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United Desert Charities and Maralee Pelka

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

UNITED DESERT CHARITIES, a
California corporation, and MARALEE
PELKA, on behalf of themselves and all
others similarly situated,

Plaintiff,

v.

FLUSHMATE a/k/a SLOAN VALVE
COMPANY, a Delaware corporation,
AMERICAN STANDARD BRANDS
AS AMERICA, INC., a Delaware
corporation, , and DOES 1-10,
inclusive,

Defendants.

Case No. **CV12-06878** SJD(SHz)

CLASS ACTION COMPLAINT

BY FAX

1 Plaintiffs UNITED DESERT CHARITIES and MARALEE PELKA
2 (“Plaintiffs”), on behalf of themselves and all others similarly situated, by and
3 through their undersigned counsel, upon personal knowledge, information, and
4 belief allege as follows:

5 **INTRODUCTION**

6 1. This is a class action for damages and/or restitution on behalf of
7 Plaintiffs and all persons or entities who own or owned an American Standard toilet
8 with a defective Series 503 Flushmate® III Pressure-Assist Flushing System
9 (“Flushmate System”) sold by Flushmate, a division of the Sloan Valve Company
10 (“Sloan/Flushmate”).

11 2. The Flushmate System poses a safety hazard and is unreasonably
12 dangerous to consumers in that the vessels in the toilet may rupture, causing the
13 toilet to explode. American Standard and Sloan/Flushmate have instructed owners
14 to immediately turn off the water supply to the toilets containing the Flushmate
15 System.

16 3. The Flushmate System is defective and the failures can lead to
17 substantial property damage as well as serious physical injury to Plaintiffs and
18 members of the proposed class.

19 4. Plaintiffs and all similarly situated owners of such toilets have been
20 damaged by Defendants’ failure to properly design, develop, test, manufacture,
21 distribute, market, and sell toilets containing the Flushmate System.

22 **PARTIES**

23 5. Plaintiff and putative class representative United Desert Charities
24 (“UDC”), is a California corporation located in Palmdale, California. Plaintiff
25 UDC owns American Standard toilets containing the defective Flushmate System.
26 One of their toilets has failed and leaked.

27 6. Plaintiff and putative class representative Maralee Pelka (“Pelka”), is a
28 resident of Las Vegas, Nevada. Pelka owns American Standard toilets containing

1 the defective Flushmate System. One of the toilets at Pelka's residence has failed
2 and leaked.

3 7. AS America, Inc., doing business in California as American Standard
4 Brands AS America, Inc. ("American Standard") is a Delaware corporation which
5 maintains its principal place of business at 1 Centennial Plaza, Piscataway, NJ
6 08855. American Standard manufactures, among other things, bathroom products,
7 including toilets containing the Flushmate System.

8 8. Flushmate is a division of the Sloan Valve Company, located at 30075
9 Research Drive, New Hudson, MI 48165. Sloan Valve Company is a Delaware
10 corporation which maintains its principal place of business at 10500 Seymour
11 Avenue Franklin Park, IL 60131 (collectively, "Sloan/Flushmate").

12 Sloan/Flushmate is engaged in the business of manufacturing, supplying and
13 distributing pressurized flushing devices including the defective Flushmate System
14 used in the American Standard toilets.

15 9. Plaintiffs are ignorant of the true names and capacities of the
16 Defendants sued herein as DOES 1 through 10, and therefore sue these Defendants
17 by such fictitious names. Plaintiffs will amend this complaint to allege their true
18 names and capacities when they are ascertained. Plaintiffs are informed and believe
19 that each of the fictitiously named Defendants is responsible in some manner for the
20 occurrences herein alleged and that damages suffered by Plaintiffs and the proposed
21 class, were proximately caused by their conduct.

22 10. Plaintiffs are informed and believe that all Defendants, including the
23 fictitious Doe Defendants 1 through 10, were at all relevant times acting as actual
24 agents, conspirators, ostensible agents, partners, alter egos and/or joint venturers
25 and employees of all other Defendants and that all acts alleged herein occurred
26 within the course and scope of that agency, employment, partnership, and/or
27 enterprise, and with the express and/or implied permission, knowledge, consent,
28 authorization and ratification of their co-Defendants.

1 **FACTUAL ALLEGATIONS**

2 **The Flushmate System**

3 15. Sloan Valve Company sells various plumbing products including the
4 Flushmate® III Pressure-Assist Flushing System, also referred to as the Flushmate
5 Flushometer Tank System (“Flushmate System”).

6 16. Sloan/Flushmate sold over 2.3 million Flushmate Systems to Plaintiffs
7 and Class Members throughout the United States. The Flushmate System was
8 installed in toilets manufactured by American Standard and others.

