UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE AZEK BLDG. PRODS, INC. MARKETING AND SALES PRACTICES LITIGATION	Civil Action No. 12-6627 MDL Docket No. 2506

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT, CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF PROPOSED CLASS NOTICE PLAN

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I. INTRODUCTION

Plaintiffs in the above-captioned litigation, on behalf of themselves and the proposed Settlement Class, hereby seek preliminary approval of the settlement ("Settlement") they have reached.[1] This memorandum outlines the parameters of the Settlement, demonstrates why preliminary approval should be granted, and proposes a schedule for final approval of the settlement. It also shows why the Court should certify the proposed Settlement Class and approve the form and manner of providing notice of the Settlement to Settlement Class Members.

The Settlement resulted from hard-fought and adversarial negotiations informed by years of contested litigation. It provides substantial benefits to the Settlement Class:

- The Settlement Class is composed of all current residential owners of AZEK decking in the United States who purchased their AZEK decking from August 1, 2007 through December 31, 2012.
- Settlement Class Members who submit timely and complete claims and are otherwise eligible under the terms of the Settlement will receive 10% of what they paid for their AZEK Decking Boards, limited to one claim per residential property address, and up to a limit of $2,000 per claimant, subject to certain offsets discussed in section 6 the Settlement Agreement (and below).

In return, the Settlement provides for dismissal with prejudice of the claims asserted in the action on behalf of Settlement Class Members against Defendants AZEK Building Products,

[1] The Settlement Agreement is attached as Exhibit 1 to the accompanying Declaration of James E. Cecchi. Unless otherwise noted, all capitalized terms in this memorandum carry the same meaning as set forth in the Settlement Agreement. All other exhibits referenced herein are Exhibits to the Cecchi Declaration.

Inc. and CPG International LLC ("CPG") (collectively, "Defendants")[2] and releases specified and described in the Settlement.

Defendants have also agreed to pay all costs of notice and claims administration, to pay service awards to the Named Plaintiffs, and to not oppose the request of Class Counsel for attorneys' fees and expenses up to $5,250,000, all in addition to the benefits paid to Settlement Class Members.

Plaintiffs respectfully submit that this Settlement represents an outstanding result for the Class and falls well within the range of possible approval under Federal Rule of Civil Procedure 23(e). Accordingly, Plaintiffs request that the Court preliminarily approve the Settlement, conditionally certify the settlement class, approve the notice plan, and order notice to the class as soon as practicable.

II. BACKGROUND

A. Summary of Plaintiffs' Allegations

Plaintiffs alleged that polyvinyl chloride (PVC), from which Defendants' decking products are made, develops stains, scratches, discoloration, chalks, and flakes under normal use. Defendants, moreover, allegedly made written representations which assured prospective customers that their decking had superior aesthetic durability to other decking alternatives, such as wood. Plaintiffs identified at least ten specific statements at issue which allegedly concern AZEK decking.

Plaintiffs also claimed Defendants had knowledge of the disputed defects when they made these statements and covered up those defects when selling the product. Specifically, they

[2] After Plaintiffs filed their Consolidated Amended Complaint, AZEK Building Products and CPG International Inc. (now CPG International LLC) underwent a corporate restructuring. (Doc. 165-1). For simplicity, "CPG" shall be used to refer to the entity that designed, manufactured, warranted, advertised, and sold AZEK decking.

claimed that Defendants held themselves out as having "over 25 years of experience in cellular PVC manufacturing," and touted itself as an expert in the manufacture and use of PVC materials. Plaintiffs further alleged that, as experts, Defendants knew or should have known that the PVC decking would undergo various degradations, but made representations contrary to that knowledge. The scientific and industrial community also knew that PVC was highly susceptible to degradation if it was exposed to sunlight and heat.

Each Plaintiff provides a date range—for most Plaintiffs, a specific month is alleged, but for some, a range of several months—within which he or she bought the AZEK decking. All of their purchases occurred before 2013. Each Plaintiff also alleges that, before purchasing the product, he or she reviewed and relied on the alleged misrepresentations made by Defendants.

