

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-81139-CIV-COHN/SELTZER

BENJAMIN HANKINSON, et al.,
individually and on behalf of others
similarly situated,

Plaintiffs,

vs.

R.T.G. Furniture Corp., d/b/a Rooms To
Go, et al.,

Defendants,

**ORDER GRANTING PLAINTIFFS' UNOPPOSED MOTION TO CONDITIONALLY
CERTIFY CLASS, PRELIMINARILY APPROVE SETTLEMENT, APPROVE CLASS
NOTICE, AND SET FINAL FAIRNESS HEARING**

THIS CAUSE is before the Court upon Plaintiffs' Unopposed Motion to Conditionally Certify Class, Preliminarily Approve Settlement, Approve Class Notice, and Set Final Fairness Hearing [DE 203] ("Motion").

Plaintiffs filed this action against R.T.G. Furniture Corp. (singly and together with subsequently named defendants, "RTG") asserting various claims based on RTG's sale and fulfillment of ForceField fabric and leather protection plans.¹ Briefly, customers purchasing upholstered furniture from RTG have the option of also purchasing a ForceField Fabric Protection Plan or ForceField Leather Protection Plan. Under these protection plans, RTG (1) treats furniture prior to delivery with a fabric or leather stain protectant and (2) for three years thereafter, warrants that, if certain types of stains

¹ Capitalized terms in this Order have the same meaning as in the parties' Settlement Agreement. In the course of this litigation, the parties have disputed which entities are appropriately named as defendants or participated in any conduct relevant to this case. The Court need not resolve that issue, but uses the term "RTG" merely for purposes of evaluating the proposed settlement.

occur that cannot be removed with the cleaner provided, RTG will clean, reupholster, or replace the furniture (for fabric plans) or clean and re-apply protectant to the furniture (for leather plans).

Plaintiffs allege that RTG has breached contracts, engaged in deceptive trade practices and been unjustly enriched in conjunction with these protection plans. RTG has denied all of Plaintiffs' allegations.

The parties completed both fact and expert discovery. While Plaintiffs' motion for class certification and RTG's motions to exclude Plaintiffs' experts were pending, the parties participated in mediation, as directed by the Court. The parties selected a mediator who is highly experienced in resolving class action and other complex litigation. After multiple live and telephonic sessions with the mediator, the parties reached a proposed settlement agreement, for which Plaintiffs now seek preliminary approval pursuant to Fed. R. Civ. P. 23(e). Although it denies all wrongdoing alleged in this action, RTG consents to the relief sought in Plaintiffs' Motion.

The Court has reviewed the Motion, the proposed Settlement, the parties' Settlement Agreement and other materials submitted in support of preliminary approval, as well as other pertinent matters of record. In addition, the Court's evaluation is informed by the class certification hearing it conducted on April 18, 2017.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

Preliminary Fairness Assessment

1. "A class action settlement [] should be approved so long as it is fair, adequate and reasonable and is not the product of collusion between the parties."

Access Now, Inc. v. Claire's Stores, Inc., 00-14017-CIV, 2002 WL 1162422, at *4 (S.D.

Fla. May 7, 2002) (internal quotation and citations omitted). “In evaluating these considerations, the Court must not try the case on the merits.” Id. at *4 (citing Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977)). “Rather, the Court must rely upon the judgment of experienced counsel and, absent fraud, ‘should be hesitant to substitute its own judgment for that of counsel.’” Id. (quoting Cotton, 559 F.2d at 1330).²

2. “In evaluating a settlement’s fairness, ‘it should not be forgotten that compromise is the essence of a settlement. The trial court should not make a proponent of a proposed settlement ‘justify each term of settlement against a hypothetical or speculative measure of what concessions might [be] gained.’” Ass’n For Disabled Ams., Inc. v. Amoco Oil Co., 211 F.R.D. 457, 468 (S.D. Fla. 2002) (quoting Cotton, 559 F.2d at 1330). And, “[p]articularly in class action suits, there is an overriding public interest in favor of settlement.” Cotton, 559 F.2d at 1331. “[A]ccordingly class-action settlements will be disapproved only upon ‘considerable circumspection.’” Mashburn v. National Healthcare, Inc., 684 F. Supp. 660, 667 (M.D. Ala. 1988) (quoting Jamison v. Butcher & Sherrerd, 68 F.R.D. 479, 481 (E.D. Pa. 1975)).

