IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

STEVEN AND JOANNA CONE, et. al. on Behalf of Themselves and Those Similarly Situated[1] *Plaintiffs* v. PORCELANA CORONA DE MÉXICO, S.A. DE C.V f/k/a SANITARIOS LAMOSA S.A. DE C.V., a/k/a VORTENS, INC *Defendants*	§ § § § § § § § § § §	Civil Action File No. 4:17-cv-00001-ALM-KPJ JOINT NOTICE OF SETTLEMENT AND REQUEST FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND MEMORANDUM IN SUPPORT

NOW COME the Parties, Plaintiffs MARK AND AMBER FESSLER, ANDREW HOCKER, MATTHEW CARRERAS, AARON AND STACEY STONE, and DANIEL AND SHARON SOUSA on behalf of Themselves and Those Similarly Situated, and Defendant Porcelana Corona de Mexico, S.A. de C.V. f/k/a Sanitarios Lamosa S.A. de C.V. a/k/a Vortens, hereby filing their Joint Motion for Preliminary Approval of Class Action Settlement, wherein same jointly and respectfully move this Court, pursuant to Federal Rule of Civil Procedure 23(e), for preliminary approval of a proposed class action settlement (the "Equitable Relief Settlement"), the terms of which are set forth by Settlement Agreement ("the Settlement Agreement" or "Agreement").

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[1] Steven and Joanna Cone settled their individual claims and were dismissed from this action. Additionally, other plaintiffs and claims were severed from the instant action for purposes of seeking and obtaining Final Approval of the 2011 Settlement Class. [Dkt.229]. A request was subsequently made to the Federal District Court Clerk per instruction by the Court as to the alteration of the case style to reflect solely the remaining Named Plaintiffs, Individually and on behalf of similarly situated parties; however, the Clerk's Office indicated a need for continuity in the case style.

The proposed Settlement resolves the request for relief pleaded in the Second Amended Complaint on behalf of each of the Plaintiffs and the requested equitable class relief defined by the certification order dated September 4, 2019. [Dkt.247]. The Parties jointly submit this Motion for Preliminary Approval of the Equitable Relief Settlement Class, and respectfully move the Court for an Order:

1. Preliminarily approving the Equitable Relief Settlement in this action pursuant to Federal Rule of Civil Procedure 23(e);[2]

2. Preliminarily approving the Equitable Relief Settlement pursuant to Rule 23(a).

3. Preliminarily approving the Equitable Relief Settlement pursuant to Rule 23(b)(2);

4. Appointing Class Counsel;

5. Appointing Equitable Relief Settlement Class Representatives;

6. Approving the proposed forms of notice and notice program, and directing the notice be disseminated pursuant to this program; and

7. Setting a Fairness Hearing and certain other dates in connection with the final approval of the Equitable Relief Settlement.[3]

This Motion is based on the included Settlement Agreement, documents attached, any reply papers, arguments of counsel, and all papers on file in this matter.

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[2] A copy of the Settlement Agreement is attached as Exhibit A.

[3] Some of the requested deadlines have already been jointly requested by the Parties and approved by the Court (Dkt. 257), including the Fairness Hearing for purposes of Final Approval, March 2, 2020.

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MEMORANDUM OF POINTS AND AUTHORITIES

The Proposed Settlement provides substantial relief to Texas consumers who own or owned toilet tanks Vortens™ model #3412 and #3464 manufactured at the Defendant's Benito Juarez plant between January 1, 2007 through December 31, 2010. The proposed Settlement was reached after nearly three years of litigation, multiple trips to Mexico, visual and destructive inspections, expert testing, reports, party and expert depositions, severance of claims, and multiple class certification briefings and hearings. Subsequent to the hearing on Plaintiff's Second Motion for Class Certification on July 24, 2019, Hon. Magistrate Priest-Johnson entered a Report and Recommendation defining the scope of the certified class and preliminarily certifying certain equitable issues under Rule 23(b)(2). [Dkt.247]. After consideration of the objections raised by Porcelana (Dkt.249), a Memorandum Adopting the Report and Recommendation of United States Magistrate Judge was entered on September 26, 2019. [Dkt.250].

The Parties thereafter engaged in arms-length negotiations within the confines of the certification order and with consideration for the potential risks of litigation for the Plaintiffs, the Defendant, and the Class. The Parties have reached an agreement as to relief for a class singularly definable by objective criteria and benefiting the putative class members defined by the Court. Resolution of class allegations and defining class benefits were at all times the priority these negotiations; individual Plaintiffs discussions were secondary to, independent from, and contingent upon first resolving the benefit to the class for the purpose of securing finality.

