

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

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

KELLY MERGENS, on behalf of  
herself and all others similarly situated,  
  
Plaintiffs,  
  
v.  
  
SLOAN VALVE COMPANY, and  
DOES 1-10, inclusive,  
  
Defendants.

Case No. 2:16-cv-05255-SJO-SK  
**CLASS ACTION SETTLEMENT  
AGREEMENT AND RELEASE**  
  
*The Honorable S. James Otero*

# TABLE OF CONTENTS

	<b>Page</b>
RECITALS.....	1
I.    DEFINITIONS.....	3
II.   GENERAL TERMS AND CONDITIONS OF SETTLEMENT.....	11
A.    Summary of Settlement.....	11
B.    The Flushmate Expanded Recall.....	11
C.    Benefit to Plaintiff and Class .....	11
D.    No Admission of Liability .....	11
E.    Submission Of The Settlement To The Court For Approval .....	12
F.    Request For Entry Of Final Order And Judgment .....	14
G.    Settlement Class Definition.....	15
H.    Certification of Settlement Class. ....	15
III.  NOTICE PROGRAM FOR THE SETTLEMENT CLASS .....	16
A.    Notice.....	16
B.    Cost of Notice .....	17
C.    CAFA Notice .....	17
D.    Opt-Out Rights.....	17
E.    Objections .....	18
IV.   SETTLEMENT FUND .....	21
V.    CLAIMS PROCESS .....	21
A.    Claims Administration .....	21
B.    Eligibility of Settlement Class Members .....	21
C.    Non-Interference with Defendant’s Business Operations and Reporting Obligations. ....	22
D.    Costs and Reporting.....	23
VI.   RELEASE AND COVENANT NOT TO SUE .....	24
A.    Release.....	24
B.    Covenant Not To Sue.....	24
C.    Good Faith.....	24
D.    Warranty Rights.....	25
E.    Waiver of Unknown Claims.....	25
VII.  ATTORNEYS’ FEES AND COSTS .....	27
VIII. INCENTIVE AWARDS .....	27

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
IX. COURT APPROVAL .....	28
A. Court Submission .....	28
B. Final Order and Judgment .....	28
X. EXCLUSIVE REMEDY AND JURISDICTION OF COURT .....	28
XI. TERMINATION .....	29
XII. CONFIDENTIALITY .....	29
XIII. MISCELLANEOUS PROVISIONS .....	30
A. Integration Clause. ....	30
B. Headings .....	31
C. Governing Law .....	31
D. Both Parties As Drafter. ....	31
E. Non-Waiver. ....	31
F. Notice. ....	31
G. Counterpart Execution. ....	32
H. Authority Of Signatories. ....	32
I. Binding Upon Successors. ....	32
J. Severability. ....	32
K. Publicity .....	33

1 This Class Action Settlement Agreement and Release (“Agreement”<sup>1</sup>) is  
 2 submitted pursuant to Rule 23 of the Federal Rules of Civil Procedure. Subject to  
 3 the approval of the Court, this Agreement memorializes the settlement between and  
 4 among all Parties to fully resolve the Action. This Agreement is entered into by  
 5 and between Plaintiff Kelly Mergens (“Plaintiff”), individually, and in her  
 6 representative capacity on behalf of the Settlement Class, and Defendant Sloan  
 7 Valve Company (“Defendant” or “Sloan”). This Agreement is intended by the  
 8 Parties to fully and finally compromise, resolve, discharge and settle all Released  
 9 Claims on the terms and conditions set forth herein, subject to approval of the  
 10 Court.

### 11 RECITALS

12 WHEREAS, the putative class action complaint filed by Plaintiff in the  
 13 United States District Court for the Central District of California alleges claims for  
 14 damages and other relief against Defendant related to the Flushmate System and  
 15 Flushmate Toilets (the “Mergens Action”);

16 WHEREAS, the Mergens Action is related to the consolidated action, *United*  
 17 *Desert Charities, et al. v. Flushmate, et al.*, U.S District Court, C.D. Cal., Case No.  
 18 2:12-cv-06878-SJO-SH (the “UDC Action”). The UDC Action involved alleged  
 19 defects associated with the Flushmate System manufactured by Flushmate, a  
 20 division of Defendant Sloan Valve Company;

21 WHEREAS, the Flushmate Systems involved in both the UDC and Mergens  
 22 Action are the subject of a voluntary product recall jointly announced by the  
 23 Consumer Product Safety Commission (“CPSC”) and Sloan. The primary  
 24 difference between the Mergens Action and the UDC Action is the manufacturing  
 25 date of the related Flushmate Systems. The Flushmate Systems involved in the  
 26 UDC Action were manufactured between October 14, 1997 and June 30, 2009. The  
 27

---

28 <sup>1</sup> Capitalized terms used herein have the definitions set forth in section 1, below.

1 Flushmate Systems involved the Mergens Action were manufactured between July  
2 1, 2009 and April 30, 2011;

3 WHEREAS, a Final Order and Judgment was entered by the Honorable S.  
4 James Otero of this Court in the UDC Action on August 25, 2014, approving a  
5 nationwide class action settlement and establishing an \$18 million settlement fund  
6 (“the UDC Settlement Fund”);

7 WHEREAS, the initial claims period in the UDC Action expired on  
8 September 24, 2016, leaving a balance in the UDC Settlement Fund;

9 WHEREAS, the parties in the UDC Action will jointly file a motion in the  
10 UDC Action to seek use of portions of the remaining UDC Settlement Fund to pay  
11 notice, administration costs, and the claims of Settlement Class Members in the  
12 Mergens Action;

13 WHEREAS, Defendant denies the substantive claims set forth in the  
14 complaint in the Mergens Action, and has denied and continues to deny any and all  
15 wrongdoing and liability of any kind with respect to any and all facts and claims  
16 alleged and further denies that any Class Member has suffered any damage;

17 WHEREAS, Plaintiff, by and through Class Counsel, has conducted a  
18 thorough examination and investigation of the facts and law relating to the  
19 allegations, claims and defenses asserted in the Mergens Action;

20 WHEREAS, under the supervision of a mediator (Hon. William J. Cahill,  
21 Ret.), the Parties have engaged in extensive, arms-length negotiations extending  
22 over a period of approximately six (6) months;

23 WHEREAS, taking into account the extensive burdens and expense of  
24 litigation, including the risks and uncertainties associated with protracted trials and  
25 appeals, as well as the fair, cost-effective and assured method of resolving the  
26 claims of the Settlement Class, Class Counsel have concluded that this Agreement  
27 provides substantial benefits to the Settlement Class and is fair, reasonable,  
28 adequate and in the best interests of Plaintiff and the Settlement Class;

1 WHEREAS, the Parties agree that Class Members shall have the right to be  
 2 excluded (“Opt-Out”) from the Settlement Class as provided in this Agreement,  
 3 such that participation in the Plan of Allocation shall be voluntary; and

4 WHEREAS, the Parties and their counsel agree that the settlement embodied  
 5 in this Agreement is a fair, reasonable, and adequate resolution of the Mergens  
 6 Action, and that the settlement in no way interferes with or otherwise hampers  
 7 Defendant’s obligations to any federal or state or local agency, including the U.S.  
 8 Consumer Product Safety Commission.

9 **NOW, THEREFORE, IT IS HEREBY STIPULATED, CONSENTED**  
 10 **TO AND AGREED**, by and between the Parties, through their respective counsel,  
 11 and subject to the approval of the Court pursuant to Fed. R. Civ. P. 23(e), that the  
 12 Mergens Action be settled, compromised and dismissed, on the merits and with  
 13 prejudice, and the Released Claims be finally and fully compromised, settled and  
 14 dismissed as to the Released Parties, subject to and in accordance with the  
 15 following terms and conditions:

16 **I. DEFINITIONS**

17 As used in this Agreement and the exhibits hereto, in addition to any  
 18 definitions elsewhere in this Agreement, the following terms shall have the  
 19 meanings set forth below:

20 “Action” and “Mergens Action” means *Kelly Mergens, et al. v. Sloan Valve*  
 21 *Company, et al.*, United States District Court for the Central District of California,  
 22 Case No. 2:16-CV-05255- SJO-SK.

23 “Agreement” means this Class Action Settlement Agreement and Release,  
 24 including all exhibits hereto.

25 “Burst,” “Bursted,” or “Bursting” means a separation of the Flushmate  
 26 System’s polypropylene vessel at or near the vessel’s weld seam causing damage to  
 27 the Flushmate Toilet.

28 “Claim Form” means the documentation a Settlement Class Member must

1 submit, under penalty of perjury, in order to participate in the Settlement Benefits  
2 offered to the Settlement Class.

3 “Claims Administrator” means the Person selected by Class Counsel and  
4 approved by the Court to manage and direct the processing and payment of claims.

5 “Claims Period” means the time period commencing on the Notice Date and  
6 concluding one (1) year after the Effective Date, during which Settlement Class  
7 Members may file claims with the Claims Administrator, in accordance with the  
8 Plan of Allocation.

