IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA,
CHARLESTON DIVISION

IN RE MI WINDOWS AND DOORS, INC., PRODUCTS LIABILITY LITIGATION **This pleading relates to:** **ALL CASES**	)	MDL Docket No. 2333 **MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT, APPROVAL OF FORM OF NOTICE, AND SCHEDULING OF FINAL APPROVAL HEARING** Hon. David C. Norton

Plaintiffs Nadine Johnson, David R. Van Such, Craig Hildebrand, Joseph DeBlaker, Mike and Janeen Meifert, Jackie Vargas Borkouski, Kerry Dewitt, Arthur and Susan Ferguson, Gregory and Kristy Kathman, Alex Krueger, Gail Loder, James Lovingood, Thomas Boettinger, John Oriolt, Jamie Reed, Patricia Lane, Larry Taylor, Jacquiline Ward, Manzoor and Sosi Wani, David Deem, John W. McCubbrey and Elizabeth D. McCubbrey, Daniel Kennedy, Charles Bradley, Jennifer and Scott McGaffin, Jessica Zepeda, Stevenson T. Womack (the "Homeowner Plaintiffs" or "Plaintiffs"), by and through Homeowner Class Counsel, and Plaintiff Lakes of Summerville, LLC (the "Contractor/Construction Plaintiff"), by and through Contractor/Construction Class Counsel,[1] respectfully submit this memorandum of law in support of their motion for preliminary approval of the concurrently filed proposed Stipulation of Class Action ("Settlement" or "Agreement") (Exhibit A to Motion) between MI Windows and Doors, LLC ("MIWD" or "Defendant") and Plaintiffs, on behalf of themselves and the Homeowner Settlement Class and the

[1] The Homeowner Plaintiffs and Contractor/Construction Plaintiff are hereinafter collectively referred to as "Plaintiffs" unless otherwise stated.

Contractor/Construction Settlement Class.[2]

I. INTRODUCTION

This is a putative class action alleging that tape glazed MIWD windows (hereinafter "MIWD windows" or "windows") manufactured by MIWD are defective, fail prematurely, and allow water to leak into the structures in which they are installed causing damage to property. MIWD denies all wrongdoing and liability, and is prepared to vigorously defend its product if the litigation proceeds. Notwithstanding, following extensive, good-faith and arm's-length negotiations between experienced counsel, and under the auspices of two Court appointed respected mediators and a Magistrate Judge, the parties have agreed to settlement terms they believe will fairly resolve this action, avoid protracted, expensive and uncertain litigation, and reasonably and adequately provide effective relief for putative class members.

The Settlement establishes a claims process as to MIWD windows for 1) all Homeowners who purchased, or came into ownership of property containing MIWD Products, as well as for all persons who have a legal obligation to maintain or repair these windows, and 2) for all Contractors who, while engaged in the business of residential construction, were involved in any respect in causing MIWD's Product to be acquired and installed into Affected Property, and also includes those Contractors who continue to own such Affected Property at the time of Notice. Qualifying Claimants may obtain cash payments, new sashes, repairs, and reimbursements based on the condition of the Window and the extent of damage, if any. The terms of the claims process are set forth in the Agreement and described herein.

The value of the benefits made available to the Settlement Class Members will be substantial given the large numbers of windows at issue, the cost of repair, and the generous

[2] Capitalized terms in this motion correspond with the definitions of such terms set forth in the Agreement.

payments available for consequential damage. There are believed to be approximately one million class members and approximately twenty one million Windows.[3]

As further described in this memorandum, the proposed settlement terms are reasonable and fair, the proposed Settlement Class meets all of the requirements for conditional certification, and the proposed class notice program is comprehensive and provides the best practicable notice under the circumstances. Given the uncertainty of litigation and obstacles to Plaintiffs' success on the merits, and the difficulties inherent in obtaining and maintaining certification of a liability or damages class for purposes of trial, the substantial benefits the Settlement provides are a very favorable result for Plaintiffs and the proposed Homeowner Settlement Class and the proposed Contractor/Construction Settlement Class. MIWD also recognizes the expense and other potential risks of litigating a class action such as this through trial (and possible appeals), and therefore is amenable to resolution on the terms set forth in the Settlement.

