**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF SOUTH CAROLINA**
**GREENWOOD DIVISION**

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| **In re:**<br>**Building Materials Corporation of America Asphalt Roofing Shingle Products Liability Litigation** | **MDL No. 8:11-mn-02000-JMC** |
| **This Document relates to:**<br><br>**CARROLL THOMPSON, on behalf of himself and all others similarly situated,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**GAF MATERIALS CORPORATION,**<br><br>**Defendant.** | **Civil Action No. 8:11-cv-00983-JMC** |
| **FIRST BAPTIST CHURCH OF BLAIRSVILLE, on behalf of itself and all others similarly situated,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**GAF MATERIALS CORPORATION,**<br><br>**Defendant.** | **Civil Action No. 8:12-00087-JMC** |
| **JOHN GREEN, on behalf of himself and all others similarly situated,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**GAF MATERIALS CORPORATION,**<br><br>**Defendant.** | **Civil Action No. 8:12-00088-JMC** |

**Plaintiffs' Memorandum In Support Of**
**Motion For Final Approval Of The Mobile Class Action Settlement**

## Introduction

Plaintiffs Carol Thompson, John Green, and Blairsville Baptist Church, through their undersigned counsel, respectfully submit this memorandum in support of their Motion for Final Approval of the Mobile Class Action Settlement with Defendant Building Materials Corporation of America d/b/a GAF Materials Corporation ("GAF" or "Defendant"). Support for the agreement is contained in previous submissions to this Court by the undersigned including the previously filed Memorandum in Support of Preliminary Approval which describes the terms and benefits of the Settlement Agreement. Plaintiffs incorporate these previous submissions and will primarily focus this filing on developments subsequent to the previous submissions.[1]

The Settlement Agreement, which was reached after extensive arms-length negotiations assisted by an experienced mediator[2], provides substantial benefits to a nationwide class of consumers who own property with Timberline® shingles ("Timberline®" or "Shingles") manufactured from 1999 through 2007 at GAF's plant in Mobile, Alabama that may be, according

[1] On December 2, 2014, the Court granted an amendment to the Settlement Agreement, as preliminarily approved, to enable a third party claims administrator ("Third Party Claims Administrator") to assist GAF with some aspects of the claims administration process. The Court's Order granting the amendment provided that the changes were "non-substantive, administrative changes" that "would not affect any evaluation of the settlement by class members." (Docket Entry 53 at ¶ 7 (MDL No. 8:12-cv-0087-JMC).)

[2] Professor McGovern has submitted an affidavit in support of both the Mobile and Non-Mobile Settlement. (Docket Entry 107 (MDL No. 8:11-mn-02000-JMC).)

to allegations in the underlying cases, defective. *See* Settlement Agreement (the "Settlement Agreement," "Settlement" or "Agreement"). Exhibit A.

The Settlement covers the owners of all properties nationwide with Timberline® shingles manufactured at the Mobile, Alabama facility. The Settlement, in acknowledgement of the different claims and procedural postures, contains a subclass for all purchasers located in South Carolina. A separate settlement has been reached for owners of properties with shingles made at the GAF plants other than Mobile. The Settlement creates a claims process providing meaningful cash and replacement benefits to owners of cracked, split, or torn Timberline® shingles based on the size of the roof and extent of any failure (provides for replacement of an entire roof, where more than five percent (5%) of the shingles manifest qualifying damage) and establishes a seven (7) year claim period. Any applicable GAF warranties remain in place for matters not related to shingle cracking, splitting, or tearing.

The Settlement is necessarily a compromise. GAF was prepared to contest liability by showing that its Shingles met industry standards, that most homeowners with Shingles installed had no problems with them, and that other problems caused any failure of the Shingles. GAF also asserted other legal defenses, including that its warranties limited the claims made by Plaintiffs. GAF, absent a Settlement, would also have argued that a class could not be certified, including a

claim that a class action was not manageable, a factor that the Court need not evaluate when considering class certification in the context of a settlement.[3]

On October 20, 2014, the Court granted preliminary approval of the Settlement Agreement, directed the content and manner of notice to Class Members, and scheduled a Final Approval Hearing for April 22, 2015. *See* Order Granting Motion to Certify Class for Settlement Purposes and for Preliminary Approval of Class Action Settlement and Form and Dissemination of Notice to the Class. ECF No. 290 (MDL No. 8:11-cv-0983-JMC); ECF No. 50 (C/A No. 8:12-cv-0087-JMC); ECF No. 50 (C/A No. 8:12-cv-0088-JMC). Notice has been sent to the Class Members in accordance with the Court-approved notice plan and the response has been overwhelmingly favorable.[4]

Consistent with the Court's Preliminary Approval Order, Kinsella Media, Rust Consulting, and Heffler were retained to and did provide notice to the Settlement Class via:

- Direct mail notice to all known owners of Timberline® shingles who had registered a warranty with, or made warranty claims to, GAF for their Shingles;
- Published notice in leading consumer magazines designed to target home and property owners;
- National cable television advertisements highlighting the settlement;
- Online media efforts through outlets like Facebook; and

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[3] A significant distinction for the South Carolina subclass justifying different terms of compensation was that a South Carolina class had been certified by two different courts and had withstood three separate challenges to decertify the action.

[4] Unless otherwise noted, the meaning of capitalized terms is the same as the definitions provided to those terms in the Settlement Agreement.

- Earned media efforts through a national press release and the settlement web site, www.RoofSettlement.com.

*See* Plaintiffs' Memorandum In Support Of Motion For Final Approval Of Non-Mobile Class Action Settlement, Exhibit C (Declaration of Shannon R. Wheatman in Support of Motions for Final Approval of Class Action Settlement re: Implementation and Adequacy of Notice Program ("Kinsella Declaration")); Exhibit E (Declaration of Kristie Livingston in Support of the Notice Program ("Rust Declaration")); and Exhibit F (Declaration of Michael E. Hamer ("Heffler Declaration")).

Although Class Members have seven years (7) years from the Effective Date[5] of the Settlement to make a claim, many Class Members have already started to contact Heffler, the Third Party Claims Administrator, for information either through the dedicated settlement website, www.RoofSettlement.com, or the toll-free telephone support line (1-866-759-6518), or by phoning Class Counsel directly.

The reaction of the Settlement Class to the proposed Settlement has been overwhelmingly positive. Mobile class counsel estimate that there are 370,000 structures in the United States that have Timberline® Shingles manufactured from 1999 through 2007 at GAF's Mobile plant. There are more structures affected by the Non-Mobile settlement which covers all of the other plants producing Timberline® Shingles from 1998 through 2009. Only nine (9) objections to both the Mobile and Non-Mobile Settlement were received, an extraordinarily small percentage of the Class.

[5] The "Effective Date" of the Settlement refers to the date when an order granting final approval of the Settlement becomes final.

As noted by the Second Circuit in *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005), "If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." 4 Newberg § 11.41, at 108; see also *D'Amato,* 236 F.3d 78, 86–87 (holding that the district court properly concluded that 18 objections from a class of 27,883 weighed in favor of settlement).

Most of these objections were the result of misunderstandings about the Settlement and some were later withdrawn. When examined closely, based upon geography and distribution, only two objections (one additional was filed and withdrawn) likely apply to the Mobile settlement. These objections raise issues which are easily addressed and fairly dealt with by the settlement and should be overruled, as they raise no valid basis for denying final approval to the Settlement.