I. BACKGROUND

A. Claims

Plaintiffs allege manufacturing defects affecting multiple models of toilet tanks manufactured, marketed and distributed by Porcelana causes such tanks to spontaneously crack, causing damage both to real and personal property. Plaintiffs argue that these spontaneous failures

occur because same were manufactured out-of-industry-specification; the result of these manufacturing errors resulted in defective toilet tanks that contain internal stresses in the ceramic construction leading to crack propagation, which affects the lifespan of the product and risks sudden tank failure. Porcelana denies all the claims and allegations in the lawsuit. Porcelana maintains that manufacturing defect allegations are not often or easily susceptible to class treatment because each individual product must be tested to determine the cause of failure. Porcelana notes the toilet tanks were manufactured by Sanitarios Lamosa, S.A. de C.V. at a time when different equipment and procedures were in use in the plant. Porcelana maintains that the toilet tanks are not defective in any respect, that the failure rate is very low and that any failures are the result of other factors (such as improper installation or misuse).

B. Progression of the Litigation and Certification Request

The Parties engaged in extensive discovery in this litigation, including multiple trips to Mexico, visual and destructive inspections, expert testing, reports, party and expert depositions, and review of more than 100,000 pages of produced documents, most of which were produced in Spanish. The operative live pleading, Plaintiffs' Second Amended Complaint and Class Action [Dkt.74], was deemed filed as of February 14, 2018, and Plaintiffs' Motion for Class Certification was filed on April 30, 2018. [Dkt.111]. After a full evidentiary certification hearing and three mediations, a partial settlement was reached as to Vortens™ model #3412 and #3464 manufactured between January 1, 2011 through December 31, 2011 (the "2011 Settlement Class"). The Parties filed a Joint Motion for Preliminary Approval of the 2011 Settlement Class. [Dkt.191]. Based on the scope and effect of the 2011 Settlement Class Agreement, the Court denied the Motion for Class Certification as moot and ordered Plaintiffs "file an amended motion to certify class addressing only those claims not addressed" by the 2011 Settlement. [Dkt.193].

Plaintiffs filed their Second Motion for Class Certification on November 19, 2018. [Dkt.194]. The Second Motion excluded tanks manufactured in 2011 due to the partial settlement and sought to define the remaining putative class: (i) a Rule 23(b)(3) class limited to Texas as the primary "exporting location" into the United States; (ii) for tank models #3412, 3464, 3436, and 3425; (iii) manufactured between January 1, 2007 – December 31, 2012, but to the exclusion of the 2011 Settlement Class tank models; (iv) a Rule 23(b)(2) class seeking equitable relief without geographic limitation; or alternatively, (v) certification of liability issues under Rule 23(c)(4) to be conducted in an initial trial phase. [Dkt.194]. During the certification hearing, the Court disagreed with the proposed scope of the class as encompassing both manufacturing plants from 2007-2012 and the scope of the certification record as insufficient to include tank models #3436 or #3425; argument thereafter proceeded on a more limited requested scope: All Texas owners of a Vortens toilet tank model #3464 or #3412 manufactured at the Benito Juarez plant, with a manufacturing date 2007-2010. [Dkt.247]. In the Recommendation and Report, the Court found that under the limitations discussed at the hearing, "the class action mechanics are suited to address specific issues common to the Proposed Class." [Dkt.247]. The Court recommended the division of the case into two phases – phase one to address the legal issues related to tank warranties, and any remaining legal and factual issues to be addressed in a secondary phase. The Report and Recommendation was adopted, granting in part and denying in part Plaintiffs' Second Motion for Class Certification. [Dkt.250].

Working within the confines of the issues defined by the certification order, the Parties cooperated on identifying anticipated additional discovery needs and provided notice to the Court of readiness for a scheduling conference. During such time, the Parties re-engaged in settlement negotiations and in good faith sought resolution for all named parties and the putative class. After

approximately a month of renewed efforts, the Parties made significant progress towards finalizing material terms of an agreement and provided notice to the Court requesting deadlines commiserate with settlement negotiations rather than deadlines regarding prosecution of phase one and trial setting. On November 25, 2019, an Order setting Case Management Deadlines was issued – this Joint Motion for Preliminary Approval is filed in accordance with the assigned deadline of December 10, 2019. [Dkt.257].

