for each Flushmate
23 Toilet repaired or replaced at the same Property address to fairly compensate them for
24 their time. (*Id.*)

25 One of the Class Counsel, whose office had primary responsibility for the claims
26 administration process and sole responsibility for the management of the Settlement
27 Fund Trust Account, maintains that “the interests of the UDC Settlement Class are best
28 protected by (1) paying the reimbursement claims in amounts of up to \$127.50/\$30
pursuant to the amended Plan of Allocation and (2) extending the Claims Period for an

1 additional year.” (Birka-White Conditional Approval Decl., ¶ 10; Birka-White Decl.,
 2 ¶ 3.) In addition, by ensuring that the \$18 million settlement fund will be available to
 3 satisfy the claims of UDC Settlement Class Members submitted during the Extended
 4 Claims Period, the modifications must be viewed as being fair, reasonable and adequate
 5 to them. *See, e.g., Ruiz v. JCP Logistics, Inc.*, No. SACV 13-1908-JLS (ANx), 2016
 6 WL 6156212, at *6 (C.D. Cal. Aug. 12, 2016) (discussing, within the context of class
 7 action settlement approval, that “[t]he recommendations of plaintiffs’ counsel should be
 8 given a presumption of reasonableness” given their experience) (internal citations
 9 omitted); *Katz v. China Century Dragon Media, Inc.*, No. LA CV11-02769 JAK (SSx),
 10 2013 WL 11237202, at *5 (C.D. Cal. Oct. 10, 2013) (“Great weight is accorded to the
 11 recommendation of counsel, who are most closely acquainted with the facts of the
 12 underlying litigation”) (internal citations omitted).¹²

13 However, even with those modifications, the Settlement Fund Trust Account will
 14 still have significant unclaimed funds. In matters such as this, the Court has “broad
 15 discretionary powers in shaping equitable decrees for distributing unclaimed class
 16 action funds.” *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307
 17 (9th Cir. 1990). This power is retained until settlement funds are completely distributed.
 18 *Powell v. Georgia–Pac. Corp.*, 843 F. Supp. 491, 495 (W.D. Ark. 1994), *aff’d*, 119 F.3d
 19 703 (8th Cir. 1997); *Newberg on Class Actions* §12:28 (5th ed. 2016). Where, as here,
 20 there are excess funds available after distribution to the class, the funds may (i) be
 21 distributed *pro rata* to class members; (ii) be distributed *cy pres*; (iii) escheat to the
 22 government; or (iv) revert to the defendant. *See Hayes v. Arthur Young & Co.*, 34 F.3d
 23 1072, 1994 WL 463493, at *17 (9th Cir. 1994) (unpub’d). *Pro rata* distribution of the
 24 funds is *not* appropriate where, as here, it will confer a windfall upon the claimants. *See*

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¹² The Claims Administrator also believes that “it is in the best interest of the UDC Settlement Class to extend the Claims Period for an additional year to maximize the recovery to UDC Settlement Class Members” from the \$18 million settlement fund. (Rodio Conditional Approval Decl., ¶ 17.)

1 *Id.* See also *Miller v. Ghirardelli Chocolate Co.*, No. 12–cv–04936–LB, 2015 WL
2 758094, at *10 (N.D. Cal. Feb. 20, 2015) (citing *Hayes*, court found it inappropriate to
3 provide claiming class members with a windfall); *In re Lupron Mktg. & Sales Practices*
4 *Litig.*, 677 F.3d 21, 35 (1st Cir. 2012) (“claimants are [not] entitled to receive a windfall
5 of any unclaimed residual money regardless of whether they have already been
6 compensated for their losses. . . . It is well accepted that protesting class members are
7 not entitled to windfalls in preference to *cy pres* distributions.”)

8 The Settlement here states precisely what should happen to the unclaimed funds;
9 they *may* be distributed on a *pro rata* basis but where, as here, *pro rata* distribution
10 would be impracticable, the Court may order “*cy pres* distribution in compliance with
11 the standard articulated in *Dennis v. Kellogg Co.*” and its progeny. (Settlement, § V.C.
12 (ECF No. 119-1).) The Settlement neither identifies the ultimate recipients of any *cy*
13 *pres* distribution nor limits the universe of potential recipients in any manner.

14 “[A] *cy pres* award must qualify as ‘the next best distribution’ to giving the funds
15 directly to class members.” *Kellogg*, 697 F.3d at 865 (internal citations omitted). It is
16 “‘guided by (1) the objectives of the underlying statute(s) and (2) the interests of the
17 silent class members,’ . . . and must not benefit a group ‘too remote from the plaintiff
18 class.’” *Id.* See also *Aboudi v. T-MobileUSA, Inc.*, No. 12CV2169 BTM (NLS), 2015
19 WL 4923602, at *5 (S.D. Cal. Aug. 18, 2015) (same).