The terms of the Settlement are eminently fair, reasonable, and adequate and the requirements for final approval are satisfied. This is an excellent Settlement for the Class that provides cash and replacement benefits to qualifying Claimants. The fact that the structure of this Settlement was in part modeled on the nationwide MDL shingle class action settlement in the *CertainTeed Corp. Roofing Products Liability Litigation*, which the Judge approved over the objections of 78 Class members, further supports final approval here. *See In re CertainTeed Corp. Roofing Shingle Prod. Liability Litig.*, 269 F.R.D. 468, 473 (E.D. Pa. 2010) (noting final number of 78 objections remaining after an initial 446 objections were filed).

In addition, the Settlement satisfies the criteria for class certification under Fed. R. Civ. P. 23, and the notice provided to Class Members comported with due process and Rule 23, both as to its content and as to the method of dissemination. Plaintiffs respectfully request that the Court: (a) grant final approval of the proposed Settlement; (b) certify the Settlement Class pursuant to Fed. R.

Civ. P. 23(b)(3); (c) award attorneys' fees and costs as set forth in Plaintiffs' separate Motion for Attorneys' Fees and Expenses and Service Awards; and (d) enter final judgment. Plaintiffs have submitted a proposed Final Approval Order for the Court's consideration.

## Statement of Facts

### A. Summary of Plaintiffs' Allegations and GAF's Defenses.

Plaintiffs allege that certain GAF Timberline® Shingles were defective and did not meet the standards represented in GAF's marketing materials. *See* Complaint at ¶¶ 11, 17, *Brooks, et al. v. GAF Materials Corp.*, 11-cv-00983 (D.S.C.), ECF No. 1 ("Complaint").[6] Plaintiffs claim that while GAF marketed and represented the Shingles to be long lasting and meeting industry standards, the contrary is true: the Shingles were defectively designed and manufactured such that they prematurely failed, causing damage to the underlying structures. *Id.* at ¶¶ 52-73. The outward manifestation of the alleged deterioration of the Shingles is cracking, splitting, and tearing. *Id.* at ¶¶ 47, 73. Plaintiffs claim that the defects were so severe that the Shingles must be repaired or replaced sooner than reasonably expected. *Id.* at ¶¶ 99-100.

GAF denies any fault, wrongdoing, illegal conduct, or liability whatsoever, and has asserted numerous affirmative defenses to Plaintiffs' claims. Among other defenses, GAF denies that its Shingles are problematic and asserts that only a tiny fraction of those with the Shingles have or could be expected to experience a problem. GAF also contends that the Shingles comply with the American Society for Testing and Materials (ASTM) and other requirements of various codes and

[6] Complaints in the other MDL Actions contain similar allegations.

standards agencies. GAF also contends that its written warranties provide proper (and limited) redress where a warranty claim is made.

### B. Procedural History and Discovery

#### a. State Court Litigation Prior to Class Certification, 2006-2010

##### 1. Procedural matters undertaken during this time period

This action began with the filing of a complaint styled Brooks v. GAF in April 2006. GAF filed a notice of removal to federal court on May 26, 2006. Thereafter, by Order of United States District Judge Henry Herlong dated July 24, 2006, plaintiffs' motion to remand the case to the Newberry County Court of Common Pleas was granted. After engaging in discovery, including interrogatories, requests for production of documents, and the taking of GAF depositions, plaintiffs filed an amended complaint in the Newberry County Court of Common Pleas on November 19, 2007, in which they alleged a class action against GAF. GAF filed a notice of removal on December 12, 2007, which was followed by plaintiffs' motion for remand. On December 18, 2007, United States District Judge Herlong granted the motion remanding the case to the Court of Common Pleas for Newberry County, which order was subsequently rescinded.

On December 20, 2007, GAF filed a petition for permission to appeal to the United States Circuit Court for the Fourth Circuit. On January 31, 2008, United States District Judge Herlong granted plaintiffs' motion for remand back to the Court of Common Pleas for Newberry County. On February 7, 2008, plaintiffs' motion for complex case designation was filed. By Order dated April 4, 2008, Chief Administrative Judge Ernest Kinard assigned the case to S.C. Circuit Judge J.

Mark Hayes II for management of discovery, handling of pretrial matters, and the trial of the case. From April 2008 through February 2009, substantial discovery was undertaken by counsel.

On February 27, 2009, plaintiffs moved to certify the case as a class action. Additional discovery was conducted, and a hearing was held on the motion to certify. By Order dated March 30, 2010, Circuit Judge Hayes granted plaintiffs' motion to certify the case as a class action. In addition, by separate Order dated September 20, 2010, Judge Hayes granted plaintiff's motion for partial summary judgment on the cause of action for breach of implied warranty. This was followed by a notice of appeal dated October 4, 2010, by GAF. During the pendency of this notice, plaintiffs moved to amend the complaint to assert that discovery reflected that damages were in excess of $5 million. The motion was granted by Order of Circuit Judge Hayes dated March 30, 2011. A second amended complaint was filed on March 31, 2011, and GAF's answer to said amended complaint was filed on April 15, 2011. Thereafter, GAF filed a notice of removal of the case to the United States District Court on April 25, 2011. Plaintiffs did not make a motion to remand, and this Honorable Court has retained jurisdiction of the case since April 25, 2011.

**2. Discovery undertaken during this time period (2006-2010)**

Substantial discovery and motions practice was undertaken by these parties during the years 2006-2011. During this time period, plaintiffs served seven (7) sets of interrogatories and eight (8) sets of requests for production of documents on GAF. To all of these written discovery requests, GAF provided responses. Approximately 30,000 total pages of documents were produced during the time period April 2006 through April 15, 2011.

Depositions were taken in New Jersey; South Carolina; and, Mobile, Alabama. Also, 30(b)(6) depositions were taken as well as depositions of fact witnesses and plaintiffs' expert, Jim Koontz. The pleadings notebook for the state court proceedings in the possession of plaintiffs' counsel includes 187 entries (including motions filed; memos in support or in opposition to motions; pleadings and amended pleadings; orders of the court; notices of removal and motions to remand, etc.). The depositions taken during this period included the following: Jack Brooks; Ellen Brooks; Richard Pienkos; Adem Chich; J.D. Hasselbach; Kevin Hull; Guy Gimson; Thadd Mays; Sudhir Railkar; Lily Vu; Paul Miller; Michael Ferraro; Natalie Zwahlen; Ken Walton; Adem Chich (2nd deposition); Michael Byrd; Philip Halpin; and, Jim Koontz. In addition, both of plaintiffs' co-lead counsel, as well as two paralegals, spent three days in Mobile, Alabama, looking at the records in the GAF plant during April 2008.

**b. Federal Court Litigation (2011-2014)**

**1. Procedural matters undertaken during this period**

After the case was removed in April 2011, additional counsel was retained in July 2011 by GAF. The law firm of Sullivan & Cromwell in New York City, New York, and three of that firm's attorneys were admitted *pro hoc vice*. A status conference was held in August 2011. Shortly before this, complaints were filed in other states alleging defective Timberline® shingles made by GAF in other states. This Court was assigned by the MDL Court to manage all cases against GAF alleging defects in the Timberline® product. This Court managed thirteen (13) cases in the MDL. The cases for plaintiffs other than Jack Brooks and Ellen Brooks were referred to as "tag-along plaintiffs."

