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

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

Plaintiff,

v.

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

Defendants.

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

The Honorable S. James Otero

**FINAL ORDER AND JUDGMENT
APPROVING CLASS ACTION
SETTLEMENT**

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 Following a hearing on April 10, 2017 (“Preliminary Approval Hearing”),
2 this Court entered its Order (ECF No. 44) (1) preliminarily approving class action
3 Settlement¹; (2) certifying Settlement Class; (3) appointing Birka-White Law
4 Offices and Lief Cabraser Heimann & Bernstein LLP as Class Counsel; (4)
5 appointing Kelly Mergens as Class Representative; (5) approving proposed Class
6 Notices; and (6) scheduling a final Fairness Hearing to determine (a) whether the
7 terms and conditions of the Settlement in this Action filed with this Court on March
8 1, 2017 (ECF No. 33-1, Exhibit A), is fair, reasonable, adequate, free from
9 collusion, and in the best interests of the Class; (b) whether the Settlement should
10 be finally approved by the Court; and (c) to consider an application by Class
11 Counsel for an award of attorneys’ fees and expenses, and Incentive Awards for the
12 Class Representative (“Preliminary Approval Order”).

13 After due process notice to the Class, the Court held the final Fairness
14 Hearing on September 18, 2017. The Court has considered: (1) the memorandum
15 submitted in support of Plaintiff’s Motion for Final Approval of Class Action
16 Settlement (“Final Approval Motion”); (2) the declarations and exhibits submitted
17 in support of the Final Approval Motion; (3) the memorandum submitted in support
18 of Class Counsel’s Application for Attorneys’ Fees and Expenses and for Service
19 Awards (“Fee Application”); (4) the declaration and exhibits submitted in support
20 of the Fee Application; (5) the Settlement, the Plan of Allocation, the Notice Plan,
21 the Class Notices and the claim forms; (6) the entire record in this proceeding,
22 including but not limited to the memorandum in support of preliminary approval of
23 the Settlement; (7) the oral presentations of Class Counsel, counsel for Defendant,
24 and Claims Administrator Arnold Rodio at the Preliminary Approval and Fairness
25 Hearings; (8) the Court’s findings and conclusions set forth in its Preliminary
26

27 ¹ Initial capitalized terms utilized herein have the same definitions as set forth in the Class
28 Action Settlement Agreement and Release filed March 1, 2017 (ECF No. 33-1, **Exhibit A**) unless
otherwise indicated.

1 Approval Order; (9) this Court’s observations while presiding over this matter;
2 (10) the Joint Motion for Final Approval of Modifications and Settlement
3 Agreement and Plan of Allocation, the Memorandum of Points and Authorities in
4 Support Thereof (“Joint Motion”) filed in the related action *United Desert*
5 *Charities, et al., v. Sloan Valve Company, et al.*, Case No. 2:12-cv-06878 SJO
6 (SHx) pending before this Court (“Related Action”); (11) the declarations and
7 exhibits related to the Joint Motion; (12) the Amended Order Conditionally
8 Approving Modifications of Settlement Agreement and Plan of Allocation filed in
9 the Related Action (ECF No. 164); and (13) the relevant law.

10 Based upon these considerations, it is HEREBY ORDERED, ADJUDGED,
11 and DECREED as follows:

12 1. This Final Order and Judgment (“Final Order”) incorporates and
13 makes a part hereof: (a) the Settlement, including the Plan of Allocation, the Notice
14 Plan, the Class Notices, and the claim forms and all exhibits thereto; and (b) the
15 Court’s findings and conclusions in the Preliminary Approval Order..

16 2. All preliminary findings and conclusions in the Court’s Preliminary
17 Approval Order are hereby made final.

