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

IN RE MI WINDOWS AND DOORS, INC., PRODUCTS LIABILITY LITIGATION	2:12-mn-00001-DCN MDL No. 2333 Hon. David C. Norton

RESPONSE TO OBJECTION FILED
BY MARK KIDNIE AND JOANNE BOUDREAU

Defendant MI Windows and Doors, Inc. ("MIWD"), through its undersigned attorneys, hereby submits the following response to the objection filed by Mark Kidnie and Joanne Boudreau (together, the "Objectors") (ECF No. 251).

RELEVANT PROCEDURAL HISTORY

On February 27, 2015, the Court entered an Order Preliminarily Approving Settlement, which granted preliminary approval to the nationwide class action settlement (the "Settlement") in this action (the "Order"). (ECF No. 227). The Settlement applies to "MIWD Product," which is defined to include "any and all MIWD windows that are glazed with Glazing Tape and were manufactured or sold between July 1, 2000 and March 31, 2010." (ECF No. 215-1 at 10 ¶ 36). On May 28, 2015, the Objectors filed an objection to the Settlement. (ECF No. 251).

ARGUMENT

I. The Relief Offered in the Settlement Is Fair, Adequate, and Reasonable.

The Objectors make several arguments as to why the relief offered by the Settlement Agreement is allegedly insufficient. Specifically, they contend that (1) the compensation provided in Class C of the Homeowner Settlement Class for repairs made prior to Notice is

insufficient; (2) the repairs provided for in Class A of the Homeowner Settlement Class for Insulated Glass Units ("IGU") are insufficient; and (3) the Objectors are not entitled to certain relief under the Settlement because they maintain and clean their Windows and have no evidence of "Visible Residue Lines." The Objectors' criticisms regarding the adequacy of the Settlement should be disregarded by the Court as they have no meaningful bearing on whether the Settlement should be approved.

District courts have "wide discretion in deciding whether or not to certify a proposed class[.]" *In re A.H. Robins Co.*, 880 F.2d 709, 728 (4th Cir. 1989). A class action settlement may be granted final approval if, after a hearing, it is found to be "fair, reasonable, and adequate." *Alvarez v. Keystone Plus Constr. Corp.*, 303 F.R.D. 152, 159 (D.D.C. 2014). The Fourth Circuit has held that "Rule 23(e) require[s] the court to consider the fairness and adequacy of the settlement primarily with regard to the interests of the plaintiff class members." *In re Jiffy Lube Securities Litigation*, 927 F.2d 155, 160 (4th Cir. 1991). The court's decision should be "informed by the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429, 434 (11th Cir. 2012) (emphasis added). The court "may rely upon the judgment of experienced counsel for the parties" and, "[a]bsent fraud, collusion, or the like, the district court should be hesitant to substitute its own judgment for that of counsel." *Id.* (internal quotations omitted). Under this standard, it is irrelevant that the Objectors themselves are not satisfied with the relief provided for in the Settlement: "The test is whether the settlement is adequate and reasonable and not whether a better settlement is conceivable." *In re Vitamins Antitrust Litig.*, No. 99-197 TFH, 2000 WL 1737867, at *2 (D.D.C. Mar. 31, 2000). *See also In Re Mego Fin. Corp. Secs. Lit.*, 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement that paid

approximately one-sixth of potential recovery); *Jenkins v. Trustmark Nat. Bank*, 300 F.R.D. 291, 304 (S.D. Miss. 2014) ("[A] satisfactory settlement . . . could . . . amount to a hundredth or even a thousandth part of a single percent of the potential recovery."); *In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) (approving settlement where class received recovery of approximately 6% of total potential recovery).

Moreover, a "settlement must be evaluated taking into account the uncertainty and risks involved in litigation and in light of the strength of the claims and possible defenses." *Jenkins*, 300 F.R.D. at 304 (internal quotation omitted). The court should consider "the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation." *Id.* at 303. A court should weigh "the immediacy and certainty of substantial settlement proceedings against the risks inherent in continued litigation." *Brunson v. Louisiana-Pac. Corp.*, 818 F. Supp. 2d 922, 926 (D.S.C. 2011). Stated differently, "[i]t has been held proper to take the bird in the hand instead of a prospective flock in the bush." *Jenkins*, 300 F.R.D. at 304 (internal quotations omitted). *See also In re Wells Fargo Wage & Hour Employment Practices Litig. (No. III)*, 18 F. Supp. 3d 844, 852 (S.D. Tex. 2014) (recognizing that "compromise is part of a settlement, and all opt-in plaintiffs are receiving the benefit of a sum certain now as opposed to a potential recovery at some later unknown date").