On September 8, 2011, GAF filed a motion for summary judgment and a motion to decertify the class. On October 11, 2011, Plaintiffs Brooks filed an extensive memo in opposition to GAF's motion for summary judgment and to decertify the class.

In January 2012, plaintiffs moved for the Court to adopt administrative orders (pretrial orders and proposed protective orders relating to case management issues).

A status conference was held by the Court on March 14, 2012, prior to which the parties submitted a joint proposed agenda relating to the scheduling argument on GAF's motion for summary judgment and motion to decertify the class, as well as other administrative matters. On March 15, 2012, a scheduling order was entered by the Court. A stipulation for entry of protective order was signed by the Court on April 5, 2012. In early May 2012, this Court conducted a hearing on GAF's motions for summary judgment and to decertify the class. Both plaintiffs and GAF submitted extensive memoranda in support of their respective positions. By Order dated May 31, 2012, this Court denied GAF's request for consideration of the circuit court's order denying summary judgment. This order also granted GAF's motion to reconsider the circuit court order granting class certification. In granting defendant's request for class decertification, the Court noted that it was without prejudice to plaintiffs' right to amend the proposed class definition.

On June 14, 2012, plaintiffs filed a motion to alter or amend the order decertifying the class and, in the alternative, a motion to redefine the class. GAF filed its memorandum in opposition to plaintiffs' motion to reconsider the Court's Order of May 31, 2012. The plaintiffs filed a reply memorandum in support of their motion to alter or amend the decertification order, and on October 19, 2012, this Court granted plaintiffs' motion and certified the class as redefined in her

Order. GAF then filed a motion for clarification and/or reconsideration of the Court's Order of October 19, 2012. The plaintiffs filed an extensive memorandum in opposition to GAF's motion on December 4, 2012, and GAF filed a reply memorandum on December 13, 2012. In its Order dated February 6, 2013, this Court denied GAF's motion to reconsider the court order of October 19, 2012, recertifying the class.

Motions and memoranda were filed by both parties regarding the issue of damaged documents from Hurricane Sandy during February and March 2013. During 2013 and 2014, the parties exchanged written discovery requests and class counsel reviewed voluminous amounts of GAF documents. This review included trips to Massachusetts to review documents damaged by Hurricane Sandy, which had since been frozen to prevent disintegration. On May 15, 2013, this Court entered its Order relating to plaintiffs' motion for an order directing the issuance of a notice to class members. The motion was denied without prejudice to plaintiffs to refile the motion. This Court entered its scheduling order on June 11, 2013. Thereafter, depositions were taken by both parties. Plaintiffs renewed their motion for an order directing the issuance of a notice to class members. On July 24, 2013, this Court granted plaintiffs' motion to issue class notice. A hearing was held telephonically by the Court with counsel relating to the class notice documents in September 2013. On September 16, 2013, the Court entered its order approving class notice. Following this Order, the Plaintiffs then executed the notice plan devised by the notice expert they had retained, Todd Hilsee, considered the foremost expert on class notice in the country. At Mr. Hilsee's suggestion, Counsel retained Carla A. Peak, Director of Legal Notification Services at Kurtzman Carson Consultants, LLC to execute publication notices. Direct notice was done by the staff of Plaintiffs' counsel. On December 9, 2013, the Court entered its order granting an

amendment to the scheduling order, and an amended scheduling order was entered the same date providing for a jury trial to commence on July 15, 2014.

As identified below, numerous written discovery requests were exchanged; numerous documents were produced; and, numerous depositions were undertaken during 2013 and 2014. This Court entered an order dated April 10, 2014, which allowed GAF to depose any of plaintiffs' experts on any new or supplemental matters.

During the six weeks prior to the trial date, the defendant filed the following motions in limine during May and June 2014: (1) Motion to Exclude Testimony of Plaintiffs' Expert Mays; (2) Motion to Exclude Portions of Testimony of Expert Koontz; (3) Motion to Limit Damages; (4) Motion to Exclude Evidence Concerning Machine Direction and Shingle Tear Strength; (5) Motion to Preclude Testimony and Evidence Relating to Non-Class Members; (6) Motion to Preclude Plaintiffs' Trial Witnesses from Expectations Testimony; (7) Motion to Exclude Testimony of Expert Monroe; and, (8) a Motion for Summary Judgment.

During May through July 2014, the plaintiffs filed the following motions in limine: (1) Precluding Testimony as to GAF's Settlement Offer and Offer of Judgment; (2) Motion to Preclude Testimony Relating to Law Suits at Plants Across the Country; (3) Motion to Preclude GAF's Motion About Plaintiffs' Ability to Re-roof at No Cost; (4) Motion to Preclude Testimony Relating to Limited Warranty; (5) Motion to Preclude Testimony Relating to Income and Duty to Mitigate; (6) Motion to Disallow Late-Named GAF Witnesses; and (7) Motion to Allow Plaintiffs to Publish Portions of GAF Managing Agents' Depositions.

All motions in limine were supported by memorandum in support thereof. Further, all parties provided extensive memoranda in opposition to motions in limine. Many days were spent by class counsel in researching, preparing and revising the various memoranda. This Court entered orders on the motions in limine during June and July 2014.

On June 6, 2014, this Court entered its Order denying GAF's motion to decertify the class represented by Jack and Ellen Brooks.

A 18-hour mediation was undertaken with special master, Francis McGovern, as mediator. The mediation commenced at 9 AM on July 11, 2013 and concluded at 3 AM on July 12, 2014. Professor McGovern filed a declaration dated September 19, 2014, which identified that the settlement was reached at arms-length, was fair and reasonable, was adequate, and should be both preliminarily and finally approved. Also, he rendered the opinion that the requested fee award, the costs of reimbursement request, and the case contribution award were in line with the amounts approved by other courts for settlements in class action litigation, including other construction product defect litigation, and is warranted to compensate class counsel for a settlement that he characterized as being finalized as a result of "their experience, reputation, and ability."

On September 23, 2014, plaintiffs' counsel filed a motion that this Court preliminarily approve the proposed settlement of the class action and that the settlement agreement be approved. On October 20, 2014, this Court entered its order granting the motion for preliminary approval of the class action settlement and directing that the preliminary and conditional certification of a settlement class was approved. The Court's lengthy order granted preliminary approval of the settlement, the attorneys' fees, the costs for reimbursement, and other matters. It set the final

approval hearing for April 22, 2015. This Order also directed that the parties file a motion requesting that this Court grant final approval of the settlement as set forth in the settlement agreement and that the Court would enter a Final Order and Judgment consistent with the terms of the settlement agreement. It also provided that class counsel may file a petition for an award of attorneys' fees and reimbursement of expenses at that time.

