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

MARK AND AMBER FESSLER,	§	Civil Action File No.
ANDREW HOCKER, KEVIN RUESS,	§	4:17-cv-00001
MATTHEW CARRERAS, CHARLES AND	§	
MICHELLE HANDLY, AARON AND	§	Hon. Judge Amos Mazzant/
STACEY STONE, and DANIEL AND	§	Hon. Magistrate Judge Priest-Johnson
SHARON SOUSA, on Behalf of Themselves and	§	
Those Similarly Situated	§	
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	§	Jury Trial Demanded
Defendant.	§	

PLAINTIFFS' SECOND MOTION FOR CLASS CERTIFICATION AND INCORPORATED MEMORANDUM IN SUPPORT

NOW COME Plaintiffs, MARK AND AMBER FESSLER, ANDREW HOCKER, KEVIN REUSS, MATTHEW CARRERAS, CHARLES AND MICHELLE HANDLY, AARON AND STACEY STONE, and DANIEL AND SHARON SOUSA on behalf of Themselves and Those Similarly Situated herby file their Motion for Class Certification and Incorporated Memorandum in Support[1] and would respectfully show the Court as follows:

[1] The Court graciously noted during the recent telephonic hearing that the Court would not limit the parties' briefing. However, in acknowledgement of this Court's preferences as reflected in Chamber Rules as well as the local rules of the Eastern District of Texas – Sherman Division, Plaintiffs have limited this Motion and Memorandum in Support to the page allowance of Case Dispositive Motions (LR CV-7(1)).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT OF THE CASE AND STAGE OF THE PROCEEDINGS

This is a products liability case. The live pleading at the time of this Motion is Plaintiffs' Second Amended Complaint. [DOC. 74]. Plaintiffs' Motion for Class Certification was filed on April 30, 2018. [DOC. 111] The Parties subsequently mediated on June 4, 2018 without success; the Motion for Class Certification was thereafter scheduled to be heard on July 18, 2018. The Friday prior to the July 18, 2018 hearing, a tentative offer was extended by Defendant and the Parties agreed to request the postponement of the hearing and return to mediation to determine whether an agreement could be reached in whole or in part.

Partial Settlement – Rule 23(b)(2). A second mediation occurred on August 28, 2018. At the end of the second mediation, an agreement was reached to provide immediate relief on behalf of certain past and current owners of Vortens tank model #3412 and #3464 manufactured between January 1, 2011 through December 31, 2011. *See* APPX. A. The agreement created an objective Replacement Program to be managed by a third-party administer on behalf of class members who currently own defined tanks and class members that previously expended funds to repair and replace tanks. *See* APPX. A. Eligibility for the Replacement Program is not subject to state geographic limitations. *See* APPX. A. However, no agreement was reached regarding tank owners that experienced property damage as a result of a cracked 2011 tank, and no discussion occurred as to years of manufacture outside of 2011 or other tank models.

First Certification Hearing – The terms of the negotiated settlement were broadly provided to the Court on September 5, 2018 during argument at the hearing on Plaintiffs' Motion for Class Certification. *See* APPX. B. The hearing thereafter moved forward on the narrowed proposed class definitions and claims that remained in dispute. The Court later ordered the Parties to "return to mediation in an effort to resolve the remaining claims in this case". [DOC. 182]

Partial Settlement – Rule 23(b)(3). A third mediation occurred on October 16, 2018. During the October 16, 2018 mediation, the Parties further resolved claims brought by owners of tank models #3412 and/or #3464 manufactured between January 1, 2011 and December 31, 2011, providing relief to class members that incurred property damage other than to the product itself. *See* APPX. A. As was noted in the Joint Mediation Report filed on October 26, 2018 [DOC. 188], and further confirmed during the telephonic hearing on November 8, 2018, the parties were unable to agree to address handling the remaining claims in any class context and the discussions concluded with all remining claims still pending.

In consideration of the intertwined nature of the original certification request and voluminous record incorporating matters relating to the 2011 Settlement Class (APPX. A), and in light of the filing of the parties' Joint Motion for Preliminary Approval of Partial Class Settlement, the Court denied the original Motion for Class Certification [DOC. 198]. This Court thereafter entered a briefing schedule to allow Plaintiffs an opportunity to file a Second Motion for Class Certification in order to separate the partial settlement (*See* APPX. A) and the remaining claims – specifically, the putative claims of owners of Vortens toilet tank models #3464, #3412, #3436 and #3425 with a manufacturing date January 1, 2007 - December 31, 2012, to the exclusion of the 2011 Settlement Class Members.

Porcelana asserts Texas is the "exporting location" for Porcelana's sanitary ware products to the United States. [2:2; 2:3]. And although individuals in other states have been admittedly affected, Porcelana takes the position that Texas is the primarily affected state. [2:1; 2:3 (205)]. Porcelana has conceded to the jurisdiction of this Court, the individual standing of the Named Plaintiffs to bring suit, and application of Texas law. Therefore, Plaintiffs have modified the initial certification request to seek certification of a Texas-only class on the limited remaining claims.

RECORD CITATIONS AND FORMAT

It is without waiver of the substantial certification record already filed in this matter (DOCS. 112-118; 164-165) that Plaintiffs submit the following targeted evidence:

Attached and incorporated into this Second Motion for Class Certification is an Appendix of significant matters for reference. Citation to these attachments are "APPX. _."

In accordance with ECF filing rules and recommendations, individual volumes of record materials are linked to this Second Motion for Class Certification as separate submissions and incorporated into this Motion and Memorandum by reference. Citation to these record volumes are as follows:

Volume 1 – Declarations and Discovery (1:__)

Volume 2 – Deposition Excerpts (2:__)

Sealed Volume – Documents filed Under Seal (S:__)

STATEMENT OF MATERIAL FACTS

1. Grupo Lamosa, S.A.B. de C.V and Grupo Inmobiliario Viber, S.A. de C.V. sold its sanitaryware division, Sanitarios Lamosa, S.A. de C.V. to Grupo Corona on December 14, 2014. On July 30, 2015, Sanitarios Lamosa, S.A. de C.V. conveyed interests and ownership of the trademark symbol and word mark "Vortens" (registration number 2269546), and underwent a name change assignment from Sanitarios Lamosa, S.A. de C.V. to Porcelana Corona de México, S.A. de C.V.