3. The Court has conducted a preliminary assessment of the fairness, reasonableness, and adequacy of the proposed Settlement and finds that it falls within the range of reasonableness meriting possible final approval. The Court therefore

² Further, “[t]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.” Adams v. Inter-Con Sec. Sys., Inc., No. C-06-5428 MHP, 2007 WL 3225466, at *3 (N.D. Cal. Oct. 30, 2007); see also In re Indep. Energy Holdings PLC, No. 00 Civ. 6689(SAS), 2003 WL 22244676, at *4 (S.D.N.Y. Sept. 29, 2003) (“[T]he fact that the settlement was reached after exhaustive arm’s-length negotiations, with the assistance of a private mediator experienced in complex litigation, is further proof that it is fair and reasonable.”).

preliminarily approves the proposed Settlement, subject to further consideration at the Fairness Hearing described below.

The Settlement Class

4. Solely for purposes of settlement, the Court certifies the following Settlement Class, finding that it meets all requirements of Federal Rules of Civil Procedure, Rule 23(a) and (b)(3):

All Persons who purchased one or more ForceField Fabric or Leather Protection Plans from RTG (including all affiliates) in stores or online in the United States during the Class Period, excluding any ForceField Fabric or Leather Protection Plans that sold for \$8.00 or less.³

First, given the quantity of protection plans sold by RTG during the various class periods, numerosity is easily met. Commonality is established because whether RTG professionally treats its furniture with a stain repellent consistent with its own standards, Shield Industries' standards,⁴ and industry standards is a common question affecting all protection plan purchasers. The typicality requirement of Rule 23(a)(3) is also satisfied in that Plaintiffs' claims are typical of the putative settlement class members' claims because the legal theories and supporting facts relied upon by both Plaintiffs and the putative settlement class members are substantially similar. Moreover, as set forth in Paragraph 5 of this Order, Class Counsel and the named plaintiffs are adequate under Rule 23(a)(4). Finally, the proposed Settlement Class also meets the requirements of Rule 23(b)(3) because (1) common questions of the class predominate over questions that affect only individual members and (2) class resolution is superior to other available

³ Plans that sold for less than \$8.00 (and sometimes as little as a penny) are overwhelmingly likely to have been purchased by RTG employees and under circumstances not common and typical to persons purchasing at higher prices.

⁴ Shield Industries ("Shield") sells the ForceField product to RTG.

methods. Specifically, whether RTG fulfilled its promises to protection plan customers is the common predominating issue in this case.

The Class Period ends on the date of this Order; start dates vary by state, as set forth in the definition of Class Period in the Settlement Agreement. The Settlement Class does not include any judge to whom this case is assigned, any member of the judge's immediate family, and the judge's staff or their immediate families.

5. The Court finds, solely for purpose of settlement, that named plaintiffs Benjamin Hankinson, James Guerra, Jeanette Gandolfo, Lisa Palmer, Donald Anderson, and Lisa Prihoda are adequate to serve as Class Representatives for the Settlement Class and that the following attorneys are adequate to serve as Class Counsel:

Theodore J. Leopold
Leslie M. Kroeger
Diana L. Martin
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Notice

6. The Court approves, as to form and content, the proposed Settlement notices attached to the Settlement Agreement as Exhibits D and E. The Court further finds that the notices are written in plain language, use simple terminology, and are designed to be readily understandable by Settlement Class Members.

7. The parties propose that KCC LLC serve as the Settlement Administrator for purposes of notifying the Settlement Class and administering the claims process. KCC is an experienced administrator of class action settlements, and the Court hereby appoints that entity to serve as Settlement Administrator.

8. In consultation with the Settlement Administrator, the parties have agreed upon and propose the following notice program. The Settlement Administrator shall email notice substantially in the form attached as Exhibit D (“Class Notice”) to the Settlement Agreement to every Settlement Class Member for whom RTG possesses an email address. See, e.g., Morgan v. Public Storage, Case No. 14-cv-21559-Ungaro/Otazo-Reyes at DE 407 (Omnibus Order Granting Final Approval of the Class Action Settlement, *et al.*) (S.D. Fla. Mar. 10, 2016) at 38-44.⁵ The Settlement Administrator shall use current best practices to avoid having emails intercepted by spam filters.⁶ The Settlement Administrator shall send the Class Notice via U.S. mail to any Settlement Class Member for whom RTG does not possess an email address or whose emailed notice bounces back. The Court finds that this notice satisfies the requirements of Rule 23 and due process.

⁵ In Morgan, the court accepted an email notification program and overruled objections, after consideration of case law and societal developments that currently render email an appropriate and effective method of notice. Id. at 38-44.

⁶ See id. at 42-43 (recognizing the effectiveness of these practices).

9. The Settlement Administrator shall commence sending the Class Notice within 45 days of entry of this Order (the "Notice Date"). At or before the Fairness Hearing, the parties shall file with the Court sufficient proof of compliance with the notice program approved by this Order.