Defendants provided a Lifetime Limited Warranty which accompanied all AZEK decking. The Lifetime Limited Warranty warranted AZEK deck components to be free from defects in material and workmanship that (1) occur as a direct result of the manufacturing process, (ii) occur under normal use and service, (iii) occur during the warranty period and (iv) result in blistering, peeling, flaking, cracking, splitting, cupping, rotting or structural defects from termites or fungal decay. The Lifetime Limited Warranty also contained a disclaimer which states:

> THE WARRANTY STATEMENTS CONTAINED IN THIS LIFETIME LIMITED WARRANTY SET FORTH THE ONLY WARRANTIES EXTENDED BY AZEK AND ARE IN LIEU OF ALL OTHER CONDITIONS AND WARRANTIES, EITHER EXPRESSED OR IMPLIED, INCLUDING WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. THE PROVISIONS OF THIS WARRANTY SHALL CONSTITUTE THE ENTIRE LIABILITY OF AZEK AND THE PURCHASER/PROPERTY OWNER'S EXCLUSIVE REMEDY FOR BREACH OF THIS WARRANTY. IN PARTICULAR, IN NO EVENT SHALL AZEK BE LIABLE TO THE PURCHASER/PROPERTY OWNER FOR SPECIAL, INCIDENTAL, INDIRECT, CONSEQUENTIAL, OR PUNITIVE DAMAGES ARISING FROM THE USE OF THE AZEK PRODUCTS OR THE BREACH OF ANY EXPRESS OR IMPLIED WARRANTY.

The Lifetime Limited Warranty requires that the manufacturer be given notice by the consumer of any defect and an opportunity to inspect defective decking. Various Plaintiffs alleged they provided notice of the alleged defects to Defendants and Defendants refused to provide coverage under the Lifetime Limited Warranty, claiming it covered only defects in "performance," not aesthetics.

Plaintiffs' claims fall in three categories: breach of express warranty, breach of the implied warranty of merchantability, and violation of various state consumer fraud and deceptive trade practices statutes.

B. The *Azek* Litigation

On October 19, 2012, Plaintiff Mel Beucler filed against Defendants a putative class action in this Court, *Mel Beucler, et al. v. CPG International, Inc., et al*., No. 2:12-06627 (D.N.J.). Dkt. 1. An amended class action complaint was filed in the same case on February 19, 2013, by Plaintiffs Mel Beucler, Michael Esposito, John Edmonds, Kathleen Dalpiaz, Barbara Derwich, Daniel Berkowitz, Kevin Mayhew, and Christine Merriam. On April 25, 2013, Plaintiffs Tom Glodo and William Murdoch filed a putative class action against Defendants in the United States District Court for the Southern District of Illinois, *Tom Glodo, et al. v. CPG International Inc., et al*., No. 3:13-00402 (S.D. Ill.), followed by the filing of a second amended complaint by those plaintiffs on October 31, 2013.

On October 29, 2013, Defendants filed a motion to centralize this litigation in this Court. Dkt. 58-2, at 1. The litigation at that point consisted of two actions, one pending against Defendants in this Court (*Beucler*) and one in the Southern District of Illinois (*Tom Glodo, et al. v. CPG International Inc., et al*., No. 3:13-00402 (S.D. Ill.). Plaintiffs Joseph and Michelle Marino filed a third putative class action against Defendants on January 3, 2014 in the U.S.

District Court for the District of Massachusetts, *Marino v. Azek Building Prods., Inc.*, No. 1:14-cv-10018-RGS (D. Mass.).

By Order dated February 21, 2014, the U.S. Judicial Panel on Multidistrict Litigation granted the Defendants' motion for transfer of the Southern District of Illinois action to this Court for consolidated or coordinated pretrial proceedings (as MDL Dkt. No. 2506 (D. N.J.)). Dkt. 80. The *Marino* case pending in the District of Massachusetts was likewise transferred to this Court on February 25, 2014 for inclusion in the consolidated pretrial proceedings.

On April 16, 2014, the Court appointed Seeger Weiss, the Complex Litigation Group, and Pogust Braslow & Millrood LLC ("PBM") as Interim Class Counsel, and Carella Byrne as Interim Liaison Counsel on behalf of Plaintiffs. Plaintiffs filed their consolidated amended complaint against Defendants on April 22, 2014. Dkt. 90. In an Order dated January 30, 2015 (Dkt. 123-124), the Court granted and denied in part Defendants' motion to dismiss the consolidated amended complaint. Plaintiffs filed their consolidated second amended complaint on February 20, 2015, Dkt. 129, and a motion for leave to file a consolidated third amended complaint on April 20, 2015, Dkt. 140, which the Court granted on August 26, 2015, Dkt. 163. The Court granted Plaintiffs' request to file a consolidated fourth amended complaint on January 4, 2016, Dkt. 180, which is the operative complaint for purposes of this Settlement.