Accordingly, Plaintiffs move this Court for an Order: (1) preliminarily certifying the Homeowner Settlement Class and the Contractor/Construction Settlement Class; (2) granting preliminary approval of the proposed Settlement; (3) approving the notice program and directing that notice be disseminated to the Homeowner Settlement Class and the Contractor/Construction Settlement Class as provided in the Settlement Agreement; (4) appointing Nadine Johnson, David R. Van Such, Craig Hildebrand, Joseph DeBlaker, Mike and Janeen Meifert, Jackie Vargas Borkouski, Kerry Dewitt, Arthur and Susan Ferguson, Gregory and Kristy Kathman, Alex Krueger, Gail Loder, James Lovingood, Thomas Boettinger, John Oriolt, Jamie Reed, Patricia Lane, Larry Taylor, Jacquiline Ward, Manzoor and Sosi Wani, David Deem, John W. McCubbrey and Elizabeth D. McCubbrey, Daniel Kennedy,

[3] It is documented that there are approximately 21 million windows manufactured during the class period that are subject to this settlement. The class size is calculated using an industry standard of seventeen windows per residence.

Charles Bradley, Jennifer and Scott McGaffin, Jessica Zepeda, Stevenson T. Womack as Homeowner Class Representatives; (6) appointing Lakes of Summerville, LLC as Contractor/Construction Class Representative; (7) appointing Whitfield Bryson & Mason LLP and the Lucey Law Firm as Co-Lead Counsel for the Homeowner Class; (8) appointing H. Blair Hahn of Richardson, Patrick, Westbrook & Brickman, LLC and Walter H. Bundy, Jr. of Smith, Bundy, Bybee & Barnett, PC as Co-Lead Counsel for the Contractor/Construction Class; and (9) appointing Epiq as the Class Action Settlement Administrator and Appeal Adjudicator, and Hilsoft as the Notice Provider.

II. BACKGROUND

A. The Pending Litigation

MIWD manufactures and sells windows throughout the United States. The windows at issue in this case were manufactured by MIWD between July 1, 2000 and March 31, 2010 using Glazing Tape ("MIWD Product" or "MIWD's Product"). Glazing Tape is a preformed plastic tape material applied between the face of the glass panel and the window unit framing to provide resilient support between the glass and the frame to limit and otherwise impede the passage of air and water. Plaintiffs contend that these windows suffer from a common defect resulting from the Glazing Tape, which prematurely fails, resulting in water intrusion, water penetration, and leakage at or around the glazing beads of the windows. Plaintiffs allege that MIWD's windows contained defects that result in a loss of seal, resulting in consequential damages to other property, including the adjoining finishes, walls, and floors.

On September 2, 2010, Plaintiff Joseph DeBlaker filed his class action in the United States District Court for the Eastern District of North Carolina. Soon thereafter, several other class actions were filed in South Carolina, New York, Ohio, Maryland, Michigan, Minnesota,

Pennsylvania, Florida, Kansas, Virginia, West Virginia, Georgia, Illinois, and Wisconsin alleging similar claims against MIWD. On May 17, 2012, Contractor Lakes of Summerville, LLC filed its nationwide class action complaint on behalf of all Contractors in the United States District Court for the District of South Carolina. On December 5, 2011, Plaintiff Craig Hildebrand filed a motion for transfer and consolidation with the Judicial Panel on Multi-District Litigation. By Order dated April 23, 2012, the panel transferred and consolidated the related MIWD cases in the United States District Court for the District of South Carolina.

Throughout this litigation, the parties have engaged in vigorous motions practice. Among other things, MIWD sought to dismiss each of the cases filed by the representative Plaintiffs. Class Counsel briefed and argued against all of MIWD's motions to dismiss. In addition, discovery was hotly contested. Among other things, Class Counsel filed numerous motions to compel, responses in opposition to MIWD's motions to compel, motions for protective orders, and motions to reconsider prior rulings by Judge David Norton.

The Parties have also engaged in extensive discovery. In particular, MIWD has produced thousands of documents, the parties have exchanged answers to interrogatories, Plaintiffs have conducted depositions of MIWD's corporate representatives, a representative Plaintiff was deposed, MIWD has inspected many of the Plaintiffs' properties, and the Parties have engaged expert witnesses. Plaintiffs' expert witnesses inspected and tested hundreds of windows in many states.

B. Settlement Negotiations and Mediation

In late 2012, the Parties began to explore the possibility of settlement. The Parties met in-person in Miami to discuss the Parties' relative positions and start to consider a framework of a resolution of the lawsuit that would be mutually acceptable.

Over the course of the next 24 months, the Parties met approximately once a month in-person, and more frequently by telephone, to negotiate the terms of the Settlement. These meetings frequently took place in Charleston, South Carolina, and meetings were also held in Miami, Florida. Several sessions were conducted with the assistance of Court-appointed Magistrate Judge Bruce Howe Hendricks,[4] Professor Eric Green, and Mediator Thomas J. Willis. As a result of the mediation and arms-length negotiations, the Parties have arrived at the Settlement that is now before the Court.

Attorneys' fees and expenses, as well as Class Representative's service fees, were negotiated separate, apart, and following negotiation of the settlement benefits to the Settlement Class.