2. Sanitarios Lamosa, S.A. de C.V., a/k/a Vortens, Inc., was registered in Texas July 21, 2004. [1:16; 2:3 (44; 177-78)]

3. Two months after the filing of this action, on March 16, 2017, Defendant withdrew its corporate registration in Texas. [1:16]

4. Plaintiffs' tanks bear the word mark and registered symbols of Vortens. [1:5–1:8]

5. Plaintiffs' tanks bear markings purporting certification and industry approvals. [1:5–1:8]

6. Plaintiffs' tanks bear manufacturing dates of 2007, 2009, 2010, and 2011.[2] [1:5-1:8]

[2] Carreras (2004); Fessler (2007); Stone (2009); Sousa (2010); Hocker (2011).

7. Plaintiffs' tanks bear imprints for model numbers 3464, 3436.[3] [1:5-1:8]

8. Hocker and Carreras provided notice of tank fracture directly to Vortens prior to appearance as plaintiffs in this litigation. [1:6]

9. Vortens has been on notice of all claims, causes of action and requested relief for more than sixty days.

10. Vortens product is imported from Mexico and is distributed throughout the United States. [2:2(48); 2:3]

11. In 2007, Vortens distributed XXX,XXX product units into the United States marketplace. [S:10].

12. In 2008, Vortens distributed XXX,XXX product units into the United States marketplace. [S:10]

13. In 2009, Vortens distributed XXX,XXX product units into the United States marketplace. [S:10]

14. In 2010, Vortens distributed XXX,XXX product units into the United States marketplace. [S:10]

15. In 2011, Vortens distributed XXX,XXX product units into the United States marketplace. [S:10]

16. In 2012, Vortens distributed XXX,XXX product units into the United States marketplace. [S:10]

17. In July 2016, Porcelana authored and released for distribution a press statement intended for the public to rely on regarding the scope of the "technical issues" occurring during manufacturing. [1:11]

18. The Press Statement made limited admissions of these "certain technical issues" that "may have" affected only two tank models, which were "mainly concentrated on production batches from 2011." [1:11]

19. Porcelana guarantees its product is free of manufacturing defects or ceramic defects for a period of five (5) years from its date of purchase. [1:12]

20. Porcelana's Warranty Claim Procedure outlines the information needed to submit a warranty claim. [1:17]

---

[3] Carreras; Fessler, Stone, Sousa, Reuss and Handly (3464); Hocker (3436).

21. Porcelana's Warranty Claim Procedure requires photographs, not destructive testing. [1:3; 1:17]

22. ASME A112.19.2M-98: Vitreous China Plumbing Fixtures is the applicable industry specification to apply to tanks manufactured 2004-2012 [1:3; 1:4], APPX. B.

23. ASME A112.19.2M-98 specifications require the water absorption level for vitreous china to be <0.5%. [[1:3; 1:4], APPX. B.

24. The expected life of a ceramic tank is greater than fifty (50) years. [1:4]; APPX.2

25. Toilet tanks will be exposed to water for the life of the product. [1:3]

26. Water is the primary cause of sub-critical, slow, crack growth in ceramics. [1:3].

27. Porcelana's control plans for manufacturing are uniform for each step of the process for all models implicated in this action. [S:21; 23-27]

28. Porcelana specifications require the water absorption level for its vitreous china products to be <0.5%. [S:18]

29. 69.8 % of disclosed direct consumer claim reporting regarding the alleged tank models and affected dates of manufacture arise from the State of Texas. [S:8; 9]

30. 70% of disclosed subrogation and litigation cases regarding fracture of the alleged tank models and affected dates of manufacture occurred in Texas structures. [S:6; 7]

31. The Fessler, Sousa, and Stone fractured tanks exceed 0.5% absorption. [1:4].

32. Photographic evidence of the Hocker and Carreras tanks exclude installation and impact causation. [1:4]

33. The parties reached an agreement after several months of arms-length negotiations regarding tank models #3412 and #3464 manufactured in 2011; a Joint Motion for Preliminary Approval was filed on November 5, 2018. [DOC. 191].

34. The settlement provides benefits to all owners of the identified tanks manufactured in 2011 without geographic limitation. APPX. A.

35. The claims of Named Plaintiffs Kevin Reuss and Charles Handly are resolved by the Stipulated Settlement Terms (APPX. A), and the parties have jointly requested approval of Reuss and Handly as Class Representatives of the Settlement Class. [DOC. 191].

STATEMENT OF THE ISSUES

1. Plaintiffs seek certification of a Texas-only class under Federal Rule of Civil Procedure 23(b)(3) for Counts I-IV allegations: Strict Products Liability; Implied Warranty; Negligence; and Texas Deceptive Trade Practices Act.

2. Plaintiffs seek certification under Federal Rules of Civil Procedure 23(b)(2) for specific equitable relief without geographic limitation.

3. Designated Named Plaintiffs seek appointment as class representatives.

4. Counsel for the Plaintiffs seek appointment as class counsel.

5. In the alternative, Plaintiffs seek the certification of liability issues under Federal Rule of Civil Procedure 23(c)(4) to be conducted in an initial trial phase.[4]

BURDEN OF PROOF

This Court must "conduct rigorous analysis of the rule 23 prerequisites before certifying a class." *Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir.1996). Plaintiffs bear the burden of proof and must demonstrate through a preponderance of evidence that the elements of their claims are capable of proof at trial through evidence that is common to the class rather than individual to its members. *Id.* While it may be necessary for the Court to probe behind the pleadings before coming to rest on the certification question, the rigorous analysis performed for certification tests solely whether the prerequisites of Rule 23(a) have been satisfied, and this Court is afforded substantial discretion in a making a certification decision. Although the analysis may at times entail overlap with the merits of the Plaintiffs' underlying claims, Plaintiffs are not required to try their final case for certification purposes. Thus, scrutiny into matters enmeshed in the factual and legal issues comprising the causes of action stops short of rulings on the merits of the claims. *See Comcast Corp. v. Behrend*, 569 U.S. 27 (2013).

[4] Plaintiffs will submit a preliminary proposed trial plan as a demonstration that trial is eminently manageable. The proposed plan tracks phased trials commonly implemented in aggregate litigation: Phase I – Class Representatives Claims and Common Liability Issues; Phase II – Damages.