10. The Court directs the Settlement Administrator to establish a Settlement Website, making available copies of this Order, the Settlement Agreement, information about the Settlement Class Members' rights and options substantially in the form attached as Exhibit E to the Settlement Agreement, a toll-free hotline, and any other information agreed upon by the parties.

Requests for Exclusion (Opt Out)

11. A member of the Settlement Class who wishes to be excluded from the Settlement Class shall mail a written request for exclusion to the Settlement Administrator at the following address: RTG Settlement Administrator, P.O. Box 404018, Louisville, KY 40233-4018.

12. The request for exclusion must be postmarked no later than the Opt-Out Deadline, which is **Friday, November 17, 2017**, and shall clearly state the following: (a) the Settlement Class Member's name; (b) physical address; (c) phone number; (d) the unique identifier that was included on the Class Notice sent to that Settlement Class Member; and (e) all further information as requested by the Settlement Administrator. In addition, the Settlement Class Member requesting exclusion shall include a signed certification containing the following language:

I hereby request to be excluded from the settlement in Hankinson v. RTG Furniture Corp. and understand that I will not be entitled to receive any proceeds from the settlement.

13. A request for exclusion must contain the Settlement Class Member's personal and original signature or the original signature of a person previously authorized by law, such as a trustee, guardian or person acting under a power of attorney, to act on behalf of the class member with respect to a claim or right such as those in this litigation (*i.e.*, conformed, reproduced, facsimile, or other non-original signatures are not valid).

14. Any exclusion requests must be submitted individually for each Settlement Class Member, signed by the person to be excluded. No person shall purport to exercise any exclusion rights of any other person, or purport (a) to exclude Settlement Class Members as a group, aggregate, or class involving more than one Settlement Class Member; or (b) exclude more than one Settlement Class Member on a single paper, or as an agent or representative. Any such purported exclusion requests shall be void, and the Settlement Class Member(s) that is or are the subject of such purported exclusion shall be treated as a Settlement Class Member and Releasing Person.

15. Any Settlement Class Member who submits a timely and valid request for exclusion as set forth above shall not be bound by the Settlement or the Final Approval Order. Upon receipt, the Settlement Administrator shall promptly provide copies of each request for exclusion to Class Counsel and Counsel for RTG.

16. At or before the Fairness Hearing, Class Counsel shall file a list reflecting all requests for exclusions under seal pursuant to the Protective Order [DE 40].

17. Any Settlement Class Member who does not submit a timely and valid request for exclusion as set forth above shall be automatically included in the

Settlement Class, shall be a Releasing Person, and shall be bound by all the terms and provisions of the Agreement and the Court's subsequent orders and judgments, whether or not such Settlement Class Member received actual notice or objected to the settlement and whether or not such Settlement Class Member submits a Claim Form or otherwise participates in the Settlement or Settlement approval process.

Claims Submission

18. To be eligible to receive Settlement Consideration, a Settlement Class Member must submit a Claim Form that meets the requirements of this Order.

19. The Settlement Administrator shall maintain a website through which Settlement Class Members may submit claims to receive the Settlement Consideration by electronic completion of a Claim Form substantially in the form as Exhibit F to the Settlement Agreement. Settlement Class Members may also submit Claim Forms via U.S. Mail by printing a Claim Form from the website or requesting one by telephone from the Settlement Administrator.

20. A Settlement Class Member who wishes to receive Settlement Consideration must submit a timely and valid Claim Form to the Settlement Administrator by the Claims Deadline, which is **Monday, January 15, 2018**. If the Claim Form is submitted by mailing via the United States Postal Service to the address indicated in the Class Notice, it shall be deemed to have been submitted as of the date postmarked. If the Claim Form is submitted in any other manner, it shall be deemed to have been submitted on the date it is actually received by the Settlement Administrator.

21. No Settlement Class Member may assign or delegate to any individual or entity the right to receive Settlement Consideration or to submit a Claim Form on behalf

of the Class Member. If a Settlement Class Member nonetheless purports to assign or delegate such right and an otherwise valid Claim Form is timely submitted on behalf of that Settlement Class Member, the Settlement Administrator shall pay any Settlement Consideration directly to the Settlement Class Member and not to the Settlement Class Member's designated assignee or delegate, notwithstanding the terms of any assignment or delegation. By this provision, the Court intends to foreclose assignments or delegations entered into solely for purposes of submitting a Claim Form in this Settlement. Nothing herein shall preclude a person previously authorized by law, such as a trustee, guardian or person acting under a power of attorney, to act on behalf of the Settlement Class Member from receiving the Settlement payment or submitting a Claim Form on behalf of a Settlement Class Member.

