IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: CERTAINTEED FIBER CEMENT SIDING LITIGATION	:	**MDL DOCKET NO. 2270**
This Motion relates to:	:	
ALL CASES	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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I. PRELIMINARY STATEMENT

Plaintiffs Steve Clavette, Chad Epsen, Monique Orieux, Chris Thames, Gwen Weithaus, Steven Weidmeyer, Richard Tesoriero, Michael Patota, John Robards, Barbara Robards, and Koreen Grube ("Plaintiffs"), through their undersigned counsel, have negotiated a proposed settlement ("Settlement" or "Settlement Agreement") that provides substantial benefits to a nationwide class of consumers in the United States who own property containing allegedly defective Weatherboards Fiber Cement Siding, Lap Siding, Vertical Siding, Shapes, Soffit, Porch Ceiling, and 7/16" Trim ("Siding") made by Defendant CertainTeed Corporation ("CertainTeed" or "Defendant"). The Settlement creates a gross, non-reversionary settlement fund of $103.9 million for the benefit of the Settlement Class and establishes a six (6) year claims period and a claims process where owners of properties on which failed Siding was installed may obtain cash payments based on the size of the affected wall and the extent of any failure. The terms of the claims process are set forth in the Settlement Agreement and described below.

Co-Lead Counsel respectfully submits that the terms of the Settlement are fair, adequate, and reasonable for the Settlement Class and that the requirements for final approval will ultimately be satisfied. However, it bears noting that for preliminary approval the only issue before the Court is whether the proposed Settlement is within the range of what may be found to be fair, adequate, and reasonable so that Settlement Class Members can be notified of the proposed Settlement and a final fairness hearing can be scheduled by the Court. Only after Class Members and others have had an opportunity to receive the Court-authorized notice and present evidence at a final fairness hearing will the Court need to render final judgment regarding the fairness of the proposed Settlement.

At this preliminary stage of the settlement process, Plaintiffs respectfully request that the Court: (1) find the terms of the parties' proposed Settlement Agreement fair, reasonable, and adequate and grant preliminary approval to the proposed Settlement; (2) preliminarily certify the proposed Settlement Class pursuant to Fed. R. Civ. P. 23(b)(3) for purposes of administering the proposed Settlement; (3) appoint Plaintiffs Steve Clavette, Chad Epsen, Monique Orieux, Chris Thames, Gwen Weithaus, Steven Weidmeyer, Richard Tesoriero, Michael Patota, John Robards, Barbara Robards, and Koreen Grube as Class Representatives; (4) appoint Interim Lead Counsel Michael McShane of Audet & Partners, LLP and H. Laddie Montague, Jr. of Berger & Montague, P.C. as Co-Lead Counsel for the Settlement Class; (5) appoint BMC Group to provide notice to the Settlement Class and administer the Settlement; (6) approve as to form and content the proposed Class Notices and Claim Forms; and direct that notice of the proposed Settlement Agreement be provided to the Settlement Class in accordance with the provisions of the Settlement Agreement; and (7) schedule a Final Approval Hearing to consider whether to grant final approval of the proposed Settlement Agreement.

II. HISTORY OF THE LITIGATION

In 2010, numerous class actions were filed across the country against CertainTeed relating to the alleged premature degradation and failure of its Siding. On August 8, 2011, the United States Judicial Panel on Multidistrict Litigation ("JPMDL") issued an Order transferring all of the actions filed in federal district court complaining about CertainTeed's Siding to this Court, finding that the seven actions then pending "involve common questions of fact, and that centralization under Section 1407 in the Eastern District of Pennsylvania will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation." Specifically, the JPMDL consolidated the following cases in this Court for

coordinated pretrial treatment: 1) *John Robards, et al. v. CertainTeed Corporation*, No. 3:11-00141 (W.D. Ky.); 2) *Richard Tesoriero v. CertainTeed Corporation*, No. 5:11-00109 (N.D.N.Y.); 3) *Steve Clavette, et al. v. CertainTeed Corporation*, No. 2:10-06978 (E.D. Pa.); 4) *Monique Orieux v. CertainTeed Corporation*, No. 2:11-00234 (E.D. Pa.); 5) *Chad Epsen v. CertainTeed Corporation*, No. 2:11-00269 (E.D. Pa.); 6) *Steven Wiedmeyer v. CertainTeed Corporation*, No. 2:11-00317 (E.D. Pa.); and 7) *Koreen Grube v. CertainTeed Corporation*, No. 2:11-00396 (E.D. Wis.). Following the consolidation, four additional cases were transferred to this MDL, including: *Patota v. CertainTeed Corporation*, No. 1:11−02701 (N.D. Ga.); *Juelich v. Certainteed Corporation*, No. 4:12-00417 (E.D. Mo.); *Hocutt, et al. v. CertainTeed Corporation, et al.*, No. 5:12-05010 (W.D. Ark.); and *Hardig, et al. v. CertainTeed Corporation, et al.*, No. 3:11-00535 (W.D.N.C.). All cases are now under the caption *In Re CertainTeed Fiber Cement Siding Litigation***,** MDL Docket No. 2270 (the "MDL Litigation").

Since the inception of the MDL Litigation, Class Counsel have conducted an extensive investigation of the issues raised by the failure of the Siding and prepared for protracted litigation. Among other things, Class Counsel investigated the cause of the Siding's failure, the applicable legal standards for product defect cases involving defective construction materials, warranties, and relevant class action standards. Class Counsel assembled a highly qualified team of attorneys to prosecute the cases. Included in this team are attorneys who have substantial experience in prosecuting class actions and, in particular, those involving defective residential construction materials.

During the course of the MDL Litigation, Class Counsel have obtained, exchanged and analyzed documents obtained through discovery, taken depositions, retained product defect experts, interviewed hundreds of potential witnesses, incurred significant costs relating to the

forensic testing and analysis of the Siding, and performed numerous on-site property inspections. In short, Class Counsel have aggressively prosecuted the claims against Defendant.

While the litigation has progressed on one track, the parties explored and commenced settlement negotiations on another track. These negotiations included numerous personal meetings of counsel, telephone conferences, email exchanges, the exchange of numerous written settlement proposals, discovery exchanges, a two-day mediation session with Hon. James R. Melinson on June 26-27, 2012, and additional follow-up meetings and telephone conferences that took place following the mediation to finalize the terms of the Settlement Agreement.

All of the negotiations between CertainTeed and Class Counsel were at arms-length and hard-fought. Both sides are represented by extremely well qualified counsel. The parties often disagreed about various issues related to the alleged defect, the manifestation of the defect, the sufficiency of the warranty, the robustness of the warranty claim process, and the scope and type of remediation required, and at what threshold, all requiring lengthy negotiations to move the process to conclusion.

III. THE PROPOSED SETTLEMENT

The details of the Settlement are contained in the Settlement Agreement entitled "Agreement of Compromise and Settlement," signed by the parties on September 30, 2013. (*See* Declaration of Michael McShane ("McShane Decl."), Ex. A (attaching a copy of the Settlement Agreement).) The Settlement Agreement provides substantial benefits to Settlement Class Members and does so through a claims process that does not impose undue burden on them.

