

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

STEPHEN BITTNER, et al.,	}	
	}	
Plaintiff,	}	
	}	
vs.	}	Civil Action No.:
	}	3:17-cv-143-MPM-JMV
	}	
BROWNING ARMS COMPANY,	}	
	}	
	}	
Defendant.	}	

**ORDER GRANTING PRELIMINARY APPROVAL OF SETTLEMENT, DIRECTING
NOTICE TO THE CLASS, SCHEDULING A FINAL APPROVAL HEARING, AND
CERTIFYING A SETTLEMENT CLASS**

I. INTRODUCTION

Plaintiff Stephen Bittner, individually and on behalf of the Settlement Class (the “Class Representative” or “Plaintiff”), and Defendant Browning Arms Company (“Browning” or “Defendant”) have reached a proposed settlement in the above-captioned litigation (the “Action”), as set forth in the parties’ Stipulation of Settlement (the “Stipulation” or the “Settlement”). Plaintiff, on behalf of himself and the Settlement Class (as hereinafter defined), have applied to the Court pursuant to Rule 23(e) of the Federal Rules of Civil Procedure for an order: (1) granting preliminary approval of the Settlement in the Action in accordance with the Stipulation; (2) dismissing the Action with prejudice as against all of the Released Parties (as defined in the Stipulation), upon the terms and conditions set forth in the Stipulation; (3) certifying the Action as a class action for settlement purposes only; (4) appointing the Representative Plaintiff as Class Plaintiff and the law firm of Heninger Garrison Davis, LLC, 2224 1st Avenue North, Birmingham, Alabama 35203 as Class Settlement Counsel; (5) scheduling a Final Approval hearing and establishing all related deadlines; (6) directing that notice be provided to the Class in accordance

with the Notice Program; and (7) preliminarily enjoining all Class Members who have not opted out from pursuing, as class members, actions based on or relating to the claims to be released by the Class Agreement; and further enjoining all persons from pursuing a lawsuit in any jurisdiction involving Class Members who have not timely excluded themselves that is based on or relating to the claims to be released by the Class Agreement.

Defendant Browning is a preeminent manufacturer and distributor of firearms in the United States. Defendant's current catalog lists over 25 firearms which come coated with Dura-Touch, including shotguns in its Maxus, A5, Silver, BPS, Gold lines as well as Rifles in its X-Bolt line. Defendant has sold firearms coated with Dura-Touch for at least 10 years. Plaintiff contends that, after a short time in use, the Dura-Touch coating on the stock of the guns sold with it becomes extremely sticky such that it interferes with the use of the firearm for its intended purpose, and Plaintiff further contends that, despite Browning's knowledge of this issue, it continues to manufacture, sell and distribute firearms coated with Dura-Touch without informing its purchasers that the Dura-Touch Coating will degrade after a short time in use.

According to Defendant, its Dura-Touch Coating is "a unique stock treatment specifically designed to improve the grip and overall feel of a rifle or shotgun while protecting the stock with an armor-like finish." Defendant knows that many purchasers of its firearms, including purchasers of its firearms containing the Dura-Touch Coating, are hunters who will be using its firearms in the outdoors. As such, Defendant touts its Dura-Touch Coating as creating a "very tactile" grip for its firearms, and that it is suitable for use "in all weather conditions and temperature ranges, in addition to being extremely durable."

Defendant asserts that its Dura-Touch Coating is "extremely durable" and suitable for use in "all weather conditions and temperature ranges," but Plaintiff contends that the Dura-Touch

Coating degrades after a short time of use. Specifically, Plaintiff contends that the Dura-Touch Coating degrades to the point where it becomes extremely sticky to the touch, impacting the firearm's grip and affecting the ability of Plaintiff and other Class members to use the firearm for its intended purpose. In order to remove the Dura-Touch Coating, Plaintiff and other members of the Class contend they will have to either pay another company to strip the Dura-Touch Coating from the firearm and "re-dip" those parts in another coating or purchase replacement parts for their Browning Shotguns at significant cost to Plaintiff and Class members.

Plaintiff contends that the cost for each Class Member to repair the firearm can range from \$400-\$500, which would include engaging a company to strip the Dura-Touch coating and "re-dip" the firearms and shipping the firearm back and forth. In certain cases where the firearms cannot be repaired, and depending on the cost of replacement of the firearm, the cost can be over \$1,000 per class member to remedy the damage caused by the Dura-Touch coating.