C. Settlement and Agreed Terms

The Settlement reached by the parties is fair and should be granted preliminary approval. The case has now been pending for nearly three years, and the parties have fought vigorously to defend each of their respective positions. Numerous trips to Mexico have occurred, including corporate representative depositions and plant inspections involving traveling with experts to locations in both Monterrey and Benito Juarez. The parties engaged in two product laboratory inspections with experts and conducted extensive testing, including testing performed by an independent third-party testing facility. Multiple depositions have been taken, inclusive of expert depositions, and over 100,000 pages of documents produced and reviewed. Multiple dispositive motions were filed, briefed and ruled upon as well as expert challenges and voluminous certification briefing.

1. Settlement Agreement

The Parties incorporate by reference the details of the Settlement Agreement reached in this matter. *See* Exhibit A. The Equitable Relief Settlement Agreement provides a mechanism for resolution for Class Members that previously submitted a warranty claim on an affected tank that was denied, allows for new submission of warranty claims on past fractures of affected tanks, and provides extended warranty relief for Class Members up through and including December 31,

2020. The Parties hereby request that the Court grant this Joint Motion for Preliminary Approval and enter the Proposed Order under Rule 23(e) of the Federal Rules of Civil Procedure preliminarily accepting the negotiated Terms, and:

a. Granting preliminary approval of the Settlement as fair, reasonable, and adequate to the Settlement Class;

b. Conditionally certifying the Equitable Relief Settlement Class as defined subject to the exclusions set forth in the Stipulated Agreement;

c. Designating Named Plaintiffs Aaron and Stacey Stone and Daniel and Sharon Sousa as representatives of the Equitable Relief Settlement Class;

d. Designating Class Counsel, N. Scott Carpenter, Rebecca Bell-Stanton and the law firm of Carpenter & Schumacher, PC. as counsel for the Equitable Relief Settlement Class.

See Exhibit G. The Settlement Agreement falls wholly within the scope of the class defined in the certification order, and addresses the specific issues outlined for consideration therein. Because this Court has previously conducted multiple hearings regarding the merits of certification, performed its rigorous analysis as to each of the Rule 23(a) elements and further as to Rule 23(b)(2), and in light of the Settlement Terms not exceeding the scope of the Report and Recommendation (Dkt.247) or the Memorandum Adopting the Report and Recommendation (Dkt.250), the Parties seek preliminary approval of the Settlement Agreement without delay.

2. Post-Preliminary Approval Scheduling and Relief

The Parties previously requested, and this Court entered, a Case Management Order setting preliminary management deadlines. [Dkt.256; 257]. In accordance with the requirements of Rule 23(e) of the Federal Rules of Civil Procedure, and incorporating the preliminary management deadlines, the Parties seek entry of the Proposed Order attached to this Joint Motion, and including:

a. Scheduling the Final Approval Hearing for **March 2, 2020** for final approval of this Settlement, resolution of any objections to this Settlement, and dismissal with prejudice of the relevant representatives' claims;

b. Directing the Settlement Administrator to mail the Class Notice no later than **January 16, 2020** to persons for whom the parties have addresses, using first class mail, and having first updated the addresses using the National Change of Address database;

c. Directing the Settlement Administrator to post the Class Notice and the Agreement on a website with a domain name instructive as to the nature of the Class and Defendant, such as "vortenswarrantytx" or similarly descriptive domain so long as the term "Vortens" is included in the domain name, no later than **January 16, 2020**;

d. Finding that notice given pursuant to the terms of the Agreement is reasonable, constitutes the best notice practicable under the circumstances, constitutes due and sufficient notice of the Settlement and the matters set forth in said notice to all persons entitled to receive notice, and fully satisfies the requirements of due process and of Federal Rule of Civil Procedure 23;

e. Requiring that any objection or intervention be exercised individually by a Settlement Class Member, not as or on behalf of a group, class, or subclass, not by any appointees, assignees, claims brokers, claims filing services, claims consultants or third-party claims organizations; except that such request may be submitted by a Settlement Class Member's attorney on an individual basis;

