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7

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

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

13 v.

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

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

The Honorable S. James Otero

**DECLARATION OF SHANNON R.
WHEATMAN, PH.D. ON
IMPLEMENTATION OF THE
NOTICE PROGRAM**

Date: September 18, 2017

Time: 10:00 a.m.

Dept.: Courtroom 10C

Action Filed: July 15, 2016

Related Case:

*United Desert Charities v.
Sloan Valve Company,
Case No. 2:12-cv-06878-SJO-SH*

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I, SHANNON R. WHEATMAN, declare as follows:

1. I am president of Kinsella Media, LLC (“KM”), a nationally recognized advertising and legal notification firm in Washington, D.C. specializing in the design and implementation of notification programs to reach unidentified putative class members, primarily in consumer and antitrust class actions, and claimants in bankruptcy and mass tort litigation. My business address is 2101 L Street NW, Suite 800, Washington, D.C. 20037. My telephone number is (202) 686-4111.

2. This declaration will describe the notices and the notice program implemented here for *Mergens v. Sloan Valve Company* ("Mergens Action") and for the related action, *United Desert Charities v. Sloan Valve Company, et al.*, Case No. CV12-06878 SJO (SHx) ("UDC Action").

3. This declaration is based upon my personal knowledge and upon information provided by Class Counsel, Defense Counsel, and my associates and staff. The information is of a type reasonably relied upon in the fields of advertising, media, and communications.

4. KM was retained to design and implement the notice program in the Mergens Action and in the related UDC Action. This declaration outlines the implementation of the notice program for the settlements in the Mergens Action and the UDC Action (collectively, the "Settlements") and the measures taken to provide the best notice of the Notice Program that was practicable under the circumstances.

NOTICE PROGRAM OVERVIEW

5. The objective of the notice program was to provide fair and adequate notice of the settlement in the Mergens Action and proposed modifications to the settlement agreement and plan of allocation in the UDC Action to class members, who are defined in the summary notice as follows:

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Any person or entity in the United States who owns or owned a toilet with a Series 503 Flushmate III Pressure-Assist Flushing System manufactured from October 14, 1997 through April 30, 2011.

6. The Series 503 Flushmate III Pressure-Assist Flushing System was sold directly to consumers at Lowe's and The Home Depot and through distributors, contractors, and plumbers. It also came pre-installed inside toilet tanks manufactured by American Standard, Copperfit, Crane, Ecotech, Eljer, Gerber, Kohler, Lamosa, Mancesa, Mansfield, Orion, St. Thomas, Universal Rundle, Vitra, Vitromex, Vortens and Western Pottery toilets.

7. The Class is made up of commercial, residential and other property owners ("Class Members").

8. KM developed a notice program that reached Class Members. Unlike most product liability cases, a percentage of Class Member addresses were available for direct notice. However, because direct notice was not able reach all Class Members, a comprehensive, integrated and multi-faceted program using paid media advertising as well as third-party direct notice was implemented.

9. The notice program was designed to reach the greatest practicable number of Class Members and ensure that they will be exposed to see, review, and understand the notice. A four-part notification program was designed and included:

- a. Direct notice in the form of a postcard notice, mailed pursuant to a list available from Flushmate regarding registered location addresses;
- b. National paid media notice;
- c. Earned media through a national press release; and
- d. Third-party outreach to selected plumbing contractors or general contractors with plumbing licenses.

1 10. This notice program is similar in substantial respects to the one
2 previously developed by KM and approved by the Court in connection with the
3 settlement of the UDC Action.

4 11. The four-part notification program described and implemented herein
5 is the best notice practicable under the circumstances and meets the requirements of
6 Fed. R. Civ. Proc. 23.

7
8 **DIRECT MAIL NOTICE**

9 12. Based on information provided by counsel, a list of Class Members
10 was created. It was, therefore, reasonable to implement an individual direct mail
11 notification effort to reach Class Members using this list.

