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

UNITED DESERT CHARITIES,
FRED EDE, III, EMILY WILLIAMS,
BRUCE PRITCHARD, JEAN
STEINER, DANIEL BERUBE,
JEFFREY BRETTLER, RANDY
KUBAT, JOHN SNYDER, AND
PANKAJ PATEL, on behalf of
themselves and all others similarly
situated,

Plaintiffs,

v.

SLOAN VALVE COMPANY
AMERICAN STANDARD BRANDS
AS AMERICA, INC., KOHLER CO.,
GERBER PLUMBING FIXTURES,
LLC, MANSFIELD PLUMBING
PRODUCTS, LLC, HOME DEPOT,
U.S.A., INC., and DOES 1-10,
inclusive,

Defendants.

Case No. 2:12-06878 SJO (SHx)

**PROPOSED MODIFICATIONS TO
CLASS ACTION SETTLEMENT
AGREEMENT AND RELEASE**

The Honorable S. James Otero

Consolidated Cases:

- Berube v. Flushmate
2:13-cv-02372-SJO-SH
- Brettler v. Flushmate
2:13-cv-02499-SJO-SH
- Kubat, et al. v. Flushmate
2:13-cv-02425-SJO-SH
- Patel v. Flushmate
2:13-cv-02428-SJO-SH

Related Cases:

- Mergens v. Sloan Valve Co.
2:16-cv-05255-SJO-SK:
- Dimov, et al. v. Sloan Valve Co.
1:12-cv-09700 (N.D. Ill)

1 Subject to the Court’s approval, the Class Action Settlement Agreement and
2 Release (“Agreement”) (ECF No. 119-1) shall be modified as follows:

3 **I. DEFINITIONS**

4 Section I of the Agreement is modified to include the following modified or
5 additional defined terms:

6 “Effective” or “Effective Date” means (1) the date of the Court’s Final Order
7 and Judgment approving this Agreement if no objections are timely filed or the date
8 of the Court’s Order approving modifications of this Agreement if no objections are
9 timely filed; (2) the expiration date of the time for filing a notice of appeal from the
10 Final Order and Judgment if objections are filed but no appeal is filed or the
11 expiration date of the time for filing a notice of appeal from the Court’s Order
12 approving modifications to this Agreement if objections are filed but no appeal is
13 filed; or (3) if an appeal is filed, the latest of (i) the date of final affirmance of the
14 Final Order and Judgment or of the Order approving modifications to this
15 Agreement, (ii) the expiration of the time for filing a petition for writ of certiorari to
16 review the Final Order and Judgment or Order approving modifications if affirmed,
17 and if certiorari is granted, the date of final affirmance of the Final Order and
18 Judgment or of the Order approving modifications following review pursuant to
19 that grant, or (iii) the date of final dismissal of any appeal from the Final Order and
20 Judgment, from the Order approving modifications or the final dismissal of any
21 proceeding on certiorari to review the Final Order and Judgment or the Order
22 approving modifications that has the effect of confirming the Final Order and
23 Judgment or the Order approving modifications.

24 “Extended Claims Period” means the time period commencing on September
25 25, 2016 and concluding one (1) year after the modifications to this Agreement
26 become Effective during which time Settlement Class Members may file claims
27 with the Claims Administrator, in accordance with the Plan of Allocation.
28

1 “Mergens Action” means *Mergens v. Sloan Valve Company*, Case No. 2:16-
2 CV-05255-SJO (SKx), United States District Court, Central District of California.

3 “Mergens Claims Period” means the time period defined in the Mergens
4 Settlement Agreement during which Mergens Settlement Class Members may file
5 claims with the Claims Administrator, in accordance with the Mergens Settlement
6 Agreement and Plan of Allocation.

7 “Mergens Class” means the settlement class defined in the Mergens
8 Settlement Agreement.

9 “Mergens Plan of Allocation” means the procedure for submission,
10 processing, and resolution of eligible claims in the Mergens Action.

11 “Mergens Settlement Agreement” means the Class Action Settlement
12 Agreement and Release, including all exhibits thereto, entered into by the parties to
13 the Mergens Action.

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

17 “Mergens Settlement Class Members” means any Person included in the
18 Mergens Settlement Class.

19 “Plan of Allocation” means the procedure for the submission, processing, and
20 resolution of Eligible Claims by members of the Settlement Class referenced in
21 Section V below, including any written modification to the procedure for the
22 submission, processing, and resolution of Eligible Claims, as agreed to by the
23 Parties, subject to approval by the Court and/or Special Master.