Plaintiff filed a class action against Browning and brought claims of negligence/wantonness; breach of implied warranties; fraudulent misrepresentation; negligent misrepresentation; fraudulent omission/concealment; unjust enrichment; and declaratory judgment. The Parties have been engaged in class certification related discovery leading up to Plaintiff's forthcoming motion to certify a class. They have also been engaged in settlement discussions for approximately eight months and have notified the Court that a settlement has been reached between the Parties.

This matter has now come before the Court pursuant to Plaintiff's Motion for Preliminary Approval of Class Action Settlement and for Certification of a Settlement Class (the "Motion").

The Court finds that it has jurisdiction over the Action, the Parties, and all Settlement Class Members for purposes of settlement under 28 U.S.C. § 1331 and 28 U.S.C. § 1332(d).

The Court held a Preliminary Approval Hearing on _____, 2018, and has considered all of the presentations and submissions related to the Motion and is otherwise fully advised of all relevant facts in connection therewith, and has found good cause for entry of the following Order.

IT IS HEREBY ORDERED AS FOLLOWS:

(1) This Order (the “Preliminary Approval Order”) hereby incorporates by reference the definitions in the Stipulation, and all terms used herein shall have the same meanings as set forth in the Stipulation;

(2) The Court, having fully reviewed Plaintiff’s unopposed Motion, the supporting Memorandum and Declarations filed in support thereof, determines that the Settlement appears to be the product of thorough, serious, informed, and non-collusive negotiations between experienced attorneys familiar with the legal and factual issues of this case; has no obvious deficiencies; does not improperly grant preferential treatment to the Settlement Class Representative or segments of the Class; and appears to be fair, reasonable, and adequate within the meaning of Rule 23 of the Federal Rules of Civil Procedure, such that preliminary approval of the Settlement should be granted, notice of the Settlement should be directed to the Settlement Class Members, and a Final Approval Hearing should be set; and

(3) The Court enjoins all members of the Settlement Class from filing, commencing, prosecuting, continuing to prosecute, supporting, intervening in, or participating as a plaintiff, a claimant, or a class member in the Related Actions or in any other lawsuit, or other proceeding in any jurisdiction based on, relating to, or arising out of the claims, or the facts and circumstances at issue, in this Action, the Related Actions, and/or the Released Claims unless and until (i) they

have been excluded from the Settlement by action of the Court, (ii) termination of this Settlement, or (iii) the Judgment or Final Judgment becomes Final, whichever occurs earliest..

Accordingly, the Motion is GRANTED.

II. THE SETTLEMENT CLASS

The Court hereby certifies, for settlement purposes only pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure, a Settlement Class defined as follows:

All United States persons who have purchased any Browning or Winchester Repeating Arms branded firearm containing the Dura-Touch coating (as defined in paragraph 2.32 of the Stipulation).

The following entities and individuals are excluded from the Class:

- A. Defendant's officers, directors and employees;
- B. Judicial officers and their immediate family members and associated court staff assigned to this case; and
- C. All those otherwise in the Class who or which timely and properly exclude themselves from the Class as provided in the Agreement.

III. THE DURA-TOUCH CLAIM RESOLUTION PROCESS

The Settlement establishes a Dura-Touch Claim Resolution Process, subject to the Court entering a Final Approval Order. To summarize that process, Browning represents that through the duration of the Claim Period, which is unlimited, it will maintain a page on its website with contact information, including a toll-free phone number, by which Class Members may get their Dura-Touch coated firearm serviced by Browning.

Once a Class Member notifies Browning, either through the website or telephone, of a potential deterioration issue, Browning will promptly send the customer a pre-paid shipping label.

The Class Member will promptly ship the firearm, and once the packaged firearm arrives at Browning's Service Center, a service technician will inspect the firearm to confirm that the Dura-Touch shows signs of deterioration and that the firearm qualifies for a repair under the Dura-Touch Claim Resolution Process.