9 “Claims Process” means the process approved by the Court as contemplated  
10 in Section V below.

11 “Class” means any Person who owns or owned a Flushmate System or  
12 Flushmate Toilet installed in the United States. Excluded from the Class are  
13 (1) Defendant, any entity in which Defendant has a controlling interest, or which  
14 has a controlling interest in Defendant and Defendant’s legal representatives,  
15 assigns, and successors, and any retailers or wholesalers of the Flushmate System  
16 or Flushmate Toilets, and (2) the judges to whom this case is or was assigned and  
17 any members of the judges’ immediate families. Also excluded from the Class are  
18 (3) all Persons who have obtained a judgment against Defendant with regard to the  
19 Released Claims on or before the date of Preliminary Approval by the Court; (4) all  
20 Persons who, prior to Preliminary Approval, received cash reimbursement from  
21 Flushmate, a division of Defendant Sloan Valve Company, for property damage  
22 resulting from a Burst or Leak in their Flushmate System or for installation of a  
23 Repair Kit, replacement vessel or replacement toilet; (5) all Persons who have  
24 incurred damages as a result of a Leak or Burst of a Flushmate System that  
25 occurred on or before July 15, 2012, but who have not brought any civil action  
26 relating thereto on or before July 15, 2016; (6) all Persons whose Property  
27 previously contained, but no longer contains, a Flushmate System or Flushmate  
28 Toilet, and have not experienced a Leak or Burst of a Flushmate System or

1 Flushmate Toilet, except Persons who replaced their Flushmate Toilets in response  
2 to the Expanded Recall; (7) all Persons who formerly owned Property that  
3 contained a Flushmate System, and did not experience a Leak or Burst of a  
4 Flushmate System or Flushmate Toilet during their ownership; and all retailers and  
5 wholesalers of the Flushmate System.

6 “Class Counsel” means Birka-White Law Offices.

7 “Class Notice” means the Court-approved forms of notice of the settlement  
8 embodied in this Agreement that will be provided to the Class and provides the  
9 information required pursuant to Federal Rule of Civil Procedure 23 and the  
10 requirements of due process.

11 “Class Representative” or “Plaintiff” means Kelly Mergens, individually on  
12 her own behalf, and in her representative capacity on behalf of the Settlement Class.

13 “Court” means the United States District Court for the Central District of  
14 California.

15 “CPSC” means the U.S. Consumer Product Safety Commission.

16 “Defendant” means Sloan Valve Company (“Sloan”).

17 “Defense Counsel” means Dentons US LLP.

18 “Effective” or Effective Date” means either (1) the date of the Court’s Final  
19 Order and Judgment approving this Agreement if no objections are timely filed;  
20 (2) the expiration date of the time for filing a notice of appeal from the Final Order  
21 and Judgment if objections are filed but no appeal is filed; or (3) if an appeal is  
22 filed, the latest of (i) the date of final affirmance of the Final Order and Judgment,  
23 (ii) the expiration of the time for filing a petition for writ of certiorari to review the  
24 Final Order and Judgment if affirmed, and if the certiorari is granted, the date of  
25 final affirmance of the Final Order and Judgment following review pursuant to that  
26 grant, or (iii) the date of final dismissal of any appeal from the Final Order and  
27 Judgment or the final dismissal of any proceeding on certiorari to review the Final  
28 Order and Judgment that has the effect of confirming the Final Order and



1 Judgment.

2 “Eligible Claim” means a claim or claims by a Settlement Class Member  
3 meeting the criteria for settlement payment under this Agreement and the Plan of  
4 Allocation.

5 “Expanded Recall” means the expanded voluntary product recall of the  
6 Flushmate System announced jointly by Flushmate and the CPSC on July 14, 2016.

7 “Fairness Hearing” shall have the meaning set forth in Section II E.7 of this  
8 Agreement.

9 “Final” means that all of the following have occurred with respect to the  
10 Final Order and Judgment: (1) this Agreement is approved in all respects by the  
11 Court, without material modifications that are unacceptable to Plaintiff or  
12 Defendant; (2) the Motion for Modification of the settlement in the UDC Action is  
13 approved without material modifications; and (3) a Final Order and Judgment has  
14 been entered dismissing with prejudice the claims of the Plaintiff and all Settlement  
15 Class Members who do not Opt-Out as provided by Rule 23 of the Federal Rules of  
16 Civil Procedure.

17 “Final Order and Judgment” means a Court order and judgment entered in  
18 this Action approving this Agreement in all respects, without material  
19 modifications, and dismissing with prejudice the claims of the Settlement Class  
20 Members who do not opt-out as provided by Rule 23 of the Federal Rules of Civil  
21 Procedure, and containing the terms set forth in Section II.F of this Agreement.

22 “Flushmate System” means the Series 503 Flushmate III Pressure-Assist  
23 Flushing System manufactured by Flushmate from July 1, 2009 through April 30,  
24 2011. The manufacturing date code/serial number is 16 characters long and is  
25 located on the label on the top of the Flushmate System’s polypropylene vessel.  
26 The first six numerals of the serial number are the manufacturing date code. The  
27 manufacturing date code range for the Expanded Recall begins with 070109 (July 1,  
28 2009) and continues through 043011 (April 30, 2011).

1           “Flushmate Toilet” means a toilet equipped with the Flushmate System.

2           “Incentive Award” shall have the meaning set forth in Section VIII of this  
3 Agreement.

4           “Leak,” “Leaking,” or “Leaked” means a leak in the Flushmate System’s  
5 polypropylene vessel. For ease of claims administration only, the definition of  
6 “Leak,” “Leaking” or “Leaked” shall include any leak in the Flushmate System’s  
7 polypropylene vessel and is not limited to a leak occurring at or near the vessel’s  
8 weld seam causing damage to the Flushmate Toilet; provided, however, “Leak,”  
9 “Leaking” or “Leaked” shall not include a leak arising from any other component  
10 part of the Flushmate System (*i.e.*, flush valve cartridge assembly, lower supply  
11 shank, upper supply assembly or duck bill valve). A leak from a component part of  
12 the Flushmate System is not included as part of this Settlement Agreement.

13           “Notice Date” means the date upon which Class Notice is first disseminated  
14 to the Class.

15           “Notice Plan” means the Court-approved plan for dissemination of Class  
16 Notice to Class Members.

17           “Notice Provider” means the Court-approved notice experts authorized to  
18 design and implement the Notice Plan.

19           “Opt-Out Period” means the period for filing a Request for Exclusion, ending  
20 on the deadline contained in the Class Notice.

21           “Opt-Out” means a Person who timely submitted a valid Request for  
22 Exclusion during the Opt-Out Period.

23           “Parties” means Plaintiff, individually and in her representative capacity on  
24 behalf of the Settlement Class, and Defendant, collectively.

25           “Person” means any individual, corporation, trust, partnership, limited  
26 liability company or other legal entity, public or private, including the United States  
27 Government and any state or local government, and his, her, or its respective  
28 predecessors, successors, subrogees or assigns.

1           “Plan of Allocation” means the procedure for submission, processing, and  
2 resolution of Eligible Claims by members of the Settlement Class referenced in  
3 Section V below.

4           “Preliminary Approval Order” means the order that the Parties will seek from  
5 the Court, as described in Section II.E of this Agreement, which, *inter alia*, would:  
6 (1) preliminarily certify the Settlement Class under Federal Rule of Civil Procedure  
7 23(b)(3); (2) preliminarily approve this Agreement, without material modifications  
8 that are unacceptable to Plaintiff and Defendant; (3) approve the proposed Class  
9 Notice; and (4) set a date for the Fairness Hearing to address this Agreement  
10 following dissemination of Class Notice to the Class Members.

11           “Property” means any structure, including homes, townhouses,  
12 condominiums, apartments, multi-unit housing structures, hotels, motels, hospitals,  
13 schools, churches or other places of worship, commercial structures, government  
14 structures, homes within a homeowners association or other similar entities, other  
15 types of buildings (e.g., guest houses, garages, workshops, sheds, hangers), or other  
16 structures of any kind, whether commercial or residential (including permanent or  
17 temporary residential structures), or any improvement to real property on or in  
18 which a Flushmate Toilet or Flushmate System is or was installed, located in the  
19 United States.

20           “Property Damage” means direct damage to a Settlement Class Member’s  
21 Flushmate Toilet, Property and/or personal property which occurs on or before the  
22 last day of the Claims Period as a result of a Burst or Leak in a Flushmate System.

23           “Release” means the release of Released Claims by Plaintiff and the  
24 Settlement Class Members in favor of the Released Parties as set forth in Section  
25 VI.A of this Agreement.