ARGUMENT

Rule 23(a) provides four prerequisites to a class action: (1) a class so numerous that joinder of all members is impracticable; (2) questions of law or fact common to the class; (3) named parties' claims or defenses typical of the class; and (4) representatives that will fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 606–08, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *Steering Comm. v. Exxon Mobil Corp*., 461 F.3d 598, 601 (5th Cir. 2006). In addition to these prerequisites, a party seeking class certification under Rule 23(b)(3) must also demonstrate "both (1) that questions common to the class members predominate over questions affecting only individual members, and (2) that class resolution is superior to alternative methods for adjudication of the controversy." *Bell Atlantic Corp. v. AT&T Corp*., 339 F.3d 294, 301 (5th Cir.2003).

Plaintiffs seek application of Texas substantive jurisprudence.[5] Similar to the 2011 Settlement Class, Plaintiffs seek a hybrid certification in this cause – certification under Rule 23(b)(3) for class members already incurring expenses for property damage due to fracture, and certification under Rule 23(b)(2) for class members owning tanks that will prematurely fail but have not yet incurred separate property damages as of the date of certification. *See e.g., Pella Corp. v. Saltzman*, 606 F.3d 391, 392 (7th Cir. 2010), cert. denied, 131 S. Ct. 998, 178 L.Ed. 2d 826 (2011) (affirming certification of a Rule 23(b)(2) class of owners whose Pella windows had not yet manifested the alleged design defect (which caused accelerated wood rot) or been replaced).

[5] Porcelana judicially admits this Court possesses both personal and subject matter jurisdiction. [DOC.101]. Vortens, Inc. was created as a Texas business entity in 2004 [1:16]. It was only after the filing of this litigation and the provision of requisite notice to the Texas Attorney General's Office that Vortens, Inc. withdrew its registration. [1:16]. Shortly thereafter, Sanitarios Lamosa also withdrew its certification as an operating business entity in Texas. [1:16].

THE PROPOSED CLASS IS ASCERTAINABLE

"In order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable." *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 639 (5th Cir.2012).[6] An identifiable class exists if its members can be ascertained by reference to objective criteria. MANUAL FOR COMPLEX LITIGATION (Fourth) § 21.222 (2004)); *see also* NEWBERG § 3:3.

The Plaintiffs seek certification of the following ascertainable class (subject to the exclusions noted in the SECOND AMENDED COMPLAINT):[7]

> *All Texas owners of a Vortens toilet tank model #3464, #3412, #3425, or #3436 with a manufacturing date 2007-2012 that experienced property damage after spontaneous tank fracture.*

Plaintiffs seek certification of the above-defined statewide Damages Class pursuing multiple claims under the laws of Texas alleging strict liability, breach of implied warranties recognized by statute and common law, negligence, and consumer claims under the DTPA.

Plaintiffs further seek certification of a Rule 23(b)(2) class for an Equitable Relief Class seeking warranty protections for latent defects:

> *All owners of a Vortens toilet tank model #3464, #3412, #3425, or #3436 with a manufacturing date 2007-2012.*

The proposed class definitions utilize objective terms capable of membership ascertainment without regard to the merits of the claim. The definitions are tied to an identifiable physical product with unique objective characteristics.

---

[6] "However, the court need not know the identity of each class member before certification; ascertainability requires only that the court be able to identify class members at some stage of the proceeding." WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:3 (5th ed.2011).

[7] [Doc.74, ¶99]

Indeed, Vortens has routinely and systematically applied objective criteria to identify model and date of manufacture of its tanks and use of the same objective criteria easily satisfy any ascertainability criteria. [1: 17; S:8; 9].[8] Porcelana cannot reasonably dispute the ascertainability requirement is not a barrier to certification: the Stipulated Settlement Terms concedes objective criteria for determining class membership exists. *See* APPX. A.

A class is ascertainable if "the general outlines of the membership of the class are determinable at the outset of the litigation." 7A Wright, Miller & Kane, *Federal Practice and Procedure* § 1760 (3d ed.). "In keeping with the liberal construction to be given the rule, it has been held that the class does not have to be so ascertainable that every potential member can be identified at the commencement of the action." *Id*. Here, after an initial liability trial, notice could be sent to the class requiring submission of photographic proof and filling out of a form. Any complaints about such a process are belied by Porcelana's warranty claim procedure [1:16] and by the 2011 Settlement Class, which relies on a similar procedure of photographic self-identification.

[8] Vortens conceded the traceability of exports, sales and distribution of the subject tanks. [2:-]. Either through sales records, receipts, tangible evidence, or by affidavit, it is possible to identify each class member based on objective criteria. *Seeligson v. Devon Energy Prod. Co., L.P.*, 2017 WL 68013, at *5 (N.D. Tex. Jan. 6, 2017).

I. RULE 23(a) CERTIFICATION REQUIREMENTS ARE SATISFIED

Rule 23(a) provides four prerequisites to a class action: (1) a class so numerous that joinder of all members is impracticable; (2) questions of law or fact common to the class; (3) named parties' claims or defenses typical of the class; and (4) representatives that will fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a). Plaintiffs meet the requisite burden to establish each element by a preponderance of the evidence.

A. The Class Is So Numerous That Joinder Is Impracticable.[9]

There is no magic number of class members required to satisfy Rule 23(a)'s numerosity requirement. *Simms v. Jones*, 296 F.R.D. 485, 497 (N.D.Tex.2013) (citing *In re TWL Corp*., 712 F.3d 886, 894 (5th Cir.2013)). Indeed, courts have certified classes with as few as 25 people. *See In re TWL Corp.*, 712 F.3d 886, 894 (5th Cir. 2013); *see also Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999). In determining the impracticability of joinder, emphasis is on factors beyond the counting of noses, including the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, the size of each plaintiff's claim, and the difficulty of bringing individual suits. *See Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981).

Porcelana's ongoing rolling production of relevant data confirms joinder of individual claimants is impractical. The originally-produced 2006-2012 production run reports for #3412 and #3464 [S:11; 13], initial claim summaries, year-end claim meeting presentations [S:1-S:5], and claim communications from 2016-2017 [S:8] are sufficient to meet the numerosity standard. Additionally, however, Porcelana has finally produced supplemental documentation, including

[9] Factors in evaluating impracticability of joinder are: 1) the size of the putative class; 2) the geographic location of the members of the proposed class; and 3) the relative ease or difficulty in identifying members of the class for joinder. *See Kilgo v. Bowman Trans., Inc*., 789 F.2d 859, 878 (11th Cir.1986); *see also Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir.1980).

