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

IN RE: MI WINDOWS AND DOORS INC. PRODUCTS LIABILITY LITIGATION	))))	MDL No. 2333 No. 2:12-mn-00001-DCN

PLAINTIFFS' SUPPLEMENGTAL MEMORANDUM
IN SUPPORT OF PRELIMINARY APPROVAL OF SETTLEMENT

Plaintiffs submit this supplemental memorandum in support of preliminary approval of the proposed settlement and national settlement class. As set forth in full below, this action satisfies the typicality requirement because the Class Representatives, like all class members whom they represent, claim that their MIWD windows are defective and fail for the same reason – the failure of glazing tape and sealant. The Class Representatives further seek relief in the form of repair and replacement, again an interest shared by all class members. This action also fully satisfies the predominance requirement. As the Court is asked to consider a settlement class, variations in state law that could affect the manageability of a trial class are not relevant here. Moreover, in this case, there is hardly any variation in state law, much less the sort of extreme variation that might threaten a proposed settlement class. For all these reason, as detailed below, and for the reasons previously set forth in Plaintiffs' Memorandum in Support of Motion for Preliminary Approval, the Motion for Preliminary Approval should be granted.

ARGUMENT

I. The Purpose of a Preliminary Approval Hearing is to Determine that a Settlement is Fair, Reasonable and Adequate and only a Preliminary Determination regarding Class Certification is Required.

The approval of a class-action settlement is governed by Rule 23(e)(2), which specifically requires that a district court approve a settlement agreement only "after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The court's goal at the preliminary fairness hearing is to assess whether there is "'probable cause' to submit the proposal to members of the class and to hold a full-scale hearing on its fairness." *In re Am. Capital S'holder Derivative Litig.*, 2013 WL 3322294, at *3 (D. Md. June 28, 2013) (quoting Manual for Complex Litigation § 1.46 (5th ed.1982)).

The Advisory Committee's notes to the 2003 Amendments do contemplate that "the decisions on certification and settlement" may "proceed simultaneously." Fed. R. Civ. P. 23(e) advisory committee's notes (2003 amendments). Though the exact process a district court should follow when presented with a "settlement class" is not prescribed by Rule 23(e), trial courts may and often do conditionally or temporarily certify a class at the preliminary approval stage, reserving final judgment on the class certification decision until a full record has been developed after the fairness hearing and the motion for final approval. *See, e.g., In re Nat. Football League Players Concussion Injury Litig.*, 775 F.3d 570 (3d Cir. 2014) (a district court's order, which "conditionally certified" a proposed settlement class and subclasses for settlement purposes only, was not appealable as an interlocutory order that granted or denied class-action certification); *In re Mid-Atl. Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1381 (D. Md. 1983) (preliminarily approving a settlement in its entirety and conditionally determining a temporary settlement class.) At the preliminary approval stage, a court that conditionally certifies a class provides a

"'preliminary determination' regarding class certification for a settlement class in order to provide notice to absent class members and that they are reserving the certification decision for a later date." *In re Nat. Football League.*, 775 F.3d at 584. District courts always have the ability to amend and alter an order before final judgment under Rule 23(c)(1)(C). *Id.*

As the Third Circuit recently recognized in *In re Nat. Football League*, "[t]he *preliminary* analysis of a proposed class is therefore a tool for settlement used by the parties to fairly and efficiently resolve litigation," which "affords defendants the opportunity to determine whether there will be sufficient participation in the class before certifying the class and dispersing any settlement fund. *Id.* at 583. Thus, a settlement class offers defendants the opportunity to engage in settlement negotiations without conceding any of the arguments they may have against class certification. *See, e.g., Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 601–02, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (discussing case where complaint, answer, proposed settlement agreement, and joint motion for conditional certification of settlement class were all filed on same day). As stated in *Amchem*, "all Federal Circuits recognize the utility" of settlement classes as a means to facilitate the settlement of complex nationwide class actions. Id. at 601-02. (stating also that "[a]mong current applications of Rule 23(b)(3), the 'settlement only' class has become a stock device") (citing T. Willging, L. Hooper, & R. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 61–62 (1996) (noting large number of such cases in districts studied)).