**2. Discovery undertaken in federal court (2011-2014)**

In addition to the extensive briefing on a multitude of issues referenced above, counsel also received thousands of pages of documents in response to discovery requests or in supplemental responses to those requests. In the state and federal court proceedings together, over 98,000 pages of documents were produced and reviewed by counsel. The following depositions were taken: (1) Jack Brooks (3rd time); (2) Ellen Brooks (3rd time); (3) Thadd Mays (2nd time); (4) Expert Jim Koontz (deposed 2nd and 3rd times); (5) Steve Albrecht with GAF; (6) Mark Glover with GAF; (7) Mark Anderson with GAF; (8) Philip Mays; (9) Anna Hancock; (10) David McKenzie; (11) Donna Parker; (12) Dora Palka; (13) Wayne Bell; (14) Mary Bell; (15) Carroll Thompson; (16) Expert Teddy Monroe; (17) Wayne Nichols; (18) Jeanette Brazell; (19) Billy Brazell; (20) Robert Meadows; (21) Dell Rowe; (22) Homer Sease; and (23) Leslie McDuffie. The depositions were conducted in Newberry, SC; Columbia, SC; New York City; Greenville, SC.; Washington, D.C.; Spartanburg, SC; and, Chester, SC.

The pleadings notebook of plaintiffs' counsel in the federal case (including motions, orders, memoranda, notices of deposition, discovery requests, etc.) included 326 entries. Many of the

individual memoranda filed by the parties in support of, or in opposition to, their positions, including exhibits, consumed in excess of a hundred of pages.

**c. Post-Settlement (2014-2015)**

After the hearing on July 14, 2014, this Court issued its Order on October 20, 2014, granting preliminary approval of the class action settlement, preliminary approval of certification of the settlement class, approval of the class notice plan, approval of a plan for objections and opt-outs, and preliminary approval of costs, incentive awards, and attorneys' fees. It further set a final fairness hearing for April 22, 2015.

The notice plan was implemented as approved and, in addition to direct notice to as many potential members as were known, publication of the class notice was undertaken on television and in widely-read publications. Pursuant to the notice plan, the notices were published during the months of December 2014 through January 2015.

Since December 2014, class counsel has received and responded to email and telephone inquiries from prospective class members on a daily basis. Each inquiry was responded to by class counsel within 24 hours of receipt. Class counsel estimates that over 800 inquiries regarding the Mobile and Non-Mobile Settlements have been responded to since December 2014, and many hours have been consumed to provide accurate information to these potential class members.

**C. The Settlement Process**

In January 2014, the parties met with noted mediator, Professor Francis McGovern from Duke University, and began formal negotiations. (Docket Entry 107 (MDL No. 8:11-mn-02000-

JMC).) Professor McGovern held a series of telephone calls concerning settlement in early 2014. In between those conferences, counsel in the MDL Actions and counsel for GAF worked through the mediator over the phone and in person to negotiate the terms of this proposed settlement. The Settlement was not reached, but the parties continued to discuss resolution through the mediator.

The *Brooks* case was set to start trial on July 15, 2014. With trial about to begin in *Brooks* and as the Court's pretrial rulings were being received, the parties again attempted a global resolution. On the Friday before trial would begin in *Brooks*, the parties met in South Carolina. Professor McGovern again presided over a mediation of all cases in this MDL. The parties mediated that day for nearly 18 hours. The parties finally reached a settlement on the material terms at approximately 3:00 a.m. on Saturday morning. The parties then worked (meetings of counsel, e-mails, telephone conferences and exchange of numerous proposals) to reach agreement on the written settlement documents.

**Material Terms of the Mobile Settlement Agreement**

**A. Settlement Class.**

The parties have agreed to settlement class definition. The proposed class is defined as follows.

> All persons and entities who are Qualifying Owners and South Carolina Qualifying Owners who own any property located in the United States with Mobile Timberline® Shingles manufactured during the period from January 1, 1999 through December 31, 2007.

Due to the unique nature and posture of the South Carolina litigation the class contains a subclass defined by the Settlement agreement:

> The Subclass shall be defined as all persons and entities who are South Carolina Qualifying Owners and who are also members of the Mobile Settlement Class.

**B. Benefits to the Class.**

The Settlement Agreement provides substantial benefits to Class Members and does so through a claims process that is similar to the process for making a warranty claim to GAF. The key provisions of the Settlement include:

- Qualifying owners of properties with Timberline® shingles that crack, split, or tear may make a claim for a cash payment or replacement shingles;
- A homeowner with a roof on which more than 5 percent of the shingles are cracked, split, or torn will receive benefits based on the total number of shingles on the entire roof;
- Any applicable GAF warranties remain in place for matters not related to shingle cracking, splitting, or tearing;
- There is no settlement fund or limit on the money to be paid out in the claims process;
- GAF will fund the entire claim administration and class notice process;
- GAF will pay attorneys' fees and costs in accordance with the Settlement, as awarded and approved by the Court; and
- GAF will pay Plaintiffs a lump sum to be distributed among the named Plaintiffs for service awards granted by the Court.

*See* Ex. A. The Settlement also provides Class Members with at least 12 months to make a claim and receive certain benefits of the Settlement, even if not otherwise available to them. *Id.*

The Settlement provides a substantial cash benefit amount to qualifying claimants. For example, the current retail cost of a square of Shingles is approximately $90 to $125 per square. An

Eligible Claimant[7] outside South Carolina who chooses to receive new Shingles may receive an additional $50 per square in cash, bringing the value per square to $140 to $175. An Eligible Claimant outside South Carolina who chooses the only cash benefit may receive $110 per square ($60 + $50). Eligible Claimants in South Carolina may receive either shingles plus an additional cash benefit of $80 per square making the value per square $170 to $205. A South Carolina Eligible Claimant who chooses only the cash benefit may receive $150 per square ($70 + $80). Eligible Claimants with more than 5 percent cracked Shingles on their property will receive payment based on the total number of squares on the entire roof, not just those that have cracked. These compensation payments exceed the benefits offered by the standard GAF warranty applicable to the Shingles.[8]

**C. The Notice Provisions In The Mobile Settlement Agreement Have Been Satisfied.**

The Court approved Third Party Claims Administrator, Heffler, and two other notice providers, Kinsella Media and Rust, have fully complied with the notice provisions detailed in the Settlement Agreement. *See* Plaintiffs' Memorandum In Support Of Motion For Final Approval Of Non-Mobile Class Action Settlement, Exhibit C (Kinsella Declaration); Exhibit E (Rust

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[7] "Eligible Claimant" has the same meaning as defined in the Settlement and refers to a Mobile Settlement Class Member who submits a claim that is deemed eligible for compensation pursuant to the terms of the Settlement.

[8] Pursuant to the Settlement, the amounts of the above cash benefits may be reduced proportionally (*i.e.*, prorated) to account for the amount of use an Eligible Claimant received from the Shingles.

Declaration); and Exhibit F (Heffler Declaration). Consistent with the Court's Preliminary Approval Order, Heffler, Kinsella Media, and Rust provided notice to the Settlement Class via:

- Direct mail notice to all known owners of Timberline® shingles who had registered a warranty with, or made warranty claims to, GAF for their Shingles;
- Published notice in leading consumer magazines designed to target home and property owners;
- National cable television advertisements highlighting the settlement;
- Online media efforts through outlets like Facebook; and
- Earned media efforts through a national press release and the settlement web site, www.RoofSettlement.com.

*Id.* Direct notice to Class Members commenced on December 22, 2014 and was completed as detailed by Rust. *Id.* at Exhibit E (Rust Declaration).