Specifically, the compensation to be provided to Settlement Class Members is based on fair, objective criteria including the size, age, and condition of the damaged Siding. Settlement Class Members whose repair costs are greater due to the size or complexity of the Siding on their

walls will receive proportionately more than those with lesser amounts of Siding on their walls. Similarly situated Class Members will receive similar benefits under the proposed Settlement.

Class Counsel are experienced in class action litigation as well as the settlement and claims processes and believe that the proposed Settlement is a fair, adequate and reasonable settlement and highly beneficial to the Settlement Class.

A. The Settlement Class

The Settlement Class is defined as:

> All individuals and entities that, as of September 30, 2013, own homes, residences, buildings, or other structures located in the United States, on which CertainTeed Weatherboards Fiber Cement Siding, Lap Siding, Vertical Siding, Shapes, Soffit, Porch Ceiling, and 7/16" Trim was installed on or before September 30, 2013 (the "Settlement Class").

(McShane Decl., Ex. A at ¶ 1.1.bb (defining "Settlement Class").)

Excluded from the Settlement Class are:

a. all individuals and entities who timely exercise their rights under Federal Rule of Civil Procedure 23 to opt out of this settlement;

b. all individuals and entities who filed a claim concerning their Siding in any court of law, if that claim has been resolved with a final judgment or order, whether or not favorable to the claimant;

c. CertainTeed, any entity in which CertainTeed has a controlling interest, any entity which has a controlling interest in CertainTeed, and CertainTeed's legal representatives, assigns, and successors; and

d. the Judge to whom this case is assigned and any member of the Judge's immediate family.

(*Id.*)

B. The Settlement Fund

The Settlement Agreement provides for a gross, non-reversionary Settlement Fund of $103.9 million (the "Settlement Fund"), which includes the costs of settlement administration,

notice to Class Members, service awards to Class Representatives, and attorneys' fees and costs. (McShane Decl., Ex. A at ¶ 1.1.dd.)

C. The Settlement Benefits

The Settlement provides substantial cash benefits to Class Members. (McShane Decl., Ex. A at § 4.) With the exception of the first two years after purchase, the warranty provided by CertainTeed limits purchasers of the Siding to recover only the cost of the affected Siding materials, reduced by a pro-rata deduction for usage. This Settlement, by contrast, provides a cash payment benefit calculated using the RS Means cost estimator, which not only includes material costs, but also includes the costs associated with labor and paint, and, notably, provides payment for the re-siding of an entire side or wall section of a house even if only 5% or more of the Siding shows qualifying damage. The amount of the cash payment is based on the quantity of affected Siding on the Class Member's house, and the degree of damage to the Siding. "Qualifying Damage" to Siding means shrinkage between the ends of Siding in excess of 3/16" except that for Siding installed abutting windows, doors or trim, shrinkage must exceed 5/16". (McShane Decl., Ex. A at ¶ 1.1.y.) In addition, Siding with warping in excess of 1/2", or cracking through the board is also Qualifying Damage. (*Id.*) The criteria to qualify for a payment under the Settlement include:

a. If Qualifying Damage exists on 5% or greater of either the total number of boards or on boards which represent 5% or more of the total square footage on the affected Wall Section, the Claimant is eligible for compensation for the number of boards on the entire Wall Section.

b. If the Claimant does not qualify for compensation for the entire Wall Section pursuant to Section 7.2(a), compensation will be based on the actual number of boards or panels with Qualifying Damage and will be prorated based on the actual number of boards with Qualifying Damage plus any necessary boards immediately above or below the affected boards. The proration for the materials will be based on the schedule under the original warranty. The remaining costs will follow the schedule set forth in section C below.

c. The schedule for valuing the claim is as follows:

Date of Original Installation	Percent of RS Means at time of Final Approval
2013	80%
2012	76%
2011	72%
2010	68%
2009	64%
2008	60%
2007	56%
2006	52%
2005	48%
2004	44%
2003	40%
2002	36%
2001	32%
2000	28%
1999	24%

(McShane Decl., Ex. A at ¶ 7.2.)

As set forth above, the amount paid to each Settlement Class Member will be determined by using the pricing provided by "RS Means", which is a widely-accepted cost estimator used in the construction/building industry, and which accounts for regional differences in costs for labor and materials. (*Id.*)

The average cost of siding a home in the United States is approximately $500/square.[1] Since the average home requires about 28 squares, the cost to re-side an average home is about $14,000. An example of a recovery for a Settlement Class Member would be as follows: if two

[1] A square consists of 100 square feet of siding, which comes in lengths usually ranging from 8 to 16 feet long and 7 to 9 inches wide.

out of the four sides of an average size home built in 2006 had qualifying damage in excess of 5%, and each of the sides was of equal size, then one-half of the 28 squares, or 14 squares would need to be replaced. According to the proration schedule in the Settlement Agreement, which reflects both a reduction for the number of years of service the homeowner received from the Siding, and the compromises inherent in the Settlement process, the claim would be valued at 52% of RS Means, which equals $3,640 ((14 squares x $500/square) x .52). Moreover, the Claimant could receive more than this amount if there are excess funds at the end of the claims period. In fact, the maximum amount payable could ultimately be the full value of the claim without adjustment.

In order to ensure that Claimants in year one are not treated differently from those who make claims in year six, all claims will be paid on a two-payment schedule. The first payment will be in the amount of 50% of the claim value (in the above example that would be $1,820) as soon as the claim is administered. The second payment will be made at the end of the claims period, unless Class Counsel seeks approval from the Court to accelerate payments based on the claims rate.

D. Settlement Administration, Class Notice, Service Awards, and Attorneys' Fees and Costs

The Settlement Agreement provides that all costs of notice and claims administration will be paid out of the Settlement Fund. (McShane Decl., Ex. A at ¶ 1.1.dd.) Following a request for proposal and competitive bidding process, Class Counsel have agreed to engage, subject to Court approval, BMC Group, as the Notice Provider and Claims Administrator to advise them with respect to the providing of notice and the processing of claims. (*See* McShane Decl., at para. 11 and at Ex. B)

Class Counsel will also request that the Court award service awards of $2,500 to $5,000 for the Named Plaintiffs. The amount requested will be $2,500 for those who participated in the litigation by providing necessary documents, responding to discovery and in many cases submitting their home to an inspection. The $5,000 award will be requested for those who were also subjected to a deposition. The amount of the incentive awards will in no event exceed $100,000.

Class Counsel will also petition the Court for reasonable attorneys' fees payable from the Settlement Fund in an amount not to exceed $18,500,000 (17.9% of the Settlement Fund), and costs not to exceed $500,000.

The Settlement Agreement provides for notice to Class Members in accordance with the Notice Plan. (McShane Decl., Ex. A at ¶ 10.) The Notice will include publication of a summary settlement notice in newspapers and other publications, television spots regarding the settlement (*id*. ¶ 10.5), mailing of a long form notice to Class Members who can be identified with reasonable effort (*id* ¶ 10.6) a toll-free telephone facility (*id*. ¶ 10.9) and a website for the settlement (*id*. ¶ 10.11). Within one week of preliminary approval the notice provider anticipates having the settlement website live and within two weeks direct mail notice will be sent to all Class Members with known email and physical addresses. Further online notice will commence by November 1, 2013, television notice will begin by November 6, 2013, and magazine publication notice will run November 10 and November 17, 2013. The proposed Notice Plan is further explained in the Settlement Agreement. (*See* McShane Decl., Ex. A., ¶ 10.)