II. The Court Should Preliminarily Certify The Settlement Class.

A. The Claims of the Class Representatives are Typical of the Claims of the Class.

Rule 23(a) requires that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). *See also Wal-Mart Stores*, 131 S.Ct.

at 2551 n.5. "[W]hile the commonality requirement focuses on the claims of the class as a whole, the typicality requirement focuses on the named plaintiff's claim." *Tatum v. R.J. Reynolds Tobacco Co.*, 254 F.R.D. 59, 64 (M.D.N.C.2008). The typicality inquiry works "to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals." *Prudential*, 148 F.3d at 311; *see also In re Control Data Corp. Sec. Litig.*, 116 F.R.D. 216, 220 (D. Minn. 1986) (citations omitted). The requirement of this subdivision of the rule, along with the adequacy of representation requirement set forth in subsection (a)(4), is designed to assure that the interests of unnamed class members will be protected adequately by the named class representative. *See e.g., General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147 (1982); *Prudential II*, 148 F.3d at 311; *Asbestos School Litigation*, 104 F.R.D. at 429-30. "[T]he appropriate analysis of typicality must involve a comparison of the plaintiffs' claims or defenses with those of the absent class members." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 467 (4th Cir. 2006). "A sufficient nexus is established [to show typicality] if the claims or defenses of the class and class representatives arise from the same event or pattern or practice and are based on the same legal theory." *Serzone Products*, 231 F.R.D. at 238 (quotation omitted). But "[t]he class representatives and class members need not have suffered identical injuries or damages." *Id.* (citations omitted).

Applying the legal standard for typicality set forth *supra*, the Class Representatives are typical of the absent Class Members because they each own homes containing MIWD's Windows that have prematurely failed and caused damage. Individual variations among the Class Representatives and Class Members do not render the Class Representatives' claims atypical of those of the Class. The claims of the Class Representatives and each of the Class Members are predicated on the failure of Windows due to the glazing tape and sealant. MIWD's liability for the

resulting damage to each Class Member does not depend on the individual circumstances of the Class Members. Rather, the Master Complaint alleges that MIWD's conduct in manufacturing, marketing and selling the Windows was unlawful and gives rise to liability to all persons who, like the Class Representatives, experienced failure of the Windows prior to the expiration of their warranted life. In order to prevail, therefore, the Class Representatives and each Class Member will be required to make the same factual presentation and legal argument with respect to the common questions of liability cited earlier, regardless of the individual circumstances which may affect their ability to prove individual causation and amount of damages on an individualized basis. '"[F]actual differences will not render a claim atypical if the claim arises from the same . . . practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory.'" *Beck v. Maximus, Inc.*, 457 F.3d 291, 296 (3d Cir. 2006) (quoting *Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994)). Accordingly, the typicality requirement of the rule is satisfied.

The legal claims of the Class Representatives are similar, if not identical, to those of the absent class members across the County because they possess the same interest and suffer the same types of harms as all absent class members. All of these Class Representatives' claims arise from the same common nucleus of operative facts regarding the manufacturing, marketing and selling of the Windows. Class Representatives and the absent class members seek to recover based upon identical legal theories, namely breach of warranties or negligence in the manufacturing of the Windows, satisfying the typicality requirement of Rule 23(a)(3). See *Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002) ("If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality.*"); See also* Exhibit A identifying Class Representatives and their causes of action against MIWD.

Further, as identified in Exhibit A, the Class Representatives' claims arose out of MIWD's breach of express warranties. As shown through this Court's orders, an express warranty is established in each and every state when a manufacturer makes "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." *See, e.g,. In re MI Windows & Doors, Inc. Products Liab. Litig.*, No. 2:12-CV-02238-DCN, 2012 WL 4761435, at *4 (D.S.C. Oct. 3, 2012) (discussing Pennsylvania's warranty law); *In re MI Windows & Doors, Inc. Products Liab. Litig.*, No. 2:12-CV-02860-DCN, 2013 WL 1442332, at *3 (D.S.C. Apr. 9, 2013) (discussing Kansas warranty law); *In re MI Windows & Doors, Inc. Products Liab. Litig.*, No. 2:11-CV-00167-DCN, 2012 WL 5408563, at *4 (D.S.C. Nov. 6, 2012) (discussing South Carolina warranty law); *In re MI Windows & Doors, Inc. Products Liab. Litig.*, No. 2:12-CV-01261-DCN, 2013 WL 1363845, at *5 (D.S.C. Apr. 3, 2013) (discussing New York warranty law); *Kennedy v. MI Windows & Doors, Inc.*, No. 2:12-CV-2305-DCN, 2013 WL 4436408, at *3 (D.S.C. Aug. 15, 2013) (discussing Illinois warranty law); *In re MI Windows & Doors, Inc. Products Liab. Litig.*, No. 2:12-CV-01256-DCN, 2012 WL 6674522, at *2 (D.S.C. Dec. 21, 2012) (discussing Wisconsin warranty law). Therefore, the legal claims are typical in each of the states.