24 “Property Damage” means direct damage to a Settlement Class Member’s
25 Flushmate Toilet, Property and/or personal property which occurs on or before the
26 last day of the Claims Period or Extended Claims Period as a result of a Burst or
27 Leak in a Flushmate System.
28

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

2 Sections III.B. and III.E.4 of the Agreement are modified and replaced by the
3 following:

4 **B. Cost of Notice**

5 All reasonable costs associated with the creation and implementation of the
6 Notice Plan described herein and in the Mergens Settlement Agreement, and all
7 reasonable costs associated with providing notice advising Settlement Class
8 Members of the modifications to the Settlement and the Plan of Allocation,
9 including the opportunity to be to be heard at, or submit written comments in
10 advance of, the final hearing, shall be paid out of the Settlement Fund Trust
11 Account, subject to Court approval.

12 **E. Objections**

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

15 **The Court**

16 Clerk of Court
17 United States District Court for the Central District of California
18 312 North Spring Street
Los Angeles, California 90012

19 **Class Counsel**

20 Birka-White Law Offices
21 65 Oak Court
22 Danville, CA 94526
Attn: David M. Birka-White
dbw@birka-white.com

23 AND

24 **Defense Counsel**

25 Dentons US LLP
26 1999 Harrison Street, Suite 1300
Oakland, CA 94612
Attn: Steven Frankel

27 ***

1 **V. CLAIMS PROCESS**

2 Sections V.B, V.C and V.E of the Agreement are modified and replaced by
3 the following:

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

5 Subject to a more detailed outline set forth in the proposed Plan of
6 Allocation, to qualify for non-property damage Settlement Benefits, a Settlement
7 Class Member must demonstrate proof of ownership of the Flushmate Toilet and
8 timely submit a Claim Form. To qualify for Property Damage Settlement Benefits,
9 the Settlement Class Member must demonstrate proof of ownership of the Property
10 that contains or contained a Flushmate Toilet and timely submit a Claim Form. The
11 Claims Administrator may permit a Settlement Class Member to remedy
12 deficiencies in any Claim Form or related documents during the Claims Period or
13 Extended Claims Period upon a showing of good cause to the Special
14 Circumstances Committee (as defined in the Plan of Allocation).

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

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

1 **C. Potential Pro Rata Distribution to Class Members**

2 With respect to those settlement funds remaining unclaimed in the Settlement
3 Fund Trust Account as of September 24, 2016, (1) supplemental payments to
4 Settlement Class Members shall be made in accordance with the modified
5 Settlement and Plan of Allocation; and (2) *cy pres* distribution shall be made to
6 claimants in the Mergens Action (a related case, which addresses Flushmate III
7 Pressure-Assist Flushing Systems manufactured from July 1, 2009 through April
8 30, 2011), pursuant to the Mergens Settlement Agreement and the Mergens Plan of
9 Allocation.

10 If, following expiration of the Extended Claims Period and Mergens Claims
11 Period, funds remain in the Settlement Fund Trust Account, then such funds shall
12 be distributed in the following order:

13 a. Mergens Settlement Class Members who submitted timely claims for
14 having installed a Repair Kit, replacement pressure vessel or replacement toilet
15 themselves shall be eligible to receive \$25.00 per Flushmate Toilet repaired or
16 replaced at the same Property address after the conclusion of the Mergens Claims
17 Period.

18 b. If sufficient funds still remain in the Settlement Fund Trust Account
19 after (a) above has been satisfied, then the Parties may agree to extend the Extended
20 Claims Period and Mergens Claims Period for period(s) to be agreed upon, subject
21 to approval by the Special Master.

22 c. In the event funds still remain in the Settlement Fund Trust Account,
23 but further distribution to Settlement Class Members and Mergens Settlement Class
24 Members would be impracticable or yield a windfall after (a) and (b) above have
25 been satisfied, such funds will be distributed *cy pres* in compliance with the
26 standard articulated in *Dennis v. Kellogg Co.*, 697 F.3d 858, 865-66 (9th Cir. 2012)
27 and any subsequent case law, subject to approval by the Special Master.
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1 **E. Costs and Reporting**

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

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

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

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

27 The Claims Administrator may be replaced at any time by Court order and
28 upon application to the Court by Class Counsel or Defense Counsel for cause

1 through a duly noticed and served motion. The moving party shall meet and confer
2 with the non-moving party at least ten (10) days prior to filing any such motion.

3 ***

4 **XIII. MISCELLANEOUS PROVISIONS**

5 Section XIII.F of the Agreement is modified and replaced by the following:

6 **F. Notice.**

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

11 If to Plaintiffs or the Class to:

12 Birka-White Law Offices
13 65 Oak Court
14 Danville, CA 94526
15 Attn: David M. Birka-White
dbw@birka-white.com

16 If to Defendants to:

17 Dentons US LLP
18 1999 Harrison Street, Suite 1300
19 Oakland, CA 94612
20 Attn: Steven Frankel
steven.frankel@dentons.com

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