

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 21190

MARK ELLIOTT, TOR AND MICHELLE)
GABRIELSON, MICHIMIRO AND YOKO)
KASHIMA, on behalf of themselves and all)
others similarly situated,)
Plaintiffs)

v.)

KB HOME NORTH CAROLINA, INC. and)
KB HOME RALEIGH-DURHAM, INC.,)
Defendants)

and)

KB HOME RALEIGH-DURHAM, INC.,)
Third-Party Plaintiff)

v.)

STOCK BUILDING SUPPLY, LLC,)
Third-Party Defendant)

ORDER ON CLASS CERTIFICATION

THIS MATTER comes before the court upon Plaintiffs' Motion for Class Certification (the "Motion") pursuant to Rule 23, North Carolina Rules of Civil Procedure ("Rule(s)"); and

THE COURT, having considered the Motion, briefs and arguments in support of and in opposition to the Motion and appropriate matters of record, FINDS and CONCLUDES as follows.

PROCEDURAL HISTORY

[1] On December 5, 2008, Plaintiffs filed their Class Action Complaint (the "Complaint") in this civil action as a putative class action against Defendant KB Home Raleigh-Durham, Inc. ("KB Home") and KB Home North Carolina, Inc. ("KB Home NC").

[2] Plaintiffs allege the following causes of action ("Claim(s)": Count I – Breach of Contract, Count II – Breach of Express Warranties, Count III – Breach of Implied Warranties, Count IV – Negligence, Count V – Negligence *Per Se*, Count VI – Unfair and Deceptive Trade Practices and Count VII – Negligent Misrepresentation. All of Plaintiffs' Claims arise from the alleged installation of James Hardie's HardiPlank cement fiber lap siding (hereinafter "HardiPlank") on Plaintiffs' homes without a weather-resistive barrier behind the HardiPlank.

[3] On February 6, 2009, KB Home and KB Home NC filed a Motion to Dismiss Plaintiffs' Complaint.

[4] On July 17, 2009, the court dismissed KB Home NC from this action.

[5] On January 7, 2010, KB Home filed a Third-Party Complaint against Third-Party Defendant Stock Building Supply, Inc. ("Stock") alleging the following causes of action ("Third-Party Claim(s)": Count I – Breach of Contract, Count II – Negligence, Count III – Indemnity and Count IV – Declaratory Relief re: Duty to Defend and Indemnify.

[6] On June 17, 2010, this case was designated as an exceptional and complex business case pursuant to Rules 2.1 and 2.2 of the General Rules of Practice for the Superior and District Courts.

[7] On March 31, 2011, Plaintiffs filed the instant Motion.

[8] The Motion has been fully briefed and is ripe for determination.

FACTUAL ALLEGATIONS

Among other things, the Complaint and Third-Party Complaint allege that:

[9] Defendant KB Home and Third-Party Defendant Stock (collectively, "Defendants") installed HardiPlank on Plaintiffs' homes without a weather-resistive barrier behind the HardiPlank.

[10] Plaintiffs assert Claims for breach of contract, breach of express warranty, breach of implied warranty, negligence, negligence *per se*, unfair and deceptive trade practices and negligent misrepresentation on behalf of "[a]ll persons in the State of North Carolina who own a home that was constructed by Defendant KB Home without a weather-restrictive barrier behind the exterior veneer of HardiPlank cement fiber lap siding."

[11] Defendant KB Home impliedly and expressly represented to Plaintiffs and class members that the HardiPlank was an adequate and protective exterior that would provide years of maintenance-free service to Plaintiffs' and class members' homes. Defendant further represented that the HardiPlank would be constructed, installed and/or applied properly in accordance with all applicable standards and codes and with the care and skill necessary to meet the standard of workmanlike quality.¹

[12] Despite these statements and reassurances, KB Home did not install (or cause Stock to install) the HardiPlank in accordance with applicable codes or standards

¹ Compl. ¶ 28.

of care because Defendants did not provide Plaintiffs or class members with an adequate weather-resistant barrier beneath the HardiPlank siding.²

[13] As a result, the homes of the class members suffered, and continue to suffer, damages as a result of water intrusion into the walls of the homes.³

[14] KB Home's actions will require Plaintiffs and class members to remedy the defective construction and perform remedial repairs to their homes.⁴

DISCUSSION

Class Prerequisites

[15] Rule 23(a) provides that "[i]f persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued." The objective of Rule 23 is the efficient resolution of the claims or liabilities of many individuals in a single action and the avoidance of repetitious litigation and potentially inconsistent results involving common questions, related events or requests for similar recoveries. The Plaintiffs in this case have the burden of showing that all the requirements of Rule 23 have been met to allow the action to proceed as a class action. *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 282 (1987).