III. TERMS OF THE PROPOSED SETTLEMENT

The following is a general summary of the principal terms of the Settlement. The Settlement relief includes repairs, reimbursement for repairs, new sashes, and cash payments for consequential damage. The Settlement Agreement also provides for payment of Homeowner Class Counsel and Contractor/Construction Class Counsel's attorneys' fees and expenses, releases, the parameters of the class notice program, and payment of the costs of notice and claims administration.

The proposed Settlement offers a substantial recovery to the Settlement Class Members and does so through a claims process that does not impose undue burden on the Settlement Class Members. Qualifying Settlement Class Members are eligible for reimbursements, repairs, replacements, and cash compensation based on an agreed-upon value for each affected MIWD Product, and Eligible Consequential Window Damage or Extensive Consequential Water

[4] Magistrate Judge Bruce Howe Hendricks was appointed and approved as an Article III judge during the mediation of this case.

Damage, as described in the Agreement. The Agreement includes an appeals process and treats all similarly situated Homeowner Settlement Class Members fairly and equally as the recovery is based on the level of damage to the MIWD Product and adjacent property and whether the Homeowner Class Member is entitled to reimbursement for past labor. The Agreement treats all similarly situated Contractor/Construction Settlement Class Members fairly and equally as the recovery is based on the level of damage to the MIWD Product and adjacent property.

A. The Settlement Class[5]

The "Homeowner Settlement Class" includes all Persons that purchased or came into ownership of (through assignment, transfer, or otherwise) Affected Property containing MIWD's Product as well as all Persons who have a legal obligation to maintain or repair a MIWD Product. The Homeowner Settlement Class does not include members of the Contractor/Construction Settlement Class. Nor does the Homeowner Settlement Class include any Persons who have previously settled and released their claims against MIWD involving or related to all their MIWD Product, or had their claims dismissed with prejudice in court, or accepted a final remedy from MIWD involving or related to all their MIWD Product as evidenced by a written document (such Persons shall be barred from any further recovery).

The "Contractor/Construction Settlement Class" includes all Persons who, while engaged in the business of residential construction, were involved in any respect in causing MIWD's Product to be acquired or installed into Affected Property, and also includes all Persons who continue to own such Affected Property at the time of Notice (including developers, builders, contractors, subcontractors, and all other persons or entities involved in the purchase, installation, or supervision of the installation of MIWD's Product). The Contractor/Construction Settlement

[5] Named Plaintiffs and Class Counsel seek certification of the Settlement Class for settlement purposes only, and agree that, if approved, certification of the Settlement Class is in no way an admission by MIWD that class certification is proper in this litigation or any other litigation against MIWD.

Class does not include members of the Homeowner Settlement Class. Nor does the Contractor/Construction Settlement Class include any Persons who have previously settled and released their claims against MIWD involving or related to all their MIWD Product, or had their claims dismissed with prejudice in court, or accepted a final remedy from MIWD involving or related to all their MIWD Product as evidenced by a written document (such Persons shall be barred from any further recovery).

B. The Settlement Benefits

Qualifying Settlement Class Members will be provided with one or more of the following benefits: repairs, replacement sashes and IGUs (insulated glass units), reimbursement of eligible repair costs, or cash payments for consequential damage.

The Settlement establishes a claims process whereby Homeowner Class Members will obtain compensation under one of three categories: (1) Class A: covering Windows determined to have visible evidence of a Visible Residue Line, Sill Joint Staining, Water Penetration Through Window Glazing, or Mull Water Intrusion and Property determined to have Consequential Water Staining or Extensive Consequential Water Damage; (2) Class B: covering Windows determined to have visible evidence of a Visible Residue Line; and (3) Class C: covering reimbursement for repair or replacement costs of up to $1,250 per Affected Property. Class C Class Members may also participate in Class A or Class B recovery provided they do not receive a double recovery for the same damage. Homeowner Class Members may also obtain relief for defects in components covered by MIWD's original express written warranty and not covered or compensated as part of a Class A, Class B, or Class C claim during the relevant Claim Period; and homeowners continue to enjoy warranty protection after the claim and repair period.

Contractor/Construction Class Members will qualify for and be entitled to elect either a

repair or a Consequential Damage Payment as set forth in the Settlement Agreement.

Within these categories, the exact compensation payable to each qualifying Settlement Class Member is determined by a formula that considers the type and extent of water intrusion, the number of windows affected, and the impact on the property adjacent to the windows. Any Claimant who has previously submitted a warranty claim for any MIWD Product may submit a claim under the Agreement for the same window regardless of whether he received any compensation or benefits (provided a written release does not exist).

No aggregate cap shall apply to limit MIWD's total, overall liability to Settlement Class Members for relief.