The primary objectives of the Notice Plan were met: to effectively reach class members with conspicuous notice of the Settlement, and provide them with a reasonable opportunity to understand their legal rights and options. *Id.* at Exhibit C (Kinsella Declaration). The comprehensive efforts undertaken to notify potential class members of their rights under the Settlement reached approximately 80% of the target audience that was most likely to contain Class Members. *Id.* This reach percentage indicates that the Notice campaign was highly successful in providing Notice to potential Class Members. *Id.*

Moreover, because the Notice Plan began on December 22, 2014, and continued via print, the internet, and television, there was sufficient time for Class Members to see the Notice and respond accordingly before the March 16, 2015 exclusion and objection deadline. *Id.* In short, the

Notice Plan that the Court preliminarily approved and that was carried out provided the best notice practicable under the circumstances of this case. *Id.*

**D. Exclusion and Objection Rights.**

The response from Settlement Class Members has been overwhelmingly favorable. Mobile class counsel believe there are an estimated 370,000 Settlement Class Members for the Mobile Settlement and the notice program was extensive. As evidence of the notice's reach, counsel for the Mobile Settlement has received approximately 800 phone calls and emails from class members wishing to participate. As of the March 16, 2015 deadline for exclusions and objections, Class Counsel received only 424 requests for exclusion and only nine (9) objections to both the Non-Mobile and Mobile Settlements, some of which were withdrawn.[9]

The few objections are summary in nature, offering no real analysis or support for their position. For instance, the basis for objector's Mr. R. Bell's objection is that (1) he was not provided enough information to make a decision; (2) submitting a sample shingle is burdensome, (3) the Settlement website did not list the Court's address; and (4) the Settlement does not allow for future claims to be made. *Id.* Mr. Bell's objections are not accurate and provide little aid to the settlement process or the Court because, contrary to his objection: (1) the Settlement Notice and website contains much background information (the settlement website, www.roofsettlement.com, contains key documents filed on the docket, a Frequently Asked Questions section and phone numbers for the toll-free telephone support line and Class Counsel); (2) submitting a sample, which is the same

[9] The nine objectors are R. Bell, R. Bensman, J. Brown, J. Carter, J. Crum, A. Grundemeier, A. Mazerolle, A. Pettigrew, and R. Shaw.

requirement that GAF and other manufacturers have under their warranty claim submission directions, is a vital way to ensure that the shingle subject to a claim is a Timberline® and that the alleged damage to the shingle falls within the scope of the Settlement; (3) the Settlement website does indeed list the Court's address in the Frequently Asked Questions section; and (4) the Settlement allows for claims to be made up to seven (7) years from the effective date. *Id.* Like Mr. Bell, the other objectors are not accurate or demonstrate a misunderstanding of the Settlement (i.e., objector Mr. R. Shaw's states that snow on his roof prevents an inspection of his shingles – this is not accurate, because the claims period allows up to seven years to make a claim); Mr. and Mrs. A. and J. Grundemeier, Mr. A. Mazerolle, and Mrs. R. Pettigrew each withdrew their objections; objector Mr. J. Crum states that he will be penalized if his Shingles crack seven years from now and that he would have chosen a different shingle supplier – this is not accurate since the claims period is for seven years and any applicable GAF limited warranties remain available for their original duration to cover claims submitted thereafter. *Id.*; *see In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 378 (D.D.C. 2002) (rejecting broad unsupported objections because they "are of little aid to the Court").

Other objectors are simply mistaken about the nature of their objection. The small number of opt-outs and objections strongly suggests that the vast majority of class members support the Settlement. *See In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 318 (3d Cir. 1998) (affirming conclusion that class reaction was favorable where 19,000 policyholders out of 8 million opted out and 300 objected); *see also Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-119 (3d Cir. 1990) (noting that "only" 29 objections in 281 member class "strongly favors settlement").

**The Mobile Settlement Merits Final Approval with Entry of Final Judgment**

**A. Settlement Approval Process**

The compromise of complex litigation is encouraged by the courts and favored by public policy. 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 11:41 at 87 (4th ed. 2002) ("Newberg"); *see also South Carolina Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1423 (D.S.C. 1990) ("The voluntary resolution of litigation through settlement is strongly favored by the courts" and is "particularly appropriate" in class actions.); *In re Lupron Mktg. and Sales Practices Litig.*, 228 F.R.D. 75, 88 (D. Mass. 2005) ("the law favors class action settlements."); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liability Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.").

The Manual for Complex Litigation describes a three-step procedure for approval of class action settlements, comprising a preliminary approval determination, provision of notice to the class, and a final fairness hearing. "First, counsel should submit the proposed terms of the settlement and the judge makes a preliminary fairness evaluation." Manual for Complex Litigation(Fourth) § 21.632, at 497 (2004) ("MCL"). Second, "[o]nce the judge is satisfied as to the certifiability of the class and the results of the initial inquiry into the fairness, reasonableness, and adequacy of the settlement, notice of a formal Rule 23(e) fairness hearing is given to the class members." *Id.* § 21.633 at 498 (the Court effectuated steps one and two through its Preliminary Approval Order dated October 20, 2014). Third, the Court holds the fairness hearing to make a satisfactory record to support the settlement so that Class Members may begin to receive settlement benefits. *Id.* §§ 32.634 - 21.635; *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158-59 (4th Cir. 1991); *In re Serzone Prods.*

*Liab. Litig.*, 231 F.R.D. 221, 223 (S.D. W. Va. 2005). The fairness hearing ensures that the settlement is "fair, reasonable, and adequate." *In Re Ames Department Stores, Inc. Debenture Litigation*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993); *Chatelain v. Prudential-Bache Securities, Inc.*, 805 F. Supp. 209, 212 (S.D.N.Y. 1992).

A presumption of fairness occurs if, like here, where the settlement was "reached after meaningful discovery [and] after arm's length negotiation conducted by capable counsel." *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 822 (D. Mass. 1987). The presumption is strengthened where the settlement was reached with the assistance of a highly experienced mediator – such as here, with Professor Francis McGovern. *In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347, 352 (E.D.N.Y. 2000) ("Most significantly, the settlements were reached only after arduous settlement discussions conducted in a good faith, non-collusive manner, over a lengthy period of time, and with the assistance of a highly experienced neutral mediator").

Pursuant to Fourth Circuit law, final approval is appropriate when the settlement is both "fair" and "adequate". *Whitaker v. Navy Fed. Credit Union*, 2010 WL 3928616, *5 (D. Md. Oct. 4, 2010) ("The United States Court of Appeals for the Fourth Circuit has held that a class action settlement should be approved if it is both 'fair' and 'adequate.'"). The "fairness" of a settlement is determined by reviewing "(1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of ... class action litigation." *Whitaker*, 2010 WL 3928616, *5-6; *Horton v. Merrill Lynch, Pierce, Fenner & Smith*, 855 F. Supp. 825, 828 (E.D.N.C. 1994).

The "adequacy" of a settlement is determined by reviewing "(1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the

plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement." *Id.* at *5-6.