9 17. The Flushmate System differs from traditional flushing systems. The
10 Flushmate System uses a vessel that traps air, and as the vessel fills with water, it
11 uses the water supply line pressure to compress the trapped air inside. The
12 compressed air forces the water into the toilet bowl, and instead of the “pulling” or
13 siphon action of a gravity unit, the pressure-assist unit “pushes” waste out.

14 18. Sloan/Flushmate represented in marketing materials that their
15 Flushmate System was “designed with continuous improvements to be the most
16 reliable, consistent, and trouble-free system available,” as well as “No Leaks,” “No
17 Callbacks,” “Easier to maintain.”

18 19. The vessels used in the Flushmate System are defective and prone to
19 leaks and weld separation. The leaks cause the Flushmate System to burst at or near
20 the vessel weld seam releasing stored pressure. The pressure then lifts the toilet lid
21 and shatters the tank, posing impact or laceration hazards to consumers, as well as
22 property damage. This failure mechanism is common to all Flushmate Systems
23 throughout the class period by virtue of their defective design and manufacture, and
24 is not caused by installation practices.

25 20. Plaintiffs and the Class own, have installed, or paid damages caused by
26 toilets with the Flushmate System that have already failed prematurely or are in the
27 process of failing prematurely, and thus have suffered or are reasonably certain to
28 suffer actual injury.

1 21. Toilets manufactured using the Flushmate System are inherently
2 defective and are substantially certain to cause the toilet to fail within the express or
3 implied warranty and/or the useful life of the plumbing system.

4 **Omissions About the Flushmate System**

5 22. Defendants made numerous material omissions relating to the design,
6 reliability, and performance of the Flushmate System used in toilets sold by
7 American Standard and others.

8 23. Among these omissions was the failure to inform purchasers and
9 consumers about the possibility that the Flushmate System may develop leaks, that
10 the welded joints may separate in the vessels, and that the toilet might explode.

11 24. Sloan/Flushmate became aware of the Flushmate System defect as
12 early as July 2000, if not sooner, but nonetheless continued to sell the Flushmate
13 System without disclosing the defect or risk, which would have allowed
14 consumers to make an informed decision whether or not to purchase a toilet
15 containing the Flushmate System.

16 25. On or about July 24, 2000, Sloan/Flushmate issued a Product Advisory
17 notice entitled, "FLUSHMATE® II VESSEL WELD LEAK OR SEPARATION."
18 Sloan/Flushmate explained that "a very small number" of Flushmate Systems
19 developed leaks, or separation of the joints in the vessels that are accompanied by
20 the rapid release of the pressurized water contained in the vessel.

21 26. Sloan/Flushmate downplayed the extent of the problems with the
22 Flushmate System. On or about June 31, 2003, the Product Advisory notice was
23 revised and entitled, "FLUSHMATE® II and III VESSEL WELD LEAK OR
24 SEPARATION" to include models manufactured between January 1998 and April
25 1998, May 4, 1998, and May 13, 1998.

26 27. Sloan/Flushmate continued to downplay the extent and seriousness of
27 the defects with the Flushmate System until a recall notice was issued by the U.S.
28 Consumer Product Safety Commission ("CPSC") on June 21, 2012, affecting

1 Flushmate Systems manufactured between October 14, 1997 and February 29,
2 2008.

3 28. According to the CPSC, Sloan/Flushmate has received 304 reports of
4 the product bursting, resulting in property damage and 14 impact or laceration
5 injuries. Sloan/Flushmate has since revised their prior Product Advisory notices to
6 read, "See Flushmate III Recall 2012."

7 29. As a result of over 300 said reports, Sloan/Flushmate was repeatedly
8 placed on notice of the serious risk that the toilets in which Flushmate Systems
9 were installed may explode, and yet did nothing to inform customers or correct the
10 problem prior to the recall.

11 30. Sloan/Flushmate was obligated to disclose these facts to Plaintiffs and
12 the Class because such disclosure was necessary to qualify affirmative
13 representations made concerning Sloan/Flushmate's pressure-assisted flushing
14 system to make such representations non-misleading. Disclosure of the facts
15 Sloan/Flushmate failed to disclose was also necessary because Sloan/Flushmate
16 was uniquely in possession of the facts it did not disclose, knew that such facts
17 were not available to Plaintiffs and Class Members, and knew that such facts would
18 be highly material to any prospective purchaser of its products.

19 31. The Recall advises owners to immediately turn off the water supply to
20 the toilets that contain the Flushmate System, thereby making it impossible for
21 Plaintiffs and Class Members who have homes with these toilet systems to use the
22 system.