C. Attorneys' Fees and Costs and Service Fees to Named Plaintiffs

Attorneys' fees and costs for Settlement Class Counsel and service fees to Named Plaintiffs are subject to approval by the Court and will be paid separately by MIWD in addition to any relief granted to Settlement Class Members. Class Counsel and MIWD have agreed that Homeowner' Class Counsel may apply to the Court for an award of attorneys' fees in an amount that shall not exceed $8,000,000, inclusive of all fees, costs, interest, and expenses of any kind. Contractor/Construction Class Counsel and MIWD have agreed that Contractor/Construction Class Counsel will not accept an Attorneys' Fees and Costs award that would require Defendant to pay Contractor/Construction Plaintiff's Class Counsel and Homeowner Plaintiffs' Class Counsel a total aggregate award greater than $9,045,000 (nine million forty-five thousand dollars), inclusive of all fees, costs, interest, and expenses of any kind. Homeowner Class Counsel and MIWD have agreed that Homeowner Class Counsel may apply to the Court for a service fee of $5,000 to pay each Named Homeowner Plaintiffs (one fee per house) in the Homeowner Class. Contractor/Construction Class Counsel and MIWD have agreed that

Contractor/Construction Class Counsel may apply to the Court for a service fee of $5,000 to pay the Named Contractor/Construction Plaintiff. Class Counsel will file a separate fee petition after Preliminary Approval that sets forth the basis for the amount to be paid by MIWD.

The requested attorneys' fees and service fees are in addition to the relief MIWD will provide to the Settlement Class under the terms of the Settlement and will in no way reduce any Settlement Class Member's recovery. The enforceability of the Agreement is not contingent on the amount of attorneys' fees or costs or service fees to Named Plaintiffs awarded. The Parties did not discuss the amount of attorneys' fees and costs or service fees to Named Plaintiffs until after reaching agreement on Settlement Class compensation issues.

D. Releases

Upon entry of the Final Order and Judgment, Named Plaintiffs and each Settlement Class member who has not timely excluded himself or herself from the Settlement Class (pursuant to the Agreement) shall be deemed to have, fully, finally, and forever released and discharged the Released Parties from all Released Claims. In connection with the Released Claims, each Settlement Class Member shall be deemed to have waived any and all provision, rights, and benefits conferred by § 1542 of the California Civil Codes or conferred by any comparable or similar statute or common law rule, regulation, or principle of law or equity established in any state or other jurisdiction. Section 1542 of the California Civil Code reads as follows:

> Section 1542. A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

E. Settlement Administration and Notice

1. Claims Resolution Procedure

As set forth in the Agreement, all costs of notice and claims administration shall be paid by MIWD. The initial claims administration will be undertaken by the Claims Administrator

and Appeal Adjudicator. The Claimant shall have the right to appeal a full or partial denial to the Appeal Adjudicator. Upon Preliminary Approval of the Settlement, the Notice Administrator and the Claims Administrator shall implement the Notice as provided in the Agreement. The Agreement provides that Settlement Class Members who wish to seek a remedy under the Settlement will be able to file a Claim Form at any time on or before: (1) 240 days from the Notice Start Date for Class A or Class B Homeowner Claimants; (2) 180 days from the Notice Start Date for Class C Homeowner Claimants; and (3) 180 days from the Notice Start Date for Contractor/Construction Claimants. Settlement Class Members will be able to request Claim Forms by contacting the Claims Administrator by telephone or in writing or by accessing the Settlement website which will provide a user-friendly method for downloading Claim Forms.

2. The Class Notice Program

Notice to Settlement Class Members will include: publication of summary notices; mailed notice to potential Settlement Class Members identified by the Parties through reasonable efforts; web notice; notice to known distributors; press release(s); and establishment of a settlement website.

As detailed in the Declaration of Cameron Azari, Vice-President Epiq System, Director Hilsoft Notifications ("Epiq Declaration), notice will include one-time publication in various publications, direct mail to approximately 150,000 homeowners identified by use of MIWD's warranty database, web notice, a press release, and notice to known distributors and contractors.

IV. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL

It is well established that the law favors class action settlements. *See S.C. Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1423 (D.S.C. 1990). This "strong judicial policy in favor of settlements" is particularly significant "in the class action context." *Wal-Mart Stores, Inc. v. Visa*

U.S.A. Inc., 396 F.3d 96, 116 (2d Cir. 2005). The present putative class action litigation is no exception, and the fair and adequate settlement terms reached by the Parties should be preliminarily approved.