26           “Released Claims” means any and all claims, actions, demands, causes of  
27 action, suits, obligations, damages, rights or liabilities, of any nature and  
28 description whatsoever, known or unknown, present or future, concealed or hidden,

1 liquidated or unliquidated, fixed or contingent, anticipated or unanticipated,  
2 whether statutory, in tort, contract, law, equity or otherwise, that have been, could  
3 have been or might in the future be asserted by Plaintiff and the Settlement Class,  
4 or any of their respective heirs, spouses, executors, administrators, partners,  
5 attorneys, subrogees, predecessors, successors, assigns, agents, and/or  
6 representatives, and/or anyone acting or purporting to act on their behalf, arising  
7 out of or related to the Expanded Recall or the Action. Released Claims include,  
8 but are not limited to, all claimed or unclaimed compensatory damages, statutory  
9 damages, consequential damages, incidental damages, punitive and exemplary  
10 damages, fines, penalties, claims for disgorgement, or equitable, declaratory or  
11 injunctive relief under any federal statute (including, but not limited to, the  
12 Magnuson-Moss Warranty Act) or state statute (including, but not limited to, any  
13 state consumer protection statutes) or common law or any other law whatsoever, to  
14 the extent such claims are alleged to be caused by, arise out of, or relate to any  
15 claim asserted, or that could have been asserted, in the Action relating to the  
16 Flushmate System and/or Flushmate Toilets. Released Claims further include any  
17 claim for interest, costs and fees arising out of any of the claims asserted, or that  
18 could have been asserted, in the Action. Released Claims shall not include any  
19 claims for personal injury, wrongful death and/or emotional distress caused by  
20 Flushmate Systems or Flushmate Toilets which have Leaked or Burst. Released  
21 Claims also shall not include claims for property damage caused by Flushmate  
22 Systems or Flushmate Toilets which Leak or Burst after the expiration of the  
23 Claims Period. Notwithstanding the foregoing, nothing in this Agreement shall be  
24 deemed a release of the Parties' respective rights and obligations under this  
25 Agreement.

26       “Released Parties” means Defendant and Defendant’s present, former and  
27 future subsidiaries, affiliates, divisions, parents, predecessors, successors and  
28 assigns, and all of their representatives, officers, directors, employees, agents,

attorneys, shareholders, insurers, vendors, suppliers, component manufacturers, toilet fixture manufacturers, distributors, and any other Person engaged in any aspect of the manufacturing, testing, sale, marketing, and distribution of the Flushmate System or Flushmate Toilets, jointly and severally.

“Repair Kit” means the “Flushmate III Repair Kit” described and pictured in Exhibit A hereto, or a later version or component thereof, if any, required by the CPSC.

“Request For Exclusion” or “Opt-Out” means the written communication that must be filed with the Claims Administrator under Section III.D of this Agreement, and postmarked on or before the end of the Opt-Out Period if a Class Member wishes to be excluded from the Settlement Class.

“Settlement” means this Agreement, including all exhibits hereto.

“Settlement Benefits” collectively means the benefits provided to Settlement Class Members as set forth in Section V of this Agreement.

“Settlement Class” means all Class Members who have not properly executed and timely filed a Request for Exclusion with the Claims Administrator.

“Settlement Class Member” means any Person included in the Settlement Class.

“Sloan” means Sloan Valve Company and its subsidiaries, affiliates, divisions, predecessors, successors and assigns, including Flushmate.

“Special Master” means the Person proposed by the Parties and appointed by the Court to preside over implementation of this Agreement and to resolve any disputes related to the Plan of Allocation.

“UDC Action” means *United Desert Charities, et al. v. Flushmate, et al.*, Case No. CV12-06878 SJO (SHx) (C.D. Cal.).

“UDC Settlement Fund” means the Settlement Fund Trust Account established in the UDC Action.

“United States” means the fifty (50) States, the District of Columbia, and all

1 territories and possessions.

2 **II. GENERAL TERMS AND CONDITIONS OF SETTLEMENT**

3 **A. Summary of Settlement**

4 In exchange for the Release, Covenant Not to Sue, and dismissal of the  
5 Action with prejudice, and subject to the terms and conditions set forth in this  
6 Agreement, the Parties agree to establish a Plan of Allocation for submission to the  
7 Court, and to otherwise make the Settlement Benefits available to Settlement Class  
8 Members who submit Eligible Claims in the time and manner specified.

9 **B. The Flushmate Expanded Recall**

10 Nothing contained in this Agreement or the Plan of Allocation shall interfere  
11 with Flushmate's past and continuing obligations to the CPSC. Flushmate shall  
12 retain sole responsibility for responding to the Expanded Recall, including, but not  
13 limited to, the shipment of Repair Kits to Class Members, responding to Leak and  
14 Burst issues, and meeting all reporting obligations to the CPSC. Class Counsel and  
15 the Claims Administrator will provide complete access to any claims data  
16 Flushmate needs to satisfy its reporting obligations to the CPSC on an as needed  
17 and/or as requested basis.

18 **C. Benefit to Plaintiff and Class**

19 Plaintiff and Class Counsel have concluded, under the circumstances and  
20 considering the pertinent facts and applicable law, that it is in the best interests of  
21 Plaintiff and the Class to enter into this Agreement to avoid the uncertainties of  
22 litigation and to secure a significant benefit to Plaintiff and all Class Members.  
23 Plaintiff and Class Counsel consider the terms and conditions of this Agreement to  
24 be fair, adequate, and reasonable and in the best interests of each of the Class  
25 Members.

26 **D. No Admission of Liability**

27 This Agreement, whether or not consummated, and any actions or  
28 proceedings pursuant to this Agreement, are for settlement purposes only. Neither

1 the fact of, nor any provision contained in this Agreement or its exhibits or any  
 2 action taken hereunder shall constitute, be construed as, or be admissible in  
 3 evidence as any admission of the validity of any claim or any fact alleged by  
 4 Plaintiff in this Action or in any other pending action or of any wrongdoing, fault,  
 5 violation of law, or liability of any kind on the part of Defendant or admission by  
 6 Defendant of any claim or allegation made in this Action or in any other action, or  
 7 as an admission by the Plaintiff or Class Members of the validity of any fact or  
 8 defense asserted against them in this Action or in any other action.

9 This Agreement is without prejudice to the rights of Defendant to (i) oppose  
 10 class certification in this Action should this Agreement not be approved or  
 11 implemented for any reason, (ii) oppose certification in any other proposed or  
 12 certified class action, or (iii) use the grant or denial of certification of the Class to  
 13 oppose certification of any other proposed or existing class arising out of the claims  
 14 asserted in the Action. Plaintiff agrees that, in the event that this Agreement is not  
 15 approved or is terminated as provided herein, she will not argue that class  
 16 certification is proper because Defendant agreed to the settlement embodied in this  
 17 Agreement. Defendant does not admit that the classes alleged in the Action are  
 18 susceptible to certification on a litigated basis.

19 **E. Submission Of The Settlement To The Court For Approval**

20 Promptly after execution of this Agreement, Class Counsel shall move the  
 21 Court for entry of the Preliminary Approval Order which by its terms shall:

- 22 1. Appoint Plaintiff as Class Representative of the Class;
- 23 2. Appoint Class Counsel to represent Plaintiff and the Class;
- 24 3. Preliminarily and conditionally certify the Class under Rule 23 of  
 25 Federal Rules of Civil Procedure for settlement purposes only and  
 26 without prejudice to Defendant's right to contest class certification if  
 27 the Agreement is not approved;
- 28 4. Preliminarily approve this Agreement for purposes of disseminating



1 Class Notice to the Class;

2 5. Approve the form and content(s) of the Class Notice and the Notice  
3 Plan for dissemination of Class Notice to the Class;

4 6. Provide for additional disclosures and discovery of the reasonably  
5 available Class Member contact information referred to in Section  
6 III.A of this Agreement, subject to entry of a Stipulated Protective  
7 Order to protect confidential and proprietary business and personal  
8 information as provided in Section XII of this Agreement;

9 7. Schedule a hearing (the “Fairness Hearing”) to (i) consider the  
10 fairness, reasonableness, and adequacy of the settlement embodied in  
11 this Agreement; (ii) consider entry of the Final Order and Judgment  
12 approving the settlement embodied in this Agreement and the  
13 dismissal with prejudice of the Action; (iii) provide Settlement Class  
14 Members with the opportunity to object to the proposed settlement  
15 embodied in this Agreement; (iv) consider Class Counsel’s application  
16 for an award of attorneys’ fees and reimbursement of costs and  
17 expenses; (v) consider the payment of an incentive payment to the  
18 Class Representative; and (vi) consider such other matters as the Court  
19 may deem necessary or proper under the circumstances in accordance  
20 with Federal Rule of Civil Procedure 23.

21 8. Establish a briefing schedule for the submission of Plaintiff’s Motion  
22 for Final Approval, Motion for Class Counsel’s Attorneys’ Fees and  
23 Cost Reimbursement and Incentive Award to Class Representative,  
24 Objections/Comments to the Settlement, and Class Counsel’s Reply  
25 Briefs. These submissions, unless otherwise agreed upon by the  
26 Parties or ordered by the Court, shall be scheduled as follows: Class  
27 Counsel’s Motion for Final Approval and Motion for an Award of  
28 Attorney’s Fees, Cost Reimbursement and Incentive Award for the



Class Representative shall be filed with the Court no later than 75 days before the Fairness Hearing; any objections/comments to the settlement embodied in this Agreement shall be filed and served no later than 30 days before the Fairness Hearing; and Plaintiff and Defendant's responses to Objections and Reply Briefs, if any, shall be filed no later than 14 days before the Fairness Hearing.