23 **Inadequate Repair**

24 32. The "repair kit" offered by Sloan/Flushmate is inadequate in that it
25 does nothing to repair or correct the design defect. Furthermore, the so called
26 "repair kit" cannot be installed in many toilets due to the restricted available space,
27 shape of the toilet, and length of the existing water line. It also improperly alters
28 the appearance and operation of the American Standard toilet in an effort to

1 compensate for the defect. Furthermore, it is unrealistic and inappropriate to
2 require consumers to install the “repair kit.” The entire Flushmate System needs to
3 be replaced by a qualified plumber, paid for by the toilet manufacturer or
4 Sloan/Flushmate. There is also the additional inconvenience of having an
5 inoperable toilet until the proper repair or replacement is completed.

6 33. The “repair kit” provided by Sloan/Flushmate does not address the
7 design and manufacturing defects of the Flushmate System.

8 34. The first component of the repair kit is a U-shaped metal strap
9 described as the “U-band.” Sloan/Flushmate instructs the owner to install the U-
10 band around the Flushmate System pressure vessel which is housed inside the toilet
11 tank. The purported purpose of the U-band is to restrain the movement of the two
12 halves of the plastic pressure vessel upon failure, to reduce the likelihood of
13 explosion of the ceramic toilet tank. The U-band is inadequately designed and fails
14 to correct, repair, or prevent the defect.

15 35. The second component of the repair kit is an “external regulator.” The
16 purported purpose of the external regulator is to reduce the water pressure supplied
17 to the Flushmate System pressure vessel and thereby reduce the likelihood of
18 explosion or leaks. The impact of reduced pressure directly compromises the
19 flushing function of the Flushmate System and is an inadequate repair.

20 36. The installation of the repair kit requires plumbing skills and tools
21 that many owners do not possess. It is unreasonable to require class members to
22 undertake the responsibility and risks associated with the installation of an
23 inadequate “repair kit.”

24 37. The notice issued in cooperation with the CPSC is insufficient.
25 Owners of the Flushmate System have not received notice and the risk of personal
26 injury and property damage remains unresolved. Furthermore, the product recall is
27 limited to Flushmate Systems manufactured between 1997 and 2008, and may not
28 include all Flushmate III Pressure-Assisted Systems.

1 38. The poorly designed repair kit and refusal of Sloan/Flushmate to pay
2 the labor costs associated with the repair, combined with an inadequate notice
3 program, undermines the purpose and impact of the recall.

4 **American Standard**

5 39. American Standard manufactures bath and kitchen products.
6 American Standard manufactured and sold toilets containing the Flushmate System.

7 40. The American Standard toilets include, but are not necessarily limited
8 to, the Cadet 16 ½" Elongated ADA Toilet, Model No. 2467.016, Cadet Elongated
9 Front Toilet, Model No. 2462.016, Yorkville Elongated Front Toilet, Model No.
10 2876.016, and Glenwall Elongated Toilet, Model No. 2093.100.

11 41. American Standard advertised that their toilets were "equipped with
12 FLUSHMATE®" and included separate service instructions for the Flushmate
13 System. American Standard also represented the Flushmate System was "factory-
14 adjusted to provide a consistent, safe seal depth in the bowl after each flush."

15 42. American Standard was negligent in making these representations
16 because the Sloan/Flushmate had issued prior product advisory notices regarding
17 issues with the Flushmate System which informed American Standard of the
18 possibility that the Flushmate System may develop leaks, that the welded joints
19 may separate in the vessels, and that the toilet might explode.

20 **Target of Flushmate's Representations**

21 43. Sloan/Flushmate sells its Flushmate System to initial purchasers,
22 including but not limited to toilet manufacturers, who are not intended to be the
23 ultimate owners of the Flushmate System (the "Initial Purchasers"). The Flushmate
24 System purchased by the Initial Purchasers is ultimately installed in toilets owned
25 by persons or entities other than the Initial Purchasers.

26 44. Sloan/Flushmate and the Initial Purchasers intended that all
27 representations made by Flushmate concerning the Flushmate System – including
28 representations concerning the quality and reliability of the Flushmate System

1 would be conveyed to and relied upon by the ultimate owners of the Flushmate
2 System. Sloan/Flushmate and the Initial Purchasers also intended that express and
3 implied warranties concerning the Flushmate System made by Sloan/Flushmate
4 were for the benefit of owners of the Flushmate System such as Plaintiffs and Class
5 Members.

6 45. Sloan/Flushmate contracted with the Initial Purchasers to supply the
7 Flushmate System to be installed in Plaintiffs' and Class Members' toilets and
8 knew that the Initial Purchasers sell toilets containing the purchased Flushmate
9 System. Express and implied warranties made by Sloan/Flushmate concerning its
10 products would be of no economic value to the Initial Purchasers unless the
11 ultimate owner of the toilets in which Sloan/Flushmate's pressure-assisting flushing
12 system is installed – Plaintiff and Class Members – received the benefit of such
13 warranties.

14 46. In fact, American Standard includes literature related to the Flushmate
15 System, including service of the tank, separate from its own service materials
16 relating to the American Standard toilet only. These materials are supplied to the
17 Initial Purchaser by Sloan/Flushmate for that purpose.