A. Legal Standard for Preliminary Approval

Pursuant to Rule 23(e), "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). A settlement must be fair, reasonable, and adequate. *Id.* In assessing a proposed class action settlement "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." *Brunson v. Louisiana-Pacific Corp.*, 818 F. Supp. 2d 922, 927 (D.S.C. 2011) (citing Newberg & Conte, Newberg on Class Actions § 11.41 (3d ed. 1992)). Here, all of these factors are met and preliminary approval of the settlement is favored.

1. The Settlement is the Result of Good Faith, Arm's-Length Negotiations by Well-Informed and Highly Experienced Counsel

Class Counsel and MIWD engaged in good faith, arm's-length negotiations after a lengthy pre-filing investigation and protracted litigation. These negotiations were wide-ranging and adversarial, involving numerous in-person meetings and countless telephone conferences taking place over more than 24 months. By the time negotiations began, the Parties were intimately aware of the strengths and weaknesses of the Action and had thoroughly considered the merits of the Named Plaintiffs' claims and MIWD's defenses. Moreover, experienced and knowledgeable counsel, who had the benefit of the wealth of fact discovery and expert opinions, conducted these negotiations. As a result of the extensive, arm's-length bargaining, there was no collusion involved and the terms of the Settlement Agreement are fair, reasonable and adequate.

The participation of experienced mediators in settlement negotiations further establishes a settlement's fairness. Thus, the fairness of the settlement here is bolstered by the fact that the Parties engaged in fruitful mediation with Magistrate Judge Bruce Howe Hendricks, Professor Eric Green, and Mediator Thomas J. Willis.

2. There was Sufficient Discovery Conducted Over the Course of Years

The Parties have engaged in substantial discovery and confirmation discovery over the past four years, in an effort to facilitate settlement. Specifically, Class Counsel thoroughly investigated and examined MIWD's engineering, business, and sales records, and its engineering and manufacturing practices, and deposed MIWD executives. In addition, Class Counsel have retained product defect experts, inspected MIWD's third party product testing records and product samples, interviewed potential witnesses, incurred significant costs relating to the testing and analysis of the windows at issue and performed numerous on-site property inspections and laboratory and on site water intrusion testing. Given the thorough investigation of the facts, Class Counsel and counsel for MIWD have been able to sufficiently evaluate the merits of the claims in this Action.

3. The Proponents of the Settlement are Experienced in Similar Class Action Litigation

Homeowner Class Counsel and Contractor/Construction Class Counsel assembled a team of highly qualified attorneys with extensive experience prosecuting complex class action cases, and in particular, those involving defective building products. *See* Declaration of Homeowner Plaintiffs' Counsel Daniel K. Bryson in Support of Motion for Preliminary Approval of Class Action Settlement ("Bryson Decl.") and *see* Declaration of Contractor/Construction Counsel H. Blair Hahn in Support of Motion for Preliminary Approval of Class Action Settlement ("Hahn Decl.").

V. THE PROPOSED CLASS SHOULD BE CONDITIONALLY CERTIFIED FOR PURPOSES OF SETTLEMENT

The requirements for certification of a settlement class parallel the requirements for certification of a litigation class. *Decohen v. Abbasi, LLC*, 299 F.R.D. 469, 476 (D. Md. 2014). "Under Federal Rule of Civil Procedure 23, to certify a class action, the class must meet the four Rule 23(a) prerequisites and fit within one of the three Rule 23(b) categories." *Id.* Courts in this Circuit and elsewhere have certified classes in matters involving product defects. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *see also Brooks v. GAF Materials Corp.*, Civ. No. 11-983, 2014 U.S. Dist. LEXIS 77042 (D.S.C. June 6, 2014); *Brunson v. Louisiana-Pacific Corp.*, 266 F.R.D. 112 (D.S.C. 2010). Although the settlement class must satisfy the commands of Fed. R. Civ. P. 23(a) and 23(b), the Court may disregard the manageability concerns of Rule 23(b)(3) because the Court may properly consider that there will be no trial. *See Amchem*, 521 U.S. at 620. Notably, "the view that the mass tort action for damages may be appropriate for class certification either partially or in whole" is recognized by Fourth Circuit jurisprudence. *Gunnells v. Healthplan Servs. Inc.*, 348 F.3d 417, 423 (4th Cir. 2003) (quoting *Central Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1992).

A. Proposed Class, Class Representatives, and Class Counsel

The Settlement defines the Settlement Class to include all Persons in the United States or its Territories who own, owned, or have a legal obligation to maintain or repair a MIWD Product. The Settlement Class contains a "Homeowner Settlement Class" defined as follows:

> Homeowner Settlement Class
>
> [A]ll persons that purchased or came into ownership of (through assignment, transfer, or otherwise) Affected Property containing MIWD's Product as well as all Persons who have a legal obligation to maintain or repair a MIWD Product. The Homeowner Settlement Class does not include members of the Contractor/Construction Settlement Class. Nor does the Homeowner Settlement Class include any Persons who have

previously settled and released their claims against MIWD involving or related to all their MIWD Product, or have their claims dismissed with prejudice in court, or accepted a final remedy from MIWD involving or related to all their MIWD Product as evidenced by a written document (such Persons shall be barred from any further recovery).