18 3. This Court has jurisdiction over the subject matter and parties to the
19 Action pursuant to 28 U.S.C. §1332(d)(2) and 28 U.S.C. §1453. This jurisdiction
20 includes, without limitation, jurisdiction to finally certify the Class for settlement
21 purposes under Fed R. Civ. P. 23(a) and (b)(3), finally approve the Settlement
22 under Fed R. Civ. P. 23(e), and dismiss the Action with prejudice.

23 **A. Certification of Settlement Class**

24 4. The Settlement Class (or “Class”) this Court previously preliminarily
25 certified in its Preliminary Approval Order is hereby finally certified for settlement
26 purposes under Fed. R. Civ. P. 23(a) and (b)(3). The Class consists of any Person
27 who owns or owned a Flushmate System or Flushmate Toilet installed in the United
28 States. Excluded from the Class are (1) Defendant, any entity in which Defendant

1 has a controlling interest, or which has a controlling interest in Defendant and
2 Defendant's legal representatives, assigns, and successors, and any retailers or
3 wholesalers of the Flushmate System or Flushmate Toilets, and (2) the judges to
4 whom this case is or was assigned and any members of the judges' immediate
5 families. Also excluded from the Class are (3) all Persons who have obtained a
6 judgment against Defendant with regard to the Released Claims on or before the
7 date of Preliminary Approval by the Court; (4) all Persons who, prior to
8 Preliminary Approval, received cash reimbursement from Flushmate, a division of
9 Defendant Sloan Valve Company, for property damage resulting from a Burst or
10 Leak in their Flushmate System or for installation of a Repair Kit, replacement
11 vessel or replacement toilet; (5) all Persons who have incurred damages as a result
12 of a Leak or Burst of a Flushmate System that occurred on or before July 15, 2012,
13 but who have not brought any civil action relating thereto on or before July 15,
14 2016; (6) all Persons whose Property previously contained, but no longer contains,
15 a Flushmate System or Flushmate Toilet, and have not experienced a Leak or Burst
16 of a Flushmate System or Flushmate Toilet, except Persons who replaced their
17 Flushmate Toilets in response to the Expanded Recall; (7) all Persons who formerly
18 owned Property that contained a Flushmate System, and did not experience a Leak
19 or Burst of a Flushmate System or Flushmate Toilet during their ownership; and
20 (8) all retailers and wholesalers of the Flushmate System.

21 5. Based upon Plaintiff's submissions and the record before this Court,
22 the prerequisites for a class action under Fed R. Civ. P. 23(a) and (b)(3) have been
23 satisfied, in that:

24 a. The members of the Class are ascertainable based upon the
25 serial numbers affixed to the top of each Flushmate System.

26 b. The members of the Class are so numerous that joinder of all
27 members is impractical. Fed. R. Civ. P. 23(a)(1). There are approximately 453,000
28 Flushmate Systems encompassed in this Action which are installed nationwide.

1 c. This litigation involves common class-wide issues that would
2 drive the resolution of the claims absent the Settlement. Fed. R. Civ. P. 23(a)(2) and
3 (b)(3); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Several
4 disputed issues are common to Plaintiff and the Class, including whether the
5 Flushmate System is subject to failure; whether the Flushmate System creates an
6 unreasonable safety risk; and whether Sloan knew or should have known that the
7 Flushmate System was allegedly defective.

8 d. The claims of the named Plaintiff are typical of the claims of the
9 Class. Fed. R. Civ. P. 23(a)(3). Typicality is satisfied because the conduct at issue is
10 alleged to have caused similar harm at the point of purchase to Plaintiff and the
11 Class.

12 e. The named Plaintiff is an adequate Class Representative and
13 possesses the same interests in the outcome of this case as the other Class members.
14 Fed. R. Civ. P. 23(a)(4). The named Plaintiff — like all Class members — own or
15 owned one or more Flushmate Toilets. Accordingly, the Court finally appoints as
16 Class Representative Plaintiff Kelly Mergens.