2007-2012 production run reports for #3436 and #3425 [S:15; 17], hundreds of additional claim files and spreadsheets of claim communications [S:9], and updated litigation tables [S:7]. These documents provide a basis for a reasonable approximation of distributed tanks affected by the manufacturing defects at issue, which are confirmed by expert testimony regarding statistical probabilities of current defect manifestation rates. [1:2].

Plaintiffs need only demonstrate "some evidence" or a "reasonable estimate" to satisfy the first requirement of Rule 23(a). *See James v. City of Dallas,* 254 F.3d 551, 570 (5th Cir. 2001) (citing *Penderson v. La. State Univ.*, 213 F.3d 858, 866 (5th Cir.2000)). The class likely encompasses thousands of tank owners, if not hundreds of thousands. And the comparison of sales figures, peak production defect periods, and internal out-of-specification and out-of-tolerance documents expand across the time defined and models identified well in excess of a presumptive floor of 25 affected members.[10] Plaintiffs have, therefore, demonstrated through a preponderance of the evidence that the proposed classes and subclasses are so numerous that joinder is impracticable.

B. <u>There are Questions of Law and Fact Common to the Class.</u>[11]

To satisfy the second requirement of Rule 23(a), the claims of every class member must "depend upon a common contention * * * of such a nature that it is capable of classwide resolution—which means the determination of its truth or falsity will resolve an issue that is central

[10] The distribution of units sold in the United States marketplace for the years identified are preliminarily outlined in the "Statement of Facts" ¶¶ 11-16 above, and the Equitable Relief Class requests declarations and relief without geographic limitation. [S:10]

[11] Commonality overlaps in large part with the predominance requirements of Rule 23(b), and the detailed arguments, authorities, and cited proof noted in the discussion of predominance is applicable assessing the low threshold for commonality as well.

to the validity of each one of the claims in one stroke." *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 840 (5th Cir.2012) (quoting *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)).

The Fifth Circuit provided clarity for this certification requirement in *In re Deepwater Horizon*, holding that "the legal requirement that class members have all 'suffered the same injury' can be satisfied by an instance of the defendant's injurious conduct, even when the resulting injurious effects-the damages-are diverse." 739 F.3d 790, 810–11 (5th Cir. 2014). Plaintiffs identified several common questions in their Second Amended Complaint [DOC.74, ¶107]. Considering the 2011 Settlement Class, Plaintiffs' certification request is now focused on common questions pertaining to the remaining tanks and years of manufacture, non-exclusively including:

(1) A defined scope of duty of sanitaryware manufacturers;

(2) Industry-accepted protocols for verifying materials specification;

(3) Failure susceptibility of product manufactured outside of industry specification and tolerance;

(4) Probable failure mode for spontaneous fracture;

(5) Statistical probability of failure attributable to identified models and years of production;

(6) Expected useful life of product manufactured outside industry specifications;

(7) Intention of self-limiting admissions through 2016 press release;

(8) Actual and constructive notice by manufacturer of release of defective product;

(9) Reasonable foreseeability of tank failures;

(10) Identification of product that would pass without objection in the trade and expert opinion of anticipated fair average quality within permitted variations;

(11) Scope of applicable implied warranties and separation of contract claims (subject to economic loss doctrine) and tort claims;

(12) Appropriate damage models and scope of "other property loss" legal meaning.

Common questions of law or fact predominate where "[c]ommon proof can be used to establish liability, or lack thereof." *Frey v. First Nat. Bank Sw*., 602 F. App'x 164, 170 (5th Cir. 2015). The predominance factor is discussed as a part of the Rule 23(b)(3) requirements, but it warrants note that these core factual and legal issues will turn on the resolution of common proof. Litigating same "will resolve an issue that is central to the validity of each one of the claims in one stroke" and, therefore, the commonality requirement of Rule 23(a)(2) is met. Because "every proposed class member can utilize that proof," commonality is attained. *Frey*, 602 F. App'x at 170.

C. Plaintiffs' Claims Are Typical of the Class.

The third requirement of Rule 23(a) requires the claims of the representative parties be typical of the proposed class members' claims. The test for typicality is not demanding, *see Forbush v. J.C. Penney Co*., 994 F.2d 1101, 1106 (5th Cir.1993), and is satisfied if the representative plaintiffs' claims arise out of the same event or course of conduct as the other proposed class members, or are based on the same legal theory. *James*, 254 F.3d at 571. Porcelana concedes the subject tanks share a nearly identical design with only minor differences,[12] none of which are relevant to the manufacturing defect at issue here. [2:2]. All tanks are subject to the same industry standards and specifications. [1:3; 1:4; 2:5 (30-31; 98; 100; 102)]; APPX. B. The tanks are manufactured in accordance with the same control plans [2:4 (186-87); S:21; 23-27], during the same time frame [1:1; 1:2; 2:4], utilizing the same control measures [1:4; 2:6 (20)], and the process is the same up to the point of final product classification (APT). [2:4].

The requirements of typicality and commonality are usually considered together because

[12] A schematic diagram of the basic design for each of the tank models at issue is included in the record for purposes of demonstrating the absence of differing manufacturing process features. [S:30-32].

they "tend to merge" and "serve as guideposts for determining whether * * * the named plaintiff's claim and the class claims are so inter-related that the interests of the class members will be fairly and adequately protected in their absence." *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). As with the commonality requirement, the threshold for satisfying the typicality prerequisite of Rule 23(a) is not high. *Newton*, 259 F.3d at 182-83. Where Plaintiffs' allegations of the existence of a defect are susceptible to proof by generalized evidence, the actual injuries suffered by each class member need not be identical to demonstrate that an identifiable and ascertainable class exists. *See Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010).

