

1 David M. Birka-White (State Bar No. 85721)
dbw@birka-white.com
2 Mindy M. Wong (State Bar No. 267820)
mwong@birka-white.com
3 BIRKA-WHITE LAW OFFICES
65 Oak Court
4 Danville, CA 94526
Telephone: (925) 362-9999
5 Facsimile: (925) 362-9970

6 Attorneys for Plaintiff
KELLY MERGENS

7 [Additional counsel listed on signature page.]
8

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

11 KELLY MERGENS, on behalf of
herself and all others similarly situated,

12 Plaintiff,

13 vs.

14 SLOAN VALVE COMPANY, and
15 DOES 1-10, inclusive,

16 Defendants.

Case No. 2:16-cv-05255-SJO-SK

**PLAINTIFF'S MOTION FOR
FINAL APPROVAL OF CLASS
ACTION SETTLEMENT;
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT THEREOF**

The Honorable S. James Otero

Date: September 18, 2017

Time: 10:00 a.m.

Dept.: Courtroom 10C

Action Filed: July 15, 2016

Related Case:

United Desert Charities, et al. v.

Sloan Valve Company, et al.

Case No. 2:12-cv-06878-SJO-SH

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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., in the Courtroom of the Honorable S. James Otero, United States District Judge for the Central District of California, located at 350 W. 1st Street, Los Angeles, CA 90012 - Courtroom 10C, Plaintiff, on behalf of herself and all others similarly situated, will and hereby does move the Court, pursuant to Federal Rule of Civil Procedure 23(e), for entry of a Final Order and Judgment approving the proposed Settlement Agreement (“Settlement”) entered into between the parties.

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 the accompanying Memorandum of Points and Authorities, the Settlement, the accompanying Declarations of David M. Birka-White, Arnold Rodio and Shannon Wheatman, and documents attached thereto, Plaintiff’s Unopposed Motion for Preliminary Approval, the accompanying Memorandum of Points and Authorities, any papers filed in reply, the argument of counsel, and all papers and records on file in this matter.

Dated: June 30, 2017

Respectfully submitted,

BIRKA-WHITE LAW OFFICES

By: /s/ David M. Birka-White

David M. Birka-White

David M. Birka-White (State Bar No. 85721)

dbw@birka-white.com

Mindy M. Wong (State Bar No. 267820)

mwong@birka-white.com

BIRKA-WHITE LAW OFFICES

65 Oak Court

Danville, CA 94526

Telephone: (925) 362-9999

Facsimile: (925) 362-9970

Attorneys for Plaintiff

KELLY MERGENS

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOTICE OF MOTION AND MOTION..... i

MEMORANDUM OF POINTS AND AUTHORITIES..... 1

I. INTRODUCTION..... 1

II. FACTUAL BACKGROUND 2

III. SUMMARY OF THE SETTLEMENT TERMS 3

 A. Mergens Settlement Class..... 3

 B. Settlement Funding, Benefits and Additional Consideration 3

 C. Claims Process 6

 D. Claims Administration 7

 E. Special Master..... 7

 F. Settlement Release 8

IV. THE APPROVED CLASS NOTICE HAS BEEN DISSEMINATED
TO THE CLASS AND SATISFIES RULE 23 AND DUE PROCESS 8

V. FINAL APPROVAL IS WARRANTED..... 10

 A. Summary of Argument..... 10

 B. The Settlement is Fair, Reasonable, and Adequate, and the
Relevant Factors Weigh in Favor of Approval..... 10

 1. The Settlement Is Within the Range of Reasonableness
Given the Benefits Conferred and the Risks of Litigation. 11

 2. Class Members Receive Substantial Relief Under the
Settlement. 13

 3. Experienced Class Counsel Strongly Believe the Settlement
Merits Approval..... 14

 4. The Settlement Evidences No Collusion..... 15

 5. Class Member Reaction to the Settlement Has Been
Overwhelmingly Favorable. 17

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

6. No Governmental Entity Has Raised Any Concern
About the Settlement. 18

7. Use of Remaining Funds in the UDC Action is
Appropriate. 18

B. Certification of the Settlement Class Remains Proper. 19

C. Attorneys’ Fees and Service Award. 20

VI. CONCLUSION 20

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

CASES

Allen v. Bedolla
787 F.3d 1218 (9th Cir. 2015)..... 15

Bayat v. Bank of the W.
No. C-13-2376 EMC, 2015 WL 1744342
(N.D. Cal. Apr. 15, 2015)..... 13

Chambers v. Whirlpool Corp.
214 F. Supp. 3d 877 (C.D. Cal. 2016), *judgment entered*,
No. SACV111733FMOMLGX, 2016 WL 5921765
(C.D. Cal. Oct. 11, 2016)..... 12

Chun-Hoon v. McKee Foods Corp.
716 F. Supp. 2d 848 (N.D. Cal. 2010)..... 17

Churchill Village, L.L.C. v. General Electric
361 F.3d 566 (9th Cir. 2004)..... 11, 17

Dennis v. Kellogg Co.
697 F.3d 858 (9th Cir. 2012)..... 18, 19

Destefano v. Zynga, Inc.
2016 WL 537946 (N.D. Cal. Feb. 11, 2016)..... 12

Dudum v. Carter’s Retail, Inc.
2016 WL 946008 (N.D. Cal. Mar. 14, 2016)..... 16

Eisen v. Porsche Cars N. Am., Inc.
2014 WL 439006 (C.D. Cal. Jan. 30, 2014)..... 14

Ellis v. Naval Air Rework Facility
87 F.R.D. 15 (N.D. Cal. 1980), *aff’d*, 661 F.2d 939 (9th Cir. 1981) 11

Garner v. State Farm Mut. Auto. Ins. Co.
No. C 08 1365 CW (EMC), 2010 WL 1687832
(N.D. Cal. Apr. 22, 2010)..... 17

Glass v. UBS Fin. Serv., Inc.
2007 WL 221862 (N.D. Cal. Jan. 26, 2007) 17

Hanlon v. Chrysler Corp.
150 F.3d 1011 (9th Cir. 1998)..... 11

Hendricks v. Starkist Co.
2015 WL 4498083 (N.D. Cal. July 23, 2015)..... 15

In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.
2011 WL 2204584 (N.D. Ill. June 2, 2011) 14