**1. The Fairness of the Mobile Settlement.**

**a. The Posture of the Case at the Time Settlement Was Proposed And the Extent of Discovery That Had Been Conducted.**

The extensive history of the Mobile litigation is discussed above. At the time Settlement was reached, the *Brooks* case, the first putative class action filed against GAF for problems related to the cracking and premature failure of Timberline® brand shingles, was just four days from trial in a certified litigation class. Discovery was complete in *Brooks* and the Plaintiffs in all of the MDL Actions had access to and had reviewed and considered that discovery. Additional discovery had been done in the other MDL Actions, including the issuance of subpoenas and document demands on third parties. The parties also conducted numerous field inspections, including mutual expert inspections of the class representatives' properties.

Plaintiffs in the MDL Actions also engaged highly respected national forensic engineering firms who conducted testing and analysis of the Shingles, reviewed internal GAF documents and deposition transcripts produced in the litigation (including thousands of hard-copy documents that were being preserved in a special preservation lab located near Boston, MA after being subjected to damage during Hurricane Sandy), and deposed a GAF warranty representative.

Along with engaging in extensive discovery, the parties engaged in substantive motion practice, including substantial dispositive motions and several discovery motions. By the time the

Settlement was reached, the Plaintiffs had sufficiently developed the case to appreciate its merits and drawbacks. *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221, 244 (S.D. W. Va. 2005).

**b. The Circumstances Surrounding the Negotiations and the Experience of Counsel in the Area of Class Action Litigation.**

In January 2014, the parties met with mediator Professor Francis McGovern and began formal negotiations – which took several months to finalize. Courts favor settlements reached with the assistance of a highly "experienced neutral mediator". Mediation was of interest to the parties because the MDL Actions were nearing the end of discovery and the *Brooks* case was set for trial on July 15, 2014.

Professor McGovern held a series of telephone calls concerning settlement in early 2014. In between those conferences, counsel in the MDL Actions and counsel for GAF worked through the mediator to negotiate the terms of this proposed settlement. In the ensuing months, counsel for GAF and counsel for both the Mobile and Non-Mobile settlements met with Professor McGovern to discuss avenues to resolution. On the Friday before trial would begin in *Brooks*, the parties met in South Carolina. Professor McGovern again presided over a mediation of all cases in the MDL. The parties mediated that day for nearly 18 hours. The parties finally reached a settlement on the material terms at approximately 3:00 a.m. on Saturday morning.

Class Counsel are well-qualified and experienced and brought economies of scale to bear on this litigation. Many of the MDL counsel had or have ongoing litigation experience against other shingle manufactures CertainTeed (MDL), Building Products of Canada, Owens Corning and IKO (MDL), in addition to countless amounts of experience litigating other kinds of complex (some of which are MDLs) nationwide class defined building material class actions. Mobile counsel,

particularly Mr. Speights, has been on the forefront of national building class actions for three decades. Prior to commencing the litigation, Class Counsel performed a factual and legal investigation regarding the alleged defects in the Shingles; including retaining nationally-recognized experts for the purpose of forensic testing and opinions regarding the cause and uniformity of the problems identified during the testing.

Class Counsel also researched and is familiar with the applicable legal standard for this product defect litigation and the applicable standards for nation-wide and state-wide class certification and the industry standards for product design, manufacturing processes, warranties, processing of warranty claims and the manifestations of defectively designed shingles (i.e., cracking and splitting). In addition, Class Counsel was well aware and understood the litany of causation defenses which could be raised by a shingle manufacturer such as GAF including but not limited to: faulty installation, poor ventilation, and weather. *See Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975) ("While the opinion and recommendation of experienced counsel is not to be blindly followed by the trial court, such opinion should be given weight in evaluating the proposed settlement"); *MicroStrategy*, 148 F. Supp. 2d at 665 (quotations omitted) (counsel possessed "experience and ability … necessary to [advance] representation of the class's interests.").

**2. The Adequacy of the Mobile Settlement.**

**a. The Relative Strength of the Plaintiffs' Case on the Merits.**

When evaluating the adequacy of a class action settlement, the Court may consider the relative strength of Plaintiffs' case. *Horton v. Merrill Lynch, Pierce, Fenner & Smith*, 855 F. Supp. 825, 831 (E.D.N.C. 1994); *MicroStrategy*, 148 F. Supp. 2d at 665.

At settlement, the Brooks case had been tested and analyzed by multiple motions for summary judgment. By prevailing in part on GAF's motions to dismiss, Plaintiffs demonstrated that the actions in *Green* and *Blairsville* contained viable allegations, however in both cases the Court significantly trimmed the Plaintiffs' avenues for relief. Plaintiffs, upon consulting with experts and reviewing the discovery, were confident that they would meet their burden as to class certification (as the *Brooks* case demonstrated). Class Counsel carefully evaluated the strengths and weaknesses of each of the class claims in negotiating the Settlement and concluded that the settlement was fair, reasonable, adequate and in the best interests of the class. In doing so, Class Counsel applied a realistic view of the merits of the Plaintiffs' claims.

**b. The Existence of Any Difficulties of Proof or Strong Defenses the Plaintiffs Were Likely to Encounter if the Case Went to Trial.**

GAF asserted numerous defenses that created serious litigation risks for Plaintiffs. GAF claimed that analysis had determined that there was no general problem with the Shingles and that only a tiny fraction of the shingles sold might be subject to failure within a warranty period. If the case was not settled, GAF would have continued to raise certain defenses that it had asserted, including that Plaintiffs' claims are: (1) barred by the economic loss doctrine; (2) limited or excluded by GAF's limited warranties; and (3) caused by the acts (i.e., faulty installation, poor ventilation, and weather), omissions, and/or conduct of third parties.

In addition, the Court had issued various pretrial rulings in the *Brooks* case that impacted the settlement calculus. Both GAF and the Plaintiffs in *Brooks* won some, but not all, of the motions they had filed. An adverse liability or defect finding in the *Brooks* case could have significantly impacted all of the cases at issue in both Settlements. These considerations adversely affect the

likelihood of recovery, as well as the plausible amounts of damages. The likely amount to be received by Class Members under the Settlement is fair and reasonable given the inherent risks of litigation and in the light of settlements in similar cases.

**c. The Anticipated Duration and Expense of Additional Litigation.**

As discussed above, *Brooks* was at the precipice of trial while the other MDL Actions including *Green* and *Blairsville* continued to be in extensive and expensive discovery. Completing discovery, drafting expert reports, preparing for *Daubert* hearings (where a number of experts for both side would have been contemplated and possibly used), along with class certification briefing would have taken much time, resources and money. GAF had every intention of litigating the MDL Actions vigorously as demonstrated by the various motions to dismiss that it filed in an attempt to narrow Plaintiffs' claims and as it had done in pretrial filings in *Brooks*.

In addition to class certification and trial, any appeals would be complex, expensive, and lengthy. *See Slomovics v. All For A Dollar*, 906 F. Supp. 146 (E.D.N.Y. 1995) ("The potential for this litigation to result in great expense and to continue for a long time suggests that settlement is in the best interests of the Class"); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 365, 475-76 (S.D.N.Y. 1998) ("class action litigation in particular, is unpredictable.") The result of the Settlement, among other things, relieved the parties, this Court and proposed Class from the "risks, complexity, duration, and expense of continuing litigation." *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 456-57 (S.D.N.Y. 2004).