D. Plaintiffs Are Adequate Representatives of the Class.

The inquiry into the adequacy of the representative parties examines whether the putative representatives have the ability and the incentive to represent the claims of the class vigorously, class counsel is adequate, and that there is no conflict between the individual's claims and those asserted on behalf of the class.'" *See Feder v. Elec. Data Sys. Corp*., 429 F.3d 125, 130 (5th Cir. 2005); *Unger*, 401 F.3d at 321. "Differences between named plaintiffs and class members render the named plaintiffs inadequate representatives only if those differences create conflicts between the named plaintiffs' interests and the class members' interests." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625–26 (5th Cir.1999). Plaintiffs Reuss and Handly are "captured" in the scope of the 2011 Settlement Class (APPX. A), and the parties have already jointly requested their appointment as the 2011 Settlement Class representatives. The remaining named Plaintiffs are prosecuting the "remaining claims" seeking recovery for damages incurred subsequent to a sudden and spontaneous fracture event. Here, the named Plaintiffs have no interests potentially antagonistic to those of unnamed class and subclass members. Indeed, the remaining named

Plaintiffs adequately cover the spectrum of potential class members: (1) individuals incurring damage to real and/or personal property as a result of a fracture event; (2) individuals incurring expenses for mitigation of risk; (3) ownership of differing manufacturing dates and/or model tanks; (4) ownership of tanks not included in the limited admissions of defect; and (5) all fall outside of the 2011 Settlement Class. [1:5-1:8]

In considering the adequacy of counsel, 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, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." FED. R. CIV. P. 23(g)(10)(A). Plaintiffs have retained counsel with substantial experience in litigating in federal court, litigating class actions generally, and litigating product claims. [1:9-1:10]. Counsel has further litigated the spontaneous fracture of tanks manufactured by Vortens during the subject time frame. Moreover, Plaintiffs' counsel has invested substantial time and resources in prosecuting this action and can continue such investment of resources. [1:9].

As noted in the Joint Motion for Preliminary Approval, the parties have already agreed to the appointment of the identified attorneys and law firm as settlement class counsel. [DOC. 191]. There is no antagonism between the remaining putative class members/claims and the Settlement Class – the demarcation is made based on specific tank models in a single year and that adequacy element is sufficiently attained for certification purposes.

II. RULE 23(b)(3) CERTIFICATION REQUIREMENTS ARE SATISFIED FOR THE DAMAGES CLASS.

Plaintiffs seek certification of a class defined as Texas owners that experienced a spontaneous fracture event pursuant to Rule 23(b)(3). Rule 23(b)(3) certification requires the Court

to find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3); *see also Funeral Consumers Alliance, Inc. v. Serv. Corp. Int'l*, 695 F.3d 330, 348 (5th Cir. 2012).

A. Common Issues Predominate.

"Rule 23(b)(3) does *not* require a plaintiff seeking class certification to prove that each element of the asserted claim is susceptible to class wide proof." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013). What the rule does require is that common questions "*predominate* over any questions affecting only individual [class] members." *Id.* (emphasis in original); *see also Unger v. Amedisys Inc*. 401 F.3d 316, 320 (5th Cir.2005); *Berger v. Compaq Computer Corp*., 257 F.3d 475, 479–80 (5th Cir. 2001).

"To decide whether there is a class-wide basis for deciding the predominant issues, [the court] must first ascertain which are the predominant issues that must be decided on a class basis." *Gene and Gene, LLC v. BioPay LLC*, 541 F.3d 318, 326 (5th Cir.2008). The court must "identify the substantive issues that will control the outcome of the case, assess which of these issues will predominate, [and] determine whether these issues are common throughout the proposed class." *Id*. "In order to 'predominate,' common issues must constitute a significant part of the individual cases." *Jenkins v. Raymark Indus., Inc*., 782 F.2d 468, 472 (5th Cir.1986). In *Frey v. First Nat'l Bank*, the Fifth Circuit provides a roadmap to Rule 23(b)(3)'s predominance inquiry:

> The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. This inquiry requires us to consider how a trial on the merits would be conducted if a class were certified. This entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class, a process that ultimately prevents the class from

> degenerating into a series of individual trials. In order to predominate, common issues must constitute a significant part of the individual cases.

602 Fed. Appx. at 169–70 (citations omitted); *see also Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co*., 319 F.3d 205, 218 (5th Cir.2003). "Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co*., 563 U.S. 804, 131 S.Ct. 2179, 2184, 180 L.Ed.2d 24 (2011) (quoting Rule 23(b)(3)).

1. Strict Products Liability – Count I

The greatest emphasis in initial certification briefing concentrated on the Strict Products Liability claims, and primarily on two fronts: (1) whether manufacturing defect cases were ever appropriate for class treatment; and (2) whether common issues predominated considering multiple jurisdictions were implicated. The supplemental briefing provided after the initial certification hearing confirms the applicability of Rule 23 to manufacturing defect claims. [DOC. 180]. And although Plaintiffs believe national certification is permissible and manageable on this cause of action considering comparable statutes, pattern jury charges, and adherence to specific treatises, Named Plaintiffs seek certification of a Texas-only class on the asserted strict product liability cause of action in light of the concessions regarding application of Texas jurisprudence and the significance of the Texas claims.

Although Porcelana originally argued the absence of authority regarding a strict liability class action certified as to a manufacturing defect, it ultimately conceded its error, arguing instead that certification should be limited [DOC. 184]. As indicated in the previous briefing and during the September 5, 2018 certification hearing (APPX. B), there is sufficient documentary evidence that product released into the marketplace manufactured during "peak years" contain a latent defect that is statistically probable for failure [S:11-17; 19-20; 22; 28-29].

Porcelana's recent production of relevant data confirms, the underlying methodology for determining whether a manufacturing defect may be sufficiently established for purposes of a liability determination. Indeed, the new production proves the point [1:1]. Dr. Capser's testimony on class certification issues is derived from his review of the data generally described above. [1:1; 1:2]. His opinions include an analysis of the processes of production and defect reporting, and quantification of variability with regards to product quality at the time of distribution for sale, and such opinions are incorporated herein by reference. [1:2].

The failure time of porcelain as a function of stress and flaw size [1:3; 1:4]. Expert testimony establishing not only objective measures for testing individual tanks but further supportive of conclusions that may be drawn from out-of-tolerance or out-of-specification sampling demonstrate through a preponderance of the evidence that common issues of both law and fact predominate. [1:1 – 1:4].

The factual proof required to establish claims will be substantially similar for all class members. Furthermore, without class certification, parties will litigate the same core facts regarding the manufacturing, distribution, testing, and sale of the product, as well as facts relating to significantly reduced life span of the tank and imminent risk of spontaneous failure.

2. Breach of Implied Warranty - Count II

Plaintiffs seek certification of a Texas class on an asserted breach of implied warranties. Defendant expressly guarantees to its sales force "that its product is free of manufacturing defects for a period of five (5) years from its date of purchase." [1:12].[13] Texas, however, also recognizes certain implied warranties implicated in this action for the ultimate owner/user of the product, and common issues predominate in litigating Count II.

