

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF BEAUFORT )

IN THE COURT OF COMMON PLEAS  
FOURTEENTH JUDICIAL CIRCUIT  
Civil Action No. 2002-CP-07-1377

JOHN CARDAMONE and his wife )  
SALLY CARDAMONE, and )  
BENJAMIN T. CLARK and his wife, )  
DIANE M. CLARK, and RAMONA )  
GLANNI, and NATHAN W. GORDON )  
and his wife, JILL C. GORDON )  
individually and on behalf of others )  
similarly situated in the state of South )  
Carolina, )

Plaintiffs, )

v. )

DRYVIT SYSTEMS, INC., ESTATE )  
BUILDERS, INC., and AMERICAN )  
WAY APPLICATORS OF SOUTH )  
CAROLINA, INC., )

Defendants. )

ORDER GRANTING  
CLASS CERTIFICATION

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LEATH BOUCH  
CLERK  
COURT

This matter is before the Court on a Motion by the Plaintiffs for an Order Certifying a Class Action pursuant to Rule 23 of the South Carolina Rules of Civil Procedure. This Motion was filed on August 19, 2002. The parties appeared and were represented by their respective counsel. Because the Plaintiffs can satisfy the requirements of Rule 23 SCRPC, the Plaintiff's Motion is GRANTED.

PROCEDURAL BACKGROUND

On August 12, 2002, the Plaintiffs filed suit in this Court to have themselves and all other similarly situated persons in South Carolina who have paid for, own, or have owned an exterior insulation and finish systems (EIFS systems). The class is restricted to property owners in South

Carolina. On August 19, 2002, the Plaintiffs filed a Motion to Certify a Class or, in the alternative, for an injunction.

Under South Carolina Rule of Civil Procedure 23(a), in order to certify a class action, it is necessary that the Court find: (1) the class is so numerous that joinder of all members is impractical; (2) there are questions of law and fact common to the class; (3) claims or defenses of the representative parties are typical of claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interest of the class; (5) the amount in controversy must exceed one hundred dollars (\$100.00) for each member of the class. The Complaint so alleges.

#### CLASS CERTIFICATION

The Plaintiffs seek to certify an opt-out class action on behalf of themselves and all other persons similarly situated who have paid for, own, or have owned an exterior insulation and finish systems (EIFS systems). The class consists of

[a]ll persons who own or have owned a one- or two-family residential dwelling, or townhouse (hereinafter "structure") in the State of South Carolina who would be a member of the Class purportedly created in the action pending in Tennessee, Posey, et al. v. Drvvit Systems, Inc.

All persons who own or have owned a structure in the State of South Carolina on which an Exterior Insulation and Finish System ("EIF system") have been installed or any previous owner of such structures who incurred any costs or expenses to inspect, repair, or replace the EIF system or other property damages by the EIF system at any time from January 1, 1989, until the date Defendants' continuing conduct is terminated (the "Class Period").

(Plaintiffs' Complaint, pp. 6-7).

As the proponent of class certification, it is the Plaintiffs' burden to make a *prima facie* showing that the five requirements of class certification pursuant to Rule 23(a) SCRPC have been met. *Waller v. Seabrook Island Property Owners Association*, 300 S.C. 465, 388 S.E.2d

799, 801 (1990); *Litlefield v. S.C. Forestry Commission*, 370 S.C. 348, 523 S.E.2d 781 (1991). The Court finds that the Plaintiffs have met their burden as to each of these requirements.

#### NUMEROSITY

South Carolina Rule of Civil Procedure 23(a)(1) requires that the class be so numerous that joinder of all members of the potential class is impractical. Impracticability means difficulty or inconvenience of joinder, not impossibility. *In re Drexel Burnam Lambert Group, Inc.*, 960 F.2d 285, 290 (2<sup>nd</sup> Cir. 1992). *Stemmermann v. Lilienthal* 54 S.C. 440, 32 S.E. 535(1889). That requirement can be satisfied by the sheer number of potential class members. *Stemmermann, id.* The Plaintiffs are not required to show the exact number in the class. *Evans v. US Pipe and Foundry Co.*, 696 F.2d 925 (11<sup>th</sup> Cir. 1983), or even that all members of the class can be readily identified. *McGann v. Mungo*, 287 S.C. 561, 340 S.E.2d 154 (Ct App. 1986). The law is clear that where the exact size of the class is unknown, but general knowledge or common sense suggests it is large, the Court may take judicial notice of the fact and assume that joinder is impractical. See Newberg, *Newberg on Class Actions*, p. 46 (2d ed. 1985)(citing *Evans v. US Pipe and Foundry Co.*, 696 F.2d 926 (11<sup>th</sup> Cir. 1983). The South Carolina Supreme Court has affirmed the certification of classes that are composed of a single family. *Caine v. Griffin*, 232 S.C. 562, 103 S.E.2d 37 (1958); *Faber v. Faber* 76 S.C. 156, 156 S.E. 677 (1907). The South Carolina Federal Court has affirmed class allegations of the property owners within a single residential subdivision, *Bates v. Tenco Services, Inc.*, 132 F.R.D. 160 (D.S.C. 1990). In this case, the potential class is composed of all persons in South Carolina who have paid for, own, or have owned the Defendants' EIFS systems. Numerosity cannot be an issue.