f. Requiring that any Settlement Class Member that wishes to object to the fairness, reasonableness, or adequacy of the proposed Settlement must provide to the Settlement Administrator and file with the Court on or before **February 3, 2020** a statement of the objection, including any support the Settlement Class Member wishes to bring to the Court's attention and all evidence the Settlement Class Member wishes to introduce in support of the objection or motion, or be barred from objecting or moving to intervene. Such a statement must (1) be made in writing; (2) contain the objector's or putative intervener's full name and current address; (3) declare that the objector or putative intervener currently owns, or formerly owned, a relevant tank(s); (4) provide a statement of specific objections and the grounds and arguments for the objection or request to intervene; (5) include all documents and other writings the objector wishes the Court to consider and describe any and all evidence that may be offered at the Final Approval Hearing, including but not limited to, the names and expected testimony of any witnesses; and (6) be filed with the Court and served on the Settlement Administrator, Lead Class Counsel, and counsel for Defendants on or before a date set by the Court;

g. Providing that any objection papers not filed and served in the prescribed manner and time will not be considered at the Final Approval Hearing, and all objections not made in the prescribed manner and time shall be deemed waived;

h. Requiring that any Settlement Class Member who objects or requests to intervene shall make themselves available to be deposed by Class Counsel and counsel for Defendants in the county of the objector's or intervener's residence within 10 days of service of his or her timely written objection or motion to intervene;

i. Requiring that any responses to objections or motions to intervene must be filed with the Court and served upon Lead Class Counsel and counsel for Defendants on or before **February 21, 2020**;

j. Requiring that Class Counsel, and any party's counsel, and/or law firms who have already entered appearances for Settlement Class Members or Named Plaintiffs as of the date of this Joint Motion must file and serve their Fee Application(s), as defined in the Agreement, on or before **January 17, 2020**;

k. Requiring any objection to the Fee Application(s) be filed with the Court and served on Counsel on or before **February 14, 2020**;

l. Requiring all Final Papers in Support of Final Approval, Attorneys Fees and Expenses, and Service Awards on or before **February 21, 2020**; and

m. Designating Epiq or a similarly qualified firm as the Settlement Administrator and instruct the Administrator to perform the functions specified in the Agreement.

A proposed order entitled "Preliminary Approval Order" is attached as Exhibit G. This proposed order, if entered by the Court, would: (i) preliminarily approve the Settlement; (ii) prescribe the form of Class Notice and direct its issuance; (iii) incorporate the dates and manner of filings, objections, and responses; and (iv) set a hearing on the Settlement and any objections thereto.

II. CLASS ACTION SETTLEMENT PROCESS

Federal Rule of Civil Procedure 23(e) governs court review of proposed class-action settlement. Because the Court previously certified the scope of the class and narrowed the issues to legal matters surrounding the equitable relief claims, "the certification issues at this settlement stage are 'whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted.'" *O'Donnell v. Harris County, Texas*, 2019 WL 4224040, *7 (S.D. Tex. 2019) (quoting FED. R. CIV. P. 23(e)(1)

Committee Notes to 2018 amendments). A proposed settlement "will be preliminarily approved unless there are obvious defects in the notice or other technical flaws, or the settlement is outside the range of reasonableness or appears to be the product of collusion, rather than arms-length negotiation." *Id.* at *8. *See also* 2 MCLAUGHLIN ON CLASS ACTIONS § 6:7 (2018). A lower degree of scrutiny applies if, as here, a certification decision took place before the settlement was reached or negotiated. *Id.; see also* MANUAL FOR COMPLEX LITIGATION § 30.44.

The proposed settlement must be "fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2); *United States v. City of New Orleans*, 731 F.3d 434, 438–39 (5th Cir. 2013). Under the 2018 amendments to Rule 23(e)(2), courts look to whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

FED. R. CIV. P. 23(e)(2); *see also* 4 NEWBERG ON CLASS ACTIONS § 13:14 (5th ed. 2019) (in adopting the 2018 amendments to Rule 23(e), "Congress essentially codified [the] prior practice"). Common-law criteria preceded the Rule 23 factors – in *Reed v. General Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983), the Fifth Circuit laid out six factors (the "*Reed* factors") for courts to consider in determining the fairness, reasonableness, and adequacy of a proposed class settlement:

> (1) evidence that the settlement was obtained by fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the litigation and available discovery; (4) the probability of plaintiffs' prevailing on the merits; (5) the range of possible recovery and certainty of damages; and (6) the opinions of class counsel, class representatives, and absent class members.

All Plaintiffs v. All Defendants, 645 F.3d 329, 334 (5th Cir. 2011) (quoting *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 194–95 (5th Cir. 2010)).