**F. Request For Entry Of Final Order And Judgment**

This Agreement is subject to, and conditioned upon, the entry by the Court of the Final Order and Judgment granting Final approval of the settlement embodied in this Agreement in accordance with applicable jurisprudence, and providing the below-specified Settlement Benefits, which shall, *inter alia*, be subject to the terms and conditions of this Agreement and the Parties' performance of their continuing rights and obligations hereunder. Such Final Order and Judgment shall:

1. Confirm the certification of the Settlement Class for settlement purposes only;
2. Dismiss the Complaint in the Action with prejudice and without costs, other than as described herein and except to the extent that Opt-Out rights are exercised pursuant to Section III.D of this Agreement, and stay or dismiss all other actions of Settlement Class Members on the Released Claims, without costs, now existing or hereafter brought against any Released Party in any state, federal and territorial courts;
3. Bar and enjoin all Settlement Class Members from asserting against any Released Party any and all Released Claims which the Settlement Class Member had, has, or may have in the future;
4. Release each Released Party from the Released Claims which any Settlement Class Members have, had, or may have in the future, against such Released Party;
5. Determine that this Agreement is entered into in good faith, is

reasonable, fair and adequate, and in the best interest of the Settlement Class; and

6. Reserve the Court's continuing and exclusive jurisdiction over the Parties to this Agreement, including Defendant, Plaintiff and all Settlement Class Members, to administer, supervise, construe and enforce this Agreement in accordance with its terms for the mutual benefit of the Parties.

#### **G. Settlement Class Definition**

For settlement purposes only, Plaintiff proposes, and Defendant consents, that the Court certify the "Settlement Class" under Rule 23(b)(3) of the Federal Rules of Civil Procedure, as that term is defined above.

#### **H. Certification of Settlement Class.**

The Parties agree that, for settlement purposes only, the Action shall be certified and proceed as a class action under applicable jurisprudence consisting of all Settlement Class Members, with Plaintiff appointed as Class Representative and Class Counsel appointed as counsel for the Settlement Class. In particular, for purposes of settling the Action only, the Parties conditionally stipulate and agree that the following Rule 23 requisites have been met:

1. The Settlement Class is so numerous as to make it impracticable to join all Settlement Class Members.
2. There is an ascertainable class.
3. There are common questions of law and fact.
4. Plaintiff's claims are typical of the claims of the members of the Settlement Class.
5. Class Counsel should be deemed "Settlement Class Counsel" and will fairly and adequately protect the interests of the Settlement Class.
6. Class Representative will fairly and adequately protect the interests of

the Settlement Class.

7. The prosecution of separate actions by individual members of the Settlement Class would create the risk of inconsistent or varying adjudications, which would establish incompatible standards of conduct.

8. Questions of law and fact common to the members of the Settlement Class predominate over questions affecting individual members of the Settlement Class and a class action is superior to other available means for the fair and efficient adjudication of the controversy.

### **III. NOTICE PROGRAM FOR THE SETTLEMENT CLASS**

#### **A. Notice.**

Upon Preliminary Approval, and as the Court may direct, Class Counsel and Defense Counsel or their designees shall cause the Class Notice describing the Fairness Hearing and the settlement embodied herein to be provided to Settlement Class Members as provided in the Notice Plan. The Class Notice shall also include notice to class members in the UDC Action regarding the use of the UDC Settlement Fund to pay claims in both actions.

The Notice Plan shall be implemented by the Court-approved Notice Provider proposed by Plaintiff and subject to the approval of Defendant. At a minimum, the Notice Plan shall provide for direct mail notice to any Class Member for whom street addresses and/or email addresses can be obtained with reasonable effort from Defendant; publication of a “summary” notice; dissemination of a long form notice; establishment of a settlement website with search engine optimization placement; and a toll-free number specified in the summary notice.

Pursuant to the Notice Plan, and subject to entry of the Stipulated Protective Order, Defendant will provide the reasonably available contact information they have for Class Members, including names, street addresses, and/or e-mail addresses, to the Notice Provider and Claims Administrator within twenty (20)

1 business days following Preliminary Approval.

2 The forms of Class Notice shall advise Class Members of the Fairness  
3 Hearing, the terms of the settlement embodied in this Agreement, and of their  
4 rights, including the right to opt-out, comment upon, or object to the settlement  
5 embodied in this Agreement, and other relevant information regarding the  
6 settlement. Copies of the proposed Notice Plan and forms of Class Notice shall be  
7 submitted to the Court with Plaintiff's Motion for Preliminary Approval.

8 **B. Cost of Notice**

9 All reasonable costs associated with the creation and implementation of the  
10 Notice Plan described herein shall be paid out of the UDC Settlement Fund, subject  
11 to Court approval.

12 **C. CAFA Notice**

13 Not later than ten (10) days after the filing of Plaintiff's Motion for  
14 Preliminary Approval, Defendant shall have complied with the obligations set forth  
15 under 28 U.S.C. § 1715. Defendant shall properly notify Class Counsel and the  
16 Court of their compliance with 28 U.S.C § 1715 as required by the Class Action  
17 Fairness Act.

18 **D. Opt-Out Rights**

19 Any Class Member may opt out of the Class at any time during the Opt-Out  
20 Period. In order to exercise the Opt-Out right, the Class Member must timely  
21 complete and mail a written Request for Exclusion to the Claims Administrator  
22 during the Opt-Out Period. Except for those Class Members who have properly  
23 opted out, all Class Members will be deemed a Settlement Class Member for all  
24 purposes under this Agreement. Any Class Member who elects to Opt-Out of the  
25 Settlement Class shall not (i) be bound by any orders or judgments entered in this  
26 Action; (ii) be entitled to Settlement Benefits under or be affected by this  
27 Agreement; (iii) gain any rights by virtue of this Agreement; or (iv) be entitled to  
28 object to any aspect of this Agreement.

1 To be timely, a Request for Exclusion must be postmarked by the deadline  
 2 set forth in the Class Notice and must be postmarked no less than 30 days before  
 3 the date of the Fairness Hearing.

4 To be valid, a Request for Exclusion must include (i) the full name and  
 5 current address and telephone number of the Class Member and property location  
 6 where the Class Member's Flushmate Toilet or Flushmate System is installed, if  
 7 different from current address; (ii) the approximate date of the Class Member's  
 8 purchase, installation or receipt, of the Class Member's Flushmate Toilet or  
 9 Flushmate System; (iii) the serial number(s), if known, of the Flushmate System(s)  
 10 the Class Member owns or owned; (iv) a statement substantially to the effect of:  
 11 "I/We hereby request that I/we be excluded from the proposed class in *Kelly*  
 12 *Mergens, et al. v. Sloan Valve Company, et al.*, and receive none of the benefits of  
 13 the settlement; and (v) the signature of the Class Member. If the Class Member is  
 14 represented by counsel, the Request for Exclusion must also be signed by the  
 15 attorney who represents the Class Member. A Request for Exclusion signed by  
 16 counsel alone shall not be sufficient. No "mass" or "class" Requests for Exclusion  
 17 shall be allowed.

18 Any Class Member who submits a timely Request for Exclusion may revoke  
 19 his or her Request for Exclusion by submitting to the Claims Administrator a  
 20 written statement of revocation, postmarked or received no later than five (5) days  
 21 before the date of the Fairness Hearing. Should Class Counsel or Defense Counsel  
 22 receive Requests for Exclusion or revocation of such requests, they shall promptly  
 23 provide copies to each other and to the Claims Administrator.

24 The Claims Administrator shall provide Class Counsel and Defense Counsel  
 25 with copies of all completed Requests for Exclusion within three (3) business days  
 26 after expiration of the Opt-Out Period.

### 27 **E. Objections**

28 Any Settlement Class Member shall be entitled to submit an objection and/or

1 comments regarding certification of the Settlement Class and/or approval of the  
2 settlement embodied in this Agreement or any terms thereof, including attorneys'  
3 fees. For an objection to be considered by the Court, the objection must be  
4 submitted in accordance with the following procedure:

- 5 1. The objection must be in writing and post-marked no later than thirty  
6 (30) days before the Fairness Hearing.
- 7 2. To be valid, an objection must include (i) the full name and current  
8 address and telephone number of the Settlement Class Member and  
9 property location where the Class Member's Flushmate Toilet or  
10 Flushmate System is or was installed, if different from current address;  
11 (ii) the approximate date of the Settlement Class Member's purchase,  
12 installation or receipt of the Settlement Class Member's Flushmate  
13 Toilet or Flushmate System; (iii) the serial number(s) of the Flushmate  
14 System(s) the Settlement Class Member owns or owned; (iv) any and  
15 all objections asserted by the Settlement Class Member, the reasons  
16 therefor, and any and all supporting papers, including, without  
17 limitation, all briefs, written evidence, and declarations; and (v) the  
18 Settlement Class Member's signature, and if represented by counsel,  
19 the signature of the attorney representing the Settlement Class  
20 Member. An objection signed by counsel alone shall not be sufficient.
- 21 3. Settlement Class Members submitting objections who wish to appear  
22 at the Fairness Hearing and seek to orally present their objections to  
23 the Court must include a written statement of intent to appear at the  
24 Fairness Hearing in the manner prescribed by the Class Notice. Only  
25 Settlement Class Members who specify in their objections that they  
26 intend to appear at the Fairness Hearing will have the right to present  
27 their objections orally at the Fairness Hearing, and only if the Court  
28 believes that such oral presentation is appropriate and/or necessary.