20 When making a *cy pres* distribution, “the unclaimed funds should be distributed
21 for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the
22 interests of class members, and the interests of those similarly situated.” *In re Airline*
23 *Ticket Com’n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir. 2002). It is important to
24 “[tailor] a *cy pres* distribution to the nature of the underlying lawsuit” or a beneficiary
25 that can claim “relation to the substantive issues” that are being litigated in the case. *Id.*
26 at 683. The recipient of *cy pres* funds should “relate, as nearly as possible, to the
27 original purposes of the class action and its settlement.” *Id.* at 684. See also *Downey*
28 *Surgical Clinic, Inc. v. Optuminisight, Inc.*, No. CV09-5457 PSG (JCx), 2016 WL

1 5938722, at *8 (C.D. Cal. May 16, 2016) (finding that *cy pres* distributions should
2 “account for the nature of the plaintiffs’ lawsuit, the objectives of the underlying
3 statutes, and the interests of the silent class members.”) (internal citations and
4 quotations omitted). Indeed, the Ninth Circuit requires “a driving nexus between the
5 plaintiff and the *cy pres* beneficiaries.” *Kellogg*, 697 F.3d at 865 (internal citations and
6 quotations omitted). *See also Palacios v. Penny Newman Grain, Inc.*, No.
7 1:14-cv-01804-KJM, 2015 WL 4078135, at *11 (E.D. Cal. July 6, 2015).

8 Here, the chosen *cy pres* beneficiaries could not be more congruent with UDC
9 Settlement Class Member interests. The requested equitable decree from this Court will
10 permit some of the unclaimed Settlement Fund Trust Account funds to be used to
11 benefit members of the proposed Mergens Settlement Class — who own the same
12 product, though manufactured during a different date range, as the UDC Settlement
13 Class Members here and who have advanced claims similar to those alleged in this
14 litigation — on the same terms as set forth in the proposed, modified Settlement and
15 Plan of Allocation.

16 The Mergens Settlement Class Members are so closely related to the UDC
17 Settlement Class Members that they have inadvertently submitted claims pursuant to
18 the UDC Settlement. (Rodio Conditional Approval Decl., ¶ 8, **Ex. A**, at 2 n.2.) Indeed,
19 based on Flushmate’s registration records, at least approximately 17,175 UDC
20 Settlement Class Members also own Flushmate Systems covered by the Expanded
21 Recall and would be included in the proposed Mergens Settlement Class. (*See*
22 Declaration of Michael Gembarski in Support of Joint Motion for Conditional Approval
23 (ECF No. 154-3) (“Gembarski Decl.”), ¶ 3.)

24 That the Mergens Settlement Class Members are technically not members of the
25 Class in this litigation is no impediment to the proposed equitable solution. In *In re*
26 *Airline Ticket*, travel agencies and their trade group (ASTA) claimed airlines colluded
27 to place caps on commissions paid to agents; the case settled, and at the end of the
28 claims period, approximately \$500,000 of the settlement funds were left undistributed.

1 *In re Airline Ticket*, 307 F.3d at 681. ASTA proposed that the district court make a *cy*
2 *pres* distribution of the unclaimed funds to agencies in Puerto Rico and the U.S. Virgin
3 Islands. *Id.* While these agencies were not part of the class (“travel agencies in the
4 United States”), the Eighth Circuit held that they “were clearly the next best recipients
5 of the funds” as they were subject to the same alleged unlawful caps, and the *cy pres*
6 distribution to them would relate directly to the antitrust injury alleged and settled by
7 the parties. *Id.* at 683. The court emphasized the fact that “our ruling that those travel
8 agencies were not specific members of the class does not foreclose such a distribution.”
9 *Id.* at 683 n.2 (citing *Powell*, 119 F.3d at 707.)

10 As in *In re Airline Ticket*, the Mergens Settlement Class Members, though not
11 technically part of the Class, are the next best recipients of the unclaimed settlement
12 funds given that they have alleged injury virtually identical to that claimed by the Class,
13 and thousands are included in both settlement classes. (*See* Gembarski Decl., ¶ 3). To
14 that end, the proposed *cy pres* distribution is tailored exactly to the nature of the
15 underlying lawsuit and the substantive claims that had been litigated in this case. As a
16 matter of economics and equity, if the unclaimed funds are not to revert to Defendants,
17 and a windfall is not to be conferred on Settlement Class Members under Ninth Circuit
18 precedent, the proposed modifications provide the next highest and best use of the
19 excess funds, consistent with the *cy pres* standard set forth in *Kellogg*.

