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CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BY: *AJS* DEPUTY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ALBERTO MALTA, individually and on  
behalf of all other similarly situated, et al.,  
Plaintiffs,  
v.  
THE FEDERAL HOME LOAN  
MORTGAGE CORPORATION, also  
known as Freddie Mac, et al.,  
Defendants.

Case No.: 3:10-cv-01290-BEN-NLS

**ORDER GRANTING SECOND  
DISTRIBUTION OF SETTLEMENT  
FUND**

Before this Court is Lead Plaintiff Alberto Malta's Motion for Second Distribution or, Alternatively, *Cy Pres* Distribution from the Residual Settlement Fund. (Docket No. 132.) The motion is unopposed. (Docket No. 134.) The Court finds the motion suitable for determination on the papers without oral argument, pursuant to Civil Local Rule 7.1.d.1. For the reasons set forth below, Lead Plaintiff's Motion is **GRANTED in part**.

**BACKGROUND**

This action was filed on June 16, 2010 for violations of the Telephone Consumer Protection Act ("TCPA"). (Docket No. 1.) On May 21, 2013, Co-Lead Plaintiffs Alberto Malta and Danny Allen, Jr. filed a First Amended Complaint on behalf of themselves and a putative class alleging Defendants sent automated text messages to non-customer's

1 cellular telephones using an automated dialing system without first obtaining the non-  
2 customer's express consent in violation of the TCPA. (Docket No. 59.)

3 On February 5, 2013, the Court granted preliminary approval of the Class Action  
4 Settlement Agreement ("Agreement").<sup>1</sup> (Docket No. 48.) On June 21, 2013, the Court  
5 entered an Order and Final Judgment of Dismissal with Prejudice ("Final Judgment  
6 Order"), which, *inter alia*, approved the Agreement, directed the parties to consummate  
7 the Settlement in accordance with the terms of the Agreement, and retained jurisdiction  
8 over the litigation for all matters relating to the consummation of the Agreement.  
9 (Docket No. 91.) On June 28, 2013, the Court granted Class Counsel's Ex Parte Request  
10 to Modify the Final Judgment Order ("Modification Order"). (Docket No. 96.) The  
11 Modification Order modified the numbers of approved late claims, requests for exclusion,  
12 and amount paid per claim.

13 On January 4, 2017, Lead Plaintiff Alberto Malta filed an unopposed Motion for  
14 Second Distribution or, Alternatively, *Cy Pres* Distribution from the Residual Settlement  
15 Fund ("Pl.'s Redistrib. Mot."). (Docket Nos. 132, 134.) Plaintiff's motion indicates that,  
16 pursuant to the Court's Final Judgment and Modification Orders, the Claims  
17 Administrator has issued each of the 120,700 claimants a settlement check. However,  
18 5,556 claimants did not cash their checks, leaving a balance of \$438,832.55 including  
19 accrued interest in the Settlement Fund as of March 7, 2016.

20 Plaintiff's motion requests a second distribution of the remaining balance in the  
21 Settlement Fund. ILYM Group, Inc., the Claims Administrator, estimates that it will cost  
22 approximately \$85,000 to complete a second distribution of the Settlement Fund, which  
23 leaves approximately \$353,823.55 for redistribution to claiming Class Members. (Pl.'s  
24 Redistrib. Mot at 2; Declaration of Lisa Mullins ("Mullins Decl.") ¶¶ 5-6.) If the Claims  
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27 <sup>1</sup> Capitalized terms not otherwise defined herein have the meanings assigned to them in  
28 the Agreement (Docket No. 38-3) or the Court's Final Judgment Order dated June 21,  
2013. (Docket No. 91.)

1 Administrator issues redistribution checks to only those Class Members who cashed the  
2 initial settlement checks, each individual will receive a check for approximately \$3.07.  
3 (Pl.'s Redistrib. Mot at 2.) If the Claims Administrator issues redistribution checks to all  
4 Class Members who submitted a valid claim regardless of whether they cashed the initial  
5 settlement check, each individual will receive a check for approximately \$2.93. (*Id.*;  
6 *Mulins Decl.* ¶ 6.)

7 Although Defendants filed a Statement of Non-Opposition, they noted that “the  
8 parties’ settlement agreement does not provide for a second distribution to settlement  
9 class members.” (Docket No. 134 at 2.) Section 11.02 of the Agreement provides:

10 Mailing of Settlement Check: Settlement checks shall be sent to  
11 Qualified Class Members by the Claims Administrator via U.S.  
12 mail no later than thirty (30) days after the Effective Date. If  
13 any settlement checks are returned, the Claims Administrator  
14 shall attempt to obtain a new mailing address for that  
15 Settlement Class Member by taking the steps described in  
16 Sections 9.01. If, after a second mailing, the settlement check  
17 is again returned, no further efforts need be taken by the Claims  
18 Administrator to resend the check. The Claims Administrator  
19 shall advise Class Counsel and counsel for Defendants of the  
20 names of the claimants whose checks are returned by the postal  
21 service as soon as practicable. Each settlement check will be  
22 negotiable for one hundred eighty (180) days after it is issued.  
23 Any funds not paid out as the result of uncashed settlement  
24 checks shall be paid out as a *cy pres* award, to a recipient  
25 agreed to by the Parties and approved by the Court, as set forth  
26 in Section 8.05(f).<sup>2</sup>

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23 <sup>2</sup> Section 8.05(f) provides:

24 [F]inally, on the Final Distribution Date, which is the earlier of  
25 (i) the date as of which all the checks for Settlement Awards  
26 have been cashed or (ii) 210 days after the date on which the  
27 last check for a Settlement Award was issued, the Claims  
28 Administrator shall pay any amount remaining in the  
Settlement Fund Account from uncashed settlement checks to  
one or more *cy pres* recipients which are agreed upon by the  
Parties and approved by the Court. (Docket No. 38.3 at 14.)