1 Settlement Class Members who do not submit timely written  
2 objections as set forth above and detailed in the Class Notice will have  
3 waived their right to assert such objections and will not be permitted to  
4 present their objections at the Fairness Hearing.

- 5 4. The objection and/or any notice of intent to appear at the Fairness  
6 Hearing must be mailed to:

7 **The Court**

8 Clerk of Court  
9 United States District Court for the Central District of California  
10 312 North Spring Street  
11 Los Angeles, California 90012

12 **Class Counsel**

13 Birka-White Law Offices  
14 65 Oak Court  
15 Danville, CA 94526  
16 Attn: David M. Birka-White

17 AND

18 **Defense Counsel**

19 Dentons US LLP  
20 1999 Harrison St., Suite 1300  
21 Oakland, CA 94612  
22 Attn: Steven Frankel

- 23 5. Failure to comply timely and fully with these procedures shall result in  
24 the invalidity and dismissal of any objection. Settlement Class  
25 Members who fail to file and serve timely written objections as set  
26 forth herein shall be deemed to have waived any objections and shall  
27 not be heard at the Fairness Hearing and shall be foreclosed from  
28 making any objections (including, by appeal or otherwise) to the  
settlement embodied in this Agreement. Statements regarding  
ownership of the Flushmate Toilet(s) shall be signed under penalty of  
perjury by the Settlement Class Member.



1 **IV. SETTLEMENT FUND**

2 Subject to Court approval of the motion to modify the class action settlement  
 3 in the UDC Action, notice costs, the cost of administration of this Agreement, and  
 4 payment of Eligible Claims shall be paid from the UDC Settlement Fund. If the  
 5 UDC Settlement Fund falls below \$50,000 during the Claims Period, Defendant  
 6 shall deposit a minimum of \$50,000 into the UDC Settlement Fund and such  
 7 additional reasonable and adequate funds to satisfy all unpaid qualified non-  
 8 property Damage claims and Property Damage claims filed during the Claims  
 9 Period in the Mergens Action and any additional administration costs. At the  
 10 conclusion of the Claims Period, after all unpaid qualified non-property Damage  
 11 claims and Property Damage claims filed during the Claims Period have been  
 12 resolved, any funds that remain in the UDC Settlement Fund from Defendant's  
 13 additional deposits in excess of their payment obligations set forth in Section IV of  
 14 the Settlement Agreement in the UDC Action, shall revert back to Defendant.

15 **V. CLAIMS PROCESS**

16 The Parties shall submit to the Court a proposed Plan of Allocation outlining  
 17 the process for filing, review, and payment of claims during the Claims Period.

18 **A. Claims Administration**

19 For purposes of the Claims Process, the services of a Claims Administrator  
 20 and a Special Master shall be retained subject to the Court's approval. The Claims  
 21 Administrator shall be responsible for effectuating the Claims Process. The Special  
 22 Master shall be responsible for resolving all disputes arising as a result of the  
 23 Claims Process, if any.

24 **B. Eligibility of Settlement Class Members**

25 Subject to a more detailed outline set forth in the proposed Plan of  
 26 Allocation, to qualify for non-property damage Settlement Benefits, a Settlement  
 27 Class Member must demonstrate proof of ownership of the Flushmate Toilet and  
 28 timely submit a Claim Form. To qualify for Property Damage Settlement Benefits,



1 the Settlement Class Member must demonstrate proof of ownership of the Property  
 2 that contains or contained a Flushmate Toilet and timely submit a Claim Form. The  
 3 Claims Administrator may permit a Settlement Class Member to remedy  
 4 deficiencies in any Claim Form or related documents during the Claims Period  
 5 upon a showing of good cause to the Special Circumstances Committee (as defined  
 6 in the Plan of Allocation).

7 If there is more than one Settlement Class Member with respect to a  
 8 Property, apportionment, if any, of the Settlement Benefits between or among those  
 9 Settlement Class Members will be made by agreement among those Settlement  
 10 Class Members or, if necessary, by the Claims Administrator, whose decision may  
 11 be appealed to the Special Master.

12 If a Settlement Class Member's Property contains more than one Flushmate  
 13 Toilet, the Settlement Class Member shall be entitled to timely file non-property  
 14 damage claims for each Flushmate Toilet located at the Property. To the extent  
 15 necessary, the Claims Administrator may develop a protocol to efficiently handle  
 16 claims involving multiple Flushmate Toilets located at the same Property address,  
 17 subject to approval of the Special Circumstances Committee, and if necessary, by  
 18 the Special Master and/or the Court.

19 **C. Non-Interference with Defendant's Business Operations and**  
 20 **Reporting Obligations.**

21 The Notice Plan, Claims Administration, Claims Process and Plan of  
 22 Allocation shall be implemented in a manner that does not interfere with  
 23 Defendant's business operations, and this settlement shall not in any way interfere  
 24 with Defendant's ongoing reporting obligations to the CPSC in connection with the  
 25 Expanded Recall. Defendant and Class Counsel reserve the right to communicate  
 26 with and respond to inquiries from Settlement Class Members about the settlement  
 27 embodied in this Agreement and the Action consistent with the terms of the Class  
 28 Notice.

1           **D. Costs and Reporting**

2           All reasonable and necessary expenses incurred in administering this  
3 Agreement, including the costs of implementing and administering the Plan of  
4 Allocation, shall be paid from the UDC Settlement Fund. The Claims  
5 Administrator shall, under the supervision of the Court, administer the Settlement  
6 Benefits provided by this Agreement by processing and resolving claims in a  
7 rational, responsive, cost-effective, and timely manner. The Claims Administrator  
8 shall maintain reasonably detailed records of its activities under this Agreement in a  
9 computerized database. The Claims Administrator shall maintain all such records  
10 until expiration of the term of this Agreement, and then destroyed unless Class  
11 Counsel and Defense Counsel otherwise agree and/or the Court otherwise directs.  
12 The Claims Administrator shall provide Class Counsel and Defense Counsel with a  
13 detailed written summary of the charges for its services on a quarterly basis.

14           Class Counsel, in conjunction with the Claims Administrator, shall submit an  
15 annual report to the Court summarizing the work performed by the Claims  
16 Administrator, including a report of all amounts paid to Settlement Class Members  
17 during the prior year.

18           Defendant and Defense Counsel shall have the right, at their sole expense,  
19 during the term of this Agreement to independently review the documents  
20 supporting the performance and findings of the Claims Administrator.

21           Upon reasonable request by Defendant, the Claims Administrator shall  
22 provide Class Member information gathered in connection with Claims Processing  
23 to Defendant sufficient to permit Defendant to add Class Member names, street  
24 addresses and Flushmate System serial numbers to its warranty database.

25           The Claims Administrator may be replaced at any time by Court order and  
26 upon application to the Court by Class Counsel or Defense Counsel for cause  
27 through a duly noticed and served motion. The moving party shall meet and confer  
28 with the non-moving party at least ten (10) days prior to filing any such motion.

1 **VI. RELEASE AND COVENANT NOT TO SUE**

2 **A. Release.**

3 Upon the Effective Date, Plaintiff, on behalf of herself and in her  
 4 representative capacity on behalf of the Class, and each Settlement Class Member,  
 5 and their respective spouses, heirs, executors, administrators, representatives,  
 6 agents, attorneys, subrogees, partners, successors, predecessors and assigns and all  
 7 those acting or purporting to act on their behalf with respect to any Flushmate  
 8 System or Flushmate Toilet, as those terms are defined herein, shall conclusively be  
 9 deemed to have fully, finally and forever released, relinquished and discharged the  
 10 Released Parties from and against any and all liability for the Released Claims.  
 11 This Release does not extend to any Flushmate System or Flushmate Toilet that has  
 12 performance problems unrelated to a “Leak,” a “Burst,” or the Expanded Recall.