17 f. Plaintiff’s counsel have the qualifications and experience to
18 represent the Settlement Class. Fed. R. Civ. P. 23(g). Accordingly, the Court
19 appoints as Class Counsel Birka-White Law Offices and Lief Cabraser Heimann
20 & Bernstein, LLP.

21 g. Class Counsel and the Class Representative have fully and
22 adequately represented the Class in the Action, and in entering into and
23 implementing the Settlement, and accordingly have satisfied the requirements of
24 Fed. R. Civ. P. 23(a)(4).

25 h. The Court also finds that common issues predominate and the
26 Settlement is a superior way to resolve this national controversy. Fed. R. Civ. P.
27 23(b)(3). The claims of fraudulent representations and omissions and other breaches
28 focus primarily on Defendant’s conduct, and the economic loss claims share a

1 common damages measurement. Further, given the inefficiencies and difficulties in
2 pursuing thousands of individual claims, the class mechanism is superior to any
3 other for resolution of these common disputes.

4 i. Therefore, the Court finally certifies the Class under Fed. R.
5 Civ. P. 23(a) and 23(b)(3) for settlement purposes only.

6 j. In making these findings, the Court has considered, among other
7 factors: (i) the interests of Class members in individually controlling the
8 prosecution or defense of separate actions; (ii) the impracticability or inefficiency
9 of prosecuting or defending separate actions; (iii) the extent and nature of any
10 litigation concerning these claims already commenced; and (iv) the desirability of
11 concentrating the litigation of the claims in a particular forum.

12 k. These findings shall be vacated and have no preclusive effect in
13 this or any other forum in the event this Final Order is for any reason (whether as a
14 result of reconsideration, appeal, or otherwise) vacated and the Settlement is
15 disapproved, or if the Settlement otherwise does not become Final or Effective for
16 any reason, including without prejudice to Defendant's right to contest class
17 certification.

18 **B. Class Notice**

19 6. This Court finds that the Claims Administrator and Notice Provider
20 caused notice to be disseminated to the Class in accordance with the Notice Plan
21 and the Preliminary Approval Order, and that notice was given in an adequate and
22 sufficient manner and fully satisfies the requirements of the Federal Rules of Civil
23 Procedure, including Fed. R. Civ. P. 23(c)(2) and (e), the United States Constitution
24 (including the Due Process Clause), the Rules of this Court, and any other
25 applicable law.

26 7. The Court further finds that the Notice Plan was reasonable and
27 provided due, adequate, and sufficient notice to all Persons entitled to receive
28 notice. The Notice Plan complied with Fed. R. Civ. P. 23(c)(2)(B) because it

1 constituted the best notice practicable under the circumstances and provided
2 individual notice to all Class members who could be identified through reasonable
3 effort and extensive published notice, as detailed in the Notice Plan. The Court
4 specifically finds that the Class Notice:

5 a. was simply written and readily understandable; and
6 b. was reasonably calculated, under the circumstances, to apprise
7 Class members of (i) the pendency of this class action, (ii) their right to exclude
8 themselves from the Class and the proposed settlement, (iii) their right to object to
9 any aspect of the proposed Settlement (including final certification of the
10 Settlement Class, the fairness, reasonableness or adequacy of the proposed
11 Settlement, the adequacy of the Class's representation by Plaintiff or Class
12 Counsel, and/or the award of attorneys' and representative fees), (iv) if they did not
13 exclude themselves from the Class, their right to appear at the Fairness Hearing
14 (either on their own or through counsel hired at their own expense), (v) the binding
15 effect of the orders and Final Order and Judgment in this action, whether favorable
16 or unfavorable, on all persons who do not request exclusion from the Class; and
17 (vi) the website address for Class members to use to submit claims and/or to obtain
18 additional information regarding the Settlement.