Because the Rule 23 and case-law factors overlap, courts in this circuit often combine them in analyzing class settlements. *See Hays v. Eaton Grp. Attorneys, LLC*, No. 17-88-JWD-RLB, 2019 WL 427331, at *9 (M.D. La. Feb. 4, 2019); *Al's Pals Pet Care v. Woodforest Nat'l Bank, NA*, No. H-17-3852, 2019 WL 387409, at *3 (S.D. Tex. Jan. 30, 2019); *see also* FED. R. CIV. P. 23(e)(2) Committee Notes to 2018 amendments ("The goal of this amendment [to Rule 23(e)(2)] is not to displace any [circuit case-law] factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal."). This Joint Motion for Preliminary Approval, therefore, tracks the overlapping elements of Rule 23(e) and the *Reed* factors.

III. ARGUMENT

"A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Erica P. John Fund, Inc. v. Halliburton Co.*, 2018 WL 1942227, at *4 (N.D. Tex. Apr. 25, 2018) (quoting *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1063 (S.D. Tex. 2012)). This presumption reflects the strong public interest in settling class actions. *Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 507 (5th Cir. Jan. 1981) The Parties have negotiated the subject Equitable Relief Settlement in a manner that falls squarely within the confines of the prior certification ruling, and jointly request preliminary approval of the

proposed Settlement without further delay. Although a more extensive examination of the Settlement Agreement is required as a part of the formal fairness hearing, the Court need only conduct a preliminary fairness evaluation at this stage of the proceedings.

A. The Proposed Settlement Merits Preliminary Approval

"If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of a class representative or of segments of the class, or of excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement." *Telles v. Midland Coll.,* 2018 WL 7352426, at *3 (W.D. Tex. Apr. 30, 2018).

1. There is No Reason to Doubt the Fairness of this Settlement.

Both parties are represented by competent counsel who are experienced in product liability litigation and class action procedure and who reached this settlement of a complex claim during arms-length negotiations. The Parties have engaged in extensive discovery for nearly three years, and each side holds more than a sufficient understanding of the facts and relative strength of the legal claims. As this Court is aware, litigation in this matter was antagonistic as to the claims, defenses, and certification, and there is no reason to doubt or dispute the presumption of fairness in reaching the Settlement Agreement.

2. *There Are No Obvious Deficiencies in the Settlement.*

The parties have negotiated a reasonable settlement and a program to provide notice of the settlement to the class members that is compliant with FED. R. CIV. P. 23(c)(2)(B). All notices will direct class members to an easy to find and easy to remember settlement website. The website will

have a long-form notice and important court documents, list important dates, and have online claim-filing capability. In addition to mailed notices, there will be designated publication notices in publications selected after consultation with the proposed Settlement Administrator due to the size of circulation and expected ability to reach settlement class members. The settlement provides ample time and reasonable procedures for class members to object to the settlement if they choose to do so. The Parties jointly submit that there are no deficiencies in this Settlement and proposed notice program or claims administration.

3. *The Settlement Does Not Improperly Grant Preferential Treatment to Plaintiffs or any Segment of the Class.*

The Equitable Relief Settlement Agreement does not improperly grant preferential treatment to the Named Plaintiffs – indeed, not all Plaintiffs qualify as class members for purposes of securing the negotiated equitable relief.[4] Plaintiffs Aaron and Stacey Stone and Daniel and Sharon Sousa, however, are appropriate class representatives of the Equitable Relief Settlement Class. *See* Exhibit D -- SOUSA DECLARATION; Exhibit E -- STONE DECLARATION.

The Parties have agreed to separately seek a service award for the Class Representatives named above for their assistance in the prosecution of this case. Federal courts consistently approve service awards in class action lawsuits to compensate named plaintiffs for the services that they provide and the burdens that they shoulder during litigation. *See, e.g., DeHoyos*, 240 F.R.D. 269, 340 (W.D. Tex. 2007). Currently, no agreement as to the amount of such awards has been reached; rather, the Parties will present their positions as to the propriety and amount of service awards as a part of the Fee Application briefing. The interim compromise is that Plaintiffs

[4] Plaintiffs Mark and Amber Fessler, Andrew Hocker, and Matthew Carreras are not members of the class as defined by the certification order (Dkt.250) and the Equitable Relief Settlement Agreement does not expand the definition for purposes of including them as either class members or representatives. Resolution of individual claims falling outside the scope of the certified class does not affect the preliminary approval of the class action or class action settlement.

agree not to request a service award greater than $7,500.00 to be paid by the Defendant to each representative;[5] Porcelana has agreed not to object to an award of $1,000.00.