18 **Plaintiff United Desert Charities**

19 47. Defendants made numerous material omissions relating to the design,
20 reliability, and performance of the Flushmate System sold by Sloan/Flushmate to
21 American Standard and others for use in their toilet systems.

22 48. Plaintiff United Desert Charities did not become aware of the falsity of
23 the representations and warranties made by Defendants until approximately July
24 2012, when one of seven American Standard toilets containing the Flushmate
25 System failed and began to leak. Plaintiff will have to repair and/or replace the
26 additional American Standard toilets containing the Flushmate System.

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28 ///

1 **Plaintiff Maralee Pelka**

2 49. Plaintiff Maralee Pelka did not become aware of the falsity of the
3 representations and warranties made by Defendants until approximately
4 June 2012, when one of two American Standard toilets at her home containing the
5 Flushmate System failed and began to leak, causing damage to her property. Pelka
6 was informed by her plumber that there was a leak in the Flushmate System and
7 recommended that the remaining toilets in her home containing the Flushmate
8 System be replaced, which was done.

9 **STATUTES OF LIMITATION**

10 50. **Discovery Rule.** Prior to failing and leaking, the defective nature of
11 the Flushmate System is not perceptible to Plaintiffs and members of the proposed
12 class. Plaintiffs did not become aware that they had suffered loss of money,
13 property, and damages caused by the defective Flushmate System until their toilets
14 failed.

15 51. **Fraudulent Concealment Tolling.** Any applicable statutes of
16 limitation have been tolled by Defendant Sloan/Flushmate's knowing and active
17 concealment of the facts as alleged herein. Plaintiffs and the proposed class have
18 been kept ignorant by Defendants of vital information essential to the pursuit of
19 these claims, without any fault or lack of diligence on their part. Plaintiffs and
20 members of the proposed class could not reasonably have discovered the problems
21 associated with the Flushmate System on their own. Sloan/Flushmate's initial
22 Product Advisory stated that only a small number of Flushmate Systems
23 manufactured in 1997 and 1998 had issues. However, the current product recall
24 affects Flushmate Systems manufactured between October 14, 1997 and February
25 29, 2008.

26 52. **Estoppel.** Defendant Sloan/Flushmate is estopped from relying on
27 any statutes of limitation in defense of this action. For the reasons described in
28 paragraph 73 below, Defendant Sloan/Flushmate was under a continuous duty to

1 disclose to Plaintiffs and the proposed class the true character, quality and nature of
2 the Flushmate System. Defendant Sloan/Flushmate knowingly and affirmatively
3 misrepresented and actively concealed the true character, quality, and nature of the
4 Flushmate System. Likewise, Defendant American Standard negligently
5 misrepresented the quality of the Flushmate System. Plaintiffs reasonably relied
6 upon Defendant Sloan/Flushmate's knowing and affirmative representations and/or
7 active concealment. Plaintiffs also reasonably relied upon Defendant American
8 Standard's negligent misrepresentations concerning the quality of the toilets
9 containing the Flushmate System.

10 CLASS ACTION ALLEGATIONS

11 53. Plaintiffs bring this action as a class action pursuant to Federal Rule of
12 Civil Procedure 23, on behalf of themselves and all others similarly situated (the
13 "Class").

14 54. The Class which Plaintiffs seek to represent in this action is defined as
15 follows:

16 **Nationwide Class:** "All persons and entities who own American
17 Standard toilets containing a Series 503 Flushmate® III Pressure-
18 Assist Flushing System manufactured from January 1997 to the
19 present, or who replaced some or all of said defective Flushmate
20 System."

21 **Nationwide Fraud Sub-Class:** All persons and entities who own
22 American Standard toilets containing the Series 503 Flushmate® III
23 Pressure-Assist Flushing System that were installed after the date
24 Sloan/Flushmate was on notice that said product was defective, or
25 who have replaced some or all of said defective Flushmate® III
26 Pressure-Assist Flushing System which had been installed after such
27 date.

28 55. The following persons shall be excluded from the Class: (1) American

1 Standard, Sloan Valve Company, Flushmate, and their subsidiaries and affiliates;
2 (2) all persons who make a timely election to be excluded from the proposed Class;
3 and (3) the judge(s) to whom this case is assigned and any immediate family
4 members thereof.

5 56. Plaintiffs reserve the right to modify or amend the Class definition, as
6 appropriate.

7 57. Certification of Plaintiffs' claims for class-wide treatment is
8 appropriate because Plaintiffs can prove the elements of their claims on a class wide
9 basis using the same evidence as would be used to prove those elements in
10 individual actions alleging the same claims, and because this case meets the
11 requirements of Federal Rule of Civil Procedure 23.