In re Bluetooth Headset Products Liab. Litig.
654 F.3d 935 (9th Cir. 2011)..... 15

In re Google Referrer Header Privacy Litig.
87 F. Supp. 3d 1122 (N.D. Cal. 2015)..... 8

*In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales
Practices, & Prod. Liab. Litig.*
2013 WL 3224585 (C.D. Cal. June 17, 2013)..... 18

1 *In re TracFone Unlimited Serv. Plan Litig.*
 112 F. Supp. 3d 993 (N.D. Cal. 2015), *reconsideration denied*,
 2 No. C-13-3440 EMC, 2015 WL 4735521 (N.D. Cal. Aug. 10, 2015)..... 13

3 *In re Transpacific Passenger Air Transportation Antitrust Litig.*
 2015 WL 3396829 (N.D. Cal. May 26, 2015) 17

4 *Lane v. Facebook, Inc.*
 696 F.3d 811 (9th Cir. 2012) 10

5 *Mazza v. American Honda Motor Co.*
 666 F.3d 581 (9th Cir. 2012) 12

6 *McLaughlin v. American Tobacco Co.*
 522 F.3d 215 (2d Cir. 2008) 12

7 *Mexican Workers v. Ariz. Citrus Growers*
 8 904 F.2d 1301 (9th Cir. 1990) 19

9 *Miller v. Ghiradelli Chocolate Co.*
 2015 WL 758094 (N.D. Cal. Feb. 20, 2015)..... 18

10 *Mirkin v. Wasserman,*
 858 P.2d 568 (Cal. 1993)..... 12

11 *Mullane v. Cent. Hanover Bank & Trust Co.*
 12 339 U.S. 306 (1950) 8

13 *Nat’l Rural Telecomm. Coop. v. DIRECTV, Inc.*
 221 F.R.D. 523 (C.D. Cal. 2004) 17

14 *Nobles v. MBNA Corp.*
 2009 WL 1854965 (N.D. Cal. June 29, 2009) 11

15 *Nwabueze v. AT & T Inc.*
 2013 WL 6199596 (N.D. Cal. Nov. 27, 2013)..... 10

16 *Riker v. Gibbons*
 17 2010 WL 4366012 (D. Nev. Oct. 28, 2010)..... 17

18 *Staton v. Boeing Co.*
 327 F.3d 938 (9th Cir. 2003) 11

19 *Torrisi v. Tuscon Elec. Power Co.*
 8 F.3d 1370 (9th Cir. 1993) 11

20

21 **STATUTES**

22

23 28 U.S.C. § 1715..... 18

24 Fed. R. Civ. P. 23..... 10

25 Fed. R. Civ. P. 23(a) 19

26 Fed. R. Civ. P. 23(b)(3) 19

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TREATISES

Manual for Complex Litigation, §§ 21.63, <i>et seq.</i> (4th ed. 2004).....	10
Newberg on Class Actions, § 13:10 (5th ed.).....	10

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Kelly Mergens (“Plaintiff”), individually and as representative of the
4 proposed Settlement Class¹, submits this memorandum in support of her unopposed
5 motion for final approval of the proposed Settlement with Defendant Sloan Valve
6 Company (“Defendant” or “Sloan”).

7 The proposed Settlement extends substantial cash relief to property owners
8 who own or owned toilets equipped with the Series 503 Flushmate III Pressure-
9 Assist Flushing System (“Flushmate System”) manufactured from July 1, 2009
10 through April 30, 2011, which are part of an Expanded Recall associated with the
11 Flushmate System. Plaintiff alleges that the Flushmate System may Leak and/or
12 Burst and cause Property Damage and potential personal injury.

13 The Court granted preliminary approval of the Settlement on April 10, 2016,
14 finding that it “confers substantial benefits upon the Settlement Class” and appeared
15 to be “fair, reasonable, and adequate.” (ECF No. 44, ¶¶ 2, 4). The proposed
16 Settlement provides significant cash relief to Class members, among other benefits.
17 The cash payments available under the Settlement will fairly and substantially
18 reimburse Class members for out-of-pocket installation expenses related to the
19 repair or replacement of their Flushmate Toilets, and will also reimburse Class
20 members for Property Damage resulting from a Flushmate System that Leaked or
21 Burst. The Settlement has added significant benefits designed to help reduce a
22 safety risk to the Class.

23 On August 25, 2014, this Court granted final approval of an \$18 million class
24 action settlement in a related action, *United Desert Charities, et. al. v. Sloan Valve*
25 *Company, et. al.*, No. CV12-06878 (“UDC Action”). The UDC Action involved
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 March 1, 2017 (ECF No. 33-1, Exhibit A) unless otherwise indicated.

1 Flushmate Systems manufactured from October 14, 1997 through June 30, 2009.
2 The initial claims period in the UDC Action ended on September 24, 2016. After
3 payment of all valid claims for unreimbursed installation costs and for any
4 sustained property damage, a balance of over \$6 million remains in the UDC
5 settlement fund (the “UDC Settlement Fund”) after payment of notice costs. Under
6 the Settlement, the parties seek use of a portion of the remaining UDC Settlement
7 Fund to provide cash payments to owners of the Flushmate Toilets at issue in this
8 action (“Mergens Action”). The proposed claims period will last one year. To the
9 extent that the settlement fund is insufficient, Defendant will deposit additional
10 sums as needed into the UDC Settlement Fund to ensure payment of all valid
11 claims submitted in the Mergens Action during the Claims Period, including any
12 additional administration costs.

13 This comprehensive Settlement is the result of two mediation sessions
14 supervised by Hon. William J. Cahill (Ret.), at JAMS, San Francisco. The arms-
15 length negotiations lasted six months. The parties carefully crafted this resolution to
16 protect the interests of settlement class members in both actions. Judge Cahill will
17 continue to contribute his expertise and knowledge of the case as Special Master,
18 ensuring that the Settlement is efficiently and fairly implemented.

19 As detailed below (and as noted in the Parties’ prior submissions to this
20 Court), the Settlement now before this Court is fair, reasonable, and adequate, and
21 satisfies all the requirements of Fed. R. Civ. P. 23 and due process. Plaintiff
22 therefore respectfully requests that the Court approve the Settlement and enter the
23 proposed Final Order and Judgment submitted herewith.