Because the Court is presented with a settlement class certification, it should not be "concerned with formulating some prediction as to how [variances in state law] would play out at trial, for the proposal is that there be no trial." *Ins. Broker.*, 579 F.3d at 269 (internal citations & quotations omitted). *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 303, 2011 U.S. App. LEXIS 25185, 61, 2011-2 Trade Cas. (CCH) P77,736, 81 Fed. R. Serv. 3d (Callaghan) 580 (3d Cir. N.J. 2011).

For instance, in *In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1054-1055, 2012 U.S. Dist. LEXIS 37326, 35-36, 2012 WL 948365 (S.D. Tex. 2012), the Court stated:

> District courts are divided as to when variations in state law in a multistate class action defeat typicality. In *Stirman*, the Fifth Circuit **held** that significant variations in state law may preclude a finding of typicality. "Given the differences among the state laws, it cannot be said that [the class representative]'s claims are 'typical' [36] of the [multistate] class as it is currently defined [.]" 280 F.3d at 562. The variations in *Stirman* were similar to those in *Sullivan*: certain states did not recognize the claim that the class representatives asserted. *See id.* Such claim-dispositive variations are readily distinguishable from such differences as dissimilarities in specific claim elements that must be proven at trial, or differences in burdens of proof. As in *Overka*, the state-law claims that the Consumer Plaintiffs assert in this case—negligence, breach of contract, and violations of state consumer-protection laws—"are recognized in some form in all jurisdictions and therefore available for all [class members.]" 265 F.R.D. at 18-19. Despite possible state-by-state variations in the elements of these claims, they arise from a single course of conduct by Heartland and a single set of legal theories. *James*, 254 F.3d at 571; *see also Norwood v. Raytheon Co.*, 237 F.R.D. 581, 588 (W.D. Tex. 2006) (finding typicality met because "general causation and general negligence do not depend on the nature of individual class members' claims"). The typicality requirement of Rule 23(a) is satisfied.

While there are various cases where variations in state law defeated class certification, these cases involved trial classes as opposed to settlement classes. See e.g. *Stirman v. Exxon Corp.*, 280 F.3d 554 (5th Cir. 2002) (reversing trial class certification); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002) (reversing trial class certification of a nationwide class); *In re Digitek Products Liab. Litig.*, No. MDL 2:08-MD-01968, 2010 WL 2102330, at *18 (S.D.W. Va. May 25, 2010) (denying certification of a nationwide trial class action); *In re Panacryl Sutures Products Liab. Cases*, 263 F.R.D. 312 (E.D.N.C. 2009) (denying certification of a nationwide trial class); *In re Vioxx Products Liab. Litig.*, 239 F.R.D. 450 (E.D. La. 2006) (denying certification of a nationwide trial class).

By contrast, numerous courts have certified national settlement classes in cases involving the state law of multiple states. See, e.g,. *In re Chinese-Manufactured Drywall Products Liab.*

Litig., No. 11-CV-1363, 2012 WL 92498, at *10 (E.D. La. Jan. 10, 2012) (certifying a settlement class of all homeowners affected by Chinese manufactured drywall); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1018 (9th Cir. 1998) (affirming a national settlement class action); *Bezdek v. Vibram USA Inc.*, No. CIV.A. 12-10513-DPW, 2015 WL 223786, at *1 (D. Mass. Jan. 16, 2015) (certifying a national settlement class of consumers who purchased FiveFingers "barefoot" footwear); *In re CertainTeed Fiber Cement Siding Litig.*, 303 F.R.D. 199, 226 (E.D. Pa. 2014) (certifying a national settlement class of homeowners with CertainTeed Siding); *In re CertainTeed Corp. Roofing Shingle Products Liab. Litig.*, 269 F.R.D. 468, 492 (E.D. Pa. 2010) (certifying a national settlement class of homeowners with CertainTeed Shingles); *In re Zurn Pex Plumbing Products Liab. Litig.*, No. 08-MDL-1958 ADM/AJB, 2013 WL 716088, at *9 (D. Minn. Feb. 27, 2013) (certifying a national settlement class of all persons who own homes with Zurn pipe fittings); *In re Uponor, Inc., F1807 Plumbing Fittings Products Liab. Litig.*, No. 11-MD-2247 ADM/JJK, 2012 WL 2512750, at *2 (D. Minn. June 29, 2012) aff'd, 716 F.3d 1057 (8th Cir. 2013) (certifying a national settlement class of Uponor pipe fittings). Accordingly, this matter should be certified for settlement purposes as well.