**d. The Solvency of the Defendants and the Likelihood of Recovery on a Litigated Judgment.**

Before entering into the proposed Settlement, Class Counsel engaged in extensive arm's-length negotiations with GAF. Class Counsel believe that they obtained the maximum settlement value for the class, given the risks of litigation. Under the Settlement, for properties with Shingles that crack, split, or tear, GAF will provide, subject to any applicable proration, either: (1) a comparable number of squares of new Shingles (based on the 5% of the roof rule), or (2) a cash option of $60 per square (or $70 per square for the South Carolina subclass), and, for qualifying Eligible Claimants, (3) additional compensation of $50 per square for other damages (or $80 per square for the South Carolina subclass).[10] GAF is financially sound and from Plaintiffs' perspective, its solvency did not play a role in determining the settlement terms.

There is no settlement fund or limit on the money to be paid out in the claims process. This compares favorably to other recently approved class action settlements (funds and claims made models). *See, e.g.*, *In re: CertainTeed Corp. Roofing Shingle Product Liability Litig.*, MDL, 06-1817 (E.D.Pa.) (estimated value between $713 million - $783 million); *Melillo v. Building Products of Canada*, 12-cv-16 (D. VE) (estimated value between $39 - $100 million); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (nonmonetary relief theoretically valued at $115 million); *Pelletz v. Weyerhaeuser Co.*, 255 F.R.D. 537, 542-43 (W.D. Wa. 2009) (nonmonetary relief of deck cleaning); *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1323 (S.D. Fla. 2005) ($120 million benefit to the class); *Will v.*

[10] Eligible Claimants qualify for the compensation available for other damages (*e.g.*, compensation for labor costs and any damage to the roof system) unless (a) they file a claim more than ten years after installation of their Shingles and (b) make a claim more than one year after the Effective Date of the Settlement.

*Gen. Dynamics Corp*, No. 06-698, 2010 WL 4818174, *1 (S.D. Ill. Nov. 22, 2010) ($15.15 million plus equitable relief, ERISA case).

**e. The Degree of Opposition to the Settlement.**

Mobile class counsel estimate that there are 370,000 potential Settlement Class Members in the Mobile Settlement. Despite this, there were only 424 requests for exclusion and nine objections to the Mobile and Non-Mobile Settlements. Typically, the reaction of the class is gauged by looking at the percentage of objections and opt-outs received in relation to the class as a whole. *See, e.g., Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 251 (D.N.J. 2005) (because only .06% of the class members opted out of the settlement, factor favored approval of the settlement); *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1313-14 (3d Cir. 1993) ("[l]ess than 30 of approximately 1.1 million shareholders objected.... This small proportion of objectors does not favor derailing settlement"); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-19 (3rd Cir. 1990) (29 objections out of a class of 281 illustrate a strong favoring of settlement); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 527 (E.D. Mich. 2003) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement."). Indeed, "[i]n litigation involving a large class it would be 'extremely unusual' not to encounter objections." *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 478 (S.D.N.Y. 1998) (citation omitted).

Here, the paucity of objections is strong evidence that the Mobile Settlement is fair, reasonable and adequate. According to Mobile class counsel, only nine objections were lodged out of both Settlement Classes with only two remaining objections likely being made by members of the Mobile class of approximately 370,000, representing a mere 0.0005% of the Mobile Settlement Class. The small number of objections submitted strongly favors approval. *See In re CertainTeed Corp.*

*Roofing Shingle Prod. Liab. Litig.*, 269 F.R.D. at 486 ("[T]he fact that approximately 367 objectors withdrew their objections to the settlement, and at least 501 opt outs chose to return to the fold confirms that this version of the proposed settlement agreement is satisfactory to a large majority of the class. Accordingly, this court finds that this factor weighs strongly in favor of settlement.").

**B. The Mobile Settlement Class Satisfies Rule 23(a).**

On October 20, 2014, the Court preliminarily certified the Mobile Settlement Class under Rule 23(b)(3), and Plaintiffs now move for final certification. The Supreme Court has recognized that the benefits of a proposed Settlement can be realized only through the certification of a settlement class. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619 (1997) ("[T]he 'settlement only' class has become a stock device," and "all Federal Circuits recognize its utility.").

Rule 23(a) requires the proponents of certification to establish that: (1) members of the proposed classes are so numerous that joinder of all members is impracticable; (2) commonality exists among issues of law or fact raised by the class members; (3) the claims of the proposed class representatives are typical of the claims of the absent class members; and (4) the proposed class representatives will fairly and adequately represent the interests of the classes. Fed. R. Civ. P. 23.

Here, as set forth below, the preponderance of the evidence as to each element of Rule 23 clearly favors the final approval of the Settlement Class.

**1. Members of the Settlement Class Are so Numerous that Joinder of All Members Is Impracticable.**

Pursuant to Fourth Circuit law, "[t]here is no mechanical test for determining whether in a particular case the requirement of numerosity has been satisfied." The district courts must look to "the facts and circumstances of the particular case" to determine whether the requirement is met.

*Kelley v. Norfolk & W. Ry. Co.*, 584 F.2d 34, 35 (4th Cir. 1978). As long as joinder is impracticable, the numerosity requirement may be satisfied with a class ranging in size from a few dozen to several million plaintiffs. *See Holsey v. Armour & Co.*, 743 F.2d 199 (4th Cir. 1984) (holding that a class of 46 to 60 met the numerosity requirement).

Mobile Class Counsel estimates that approximately 370,000 mostly residential structures are roofed with Shingles manufactured from 1999 through 2007 at GAF's Mobile plant. In addition, Mobile Settlement Class Members are geographically dispersed throughout the southeastern portion of the United States. There can be no dispute that the Mobile Settlement Class meets the numerosity requirement.

**2. Common Issues of Law or Fact Unite the Class Member Claims.**

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The Supreme Court has emphasized that "for purposes of Rule 23(a)(2), even a single common question will do." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011) (internal quotation and alterations omitted); *see also In re: Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 853 (6th Cir. 2013) ("We start from the premise that there need be only one common question to certify a class."). "In a class action brought under Rule 23(b)(3), the 'commonality' requirement [of Rule 23(a)(2)] is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class 'predominate over' other questions." *Lienhart v. Dryvit Syst., Inc.*, 255 F.3d 138, 147 n.4 (4th Cir. 2001) (citation omitted). Courts may analyze the commonality and predominance inquiries together or separately. *Compare Brown v. Cameron-Brown Co.*, 92 F.R.D. 32, 41 (D.C. Va. 1981) (stating that "[t]he issue of predominance is often treated by the courts in conjunction with their 23(a)(2) analysis"), with *Beaulieu v. EQ Indus.*

*Servs., Inc.*, 5:06-CV-00400BR, 2009 WL 2208131 (E.D.N.C. July 22, 2009) (determining that it is sometimes "appropriate to analyze and discuss compliance with the commonality requirement distinctly in Rule 23(b)(3) cases").

The commonality requirement is met "[w]hen the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action," because, in those circumstances, "one or more of the elements of that cause of action will be common to all of the persons affected." *Beaulieu*, 2009 WL 2208131, at *11 (quoting NEWBERG § 3:10). The predominance inquiry "trains on the legal or factual questions that qualify each class member's case as a genuine controversy," which are "questions that preexist any settlement." *Amchem Prods., Inc. v. Windsor*, 521 U.S. at 591, 623 (1997). The requirement tests "whether proposed classes are cohesive enough to warrant adjudication by representation." *Gariety v. Grant Thornton*, 368 F.3d 356, 362 (4th Cir. 2004).