24 **II. FACTUAL BACKGROUND**

25 The factual background and litigation history for this Motion is described in
26 detail in the Unopposed Motion for Preliminary Approval of Class Action
27 Settlement and the Memorandum of Points and Authorities in Support thereof
28 (ECF No. 33), which is incorporated herein by reference.

1 **III. SUMMARY OF THE SETTLEMENT TERMS**

2 The Settlement terms were described in detail in Plaintiff’s preliminary
3 approval papers (ECF No. 33-1, Exhibit A), and are briefly summarized again here.

4 **A. Mergens Settlement Class**

5 The Settlement provides cash reimbursement to members of the “Class,”
6 defined to include “any Person who owns or owned a Flushmate System or
7 Flushmate Toilet installed in the United States.” Settlement, § I (Definition of
8 “Class”). Under the Settlement, a Flushmate Toilet means any toilet equipped with
9 a Flushmate System. Settlement, § I (Definition of “Flushmate Toilet”). The
10 Flushmate System is defined as any Series 503 Flushmate III Pressure-Assist
11 Flushing System manufactured by Flushmate between July 1, 2009 and April 30,
12 2011. Settlement, § I (Definition of “Flushmate System”).

13 The manufacturing date code/serial number is 16 characters long and is
14 located on the label on the top of the Flushmate System’s polypropylene vessel.
15 The first six numerals of the serial number are the manufacturing date code. The
16 manufacturing date code range for the Expanded Recall begins with 070109 (July 1,
17 2009) and continues through 043011(April 30, 2011). *See* Settlement, § I
18 (Definition of “Flushmate System”). The serial number is easily visible upon lifting
19 the lid of the porcelain tank on any Flushmate Toilet, making it simple and easy for
20 consumers to ascertain whether they are members of the Settlement Class.

21 **B. Settlement Funding, Benefits and Additional Consideration**

22 The Court in the UDC Action conditionally approved the parties Joint
23 Motion to modify the terms of the UDC settlement agreement to: (1) extend the
24 claims period for one year during which time UDC settlement class members can
25 continue to submit claims for unreimbursed out-of-pocket installation costs and for
26 property damage; (2) utilize the UDC Settlement Fund to pay all valid claims
27 submitted by Settlement Class Members during the one-year Claims Period; and
28 (3) pay notice and administration costs. If finally approved by this Court, the UDC

1 Settlement Fund will be the source for disbursements to pay the valid claims
2 submitted by settlement class members in both actions and for claims
3 administration. Defendant has agreed to make a separate payment for Court-
4 approved attorneys' fees and costs and for an incentive award to the Class
5 Representative.

6 As of the date of this filing, after payment of notice costs, the UDC
7 Settlement Fund has a remaining balance of over \$6 million. There were
8 approximately 2.7 million Flushmate Systems at issue in the UDC Action and the
9 claims rate was approximately 1.2%. There are approximately 453,000 Flushmate
10 Systems at issue in the Mergens Action. Plaintiff and Defendant believe there are
11 sufficient funds in the UDC Settlement Fund to satisfy all valid claims submitted in
12 both actions, and to also pay for the costs of notice and claims administration.
13 Moreover, if the UDC Settlement Fund falls below \$50,000 before the end of the
14 Claims Period in the Mergens Action, Defendant will deposit such necessary
15 additional funds into the UDC Settlement Fund to pay all valid claims filed by
16 Settlement Class Members during the Claims Period.

17 Settlement Class Members who have (1) installed a Repair Kit, (2) installed a
18 replacement pressure vessel, (3) installed a replacement toilet, and/or (4) sustained
19 direct Property Damage as a result of a Leak or Burst of a Flushmate System
20 manufactured by Flushmate from July 1, 2009 through April 30, 2011, at any time
21 prior to the close of the Claims Period, will be eligible to submit a claim in the
22 Mergens Action during the Claims Period.

23 **1. Reimbursement for Unreimbursed, Out-of-Pocket,**
24 **Installation Costs.**

25 Under the terms of the Expanded Recall, Flushmate provides a free Repair
26 Kit to any Flushmate Toilet owner who requests one. The Repair Kit, depicted in
27 detail at Exhibit A to the Settlement Agreement, is comprised of a metal U-band
28 that encircles the Flushmate System within the Flushmate Toilet and an external

1 pressure regulator to be installed between the water supply line and the toilet
2 fixture. While the U-band itself does not strengthen the weld seam in the pressure
3 vessel or prevent leaks, it does serve to contain the pressure vessel in the event of a
4 weld seam separation. The external regulator further reduces the likelihood and
5 severity of a weld seam separation by reducing the pressure within the Flushmate
6 System.

7 While the Repair Kit was designed for ease of installation, numerous Class
8 members report feeling unable to install the Repair Kit without professional
9 assistance. Class members who choose to engage a plumbing or other third party
10 professional to install the Repair Kit may expect to pay up to \$127.50 for that
11 service. Under the Settlement, Class members who submit valid claims for
12 reimbursement for the installation of a Repair Kit, replacement pressure vessel, or
13 replacement toilet during the Claims Period will be entitled to a cash payment for
14 their unreimbursed, out-of-pocket installation expenses. Class Counsel anticipate
15 claimants will receive up to \$127.50 per Flushmate Toilet, with \$30.00 for each
16 additional Flushmate Toilet repaired or replaced at the same Property address due
17 to economies of scale. Moreover, the Settlement provides for reimbursement of
18 installation costs in excess of these amounts, subject to proof. Class members who
19 expended their own labor to install a Repair Kit, replacement pressure vessel, or
20 replacement toilet will receive a cash payment of \$25.00 at the end of the Claims
21 Period, if there are sufficient funds remaining in the UDC Settlement Fund at that
22 time. *See* Plan of Allocation, I.B.1.