[13] The Warranty specifically references such warranty applies "to the original purchaser." [1:12].

"Unless excluded or modified (Section 2.316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." TEX. BUS. & COM.CODE ANN. § 2.314(a).

> Goods to be merchantable must be at least such as (1) pass without objection in the trade under the contract description; and (2) in the case of fungible goods, are of fair average quality within the description; and (3) are fit for the ordinary purposes for which such goods are used; and (4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and (5) are adequately contained, packaged, and labeled as the agreement may require; and (6) conform to the promises or affirmations of fact made on the container or label if any.

Id. § 2.314(b); *see also Alcan Aluminum Corp. v. BASF Corp.*, 133 F.Supp.2d 482 (N.D. Tex. 2011). The putative class will first uniformly seek findings regarding the applicability and scope of which, if any, implied warranties arise by operation of law. *Id.* §§2.314, 2.315.

Additionally, the (in)applicability of common law doctrines affecting available damage recovery is uniform, such as whether the economic loss rule will apply since "[t]he rule does not preclude tort recovery if a defective product causes physical harm to the ultimate user or consumer or other property of the user or consumer in addition to causing damage to the product itself." *Equistar Chemicals, L.P. v. Dresser–Rand Co.,* 240 S.W.3d 864, 867 (Tex.2007). A bright-line determination of the scope of "other property damage" is beneficial to the putative class and the Defendant since it defines the available damage model(s).

Ultimately, class members' claims stem from definable product conditions and a common course of manufacturing conduct. Application of collective evidence as described herein regarding industry expectations, specifications, and failures in the production process will result in a uniformity in the factual and legal findings on the identified common questions. *See id.*

3. Negligence - Count III

Plaintiffs seek certification of a Texas class on the asserted negligence cause of action. The elements of a negligence cause of action against a product manufacturer or seller arising out of a defective product are the same as for most any other type of negligence action: duty, breach of duty, causation and damage.

"A negligence cause of action requires a different showing from a strict liability claim, even when the action is against the manufacturer." *Syrie*, 748 F.2d at 307. "Strict liability looks at the product itself and determines if it is defective. Negligence looks at the act of the manufacturer and determines if it exercised ordinary care in design and production." *Meador v. Apple, Inc.*, No. 6:15-CV-715, 2016 WL 7665863, at *2 (E.D. Tex. Aug. 16, 2016), report and recommendation adopted, 2017 WL 3529577 (E.D. Tex. Aug. 17, 2017) (quoting *Gonzales v. Caterpillar Tractor Co.*, 571 S.W.2d 867, 871 (Tex. 1978)). Manufacturers are held to the level of reasonable care for the particular industry – in this case, sanitaryware ceramics. The existence of a duty, level of care required, and whether Vortens fell short of the standard of care are common liability questions that will be established through common proof. These liability considerations predominate over any individual inquiry.

ASME A112.19.2 is the harmonized standard developed for evaluation of ceramic plumbing fixtures; the standard "covers vitreous and non-vitreous china plumbing fixtures and specifies requirements for materials, construction, performance, testing, and makings." ASME A112.19.2, *Ceramic Plumbing Fixtures* §§0.1; 1.1 [1:3; 1:4]. The use of the term "shall" within the standard "is used to express a requirement, *i.e.*, a provision that the user is obliged to satisfy in order to comply with the standard." *Id.* §1.3. Every member of the putative Damages Class must establish Defendant's breach of a legal duty, and the evidence used to establish Defendants

breached the assigned industry obligations is common as to all class members. Duty and breach are certainly threshold substantive issues that can control the outcome of the case. Certification of a Texas-only class on the negligence cause of action is appropriate - liability for the manufacturing process and distribution will be established based on common proof. [1:1; 1:2]. Furthermore, a significant causative common question exists—the probable failure mode for spontaneous fracture decades prior to the expiration of the anticipated useful life of a ceramic toilet tank. Resolution of this is likely conclusive as it provides sufficient circumstantial evidence supporting causation. [1:3].

The test at the certification stage is not conducted at the same level of proof required of a merits-based decision. Certification is a procedural step designed to assess whether an aggregation of issues is appropriate. The common proof demonstrates peaks in defective material recorded 2007-2012 that even Defendant's own expert concedes demonstrates manufacturing processing errors [1:1; 2:4]; the resulting release of inherently compromised tanks into the stream of commerce can be demonstrated by common proof of a breach of duty and proximate cause of spontaneous fracture events.

4. Deceptive Trade Practices - Count IV

The DTPA was enacted to protect consumers and allow recovery when certain deceptive acts cause damages. *See* TEX. BUS. & COM. CODE ANN. §17.50 (West 2015). *Disalvatore v. Foretravel, Inc.*, No. 9:14-CV-150, 2016 WL 3951426, at *6 (E.D. Tex. June 30, 2016), *report and recommendation adopted*, No. 9:14-CV-150, 2016 WL 3926575 (E.D. Tex. July 21, 2016). "To recover under the DTPA, a plaintiff must prove: (1) plaintiff is a consumer; (2) defendant is a proper defendant under DTPA; (3) defendant committed a violation of the statute; and (4) the violation caused plaintiff damages." *Id.; see also Amstadt v. U.S. Brass Co.*, 919 S.W.2d 644, 649

(Tex. 1996). There are five types of wrongful acts that can support a plaintiff's DTPA claim: (1) deceptive acts or practices, (2) breach of warranty, (3) unconscionable acts, (4) violations of the Texas Insurance Code, and (5) violations of a tie-in statute. TEX. CIV. PRAC. & REM. CODE § 17.50(a)(1)-(a)(4), (h). When a DTPA claim is based on a defendant having breached a warranty, such as Plaintiffs' DTPA claim, detrimental reliance is not an element of the plaintiff's DTPA claim. *Id*. at § 17.50(a)(2); *Cont'l Dredging, Inc. v. De-Kaizered, Inc.*, 120 S.W.3d 380, 391 (Tex. App. – Texarkana 2003, pet. denied) (holding that a defendant may be liable for violating the DTPA based on a breach of warranty even though the defendant has not made an actionable representations.