4. *The Settlement does Not Excessively Compensate Class Counsel.*

The Parties defer the determination of compensation to the Court and upon Class Counsel's filing of a separate motion for attorneys' fees and expenses, which will further be posted on the settlement website for class members to review.[6] Class Counsel will provide billing and expense documentation supporting the reasonableness of the requested fees as well as recovery of expenses. Furthermore, although a settlement account may be utilized by the administrator for distribution of class reimbursement funds, Class Counsel fees will not diminish such administration account, nor otherwise reduce the recovery of any class member.

5. *The Settlement is Within the Range of Reasonableness.*

The Equitable Relief Settlement is well within the range of reasonableness – it extends warranty relief for consumers that otherwise expired seven (7) to five (5) years after product sale and includes incidental product reimbursement for fractured tanks at no cost to the consumer. Exhibit A. Owners of affected tank models that previously incurred product replacement expenses as a result of a fracture are afforded a mechanism to recover such expenses in whole or in part upon adequate proof under the negotiated extended warranty program. The Parties further

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[5] $7,500 is the service award amount agreed upon by the Parties as to the 2011 Settlement Class Representatives and thereafter awarded by the Court.

[6] As Plaintiffs previously represented to the Court, the Fee Application in *Handley et. al v. Porcelana et. al.,* Cause No. 4:19-cv-000248 (Dkts. 21; 25; 33) underwent a review that Plaintiffs' counsel contend separated, and ultimately excluded fees and expenses attributable solely to the remaining claims. Plaintiffs intend that no double or overlapping recovery will be sought instanter. However, Plaintiffs believe that in the absence of a ruling on the Fee Application in Cause No. 4:19-cv-000248, the Parties are constrained in negotiating the remaining attorney fees and recovery of segregated expenses. The Parties agree to attempt resolution of the remaining fees and expenses in *Cone et. al v. Porcelana, et.al,* Cause No. 4:17-cv-00001 to the extent possible once the issues raised in the severed action are clarified and resolved.

negotiated reasonable aspects of necessary proof and the Agreement prevents double recovery or windfall payments to any Class Member. There are no unreasonable impediments to member qualification and claim administration is performed by a third-party administrator whose interests are not in preferential alignment with any party.

B. Rule 23 Certification Factors

On September 26, 2019, this Court adopted the Magistrate Report and Recommendation to **GRANT in part and DENY in part** Plaintiffs' Second Motion for Class Certification. [Dkts. 247; 250]. As a part of its rigorous analysis, findings and fact and conclusions of law were formulated based on the voluminous certification briefing, certification record, and multiple certification hearings. After conducting a final hearing on the remaining certification issues raised by Plaintiffs' Second Motion for Class Certification, the elements of Rule 23(a) and 23(b)(2) were analyzed, and the certification request was granted in part and denied in part. Because the Settlement Agreement was negotiated within the boundaries of those findings and conclusions, preliminary approval is warranted.

1. *The Settlement Class Defined.*

The Parties defined the scope of the Equitable Relief Class within the same parameters as the adopted Report and Recommendation:

> **All Texas owners of a Vortens™ toilet tank models #3464 and #3412 manufactured at the Benito Juarez plant with a manufacturing date 2007-2010.**

See Exhibit A. The Settlement Agreement further limits the scope of requested relief to the equitable issues raised in the certification request pursuant to Rule 23(b)(2), namely warranty protections.

The Parties have extensively briefed, and this Court has rigorously considered, the Rule 23 elements for certification. It is further anticipated that the Motion for Final Approval will constitute

a dispositive pleading under the Local Rules with allowance for additional pages of argument and authority if needed in further confirmation that the requirements of Rule 23 are satisfied.

2. *The Requirements of Fed. R. Civ. P. 23(a) Are Satisfied.*

To be certified, the class must first satisfy four threshold requirements of Rule 23(a), which provides that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

a. Numerosity.

Rule 23(a)(1) requires that the class be so numerous that joinder of all members is impracticable. FED. R. CIV. P. 23(a)(1). The Parties agree that the numerosity is clearly satisfied. *See Zeidman v. J. Ray McDermott & Co*., 651 F.2d 1030, 1038 (5th Cir. 1981) (noting that courts have certified classes with as few as twenty-five or thirty members).

b. Commonality and Typicality.