The Settlement includes a "Contractor/Construction Settlement Class" defined as follows:

Contractor/Construction Settlement Class

All Persons who, while engaged in the business of residential construction, were involved in any respect in causing MIWD's Product to be acquired and installed into Affected Property, and also includes those contractors who continue to own such Affected Property at the time of Notice (including developers, builders, contractors, subcontractors, and all other persons or entities involved in the purchase, installation, or supervision of the installation of MIWD's Product). The Contractor/Construction Settlement Class does not include members of the Homeowner Settlement Class. Nor does the Contractor/Construction Settlement Class include any Persons who have previously settled their claims against MIWD, or had their claims dismissed with prejudice in court, or accepted a final remedy from MIWD (such Persons shall be barred from any further recovery).

Homeowner Plaintiffs' Counsel also move the Court to designate the named Homeowner Plaintiffs in this Action (Nadine Johnson, David R. Van Such, Craig Hildebrand, Joseph DeBlaker, Mike and Janeen Meifert, Jackie Vargas Borkouski, Kerry Dewitt, Arthur and Susan Ferguson, Gregory and Kristy Kathman, Alex Krueger, Gail Loder, James Lovingood, Thomas Boettinger, John Oriolt, Jamie Reed, Patricia Lane, Larry Taylor, Jacquiline Ward, Manzoor and Sosi Wani, David Deem, John W. McCubbrey and Elizabeth D. McCubbrey, Daniel Kennedy, Charles Bradley, Jennifer and Scott McGaffin, Jessica Zepeda, Stevenson T. Womack) as class representatives for the Homeowner Settlement Class and the law firms of Whitfield Bryson & Mason LLP and the Lucey Law Firm as Class Counsel for the Homeowner Settlement Class. The Contractor/Construction Plaintiff's Counsel move the Court to designate the named Contractor/Construction Plaintiff, Lakes of Summerville, LLC, as class representative for the

Contractor/Construction Settlement Class and the law firms of Richardson, Patrick, Westbrook & Brickman, LLC and Smith, Bundy, Bybee, & Barnett, PC as Class Counsel for the Contractor/Construction Settlement Class.

B. The Proposed Settlement Class Satisfies the Requirements of Rule 23(a)

Under Rule 23(a), class certification is appropriate if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. Rule 23(a).

1. Settlement Class Members Are Too Numerous to Be Joined

In this action, it is axiomatic that joinder of all potential Settlement Class Members would be impracticable. While there is no concrete threshold of potential class members above which joinder becomes impracticable, "[w]hen a class is extremely large, the numbers alone may allow the court to presume impracticability of joinder." *Hewlett v. Premier Salons Int'l, Inc.*, 185 F.R.D. 211, 215 (D. Md. 1997). Additionally, "the Fourth Circuit affirmed the district court's approval of a class with 480 potential class members, stating this number 'would easily satisfy the numerosity requirement.'" *Thomas v. Louisiana-Pacific Corp.*, 246 F.R.D. 505, 508 (D.S.C. 2007) (quoting *Central Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177 (4th Cir. 1993)). Here the proposed Settlement Class consists of all persons in the United States who own, owned or have a legal obligation to maintain or repair a MIWD Product.

2. Plaintiffs and the Settlement Class Members Share Common Legal and Factual Questions

Rule 23(a) requires that there exists common questions of law or fact among the class. Fed. R. Civ. P. 23(a)(2). "What matters to class certification is the capacity of a classwide

proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc., v. Dukes*, 131 S. Ct. 2541, 2551 (2011). While a single common question will suffice, it must be of such a nature that its determination "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 2556.

Here, there are several common questions with respect to the Settlement Class, including: whether (1) the Windows are defective and (2) MIWD was negligent in its manufacture of the Windows. Further, the suitability and performance of the glazing tape is the single dominant factual issue that drove this litigation. Accordingly, the commonality requirement is satisfied.

3. Plaintiffs' Claims are Typical of the Settlement Class

In order to satisfy the typicality requirement "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Thomas*, 246 F.R.D. at 510 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982)). For this reason, the typicality requirement "tends to merge with the commonality and adequacy-of-representation requirements." *Deiter v. Microsoft Corp.*, 155 F.3d 461, 466 (4th Cir. 2006). In this case, Plaintiffs have alleged that their claims arise out of MIWD's conduct in manufacturing, marketing, advertising, warranting, and selling defective Windows. By way of example, Homeowner Plaintiffs Kennedy and McGaffin each allege that their Windows suffered a lack of or loss of seal at joints, all of which permitted moisture or water intrusion into their home and have continuously and repeatedly caused damage in and around the Windows, and are alleging causes of action for breach of express and implied warranties as well as negligence. Again, the suitability and performance of the glazing tape is the single dominant factual issue that drove this litigation. These claims are typical when compared to those held by other members of the Settlement Class.