E. Claims Resolution Procedure

The Settlement Agreement provides that Class Members who wish to participate in the Settlement will be able to file a Claim Form ("Claim Form") within six (6) years of the

Settlement's Effective Date. Claim Forms may be obtained by calling a toll-free number or from the Internet through a settlement website that will provide a user-friendly method for downloading Claim Forms. (McShane Decl., Ex. A, ¶¶ 10.9 & 10.11.)

F. Exclusion and Objection Rights

Settlement Class Members who wish to do so may opt out of the Settlement Class during the opt-out period. (McShane Decl., Ex. A at ¶ 11.) The opt-out period will be 60 days from the date Notice is disseminated. (*Id.*) Those who wish to opt out can do so by providing a written Opt-Out Form requesting exclusion which includes the potential Class Member's name, address, telephone number, an email address (if available) and an express statement of desire to be excluded from the Settlement Class. (*Id.*) The request must be filed with the Clerk of the Court and sent by first-class mail to counsel for CertainTeed and Class Counsel. The Court shall determine whether any of the contested opt-outs are valid.

Within five (5) business days after the closing of the opt out period, Class Counsel shall provide counsel for CertainTeed, by electronic mail, facsimile, and/or hand delivery, with a list identifying each person who has requested exclusion from the Settlement Class and attaching copies of all such requests for exclusion. (*Id.* ¶ 11.4.)

The Settlement Agreement provides that CertainTeed may unilaterally void the Settlement if it concludes, in its sole discretion, that the number of Settlement Class Members opting out reaches a level that, in CertainTeed's judgment, threatens to frustrate the essential purpose of this Agreement. (*Id.* ¶ 11.5.) CertainTeed shall advise Class Counsel and the Court, in writing, whether it elects to void the Settlement Agreement, within ten (10) business days of receiving the list of opt-outs pursuant to the Settlement. (*Id.*)

Alternatively, Class Members may file a notice of intent to object to the Settlement if they wish to do so. (McShane Decl., Ex. A at ¶ 11.6.) Class Members who wish to object must file a notice of intent with the Clerk of the Court no later than 60 days from the date notice is disseminated. Copies of the notice must also be sent to Class Counsel and counsel for CertainTeed. *Id*. The objection must bear the signature of the Settlement Class Member (even if represented by counsel), the Class Member's current address and telephone number or email address, if available, state the address or addresses of the property or properties that may contain Siding, specify the number of units of residential property or other structures at each address containing the Siding, and state the exact nature of the objection and whether or not the Class Member intends to appear at the final approval hearing. If the Class Member is represented by counsel, the objection shall also be signed by the attorney who represents the Class Member. If an attorney for an objector intends to appear in this matter, the notice of appearance must be filed with the Court and postmarked or personally delivered to Class Counsel within 10 days of the objecting Class Member's written objection. Objections sent by any Settlement Class Member to incorrect locations shall not be valid. (*Id.*)

IV. ARGUMENT

A. The Court Should Preliminarily Certify The Settlement Class As A National Class For Purposes Of The Settlement

The Supreme Court and various Circuit Courts have recognized that the benefits of the proposed Settlement can be realized only through the certification of a settlement class. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997); *In re Prudential Ins. Co. Am. Sales Practices Litig.,* 148 F.3d 283 (3d Cir. 1998), *cert. denied*, 119 S. Ct. 890 (1999) ("*Prudential II*"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998). Here in the Third Circuit, there is a preference for class certification: "[t]he interests of justice require that in a doubtful case …

any error, if there is to be one, should be committed in favor of allowing a class action." *Eisenberg v. Gagnon,* 766 F.2d 770 (3d Cir. 1985), *cert. denied*, 424 U.S. 946 (1985); *see also Walsh v. Pittsburgh Press Co.,* 160 F.R.D. 527 (W.D. Pa. 1994). In the case of settlements, "tentative or temporary settlement classes are favored when there is little or no likelihood of abuse, and the settlement is fair and reasonable and under scrutiny of the trial judge." *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R. D. 202, 205 (S.D.N.Y 1995) (*quoting In re Beef Indus Antitrust Litig.*, 607 F.2d 167, 174 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981)). Here, there is no likelihood of abuse of the class action device, and the settlement is fair, reasonable and adequate and is subject to approval by the Court.

The ultimate determination of whether a proposed class action settlement warrants approval resides in the Court's discretion. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968). As discussed below, at this stage of preliminary approval, there is clear evidence that the Settlement Agreement is well within the range of possible approval and thus should be preliminarily approved.

Courts may certify class actions for the purposes of settlement only. *See, e.g.*, *Sullivan v. DB Invs., Inc.*, 667 F.3d 273,311 (3d Cir. 2011) (en banc); *In re Processed Egg Prods. Antitrust Litig.* ("*Eggs*"), 284 F.R.D. 249, 278 (E.D. Pa. 2012). Before preliminarily approving a settlement in a case where a class has not yet been certified, the court should determine whether the class proposed for settlement purposes is appropriate under Rule 23. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997); *Sullivan*, 667 F.3d at 296. The MANUAL FOR COMPLEX LITIGATION § 21:632 (4th ed. 2004) (hereinafter "MCL 4TH") advises:

> If the case is presented for both class certification and settlement approval, the certification hearing and preliminary fairness evaluation can usually be combined. The judge should make a preliminary determination that the proposed class satisfies the

> criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b).

MCL 4TH § 21.632. However, when a court is "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems." *Eggs*, 284 F.R.D. at 264 (quotation marks and citation omitted); *see also Sullivan*, 667 F.3d at 322 n.56. Further, the practical purpose of provisional class certification is to facilitate dissemination of notice to the class of the terms of the proposed settlement and the date and time of the final settlement approval hearing. *See* MCL 4TH § 21.633.

Rule 23 governs the issue of class certification, whether the proposed class is a litigation class or, as here, a settlement class. All the criteria for certification of a class for litigation purposes, except manageability, apply to certification for settlement purposes. Thus, a settlement class should be certified where the four requirements of Rule 23(a) – numerosity, commonality, typicality, and adequacy – are satisfied, and when one of the three subsections of Rule 23(b) is met.

Certification of the proposed Settlement Class is appropriate here as it is requested to effectuate a settlement of claims against CertainTeed. Given the fact that thousands of property owners in the United States have CertainTeed Siding installed on their properties, there is no question that the numerosity requirement is met. The commonality and typicality requirements also are easily satisfied, as the claims of the proposed Class Representatives and all Settlement Class Members are premised on the same theories of breach of warranty, strict liability and negligence in the design, manufacture, testing, marketing, distributing and putting into the stream of commerce defective Siding. Further, adequacy of representation is assured as the Class is represented by Class Counsel who have a wealth of experience in complex product liability litigation such as this.