12 13. Direct mail notice consisted of sending a postcard notice by Class
13 Litigation Administration and Support Services (CLASS), via bulk rate mail, to
14 approximately 231,254 potential Class Members as follows: 203,041 UDC
15 Settlement Class Members, 16,350 Mergens Settlement Class Members, and 11,863
16 to persons who are members of both the UDC and Mergens Class to inform them of
17 their rights and how they may participate. Overall, according to CLASS, after all
18 mailings were completed, 370 notices are currently undeliverable.

19 14. The Detailed Notice had in bold print the settlement website address,
20 www.flushmateclaims.com (the ‘‘Settlement Website’’) where Class Members were
21 able to download the detailed notice that describes the Settlements. The detailed
22 notice was also available on the Settlement Website as a PDF file.

23 **PAID MEDIA NOTICE**

24 15. In considering which media to use for this case, KM evaluated the
25 media consumption habits of homeowners with a household income of \$60,000 or
26 more (‘‘Homeowners HHI \$60k+’’) to reach residential consumer Class Members.¹

27 ¹ KM used the target audience of homeowners with a household income of \$50K+ in the 2014
28 Flushmate media program. Since then, comScore (a source of Internet audience measurement for
advertising agencies, publishers, marketers, and financial analysts) has changed the household

1 16. Because there is no target in GfK MRI² that specifically measures
2 individuals or entities that own commercial property such as apartment buildings,
3 hotels and multiple-unit housing, a broader target that includes these individuals
4 and entities was selected for purposes of measurement. KM evaluated the media
5 consumption habits of people with the job title of owner-partner or chairman/CEO
6 (“Owner-Partner or CEO”) to reach commercial property owner Class Members.
7

8 17. All media selected were measured against both targets.

9 18. The proposed media plan effectively met the reach goal and ensured
10 the notice was placed in vehicles whose audiences are more likely to include
11 potential Class Members.

12 ***Paid Media Components***

13 19. The core of the notice program was paid media, which included a
14 national consumer magazine, a national newspaper supplement, local newspapers in
15 the U.S. territories and possessions, online trade publications, and Internet
16 networks.

17 20. The newspaper supplement, consumer magazine, U.S. Territory
18 newspapers, and the Internet were intended to reach Class Members. The online
19 trade publications were targeted specifically to reach commercial and other
20 property owners.

21 21. The publication notice appeared in the following:

22 a. Consumer Magazine: *People*.

23 income segments within its survey data. To be compatible with measurement standards, KM has
24 updated the target here to household incomes of \$60K+. KM believes this encompasses a
25 majority of the Class Members as over 69% of homeowners have a household income of \$60K+.
26 ² GfK MRI is a nationally accredited media and marketing research firm that provides syndicated
27 data on audience size, composition, and other relevant factors pertaining to major media including
28 broadcast, magazines, newspapers, and outdoor advertising. GfK MRI provides a single-source
of major media, products, services, and in-depth consumer demographic and
lifestyle/psychographic characteristics. comScore, Inc. is a source of Internet audience
measurement for advertising agencies, publishers, marketers, and financial analysts.

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b. Newspaper Supplement: *Parade*.

c. Newspapers in U.S. Territories & Possessions: *Samoa News*, *Pacific Daily News*, *Saipan Tribune*, *El Nuevo Dia*, *El Vocero*, *Primera Hora*, *St. Croix Avis*, *Virgin Islands Daily News*.³

22. An Implementation Report for the Notice Program is attached as **Exhibit 1** and confirms that the Court-approved Notice Program was implemented. The report details each advertisement and the date and page number upon which the advertisement appeared. The report confirms that KM has received a true and correct copy of the advertisement, or “tearsheet,” from each publication.⁴

23. The banner ad appeared on the following trade publication websites: Buildings, Building Operating Management, Hotels, Hotel Business, Hotel Management, Lodging, Facility Executive, Facility Maintenance Decisions, The Cooperator, and Units.⁵

24. The banner ad also appeared on the following online networks: Advertising.com Network, Conversant, Facebook.com, and Rocket Fuel. The banner ads ran across the partner websites until the number of total planned gross impressions (202,502,087) were delivered.⁶ Impressions were allocated to maximize exposure during the campaign across websites that are best driving potential Class Members to the website.

25. Attached as **Exhibit 2** are true and correct copies of the banner ads and examples of how they appeared on several websites.