4. Plaintiffs Will Fairly and Adequately Protect the Interests of the Settlement Class

The final element required under Rule 23(a) instructs that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). A class representative is adequate if he or she "possess[es] the same interest and suffer[s] the same injury" as the class members he or she seeks to represent. *Int'l Woodworkers of America AFL-CIO, CLC v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1269 (4th Cir. 1981). "The principal factor in determining the adequacy of class representatives is whether the plaintiffs have the ability and commitment to prosecute the action vigorously. This inquiry involves two issues: (i) whether plaintiffs have any interest antagonistic to the rest of the class, and (ii) whether plaintiffs' counsel are qualified, experienced and generally able to conduct the proposed litigation." *S.C. Nat'l Bank v. Stone*, 139 F.R.D. 325, 329-30 (D.S.C. 1991). Importantly, "[t]he adequacy of plaintiffs' counsel, like that of the individual plaintiffs, is presumed in the absence of specific proof to the contrary." *Thomas*, 246 F.R.D. at 509 (quoting *Stone*, 139 F.R.D. 325).

Here, Class Counsel are abundantly qualified and experienced to pursue these claims and negotiate a settlement in this class action. The attorneys at Whitfield Bryson & Mason LLP, and the Lucey Law Firm, have significant experience in class action litigation proceedings throughout the United States, securing in sum over a billion dollars in settlement funds for their consumer class action clients. The attorneys at Richardson, Patrick, Westbrook & Brickman, LLC and Smith, Bundy, Bybee & Barnett, PC have significant experience in class action and construction defect litigation proceedings throughout the United States. Further, there is no reason to believe that antagonism or conflicts of interest exist between Plaintiffs and the proposed Settlement Class. Plaintiffs, like all proposed Settlement Class Members own, owned, or are responsible for upkeep and repair of MIWD Product, and seek to maximize their recovery.

Therefore Rule 23(a)(4) is satisfied.

C. The Proposed Settlement Class Satisfies the Requirements of Rule 23(b).

Rule 23(b)(3) allows class certification when "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The requirements of predominance and superiority "do not foreclose the possibility of mass tort class actions, but merely ensure that class certification in such cases 'achieve economies of time, effort, and expense, and promote … uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Gunnells*, 348 F.3d at 424 (quoting *Amchem Products*, 521 U.S. at 615).

1. Common Questions of Law and Fact Predominate.

"The predominance requirement ensures that a class is 'sufficiently cohesive to warrant adjudication by representation.'" *Melton v. Carolina Power & Light Co.*, 283 F.R.D. 280, 288 (D.S.C. 2012) (quoting *Amchem Products*, 521 U.S. at 623). In order to satisfy the predominance requirement, "[p]laintiffs must show that the issues they seek to litigate are ones that are 'readily susceptible to classwide proof.'" *Lloyd v. GMC*, 266 F.R.D. 98, 105 (D. Md. 2010) (quoting *Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 341 (4th Cir. 1998)). In this case, MIWD's liability can be determined by class-wide proof, given that the same course of alleged conduct by MIWD – *i.e.* the same manufacturing, marketing, advertising, warranting, and selling of defective Windows utilizing glazing tape– forms the basis of all of the Settlement Class Members' claims.

2. Class Resolution of this Action is Superior to Other Methods of Adjudication.

In order to determine whether the class action device is the superior method of adjudicating these claims, Rule 23(b)(3) enumerates four factors for consideration: (1) the class members' interests in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already begun by or against class members; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the likely difficulties in managing a class action. Fed. R. Civ. P. Rule 23(b)(3). "The Supreme Court explained in *Amchem* that when dealing with a settlement only class pursuant to Rule 23(e), a district court need not inquire whether the case, if tried, would present intractable management problems." *Gunnells*, 348 F.3d at 440 (internal quotes omitted). It is well settled that "the policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Id.* (quoting *Amchem Products*, 521 U.S. at 617).

This case presents a disincentive to pursue individual lawsuits because the prospect of small individual recoveries is dwarfed by the cost of litigation, which includes collection and presentation of common proof that is required to establish MIWD's liability. If each Class Member were required to sue MIWD individually, then each would also have to present evidence that MIWD Products are defective, which requires extensive discovery, engineering work and testing, and expert testimony. Rather, since this action arises from an alleged common defect without variation across the Settlement Class, this case is a quintessential one for aggregate treatment.