[16] A class action exists under Rule 23 when "the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Faulkenbury v. Teachers' & State Employees' Ret. Sys*, 345 N.C. 683, 697 (quoting *Crow*, 319 N.C. at

² *Id.* ¶ 29.

³ *Id.* ¶ 30.

⁴ *Id.* ¶ 34.

280). This requirement, that a class exists, is the first prerequisite for certification of a class. *See id.*

[17] The second prerequisite for bringing a class action is that the named representatives must establish that they will fairly and adequately represent the interests of all members of the class by showing that: "(a) the class representatives have no conflict of interest with the members of the class; (b) the class representatives . . . have a genuine personal interest, not a mere technical interest, in the outcome of the case; and (c) the class representatives within this jurisdiction [will] adequately represent members outside the state." *Pitts v. Am. Sec'y Ins. Co.*, 144 N.C. App. 1, 10 (2001) (citing *Faulkenbury*, 345 N.C. at 697) (internal citations omitted).

[18] The third prerequisite to certification is that the "class members are so numerous that it is impractical to bring them all before the court." *Id.* Finally, "adequate notice must be given to all members of the class." *Faulkenbury*, 345 N.C. at 697.

[19] If the court concludes that Plaintiffs have met these prerequisites, the court must next determine whether "a class action is superior to other available methods for the adjudication of [the] controversy." *Crow*, 319 N.C. at 284. Where a class is "likely to serve useful purposes, such as preventing a multiplicity of suits or inconsistent results, it should be certified." *Id.*; *see also Pitts*, 144 N.C. App. at 11.

[20] At the class certification stage, the focus "is properly on the typicality of the plaintiff's claim as it applies to the general liability issues [and] not on the plaintiff's ultimate ability to recover." *See Pitts*, 144 N.C. App. at 12 (quoting 1 Newberg on Class

Actions § 3.16 at 3-88-90 (3d ed. 1992).⁵ Therefore, at the certification stage, it is not necessary for the court to consider potential defenses that a defendant may have to the respective claims asserted by some members of the class. *Id.* Further, there is no requirement that the claims asserted in any class action by class members be factually identical to each other. *Pitts*, 144 N.C. App. at 13. Rather, the existence of a class rests on whether the same issue of law or fact predominates over any individual issues. *Id.*

[21] In the instant action, the Claims of every member of the proposed class arise from the same common nucleus of operative alleged facts (i.e., KB Home constructed each class member's home without a weather-restrictive barrier). Similarly, each and every class member has an interest in the same overarching question of law (i.e., whether KB Home violated applicable North Carolina Building Codes and applicable manufacturer's recommendations by failing to install a weather-restrictive barrier behind the exterior veneer of the HardiPlank).

[22] If it is found that KB Home failed to comply with applicable building codes when it installed the HardiPlank without a weather-restrictive barrier, that ruling will be critical to determining KB Home's liability for *all* of the class members and their Claims. Plaintiffs contend that on this basis a class exists. *See Haywood v. Barnes*, 109 F.R.D. 568, 577 (E.D.N.C. 1986) ("[A] single common question [of law or fact] is sufficient to satisfy the rule."). Further, whether KB Home is liable to class members for Claims raised in the Complaint affects the named and unnamed Plaintiffs in the same manner.

⁵ North Carolina courts have found that federal case law and Newberg on Class Actions, though not binding, may be instructive. *Hamilton v. Memorex Telex Corp.*, 118 N.C. App. 1, 16 (1995); *see also Pitts*, 144 N.C. App. at 11, n.5 (stating same).

These straightforward, shared issues of fact and law provide the basis for this action and predominate over any issue affecting only individual class members.

[23] Any inquiries related to the amount of damages to which Plaintiffs and the class members may be entitled do not overwhelm the prevailing common questions identified above. Indeed, it has been held that "[t]he amount of damages is invariably an individual question and does not defeat class action treatment." *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975). Thus, "when a plaintiff establishes an issue of law common to all class members, the possibility of individualized damages is a collateral matter." *Pitts*, 144 N.C. App. at 12; *Faulkenbury*, 345 N.C. at 698. Accordingly, a class exists due to the common questions of law or fact affecting the named and unnamed class members.