Certification of the Settlement Class under Rule 23(b)(3) for settlement of compensatory damages claims also is appropriate because all of the claims for compensatory relief are premised upon the predominating common issue of CertainTeed's conduct in marketing, manufacturing, and distributing the Siding. There is no danger that individual variations in the type or magnitude of damage suffered by individual Class Members will affect predominance as the Class Representatives have the same type of damages and seek the same type of relief as members of the proposed Settlement Class. Moreover, resolution of the litigation by a class settlement is superior to individual adjudication of the Class Members' claims for compensatory relief. In particular, the Settlement provides members of the Settlement Class with an ability to obtain predictable, certain, and definite compensatory relief promptly and contains well-defined administrative procedures to assure due process in the application of the Settlement Agreement to each individual claimant including the right to "opt out." By contrast, individualized litigation carries with it great uncertainty, risk and costs and provides no guarantee that the injured Class member will obtain necessary and timely compensatory relief at the conclusion of the litigation process. Settlement also would relieve judicial burdens that would be caused by repeated adjudication of the same issues in thousands of individualized trials against CertainTeed.

1. The Elements of Rule 23(a) are Satisfied

In order for a lawsuit to be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, the plaintiff must establish each of the four threshold requirements of Subsection (a) of the Rule, which provides, in pertinent part:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the

> representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); *see, e.g.*, *Barnes v. American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998); *Prudential II*, 148 F.3d at 308-09; *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239 (3d Cir. 1975). Here, all four elements easily are satisfied.

(a) Numerosity

Rule 23(a)(1) requires that the proponent of a class action demonstrate that "the class is so numerous that joinder of all members is impracticable." *Eggs*, 248 F.R.D. at 259. While no specific number of class members is required to maintain a class action, a class of more than 40 people generally satisfies the numerosity requirement. *Stewart v. Abraham*, 275 F.3d 220, 226-228 (3d. Cir. 2001); *Pyke v. Cuomo,* 209 F.R.D. 33, 41 (N.D.N.Y. 2002) ("class comprised of 4,000 members is obviously numerous, and renders joinder impracticable."). As is frequently pointed out, a plaintiff is not required to demonstrate that joinder of all class members is "impossible." *See, e.g., Cureton v. National Collegiate Athletic Ass'n*, 1999 WL 447313, at *5-6 (E.D. Pa. July 1, 1999); *McMahon Books, Inc. v. Willow Grove Associates*, 108 F.R.D. 32, 35 (E.D. Pa. 1985); *Fox v. Prudent Resources Trust*, 69 F.R.D. 74, 78 (E.D. Pa. 1975). Moreover, numerosity is not determined solely by the size of the class, but also by the geographic location of class members. *Marsden v. Select Medical Corp.*, 246 F.R.D. 480, 484 (E.D. Pa. 2007); *In Re Flat Glass Antitrust Litig.,* 191 F.R.D. 472, 477 (W.D. Pa. 1999).

It is proper for the court to accept common sense assumptions in order to support a finding of numerosity. *See Zinberg v. Washington Bancorp, Inc.*, 138 F.R.D. 397, 405 (D.N.J. 1990). Here, Plaintiffs seek certification of a class of virtually all persons and entities who own property in the United States on which CertainTeed Siding was installed before September 30, 2013. Based upon Defendant's sales data and discovery in this matter, it is estimated that there

are approximately 300,000. (See McShane Decl at para. 7) In addition, Settlement Class Members geographically dispersed throughout the United States. There can be no dispute, therefore, that the proposed Class meets the numerosity requirement.

(b) Commonality

Rule 23(a)(2) 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." *Dukes*, 131 S. Ct. at 2556 (internal quotation and alterations omitted); *see also In re: Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 2013 U.S. App. LEXIS 14519, at *16 (6th Cir. July 18, 2013) ("We start from the premise that there need be only one common question to certify a class."); *see also Baby Neal v. Casey,* 43 F.3d 48, 56 (3d Cir. 1994) ("The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class."). The key inquiry for the commonality analysis is whether a common question can be answered in a class wide proceeding, such that the answer will "drive the resolution of the litigation." *Dukes*, 131 S. Ct. at 2551. A common question is one which "arises from 'a common nucleus of operative facts' regardless of whether the underlying facts fluctuate over the class period and vary as to individual claimants." *Yslava v. Hughes Aircraft Co.*, 845 F. Supp. 705, 712 (D. Ariz. 1993).

Significantly, the rule does not require that *all* questions be common or even that common questions predominate. *Hummel v. Brennan*, 83 F.R.D. 141, 145 (E.D. Pa. 1979); *Kuhn v. Philadelphia Electric Co.*, 80 F.R.D. 681, 684 (E.D. Pa. 1978). Plaintiffs are not required to show that all Settlement Class Members' claims are identical to each other, and any differences between the proposed Class Members, "while arguably relevant as defenses to liability, do not change the fact that this class action raises the same basic claim and shares common questions of

law." *Mack v. Suffolk County,* 191 F.R.D. 16, 23 (D. Mass. 2000). Thus, "[f]actual differences among the claims of the putative class members do not defeat certification," *Baby Neal*, 43 F.3d at 56; *Prudential II*, 148 F.3d at 310, and a single common question is sufficient to satisfy the requirements of Rule 23(a)(2). *See Prudential II*, 148 F.3d at 310; *In re Telectronics Pacing Sys., Inc*., 172 F.R.D. 271, 280 (S.D. Ohio 1997); *Simon v. Westinghouse Electric Corp.*, 73 F.R.D. 480, 484 (E.D. Pa. 1977); *see also In re Agent Orange Product Liability Litigation,* 818 F.2d 145 (2d Cir. 1987).

Applying these principles, it is evident that the commonality requirement of Rule 23(a)(2) is easily met here. The central issues posed by this litigation are the defective nature of the Siding and, specifically, the likelihood that the Siding will degrade and fail well before the expiration of its warranted life. This is a question that can be answered on a Class-wide basis. Given the presence of these common questions central to this litigation, Rule 23(a)(2)'s requirement for the existence of common questions of fact or law has been met here.

(c) Typicality

Rule 23(a)(3) requires that the claims of the class representatives be "typical of the claims … of the class." As the Third Circuit described in *Baby Neal v. Casey*:

> The typicality inquiry is intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented. [Citation omitted.] The typicality criterion is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of the absentees by requiring that the common claims are comparably central to the claims of the named plaintiffs as to the claims of the absentees. [Citation omitted].
>
> Typicality entails an inquiry whether 'the named plaintiff's individual circumstances are markedly different or … the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based.' [Citations omitted.] Commentators

> have noted that cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims. [Citation omitted.]