1 (Docket No. 38-3 at 18.) Nevertheless, as will be explained below, the Court concludes  
2 granting Plaintiff's request for a second distribution of the Settlement Fund is the most  
3 appropriate disposition of the remaining funds at this time.

#### 4 DISCUSSION

5 "It is not uncommon in consumer class actions to have funds remaining after  
6 payment of all identifiable claims." *Diamond Chem. Co. v. Akzo Nobel Chemicals B.V.*,  
7 517 F. Supp. 2d 212, 217 (D.D.C. 2007) (quoting *In re Motorsports Merch. Antitrust*  
8 *Litig.*, 160 F. Supp. 2d 1392, 1393 (N.D. Ga. 2001); see also *Six (6) Mexican Workers v.*  
9 *Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990). Various courts who have  
10 considered the question of how to appropriately distribute such funds have determined  
11 that "neither the class members nor the settling defendants have any legal right to  
12 unclaimed or excess funds." *Id.* (quoting *Powell v. Georgia-Pacific Corp.*, 843 F. Supp.  
13 491, 495 (W.D. Ark. 1994), *aff'd*, 119 F.3d 703 (8th Cir. 1997)); see also *Motorsports*  
14 *Merch.*, 160 F. Supp. 2d at 1393; *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 811-  
15 12 (5th Cir. 1989); *In re Folding Carton Antitrust Litig.*, 744 F.2d 1252, 1254 (7th Cir.  
16 1984), *cert. dismissed*, 471 U.S. 1113, 106 S.Ct. 11 (1985).

17 Neither Lead Plaintiff nor Defendants contend they retain any legal claim to the  
18 remaining Settlement Fund. Nor are they entitled to it pursuant to the terms of the  
19 Agreement. Therefore, the Court "must apply equitable principles in considering the  
20 appropriate distribution of the [r]emaining Settlement Fund." *Id.* (citing *Motorsports*  
21 *Merch.*, 160 F. Supp.2 d at 1393); see also *Powell*, 843 F. Supp. at 495 (until settlement  
22 funds are completely distributed, the court retains its traditional equity powers) (citing  
23 *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978)).

24 The Court has reviewed Plaintiff's Motion and corresponding memorandum of  
25 points and authorities, the Declarations of Lisa Mullins and Jennifer M. Urban in support  
26 of Plaintiff's Motion, all other exhibits and papers submitted in support thereof, and  
27 Defendant's Statement of Non-Opposition, and determines that good cause exists for a  
28 second distribution of the Settlement Fund to the Class Members who cashed the initial

1 settlement checks. First, although the Agreement provides for *cy pres* distribution of  
2 unclaimed funds from the first distribution of the Settlement Fund, it is not clear from the  
3 Agreement that a *cy pres* distribution of this size was contemplated.<sup>3</sup> In contrast, it is  
4 clear to the Court that the Settlement Fund was intended to compensate Class Members  
5 whose claims were timely filed and approved by this Court. Second, although each  
6 payment to individual Class Members in a second distribution will be small, it is not non-  
7 distributable, insignificant, or *de minimis*. See *In re Google Referrer Header Privacy*  
8 *Litig.*, 87 F. Supp. 3d 1122, 1132 (N.D. Cal. 2015) (quoting *Nachshin v. AOL, LLC*, 663  
9 F.3d 1034, 1038 (9th Cir. 2011) (*Cy pres* payments may be approved when actual funds  
10 are “non-distributable,” or “where the proof of individual claims would be burdensome or  
11 distribution of damages costly.”) (internal citation and quotation marks omitted). Third,  
12 the Court agrees with Plaintiff’s assertion that it is unlikely that Class Members who did  
13 not cash the initial check for \$84.78 will cash a check for less than \$4.00.

14 Therefore, the Court directs the Claims Administrator to pay each of the Class  
15 Members who cashed the initial settlement checks an equal share of the remaining  
16 Settlement Fund, after its own fees of no more than \$85,000.00 are paid. If unclaimed  
17 funds remain in the Settlement Fund after the second distribution, either party may move  
18 the Court for a *cy pres* distribution in accordance with the Agreement.

19 This Court retains jurisdiction to consider any further applications concerning the  
20 administration of the Agreement, and such other and further relief as this Court deems  
21 appropriate.

22 **IT IS SO ORDERED.**

23  
24 DATED: July 21, 2017

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26 \_\_\_\_\_  
27 HON. ROGER T. BENITEZ  
28 United States District Court Judge

27  
28 <sup>3</sup> Indeed, Lead Plaintiff’s request for a second distribution of the remaining funds and  
Defendants non-opposition to a second distribution supports the Court’s determination.