23 **2. Reimbursement for Repairs Related to Property Damage.**

24 For Class members who have experienced Leaked or Burst Flushmate
25 Systems that resulted in Property Damage, the Settlement provides for recovery of
26 all reasonable expenses incurred to restore the affected Property to its pre-damage
27
28

1 condition. *See* Plan of Allocation, § I.B.2.²

2 **C. Claims Process**

3 Section V of the Settlement, in conjunction with the more detailed Plan of
4 Allocation, sets forth the claims process. Claimants whose Property contains more
5 than one Flushmate Toilet can file multiple claims, one for each toilet. *See*
6 Settlement, § V.B. The costs associated with administering the Settlement will be
7 paid out of the UDC Settlement Fund. *See* Settlement, §§ IV, V.E. For purposes of
8 Settlement administration, claimants are sorted into two groups: non-Property
9 Damage and Property Damage claimants.

10 **Non-Property Damage claimants.** Owners of Flushmate Toilets can submit
11 claims for the amount of their unreimbursed out-of-pocket installation costs
12 associated with the installation of a Repair Kit, replacement pressure vessel, or
13 replacement toilet. As discussed above, it is anticipated that these claimants will
14 receive up to \$127.50 for the first toilet, and \$30.00 for each additional toilet, upon
15 proof of the installation.³ *See* Plan of Allocation, I.B.1 (ECF No. 33-1, Exhibit B).
16 Based on the Claim Administrator's review of all UDC non-property damage
17 claims, his knowledge of how to install the Repair Kit, a replacement pressure
18 vessel, and a replacement toilet, his review of various nationally accepted pricing
19 guides, and his extensive plumbing expertise and familiarity with plumbing labor
20 rates throughout the United States, the Claims Administrator determined that
21 \$127.50 is a fair and reasonable rate for the installation cost of a first Repair Kit,
22 replacement pressure vessel or replacement toilet, with \$30.00 being a fair and
23 reasonable rate for each additional Repair Kit, replacement pressure vessel or
24 replacement toilet due to economies of scale. *See* Declaration of Arnold Rodio in

25 _____
26 ² Property Damage claims arising after the conclusion of the Claims Period are not
released in the Settlement.

27 ³ In the event that Settlement Class Members incurred unreimbursed out-of-pocket
28 installation expenses in excess of that amount, those claims will be reviewed by the
Claims Administrator, who will make a recommendation to the Special
Circumstances Committee for final disposition. Plan of Allocation, I.B.1.

1 Support of Plaintiff's Unopposed Motion for Preliminary Approval of Class Action
2 Settlement (ECF No. 33-2, ¶¶ 9-10).

3 **Property Damage claimants.** Owners of Flushmate Toilets whose Property
4 was damaged as a result of a Leak or a Burst are entitled to reimbursement for the
5 reasonable and necessary documented expense to restore the Property to its pre-
6 damage condition. *See* Plan of Allocation, I.B.2.

7 **D. Claims Administration**

8 The parties proposed and the Court preliminarily approved the appointment
9 of Class Litigation Administration Support Services ("CLASS"), the Court-
10 appointed Claims Administrator for the UDC Action, as the Claims Administrator
11 for this action. (ECF No. 44, ¶ 17).

12 Arnold Rodio, President of CLASS, is not only an experienced claims
13 administrator, but also a plumbing expert who is the former president of the largest
14 California plumbing trade group and a member of various committees of the
15 international plumbing trade association responsible for promulgating uniform
16 plumbing standards. (ECF No. 33-2, ¶¶ 1-6). Mr. Rodio is ideally suited to
17 administer both settlements and has, to date, performed in an exemplary fashion.

18 Class Counsel will submit an annual report to the Court detailing the work
19 performed by the Claims Administrator and the amounts paid to the Settlement
20 Class during the prior year. *See* Settlement, § V.E. At the end of the Claims Period,
21 the Settlement Class Members will revert to their remaining warranty rights, which
22 the Settlement preserves. *See* Settlement, § VI.D.

23 **E. Special Master**

24 The Settlement provides for the appointment of a Special Master who will
25 resolve certain disputes, which may arise during Settlement administration. The
26 parties have agreed and the Court has appointed Hon. William J. Cahill (Ret.) to
27 serve as the Special Master. (ECF No. 44, ¶ 18.) Judge Cahill is also the Court-
28 appointed Special Master in the UDC Action. No appeal will lie from the Special

1 Master's decisions. As in the UDC Action, the Settlement also provides for the
 2 appointment of a Special Circumstances Committee, comprised of the Claims
 3 Administrator and representatives of Plaintiff and Defendant, to resolve large,
 4 disputed, or unusual claims in the first instance. *See* Plan of Allocation, § V. If
 5 approved, the duties of the special circumstances committee in the UDC Action will
 6 be expanded to include the Mergens Settlement.

7 **F. Settlement Release**

8 In exchange for the valuable consideration summarized above and set forth in
 9 greater detail in the Settlement, Plaintiff agrees to an appropriately tailored Release
 10 of Defendant from liability. *See* Settlement, § VI.A (ECF No. 33-1, Exhibit A at
 11 25-27). This Release will preclude future claims “to the extent such claims are
 12 alleged to be caused by, arise out of, or relate to any claim asserted, or that could
 13 have been asserted, in the Action relating to the Flushmate System and/or
 14 Flushmate Toilets.” Settlement, § I (Definition of “Released Claims”) (ECF No.
 15 33-1, Exhibit A at 8-9). The Release does not prevent Class members from
 16 exercising their rights under any applicable written express warranties offered with
 17 Flushmate Systems and Flushmate Toilets during or after the Claims Period. *See*
 18 Settlement, § VI.D (ECF No. 33-1, Exhibit A at 25). Moreover, the Release does
 19 not extinguish any wrongful death, personal injury, or emotional distress claims, or
 20 any claims for property damage arising after the end of the Claims Period. *See*
 21 Settlement, § I (Definition of “Released Claims”) (ECF No. 33-1, Exhibit A at 9).

22 **IV. THE APPROVED CLASS NOTICE HAS BEEN DISSEMINATED TO**
 23 **THE CLASS AND SATISFIES RULE 23 AND DUE PROCESS**

24 When individual notice is not practicable, “publication or some similar
 25 mechanism can be sufficient to provide notice to the individuals that will be bound
 26 by the class action judgment.” *In re Google Referrer Header Privacy Litig.*, 87 F.
 27 Supp. 3d 1122, 1129 (N.D. Cal. 2015) (citing *Mullane v. Cent. Hanover Bank &*
 28 *Trust Co.*, 339 U.S. 306, 315 (1950)).