Plaintiffs served their motion for class certification on October 10, 2016, and Defendants served their Opposition on November 17, 2016. On November 16, 2016, the parties served motions to strike each other's respective expert reports. Defendants served a motion for summary judgment on January 6, 2017. By Order dated January 27, 2017, the Court entered a 45-day stay of all deadlines, and later extended that for another 30 days. Dkt. 206, 208. On May

26, 2017, the Court entered an additional 30-day stay of all deadlines in order to permit the parties to finalize a settlement. Dkt. 212.

During the approximately six and one-half years that the parties were litigating this case, they engaged in extensive research, investigation, discovery, expert work, and motion practice. Cecchi Decl. ¶ 2. Class Counsel's investigation of the facts and circumstances underlying the case have included consultations with experts, interviewing and deposing numerous CPG employees and third parties, conducting investigations of the properties of the Named Plaintiffs, reviewing thousands of documents produced by CPG and third parties, and researching and studying the legal principles applicable to issues in the MDL Litigation. Discovery in this case has been time-intensive and vigorously contested. It has included the production of approximately 380,000 pages of documents by CPG, 31,000 pages of documents by third parties, 21 depositions, and nine expert reports. *Id.*

In short, the instant settlement was reached only after six and one-half years of litigation involving robust, adversarial discovery and vigorous motion practice. The parties' litigation efforts demonstrate that both sides thoroughly understand the relative strengths and weaknesses of their respective positions.

C. Settlement Negotiations

Over the past six months, the parties have engaged in extensive arms-length settlement negotiations, including mediation presided over by an experienced third-party mediator, the Honorable Dennis M. Cavanaugh. Cecchi Decl. ¶¶ 2-3. During this mediation, the Parties engaged in arm's-length negotiations, and separately met without the mediator to negotiate. As a result of those negotiations, the parties reached agreement on the material terms of substantive relief for the Settlement Class. *Id*.

Class Counsel has evaluated the time and expense that will be necessary to prosecute these consolidated multidistrict cases to final judgment, the delays that are likely before any judgment may be entered, and the uncertainty inherent in any complex litigation such as this. Based upon that evaluation, Class Counsel has concluded that further proceedings in these actions are likely to be protracted, complex and expensive, and that the outcome is uncertain.

After the parties reached an agreement on all material terms of the settlement, they negotiated the amount of incentive awards Defendants would pay to the Named Plaintiffs, who include nine individuals from across the nation,[3] and fees and costs to Class Counsel (subject to Court approval). Cecchi Decl. ¶¶ 5-6.

III. MATERIAL TERMS OF THE SETTLEMENT

Plaintiffs seek preliminary approval of the Settlement on behalf of the following Settlement Class:

> all current residential owners of AZEK Decking in the United States who purchased AZEK Decking from August 1, 2007 through December 31, 2012 and who still own the property on which that deck is located.

Distributors, dealers, contractors, nonresidential owners, and non-original purchases are not part of the Settlement Class. The Settlement resolves claims related to the purchase of certain legacy AZEK-branded Decking Boards purchased from August 1, 2007 through December 31, 2012, in the following colors: Brownstone, Clay, Slate Gray, Ivory, White, Fawn, Kona, Sedona, Tahoe, Acacia, Morado, and Redland Rose.[4]

Excluded from the Settlement Class are:

a. All persons who timely exercise their rights under Federal Rule

[3] The Named Plaintiffs are Daniel Berkowitz, Mel Beucler, Barbara Derwich, John Edmonds, Joseph Marino, Kevin Mayhew, Christine Merriam, Joseph Solo, and Jeffrey Wayne.

[4] Some of these colors were produced post-2013 in non-legacy decking, which is not covered by this Settlement.

of Civil Procedure 23 to opt out of the Settlement; and

b. CPG or any of its predecessors, successors, parent or subsidiary companies, affiliates, officers, directors, employees, agents, attorneys, representatives, insurers, suppliers, distributors or vendors; and

c. Class Counsel and any member of Class Counsels' immediate family; and

d. The Judges, including Magistrates, to whom the cases within the MDL Litigation were assigned in the transferor courts, the Judges, including Magistrates, to whom the MDL Litigation is assigned, and any member of those Judges', including Magistrates', immediate family.