B. Common Questions of Fact and Law Predominate

As a threshold matter, this Court need not find that common issues of fact and law predominate for the purpose of granting preliminary approval. Section 21.632 of the Federal Judicial Center's Manual for Complex Litigation (Fourth) explains that when combining a certification and preliminary fairness hearing:

> The judge should make a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b) . . . . The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.

Manual for Complex Litigation § 21.632 (4th ed.2004). (emphasis added). Thus, if this Court finds that any of the other requirements of Rule 23(b) are satisfied, a predominance analysis is unnecessary until the record has been completed in this case following a fairness hearing and Plaintiffs' motion for final approval. Nonetheless, Plaintiffs' claims easily meet the predominance requirement of Rule 23(b)(3).

Admittedly, the predominance test of Rule 23(b)(3) is more demanding than Rule 23(a)'s commonality requirement. *See Amchem*, 521 U.S. at 623-24 & n.18. For a settlement class action, the Rule 23(b)(3) "inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." *Id*. at 623. However, for the practical purpose of promoting settlement, the Fourth Circuit recognizes that the predominance requirement of Rule 23(b)(3) is applied with less force at the settlement stage than when the propriety of class certification is disputed. *See Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 440 (4th Cir. 2003) (explaining that "settlement is relevant to class certification" under *Amchem* and that "Rule 23(e) affects a court's evaluation of predominance.") The same is true in the Ninth Circuit, which, in *Hanlon v. Chrysler Corp.,* for example, approved a settlement class relating to an automobile defect that involved varying state laws of products liability, breaches of express and implied warranties, and "lemon laws." 150 F.3d 1011, 1022–23 (9th Cir. 1998). There, the court held that common factual questions, particularly the defendant's prior knowledge of the design defect, overrode any variations in state law.

As detailed in Plaintiffs' Motion for Preliminary Approval, this case involves a single dominant factual issue from which all legal issues flow: the sustainability and performance **of** Defendant's glazing tape and sealant. Pls.' Mot. 17. The performance of the glazing tape and sealant does not involve third-party installers, homeowners' failure to properly maintain the

product, or any other factors outside of Defendant's control. And while Brooks *v. GAF Materials Corp.*, 301 F.R.D. 229 (D.S.C. 2014), involved only a single line of products manufactured at a single plant over a limited period of time, *id.* at 234, here, as in *Brooks*, the predominance requirement is met because single aspect of the product –here, the use of glazing tape and sealant – is common to all class members.

This case is readily distinguishable from *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 149 (4th Cir. 2001). First, *Lienhart* did not involve a settlement class. Id. at 141. Moreover, in *Lienhart*, the damages plaintiffs were seeking due to a failure of defendant's product were arguably attributable to third-parties (e.g., installers) that are not at issue in the instant case. *Id.* at 148. This case involves damages caused by a failure of defendant's glazing tape and sealant, which was incorporated into the windows at the time of manufacture and was installed unaltered in class members' homes.

In cases like this one, where several common questions of law and fact arise from a central issue, courts routinely find predominance in nationwide class action settlements. *See, e.g., In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1059 (S.D. Tex. 2012) (certifying class on basis that "several common questions of law and fact" arose from a "central issue: [defendant's] conduct before, during, and following the data breach, and the resulting injury to each class member from that conduct.") *see also, O'Keefe v. Mercedes-Benz United States, LLC*, 214 F.R.D. 266, 290-292 (E.D. Pa. 2003) (certifying nationwide class because of "one core liability issue that dominates this case and predominates over any class member's individual circumstances. [Defendant] is accused of failing to inform its customers about the risks of using conventional oil . . . and actively concealing that risk. Such a scheme common to all plaintiffs predominates over individual issues.")

Here, the settlement posture of this case and the single, predominant issue driving the litigation and defendant's liability militate towards a finding of predominance.

CONCLUSION

For the foregoing reasons, and those reasons set forth in Plaintiffs' Motion for Preliminary Approval, Plaintiffs respectfully request that the Court grant the motion for preliminary approval.

Dated: February 26, 2015

Respectfully submitted,

/s/ Justin Lucey
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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 February 2015.

/s/ Justin Lucey