43 F.3d at 57-58.

The requirement of this subdivision of the rule, along with the adequacy of representation requirement set forth in subsection (a)(4), is designed to assure that the interests of unnamed class members will be protected adequately by the named class representative. *See e.g., General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147 (1982); *Prudential II*, 148 F.3d at 311; *Asbestos School Litigation*, 104 F.R.D. at 429-30. The measure of whether a plaintiff's claims are typical is whether the nature of their claims, judged from both a factual and a legal perspective, are such that in litigating his or her personal claims he or she reasonably can be expected to advance the interests of absent class members. *See, e.g.*, *Falcon,* 457 U.S. at 156-157; *Weiss v. York Hospital*, 745 F.2d 786 (3d Cir. 1984); *Telectronics*, 172 F.R.D. at 280. The typicality requirement has been liberally construed by the federal courts. See, *e.g., Scholes v. Stone, McGuire & Benjamin,* 143 F.R.D. 181, 185 (N.D. Ill. 1992).

In product liability cases such as this, individual variations among the class representatives and class members concerning such matters as magnitude of injury to a property and the like do not defeat a finding of typicality because they are not germane to the "factual and legal issues of a defendant's liability [which] do not differ dramatically from one Plaintiff to the next." *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988); a*ccord, Telectronics*, 172 F.R.D. at 280; *In re Federal Skywalk Cases*, 95 F.R.D. 483 (W.D. Mo. 1982) (Rule 23(b)(3) mass tort class certified; "egregiousness of a class [representative's] injuries is irrelevant" to typicality); *Day v. NLO, Inc.*, 144 F.R.D. 330 (S.D. Ohio 1992), *vacated in part on other grounds*, 5 F.3d 154 (6th Cir. 1993) (the "important question is to what extent those

differences, when compared to the nature and extent of the shared characteristics of the named Plaintiffs and class members' claims, will defeat the court's ability to achieve a considerable efficiency through collective adjudication of those claims.") (quoting *Boggs,* 141 F.R.D. at 65).

Here, individual variations among the Settlement Class Members do not render the Named Plaintiffs' claims atypical of those of the Class. The claims of the Named Plaintiffs and each of the Class Members are predicated on the premature failure of Siding. CertainTeed's liability for the resulting damage to each Class Member does not depend on the individual circumstances of the Class Members. Rather, the Complaint alleges that Defendant's conduct in manufacturing, promoting, and selling the Siding was unlawful and gives rise to liability to all persons who, like the Named Plaintiffs, experienced failure of the Siding prior to the expiration of their warranted life. In order to prevail, therefore, the Named Plaintiffs and each Class Member will be required to make the same factual presentation and legal argument with respect to the common questions of liability cited earlier, regardless of the individual circumstances which may affect their ability to prove individual causation and amount of damages on an individualized basis.

The common issues necessarily share "the same degree of centrality" to the Named Plaintiffs' claims such that in litigating the liability issues, the Named Plaintiffs reasonably can be expected to advance the interests of all absent Class Members in a favorable determination with respect to each such issue. "Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members and if based on the same legal theory." *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 923 (3d Cir. 1992). 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." *In re Microcrystalline Cellulose Antitrust Litig.*, 218 F.R.D. 79, 84 (E.D. Pa. 2003); *see also In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 185 (D.N.J. 2008) ("[W]hile the Court must ensure the interest of the plaintiffs are congruent the Court will not reject the Plaintiffs' claim of typicality on speculation regarding conflicts that may arise in the future."). Accordingly, the typicality requirement of the rule is easily satisfied.

(d) Adequacy

Rule 23(a)(4)'s adequacy prong requires that "the representative parties will fairly and adequately protect the interests of the class." The Third Circuit consistently has ruled that:

> Adequate representation depends on two factors: (a) the Plaintiff's attorney must be qualified, experienced and generally able to conduct the proposed litigation; and (b) the Plaintiffs must not have interests antagonistic to those of the class.

Weiss, 745 F.2d at 811 (quoting *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d at 247); *see also Prudential II*, 148 F.3d at 312. These two components are designed to ensure that absentee class members' interests are fully pursued.

i. The Class Has Been More Than Adequately Represented by Class Counsel

In the present case, the presumption of adequate representation cannot be rebutted. With respect to the issue of adequacy of counsel, the Court may take judicial notice of the fact that Class Counsel have substantial experience in litigating mass tort class actions and complex product liability cases and have been lead counsel in numerous complex class action cases. Class Counsel have and will continue to aggressively litigate this case. Counsel have taken significant discovery enabling them to negotiate an advantageous settlement from a position of knowledge and strength, and as advocates for the entirety of the Settlement Class. The adequacy requirement

is satisfied for certification and Interim Counsel should be appointed Lead Counsel pursuant to Rule 23(g).

ii. The Class Representatives' Interests Are Not Antagonistic to Those of the Class

There is nothing to suggest that the Named Plaintiffs have interests antagonistic to those of the absent Class Members. *See Dietrich v. Bauer,* 192 F.R.D. 119, 126 (S.D.N.Y. 2000) ("gauging the adequacy of representation requires an assessment whether the class representatives have interests antagonistic to those of the class they seek to represent"). Here, the Named Plaintiffs and Settlement Class Members are equally interested in demonstrating the defective nature of the Siding, and are further committed to obtaining appropriate compensation from CertainTeed. Plaintiffs have obtained an advantageous settlement that treats all Settlement Class Members in the same fashion, and provides real value to all.

Having demonstrated that each of the mandatory requirements of Rule 23(a) are satisfied here, Plaintiffs now turn to consideration of the factors which, independently, justify class treatment of this action under Rule 23(b)(3).

2. The Requirements of Rule 23(b)(3) Are Easily Met Here in the Settlement Context

In addition to satisfying Rule 23(a), the Settlement Class qualifies under Rule 23(b)(3), under which a class action may be maintained if:

> [T]he court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623; *Newton v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187 (3d Cir. 2001). Although Rule 23(b)(3) requires that common issues of law and fact predominate, it does not require that there be an absence of any individual issues. *In re Sugar Industry Antitrust Litig.*, 73 F.R.D. 322, 344 (E.D. Pa. 1976). The Court must find that "the group for which certification is sought seeks to remedy a common legal grievance." *Hochschuler v. G.D. Searle & Co.*, 82 F.R.D. 339, 348-49 (N.D. Ill. 1978). Rule 23(b)(3) does not require that all questions of law or fact be common. *See Telectronics*, 172 F.R.D. at 287-88. In this regard, courts generally focus on the liability issues, and if these issues are common to the class, common questions are held to predominate over individual questions. *See id.*; *Dietrich v. Bauer*, 192 F.R.D. 119, 127 (S.D.N.Y. 2000) (in determining whether common issues of fact predominate, "a court's inquiry is directed primarily toward whether the issue of liability is common to members of the class."). "Plaintiffs' burden is not to prove each element of their claim, but to show each element is capable of proof through common evidence." *Sherman v. Am. Eagle Express, Inc.*, 2012 WL 748400, at *10 (E.D. Pa. Mar. 8, 2012).

Common questions of law and fact predominate here. The Settlement Class Members' claims for compensatory relief are founded upon common legal theories related to the issues of CertainTeed's designing, creating, manufacturing, testing, marketing, distributing and/or selling defective Siding. Thus, Class Members have an interest in the adjudication of what is by far and away the single issue of law and fact dominate this litigation, *e.g.*, whether or not the subject Siding is defective. Once that issue is determined on a class-wide basis, the remaining issues

focus on relatively minor matters such as the size of a Class Member's wall and how long the wall has been on the structure.