The Settlement further sets forth the right of Settlement Class Members, and the appropriate methods, to opt-out of the Settlement and to object to the Settlement.

A. Class Benefits

The Settlement provides substantial economic benefits to the Class. Settlement Class Members who submit timely and complete claims will receive 10% of what they paid for their AZEK Decking Boards, up to a limit of $2,000 per claimant and restricted to one claim per residential property address.

This amount is subject to the following set-offs: (1) a dollar-for-dollar offset for any prior cash refund provided such refund is related to the allegations in the Fourth Amended Complaint; (2) an offset for previously-provided partial or complete Decking replacement (valued at $2 per linear foot); (3) an offset for professional cleaning/conditioning previously provided by CPG to the Class Member (valued at $1 per linear foot); and (4) one $50.00 offset for each bottle of DeckMax previously provided by CPG to the Class Member (whether by coupon/voucher or product itself).

Defendants agreed to pay for executing and implementing the settlement class notice, for claims administration, and for $5,000 service awards to each Named Plaintiff (namely, Daniel Berkowitz, Mel Beucler, Barbara Derwich, John Edmonds, Joseph Marino, Kevin Mayhew, Christine Merriam, Joseph Solo, and Jeffrey Wayne). Finally, Defendants have agreed not to oppose any application of Class Counsel for attorneys' fees, costs and expenses provided the aggregate amount does not exceed $5,250,000. That amount represents a steep discount on the actual time and costs expended by Class Counsel litigating these cases. Cecchi Decl. ¶ 6. The other terms of the Settlement are in no way contingent on Class Counsel's fees, costs, and expenses request. Defendants will pay administration costs, service awards, and attorneys' fees, costs and expenses independent of the compensation that Defendants are providing Settlement Class Members as part of the Settlement.

B. Claims Process

To receive settlement benefits, a Class Member must submit a completed claim package containing the Claim Form and information required by the Settlement within the Claims Period which establish:

(a) Proof of ownership at time of installation and at time of claim submission of the property on which the Decking is installed (e.g., a copy of a title, deed, mortgage bill, tax bill, or utility bill); and

(b) Proof of Decking purchase (e.g., an itemized receipt or invoice showing the color, quantity, and price paid for the Decking Boards), including proof of payment and payment date (e.g., a dated credit card statement or copy of cancelled check); and

(c) Photographs of the Decking sufficient to verify the Decking's color and size.

Alternatively, a Class Member who is unable to provide proof of purchase (including proof of payment) required above must submit a Claim Form and Seller Verification Form which provides and attaches the following:

(a) Proof of ownership at time of installation and at time of claim submission of the property on which the Decking is installed (e.g., a copy of a title, deed, mortgage bill, tax bill, or utility bill);

(b) The name and contact information for the contractor or person who installed their Decking;

(c) The name of the retailer from whom the Class Member or contractor purchased the Decking;

(d) A declaration under penalty of perjury pursuant to 28 U.S.C. § 1746 plus confirmatory proof of business (e.g., business card) from either the contractor (so long as a third-party) or retailer stating the date of the purchase, the color and quantity of AZEK Decking Boards purchased for the construction of the Class Member's Deck, and the amount paid by the Class Member for the Decking Boards;

(e) The approximate dimensions of the Deck; and

(f) Photographs of the Decking sufficient to verify the Deck's color and size as stated by the contractor or retailer under subsection (d) above.

In the event that the sworn declaration under subsection (d) above does not itemize the amount paid by the Class Member for the Azek Decking Boards, CPG will reimburse the Class member 10% of the estimated price paid for the AZEK Decking Boards in the amount of $2.75 per lineal foot. Any other deficiencies in the submission will result in denial of the claim.

Dahl Administration will administer the claims at CPG's own cost and expense. Such administration will include:

a. establishing and maintaining an internet website and toll free number that Settlement Class Members may contact for information concerning the Settlement;

b. performing the claim intake process;

c. evaluating claims for eligibility; and

d. providing periodic reporting to Class Counsel as described in the Settlement.