19 8. In addition, based on the submissions of the parties, the Court finds
20 that on March 10, 2017, Defendant fully satisfied its obligations of providing
21 Notice of the proposed Settlement to the public officials designated under the Class
22 Action Fairness Act, 28 U.S.C. § 1715, to receive such notice as set forth in the
23 Settling Defendant's Notice of Compliance with 28 U.S.C. § 1715, filed March 13,
24 2017. (ECF No. 41.)

25 **C. Final Settlement Approval**

26 9. Plaintiff, by and through her counsel, have investigated the pertinent
27 facts and law, and have evaluated the risks associated with continued litigation,
28 class certification, trial, and/or appeal. The Court finds that the Settlement was

1 reached in the absence of collusion, is the product of informed, good-faith arms-
2 length negotiations between the parties and their capable and experienced counsel,
3 and was reached with the assistance of a well-qualified and experienced mediator,
4 the Honorable William J. Cahill (Ret.). The Court further finds that this litigation is
5 complex and that if it were to continue through trial and potential subsequent
6 appeals, it would likely be both contentious and protracted. The Court also notes
7 that Defendant has asserted numerous defenses to the Plaintiff's claims and has
8 vigorously denied any liability or damage, that Plaintiff's ultimate success in the
9 litigation is not guaranteed, and that the risks of establishing liability on behalf of
10 Class members are significant.

11 10. The Court finds that the Settlement confers substantial benefits upon
12 the Settlement Class and avoids the costs, uncertainty, delays, and other risks
13 associated with continued litigation, trial, and/or appeal. The UDC Settlement Fund
14 shall be used to satisfy claims submitted by the Class. Should that \$18,000,000
15 common fund be exhausted before the end of the Claims Period, Defendant will
16 deposit additional sums as needed to satisfy all valid claims submitted by the Class.
17 The Claims Period will last for at least one year to enhance Class members' ability
18 to obtain benefits from the Settlement. Moreover, the Settlement will promote
19 public safety inasmuch as it is structured to maximize Class members' incentive to
20 repair or replace their Flushmate Toilets by providing full reimbursement of all
21 reasonable out-of-pocket installation and Property Damage expenses incurred.

22 11. The Court has been informed that no objections to the Settlement were
23 submitted in accordance with the requirements of the Class Notices and the
24 Preliminary Approval Order, and has been further informed that ___ Persons have
25 submitted timely requests to be excluded from the Class in accordance with the
26 requirements of Class Notices and the Preliminary Approval Order. The Court has
27 evaluated this overall reaction of the Class to the Settlement, and finds that the
28 overall acceptance of the Settlement by Class members supports the Court's

1 conclusion that the Settlement is in all respects fair, reasonable, adequate, and in the
2 best interests of the Class.

3 12. Because the terms and provisions of the Settlement have been entered
4 into in good faith and are in full compliance with all applicable requirements of the
5 United States Constitution (including its Due Process Clause), the Federal Rules of
6 Civil Procedure, the rules of this Court and any other applicable law, and are fair,
7 reasonable, and adequate and in the best interests of the Class, the Court hereby
8 finally approves the Settlement.

9 13. The parties and the Claims Administrator are directed to implement
10 the Settlement according to its terms and conditions.

11 **D. Administrative Matters**

12 14. Concurrently with this order, the Court has entered an order in the
13 Related Action finally approving modifications of the settlement agreement and
14 plan of allocation. The UDC Settlement Fund shall be used to pay notice costs, the
15 cost of administration of this Agreement, and settlement payments to Settlement
16 Class Members in this Action (the “Mergens Settlement Class Members”).
17 Additionally, if the UDC Settlement Fund is exhausted during the Claims Period,
18 Defendant shall deposit additional sums into the UDC Settlement Fund to ensure all
19 valid claims filed by Mergens Settlement Class Members during the Claims Period
20 as set forth in Section IV of the Settlement. The Claims Period will last for one
21 year.