1 On April 10, 2017, the Court found that the Notice Plan was “reasonable and
 2 provides due, adequate and sufficient notice to all persons entitled to receive notice,
 3 and meets the requirements of due process and Rule 23.” (ECF No. 44, ¶¶ 9-10.)
 4 The Notice Plan approved by the Court has been implemented by the Parties, and
 5 the Court-approved Claims Administrator and Notice Provider in accordance with
 6 the Court’s directives. (Declaration of David M. Birka-White in Support of
 7 Plaintiffs’s Motion for Final Approval of Class Action Settlement and Motion for
 8 Attorney Fees and Costs and Incentive Award (“*Birka-White Decl.*”), ¶ 24;
 9 Declaration of Shannon Wheatman, ¶¶ 11, 39 (“*Wheatman Decl.*”); Declaration of
 10 Arnold Rodio (“*Rodio Decl.*”), ¶ 8.)

11 Following preliminary approval, Class Counsel diligently worked with
 12 Kinsella Media LLC and the Claims Administrator to effectuate the Notice Plan
 13 ordered by the Court. Pursuant to the Court-approved Notice Plan, direct individual
 14 notice of the Settlement has been disseminated by mail and/or e-mail to
 15 approximately 231,254 Class Members in the Mergens and UDC Actions, and to
 16 approximately 72,603 plumbing and general contractors nationwide.⁴ *Rodio Decl.*,
 17 ¶ 8; *Wheatman Decl.*, ¶ 13, 31. The Settlement notice has also been published in
 18 dozens of media outlets, including People and Parade, as well as local newspapers
 19 in U.S. territories, Internet, settlement website, and online trade publications likely
 20 to be read by commercial, public, and other owners of Flushmate Toilets.
 21 *Wheatman Decl.*, ¶¶ 19-26, 32.

22 The Notice Plan as executed complies with the Court’s Order, satisfies the
 23 requirements of Fed. R. Civ. Proc. 23, and provided the best notice practicable.
 24 *Wheatman Decl.*, ¶¶ 11, 49.

25 ///

26 ///

27 _____
 28 ⁴ Direct notice will be sent to an additional 33,190 third-party contractors who
 may have installed Flushmate Toilets by July 10, 2017.

1 **V. FINAL APPROVAL IS WARRANTED**

2 **A. Summary of Argument**

3 The *Manual for Complex Litigation* §§ 21.63, et seq. (4th ed. 2004) describes
4 the three-step procedure for approval of class action settlements pursuant to Fed. R.
5 Civ. P. 23:

- 6 1. Certification of a settlement class and preliminary approval of the
7 proposed settlement at a hearing after submission to the Court of a
8 written motion for preliminary approval;
- 9 2. Dissemination of notice of the proposed settlement to the affected
10 class members; and
- 11 3. A “formal fairness hearing” or final settlement approval hearing, at
12 which class members may be heard regarding the settlement, and at
13 which evidence and argument concerning the fairness, adequacy, and
14 reasonableness of the settlement may be presented.

15 *See also Nwabueze v. AT & T Inc.*, No. C 09-01529 SI, 2013 WL 6199596, at *3
16 (N.D. Cal. Nov. 27, 2013). This procedure, regularly used by courts in this Circuit,
17 safeguards class members’ due process rights and enables the Court to fulfill its role
18 as the guardian of class interests. *See Newberg on Class Actions*, § 13:10 (5th ed.).

19 The first two steps in this process have now occurred. With this motion,
20 Plaintiff respectfully requests that the Court take the third and final step in the
21 process by confirming its provisional certification of the Settlement Class and
22 granting final approval to the Settlement agreed upon by the parties.

23 **B. The Settlement is Fair, Reasonable, and Adequate, and the**
24 **Relevant Factors Weigh in Favor of Approval.**

25 “Although Rule 23 imposes strict procedural requirements on the approval of
26 a class settlement, a district court’s only role in reviewing the substance of that
27 settlement is to ensure that it is ‘fair, adequate, and free from collusion.’” *Lane v.*
28 *Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012), *cert. denied*, 134 S. Ct. 8 (2013)

1 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998)). When
 2 class counsel is experienced and supports the settlement, and the agreement was
 3 reached after arm's-length negotiations, courts should give a presumption of
 4 fairness to the settlement. *See Nobles v. MBNA Corp.*, No. C 06-3723 CRB, 2009
 5 WL 1854965, at *6 (N.D. Cal. June 29, 2009); *Ellis v. Naval Air Rework Facility*,
 6 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981).

7 The Ninth Circuit has laid out a set of factors courts should consider in
 8 evaluating class settlements: (1) the strength of the plaintiffs' case; (2) the risk,
 9 expense, complexity, and likely duration of further litigation; (3) the risk of
 10 maintaining class action status throughout the trial; (4) the amount offered in
 11 settlement; (5) the extent of discovery completed and the stage of the proceedings;
 12 (6) the experience and views of counsel; (7) the presence of a governmental
 13 participant; and (8) the reaction of the class members to the proposed settlement.
 14 *Hanlon*, 150 F.3d at 1026; *Churchill Village, L.L.C. v. General Electric*, 361 F.3d
 15 566, 575 (9th Cir. 2004); *Torrisi v. Tuscon Elec. Power Co.*, 8 F.3d 1370, 1375 (9th
 16 Cir. 1993). This list is non-exclusive, *Churchill Village*, 361 F.3d at 576 n.7, and
 17 "[i]t is the settlement taken as a whole, rather than the individual component parts,
 18 that must be examined for overall fairness," *Staton v. Boeing Co.*, 327 F.3d 938,
 19 952 (9th Cir. 2003).

20 Application of the pertinent factors and consideration of the Settlement as a
 21 whole demonstrates that the Settlement is fair, reasonable, and adequate. For this
 22 reason the Settlement merits final approval.

23 **1. The Settlement Is Within the Range of Reasonableness**
 24 **Given the Benefits Conferred and the Risks of Litigation.**

25 The Settlement is even more compelling given the substantial litigation risks.
 26 Nationwide class certification under California law or the laws of multiple states
 27 would have presented an uphill battle. *See Chambers v. Whirlpool Corp.*, 214 F.
 28 Supp. 3d 877, 888 (C.D. Cal. 2016), *judgment entered*, No.