³ GfK MRI does not measure publications in the U.S. Territories and Possessions. Therefore, their contribution to the overall reach of the media was not calculated. Their inclusion in the notice program is still recommended, however, given the Class Members here.

⁴ Copies of the notices as they appeared in each publication are available to the Court upon request.

⁵ While the reach of these trade publication websites was not measured, they penetrated the commercial segment of the target audience.

⁶ Gross impressions are the duplicated sum of audiences of all media vehicles containing the notice.

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26. KM implemented sponsored keywords and phrases with all major search engines, including: Google AdWords, Bing Microsoft Advertising, and their search partners. When a user searches for one of the specified search terms or phrases, sponsored links appeared on the results page. Possible keyword/phrase searches included: bursting toilet, Flushmate System, toilet lawsuit, toilet settlement, Flushmate settlement.

Paid Media Delivery

27. For the purpose of evaluating the strength and efficiency of the media, the paid media program was measured against the demographic target to establish the estimated *reach*⁷ of the media program and the estimated *frequency*⁸ of exposure to the media vehicles. The notice program (paid media program in combination with direct notice) provided Class Members with multiple exposure opportunities to media vehicles carrying the notice and delivers the following estimated reach and frequency measurements:

- a. An estimated 80.0% reach against “Homeowners HHI \$60K+” with an estimated 2.3 frequency, and
- b. An estimated 74.7% reach against “Owner-Partner or CEO” with an estimated 2.1 frequency.

28. The reach of the target audiences and the number of exposure opportunities is the best notice practicable under the circumstances, and the notice program is consistent with the standards employed by KM in notification programs designed to reach identified and unidentified members of settlements.

⁷ *Reach* is the estimated percentage of a target audience reached through a specific media vehicle or combination of media vehicles.

⁸ *Frequency* is the estimated average number of times an audience is exposed to an advertising vehicle carrying the message.

1 **EARNED MEDIA PROGRAM**

2 29. On May 15, 2017, a press release was distributed on PR Newswire's
3 US1 national wire, reaching 15,000 print and online media outlets and more than
4 5,400 websites, databases, and online services. It highlighted the toll-free telephone
5 number and Settlement Website so that Class Members can obtain complete
6 information.

7 **THIRD-PARTY OUTREACH**

8 30. Third-party outreach was conducted to reach plumbing contractors or
9 general contractors with plumbing licenses to encourage their participation in the
10 notice effort.

11 31. Third-party outreach consisted of mailing a Cover Letter and Summary
12 Notice, via bulk rate mail, to a list of 72,603 plumbers and plumbing contractors.⁹

13 **SETTLEMENT ADMINISTRATION COMPONENTS**

14 32. The Administrator updated the Settlement Website to enable Class
15 Members to get information on the Settlements, including the detailed notice and
16 the settlement agreements. Class Members were able to download notice
17 materials.¹⁰

18 33. The Administrator is continuing to operate the toll-free telephone
19 number with live operator support established to service consumers and third-party
20 plumbing organizations calling as a result of the notice program. The call center
21 will continue to be staffed with operators who have plumbing knowledge.

22 **NOTICE FORM AND CONTENT**

23 34. The notices effectively communicated the required information about
24 the Settlements. All print advertising carried a phone number and the Settlement
25

26 ⁹ Such notice will also be sent to an additional 33,190 third-party contractors who may have
installed Flushmate Toilets by July 10, 2017.

27 ¹⁰ There have been 360,957 total views to the website between April 2017 and June 28, 2017.
28 There have been 188,306 unique visits to the website between April 2017 and June 22, 2017.

1 Website address so that potential Class Members may request or access the detailed
2 notice.

3 35. Fed. R. Civ. Proc. 23(c)(2) requires class action notices to be written in
4 “plain, easily understood language.” KM applies the plain language requirement in
5 drafting notices in federal and state class actions. All notice materials in this case
6 were in plain, easily understood language.