12 58. **Numerosity Under Rule 23(a)(1)**. The members of the Class are so
13 numerous that individual joinder of all the members is impracticable. Plaintiffs are
14 informed and believe that there are at least thousands of purchasers who have been
15 damaged by Defendants' conduct, as alleged herein.

16 59. **Commonality and Predominance Under Rule 23(a)(2) and (b)(3)**.
17 This action involves common questions of law and fact, which predominate over
18 any questions affecting individual class members, including, but not limited to, the
19 following.

20 a. Whether Defendants violated California's Unfair Competition
21 Law, Bus. & Prof. Code § 17200, et seq., by, among other things, engaging in
22 unfair, unlawful, or fraudulent practices;

23 b. Whether Defendants violated California's Unfair Competition
24 Law, Bus. & Prof. Code § 17200, et seq., by, among other things, falsely
25 advertising that their Flushmate System was of a certain standard, quality, and
26 grade when in fact, it was not;

27 c. Whether Defendants have been unjustly enriched as a result of
28 the conduct complained of herein;

1 d. Whether Plaintiffs and the Class are entitled to equitable relief,
2 including but not limited restitution.

3 e. Whether the Flushmate System is subject to premature failure in
4 advance of its useful life, and not suitable for use as a long-term plumbing product;

5 f. Whether Defendants knew or should have known that toilets
6 containing the Flushmate System were defective;

7 g. Whether Defendant Sloan/Flushmate had a duty to Plaintiffs and
8 the Class to disclose the true nature of the Flushmate System;

9 h. Whether Defendant Sloan/Flushmate falsely represented that
10 their Flushmate System was of a certain standard, quality, and grade, when in fact,
11 they were not;

12 i. Whether Defendant American Standard falsely represented that
13 their toilets containing the Flushmate System were of a certain standard, quality,
14 and grade, when in fact, they were not;

15 j. Whether Defendant Sloan/Flushmate concealed material
16 information regarding the true characteristics and defective nature of their products;

17 k. Whether Defendant Sloan/Flushmate's false representations and
18 concealment of the defective nature of their Flushmate System was knowing,
19 intentional, reckless, and/or malicious.

20 l. Whether Defendant American Standard negligently
21 misrepresented the true characteristics of their toilets containing the Flushmate
22 System;

23 m. Whether Plaintiffs and the Class are entitled to actual, statutory,
24 punitive, exemplary, and/or other forms of damages, and/or other monetary relief
25 and, if so, in what amount;

26 n. Whether Defendants breached their express warranties to
27 Plaintiffs and the Class.

28 o. Whether Defendants breached their implied warranties to

1 Plaintiffs and the Class.

2 60. **Typicality Under Rule 23(a)(3)**. The named Plaintiffs' claims are
3 typical of the claims of the Class because, among other things, Plaintiffs, like all
4 Class members, own toilets containing the Flushmate System or purchased
5 residences or commercial property in which the defective toilets were installed and
6 marketed and sold by Defendants, and were damaged as a result. The universally
7 defective nature of the Flushmate System renders each Class member's claims,
8 legal theory, and injury common and typical.

9 61. **Adequacy of Representation Under Rule 23(a)(4)**. Plaintiffs are
10 adequate representatives of the Class because their interests do not conflict with the
11 interests of the proposed Class. Plaintiffs have retained counsel competent and
12 experienced in complex class actions involving building products and product
13 liability, and intend to prosecute this action vigorously. The interests of the Class
14 will be fairly and adequately protected by Plaintiffs and their counsel.

15 62. **Superiority Under Rule 23(b)(3)**. A class action is superior to all
16 other available means for the fair and efficient adjudication of this controversy in
17 that:

18 a. The prosecution of separate actions by individual members of
19 the Class would create a foreseeable risk of inconsistent or varying adjudications
20 which would establish incompatible results and standards for Defendants;

21 b. Adjudications with respect to individual members of the Class
22 would, as a practical matter, be dispositive of the interests of the other members not
23 parties to the individual adjudications or would substantially impair or impede their
24 ability to protect their own separate interests;

25 c. Class action treatment avoids the waste and duplication inherent
26 in potentially thousands of individual actions, and conserves the resources of the
27 courts; and

28 d. The claims of the individual Class members are relatively small

1 compared to the burden and expense that would be required to individually litigate
2 their claims against Defendants, so it would be impracticable for the members of
3 the Class to individually seek redress for Defendants' wrongful conduct. Even if
4 the members of the Class could afford individual litigation, the court system could
5 not. Individualized litigation creates a potential for inconsistent or contradictory
6 judgments, and increases the delay and expense to all parties and the court system.
7 By contrast, the class action device presents far fewer management difficulties, and
8 provides the benefits of single adjudication, economy of scale, and comprehensive
9 supervision by a single court.