VI. THE PROPOSED NOTICE PLAN SHOULD BE APPROVED

According to Rule 23, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Notice of a proposed settlement to class members must be the "best notice practicable." *See* Fed. R. Civ. P. 23(c)(2)(B). "[B]est notice practicable" means "individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). The Notice provided for in the Agreement has been developed with the thought of providing the most comprehensive notice possible, with a reach that more than satisfies federal guidelines.

The proposed Notice provides clear and accurate information as to: (1) the nature and principal terms of the Agreement, including the monetary and other relief the Settlement will provide Settlement Class Members; (2) the procedures and deadlines for opting out of the Settlement or submitting objections; (3) the consequences of taking or foregoing the various options available to Class Members; (4) the date, time and place of the Final Approval Hearing; (5) the maximum amount of attorneys' fees and costs that may be sought by Class Counsel, pursuant to Fed. R. Civ. P. 23(h); and (6) the identities and contact information for Class Counsel, counsel for MIWD, and the Court.

In this case, Notice will include sophisticated marketing efforts to provide adequate notice to absent Settlement Class Members. Notice will utilize the most reliable and modern technologies to provide notice to users who are unknown. Furthermore, Notice will meet all necessary legal requirements and provide a comprehensive explanation of the Settlement in layman's terms. Specifically, Notice to Settlement Class Members shall include: publication of summary notices; mailed notice to those potential Settlement Class Members who can be identified by the Parties through reasonable efforts; notice to known distributors; press release(s);

and establishment of a Settlement website. In addition, the Claims Administrator shall mail a long-form notice to anyone requesting one. The Notice Program complies with the standards of fairness, completeness, and neutrality required of a settlement class notice disseminated under authority of the Court. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION, FOURTH (2008) § 21.311-21.312. As a result, Plaintiffs respectfully request the Court direct Notice to all Settlement Class Members.

VII. A FINAL APPROVAL HEARING SHOULD BE SCHEDULED

The Court should schedule a Final Approval Hearing to consider all required information to determine that class certification is proper and the settlement should be approved. *See* MANUAL FOR COMPLEX LITIGATION, Fourth § 21.633 (2008). The Final Approval Hearing will provide a forum for proponents and opponents to explain, describe, or challenge the terms and conditions of the class certification and settlement, including the fairness, adequacy, and reasonableness of the settlement. Accordingly, Plaintiffs request that the Court schedule the Final Approval Hearing for a date no earlier than one hundred days after Preliminary Approval.

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter an Order (a proposed form of which is attached to the Motion as Exhibit C) conditionally certifying the Settlement Class pursuant to Fed. R. Civ. P. 23 for settlement purposes only. Additionally, Plaintiffs request that the Court enter an Order (1) preliminarily approving the terms of the Settlement as within the range of fair, adequate, and reasonable terms; (2) approving the notice program set forth in the Agreement and approving the form and content of the Notices of the Settlement; (3) approving the procedures for Settlement Class Members to exclude themselves from the Settlement Class or to object to the Settlement; (4) designating Class Counsel as counsel

for the Settlement Class; (5) enjoining all Settlement Class Members, unless and until they have timely and properly excluded themselves from the Settlement Class, from participating as a plaintiff or a class member in any other lawsuit or proceeding in any jurisdiction based on, relating to, or arising out of any MIWD Window; and (6) scheduling a final approval hearing for a date no earlier than one hundred days (100) days after Preliminary Approval.

Dated: January 26, 2015

Respectfully submitted,

/s/ Daniel K. Bryson
Daniel K Bryson
WHITFIELD BRYSON & MASON LLP
900 West Morgan Street
Raleigh, NC 27603
919-600-5002
Email: dan@wbmllp.com

Justin Lucey
JUSTIN O'TOOLE LUCEY, PA
415 Mill Street
Mt. Pleasant, SC 29464
843-849-8400
Email: jlucey@lucey-law.com

Counsel for Homeowner Plaintiffs

/s/ H. Blair Hahn
H. Blair Hahn, Esquire
RICHARDSON, PATRICK,
WESTBROOK, & BRICKMAN, LLC
1037 Chuck Dawley Blvd., Bldg. A
Mt. Pleasant, SC 29464
Telephone: (843) 727-6500

W. H. Bundy, Jr., Esquire
SMITH, BUNDY, BYBEE &
BARNETT, P.C.
Post Office Box 1542
Mt. Pleasant, SC 29465-1542
Telephone: (843) 881-1623
Counsel for Contractor/Construction
Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent via U.S. first class mail to those indicated as non-registered participants, this 26th day of January, 2015.