22. Each Settlement Class Member who submits a Claim Form thereby submits to the jurisdiction of this Court with respect to the claims submitted and shall (subject to final approval of the proposed Settlement) be bound by all the terms and provisions of the Agreement.

Objections

23. Any Settlement Class member who has not submitted a timely and complete written request for exclusion and who complies with the requirements of this Order may object to any aspect of the proposed Settlement (including the requested award of attorney fees and expenses to Class Counsel or incentive payments to the Class Representatives) either on his or her own or through an attorney hired at his or her expense. Any Settlement Class Member who wishes to object must file with the Court and serve on Class Counsel and RTG's Counsel (at the addresses in Paragraph

28 below) a written statement of objection that shall reference the case (Hankinson Class Action, No. 9:15-CV-81139).

24. Each Objection must (a) state the Settlement Class Member's full name, current address, and telephone number; (b) include the unique individual identification number contained on the Class Notice sent to the Settlement Class Member; (c) contain the Settlement Class Member's original signature (conformed, reproduced, facsimile, or other non-original signatures will not be valid, nor is the signature of an attorney for the Settlement Class Member sufficient); (d) state that the Settlement Class Member objects to the Settlement, in whole or in part; (e) set forth a statement of the legal and factual basis for the objection; (f) provide copies of any documents that the Settlement Class Member wishes to submit in support of his/her position; (g) identify by name, address and bar number any attorney who represents the Settlement Class Member with respect to the Objection or who assisted or advised the Settlement Class Member in any way with respect to the Objection; (h) list by case name and civil action number all class action settlements to which the Settlement Class Member or any attorney that meets the description of subsection (g) of this paragraph have objected within the last five years; and (i) attach a copy of any orders relating to or ruling upon the objector's prior objections that were issued by the trial and appellate courts in each case.

25. In addition, if the objecting Settlement Class Member is represented by an attorney who intends to seek fees and expenses from anyone other than the objectors he or she represents, the objection must also include (i) a description of the attorney's legal background and prior experience in connection with class action litigation; (ii) the amount of fees sought by the attorney for representing the objector and the factual and

legal justification for the fees being sought; (iii) a statement regarding whether the fees being sought are calculated on the basis of a lodestar, contingency, or other method; (iv) the number of hours already spent by the attorney and an estimate of the hours to be spent in the future; (v) the attorney's hourly rate; and (vi) any and all agreements that relate to the objection or the process of objecting, whether written or verbal, between the objecting Settlement Class Member and his or her counsel and any other person or entity.

26. Any attorney who represents the Settlement Class Member with respect to the Objection or who assisted or advised the Settlement Class Member in any way with respect to the Objection thereby submits to the jurisdiction of this Court with respect to that Objection.

27. Counsel for any party may take the deposition of any objecting Settlement Class Member prior to the Fairness Hearing, subject to the procedures and protections of Fed. R. Civ. P. 26 and 30.

28. Any objection must be postmarked or deposited with the overnight delivery service or hand delivered by the Objection Deadline, which is **Friday, November 17, 2017**, to each of the following:

Clerk of Court	Clerk of Court United States District Court for the Southern District of Florida, West Palm Beach Division 701 Clematis Street Room 202 West Palm Beach, FL 33401 Re: <u>Hankinson Class Action</u> , No. 9:15-CV-81139
Class Counsel	Douglas J. McNamara COHEN MILSTEIN SELLERS & TOLL PLLC 1100 New York Ave. NW East Tower, 5th Floor

	Washington, DC 20005 Re: <u>Hankinson Class Action</u> , No. 9:15-CV-81139
RTG's Counsel	Jamie Zysk Isani HUNTON & WILLIAMS LLP 1111 Brickell Avenue, Suite 2500 Miami, Florida 33131 Re: <u>Hankinson Class Action</u> , No. 9:15-CV-81139

29. Any Settlement Class Member who does not timely file and serve a written objection that meets all of the requirements of this Order shall be deemed to have waived any objection to the Settlement (including the requested award of attorney fees and expenses to Class Counsel or incentive payments to the Class Representatives), and shall be bound by all the terms of the Settlement Agreement, this Order, and by all proceedings, orders, and judgments, including, but not limited to, the release in the Settlement Agreement if final judgment is entered approving the Settlement.