The other requirement of Rule 23(b)(3) that must be satisfied is the superiority requirement (*i.e.*, that a class action suit provides the best way of managing and adjudicating the claims at issue). "The superiority requirement asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." *Prudential II*, 148 F.3d at 316). Considerations of judicial economy underscore the superiority of the class action mechanism in this case. *See Prudential II*, 148 F.3d at 316 and n. 57. Settlement on a class basis also is superior to individual litigation and adjudication because settlement provides Class Members with prompt compensation for their damages. By contrast, compensation resulting from litigation is highly uncertain and may not be received before lengthy trial and appellate proceedings are complete. In addition, the Settlement obviously removes the overwhelming and redundant costs of individual trials.

The Settlement Agreement renders a class action superior to other potential avenues of recovery for Named Plaintiffs and the Class. In fact, this case presents the paradigmatic example of a dispute that can be resolved to effectuate the fundamental goals of Rule 23: (1) to promote judicial economy through the efficient resolution of multiple claims in a single action; and (2) to provide persons with smaller claims, who would otherwise be economically precluded from doing so, the opportunity to assert their rights. WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 1754. At the same time, the Settlement fully preserves the due process rights of each individual plaintiff seeking compensatory damages.

In sum, the requirements of Rule 23(b)(3) are satisfied and certification of the proposed Settlement Class is appropriate and should be granted.

B. The Court Should Grant Preliminary Approval of The Settlement

In addition to class certification, Plaintiffs seek preliminary approval of the Settlement. The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation. *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("[T]here is an overriding public interest in settling class action litigation and it should therefore be encouraged."). Where, as here, the parties propose to resolve class action litigation through a class-wide settlement, they must obtain the court's approval. *See* Fed. R. Civ. P. 23(e); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 295 (3d Cir. 2011) (en banc). Preliminary approval requires a finding that the Settlement falls within the range of possible approval, meaning, primarily, that the Settlement was reached as a result of arms-length negotiations and with sufficient information. Here, both those requirements are satisfied.

As detailed above, after a lengthy pre-filing investigation and protracted litigation, Class Counsel entered settlement negotiations with CertainTeed. The negotiations included numerous personal meetings of counsel, telephone conferences, email exchanges, the exchange of numerous written settlement proposals and a two-day mediation session with Hon, James R. Melinson on June 26-27, 2012, followed by numerous additional telephone conferences and meetings to finalize the terms of the Settlement Agreement.

While the mediation was fruitful and ultimately resulted in a Settlement, Class Counsel conducted an extensive investigation of the issues raised by the failure of the Siding and prepared for protracted litigation. In doing so, Class Counsel obtained, exchanged and analyzed documents obtained through discovery. In addition, Class Counsel retained product defect

experts, interviewed hundreds of potential witnesses, incurred significant costs relating to the forensic testing and analysis of the Siding, and performed numerous on-site property inspections. Class Counsel also investigated the cause of the failure of the Siding, the applicable legal standards for product defect cases involving defective construction materials, warranties, and relevant class action standards. To carry these duties out, Class Counsel assembled a highly qualified team of attorneys who have substantial experience in prosecuting class actions and, in particular, those involving defective residential construction materials.

Accordingly, at this stage of preliminary approval, there is clear evidence that the Settlement is within the range of possible approval and thus should be preliminarily approved.

1. The Standards and Procedures for Preliminary Approval

Rule 23(e) of the Federal Rules of Civil Procedure mandates that a class action cannot be settled without court approval:

> The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
>
> (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
> (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
> (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
> (4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
> (5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

Fed. R. Civ. P. 23(e); *Amchem,* 521 U.S. at 617; *Prudential II*, 148 F.3d at 316.

The procedure of providing notice to the class followed by a hearing to consider approving a class settlement has been accepted by numerous courts and is now standard practice. *Prudential II*, 148 F.3d at 326-27; *see also Bronson v. Board of Education of the City School District of the City of Cincinnati*, 604 F. Supp. 68 (S.D. Ohio 1984). In determining whether preliminary approval is warranted, the primary issue is whether the proposed settlement is within the range of what might be found fair, reasonable and adequate, so that notice of the proposed settlement should be given to class members, and a hearing scheduled to determine final approval. The MCL 4TH summarizes the recommended procedure that courts have articulated for the class action settlement approval process:

> Review of a proposed class action settlement generally involves two hearings. First, counsel submits the proposed terms of the settlement and the judge makes a preliminary fairness evaluation.… If the case is presented for both class certification and settlement approval, the certification hearing and preliminary fairness evaluation can usually be combined.… The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.

MCL 4TH § 26.632.

When deciding preliminary approval, a court does not conduct a "definitive proceeding on fairness of the proposed settlement." *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983); *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) (holding that the "preliminary determination establishes an initial presumption of fairness."). The "definitive proceeding on fairness of proposed settlement" must await the final hearing, at which fairness, reasonableness and adequacy of the settlement is addressed. *In re Linerboard Antitrust Litig.*, 292 F.Supp. 2d 631, 638 (E.D. Pa.

2003); *Prudential II*, 148 F.3d at 316-17; *General Motors*, 55 F.3d at 785; *Stoetzner v. U.S. Steel Corp*., 897 F.2d 115 (3d Cir. 1990).

> In evaluating a settlement for preliminary approval, the court need not reach any ultimate conclusions on the issues of fact and law that underline the merits of the dispute…. Instead, the court must determine whether 'the proposed settlement discloses grounds to doubt its fairness or otherwise obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class or excessive compensation for attorneys, and whether it appears to fall within the range of possible approval…. The analysis often focused on whether the settlement is the product of 'arms-length negotiations.'

In re Auto Refinishing Paint Antitrust Litig., 2004 WL 1068807, at *2 (E.D. Pa May 11, 2004) (citations omitted); *Thomas v. NCO Financial Sys*., 2002 WL 1773035, at *5 (E.D. Pa. July 31, 2002).

A settlement falls within the "range of possible approval" under Rule 23 if there is a conceivable basis for presuming that the standard applied for final approval will be satisfied so as to justify "notify[ing] the Class Members of the proposed settlement and… proceed[ing] with a fairness hearing." *Armstrong v. Bd. of School Dir. Of the City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled in part on other grounds by Felzen v. Andreas,* 134 F.3d 873 (7th Cir. 1998); *see also General Motors*, 55 F.3d at 785; *In re Baldwin-United Corp. Sec. Lit.*, 105 F.R.D. 475, 482 (S.D.N.Y. 1984); *In re Corrugated Container Antitrust Litigation,* 643 F.2d 195 (5th Cir. 1981).

An initial analysis of the terms of the Settlement Agreement here should give the Court confidence that it merits serious consideration by Settlement Class Members and that it will likely serve as the fair and comprehensive resolution of Class Members' claims. The Settlement is "sufficiently fair, reasonable and adequate to justify notice to those affected and an opportunity to be heard," the legal standard for preliminary approval of a class action settlement.