C. Class Notice

CPG will pay all costs of the notice, except for the costs of additional notice as set forth in Section 11.10 of the Settlement. Class Counsel and CPG agree that reasonable notice consistent with the due process requirements of the United States Constitution will be given to the Settlement Class Members. To effectuate such notice, Class Counsel and CPG have agreed to engage Dahl Administration (the "Notice Administrator") to advise them with respect to the providing of notice and to disseminate such notice per Court order.

The Settlement provides that notice shall include, but not be limited to, digital notice through web-based banner advertising and paid search placements as set forth in section 11.3 of the Settlement, e-mailing of long-form notices as set forth in section 11.4 of the Settlement, and publication of the short-form notice. The text of the notices and the mechanisms for distributing the notices shall be subject to approval of the Court. The detailed Notice Plan prepared by the Notice Administrator is described in the Declarations of Mark Fellows and John Grudnowski. In addition, a toll-free telephone number will be included in the long-form and short-form notices, and CPG will cause the Notice Administrator to set up and maintain during the Claims Period the Internet website discussed above concerning the Settlement. The Notice itself explains the lawsuit, the Settlement, how to submit a claim form, how to opt-out of the Settlement and to object to it.

IV. LEGAL ARGUMENT

A. Preliminary Approval of the Settlement is Appropriate.

Pursuant to Rule 23(e), all class action settlements must be judicially approved. Fed. R. Civ. P. 23(e); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 296 (3d Cir. 2011). That said, "[c]ompromises of disputed claims are favored by the courts." *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910). This is "particularly [true] in class actions and other complex cases where

substantial judicial resources can be conserved by avoiding formal litigation." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995); *see also 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"). "The strong judicial policy in favor of class action settlement contemplates a circumscribed role for the district courts in settlement review and approval proceedings. This policy also ties into the strong policy favoring the finality of judgments and the termination of litigation. Settlement agreements are to be encouraged because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010). As demonstrated below, the Settlement easily satisfies the requirements for preliminary approval.

"Review of a proposed class action settlement is a two-step process: preliminary approval and a subsequent fairness hearing." *In re Aetna UCR Litigation*, 2013 WL 4697994, at *10 (D.N.J. Aug. 30, 2013). This procedure safeguards class members' due process rights and enables the Court to fulfill its role as the guardian of class interests. *See In re GMC*, 55 F.3d at 785; *Hanlon v. Palace Entertainment Holdings, LLC*, 2012 WL 27461, at *5 (W.D. Pa. Jan. 3, 2012) (explaining that at the preliminary approval phase, the "court must only 'make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms'" (quoting *Manual for Complex Litigation* (Fourth), § 21.632 (2011))). "Preliminary approval is not binding, and it is granted unless a proposed settlement is obviously deficient." *Aetna UCR*, 2013 WL 4697994, at *10. "Preliminary approval is appropriate where the proposed settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason." *Id.*; *see also Smith v.*

Professional Billing & Management Services, Inc., 2007 WL 4191749, at *1 (D.N.J. Nov. 21, 2007); *Jones v. Commerce Bancorp Inc.*, 2007 WL 2085357, at *2 (D.N.J. July 16, 2007) ("Preliminary approval is not binding, and it is granted unless a proposed settlement is obviously deficient."). If the Court grants preliminary approval, the Court then directs that notice be sent to all class members. Manual for Complex Litigation § 21.632 (4th ed. 2006).

"An initial 'presumption of fairness for the settlement is established if the court finds that: (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.'" *In re Cendant Corp. Litigation*, 264 F.3d 201, 232 n. 18 (3d Cir. 2001)); *In re Gen. Motors Corp.*, 55 F.3d at 785. "'These factors create an "initial presumption of fairness.' . . . In the second stage, after class notice, the court holds a final fairness hearing. . . . If the court concludes that the settlement is 'fair, reasonable and adequate,' it will give final approval." *Skeen v. BMW of N. Am., LLC*, No. 2:13-CV-1531-WHW-CLW, 2016 WL 70817, at *4 (D.N.J. Jan. 6, 2016). The proposed Agreement is fair, adequate, and reasonable. Therefore, this Court should preliminarily approve the Settlement and certify a Settlement class.