Rule 23(a)(2) requires class members to "raise at least one contention that is central to the validity of each class member's claims" and that there be questions of law or fact common to the class. Commonality requires class-wide proceedings to have the ability "to generate common answers apt to drive the resolution of the litigation." *Walmart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Although the ultimate merits or answers are not agreed upon by the Parties, for purposes of settlement approval the Parties respectfully request this Court accept that the following issues of fact, expert opinion, or law constitute contentions susceptible to common proof: (1) industry-accepted standards in sanitaryware production; (2) manufacturing protocols regarding casting, loading, kiln temperatures and speed, and materials specification; (3) presence

or scope of issues in the manufacturing process at the Benito Juarez plant 2007-2010; (4) quality control policies and procedures prior to export of tank models #3412 and #3464 manufactured 2007-2010; (5) anticipated useful life of the tank product; and (6) interpretation of warranty terms.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). As Texas owners of affected tank models manufactured at the Benito Juarez during the relevant time period, the Stone and Sousa Plaintiffs possess claims typical of the Equitable Relief Class. Rule 23(a)(3) is therefore satisfied. *Duncan,* 2015 WL 11623393, at *3 (citing *James v. City of Dallas, Tex.*, 254 F.3d 551, 571 (5th Cir. 2001) (typicality satisfied where "claims arise from a similar course of conduct and share the same legal theory")).

c. Adequacy.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). The Proposed Class Representatives' interests are coextensive with, not antagonistic to, the interests of the Settlement Class without intra-class conflict, and absent Settlement Class Members have no diverging interests from these proposed representatives. *See, e.g., Heartland*, 851 F. Supp. 2d at 1055-57.

Proposed Class Counsel respectfully suggest that the results achieved in this case are strong evidence of the adequacy of class counsel. Further, Plaintiffs' attorneys are knowledgeable and experienced in class action litigation and in litigation of product liability claims and are free from conflicts with the class. *See* Exhibit B - CARPENTER DECLARATION; Exhibit C - BELL-STANTON DECLARATION. Plaintiffs' counsel has vigorously prosecuted this case and understand their fiduciary responsibilities to the class, negotiating this Settlement at arms-length with securing class relief as paramount to any other consideration. *Id.*

3. *The Requirements of Fed. R. Civ. P. 23(b) Are Satisfied.*

If the prerequisites of Rule 23(a) are met, a settlement class must still also satisfy the requirements of Rule 23(b). These elements are relaxed when certification of a conditional settlement class is sought, because the settlement obviates any problems that would arise if the case were tried. *Heartland*, 851 F. Supp. 2d at 1058-1060.

Preliminary approval of a Rule 23(b)(2) class resembles the inquiry undertaken to evaluate an "issue" class under Rule 23(c)(4) examining whether the class wide adjudication will materially advance the resolution of the litigation and not leave behind significant questions for individual resolution. *In re St. Jude Medical, Inc.*, 522 F.3d 836, 841 (8th Cir. 2008); *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008). Such is the relief negotiated and provided under the terms of the proposed Settlement. *See* Exhibit A. In *Pella Corp. v. Saltzman,*[7] the Seventh Circuit affirmed certification of a (b)(2) class of window owners seeking designated declarations regarding a defect, premature rotting, and modifications to a warranty program that did not previously provide notice to window owners and fell short of the relief requested by the putative class. *Pella*, 606 F.3d at 395. Similarly, the proposed Settlement provides the cumulative effect of notice to Class Members of extended warranty review for prior fractures as well as benefits for product replacement at no cost to the Class Member for fractures through and including December 31, 2020.

4. *The Requirements of Fed. R. Civ. P. 23(g) Are Satisfied.*

A court that preliminarily approves certification must also appoint class counsel. FED. R. CIV. P. 23(g). In so doing, the Court must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions,

[7] 606 F.3d 391 (7th Cir. 2010), cert. denied, 131 S. Ct. 998, 178 L.Ed. 2d 826 (2011).

other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources committed to representing the class. As outlined above, the parties request N. Scott Carpenter and Rebecca Bell-Stanton and the law firm Carpenter & Schumacher, P.C. be appointed as class counsel. *See* Exhibit B - CARPENTER DECLARATION; Exhibit C - BELL-STANTON DECLARATION.