Based on the firearm model, the service technician will then determine whether the firearm qualifies for either of three service methods that will be carried out on the affected firearm. The service method carried out on the qualified firearm will be chosen by Browning in its sole and absolute discretion. The three service methods will be as follows:

Parts Replacement. Browning has worked with its manufacturers to produce non-Dura-Touch replacement parts (i.e., stocks and forearms) for most potentially affected firearms. The replacement parts will be of equal quality but will use a clear-coat protectant rather than the Dura-Touch coating. When Browning's replacement part inventory allows, Browning's service technicians will remove and discard the deteriorating parts and install the replacement stocks and forearms. Due to the short turnaround time of a replacement service, as compared to the lengthier turnaround time of an actual repair of the affected parts (as described directly below), an outright replacement of the affected parts will be the preferred service method.

Parts Repair. In the event that replacement parts are not in Browning's service inventory or are otherwise not available for a particular firearm model, Browning will repair the deteriorating parts. Browning has engaged the services of at least four third-party service vendors that have the capability, know-how, and necessary equipment to properly repair a deteriorating firearm. Following an internal inspection of the firearm, Browning will send the firearm to one of its third-party service vendors. The service vendor will strip the Dura-Touch coating from the affected parts, carry out a sophisticated water transfer printing process to apply a particular camouflage

pattern to the parts (i.e., hydro-dipping), and then finish the repair through the application of a clear-coat protectant.

Firearm Replacement. In the event the firearm parts are not able to be replaced or repaired in a reasonable and financially sound manner, in Browning's sole and absolute discretion, Browning will provide the consumer with a new Browning firearm of equal or greater value.

Following the service of a firearm in one of the three methods described above, Browning's service department will carry out a function test. The function test includes a visual inspection of the firearm, a verification that the trigger pull and other firearm mechanics are within specification, and lastly a test fire with live ammunition. Following a successful function test, the firearm will be packaged by Browning and returned to the Class Member at no cost. The total turnaround time (from receipt of the firearm to return of the firearm) will be six (6) months or less for those firearms that take advantage of the Dura-Touch Claim Resolution Process.

For those firearms which Browning deems do not qualify for a repair under the Dura-Touch Claim Resolution Process, the firearm will be packaged by Browning and shipped to a neutral party with expertise to evaluate the firearm (the "Neutral"), and Browning will notify both the Settlement Class Member and Class Counsel of said rejection. This notice will include the name and address of the Class Member, the reason why the firearm was rejected for repair, and the date it was sent to the Neutral for review.

Upon receiving the firearm, the Neutral will inspect the firearm to determine whether the Dura-Touch shows signs of deterioration and whether the firearm qualifies for a repair under the Dura-Touch Claim Resolution Process. The Neutral's decision is final. If the Neutral decides that the firearm shows deterioration of its Dura-Touch coating and qualifies for a repair under the Dura-Touch Claim Resolution Process, then the Neutral will notify Browning, the Class Member and

Class Counsel of his or her decision. The Neutral will also ship the firearm back to Browning where it will be treated as a Qualified Repair as set forth in Section 7.2 of the Stipulation. Browning will have no right to appeal the Neutral's decision. All shipping costs to and from the Neutral, as well as any fees charged by the Neutral, shall be paid by Browning.

If the Neutral decides that the firearm does not show signs of deterioration of its Dura-Touch Coating and does not qualify for a repair under the Dura-Touch Claim Resolution Process, then the Neutral will notify Browning, the Class Member and Class Counsel of his or her decision. The Class Member will have no right to appeal the Neutral's decision. In this case, the Neutral shall return the firearm to Browning. Browning will ship the firearm to the class member for delivery via cash on delivery that will charge the class member the costs of the shipping and the costs of the neutral's review of the firearm.

Defendant does not admit wrongdoing in the Settlement and denies the material allegations and claims asserted in the Amended Class Action Complaint. In exchange for the benefits conferred on Settlement Class Members by the Settlement, Settlement Class Members who do not opt out agree to release all claims that could have been asserted, or that arise out of the same transactions or occurrences as the claims against Defendant that were or could have been asserted in this Action, commensurate with the *res judicata* effect at the conclusion of the litigation, as described in the Settlement.

IV. PRELIMINARY FINDINGS

The Court preliminarily finds that this Settlement complies with this Court's standard for preliminary approval of class action settlements. See *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977). Furthermore, the Court finds, on a preliminary basis, that the Settlement appears to be within the range of reasonableness of a settlement which could ultimately be given final approval

by this Court, and that the Settlement is fair and reasonable to Settlement Class Members when balanced against the probable outcome of further litigation, liability and damages issues, and potential appeals of rulings.