1. A Review of the Applicable Factors Favors Preliminary Approval.

The parties have vigorously litigated this case for over six years and reached the Settlement only following extensive arm's-length negotiations, including mediation conducted by former U.S. District Court Judge Dennis M. Cavanaugh. *See* Rubenstein, *Newberg on Class Actions* § 13:14 (5th ed. 2015) ("The primary procedural factor courts consider in determining whether to preliminarily approve a proposed settlement is whether the agreement arose out of arms-length-noncollusive negotiations."). Indeed, the Settlement – both the amount and structure – was the product of arms' length negotiations between counsel who have extensive experience in class actions and those related to allegedly defective consumer products. Cecchi

Decl. ¶ 2-3. These negotiations were comprehensive, often spirited. Apart from the formal mediation, the Parties engaged in one-on-one exchanges with the mediator regarding their respective positions, as well as numerous communication between the Parties in an attempt to find common ground on potential settlement terms. *Id.* The participation of a mediator in this case is further assurance that the settlement is the result of arms-length negotiations. *See Aetna UCR Litig.*, 2013 WL 4697994, at *11 ("sessions with a respected and experienced mediator, gave counsel on both sides ample opportunity to adequately assess the strengths of their respective positions and facilitated serious and informed negotiations").[5] Throughout every stage in the mediation and negotiation process, the Parties weighed the strengths and weaknesses of Plaintiffs' claims and CPG's defenses, including consideration of, among other issues, liability, causation, and damages. The Parties engaged in intensive bargaining over the merits and value of Plaintiffs' claims. Because of the extensive, arm's-length bargaining involved, there is no issue (or even a suggestion) that there is any collusive aspect to the proposed Settlement. Balancing the risks and resources, the proposed Settlement is a fair, reasonable, and just result.

As to the second factor, the Parties completed extensive fact, class, and expert discovery. Depositions were taken of all Named Plaintiffs and multiple company witnesses. The Parties

[5] *See also Lenahan v. Sears, Roebuck & Co.*, No. 02-0045, 2006 WL 2085282, at *14 (D.N.J. Jul. 10, 2006) (rigorous mediation and negotiation processes "gave the parties ample opportunity to assess the relative strengths and weaknesses of their claims"); *Bredbenner v. Liberty Travel, Inc.*, 2011 WL 1344745, at *10 (D.N.J. Apr. 8, 2011) ("Participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm's length and without collusion between the parties.") (internal quotation marks omitted); *cf. Bernhard v. TD Bank, N.A.*, 2009 WL 3233541, at *2 (D.N.J. Oct. 5, 2009) (finding that the standards for preliminary approval were met where the settlement was the product of "serious negotiation" between counsel and conducted pursuant to mediation by a retired judge); *In re Cigna Corp. Secs. Litig.*, 2007 WL 2071898, at *3 (E.D. Pa. July 13, 2007) ("[I]t is clear that negotiations for the settlement occurred at arm's length, as the parties were assisted by a retired federal district judge who was privately retained and served as mediator.").

served multiple expert reports, CPG produced nearly 380,000 pages of documents, and third parties produced an additional 31,000 pages. Plaintiffs also vetted and retained several experts in connection with this action, including experts capable of inspecting and analyzing the decking boards at issue in the litigation and calculating the monetary damages suffered by the Settlement Class. Cecchi Decl. ¶ 2. The Parties were, therefore, fully informed of the merits of the case during negotiations.

Regarding the third factor, Class Counsel and Defendants' counsel are highly-experienced class action litigators. They are well-versed in the issues and fully capable of determining the strengths and weaknesses of this consumer fraud class action. They have been extensively involved in the litigation and resolution of several of the seminal cases in these fields. *See* Exs. 2-4 (firm resumes). In counsel's opinion, there is no obvious deficiency in the class settlement. Their judgment that the settlement is fair and reasonable should weigh in favor of preliminary approval.[6]

If preliminary approval is granted, the fourth factor will be addressed following notice, as there is not yet information regarding any objections to the proposed settlement from putative class members. *See Skeen*, 2016 WL 70817, at *4 ("but this does not preclude preliminary

[6] *See E.E.O.C. v. Com. of Pa.*, 772 F. Supp. 217, 219-20 (M.D. Pa. 1991) ("[T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, *taken as a whole*, is fair, reasonable and adequate to all concerned." (emphasis in original) (quoting *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982)), *aff'd*, 977 F.2d 738 (3d Cir. 1992); *see also Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 240 (D.N.J. 2005) ("Class Counsel's approval of the Settlement also weighs in favor of the Settlement's fairness."); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 543 (D.N.J. 1997) (citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) (court is "entitled to rely upon the judgment of experienced counsel for the parties")), *aff'd*, 148 F.3d 283 (3d. Cir. 1998).

approval because class members have not yet been formally notified of the class action or proposed settlement and will have the opportunity to object.").