IV. APPROVAL OF THE NOTICE TO THE CLASS MEMBERS

Rule 23(e)(1) provides that "[t]he Court must direct notice in a reasonable manner to all class members who would be bound by the proposal" and Rule 23(c)(2)(B) sets out the minimum contents of the notice. The Settlement Agreement and proposed notice program establishes compliance with both rules. *See* Exhibit F.

The notice plan in this case includes direct mail notice to class members whose addresses are available. In addition, notice will be provided through publication efforts, internet targeting campaigns, and a settlement website. *See* Exhibit F. Notice will also be included on the company website for Vortens directing Class Members to the warranty process being administered by the Settlement Administrator. These notice activities will initiate no later than thirty days after this Court's approval of the notice campaign and are conducted in various forms after the Court's Preliminary Approval Order is entered. The parties have cooperated in the preparation of the proposed notices, and such notice, in whatever form, will clearly, concisely, and neutrally apprise class members in plain language of the nature of the action, the definition of the class, the claims, their right to their own attorney, their right to object to the settlement, and how and when objections must be made. *See* Exhibit F. All forms of notice advise class members of the binding effect of the class judgment and describe the processes and procedures for submitting claims for and collecting settlement proceeds. Further, each notice directs class members to the settlement website for more

detailed information. In short, the proposed notice satisfies due process by "provid[ing] class members with the information reasonably necessary for them to make a decision whether to object to the settlement." *In re Katrina Canal Breaches Litig.*, 628 F.3d 186, 197 (5th Cir. 2010)).

V. CONCLUSION

At the preliminary approval stage, the Court's task is to evaluate whether the Settlement is within the "range of reasonableness." The proposed settlement is the product of serious, informed, non-collusive negotiations, does not improperly grant preferential treatment to class representatives, and falls within the range of possible judicial approval. The Settlement is the result of arm's-length, informed bargaining with the aid of experienced counsel" and as such support a preliminary finding of fairness." *Duncan,* 2015 WL 11623393, at *3. The parties have negotiated a reasonable settlement and a program to provide notice of the settlement to the class members that is compliant with FED. R. CIV. P. 23(c)(2)(B), and respectfully request this Court preliminarily approve same.

Respectfully submitted,

/s/ N. Scott Carpenter
N. SCOTT CARPENTER
State Bar No. 00790428
REBECCA E. BELL-STANTON
State Bar No. 24026795
CARPENTER & SCHUMACHER, P.C.
2701 NORTH DALLAS PARKWAY, SUITE 570
Plano, Texas 75093
(972) 403-1133
(972) 403-0311 [Fax]
scarpenter@cstriallaw.com
rstanton@cstriallaw.com

ATTORNEYS FOR PLAINTIFFS AND PROPOSED SETTLEMENT CLASS

/s/ Melissa Dorman Matthews
DARRELL L. BARGER
State Bar No. 01733800
dbarger@hartlinebarger.com
HARTLINE BARGER LLP
800 N. Shoreline Blvd., Suite 2000, North Tower
Corpus Christi, Texas 78401
(361) 866-8000
(361) 866-8039 fax

MELISSA DORMAN MATTHEWS
State Bar No. 00790603
mmatthews@hartlinebarger.com
ANGELA S. GORDON
State Bar No. 24027333
agordon@hartlinebarger.com
L. ABIGAIL FOREMAN
State Bar No. 24056371
aforeman@hartlinebarger. com
HARTLINE BARGER LLP
8750 N. Central Expressway, Suite 1600
Dallas, TX 75231
(214) 369-2100
(214) 267-4271 (direct facsimile)

ATTORNEYS FOR DEFENDANT PORCELANA CORONA DE MEXICO, S.A. DE C.V. F/K/A SANITARIOS LAMOSA S.A. DE C.V. A/K/A VORTENS

CERTIFICATE OF CONFERENCE

I certify that counsel for the respective parties cooperated and conferred as to the filing and content of this Motion and jointly present this Motion for Preliminary Approval of Settlement.

/s/ Rebecca Bell-Stanton
REBECCA BELL-STANTON

CERTIFICATE OF SERVICE

I certify that on the 10th day of December, 2019 that the foregoing was served to all counsel of record either by hand delivery, U.S. Mail, postage pre-paid, facsimile, electronically, and/or *via* the Court's CM/ECF document filing system.

/s/ Rebecca Bell-Stanton
REBECCA BELL-STANTON