20 Notably, prior to the Court’s conditional approval, the court-appointed Special
21 Master, the Hon. William J. Cahill (Ret.), reviewed the proposed plan for distribution of
22 the unclaimed settlement funds to UDC Settlement Class Members and to the proposed
23 Mergens Settlement Class. He believed that the modifications were a fair, equitable and
24 reasonable solution for the distribution of the unclaimed settlement funds, and provided
25 for the next highest and best use of the funds in accordance with the *cy pres* doctrine.
26 (Special Master’s Report and Recommendation (ECF No. 154-5).) Likewise, in
27 conditionally approving the proposed modifications, this Court found that the
28 modifications provide for “a fair, reasonable and equitable solution for allowing

1 distribution of some of the unclaimed settlement funds . . . to the Settlement Class,” and
2 further held that, by using unclaimed settlement funds to resolve claims in the Mergens
3 Action, those funds would be applied “to their next highest and best use in accordance
4 with the *cy pres* doctrine.” (Amended Order, ¶ 1.)

5 **B. Even Though Notice of the Modifications and Cy Pres Distribution**
6 **Was Not Required, Notice Was Provided To Settlement Class**
7 **Members and No Settlement Class Members Have Commented To**
8 **Date**

9 The proposed modifications do not provide for a lesser recovery to the Settlement
10 Class than was available under the original Settlement nor do they bargain away rights
11 to enforce portions of that agreement. As a result, and as this Court concluded in its
12 Amended Order, it was not necessary to provide notice to the Settlement Class or afford
13 Settlement Class Members the opportunity to be heard on the proposed modifications
14 under Rule 23(e) of the Federal Rules of Civil Procedure prior to their adoption.
15 *Keepseagle v. Vilsack*, 102 F.Supp. 3d 306, 312-14 (D.D.C. 2015) (where proposed
16 amendments provide many additional benefits to class members, and no legal right is
17 adversely affected, Rule 23(e) is not applicable).

18 The same holds true for the *cy pres* distribution to the proposed Mergens
19 Settlement Class. Rule 23(e)’s procedural requirements are inapplicable because all
20 Settlement Class Members have settled their legal claims, retain no property interest in
21 the unclaimed funds, and the *cy pres* distribution will not materially impact any of their
22 legal rights. *See Id.* at 315-16. *See also Smallwood v. Yates*, No. 16–161 (RBW), 2017
23 WL 398334, at *5 (D.D.C. Jan. 30, 2017) (a plaintiff that has received his settlement
24 reward has “no property right in the unclaimed funds.”)

25 Nevertheless, in response to the parties’ request, the Court directed that notice of
26 the proposed modifications be provided to the Settlement Class, and Settlement Class
27 Members be afforded the opportunity to be heard at, or submit written comments in
28 advance of, the final hearing on this Motion. Because the deadline to submit written
comments on the proposed modifications has not yet passed, the reaction of the

1 Settlement Class to the modifications cannot be fully evaluated. However, as of the
2 date of the filing of this Motion, there appears to be overall acceptance of the
3 modifications by the Settlement Class, in that, despite that hundreds of thousands of
4 Settlement Class Members have received direct notice, the parties have not received
5 *any* comments on the proposed modifications. (Frankel Decl., ¶ 2; Birka-White Decl.,
6 ¶ 6; Rodio Decl., ¶ 8.)

7 This reaction of the Settlement Class (or lack thereof) to the modifications
8 supports final approval of the proposed modifications. *See Ruiz*, 2016 WL 6156212, at
9 *6-7 (granting final approval of a class action settlement in light of, among other things,
10 the absence of any objections and minimal number of opt-outs); *Katz*, 2013 WL
11 11237202, at *6 (“Although every single class member did not approve the settlement,
12 ‘the fact that the overwhelming majority of the class willingly approved the offer and
13 stayed in the class presents at least some objective positive commentary as to its
14 fairness.’”) (internal citations omitted). (*See also* Birka-White Decl., ¶ 7 (“My 30 plus
15 years of experience prosecuting class action cases informs me that if there are no
16 objections to the proposed modification, the parties and the Court can be confident that
17 the class members overwhelmingly approve.”).) Based on the overall acceptance of the
18 modifications by the Settlement Class, this Court should finally approve the
19 modifications to the Settlement and Plan of Allocation.

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IV. CONCLUSION

For the foregoing reasons, the Court should grant the Joint Motion for Final Approval, and in the exercise of its equitable jurisdiction, finally approve the proposed modifications of the Settlement and Plan of Allocation.

Dated: June 30, 2017

Respectfully submitted,

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CERTIFICATION

Pursuant to Civil Local Rule 5–4.3.4(a)(2)(i), David M. Birka-White, the ECF User whose identification and password are being used to file the foregoing NOTICE OF MOTION AND JOINT MOTION FOR FINAL APPROVAL OF MODIFICATIONS OF SETTLEMENT AGREEMENT AND PLAN OF ALLOCATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF, attests that all other signatories listed, and on whose behalf the filing is submitted, concur in the filing’s content and have authorized the filing.

Dated: June 30, 2017

/s/ David M. Birka-White
David M. Birka-White