10 63. **Class Notice (Central District Local Rule 23-2.2(g))**. Plaintiffs
11 cannot be certain of the form and manner of class notice it will propose until the
12 class is finally defined and some discovery concerning the identity of Class
13 members is undertaken. Based on the experience of its counsel in previous cases,
14 however, Plaintiffs anticipate that notice by mail will be given to all Class members
15 who can be identified specifically and that this notice will be supplemented by
16 notice published in appropriate periodicals, notice published on the Internet and by
17 press releases and similar communications to relevant industry and trade groups.

18 **CLAIMS FOR RELIEF**

19 **FIRST CLAIM FOR RELIEF**

20 **(Breach of Express Warranty)**

21 **(Against All Defendants)**

22 64. Plaintiffs incorporate by reference each allegation set forth in the
23 preceding paragraphs.

24 65. In order to promote and induce the purchase of its products, Defendant
25 Sloan/Flushmate expressly warranted to Initial Purchasers (who are primarily
26 manufacturers of toilets), Plaintiffs and the Class, by advertisement, literature, and
27 other means, that the Flushmate System was merchantable and fit for the ordinary
28 purpose for which it was sold.

1 66. Defendant American Standard also expressly warranted to Plaintiffs
2 and the Class, by advertisement, literature, and other means, that their toilets
3 containing the Flushmate System were merchantable and fit for the ordinary
4 purpose for which such products were sold, in order to promote and induce
5 purchase of its toilets.

6 67. Sloan/Flushmate and American Standard intended the express
7 warranties were for the benefit of Plaintiffs and Class Members, the owners of the
8 properties where the toilets containing the Flushmate System are installed.
9 Sloan/Flushmate contracted with American Standard to supply the Flushmate
10 System and to be installed in toilets owned by Plaintiffs and the Class. The express
11 warranties would be of no economic value to American Standard unless the
12 ultimate owner of the properties containing Sloan/Flushmate's pressure-assisted
13 flushing system, Plaintiffs and the Class, received the benefit of such warranties.

14 68. These express warranties formed part of the basis of the bargain
15 between Sloan/Flushmate, American Standard, and Plaintiffs and the Class.

16 69. Defendants breached their express warranties by selling the Flushmate
17 System for use in toilets manufactured by American Standard that were: (1) not of
18 merchantable quality; and (2) unfit for their intended use as they are reasonably
19 certain to fail before the useful life of the system.

20 70. As a result of Sloan/Flushmate's breaches of its express warranties,
21 Plaintiffs and the Class have been damaged in an amount to be proven at trial.

22 71. Defendants received timely notice of the breach of warranty alleged
23 herein by reason of its own knowledge of the defective Flushmate System, the
24 assertion by Class members of claims, this Complaint, and Plaintiffs' Consumers
25 Legal Remedies Act ("CLRA") Notice dated July 19, 2012, issued pursuant to Civil
26 Code section 1782.

27 72. By reason of the foregoing, Plaintiffs, on behalf of themselves and all
28 others similarly situated, demand judgment against Defendants for damages,

1 including compensatory, incidental and consequential damages (excepting damages
2 for personal injuries) for itself and each member of the Class.

3 **SECOND CLAIM FOR RELIEF**

4 **(Breach of Implied Warranty)**

5 **(Against All Defendants)**

6 73. Plaintiffs incorporate by reference each allegation set forth in the
7 preceding paragraphs.

8 74. The sale of the Flushmate System between Sloan/Flushmate and
9 American Standard, and the sales by American Standard, included warranties
10 implied in the law that the Flushmate System, and the American Standard toilets
11 containing the Flushmate System, were merchantable and fit for the ordinary
12 purpose for which such products were sold (the "Implied Warranties").

13 75. Sloan/Flushmate and American Standards breached the Implied
14 Warranties by manufacturing and selling the Flushmate System, and toilets
15 containing the Flushmate system that were (1) not fit for use as a flushing system in
16 toilets installed in homes and other structures, (2) not of a merchantable quality;
17 and (3) unfit for their intended use in that the vessel used in the pressure-assisted
18 flushing system is defective and dangerous in that it can leak/burst at or near the
19 vessel weld seam releasing stored pressure, causing the toilet tank lid to lift off and
20 shatter the tank, which can result in serious physical injuries and property damage.

21 76. As a direct and proximate result of Sloan/Flushmate's and American
22 Standard's breaches of the Implied Warranties, Plaintiffs and the Class have been
23 damaged in an amount to be proven at trial.

24 **THIRD CLAIM FOR RELIEF**

25 **(Fraudulent Concealment/Intentional Misrepresentation)**

26 **(Against Sloan/Flushmate)**

27 77. Plaintiffs incorporate by reference each allegation set forth in the
28 preceding paragraphs.