1 SACV111733FMOMLGX, 2016 WL 5921765 (C.D. Cal. Oct. 11, 2016), and
2 appeal dismissed sub nom. *Steve Chambers, et al. v. Whirlpool Corporation, et al.*,
3 (Nov. 10, 2016) (“nationwide class certification under California law or the laws of
4 multiple states is rare”); *Mazza v. American Honda Motor Co.*, 666 F.3d 581, 590-
5 94 (9th Cir. 2012). *See also Destefano v. Zynga, Inc.*, No. 12-CV-04007-JSC, 2016
6 WL 537946, at *11 (N.D. Cal. Feb. 11, 2016) (where settlement class was broader
7 than could have been certified in continued litigation, factor weighs in favor of
8 approval).

9 Further, the potentially individualized issue of Class members’ reliance upon
10 Defendant’s representations or omissions would have raised an additional hurdle to
11 certification of any UCL fraud claim. *See McLaughlin v. American Tobacco Co.*,
12 522 F.3d 215, 222-26 (2d Cir. 2008). Establishing Defendant’s liability for fraud
13 would have been challenging, because there could be no guarantee that Plaintiff’s
14 theory of indirect reliance through “Advisors” and the distribution chain would
15 have been found legally viable. *See Mirkin v. Wasserman*, 858 P.2d 568 (Cal.
16 1993). Plaintiff also would have needed to establish that Defendant knew or should
17 have known of the defect but failed to disclose it until notice of the Expanded
18 Recall was issued.

19 Defendant would have mounted challenges to the express warranty claims as
20 well. It would have argued that its limited warranty covering “defects in materials
21 and workmanship” does not extend to the alleged design defect. It would have
22 further argued that the warranty claim lacks merit because Plaintiff allegedly did
23 not satisfy all the conditions precedent, *i.e.*, contacting Flushmate to request
24 warranty service and making their toilets available for inspection. In addition,
25 Defendant would have attacked the warranty claims on the grounds that the defect
26 did not manifest and/or was not substantially certain to manifest in most of the
27 Flushmate Toilets owned by Plaintiff and the putative Class.

28

1 While Plaintiff believes they have a strong case, there can be no denying the
2 formidable class-wide risks. Assessed against these risks, and the delays and
3 uncertainties associated with protracted litigation of putative consumer class
4 actions, the Settlement provides substantial financial benefits and falls within the
5 range of reasonableness. Indeed, it is hard to argue that a trial would have resulted
6 in more or somehow better relief than the relief now being made available to
7 Settlement Class Members.

8 **2. Class Members Receive Substantial Relief Under the**
9 **Settlement.**

10 “[T]he most important variable in assessing a class settlement is the amount
11 of relief obtained for the class.” *In re TracFone Unlimited Serv. Plan Litig.*, 112 F.
12 Supp. 3d 993, 1001 (N.D. Cal. 2015), *reconsideration denied*, No. C-13-3440
13 EMC, 2015 WL 4735521 (N.D. Cal. Aug. 10, 2015) (citing *Bayat v. Bank of the*
14 *W.*, No. C-13-2376 EMC, 2015 WL 1744342, at *4 (N.D. Cal. Apr. 15, 2015)).

15 The Settlement provides exceptional relief to the Settlement Class. Every
16 Settlement Class Member who installs the Repair Kit, a replacement pressure
17 vessel, or a replacement toilet, the efficacy of which Plaintiff’s counsel previously
18 investigated and confirmed through discovery, will receive reimbursement of their
19 reasonable out-of-pocket installation costs. Claimants are expected to receive up to
20 \$127.50 for installation reimbursement. Reimbursement of installation costs in
21 excess of \$127.50 will be paid upon proof and approval by the Special
22 Circumstances Committee. The Settlement thus confers substantial recovery upon
23 the Settlement Class Members.

24 The Settlement not only provides tangible benefits to the Settlement Class, it
25 also promotes safety by creating an incentive for owners to repair or replace toilets
26 containing the recalled Flushmate Systems and payment in full of their reasonable
27 unreimbursed out-of-pocket installation expenses to do so.

28

1 Furthermore, the Settlement is informed by Class Counsel’s thorough
2 investigation of Plaintiff’s claims. Prior to filing the initial complaint, Class
3 Counsel closely investigated the problems with the Flushmate System. *Birka-White*
4 *Declaration in Support of Plaintiff’s Motion for Preliminary Approval* (ECF No.
5 33-1) at ¶¶ 17-18. Settlement negotiations were also informed by this investigation,
6 the Expanded Recall and the discovery that Defendant provided during the course
7 of negotiations. *Id.* at ¶¶ 19-20.

8 Class Counsel thus had a sound basis for weighing the benefits of this
9 Settlement against the risks attending continued litigation. Sufficient investigation
10 has been conducted to allow counsel and the Court to evaluate the Settlement terms.
11 To the extent that the Settlement might be viewed as “early” because the class
12 certification issues have not yet been litigated, this is “an early resolution [that]
13 demonstrate[s] that the parties and their counsel are well prepared and well aware
14 of the strength and weaknesses of their positions and of the interests to be served by
15 an amicable end to the case.” *In re AT&T Mobility Wireless Data Servs. Sales Tax*
16 *Litig.*, MDL No. 2147, 2011 WL 2204584 (N.D. Ill. June 2, 2011) (citations
17 omitted). But for the skill and experience of counsel for Plaintiff and Defendant,
18 this Settlement would not have been possible. Plaintiff’s Counsel was able to utilize
19 their wealth of knowledge gained in the UDC Action to ensure relief for Plaintiff
20 and the Settlement Class. It is hard to imagine a better result could be achieved.

21 **3. Experienced Class Counsel Strongly Believe the Settlement**
22 **Merits Approval.**

23 The judgment of competent counsel regarding the Settlement should be
24 accorded significant weight. *Eisen v. Porsche Cars N. Am., Inc.*, No. 2:11-CV-
25 09405-CAS, 2014 WL 439006, at *5 (C.D. Cal. Jan. 30, 2014) (in granting final
26 approval, noting that “[t]he recommendations of counsel are given great weight
27 since they are most familiar with the facts of the underlying litigation.”)(citing
28 cases); *Hendricks v. Starkist Co.*, No. 13-CV-00729-HSG, 2015 WL 4498083, at *6

1 (N.D. Cal. July 23, 2015) (“An initial presumption of fairness is usually involved if
2 the settlement is recommended by class counsel after arm’s-length bargaining.”).