Here, the Objectors fail to take into account that a settlement is a compromise. They instead take the position that the homeowners should be given greater benefits simply because the Objectors subjectively believe that the relief provided in the Settlement is insufficient. As set forth above, this is not a valid reason to strike down a class action settlement. *See, e.g., In re Vitamins Antitrust Litig.*, 2000 WL 1737867, at *2. The Settlement Agreement was negotiated

by competent counsel through arms-length negotiations that were overseen by several mediators, including a judge of this Court. The Court is entitled to rely on the judgment of such counsel and should hesitate to "substitute its own judgment for that of counsel." *See Nelson*, 484 F. App'x at 434.

The Objectors also fail to take into account any of the weaknesses in the Plaintiffs' claims or the risks and expenses involved in litigation. As this Court is aware, MIWD successfully moved to dismiss several of the Plaintiffs' complaints, both in part and in whole.[1] For example, the Plaintiffs' breach of express warranty claims were often dismissed by the Court because the Plaintiffs could not show that "MIWD's express warranty was part of the basis of the bargain." *Walsh v. MI Windows & Doors, Inc.*, 2:12-cv-2238-DCN, Docket Entry No. 44 at 9 (D.S.C. Oct. 3, 2012). As such, if the Settlement Agreement were not approved and this action proceeded to trial, a significant risk exists that none of the homeowners would have valid express warranty claims and would not be entitled to relief under the warranty. The Settlement Agreement eliminates this risk and provides the homeowners with even greater relief than they would be entitled to under the express warranty by eliminating the basis of the bargain requirement and eliminating the need to prove proximate cause. The Settlement also permits

[1] *See, e.g.*, *Wani v. MI Windows & Doors, Inc.*, 2:12-cv-1255-DCN, Docket Entry No. 43 (D.S.C. Sept. 27, 2012) (dismissing claims for unjust enrichment, fraudulent concealment, and violation of the Ohio Consumer Sales Practices Act); *Meifert v. MI Windows & Doors, Inc.*, 2:12-cv-1256-DCN, Docket Entry No. 39 (D.S.C. Oct. 11, 2012) (dismissing in part claim for negligence and dismissing claims for breach of express warranty and declaratory relief); *Hildebrand v. MI Windows & Doors, Inc.*, 2:12-cv-1261-DCN, Docket Entry No. 37 (D.S.C. Nov. 7, 2012) (dismissing claims for unfair and deceptive trade practices under New York law, negligence, unjust enrichment, and declaratory relief); *Hildebrand v. MI Windows & Doors, Inc.*, 2:12-cv-1261-DCN, Docket Entry No. 49 (D.S.C. Apr. 3, 2013) (dismissing claims for unfair and deceptive trade practices under New York law, breach of express warranty, unjust enrichment, and declaratory relief); *Walsh v. MI Windows & Doors, Inc.*, 2:12-cv-2238-DCN, Docket Entry No. 44 (D.S.C. Oct. 3, 2012) (dismissing claims for breach of express warranty, breach of implied warranty, and declaratory relief).

homeowners to recover for consequential water damages, which are excluded by the language of the express warranty. (*See* ECF No. 215-1).

As the foregoing analysis makes clear, there is no merit to the Objectors' contention that Class Counsel should have negotiated a "better deal" and a higher consequential damage payment for homeowners who made repairs prior to Notice (Class C of the Homeowner Settlement Class). (ECF No. 251 at 4). Nor is there any merit to the Objectors' contention that the repairs for IGUs consist of nothing more than a "tube of caulk" and that the negotiated relief is somehow insufficient. (ECF No. 251 at 5). The Settlement Agreement specifically states that with respect to eligible claimants, the glass in failed insulated glass units will be replaced. (ECF No. 215-1 at 27). Thus, the Objectors misstate the nature of the repair and this Court should disregard the objection. Finally, there is no merit to the Objectors' contention that because they maintain and clean their Windows, they are deprived of the settlement benefits associated with "Visible Residue Lines." (ECF No. 251 at 4). Put simply, if the Windows do not suffer from a defect, there is no basis for compensation. Weighing "the immediacy and certainty of substantial settlement proceedings against the risks inherent in continued litigation" shows that the relief provided under the Settlement Agreement is fair, adequate, and reasonable and the Objectors have failed to show otherwise. *See Brunson*, 818 F. Supp. 2d at 926. As such, the Court should disregard the Objectors' contentions.