22 15. Class Litigation Administration Support Services of Lancaster,
23 California, is finally appointed to serve as the Claims Administrator as provided
24 under the Settlement and Plan of Allocation. All reasonable fees, costs, and
25 expenses of the Claims Administrator shall be paid as provided in the Settlement.
26 The Claims Administrator is directed to begin processing all validly filed claims in
27 accordance with Section V of the Settlement and the Plan of Allocation.
28

1 16. The Hon. William J. Cahill (Ret.) of JAMS, San Francisco, California,
2 is finally appointed to serve as the Special Master as provided for under the
3 Settlement and Plan of Allocation. All reasonable fees, costs, and expenses of the
4 Special Master shall be paid as provided in the Settlement.

5 17. This Final Order and the Settlement shall be forever binding on
6 Plaintiff and each Class member, as well as their heirs, executors, administrators,
7 and their respective predecessors, successors, representatives and assigns, or any
8 and all of them, and those terms shall have res judicata and preclusive effect in all
9 pending and future claims, lawsuits, or other proceedings involving the Released
10 Claims in any state, federal, or territorial court, arbitral forum or other forum of any
11 kind.

12 18. Plaintiff and each Class member, as well as their respective spouses,
13 heirs, executors, administrators, representatives, agents, attorneys, subrogees,
14 partners, successors, predecessors, and assigns, and all those acting or purporting to
15 act on their behalf, is conclusively deemed to have fully, finally, and forever
16 released, relinquished and discharged Defendant and the Released Parties from and
17 against any and all liability for the Released Claims as set forth in Section VI of the
18 Settlement.

19 19. Plaintiff and each Class member are barred and permanently enjoined
20 from initiating, asserting and/or prosecuting any Released Claims which the Class
21 member had, has or may have in the future against any Defendant or Released Party
22 in any court, arbitration, tribunal, or forum of any kind. The Court finds that
23 issuance of this permanent injunction is necessary and appropriate in aid of the
24 Court's jurisdiction over this Action and to protect and effectuate this Final Order.

25 20. As set forth in the Settlement, Defendant has denied, and continues to
26 deny, any wrongdoing or liability of any kind relating to the Action. Neither this
27 Final Order, nor any provisions of the Settlement or any negotiations leading to its
28 execution, may be construed as, offered as, received as, used as, or deemed to be

1 evidence of an admission of any liability or wrongdoing of any kind on the part of
2 Defendant and the Released Parties in the Action, or in any other judicial,
3 administrative, regulatory, or other forum of any kind.

4 21. Without affecting the finality of this Final Order, the Court reserves
5 exclusive jurisdiction as to all matters related to administration, consummation,
6 enforcement, and interpretation of the Settlement and this Final Order, including,
7 without limitation, for the purpose of:

8 a. enforcing the terms and conditions of the Settlement and
9 resolving any disputes, claims, or causes of action that, in whole or in part, are
10 related to or arise out of the Settlement or this Final Order (including, without
11 limitation, whether a person or entity is or is not a Class member and whether
12 claims or causes of action allegedly related to the Action are or are not barred or
13 released by this Final Order and the Settlement);

14 b. entering such additional orders, if any, as may be necessary or
15 appropriate to protect or effectuate this Final Order and the Settlement, or to ensure
16 the fair and orderly administration of the Settlement; and

17 c. entering any other necessary or appropriate orders to protect and
18 effectuate the Court's retention of continuing jurisdiction.

19 22. The Action is hereby dismissed with prejudice in its entirety, except to
20 the extent that this Court has maintained continuing jurisdiction as stated in
21 paragraph 21 above. Except as expressly granted by this Final Order and as set forth
22 in the Settlement, it is adjudged that Plaintiff and all Class members take nothing
23 by reason of the Action against Defendant, and their claims are hereby dismissed
24 with prejudice. There is no just cause to delay appeal or enforcement of this Final
25 Order.

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IT IS SO ORDERED.

Dated:

THE HONORABLE S. JAMES OTERO
UNITED STATES DISTRICT JUDGE