The Named Plaintiffs Will Fairly
and Adequately Represent the Class

[24] Rule 23 requires, for the purposes of due process, that the named representatives establish that they will fairly and adequately represent the interests of all members of the class by showing that: "(a) the class representatives have no conflict of interest with the members of the class; (b) the class representatives must have a genuine personal interest, not a mere technical interest, in the outcome of the case; and (c) the class representatives within this jurisdiction [will] adequately represent members outside the state." *Pitts*, 144 N.C. App. 10 (internal citations omitted). For the reasons set forth below, the court FINDS that the named Plaintiffs each satisfy all the requirements necessary to fairly and adequately represent the class.

[25] "For a conflict of interest to prevent plaintiffs from meeting the requirements of Rule 23(a), the conflict 'must be fundamental.'" *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 430 (4th Cir. 2003) (internal citation omitted). A conflict is not fundamental "when . . . all class members 'share common objectives and the same factual and legal positions [and] have the same interest in establishing [liability].'" *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) (quoting *Gunnells*, 348 F.3d at 431).

[26] In this case, the interests of Plaintiffs align with those of the other class members. Plaintiffs' Claims arise from the same conduct that gives rise to the Claims of other class members and are based on the same legal theories. Each named Plaintiff, like each member of the proposed class, has a strong interest in proving the Complaint's allegations that KB Home's failure to install a weather-restrictive barrier violated the North Carolina State Building Code and manufacturer's recommendations, and has caused or will cause impermissible water damage that necessitates remediation. The fact that there may be "[a] difference in the amount of damages does not create a material conflict of interest between [named plaintiffs] and the other proposed class members." *Pitts*, 144 N.C. App. at 15.

[27] The named Plaintiffs have shown their commitment to carrying out the duties of a class representative in this litigation, including but not limited to, responding to numerous discovery requests and participating in, or agreeing to participate in, a lengthy deposition.

[28] Plaintiffs' testimony reveals a grasp of the factual and legal foundations of the suit. All Plaintiffs identified the lack of a weather-restrictive barrier as the central

issue of the suit.⁶ Also, all Plaintiffs affirmed a commitment to seeking a class-wide resolution to the problem.⁷ These statements show that named Plaintiffs meet the threshold required to serve as class representatives. *See Stanich v. Travelers Indem. Co.*, 259 F.R.D. 294, 316 (N.D. Ohio 2009) (citing Wright, Miller & Kane, 7A Fed. Prac. & Proc. Civ. 3d § 1766 (2008)).

[29] This class action is brought on behalf of all persons in the State of North Carolina who own a home that was constructed by KB Home without a weather-restrictive barrier behind the exterior veneer of the HardiPlank cement fiber lap siding.⁸ Because Plaintiffs seek certification of a class consisting solely of North Carolina members, this factor is not relevant to the class determination. *Pitts*, 144 N.C. App. at 18.

The Class Members Are So Numerous That It Is
Impractical to Bring Them All Before the Court

[30] Here, the class members are so numerous that it is impractical to bring them all before the court. It is not necessary that plaintiffs in a class action demonstrate the impossibility of joining class members. Rather, they must "demonstrate substantial difficulty or inconvenience in joining all members of the class." *Crow*, 319 N.C. at 283. "There can be no firm rule for determining when a class is so numerous that joinder of all members is impractical. The number is not dependent upon any arbitrary limit, but rather upon the circumstances of each case." *Id.* Class actions have been sustained in North Carolina with as few as eight members. *See e.g., Big Bear of North Carolina, Inc. v. High Point*, 33 N.C. App. 563 (1977), *rev'd on other grounds*, 294 N.C. 262 (1978).

⁶ Y. Kashima Dep. 75:3-6, 87:5-17; Elliott Dep. 76:10-23; T. Gabrielson Dep. 62:20-63:9.

⁷ See Y. Kashima Dep. 110:13-14; Elliott Dep. 87:23-88:9; T. Gabrielson Dep. 77:17-77:24.4.

⁸ Compl. ¶ 9.

[31] Here, the evidence is that the number of homes in the proposed class is at least 277, and that the total class members could number between 277 and 554 persons, depending on how many owners there are of each home.⁹ For the purposes of class certification, a good faith estimate of the size of the class is sufficient. *Pitts*, 144 N.C. App. at 18. Because of the large number of homeowners, joinder is impractical.

[32] Plaintiffs have satisfied the numerosity requirements of Rule 23. See *Olivera-Morales v. Int'l Labor Mgmt. Corp.*, 246 F.R.D. 250, 256 (M.D.N.C. 2007) (quoting *Hewlett v. Premier Salons Int'l, Inc.*, 185 F.R.D. 211, 215 (D. Md. 1997)) (finding that large numbers alone "may allow the court to presume impracticality of joinder and find that the numerosity requirement has been met").