II. The Claims Process Is Fair and Reasonable.

The Objectors contend that the claims process and, specifically, the requirement that claimants provide either photographic or video proof, are "ridiculously restrictive" as "condensation between the panes of glass" is "very difficult to photograph." (ECF No. 251 at 4). As set forth below, the Objectors' contentions have no merit. The Objectors seek to be taken at

their word that they are entitled to relief under the Settlement Agreement without having to provide any evidence whatsoever to support their claim. *See South Carolina Nat'l Bank*, 139 F.R.D. at 339 ("In assessing the fairness and adequacy of a proposed settlement, 'there is a strong initial presumption that the compromise is fair and reasonable.'") (citation omitted); see also MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004) §§ 21.61-62. Their objections "ignore the rule that a plaintiff in a civil lawsuit bears the burden of proving liability and damages in his or her case" and "[c]lass action status does not alter this basic principle." *Mangone v. First USA Bank*, 206 F.R.D. 222, 234 (S.D. Ill. 2001). While courts recognize that there are limits to what may be demanded of class members, "it is likewise true that class members are not entitled to an effortless claim process." *In re WorldCom, Inc.*, 347 B.R. 123, 153 (Bankr. S.D.N.Y. 2006). Courts routinely uphold claims procedures that require class members to submit photographs evidencing the alleged defect. *See Pelletz v. Weyerhaeuser Co.*, 255 F.R.D. 537, 544 (W.D. Wash. 2009) (finding claims process that required class members to submit photographs to show existence of alleged defect was reasonable). Moreover, condensation is not an Identifiable Condition that needs to be photographed in order for a homeowner to be entitled to relief. (*See* ECF No. 215-1 at 9-10). As such, the Court should disregard the Objectors' objections.

III. The Settlement Agreement Does Not Require Homeowners to Look for Damage Behind Walls.

The Objectors contend that the Settlement is unreasonable because it requires homeowners to remove all of their Windows to determine whether water damage is located behind walls. (ECF No. 251 at 4). The Objectors misunderstand the Settlement Agreement. It appears that the Objectors have interpreted the Identifiable Condition regarding "interior water penetration" to mean water penetration behind a wall. (*See* ECF No. 215-1 at 11). This is incorrect. The "interior water penetration" referred to in the Identifiable Conditions means the

interior of a home - not the interior of a wall. There is no need for any homeowner to remove interior finishes to qualify for relief under the Settlement. As such, the Objectors' contentions have no merit.

IV. The Settlement Agreement Accounts for Potential Future Harm.

The Objectors contend that the Settlement Agreement is unfair because it allegedly does not account for potential future harm. (ECF No. 251 at 5). This is incorrect. Under the Settlement Agreement, Homeowner Settlement Class Members whose Windows have not exhibited any of the conditions that would entitle them to relief during the defined Claim Periods (ECF No. 215-1 at 6-7) can nevertheless file a warranty claim with MIWD if the Windows exhibit warrantable conditions in the future. (ECF No. 215-1 at 33-36). As to such future warranty claims, the Settlement Agreement eliminates any requirement that Class Members establish reliance or prove that they saw the warranty prior to purchase of the Windows. The Settlement Agreement also provides for third party review (by Epiq) of any warranty decision if a Class Member disagrees with MIWD's determination. As such, there is no merit to the Objectors' contention that the Settlement Agreement does not account for future potential harm.

V. The Settlement Agreement Provides an Expedited Claims Process.

The Objectors contend that the Settlement Agreement is unreasonable because homeowners that intend to replace all of their Windows must wait until 2016 to do so. (ECF No. 251 at 5). The Objectors ignore the provision in the Settlement Agreement that provides for an expedited claims process: "An expedited initial Claim review for special circumstances (e.g., repairs in process or property subject to a contract of sale) will be available upon Claimant request and subject to the availability of Epiq." (ECF No. 215-1 at 45). Thus, the Objectors' contentions should be disregarded by the Court.

VI. Requiring Notice to Subsequent Purchasers Is Reasonable.

The Objectors contend that the Settlement is unreasonable because it allegedly requires Class Members to "disclose our defective windows to prospective buyers." (ECF No. 251 at 5). The Objectors mischaracterize the Settlement. As set forth in the Claims Form, a Class Member that makes a claim under the Settlement agrees to notify any subsequent purchaser of the property that the claim was made and to make any disclosures required under the law. The disclosure requirement applies only to Class Members that make claims under the Settlement and does not, as the Objectors contend, require Class Members to disclose that the property contains "defective windows." Rather, the Class Members must disclose that they have a claim under the Settlement in order for future purchasers to understand their potential rights, if any, under the Settlement. As such, the limited disclosure requirement is reasonable and the Objectors' contentions have no merit.

CONCLUSION

For the foregoing reasons, MIWD respectfully requests that the Court overrule the objection filed by Mark Kidnie and Joanne Boudreau.

Dated: June 25, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2015, a copy of the foregoing answer was filed electronically, such that notice of this filing should be sent by operation of the Court's electronic filing system to all parties and counsel of record.

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