13 **B. Covenant Not To Sue.**

14 Upon the Effective Date, Plaintiff, on behalf of herself and in her  
 15 representative capacity on behalf of the Settlement Class, and each Settlement Class  
 16 Member, and their respective spouses, heirs, executors, administrators,  
 17 representatives, agents, attorneys, subrogees, partners, successors, predecessors and  
 18 assigns and all those acting or purporting to act on their behalf with respect to any  
 19 Flushmate Toilet or Flushmate System, as those terms are defined herein, covenant  
 20 and agree that they shall not hereafter commence any lawsuit or proceeding that  
 21 seeks to establish liability against any Released Party or any other Person based, in  
 22 whole or in part, on any of the Released Claims.

23 **C. Good Faith.**

24 Plaintiff and each Settlement Class Member agree that the provisions of this  
 25 Agreement and any claim thereunder constitute a good faith settlement under  
 26 California Code of Civil Procedure sections 877 and 877.6 and comparable laws in  
 27 other states, that Class Counsel and the Released Parties shall cooperate fully in any  
 28 effort of the Released Parties to establish such good faith settlement before any

1 court (including, without limitation, by joining any motion or other procedure and  
2 providing declarations and other evidence to establish such good faith settlement  
3 where requested by any Released Party), and that all payments of Settlement  
4 Benefits made under this Agreement relate to claims arising out of or related to the  
5 Released Claims.

6 The Parties to this Agreement and their counsel agree that they shall act in  
7 good faith and exercise their best efforts to secure approval of this Agreement and  
8 full participation by all members of the Settlement Class and that they will take  
9 such other reasonable steps as are necessary to implement this Agreement. Subject  
10 to Court approval, the Parties may agree to reasonable extensions of time to carry  
11 out any provisions of this Agreement.

12 The Parties also agree to hold all proceedings in the Action in abeyance,  
13 including any and all discovery, except such steps and proceedings as are necessary  
14 to implement and complete the settlement embodied in this Agreement.

15 **D. Warranty Rights.**

16 Nothing in this Agreement shall, or shall be construed to, restrict or  
17 otherwise alter the written express limited warranty that Flushmate offered with the  
18 Flushmate System or that manufacturers of Flushmate Toilets offered with their  
19 respective Flushmate Toilets to the extent not otherwise expired.

20 **E. Waiver of Unknown Claims.**

21 Plaintiff, on behalf of herself and in her representative capacity on behalf of  
22 the Settlement Class, and each Settlement Class Member, and their respective  
23 spouses, heirs, executors, administrators, representatives, agents, attorneys,  
24 subrogees, partners, successors, predecessors and assigns, and all those acting or  
25 purporting to act on their behalf, hereby warrant, represent and agree that:  
26 (i) unknown losses or claims could possibly exist and present losses may have been  
27 underestimated in amount or severity; (ii) they have explicitly taken that into  
28 account in entering into this Agreement, and a portion of the consideration and the

1 mutual covenants contained herein have been bargained for between the Parties,  
2 with the knowledge of the possibility of such unknown claims and losses; and  
3 (iii) the Settlement Benefits provided to them were given in exchange for a full  
4 accord, satisfaction and discharge of all Released Claims. Consequently, Plaintiff  
5 and each Settlement Class Member expressly waives, and is conclusively deemed  
6 to have waived, all rights under California Civil Code Section 1542, which  
7 provides:

8 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS  
9 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO  
10 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING  
11 THE RELEASES, WHICH IF KNOWN BY HIM OR HER MUST  
12 HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT  
13 WITH THE DEBTOR.

12 Plaintiff and each Settlement Class Member likewise expressly waives, and  
13 is conclusively deemed to have waived, all rights under any similar federal or state  
14 statute or regulation.

15 Plaintiff and each Settlement Class Member acknowledges and agrees that:  
16 (iv) he, she or it understands and appreciates the significance of this waiver of  
17 California Civil Code Section 1542 and/or of any other applicable law relating to  
18 limitations on releases; and (v) notwithstanding that he, she or it may hereafter  
19 discover facts in addition to, or different from, those facts which he, she or it now  
20 knows or believes to be true with respect to the subject matter of this Agreement, it  
21 is his, her or its intention to release fully, finally and forever all Released Claims,  
22 and dismiss with prejudice the Action; and (vi) in furtherance of such intention, the  
23 release of all Released Claims will be and remain in effect notwithstanding the  
24 discovery or existence of any such additional or different facts.

25 Class Counsel agree that: (vii) they will not directly or indirectly, alone or  
26 through others, promote, assist, advise, discuss or cooperate with any other Person,  
27 firm or entity to institute or pursue any claims or litigation against the Released  
28 Parties in any way relating to the Released Claims by any Settlement Class

1 Member; and (viii) they will not represent, encourage, solicit, or otherwise assist  
2 any Person in requesting exclusion from the Class.

3 Notwithstanding the above, Defendant shall be solely responsible for the  
4 resolution and payment of all claims falling within the scope of Section V of this  
5 Agreement, including any notice of specific potential claims, that are made prior to  
6 Preliminary Approval of this Agreement.

## 7 **VII. ATTORNEYS' FEES AND COSTS**

8 Subject to the Court's approval, Class Counsel will seek an award of  
9 attorneys' fees and reimbursement of costs and expenses. Defendant agrees not to  
10 contest a motion by Class Counsel for an award of attorneys' fees in an amount up  
11 to, but not exceeding \$600,000, plus reimbursement of costs and expenses. Any  
12 amount awarded by the Court shall be paid separately by Defendant and will not be  
13 deducted from the UDC Settlement Fund.

14 In the event the Court approves the Settlement, but declines to award Class  
15 Counsel's fees and expenses in the amount requested by Class Counsel, the  
16 Settlement will nevertheless be binding on the Parties. The Parties negotiated and  
17 reached agreement on the Class Counsel's fees and expenses only after reaching  
18 agreement on all other material terms of the Agreement.

19 Class Counsel shall be entitled to payment of attorneys' fees and expenses  
20 awarded by the Court within five (5) days after the Effective Date.

## 21 **VIII. INCENTIVE AWARDS**

22 In recognition of the time and effort Class Representative Kelly Mergens  
23 expended in pursuing this Action and in fulfilling her obligations and  
24 responsibilities as Class Representative, and of the Settlement Benefits conferred on  
25 all of the Class Members by the settlement embodied in this Agreement, Class  
26 Counsel will ask the Court to approve an incentive award not to exceed \$1,000 (the  
27 "Incentive Award"). Defendant agrees that it will not object to a request by Class  
28 Counsel to the Court for an incentive award to the Class Representative not to

1 exceed \$1,000, which is to be paid by separately by Defendant following the  
2 Effective Date. Additionally, the Class Representative shall be entitled to submit a  
3 Claim Form according to the same process as other Class Members. No other  
4 agreement exists between or among the Parties as to payments to be made to the  
5 Class Representative.

6 **IX. COURT APPROVAL**

7 **A. Court Submission**

8 Class Counsel will submit this Agreement, along with such other supporting  
9 papers as may be appropriate, to the Court for Preliminary Approval pursuant to  
10 Rule 23 of the Federal Rules of Civil Procedure. If the Court declines to grant  
11 Preliminary Approval, to order notice of a Fairness Hearing with respect to the  
12 proposed Settlement Class, and/or to grant approval after the Fairness Hearing or  
13 otherwise materially alters the terms of this Agreement, then this Agreement will  
14 terminate as soon as the Court enters an order unconditionally and finally  
15 adjudicating that the terms and conditions of the settlement embodied in this  
16 Agreement are not approved.

17 **B. Final Order and Judgment**

18 The Parties agree that this Agreement is expressly conditioned upon the  
19 Court granting the Motion to Modify the Class Action Settlement Agreement and  
20 Release in the UDC Action, dismissal with prejudice of this Action, and the Final  
21 Order and Judgment becoming Effective. The Parties will jointly submit a  
22 proposed Final Order and Judgment prior to the Fairness Hearing.

23 **X. EXCLUSIVE REMEDY AND JURISDICTION OF COURT**

24 This Agreement shall be the sole and exclusive remedy of Settlement Class  
25 Members against any of the Released Parties relating to any and all Released  
26 Claims. Upon entry of the Final Order and Judgment, each and every Settlement  
27 Class Member shall be permanently barred and enjoined from initiating, asserting  
28 and/or prosecuting any Released Claims against any of the Released Parties in any



1 court, arbitration, tribunal, or forum of any kind.

2 The Parties agree that the Court shall retain exclusive and continuing  
3 jurisdiction over the Action, the Parties, Settlement Class Members, and the Claims  
4 Administrator in order to interpret and enforce the terms, conditions and obligations  
5 under this Agreement.

6 **XI. TERMINATION**

7 This Agreement shall, without notice, be automatically terminated if the  
8 Final Order and Judgment is not entered, or if the Final Order and Judgment is  
9 reversed on appeal and the reversal becomes Final.

10 If Settlement Class Members who own or owned in the aggregate 7.5 percent  
11 (7.5%) or more Flushmate Systems submit timely and valid Requests for Exclusion,  
12 Defendant shall have the right, at their option, to terminate and rescind this  
13 Agreement, provided that Defendant exercises this right within ten (10) days after  
14 receiving notice that the specified number of timely and valid Requests for  
15 Exclusion have been submitted. To terminate the Agreement under this paragraph,  
16 Defendant must provide timely written notice to Class Counsel and to the Court.