The Court preliminarily finds, for purposes of settlement only, that the proposed Settlement Class as defined above meets the numerosity requirement of Rule 23(a)(1) such that joinder would be impractical; that there are questions of law and fact common to the Settlement Class as required by Rule 23(a)(2); that these common questions predominate over individual questions as required by Rule 23(b)(3); that the claims of the proposed Settlement Class Representatives are typical of the claims of the Class under Rule 23(a)(3).

In addition, the Court preliminarily finds that the Class Counsel and Plaintiff will fairly and adequately represent the interests of the Class under Rule 23(a)(4), have done so, and are adequate under Rule 23(g)(1) and (4), and, therefore, hereby appoints W. Lewis Garrison and James F. McDonough of Heninger Garrison Davis, LLC as Class Counsel and Plaintiff as class representative, under Rules 23(c)(1)(B) and 23(g) to implement and complete the Settlement Approval Process.

V. NOTICE TO CLASS MEMBERS

Under Rule 23(c)(2), the Court approves, as to content and format, the Long Form Notice (Ex. B) and the Summary Publication Notice (Ex. C) (collectively, “Notice”). The Court further finds that the method of disseminating Notice, as set forth in the Motion and the Parties’ Stipulation—including (1) an extensive publication campaign composed of consumer magazine publications in *American Rifleman*, *Field and Stream*, and *American Hunter* using the Summary Publication Notice, (2) providing Dealer Notice by the means outlined in Section 5.1.4 of the Stipulation and providing the Long Form Notice, (3) displaying digital notice on each of

Browning's websites (www.browning.com and www.winchesterguns.com) in the form of Exhibit E and the electronic claim form in the form of Exhibit E to reach the prospective Class members, (4) publishing the Long Form Notice on the Settlement on Class Counsel's website, and (5) issuing a press release in the form of Exhibit G is the best method of notice practicable under the circumstances and satisfies all requirements provided in Rule 23(c)(2)(B) and all Constitutional requirements including those of due process.

The Court further finds that the Notice fully satisfies Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process; provided, that the Parties, by agreement, may revise the Notice, the Claim Form, and other exhibits to the Stipulation, in ways that are not material or ways that are appropriate to update those documents for purposes of accuracy.

Specifically, the Court further finds that the Notice adequately advises the Settlement Class about:

- A. The class action;
- B. The terms of the proposed Settlement, the benefits available to each Settlement Class Member, and proposed fees and costs to Class Counsel;
- C. Each Settlement Class Member's right to object or opt out of the settlement, and the timing and procedures for doing so;
- D. Preliminary court approval of the proposed Settlement; and
- E. The date of the Final Approval Hearing as well as the rights of Settlement Class Members to file documentation in support of or in opposition to and appear in connection with said hearing.

Browning and Class Counsel shall publish the Full Publication Notice and the Summary Publication Notice in substantially the form attached to the Stipulation as Exhibits B and C by the

means described above and in the Stipulation, and Class Counsel shall issue the press release in substantially the form attached as Exhibit G to the Stipulation by no later than 15 days after the date of this Order. The Court otherwise hereby directs that such notice be disseminated in the manner set forth in the Settlement to Settlement Class Members under Rule 23(e)(1).

VII. SCHEDULE AND PROCEDURES

The Court orders the following schedule and procedures for disseminating Notice, filing claims, requesting exclusion from the class, filing objections to the Settlement, and filing the motion for final approval:

DATE	EVENT
2:00 p.m. on Thursday, December 20, 2018	Preliminary Approval Hearing
15 Days After Preliminary Approval Order	Class Notice Date
45 Days After Class Notice Date	Objection Deadline and Opt-out Deadline
52 Days After Class Notice Date	Class Representatives to File Motion for Final Approval and/or Attorneys' Fees
52 Days After Class Notice Date	Class Counsel will prepare and file a list of Opt-Outs with the Court
52 Days After Class Notice Date	Class Representative and/or Defendant to file response to any written Objection
10:00 a.m. on Thursday, March 21, 2019	Final Approval Hearing
15 Days After Final Approval Order	Defendant deposit any attorney fees approved by the Court into Class Counsel account
Any time after Final Approval Order	Deadline to Submit Claim Form

VIII. FINAL APPROVAL HEARING

The Final Approval Hearing shall take place on **10:00 a.m. on Thursday, March 21, 2019**, at the United States District Court for the Northern District of Mississippi, Federal Building Room 369, 911 Jackson Avenue East, Oxford, MS 38655, before the Honorable Michael P. Mills, to

determine whether the proposed Settlement is fair, reasonable, and adequate and should receive the Court's final approval.