In re Auto Refinishing Pain Antitrust Litig., 2004 WL 1068807, at *1 (E.D. Pa. May 11, 2004) (quotation omitted).

Further, it is well-established that there is an overriding public interest in resolving litigation, and this is particularly true in class actions. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534-35 (3d Cir. 2004); *General Motors,* 55 F.3d at 784 (holding that "the law favors settlement, particularly in class actions and other complex cases where substantial judicial resource can be conserved by avoiding formal litigation."); *Austin v. Pa. Dept. of Corr.*, 876 F.Supp. 1437, 1455 (E.D. Pa. 1985) (explaining that "the extraordinary amount of judicial and private resources consumed by massive class action litigation elevates the general policy of encouraging settlements to 'an overriding public interest.'").

2. The Settlement Is Fair, Reasonable and Adequate

The Third Circuit has set forth a four-factor test to determine the preliminary fairness of a class action settlement.

(1) the negotiations occurred at arm's length;

(2) there was sufficient discovery;

(3) the proponents of the settlement are experienced in similar litigation; and

(4) only a small fraction of the class objected.

General Motors, 55 F.3d at 785. Subsequently, at the final fairness hearing, the Court has the discretion under Rule 23(e) to finally approve the settlement if the Court finds it to be fair, adequate and reasonable to Class Members. In the absence of fraud, collusion or the like, the Court should be hesitant to substitute its own judgment for that of counsel. *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982); *see also Trief v. Dun & Bradstreet Corp.,* 840 F. Supp. 277, 281 (S.D.N.Y. 1993) ("absent evidence of fraud or overreaching [courts] consistently have

refused to act as Monday morning quarterbacks in evaluating the judgment of counsel."); *In re Warner Communications Sec. Lit.*, 798 F.2d 35, 37 (2d Cir. 1986) ("[I]t is not a district judge's job to dictate the terms of a class settlement."); *M. Berenson Co. v. Faneuil Hall Market Place, Inc.*, 671 F. Supp. 819, 822 (D. Mass. 1987) ("Where, as here, a proposed settlement has been reached after meaningful discovery, after arm's length negotiations conducted by capable counsel, it is presumptively fair.") (footnote omitted).

Settlements negotiated by experienced counsel that result from arms-length negotiations are generally entitled to deference from the court. *In re Auto-Refinishing Pain Antitrust Litig.*, 2003 WL 23316645, at *6 (E.D. Pa. Sep. 5, 2003); *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003) ("[a] presumption of correctness is said to attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel") (citing *Hannahan v. Britt*, 174 F.R.D. 356, 366 (E.D. Pa. 1997)); *Lake v. First Nationwide Bank*, 156 F.R.D. 615, 628 (E.D. Pa. 1994) (giving "due regard to the recommendations of the experienced counsel in this case, who have negotiated this settlement at arms-length and in good faith"); *Petruzzi's, Inc. v. Darling-Delaware Co.*, 880 F. Supp. 292, 301 (M.D. Pa. 1995) ("the opinions and recommendations of such experienced counsel are indeed entitled to considerable weight"); 2 NEWBERG ON CLASS ACTIONS, (11.4) (3d ed. 1992) ("There is usually an initial presumption of fairness when a proposed class settlement, which negotiated at arm's-length by counsel for the class is presented for court approval."). This deference reflects the understanding that vigorous negotiations between seasoned counsel protect against collusion and advance the fairness consideration of Rule 23(e).

The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation. *See In re Warfarin*

Sodium Antitrust Litig., 391 F.3d 516, 535 (3d Cir. 2004); *In re Vicuron Pharms., Inc. Secs. Litig.*, 512 F. Supp. 2d 279, 284 (E.D. Pa. 2007). The parties may also gain significantly from avoiding the costs and risks of a lengthy and complex trial. *See In re First Commodity Corp. of Boston Customer Accts. Litig.*, 119 F.R.D. 301, 306-07 (D. Mass. 1987). These economic gains multiply when settlement also avoids the costs of litigating class status – often a complex litigation within itself. Furthermore, a settlement may represent the best method of distributing damage awards to injured plaintiffs, especially where litigation would delay and consume the available resources and where piecemeal settlement could result in the complete exhaustion of defendant's resources.

Here, each of the relevant factors balance heavily in favor of preliminarily approving the proposed Settlement. To begin, the negotiation process with CertainTeed supports a finding that the settlement is fair, reasonable and adequate. It is beyond dispute that the Settlement Agreement was the result of vigorous arms'-length negotiations, conducted by experienced counsel for all parties and after more than sufficient discovery had been undertaken. Class Counsel and CertainTeed's counsel vigorously advocated their respective clients' positions in the settlement negotiations and were prepared to litigate the case fully if no settlement was reached. Only after the exchange of discovery, review of documents, consultations with experts and litigation of this MDL in earnest, was the Settlement reached. Nothing in the course of the negotiations or in the substance of the proposed Settlement presents any reason to doubt its fairness and the concern noted in *Amchem*—regarding the vulnerability of a settlement claim where the parties had not been put to the test of a vigorous adversarial process in shaping their position at the bargaining table, *Amchem*, 521 U.S. at 601 & 620—is not at issue here.

The fairness of the settlement process and of the Settlement Agreement itself also was shaped by the experience and reputation of counsel, an important factor in final approval of class action settlements. *See General Motors*, 55 F.3d at 787-88; *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977); *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 410 F. Supp. 659, 667 (D. Minn.1974) ("The recommendation of experienced antitrust counsel is entitled to great weight."); *Fisher Brothers v. Phelps Dodge Industries, Inc.,* 604 F. Supp. 446, 452 (E.D. Pa. 1985) ("The professional judgment of counsel involved in the litigation is entitled to significant weight."). This Settlement was negotiated by experienced counsel to meet all the requirements of Rule 23 as discussed in *Amchem*, and specifically to provide administrative procedures to assure all Class Members equal and sufficient due process rights. Accordingly, the Settlement was not the product of collusive dealings, but, rather, was informed by the vigorous prosecution of the case by experienced and qualified counsel.

Further, continued litigation would be long, complex and expensive, and a burden to the Court. *See In re Pet Food Prods. Liab. Litig*., 629 F.3d 333, 350 (3d Cir. 2010); *Benjamin v. Dep't of Pub. Welfare*, 807 F.Supp.2d 201, 207 (M.D. Pa. 2011); *Lake*, 900 F. Supp. 726 (expense and duration of litigation are factors to be considered in evaluating the reasonableness of a settlement); *Weiss v. Mercedes-Benz of N. Am. Inc.,* 899 F. Supp. 1297 (D.N.J. 1995) (burden on crowded court dockets to be considered). Continuing this litigation against CertainTeed would entail a lengthy and expensive battle, involving legal and factual issues specific to CertainTeed. It is reasonable to expect that all such matters would be sharply disputed and vigorously contested, as they were in settlement negotiations. Additionally, CertainTeed would assert various defenses, and a jury trial (assuming the case proceeded beyond pretrial motions) might well turn on class questions of proof making the outcome of such trial uncertain

for both parties. Even after trial was concluded, there would very likely be one or more lengthy appeals. Given this uncertainty, a certain "bird in the hand in this litigation is surely worth more than whatever birds are lurking in the bushes." *In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 838 (W.D. Pa. 1995).