17 Upon termination of this Agreement, all Parties shall be restored to their  
18 respective positions as existed immediately prior to the date of execution of this  
19 Agreement except as otherwise provided.

20 Notwithstanding any other provision of this Agreement, if this Agreement is  
21 terminated, Defendant hereby stipulates and agrees that Plaintiff may pursue her  
22 claims by moving for class certification. In that event, Defendant may oppose class  
23 certification on any grounds *nunc pro tunc* without prejudice from the existence of  
24 this Agreement.

25 **XII. CONFIDENTIALITY**

26 The Parties and their counsel shall keep the terms of this Agreement  
27 confidential until the terms are disclosed as part of the public record. The terms of  
28 this Agreement and the contents of the settlement negotiations may, however, be



1 disclosed to Defendant's respective parent and affiliate corporations, insurers,  
2 reinsurers, attorneys, auditors, and administrators.

3 The names, addresses, and other data concerning Settlement Class Members  
4 compiled by Defendant in effectuating this Agreement, and all documents produced  
5 by Defendant to Class Counsel in connection with this Action ("Proprietary  
6 Information"), constitute confidential and proprietary business and personal  
7 information.

8 It is further agreed that after performance of all terms of this Agreement is  
9 completed, any and all Proprietary Information or other documentation (exclusive  
10 of documents filed with the Court) provided by Defendant to Plaintiff, Class  
11 Counsel, or the Claims Administrator in this Action, and all copies thereof, shall be  
12 promptly returned to Defendant or destroyed, and Class Counsel shall confirm in  
13 writing, at the time of the return or destruction of the Proprietary Information and  
14 documentation, that all such Proprietary Information and documentation has been  
15 returned or destroyed.

### 16 **XIII. MISCELLANEOUS PROVISIONS**

#### 17 **A. Integration Clause.**

18 This Agreement, including all exhibits hereto, contains a full, complete, and  
19 integrated statement of each and every term and provision agreed to between and  
20 among the Parties and supersedes any prior representations, writings or agreements  
21 (written or oral) between or among the Parties, which prior agreements may no  
22 longer be relied upon for any purpose. This Agreement may not be orally modified  
23 in any respect and may be modified only by the written agreement of the Parties,  
24 subject to Court approval. The Parties contemplate that, subject to Court approval  
25 or without such approval where legally permissible, the exhibits to this Agreement  
26 may be modified by subsequent agreement of the Parties prior to dissemination to  
27 the Settlement Class. In the event a dispute arises between the Parties over the  
28 meaning or intent of any provision of this Agreement, the Parties agree that prior

1 drafts, notes, memoranda, discussions or any other oral communications or  
2 documents regarding the negotiations, meaning or intent of this Agreement shall  
3 not be offered or admitted into evidence.

4 **B. Headings.**

5 Headings contained in this Agreement are for convenience of reference only  
6 and are not intended to alter or vary the construction and meaning of this  
7 Agreement.

8 **C. Governing Law.**

9 The construction, interpretation, operation, effect, validity and enforcement  
10 of this Agreement and all documents necessary to effectuate it shall be governed by  
11 the laws of the State of California without regard to principles of conflict of laws,  
12 except to the extent that federal law requires that federal law governs.

13 **D. Both Parties As Drafter.**

14 The Parties stipulate and agree that this Agreement was negotiated on an  
15 “arms-length” basis between parties of equal bargaining power represented by  
16 counsel, and drafted jointly by the Parties and, accordingly, no ambiguity in this  
17 Agreement shall be construed in favor of or against any of the Parties.

18 **E. Non-Waiver.**

19 The waiver by one Party of any provision or breach of this Agreement shall  
20 not be deemed a waiver of any other provision or breach of this Agreement.

21 **F. Notice.**

22 Except as otherwise specifically provided herein, whenever any written  
23 notice is required by the terms of this Agreement, it shall be deemed effective on  
24 the date received, addressed and transmitted by first class United States mail and  
25 e-mail as follows:

26 ///

27 ///

28 ///

1 If to Plaintiff or the Class to:

2 Birka-White Law Offices  
 3 65 Oak Court  
 4 Danville, CA 94526  
 Attn: David M. Birka-White  
 dbw@birka-white.com

5 If to Defendants to:

6 Dentons US LLP  
 7 1999 Harrison Street, Suite 1300  
 8 Oakland, CA 94612  
 Attn: Steven Frankel  
 steven.frankel@dentons.com

9 **G. Counterpart Execution.**

10 This Agreement may be executed in any number of counterparts. A  
 11 facsimile or electronically transmitted signature shall be deemed to constitute an  
 12 original signature for purposes of this Agreement. Each counterpart when so  
 13 executed shall be deemed to be an original, and all such counterparts together shall  
 14 constitute the same instrument. This Agreement will be binding when it has been  
 15 executed and delivered by the last signatory hereto to execute a counterpart, subject  
 16 to Court approval.

17 **H. Authority Of Signatories.**

18 Each person signing this Agreement represents and warrants that he or she  
 19 has full authority to sign this Agreement on behalf of the Party for whom he or she  
 20 is signing and warrants that he or she has the ability to bind that Party to the  
 21 obligations and commitments set forth herein.

22 **I. Binding Upon Successors.**

23 This Agreement shall be binding upon and inure to the benefit of the Parties  
 24 and his, her or its representatives, heirs, predecessors, successors, and assigns.

25 **J. Severability.**

26 In the event any one or more of the provisions contained in this Agreement  
 27 shall for any reason be held invalid, illegal, or unenforceable in any respect such  
 28 invalidity, illegality, or unenforceability shall not affect any other provisions if the

Parties and their counsel mutually elect by written stipulation to be filed with the Court within twenty (20) days of the filing of any such determination or holding to proceed as if such invalid, illegal, or unenforceable provision had never been included in this Agreement.

**K. Publicity**

Plaintiff, Class Counsel, Defendant, and Defendant's Counsel agree that they will not make or distribute any press release or other public statement intended to be disseminated through the press or other media that: (i) states or suggests that any party has, through this Agreement, prevailed or established the propriety of its claims or defenses, or that any party has lost or acknowledged the invalidity of its claims or defenses; (ii) states or suggests that this Agreement is evidence on the merits of that party's position in the Action or the lack of merit in any other party's position in the Action; or (iii) disparages any other party with respect to this Agreement, the conduct of the Action, or the subject matter addressed in the Action. The foregoing is not intended to prevent disclosure of the existence or terms of the Agreement itself, or to prevent Class Counsel or Defendant's Counsel from accurately reporting the terms of this Agreement in response to press inquiries related to their respective firms or lawyers pursuant to a statement jointly approved by Class Counsel and Defendant's Counsel. Counsel for each Party agree to instruct all Persons or agents involved in administration of this Agreement to abide by the terms of this paragraph.

IN WITNESS WHEREOF, each of the Parties hereto has caused this Agreement to be executed on its, his, her or their behalf, all as of the day set forth below.

Dated: February 23, 2017

  
KELLY MERGENS

1 Dated: February \_\_\_\_, 2017

SLOAN VALVE COMPANY

2  
3 By: \_\_\_\_\_

4 Printed Name: \_\_\_\_\_

5 Title: \_\_\_\_\_

6  
7 **APPROVED AS TO FORM:**

8 Dated: February 23<sup>rd</sup>, 2017

BIRKA-WHITE LAW OFFICES

9  
10 By: \_\_\_\_\_

David M. Birka-White

11  
12 David M. Birka-White (State Bar No. 85721)