A. Objections by Settlement Class Members (who do not timely elect to exclude themselves from the Class) to the proposed Settlement will be considered if filed in writing with the clerk within 45 days of the Class Notice Date.

B. At the Final Approval Hearing, Settlement Class Members (who do not timely elect to exclude themselves from the Class) may be heard orally in support of or in opposition to the Settlement, provided each such person filed with the clerk not later than 45 days after the Class Notice Date a written notification of his or her desire to appear personally, indicating (if in opposition to the Settlement) briefly the nature of the objection. Failure to comply with the notification requirement may be excused upon a showing of good cause.

C. Settlement Class Counsel and counsel for Defendant should be prepared at the hearing to respond to objections filed by Settlement Class Members and to provide other information, as appropriate, bearing on whether or not the Settlement should be approved.

IX. OTHER PROVISIONS

Settlement Class Counsel and Defendant are authorized to take, without further Court approval, all necessary and appropriate steps to implement the Settlement including the approved Notice Program.

The deadlines set forth in this Preliminary Approval Order, including, but not limited to, adjourning the Final Approval Hearing, may be extended by Order of the Court, for good cause shown, without further notice to the Settlement Class Members, except that notice of any such

extensions shall be included on the Settlement Website. Settlement Class Members should check the Settlement Website regularly for updates and further details regarding extensions of these deadlines. Exclusions and Objections must meet the deadlines and follow the requirements set forth in the approved Class Notice in order to be valid.

If, for any reason, the Court does not execute and file an Order of Final Approval, or if the Effective Date does not occur for any reason whatsoever, the proposed Settlement and the proposed Settlement subject of this Order and all evidence and proceedings had in connection therewith, shall be without prejudice to the status *quo ante* rights of the parties to the litigation as more specifically set forth in the Settlement.

Class Counsel and Defendant's Counsel are hereby authorized to use all reasonable procedures in connection with approval and administration of the Settlement that are not materially inconsistent with the Preliminary Approval Order or the Settlement, including making, without further approval of the Court, minor changes to the Settlement, to the form or content of the Notice, or to any other exhibits that the Parties jointly agree are reasonable or necessary.

To "secure the just, speedy, and inexpensive determination" of this and related actions, FRCP 1, the Court also hereby stays further proceedings in related actions pending (i) Judgment, or (ii) termination of this Settlement, whichever occurs earlier.

X. SUMMARY

In summary, the Court:

A. preliminarily approves the Settlement as being a fair, reasonable, and adequate settlement as to Settlement Class Members within the meaning of Rule 23 of the Federal Rules of Civil Procedure;

B. certifies, for settlement purposes only, the Settlement Class pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure;

C. appoints Plaintiff Bittner as Class Plaintiff, appoints their counsel as Class Counsel to execute this Settlement on behalf of Representative Plaintiff and the Settlement Class, and authorizes Class Counsel to take approved steps to proceed with this Settlement on behalf of the Settlement Class;

D. schedules a Final Approval hearing and establishing all related deadlines;

E. directs notice to be disseminated as set forth in the Settlement, and finds that the Notice Program and materials satisfy Rule 23 and due process;

F. conditionally and temporarily stays related cases;

G. preliminarily enjoins all Class Members who have not opted out from pursuing, as class members, actions based on or relating to the claims to be released by the Class Agreement; and further enjoins all persons from pursuing a lawsuit in any jurisdiction involving Class Members who have not timely excluded themselves that is based on or relating to the claims to be released by the Class Agreement; and

The Court shall maintain continuing jurisdiction over these proceedings for the benefit of the Class as defined in this Order.

IT IS SO ORDERED.

Dated: December 20, 2018

/s/ MICHAEL P. MILLS
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF MISSISSIPPI