1 78. Sloan/Flushmate knowingly concealed and intentionally failed to
2 disclose to Plaintiffs and the Class the facts that the Flushmate System they sold to
3 American Standard for use in toilets sold to the public were defective, highly
4 susceptible to leaks and weld separation, and presented a risk of dangerous
5 catastrophic failure. Sloan/Flushmate represented that their Flushmate System was
6 reliable, consistent, and trouble-free – “No Leaks.” This information was material
7 to Plaintiffs and the Class and was concealed by Sloan/Flushmate to induce Initial
8 Purchasers (like American Standard), Plaintiffs and their agents, representatives,
9 builders, and installers, and the Class to purchase the Flushmate System and/or
10 toilets containing a Flushmate System. A safety consideration as fundamental as
11 whether the tank in your toilet might leak or explode is material to Plaintiffs and the
12 Class.

13 79. At all relevant times, Sloan/Flushmate had exclusive knowledge of
14 material facts not known to Plaintiffs and the Class, actively concealed these facts
15 from the Plaintiffs and the Class, and made representations concerning the
16 reliability of the Flushmate Systems which were materially misleading in light of
17 the facts it suppressed.

18 80. Defendant Sloan/Flushmate intended for Plaintiffs and the Class to
19 rely on its omissions regarding the quality of their Flushmate System. Defendant
20 Sloan/Flushmate knew that had they disclosed the true facts as alleged herein,
21 Initial Purchasers, Plaintiff and the Class would not have purchased toilets
22 containing the Flushmate System.

23 81. Plaintiffs and the Class were unaware that the Flushmate System sold
24 by Defendant Sloan/Flushmate for use in their toilet systems was defective and
25 susceptible to catastrophic failure. Had Plaintiffs and the Class been aware of
26 Defendant Sloan/Flushmate’s omissions concerning the Flushmate System, they
27 would not have purchased an American Standard toilet containing the defective
28 Flushmate System.

1 Flushmate System itself, as alleged herein, Plaintiffs and the Class have been
2 damaged in an amount to be proven at trial.

3 **FIFTH CLAIM FOR RELIEF**

4 **(Violation of Unfair Competition Law)**

5 **(Against All Defendants)**

6 90. Plaintiffs incorporate by reference each allegation set forth in the
7 preceding paragraphs.

8 91. Pursuant to Bus. & Prof. Code § 17200, “unfair competition shall
9 mean and include any unlawful, unfair or fraudulent business act or practice and
10 unfair, deceptive, untrue or misleading advertising.”

11 92. Defendants’ actions, as alleged herein, constitute deceptive, unfair,
12 fraudulent, and unlawful practices committed in violation of the Bus. & Prof. Code
13 § 17200, *et seq.*

14 93. All of the conduct and misrepresentations alleged herein occurred in
15 the course of Defendants’ business and was part of a pattern or generalized course
16 of conduct.

17 94. Defendants’ deceptive, unfair, fraudulent, and unlawful conduct
18 alleged herein was specifically designed to and did induce Plaintiffs, or Plaintiffs’
19 agents, representatives, or builders/installers, and the Class to purchase toilets with
20 the Flushmate System for use and installation in their homes and other structures.

21 95. Plaintiffs and the Class reasonably and justifiably relied on
22 Defendants’ deceptive, unfair, fraudulent, and unlawful conduct alleged herein.

23 96. As a direct and proximate cause of Defendants’ unfair methods of
24 competition and unfair or deceptive acts or practices, Plaintiffs and the Class have
25 suffered injury-in-fact, lost money, and lost property, in that they own or owned
26 properties in which the defective Flushmate Systems are or were installed. The
27 Flushmate System will prematurely fail, which will require (or has already
28 required) Plaintiffs and the Class to incur costs to prematurely repair and/or replace

1 their toilets and/or Flushmate System. Further, Plaintiffs and the Class lose the use
2 of their toilets until repair/replacement of same due to the hazardous conditions
3 created by the defective Flushmate System requiring the water supply to the toilet
4 be immediately turned off.

5 97. Pursuant to Bus. & Prof. Code §§ 17203, 17204, Plaintiffs and the
6 Class seek to recover from Defendants restitution of earnings, profits, compensation
7 and benefit obtained as a result of the practices that are unlawful under Bus. & Prof.
8 Code § 17200 *et seq.*, according to proof.

9 **SIXTH CLAIM FOR RELIEF**
10 **(Unjust Enrichment/Restitution)**
11 **(Against All Defendants)**

12 98. Plaintiffs incorporate by reference each allegation set forth in the
13 preceding paragraphs.

14 99. To the detriment of Plaintiffs and the Class, Defendants have been
15 unjustly enriched as a result of the unlawful and/or wrongful collection of, *inter*
16 *alia*, payments for toilets containing defective Flushmate pressure-assisted flushing
17 systems.

18 100. It would be inequitable and unjust for Defendants to retain any profits,
19 benefits, or other money it obtained from their wrongful conduct.