3 The Settlement is the product of arms’ length negotiations conducted by
4 capable and experienced counsel with substantial experience litigating, trying and
5 settling consumer class actions and other complex matters. *Birka-White Decl.*, ¶¶ 3,
6 9, 24, 48-49, 54. They have intensively investigated the factual and legal issues
7 raised in this action. *Id.* at ¶ 5. The fact that qualified and well-informed counsel
8 endorse the Settlement as fair, reasonable, and adequate weighs in favor of its
9 approval.

10 **4. The Settlement Evidences No Collusion.**

11 When a class action settlement is reached prior to class certification, “such
12 agreements must withstand an even higher level of scrutiny for evidence of
13 collusion or other conflicts of interest than is ordinarily required under Rule 23(e)
14 before securing the court’s approval as fair.” *Allen v. Bedolla*, 787 F.3d 1218, 1224
15 (9th Cir. 2015) (quoting *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d
16 935, 946 (9th Cir. 2011)). Specifically, a court examines three nondispositive
17 factors – disproportionate attorneys’ fees, the inclusion of a clear-sailing provision,
18 and a provision whereby unclaimed funds revert to the defendant – to determine
19 whether a settlement was the product of collusion. *In re Bluetooth*, 654 F.3d at
20 946-947.

21 After reviewing Plaintiff’s motion for preliminary approval, this Court found
22 that “the Settlement was reached in the absence of collusion, is the product of
23 informed, good-faith, arms-length negotiations between the parties and their
24 capable and experienced counsel, and was reached with the assistance of a well-
25 qualified and experienced mediator, the Honorable William J. Cahill (Ret.)” ECF
26 No. 44 (Preliminary Approval Order) at 2. As explained in the accompanying fee
27 motion, Class Counsel’s fees and costs request of \$600,000 was negotiated under
28 the watch of Judge Cahill after all other substantive terms of the settlement had

1 been negotiated. *Birka-White Decl.*, ¶¶ 25-28. Further, the proposed attorney fees
 2 will be paid separately by Defendant and will not come out of the UDC Settlement
 3 Fund. *Id.* at ¶ 73.

4 The UDC Settlement Fund was an \$18 million common fund that does not revert to
 5 Defendant.⁵ *Id.* at ¶ 8. Should the UDC Settlement Fund fall below \$50,000,
 6 Defendant will pay additional funds to satisfy all valid claims submitted by
 7 Settlement Class Members during the Claims Period. *See Settlement*, Section IV;
 8 *Id.* at ¶ 21. While any unused *additional* sums (in excess of the \$18 million
 9 originally deposited in the UDC Settlement Fund) paid by Defendant to satisfy
 10 valid claims filed by Settlement Class Members in the Mergens Action during the
 11 Claims Period will revert to Defendant if unused, the sums paid by Defendant will
 12 nonetheless result in guaranteed payments to every Settlement Class Member who
 13 submits a valid claim in the Mergens Action during the Claims Period. *Id.* Thus, the
 14 reversion provision here is of little significance given that the Settlement provides
 15 relief to Settlement Class Members. *Dudum v. Carter's Retail, Inc.*, No. 14-CV-
 16 00988-HSG, 2016 WL 946008, at *7 (N.D. Cal. Mar. 14, 2016) (approving
 17 settlement with reversion provision where provision was necessary to the
 18 compromise and individual class members will recover full damages). While the
 19 Court had some initial concerns regarding this provision, it recognized that “it
 20 makes sense for those funds to revert because the defendant is not gaining any type
 21 of windfall...but simply recouping monies paid into the additional UDC fund...
 22 separate and apart from the previous order issued from this Court that are not used.”
 23 *Transcript of Proceedings* April 10, 2017, 8:1-8.

24 Essentially, Settlement Class Members will have access to an uncapped
 25 settlement fund during the Claims Period. The substantive Settlement terms and
 26 the objectively reasonable fee request reflect the absence of collusion in this matter.

27 _____
 28 ⁵ UDC settlement class members will receive the full benefit of the original
 \$18 million common fund. *Id.* at ¶¶ 15, 21.

1 **5. Class Member Reaction to the Settlement Has Been**
 2 **Overwhelmingly Favorable.**

3 It has long been established that “the absence of a large number of objections
 4 to a proposed class action settlement raises a strong presumption that the terms of a
 5 proposed class action settlement are favorable to the class members.” *Nat’l Rural*
 6 *Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004); *see*
 7 *also Garner v. State Farm Mut. Auto. Ins. Co.*, No. C 08 1365 CW (EMC), 2010
 8 WL 1687832, at *14 (N.D. Cal. Apr. 22, 2010); *Riker v. Gibbons*, No. 3:08-cv-
 9 00115-LRH-VPC, 2010 WL 4366012, at *5 (D. Nev. Oct. 28, 2010) (“The small
 10 number of objections is an indication that the settlement is fair, adequate, and
 11 reasonable.”).

12 As of June 15, 2017, more than two months after commencement of the
 13 Notice Plan, 368 claims have been filed by potential Class members. *Rodio Decl.*,
 14 ¶ 14. Further, of the hundreds of thousands of potential Class members who
 15 received notice, there have been no objections or opt-outs to date.⁶ *Rodio Decl.*,
 16 ¶ 8. Class Counsel will update these figures in their reply brief, but the response
 17 from the Class so far strongly favors approval. *Compare Churchill Village*, 361
 18 F.3d 566, 577 (9th Cir. 2004) (affirming approval of settlement with 45 objections
 19 and 500 opt-outs from class of 90,000 members, roughly 0.6%); *Chun-Hoon v.*
 20 *McKee Foods Corp.*, 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010) (finding that
 21 sixteen opt outs in class of 329 members, or 4.86%, strongly supported settlement);
 22 *Glass v. UBS Fin. Serv., Inc.*, No. C-06-4068-MMC, 2007 WL 221862, at *5 (N.D.
 23 Cal. Jan. 26, 2007) (approving settlement with 2% opt-out rate); *In re Transpacific*
 24 *Passenger Air Transportation Antitrust Litig.*, No. C 07-05634 CRB, 2015 WL
 25 3396829, at *3 (N.D. Cal. May 26, 2015) (approving settlement with just one opt-
 26 out from a class of hundreds of thousands).