7 36. The postcard notice and publication notice were designed to capture
8 the Class Members’ attention with clear, concise, plain language. They directed
9 readers to the Settlement Website for more information. The plain language text
10 provided important information regarding the subject of the litigation, the class
11 definitions in the UDC Action and the Mergens Action, and the legal rights
12 available to Class Members. No important or required information was missing or
13 omitted. In fact, the notices stated all required information, without omitting
14 significant facts that Class Members need to understand their rights. The notices
15 referred readers to the detailed notice, which is available to those who call or visit
16 the website.

17 37. The detailed notice provided substantial information, including
18 background on the issues in the case and all specific instructions Class Members
19 need to follow to properly exercise their rights. No important or required
20 information was missing or omitted. It was designed to encourage readership and
21 understanding, in a well-organized and reader-friendly format.

22 CONCLUSION

23 38. The notice program was carefully crafted with multiple layers of
24 notice including, direct notice, paid and earned media notice, and third-party
25 outreach.

26 39. It is my opinion that the notice program and content of the notices are
27 adequate and reasonable under the circumstances and provided the best notice
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practicable. The notice program is consistent with the standards employed by KM in notification programs designed to reach class members. The notice program, as designed and implemented, is fully compliant with Rule 23 of the Federal Rules of Civil Procedure.

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

Executed in Souderton, Pennsylvania, this 30th day of June 2017.



SHANNON R. WHEATMAN, PH.D.

EXHIBIT 1

Implementation Report

Flushmate Settlement

June 22, 2017



Media

Print Media

	Unit Type/Size	Issue Date	Date Ad(s) Ran	Page # of Ad	Tearsheet Received
Magazine(s)					
<i>People</i>	Full Page (7" x 10")	June 5, 2017	May 26, 2017	113	Yes
Newspaper Supplement(s)					
<i>Parade</i>	Half Page (4" x 9.125")	May 21, 2017	May 21, 2017	6	Yes
Newspaper(s)					
<i>El Nuevo Dia</i>	10.87" x 6"	May 25, 2017	May 25, 2017	38	Yes
<i>El Vocero</i>	10.25" x 6.25"	May 25, 2017	May 25, 2017	22	Yes
<i>Pacific Daily News</i>	5.35" x 10"	May 28, 2017	May 28, 2017	8	Yes
<i>Primera Hora</i>	10.87" x 6"	May 25, 2017	May 25, 2017	20	Yes
<i>Saipan Tribune</i>	7.25" x 10.125"	May 25, 2017	May 25, 2017	13	Yes
<i>Samoa News</i>	6" x 10"	May 22, 2017	May 22, 2017	12	Yes
<i>St. Croix Avis</i>	6" x 10"	May 24, 2017	May 24, 2017	11	Yes
<i>Virgin Islands Daily News</i>	6.08" x 9"	May 24, 2017	May 24, 2017	12	Yes

Online Media

Trade Websites

	Ad Type/Size	Date Ad(s) Ran
Buildings	728x90, 300x250	May 15 - June 11, 2017
Building Operating Management	728x90; 300x250; 320x50	May 15 - June 11, 2017
Facilities Maintenance Decisions	728x90; 300x250; 320x50	May 15 - June 11, 2017
Facility Executive	300x250 - Above Fold Article Box	May 15 - June 11, 2017
Hotel Business	300x250 - High Profile; 728x90 - Leaderboard	May 15 - June 11, 2017
Hotel Management	300x250; 970x90	May 15 - June 11, 2017
Hotels	240x400 - Tower (Vertical Rectangle); 728x90 - Leaderboard	May 15 - June 11, 2017
Lodging	160x600; 300x250	May 15 - June 11, 2017
The Cooperator	300x250 - Big Box; 728x90 - Top Leaderboard	May 15 - June 11, 2017
Units	300x250 - Homepage Rectangle; 728x90 - Homepage Leaderboard; 728x90 - Interior Leaderboard	May 15 - June 11, 2017

	Ad Type/Size	Delivered Impressions
Web		
Advertising.com Network	728x90; 300x250; 160x600	66,336,787
Conversant	728x90, 300x250, 160x600	79,978,093
Facebook	233 x 154	34,571,017
Rocketfuel	728x90 ; 300x250 ; 160x600	21,616,190



Earned Media

	Status
Keyword Search Campaign	Ongoing - until end date
Press Release (National)	Completed

EXHIBIT 2

Advertising.com



Does Your Toilet Have a Flushmate III System?  You May Be Eligible for Cash Payments From Two Settlements [File a Claim Now](#) 

490

 8.3

STYLE 05/12/2017 11:00 AM ET

There's A Slice Of Pizza Hiding In This Haircut And Now We're Hungry


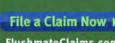
It's the upper crust of haircuts.