30. Any Settlement Class Member who files and serves a timely written objection that complies with this Order may also appear at the Fairness Hearing either in person or through counsel retained at the Settlement Class Member's expense. Settlement Class Members and their attorneys, if applicable, intending to appear at the Fairness Hearing must serve on Class Counsel and RTG's Counsel, and file with the Clerk of Court, at the addresses specified above in paragraph 28 of this Order, no later than **Thursday, November 30, 2017**, a notice of intention to appear, setting forth (a) the case (Hankinson Class Action, No. 9:15-CV-81139); (b) the name, address, and telephone number of the Settlement Class Member; (c) if applicable, the name, address, and telephone number of the Settlement Class Member's attorney; (d) whether the Settlement Class Member intends to offer his or her testimony at the Fairness

Hearing; and (e) the identity of any other person whose testimony the Settlement Class Member intends to offer at the Fairness Hearing.

31. Any Settlement Class Member who fails to comply with this Order shall not be permitted to appear at the Fairness Hearing. No Settlement Class Member shall be permitted to raise matters at the Fairness Hearing that the Settlement Class Member could have raised in an Objection, but failed to do so.

32. Counsel for the parties shall promptly furnish each other with copies of any and all objections or written requests for exclusion that might come into their possession.

33. Any motions by Settlement Class Members to intervene in this action shall be filed by **Friday, November 17, 2017**.

34. Any objections, statements or other submissions by any person noticed pursuant to 28 U.S.C. § 1715 (or claiming an entitlement to have been noticed pursuant to 28 U.S.C. § 1715) shall be filed by the deadlines and in accordance with the procedures and requirements that apply to Settlement Class Member objections. Likewise, any notice of appearance by any person noticed pursuant to 28 U.S.C. § 1715 (or claiming an entitlement to have been noticed pursuant to 28 U.S.C. § 1715) shall be filed by the deadlines and in accordance with the procedures and requirements that apply to notices of appearance by Settlement Class Members.

Motions for Fees, Expenses and Incentive Awards

35. No later than **Wednesday, October 18, 2017** Class Counsel shall file any motion for an award of attorney fees and expenses or for an incentive award to the

Class Representatives. The Settlement Administrator shall post that motion and the supporting materials on the Settlement Website.

Final Approval Procedures and Fairness Hearing

36. Pursuant to Fed. R. Civ. P. 23(e), the Court will hold a final approval hearing (the “Fairness Hearing”) on **Friday, December 15, 2017, at 9:00 a.m.**, in the Courtroom of the Honorable James I. Cohn, United States District Court for the Southern District of Florida, 299 East Broward Boulevard, Room 203E, Fort Lauderdale, Florida, for the following purposes:

a. determining whether the resolution of this litigation on the terms and conditions provided for in the proposed Settlement is fair, reasonable, and adequate;

b. considering the motion of Class Counsel for a fee and expense award;

c. considering any motion of Class Counsel for incentive awards to the Class Representatives for services rendered to the Settlement Class; and

d. ruling upon such other matters as the Court may deem just and appropriate.

37. No later than 10 days prior to the Fairness Hearing, Class Counsel and RTG, if applicable, must file any additional memoranda or materials regarding settlement approval or Class Counsel’s motion for an award of attorney fees and expenses or for an incentive award to the Class Representatives.

38. The Court reserves the right to adjourn or continue the Final Approval Hearing and related deadlines without further written notice to the Settlement Class. If

the Court alters any of those dates or times, the revised dates and times shall be posted on the Settlement website.

Status of Action Pending the Fairness Hearing

39. The Court continues the stay of all deadlines in this action until further order, except as may be necessary to consider the approval of the Settlement or to implement and enforce the Settlement if it is approved. Additionally, all pending motions are hereby **DENIED as moot** without prejudice to be renewed in the event the proposed Settlement does not become final or is terminated for any reason.

40. The parties may further modify the Settlement Agreement prior to the Fairness Hearing so long as such modifications do not materially change the terms of the Settlement set forth thereunder. The Court may approve the proposed Settlement with such modifications as may be agreed to by the parties, if appropriate, without further notice to Settlement Class Members.

41. This Order shall be of no force and effect if the Settlement does not become final or is terminated for any reason, and shall not be construed or used as an admission, concession, or declaration by or against any party of any fault, wrongdoing, liability, or other matter of law or fact. Further, if the proposed Settlement does not become final or is terminated for any reason, the parties and these actions shall be restored to the status they occupied as of the date that plaintiffs file their motion for preliminary approval. In such event, the proposed Settlement, the documents filed in conjunction with the proposed approval of that Settlement, and the Court's orders regarding the Settlement, including this Order, shall not be used or referred to for any purpose, except as may be specifically permitted in the Settlement Agreement.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County,
Florida, this 4th day of August, 2017.



JAMES I. COHN
United States District Judge

Copies to counsel of record via CM/ECF.