27 _____
 28 ⁶ To the extent any Class Members object, Class Counsel will respond by
 September 4, 2017, as directed by the Court. (ECF No. 44.)

1 **6. No Governmental Entity Has Raised Any Concern About**
 2 **the Settlement.**

3 On March 10, 2017, Defendant provided notice of the Settlement to the
 4 governmental officials designated to receive such notice under the Class Action
 5 Fairness Act, 28 U.S.C. § 1715. (ECF No. 41.) To date no governmental entity has
 6 raised any objection or concern about any aspect of the Settlement. *Birka-White*
 7 *Decl.*, ¶ 75; *Rodio Decl.*, ¶ 8. This factor points to its fairness, reasonableness, and
 8 adequacy. *See, e.g., In re Toyota Motor Corp. Unintended Acceleration Mktg.,*
 9 *Sales Practices, & Prod. Liab. Litig.*, No. 8:10ML 02151 JVS, 2013 WL 3224585,
 10 at *11 (C.D. Cal. June 17, 2013) (“Although no governmental entity is a party to
 11 this action, the proposed settlement nevertheless bears the silent imprimatur of
 12 government approval because despite receiving notice, no state or federal official
 13 has filed an objection to the proposed settlement.”).

14 **7. Use of Remaining Funds in the UDC Action is Appropriate.**

15 After all valid claims in the UDC Action have been paid, there will be a
 16 remaining balance in the UDC Settlement Fund of approximately \$6 million. *Rodio*
 17 *Decl.*, ¶ 9. Pursuant to the terms of the settlement in the UDC Action, the Court
 18 may order “*cy pres* distribution in compliance with the standard articulated in
 19 *Dennis v. Kellogg Co.*, 697 F.3d 858, 865-66 (9th Cir. 2012) and its progeny.” *See*
 20 *Settlement*, § V.C (UDC Action, ECF No. 119-1 at 32). Here, a *pro rata*
 21 distribution of the funds to UDC settlement class members is not appropriate where
 22 it will confer a windfall upon claimants. *See Miller v. Ghiradelli Chocolate Co.*,
 23 2015 WL 758094 (N.D. Cal. Feb. 20, 2015) (court found it inappropriate to provide
 24 claiming class members with a windfall).

25 Accordingly, as set forth by the Ninth Circuit in *Kellogg*, “a *cy pres* award
 26 must qualify as ‘the next best distribution’ to giving the funds directly to class
 27 members.” *Kellogg*, 697 F.3d at 865. It is “‘guided by (1) the objectives of the
 28 underlying statute(s) and (2) the interests of the silent class members,’ . . . and must

1 not benefit a group ‘too remote from the plaintiff class.’” *Id.* (citing *Six Mexican*
2 *Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990)).

3 The Settlement Class Members, though not technically part of the UDC
4 settlement class, are the next best recipients of the unclaimed UDC Settlement
5 Funds given that they have alleged injury virtually identical to that claimed and
6 litigated by the UDC settlement class. *Birka-White Decl.*, ¶ 7. The Court
7 conditionally approved the proposed modifications to the settlement agreement and
8 plan of allocation in the UDC Action to allow for the payment of valid claims
9 submitted by Settlement Class Members. (UDC Action, ECF No. 164.) The Court
10 found the modification to be “a fair, reasonable and equitable solution for allowing
11 distribution of some of the unclaimed settlement funds remaining in the UDC
12 Settlement Fund.” *Id.* at ¶ 1.

13 **B. Certification of the Settlement Class Remains Proper.**

14 Class certification is appropriate where: “(1) the class is so numerous that
15 joinder of all members is impracticable; (2) there are questions of law and fact
16 common to the class; (3) the claims or defenses of the representative parties are
17 typical of the claims or defenses of the class; and (4) the representative parties will
18 fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a).
19 Certification of a class seeking monetary compensation also requires a showing that
20 “questions of law and fact common to class members predominate over any
21 questions affecting only individual members, and that a class action is superior to
22 other available methods for fairly and efficiently adjudicating the controversy.”
23 Fed. R. Civ. P. 23(b)(3).

24 Pursuant to the Preliminary Approval Order, the Court certified the Class
25 defined in Section I of the Settlement for settlement purposes. (ECF No. 44, ¶ 7.) In
26 doing so, the Court found that the Settlement Class satisfied both Rule 23(a) and
27 (b)(3) requirements, and that the Settlement Class Representative and Class
28 Counsel were adequate representatives of the Class. The Court’s conclusion

1 remains the correct one.

2 **C. Attorneys’ Fees and Service Award.**

3 Concurrently with this filing, Class Counsel will apply for an award of
4 attorneys’ fees of \$600,000, plus reimbursement of reasonable litigation costs and
5 for a service or incentive award to the Class Representative, all of which are to be
6 paid separately by Defendant. Class Counsel will file responses to any objections
7 to final approval or the proposed fees and costs award by September 4, 2017, per
8 the Court’s preliminary approval order.

9 **VI. CONCLUSION**

10 For all of the foregoing reasons, Class Counsel respectfully request the Court
11 enter a Final Order and Judgment approving the proposed Settlement.

12 Dated: June 30, 2017

Respectfully submitted,

13 BIRKA-WHITE LAW OFFICES

14
15 By: /s/ David M. Birka-White
David M. Birka-White

16 David M. Birka-White (State Bar No. 85721)
17 *dbw@birka-white.com*
18 Mindy M. Wong (State Bar No. 267820)
mwong@birka-white.com
19 BIRKA-WHITE LAW OFFICES
65 Oak Court
20 Danville, CA 94526
Telephone: (925) 362-9999
21 Facsimile: (925) 362-9970

22 Robert J. Nelson (Cal. Bar No. 132797)
rnelson@lchb.com
23 LIEFF CABRASER HEIMANN &
BERNSTEIN, LLP
24 275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
25 Telephone: (415) 956-1000
26 Facsimile: (415) 956-1008

27 Attorneys for Plaintiff
KELLY MERGENS

28