By Jamie Feldman

Pizza lovers, it's time to book a trip to the salon. And a flight.

Kelly Woodford, owner of a very color-obsessed hair salon in Winnipeg, Canada, gave her friend and fellow stylist [Jasmine Meadows-Birch](#) the undercut of a slice-time: one that's shaped and dyed like a slice of pizza.



Does Your Toilet Have a Flushmate III System?  You May Be Eligible for Cash Payments From Two Settlements [File a Claim Now](#) 

HOME ED BY ELLEN TICKETS PHOTOS VIDEO CLIPS EPISODES GIVEAWAYS SEND TO ELLEN SHOP Search

ellentube Like 27M Follow

ellen 4 3:00 PM WEEKDAYS Not in 90260? Change location

Featured Links: [Subscribe to Ellen's Newsletter](#) [As Seen On Ellen](#)

SHOW CLIP

Kunal Nayyar Takes on the Bowl of

COMING UP ON ELLEN

THURSDAY JUNE 22
Chris Hardwick, Kunal Nayyar, 'Pretty Little Liars' Cast

Get Hot Hands!
Play the fast and furious tip-of-the-tongue game that Ellen plays on her show!



BUSINESS INSIDER
REUTERS

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\$79.99/mo
Plus, HBO[®] included for 1 year (reg. \$15/mo.) and free Multi Room DVR service for 2-years.
fios

US STOCKS SNAPSHOT-S&P, Nasdaq open at record intraday highs

Reuters
May 16, 2017, 9:32 AM

FACEBOOK
LINKEDIN
TWITTER
EMAIL
PRINT

May 16 (Reuters) - The S&P 500 and the Nasdaq opened at record intraday highs on Tuesday, helped by gains in technology and consumer staples stocks.

The Dow Jones Industrial Average was up 30.98 points, or 0.15 percent, at 21,012.92, the S&P 500 was up 2.35 points, or 0.098 percent, at 2,404.07 and the Nasdaq Composite was up 7.97 points, or 0.13 percent, at 6,157.64. (Reporting by Yashaswini Swamynathan in Bengaluru; Editing by Saunayadeb Chakrabarty)

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- Prosecutor accuses Samsung chief of conspiring to hide millions of dollars in bribes (SSNLF)
- The world's largest tech fund is considering a \$1 billion plus investment in WeWork
- Silicon Valley is financing the fight against Trump's immigration policy (BOX, NFLX, MSTR, LBRK)

Does Your Toilet Have a Flushmate III System?

You May Be Eligible for Cash Payments From Two Settlements

File a Claim Now

the family handyman
Magazine >>
Give a gift >>
Shop >>

find DIY projects, repairs, tips

Popular topics: [Fixing a toilet](#) [Electrical](#) [Organizing](#) [Cleaning](#) [Plumbing](#) [Automotive](#)

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WIN THE ULTIMATE RYOBI TOOL SET

ENTER NOW >

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File a Claim Now >

FlushmateClaims.com

10 Easy-to-Build Planters and Trellises for Spring

Whether you have a lot of space to fill with greenery or you just want to build a simple window box, we have you covered. Check out these 10 great outdoor projects for spring!

Handyman
1 2 3 4 5

Free Newsletter

Get timely DIY projects for your home and yard delivered right to your inbox every week!

SIGN UP

UP TO \$1,700 IN SAVINGS

FINANCED BY LOWE'S

TO BE ELIGIBLE FOR THE PROMOTION, THE HOMEOWNER MUST PURCHASE A QUALIFYING PRODUCT BETWEEN MARCH 13, 2017 AND JUNE 8, 2017. ALL QUALIFYING EQUIPMENT MUST BE INSTALLED BY JULY 7, 2017. SEE YOUR LOWE'S LENNOX DEALER FOR DETAILS.

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