*dbw@birka-white.com*

13 Mindy M. Wong (State Bar No. 267820)

*mwong@birka-white.com*

14 65 Oak Court

Danville, CA 94526

15 Telephone: (925) 362-9999

16 Facsimile: (925) 362-9970

17 Attorneys for Plaintiff

Kelly Mergens

18  
19 Dated: February \_\_\_\_, 2017

DENTONS US LLP

20  
21 By: \_\_\_\_\_

Steven H. Frankel

22 Steven H. Frankel (State Bar No. 171919)

*steven.frankel@dentons.com*

23 DENTONS US LLP

1999 Harrison Street, Suite 1300

24 Oakland, California 94612

25 Telephone: (415) 882-5000

Facsimile: (415) 882-0300

26 Attorneys for Defendant

27 Sloan Valve Company

2

3

4

5

6

## 7

8

9

10

11

12

13

14

15

16

17

18

~~DENTONS~~ US LLP

19

20

21

22

23

24

25

26

27

28

# EXHIBIT A





**FLUSHMATE®**  
New Hudson, MI

# FLUSHMATE® III Repair Kit

## Things to know before you begin:



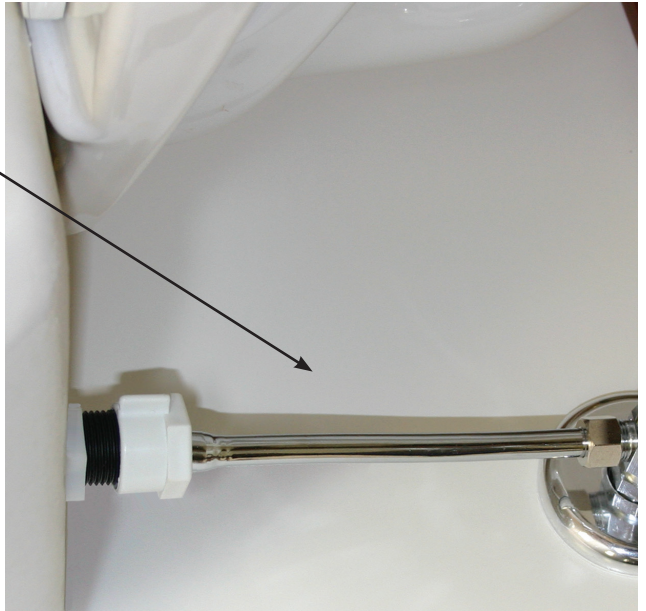
### WARNING

#### READ BEFORE YOU START

- To minimize the possibility for injury and property damage due to FLUSHMATE III unit separation, it is recommended that you install the complete Repair Kit IMMEDIATELY.
- This Repair Kit is for your recalled FLUSHMATE III unit produced between October 14, 1997 and April 30, 2011.
- The repair should take less than 20 minutes.
- Read all instructions on both sides of this instruction sheet prior to starting the installation.

**IMPORTANT: TURN OFF THE WATER AND THEN FLUSH THE TOILET PRIOR TO INSTALLING THE REPAIR KIT.**

If you have a rigid supply line/tube and experience difficulty attaching the **EXTERNAL REGULATOR** please call (800) 303-5123.

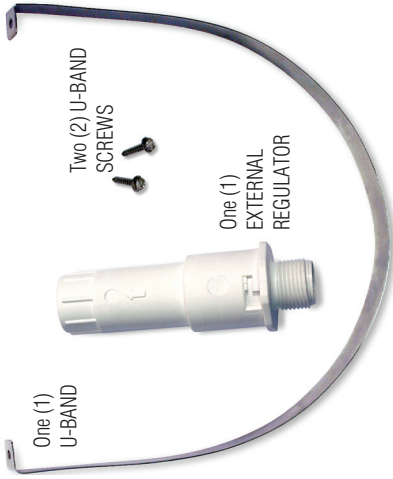


If you have a right hand toilet, which means the flush mechanism is on the right side of the tank please call (800) 303-5123.



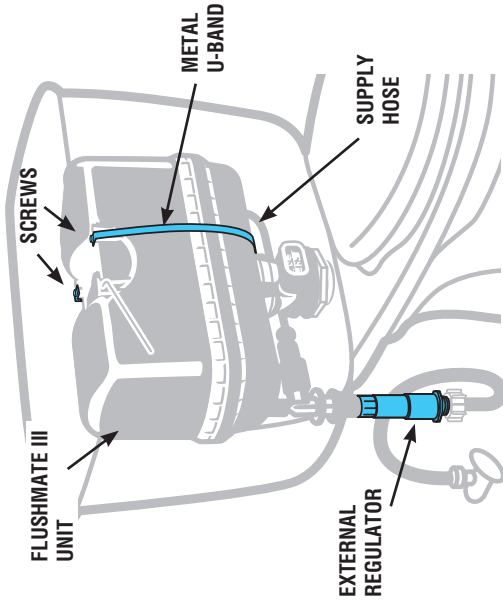
If you have any questions, please call **(800) 303-5123** Monday through Friday between 8AM and 10PM ET and Saturday between 8AM and 6:30PM ET.

### EACH REPAIR KIT CONTAINS:



### TOOL NEEDED: Phillips Screwdriver

DO NOT use any types of sealants on threads, including Teflon® Tape, pipe liquid sealer, or plumber's putty.



Repair Kit parts are highlighted in blue for clarity.

**Installation Instructions on reverse side**



# FLUSHMATE® III Repair Kit

Use the weblink or QR below to view the Installation Video for the Repair Kit.  
[www.flushmate.com/recall/video](http://www.flushmate.com/recall/video)



## WARNING

### READ BEFORE YOU START

- To minimize the possibility for injury and property damage due to FLUSHMATE III unit separation, it is recommended that you install the complete Repair Kit IMMEDIATELY.
- This Repair Kit is for your recalled FLUSHMATE III unit produced between October 14, 1997 and April 30, 2011.
- The repair should take less than 20 minutes.
- Read all instructions on both sides of this instruction sheet prior to starting the installation.

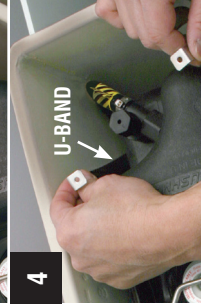
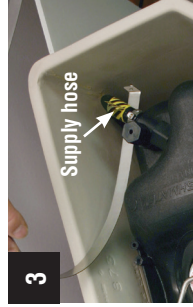
**IMPORTANT: TURN OFF THE WATER AND THEN FLUSH THE TOILET PRIOR TO INSTALLING THE REPAIR KIT.**

## U-BAND Installation Instructions

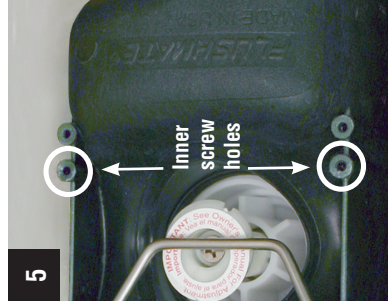
### IMPORTANT:

Before you start, always turn off water and then flush toilet to release pressure before servicing the FLUSHMATE III unit, as noted in steps 1 and 2.

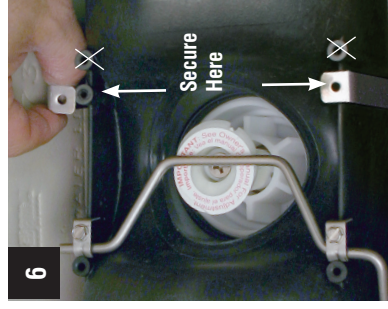
DO NOT use any types of sealants on threads, including Teflon® Tape, pipe liquid sealer, or plumber's putty.



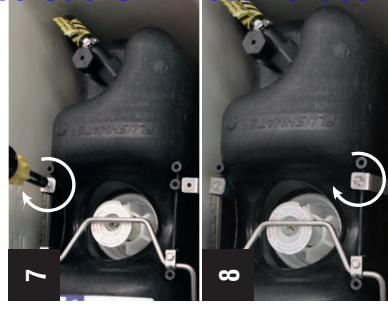
1. Rotate handle of water supply stop clockwise to turn off water.
2. Flush toilet to release pressure. Remove china tank lid and flush again to ensure pressure has been released.
3. Slide U-BAND between supply hose and Flushmate III unit.
4. Position the U-BAND down and around the right side of the FLUSHMATE III unit and guide the U-BAND so that it passes under the right side of the FLUSHMATE III unit.



5. Locate the inner screw holes on the FLUSHMATE III unit as shown. The inner screw holes, which are closest to the center of the unit, will be used to secure the U-BAND.



6. Gradually slide U-BAND toward the middle of the FLUSHMATE III unit. When aligned, U-BAND should be centered over inner screw holes, as shown. DO NOT use outer screw holes to secure U-BAND.



7. Align U-BAND over back inner screw hole on FLUSHMATE III unit, as shown. Install screw, hand tight with screwdriver to secure U-BAND.
8. Position other end of U-BAND over front inner screw hole. Install screw, hand tight with screwdriver to secure U-BAND.

## EXTERNAL REGULATOR Installation Instructions



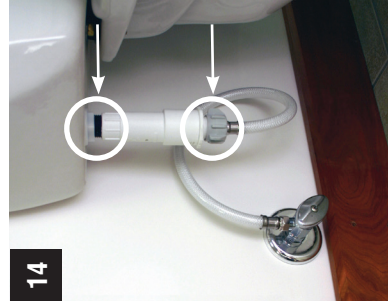
9. Disconnect water supply line from the lower supply shank. Be prepared to collect a small amount of residual water from the supply line.



10. Make sure gasket is seated at base of threads in the EXTERNAL REGULATOR.
11. Thread EXTERNAL REGULATOR onto lower supply shank and hand tighten.



12. Connect supply line to EXTERNAL REGULATOR and hand tighten.
13. Then, rotate handle of water supply stop counter-clockwise to fully open the water supply.



14. Check for leaks around threaded connections as indicated in the image above. If leak is present, inspect for loose, overtightened or cross threaded connection.



15. Flush toilet three times. Allow 60 seconds between flushes for refill. Replace lid. You may notice a change in the flush sound after installing the Repair Kit.

Completed installation should look like illustration shown at right. Repair Kit Parts are highlighted in blue for clarity.

**You have completed the installation of the Repair Kit.**