The commonality requirement for settlement purposes is easily met in this case. The central issues posed here at the settlement stage revolve around the allegedly defective nature (cracking and splitting) of the Shingles, and the likelihood they will degrade and fail before the expiration of their warranted life. *See In re CertainTeed Corp. Roofing Shingle Prod. Liability Litig.*, 269 F.R.D. at 478 ("[t]he fact that the settlement agreement covers only very particular forms of damage confirms the existence of factual and legal commonality among the claims.").

Given the presence of these common questions to the Settlement Class, which describe common issues of law and fact, Rule 23(a)(2)'s requirement is met. *See* Order Granting Motion to Certify Class for Settlement Purposes and for Preliminary Approval of Class Action Settlement and Form and Dissemination of Notice to the Class, Oct. 20, 2014, ECF No. 290 (MDL No. 8:11-cv-

0983-JMC); ECF No. 50 (C/A No. 8:12-cv-0087-JMC); ECF No. 50 (C/A No. 8:12-cv-0088-JMC) (finding that commonality exists because all members of the Settlement Class contend that the Mobile Timberline® shingles were or may be defective and / or did not or may not meet ASTM standards and warranties and that GAF's legal and other defenses raise common questions of law and fact).

**3. The Claims of the Proposed Class Representatives Are Typical of the Settlement Class. Fed. R. Civ. P. 23(a)(3)**

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The commonality and typicality requirements of Rule 23(a) "tend to merge." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157, n. 13 (1982). "[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." *In re Control Data Corp. Sec. Litig.*, 116 F.R.D. 216, 220 (D. Minn. 1986) (citations omitted). "[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.*

Here, the Named Plaintiffs' claims and those of the Class Members are based on the alleged premature failure of the Shingles. *See In re CertainTeed Corp. Roofing Shingle Prod. Liab. Litig.*, 269 F.R.D. at 478 (finding typicality requirement was satisfied and holding that "[t]he named plaintiffs, like the remainder of the class, claim to have suffered from defective CertainTeed shingles."). Plaintiffs and the Class would all have to show at trial the same facts and legal arguments about the common liability issues previously described, regardless of any individual circumstances that might affect their proof of individual causation or damages.

"The possibility of factual distinctions between the claims of the named plaintiffs and those of other class members does not destroy typicality, as similarity of legal theory may control even in the face of differences of fact." *Id.*; *In re Microcrystalline Cellulose Antitrust Litig.*, 218 F.R.D. 79, 84 (E.D. Pa. 2003) (Even if there are "pronounced factual differences among the plaintiffs, typicality is satisfied as long as there is a strong similarity of legal theories and the named plaintiff does not have any unique circumstances.") Accordingly, the Named Plaintiffs' claims are typical of the claims of the other Class Members, and this requirement is satisfied.

**4. Counsel and the Class Representatives Are Adequate.**

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To fulfill this requirement, two factors must be satisfied: 1) the class representatives must demonstrate that they "will vigorously prosecute the interests of the class through qualified counsel," and 2) the class representatives must have "common interests with unnamed members of the class." *Beaulieu*, 2009 WL 2208131, at *15 (quotations omitted).

The inquiry into the first factor requires an examination of whether "plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation," and occasionally, whether "the representatives themselves have the willingness and ability to take an active role in and control the litigation and to protect the interests of absentees." *Id.* As demonstrated in the sections above, the lawyers and firms representing the plaintiffs in the Mobile Settlement are experienced class action litigators and have handled (as Lead Counsel) and resolved numerous shingle and building product cases similar to this litigation. Mobile Class Counsel has devoted significant time and resources to properly prosecute the plaintiffs' claims in this litigation and have negotiated an excellent settlement.

The representatives have shown the willingness and ability to take an active role in and control the litigation and to protect the interests of the absent class members. Mr. Brooks and Mr. Thompson both were deposed (Mr. Brooks and his wife Ellen were deposed numerous times). The representatives participated in discovery, assisted counsel in responding to discovery, and opened their homes up for inspection and sampling. Each was committed to the prosecution of their respective Actions. *See Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 183 (3d Cir. 2012) (recognizing that "the linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class").

### C. The Proposed Mobile Settlement Additionally Meets The Standards Of Rule 23(b)(3).

In addition to satisfying Rule 23(a), plaintiffs must show that each putative class falls under at least one of the three subsections of Rule 23(b). Here, the Settlement class qualifies under Rule 23(b)(3). Under 23(b)(3) a class action may be maintained if:

> [T]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3). As discussed above, the Court may treat the predominance inquiry either alongside or separately from the commonality requirement of Rule 23(a), and this memorandum treats them alongside each other.

The Class Members' claims are based on common legal theory related to GAF's Shingles. Class members seek adjudication of the issue that far and away dominates this litigation – whether the GAF's Shingles are defective. Once that issue is determined on a class-wide basis, the remaining issues focus on relatively minor issues such as the size and age of a Class Member's roof. In addition to predominance, Plaintiffs must show that a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). A class action may be the most efficient means of resolving litigation when it allows the aggregation of many small claims, which may not be viable individually, into one lawsuit.

Here, the class settlement is superior to individual litigation and adjudication because it provides prompt compensation to Class Members for their damages. Compensation from individual lawsuits is highly uncertain and may require lengthy trial and appellate proceedings. The Settlement also removes the overwhelming and redundant cost, to the courts and the litigants, of individual suits and trials in multiple forums.

**Conclusion**

The parties to this case have reached a fair, substantial, arms-length Settlement Agreement. The Settlement creates a claims process for Class Members to obtain cash payments or reimbursement for repairs and reverses the burden of proof for causation issues in that claims process. For the foregoing reasons, Plaintiffs respectfully request that this Court enter an order:

1. Finally approving the written Settlement Agreement;

2. Confirming certification of the Settlement Class;

3. Approving the form, content, and dissemination of Class Settlement Notice;

4. Approving the fees to Mobile class counsel of up to $3 Million, as reasonable;

5. Approving the 30% contingency fee on the enhanced benefit ($20.00 per square, prorated as applicable) to Mobile Settlement Class Members outside South Carolina (above the benefit to non-Mobile class members);

6. Approving the costs incurred by Mobile class counsel of up to $700,000, as reasonably incurred and documented;

7. Entering final judgment approving the Settlement Agreement and directing the following:

    a. The claims process will commence 10 days after the Effective Date.

    b. GAF shall pay to Mobile class counsel the said attorneys' fees and costs within 30 days after the Effective Date.

    c. The 30% contingency fee on the enhanced benefit ($20.00 per square, prorated as applicable) to Mobile Settlement Class Members outside South Carolina will not be paid by GAF. The contingency fee will be paid out of the proceeds of any enhanced benefit awarded to such Class Members. The administrator will pay 70% of the enhanced benefit to the applicable claimant, and will pay the 30% contingent fee, on a quarterly basis, to class counsel for the Mobile Settlement Class.

Respectfully Submitted,

By: s/Thomas H. Pope III

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**Certificate of Service**

I, Thomas H. Pope III, hereby certify that on April 15, 2015, I filed the foregoing through the Court's CM/ECF system thereby serving all parties and counsel of record via electronic email.

By: s/Thomas H. Pope III