The Court finds that the sheer numbers of proposed class members who have paid for, own or have owned the Defendants' EIFS systems establishes that there are large numbers of

potential class members in this case. Based upon the sheer number of potential class members, joinder of all the class members would be impracticable. *South Carolina Public Service Authority v. C&S Bank*, 300 S.C. 42, 836 S.E.2d 775 (1989). *Stemmerman v. Lilienthal*, 54 S.C. 440, 32 S.E. 535 (1899).

#### COMMONALITY

South Carolina Rule of Civil Procedure 23(a)(2) requires that there be questions of law common to the class; a "common nucleus of operative fact" generally satisfies the commonality requirement of the Rule. Under Rule 23, a single common issue will suffice if it is important enough. It also follows that the mere existence of individual issues does not defeat class action status. *McGann v. Mungo*, 287 S.C. 561, 340 S.E.2d 157 (Ct. App. 1986); *Central Wesleyan College v. W.R. Grace and Company*, 143 F.R.D. 628, 636 (D.S.C. 1992); Flanagan, *South Carolina Civil Procedure*, p. 179 (2d ed. 1996). In defective products cases, the commonality requirement is easily satisfied. By their nature, defective product cases entail common legal and factual questions about the existence in fact of the alleged defect and defective product. *In re Playmobil Antitrust Litigation*, 35 F.2d 231, 240 (E.D.N.Y. 1998).

The Court finds this defects product case satisfies the requirement of common questions of law or fact. The Court finds that the Plaintiffs have established that there are questions of both law and fact common to the class.

#### TYPICALITY

Rule 23(a)(3) requires the claims of representative parties to be "typical of the claims of the class". Judge Blatt recognized in the *Central Wesleyan* case "a claim is typical if it arises from the same course of conduct that gives rise to the claims of the class members and if the claims are based on the same legal theories." *Central Wesleyan, supra*, 143 F.R.D. at 637. The

test does not require that the representative have identical claims, but focuses instead on the similarity of legal and remedial theories of claims of the named and unnamed Plaintiffs. *Id.*; see also *Bates v. Tenco Services*, 132 F.R.D. 160, 163 (D.S.C. 1990). Moreover, the typicality and commonality requirements tend to merge. *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147 (1982). Typicality is generally presumed when common questions exist. *Newberg Newberg on Class Actions*, 165 (2d ed. 1985).

#### ADEQUACY

Rule 23(a) requires that the named Plaintiffs adequately represent the class and that the named parties "will adequately and fairly represent the class." To be adequate, the Plaintiffs need only show that they have common interests with the unnamed members of the class and that they will vigorously prosecute the interest of the class. *Waller v. Seabrook Island Property Owners Ass'n*, 300 S.C. 465, 388 S.E.2d 799 S.C. (1990); *Runion v. US Shelter*, 98 F.R.D. 313, 317 (D.S.C. 1983). The kind of antagonism that will defeat certification is limited to that which relates to the subject matter in controversy. *Waller, id.* at 301. This antagonism exists when the main Plaintiff has a claim which conflicts with the economic interest of the class. *Id.* There is no question of antagonism in this case.

The adequacy requirement does not require that the Plaintiffs show they are likely to succeed on the merits. Requiring such a showing on the merits in determining whether a class should be certified is error. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974). Adequacy does not require that the absent class members express prior satisfaction. *Id.* After notice, class members will have adequate opportunity to opt out of the class. *Central Wesleyan College, supra*, 6 F.3d at 138 (4<sup>th</sup> Cir. 1988).

The standard for determining the adequacy of class counsel is whether counsel is "qualified, experienced, and generally able to conduct the proposed litigation." *South Carolina National Bank v. Stone*, 139 F.R.D. 325 (D.S.C. 1991). Counsel for the Plaintiffs have established that they are adequate and qualified to act as class counsel.

Finally, the named class members, through their attorneys, are willing to undertake the cost of class notice.

#### AMOUNT IN CONTROVERSY


Rule 23(a) requires that each class member have at least one hundred (\$100.00) dollars in controversy. The Complaint alleges as much. There can be no dispute that the potential class members either paid more than one hundred dollars for the installation of their EIFS system; suffered more than one hundred dollars in damages as a result of the failure of their EIFS system; or has made repairs to their buildings costing over one hundred dollars. The knowledge of the attorneys involved in litigation with Dryvit makes it clear that the repair and replacement costs for an EIFS system requires expenditures well over one hundred dollars.

The Court finds that each of the potential class members would meet the requirement of the amount in controversy.

CONCLUSION

For the foregoing reasons, the Plaintiffs' Motion is GRANTED. The Plaintiffs shall provide this Court with a proposed Notice Plan within the next thirty (30) days of the date of this Order, and

IT IS SO ORDERED!


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~~The Honorable~~ Thomas Kemmerlin  
Master in Equity and Special Circuit Judge for  
Beaufort County

Beaufort, South Carolina

Date: ~~Sept 11~~ August 30, 2002

*hunc pro tunc*