Prior to (and ongoing since) manufacturing, marketing, and selling the subject tanks, Porcelana possessed actual or constructive knowledge of the defects described herein. Defendant knew or should have known that the toilet tanks in the production lines of certain models manufactured as early as 2007 and up through the production year of 2012 were manufactured in a faulty manner and/or were defective, unreasonably dangerous, and were catastrophically failing and cracking, causing damages to the consumers/owners of these products (Doc.74 ¶79).

The damages available to the putative class can be determined by reference to a mathematical or formulaic calculation, and such determination arises through common issues shared by the class. *Id*. at 308; *Steering Comm*., 461 F.3d at 602. Although the ultimate, final number awarded after proof of liability may differ, the Fifth Circuit has found no abuse of discretion in certification under Rule 23(b)(3) where there required individualized calculation of damages because "every issue prior to damages [was] a common issue." *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 298 (5th Cir.2001). The fact that class members may eventually be required to come forward and make an individual showing of damages does not defeat

predominance or preclude class certification. *Van Horn v. Nationwide Property and Cas. Ins. Co.*, 2009 WL 347758, at *11 (Gwin, J.) ("[T]he Sixth Circuit [has] affirmed certification of a class where 'individual *damage* determinations might be necessary' because 'the plaintiffs . . . raised common allegations which would likely allow the court to determine liability . . . for the class as a whole.'") (quoting *Olden v. LaFarge Corp.*, 383 F.3d 495, 509 (6th Cir. 2004)) (emphasis in original); *Beattie*, 511 F.3d at 564 ("[C]ommon issues may predominate when liability can be determined on a classwide basis, even when there are some individualized damage issues").

B. Class Certification Is Superior to a Multitude of Individual Cases Pursuant to Rule 23(b)(3).

"Rule 23(b)(3) requires that the Court determine that certification of a settlement class is superior to other methods of adjudication. Courts examine four factors: (A) the class members' interests in individually controlling the prosecution* * * of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by * * * class members, (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." FED. R. CIV. P. 23(b)(3).

"[T]he superiority analysis is fact-specific and will vary depending on the circumstances of any given case." *In re TWL Corp.*, 712 F.3d 886, 896 (5th Cir.2013) (internal quotation marks omitted) (citation omitted). In *Roper v. Consurve*, 578 F.2d 1106 (5th Cir.1978), *aff'd sub nom. Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980), the Fifth Circuit noted that a case was "a classic case for Rule 23(b)(3) class" where "[t]he claims of a large number of individuals can be adjudicated at one time, with less expense than would be incurred in any other form of litigation." *Id*. at 1112. Even if necessary to make individual fact determinations with respect to final recovery, if that question is reached, such decisions will depend on objective criteria. *Id*.

Also, the small potential damage award compared to the substantial costs to prosecute a claim provides little incentive for individuals to pursue their claims individually. *Amchem Prods., Inc*., 521 U.S. at 617 (noting that certification under Rule 23(b)(3) contemplates "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."). For the members of the putative class, pursuing individual claims is not financially feasible when weighing the litigation costs compared to the recoverable relief. The testing alone (without considering the expenditures associated with retaining the multiple qualified experts that would be necessary) is cost-prohibitive for the individual consumer. [1:9].

Because the issue of Defendants' liability is common to all class members, resolving the claims of the Class members on a class-wide basis is superior as it would be "inefficient and costly to maintain hundreds of individual lawsuits, all based on extremely similar underlying facts and virtually identical legal arguments." It would be a waste of judicial resources for the same question to be adjudicated in multiple forums. Moreover, denial for management reasons, in view of the public interest involved in class actions, should be the exception rather than the rule. *Klay v. Humana, Inc.,* 382 F.3d 1241, 1272- 73 (11th Cir. 2004) (finding manageability "will rarely, if ever, be in itself sufficient to prevent certification of a class"). As Judge Posner noted in a Seventh Circuit decision,

> The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30. But a class action has to be unwieldy indeed before it can be pronounced an inferior alternative -- no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied -- to no litigation at all.

Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004). Considering the conclusive nature of common issues predominating in each pending claim, resolution is not only possible, but significantly more feasible in the class action context.

III. THIS COURT MAY EMPLOY RULE 23(C)(4) TO RESOLVE CRITICAL ISSUES

Although certification under Rule 23(b)(3) is merited, subject perhaps to bifurcation of certain damage matters in the event this Court finds that any of Counts I-IV fail to satisfy the requirements of the Rule, Plaintiffs request certification of the articulated liability issues under Rule 23(c)(4). When such certification is sought, there is no need to engage in the predominance inquiry as to the action as a whole. Instead, the Court must simply be satisfied that common issues predominate as to the issue(s) the plaintiff seeks to certify. *In re Deepwater Horizon*, 739 F.3d at 817; *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013)).

Again, Plaintiffs strongly contend that certification is appropriate under Rule 23(b)(3) without a separation of certification issues. However, should the Court decide such certification is not warranted for any reason, partial certification of the liability questions posed in this case would be efficient and would provide the parties with a single answer to such questions by which to govern claims going forward. These common liability issues, also discussed in the context of commonality and predominance elements, include by example:

(1) Legal findings defining the scope of duty of sanitaryware manufacturers;

(2) Factual/expert findings on industry-accepted protocols for materials specification;

(3) Factual/expert findings for failure susceptibility;

(4) Factual/expert findings of the probable failure mode for spontaneous fracture;

(5) Factual/expert findings of the expected useful life of product manufactured outside industry specifications;

(6) Factual findings regarding actual and constructive notice of release of defective product;

(7) Factual/expert findings of the reasonable foreseeability of tank failures;

(8) Factual/expert findings of product that would pass without objection in the trade and expert opinion of anticipated fair average quality within permitted variations.

Numerous authorities recognize the facilitation of issue preclusion. *See, e.g.*, Elizabeth Burch, *Constructing Issue Classes*, 101 Va. L. Rev. 1855, 1899 (2015) (resolving issues on a classwide basis "encourag[es] accuracy and consistency through issue preclusion"); Jenna Smith, "*Carving At The Joints": Using Issue Classes to Reframe Consumer Class Actions*, 88 Wash. L. Rev. 1187, 1204 (2013) ("[A]fter [a] common issue has been tried, [members] may file their own individual actions, relying on the preclusive effect of the resolution of the common issue.")