20 101. Accordingly, Plaintiffs and the Class seek full restitution of
21 Defendants' enrichment, benefits, and ill-gotten gains acquired as a result of
22 Defendants' unfair, fraudulent, and unlawful conduct alleged herein, according to
23 proof.

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly
26 situated, pray that the Court certify the Class, as defined hereinabove, enter
27 judgment against Defendants and in favor of Plaintiffs and the Class, and award the
28 following relief:

- 1 1. An Order certifying this action as a Class Action (and certifying any
2 appropriate subclasses), appointing Plaintiffs as Class Representatives and their
3 counsel of record jointly as Class Counsel;
- 4 2. For restitutionary relief consisting of:
- 5 a. An accounting against the Defendants for all sums collected
6 from Plaintiffs and the Class for the purchase of toilets with a defective Flushmate
7 System;
- 8 b. The imposition of a constructive trust for all such sums;
- 9 c. For restitution and/or disgorgement of revenues, earnings,
10 profits, compensation, and benefits which were received by Defendants as a result
11 of such unlawful business acts or practices, according to proof;
- 12 3. Injunctive relief;
- 13 a. A declaration that Defendants are financially responsible for
14 notifying all Class Members;
- 15 4. Actual damages, punitive damages, and such other relief as provided
16 by the law;
- 17 5. Pre-judgment and post-judgment interest on such monetary relief;
- 18 6. For Plaintiffs' attorneys' fees;
- 19 7. For costs of suit; and
- 20 8. All other relief to which Plaintiff and the Class may be entitled at law
21 or in equity and which the Court deems appropriate

22 DATED: August 9, 2012

Respectfully submitted,

23 BIRKA-WHITE LAW OFFICES

24
25 By: 

26 DAVID M. BIRKA-WHITE
27 *Attorneys for Plaintiffs*
28 UNITED DESERT CHARITIES and
MARALEE PELKA

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JURY DEMAND

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiffs,
individually and on behalf of all others similarly situated, hereby demand a jury
trial.

Dated: August 9, 2012

Respectfully submitted,

BIRKA-WHITE LAW OFFICES

By: 

David M. Birka-White

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**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET**

VIII(a). IDENTICAL CASES: Has this action been previously filed in this court and dismissed, remanded or closed? No Yes
If yes, list case number(s): _____

VIII(b). RELATED CASES: Have any cases been previously filed in this court that are related to the present case? No Yes
If yes, list case number(s): _____

Civil cases are deemed related if a previously filed case and the present case:

- (Check all boxes that apply) A. Arise from the same or closely related transactions, happenings, or events; or
 B. Call for determination of the same or substantially related or similar questions of law and fact; or
 C. For other reasons would entail substantial duplication of labor if heard by different judges; or
 D. Involve the same patent, trademark or copyright, and one of the factors identified above in a, b or c also is present.

IX. VENUE: (When completing the following information, use an additional sheet if necessary.)

(a) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** named plaintiff resides.
 Check here if the government, its agencies or employees is a named plaintiff. If this box is checked, go to item (b).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
County of Los Angeles	Nevada Nationwide

(b) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** named defendant resides.
 Check here if the government, its agencies or employees is a named defendant. If this box is checked, go to item (c).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
	Delaware New Jersey Illinois

(c) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** claim arose.
Note: In land condemnation cases, use the location of the tract of land involved.

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
County of Los Angeles	Nevada

* Los Angeles, Orange, San Bernardino, Riverside, Ventura, Santa Barbara, or San Luis Obispo Counties

Note: In land condemnation cases, use the location of the tract of land involved

X. SIGNATURE OF ATTORNEY (OR PRO PER) _____ Date August 9, 2012

Notice to Counsel/Parties: The CV-71 (J6-44) Civil Cover Sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form, approved by the Judicial Conference of the United States in September 1974, is required pursuant to Local Rule 3-1 is not filed but is used by the Clerk of the Court for the purpose of statistics, venue and initiating the civil docket sheet. (For more detailed instructions, see separate instructions sheet.)

Key to Statistical codes relating to Social Security Cases:

Nature of Suit Code	Abbreviation	Substantive Statement of Cause of Action
861	HIA	All claims for health insurance benefits (Medicare) under Title 18, Part A, of the Social Security Act, as amended. Also, include claims by hospitals, skilled nursing facilities, etc., for certification as providers of services under the program. (42 U.S.C. 1935FF(b))
862	BL	All claims for "Black Lung" benefits under Title 4, Part B, of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. 923)
863	DIWC	All claims filed by insured workers for disability insurance benefits under Title 2 of the Social Security Act, as amended; plus all claims filed for child's insurance benefits based on disability. (42 U.S.C. 405(g))
863	DIWW	All claims filed for widows or widowers insurance benefits based on disability under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405(g))
864	SSID	All claims for supplemental security income payments based upon disability filed under Title 16 of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors benefits under Title 2 of the Social Security Act, as amended. (42 U.S.C. (g))