Adequate Notice Will Be Given to the Class

[33] Once a class is certified, it is up to the trial court judge to ensure that the best practical notice be sent to class members. *Crow*, 319 N.C. at 283. Such notice "should include individual notice to all members who can be identified through reasonable efforts, but it need not comply with the formalities of service of process." *Id.* at 283-84. Because KB Home has produced spreadsheets showing lot numbers for those homes that fall within the class definition and Stock has produced invoices showing deliveries of HardiPlank to the homes that are within the class,¹⁰ the court FINDS that KB Home's and Stock's records can assist in the identification of class members.

⁹ KB Supp. Resp. First Interrogs. Resp. No. 19; KB Supp. Resp. Second Interrogs. Resp. No. 2.

¹⁰ These invoices identify specific street addresses.

[34] Plaintiffs have submitted to the court a direct notice of class action that will be sent to the two (2) homes in the Amberlee housing community that KB Home has identified as falling within the class definition (the "Amberlee Homes") and all homes in the Twin Lakes housing community with a building permit issued prior to December 31, 2007 (the "Twin Lakes Homes"). Plaintiffs propose that the homes in the Twin Lakes community be mailed the notice in case the list of 277 homes identified by KB Home's and Stock's records is underinclusive. The court approves Plaintiffs' proposed Notice of Class Action, attached as Exhibit A to this Order (the "Notice").

A Class Action is the Superior Method of Adjudication

[35] Once the trial court judge finds the prerequisites to certification have been met, the trial court judge must determine whether "a class action is superior to other available methods for the adjudication of th[e] controversy." *Crow*, 319 N.C. at 284. "Class actions should be permitted where they are likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results." *Id.* The usefulness of the class action must be balanced, however, against inefficiency or other drawbacks. *Id.*

[36] Here, Plaintiffs seek class certification based upon Defendant's construction of class members' homes without the use of a weather-restrictive barrier behind the exterior veneer of HardiPlank cement fiber lap siding. If this class action is not allowed to proceed, the same issues will likely be relitigated in perhaps hundreds of individual cases by homeowners whose homes have been constructed without a weather-restrictive barrier. As stated by the court in *Joseph v. General Motors Corp.*, explaining why a class action would be superior to other forms of litigation,

First, relitigation of the same issues and presentation of the same evidence in hundreds of individual actions or

arbitration proceedings would be grossly inefficient and wasteful of judicial resources. Second, maintenance of individual actions would be prohibitively expensive. Many of the crucial issues in this case require substantial discovery, expert testimony and trial time, all of which would render uneconomical individual actions.

109 F.R.D. 635, 642 (D. Colo. 1986).

[37] Given the potentially hundreds of individual cases that may have to be litigated on this issue and the costs required to do so, the court FINDS that a class action is the superior method for adjudication of this case given the number of homeowners and the efficiency of this case versus many individual cases.

[38] At the certification stage, the trial court judge has broad discretion in deciding whether an action should be allowed to continue as a class action.

Faulkenbury, 345 N.C. at 699. Based upon the foregoing, and in the exercise of its discretion, the court CONCLUDES that Plaintiffs in this case have met all the requirements of Rule 23, and that this matter should be certified as a class action.

NOW THEREFORE, based upon the foregoing FINDINGS and CONCLUSIONS, it hereby is ORDERED that:

[1] Plaintiffs' Motion for Class Certification is GRANTED.

[2] The class shall be defined as:

All persons in the State of North Carolina who own a home constructed by Defendant KB Home without a weather-restrictive barrier behind the exterior veneer of HardiPlank cement fiber lap siding. Excluded from the Class are: (a) any judge or magistrate presiding over this action and members of their families; (b) any Defendant and/or Third-Party Defendant and any entity in which any Defendant and/or Third-Party Defendant have a controlling interest or which has a controlling interest in any Defendant and/or Third-Party Defendant and its legal representatives, assigns and successors of any Defendant and/or Third-Party

Defendant; and (c) all persons who properly execute and file a timely request for exclusion from the Class.

[3] Daniel K. Bryson, Esq. and Gary E. Mason, Esq., of the firm Whitfield Bryson & Mason, LLP, are appointed Class Counsel. Mark Elliot, Tor and Michelle Gabrielson and Michihiro and Yoko Kashima hereby are appointed Class Representatives.

[39] The Plaintiffs shall cause the Notice to be mailed to the Amberlee Homes and the Twin Lakes Homes by first-class United States Postal Service mail no later than Thursday, March 15, 2012.

This the 27th day of February, 2012.

/s/ John R. Jolly, Jr.
John R. Jolly, Jr.
Chief Special Superior Court Judge for
Complex Business Cases