Finally, there is no reason to doubt the fairness of the proposed Settlement. As discussed above, the Settlement provides substantial cash benefits to the Settlement Class Members that are fair and reasonable consideration for the claims.

Balancing the complexities of this litigation, the substantial risk, expense and duration of continued litigation against CertainTeed and likely appeal if Plaintiffs did prevail against CertainTeed at trial, Class Counsel firmly believe that the Settlement represents an excellent resolution of this litigation against CertainTeed. It is well established that significant weight should be attributed to the belief of experienced counsel that settlement is in the best interests of the class as here. *In re General Instruments Sec. Litig.*, 209 F.Supp. 2d 423, 431 (E.D. Pa. 2001).

The Settlement was the result of good faith, arms'-length negotiations between experienced and informed counsel on both sides. There was no collusion between the negotiating parties. The proposed Settlement does not grant unduly preferential treatment to the class representatives or to segments of the Settlement Class, and it does not provide excessive compensation to Class Counsel. *See Martin v. Foster Wheeler Energy Corp.*, 2008 WL 906472, at *2 (M.D. Pa. Mar. 31, 2008); *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 153 (E.D. Pa. 2000); *Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 379 (N.D. Ohio 2001). The standards for preliminary approval are therefore met in this case. *Id.*; *see also In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1999).[2] Therefore, the Court

[2] With respect to the reaction of the Class to the Settlement, the Court will only be able to evaluate this factor after the notice period.

should grant the present motion so that the Settlement Class can respond to the proposed Settlement and the Court can evaluate its fairness at a Final Approval Hearing.

C. THE COURT SHOULD DIRECT NOTICE TO THE CLASS

Rule 23(e) provides that class members are entitled to notice of any proposed settlement before it is ultimately approved by the Court. Under Rule 23(e) and the relevant due process considerations, adequate notice must be given to all absent class members and potential class members to enable them to make an intelligent choice as to whether to opt-out of the class. *Prudential II*, 148 F.3d at 326-27; *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996). The Notice plan provided for in the Settlement Agreement has been developed with the thought of providing the most comprehensive notice possible, and a notice that will in fact "reach" all Class Members.

The proposed Notice provides clear and accurate information as to the nature and principal terms of the Settlement Agreement, including the monetary and other relief the Settlement will provide Members of the Class, the procedures and deadlines for opting out of the Settlement or submitting objections, the consequences of taking or foregoing the various options available to Class Members, and the date, time and place of the final settlement approval hearing. Pursuant to Fed. R. Civ. P. 23(h), the proposed Notice also sets forth the maximum amount of attorneys' fees and costs that may be sought by Named Plaintiffs and their counsel. The Settlement Agreement proposes that the Notice to all Class Members and interested parties be provided by publication of summary notices in the print media, on television, and on the internet, and direct mailing of the long form notice to Class Members and reasonably identifiable distributors of the Siding at the addresses last known to CertainTeed. It also identifies and provides contact information for Class Counsel, counsel for CertainTeed and the Court.

Courts have sanctioned a variety of public notices to ensure that absent class members are aware of the settlement and are capable of making an informed choice. In the Second Circuit, the parties sought the aid of the mass media and the state governments to provide adequate notice to the absent class members. *In Re Agent Orange Prod. Liability Litigation*, 818 F.2d 145, 169 (2d Cir. 1987). This district has found that utilizing the mass media and posting notices in prisons gave adequate notice to absent class members in a civil rights action regarding the overcrowding of prisons. *Harris v. Reeves*, 761 F. Supp. 382 (E.D. Pa. 1991). In the Northern District of Georgia, the federal court sanctioned publication in 100 of the largest cities in the United States and through a public awareness program. The public awareness program included news releases through the broadcast media and the print media. *See In Re Domestic Air Transp. Antitrust Litigation*, 141 F.R.D. 534 (N.D. Ga. 1992). Through those sophisticated publications, the courts found Rule 23(e) and due process have been satisfied.

In this case, the Notice program will include sophisticated marketing efforts to provide adequate notice to all Settlement Class Members. The Plan will include the most reliable and modern advancements available to provide notice to users who are not known. Furthermore, notice will meet all necessary legal requirements and provide a comprehensive explanation of the Settlement in layman's terms. Through these extensive efforts, Settlement Class Members will receive adequate notice of the Settlement. The Short Form notices to be used in print ads, on television spots, and internet media. The Long Form notice will be mailed directly to each Class member for which the parties have a valid mailing address. The Notice complies with the standards of fairness, completeness, and neutrality required of a settlement class notice disseminated under authority of the Court. *See, e.g.,* MCL 4TH § 21.311-21.312.

Full and understandable notice is particularly important here due to the substantial benefits that will provided to Settlement Class Members who submit a Claim Form. To ensure that such full and understandable notice is provided, that the notice requirements of Rule 23 are met, and that the Notice provided ensures that Class Members' constitutional due process rights are guaranteed, Plaintiffs request that the Court hold a pre-notice hearing prior to the dissemination of notice, to allow for objections to or comments upon the timing, contents of method of dissemination of the proposed notice. Holding a hearing prior to the dissemination of notice is a procedure that has been utilized in similar types of complex products liability litigation by courts within the Third Circuit to ascertain whether the notice of a classwide settlement that has been approved was sufficient prior to its dissemination. *See Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314 (E.D. Pa. 1993). To ensure that such a pre-dissemination hearing provides meaningful opportunity for objection and comment upon the notice plan, the Plaintiffs will widely disseminate the Notice, by *inter alia*, publishing the full text of the proposed notice on the Internet website that has been specially created to address questions about the Settlement and by direct mail of same to Plaintiffs' counsel as part of the distribution of the Settlement Agreement.

D. A FINAL FAIRNESS HEARING SHOULD BE SCHEDULED

The Court should schedule a final fairness hearing to obtain all required information to determine that class certification is proper and the settlement should be approved. *See* MANUAL FOR COMPLEX LITIGATION, Fourth § 21.633 (2008). The fairness hearing will provide a forum for proponents and opponents to explain, describe, or challenge the terms and conditions of the class certification and settlement, including the fairness, adequacy and reasonableness of the

settlement. Accordingly, Plaintiffs request that the Court schedule the time, date, and place of the final fairness hearing.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant preliminary approval of the parties' Settlement Agreement.

Dated: September 30, 2013

BERGER & MONTAGUE, P.C.

/s/ H. Laddie Montague, Jr.

H. Laddie Montague, Jr.
Lawrence Deutsch
Shanon J. Carson
Berger & Montague, P.C.
1622 Locust Street
Philadelphia, PA 19103-6365
Telephone: (215) 875-4656
Facsimile: (215) 875-4604
Email: scarson@bm.net

AUDET & PARTNERS, LLP
Michael McShane
221 Main Street, Suite 1460
San Francisco, CA 94105
Telephone: 415.568.2555
Facsimile: 415.568.2556
Email: MMcShane@audetlaw.com

Co-Lead Counsel for Plaintiffs and the Proposed Settlement Class