IV. HYBRID CERTIFICATION IS WARRANTED.

A Rule 23(b)(2) injunctive relief class is typically used in consumer product class actions to obtain a declaration that a product is defective so that relief can be easily pursued once that defect manifests or causes damages. *See e.g., Pella*, 606 F.3d at 392 (affirming certification of a Rule 23(b)(2) class of owners whose Pella windows had not yet manifested the alleged design defect (which caused accelerated wood rot) or been replaced). In such cases, Rule 23(b)(3) class members are entitled to damages because the defect already manifested itself (assuming all other elements of a particular legal claim are established), while Rule 23(b)(2) class members are guaranteed damages if the defect ever manifests and causes harm (again, assuming all other elements of a particular legal claim are established).

Plaintiffs seek certification of a Rule 23(b)(2) class on declaratory terms, proposing the following exemplar declaratory issues for the Equitable Relief Class, or alternatively, certified in this Court's discretion pursuant to Rule 23(c)(4) regardless of certification under Rule 23(b)(2) to affect:

> *All owners of a Vortens toilet tank model #3464, #3412, #3425, or #3436 with a manufacturing date 2007-2012.*

Declaration: Vortens was on notice that tanks manufactured between 2007-2012 were produced outside industry specifications for ceramic sanitaryware.

Declaration: Tanks manufactured between 2007-2012 were produced subject to manufacturing process errors that threaten the integrity of the tank.

Declaration: Vortens tanks manufactured between 2007-2012 that suddenly and spontaneously fail are eligible for warranty remedies.

Specific performance of warranty remedies upon manifestation and declaration that the warranty extends to owners of designated tanks during these "peak years" of statistical nonconformance equitably warranted. *See, e.g., Pella,* 606 F.3d at 392. Although Porcelana admits to possessing knowledge of the defective condition of tank models #3412 and #3464 manufactured in 2011, it refuses to acknowledge the data patterns of defect in the surrounding years or even the contemporaneous manufacturing of tanks during the identical time frame as the Settlement Class.

Tanks manufactured outside of industry specifications are at imminent risk of premature failure. [1:3] Despite possessing both actual and constructive knowledge of the defective condition of the identified tanks, Porcelana continues its efforts to obfuscate the magnitude of the problem and certification of the Equitable Relief Class affords a minimum protection upon manifestation of the latent defect. "Cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims. * * * Actions requesting declaratory and injunctive relief to remedy conduct directed at the class clearly fit this mold." *Serventi v. Bucks Tech. High Sch.*, 225 F.R.D. 159, 165 (E.D. Pa. 2004). The Record contains sufficient evidence to make the necessary showing required under Rule 23(b(2). The Fifth Circuit has set forth two requirements for certification under Rule 23(b)(2) when a class seeks classwide injunctive relief: "(1) the 'class members must have been harmed in essentially the same way' ... and (2) 'the injunctive relief sought must be specific.' " *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 845 (5th Cir.2012) (citations omitted). Such is the relief requested herein.

The hybrid nature of the requested certification is particularly appropriate in cases involving inherent defects with delayed failure events. In such cases, Rule 23(b)(3) class members are entitled to damages because the defect already manifested itself, while Rule 23(b)(2) class members are guaranteed damages if the defect ever manifests and causes harm (again, assuming all other elements of a particular legal claim are established). *See e.g., Pella*, 606 F.3d at 392 (affirming certification of a Rule 23(b)(2) class of owners whose Pella windows had not yet manifested the alleged design defect (which caused accelerated wood rot) or been replaced). Dr. Capser provides the methodology for the designation of the "peak years" 2007-2012, relying on defect data, production tracking, yield, and defect rates [1:1; 1:2] and certification of these production years with comingling of defective product that will fail prior to the anticipated useful life expiration [1:3; 1:4] is appropriate for tanks that have not yet manifested with spontaneous fracture events.

Declaratory relief corresponds to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. FED. R. CIV. P. 23 advisory committee's note. Plaintiffs, therefore, respectfully request the conditional certification as described above. Since the claims of the Rule 23(b)(2) class essentially force Vortens to extend its warranty to cover the subject years, there is no legitimate barrier to ascertaining the affected class members and after merits determination issuance of the exemplar declarations.

CONCLUSION

Plaintiffs seek certification of a nationwide class for Counts I under Federal Rule of Civil Procedure 23(b)(3). In the event that the Court should determine not to certify a nationwide Class, then in the alternative, Plaintiffs seek certification of a Texas-only class. Plaintiffs further seek certification of a Texas-only class for Counts II-IV allegations involving. Plaintiffs alternatively propose the certification of nationwide claim classes based upon state adoption of designated codes

and treatises. And although certification under Rule 23(b)(3) is merited, in the event this Court finds that certification as to any of Counts I-IV is improper, Plaintiffs request certification of liability issues under Rule 23(c)(4). Plaintiffs have affirmatively demonstrated compliance with Rule 23. *Wal-Mart Stores, Inc. v. Dukes,* 131 S.Ct. at 2551–52.

To the extent that future responsive briefing may challenge the consideration of the evidentiary record, Plaintiffs request an opportunity to address such evidentiary objections in the form of limited trial briefs to the extent requested by the Court. As noted above, Plaintiffs are prepared to present a preliminary proposal regarding the trial plan of this action as a class.

WHEREFORE, Plaintiffs, Individually and on Behalf of Those Similarly Situated, pursuant to Federal Rule of Civil Procedure 23(a), 23(b), and 23(c), respectfully pray this Court: (a) certify the Class/Subclasses defined herein; (b) appoint the designated Named Plaintiffs as Class Representatives to the extent requested, (c) appoint as Lead Class Counsel N. Scott Carpenter and Rebecca Bell-Stanton of Carpenter & Schumacher, P.C., and for such other just relief.

Respectfully submitted,

/s/ Rebecca E. Bell-Stanton

REBECCA E. BELL-STANTON
State Bar No. 24026795
N. SCOTT CARPENTER
State Bar No. 00790428
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 CLASS

CERTIFICATE OF FILING UNDER SEAL

Pursuant to the Protective Order in this matter, documents designated as CONFIDENTIAL and not otherwise subject to the parties agreed stipulation of de-designation are filed under SEAL.

/s/ Rebecca E. Bell-Stanton
REBECCA E. BELL-STANTON

CERTIFICATE OF SERVICE

I certify that on the 19th day of November 2018 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 E. Bell-Stanton
REBECCA E. BELL-STANTON