B. The Settlement Class Should Be Certified.

Courts may certify class actions for the purposes of settlement only. *See, e.g.*, *Amchem Products v. Windsor*, 521 U.S. 591, 620 (1997). When certifying a settlement-only class, the Court "need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial." *Id*. at 620. However, all of the other requirements of Rule 23 must be satisfied when satisfying a settlement class. *Id.* Plaintiffs respectfully submit that this Court should preliminarily certify the Settlement Classes under Rules 23(a) and 23(b)(3).

In this case, all of the requirements of Rule 23(a) and Rule 23(b)(3) are readily met. Rule 23(a) requires that (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 defense of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Rule 23(b)(3) requires that "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."

1. Numerosity

Rule 23(a)(1) requires that a class be "so numerous that their joinder before the Court would be impracticable." "[G]enerally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Marcus v. BWW of North America*, 687 F.3d 583, 595 (3d Cir. 2012). Here, the Class is estimated to include thousands of Settlement Class Members and so numerosity is satisfied. *Stewart v. Abraham*, 275

F.3d 220, 226–28 (3d Cir. 2001). *See, e.g.*, *Elias v. Ungar's Food Products, Inc.*, 252 F.R.D. 233, 242 (D.N.J. 2008) (numerosity satisfied with class of "at least tens of thousands" of members); *see also In re Whirlpool, Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 852 (6th Cir. 2013) (numerosity satisfied where thousands of allegedly defective washers were shipped into the state), *cert. denied* 134 S. Ct. 1277 (2014).

2. Commonality

Rule 23(a)(2) requires a showing of the existence of "questions of law or fact common to the class." Importantly, "Rule 23(a)(2)'s commonality requirement does not require identical claims or facts among class member[s]." *Marcus*, 687 F.3d at 597 (citation and internal quotation marks omitted). "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." *Stewart*, 275 F.3d at 227 (quotation marks and emphasis omitted); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (explaining that, for commonality to be satisfied, the answer to the common question must help "drive the resolution" of the litigation) (citation and quotation marks omitted).

Applying these principles, it is evident that the commonality requirement of Rule 23(a)(2) is easily met here because Plaintiffs allege as common questions, among other things, whether the legacy AZEK decking boards were defective and whether Defendants were aware of those defects. *See* Dkt. 181 (Fourth Amended Consolidated Complaint) ¶¶ 167-68 (discussing common issues).

3. Typicality

Rule 23(a)(3) requires that the class representatives' claims be "typical of the claims . . . of the class." As the Third Circuit explained:

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.

Baby Neal ex rel. Kanter v. Casey, 43 F.3d 48, 56-58 (3d Cir. 1994); *see also Marcus*, 687 F.3d at 598 ("If a plaintiff's claim arises from the same event, practice or course of conduct that gives rises to the claims of the class members, factual differences will not render that claim atypical if it is based on the same legal theory as the claims of the class.") (citation and quotation marks omitted).

Here, the typicality requirement is met because the Class Representatives suffered the same alleged injury—the allegedly defective product—as the other Settlement Class Members. Furthermore, variations in state laws do not impact the typicality analysis. *See Sullivan*, 667 F.3d at 304 ("state law variations are largely 'irrelevant to certification of a settlement class'") (quoting *Warfarin II*, 391 F.3d at 529). The common-law and consumer-protection claims asserted in this case "are recognized in some form in all jurisdictions and therefore available for all class members. . . . Despite possible state-by-state variations in the elements of these claims, they arise from a single course of conduct by [LG] and a single set of legal theories." *In re Heartland Payment Sys, Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1055 (S.D. Tex. 2012) (internal question marks omitted); *see also In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 519 (E.D. Mich. 2003) (finding class representatives adequate "to prosecute claims under the laws of other states").

4. Adequacy

Rule 23(a)(4) requires that the named representatives "will fairly and adequately protect the interests of the class." The adequacy inquiry "assures that the named plaintiffs' claims are not antagonistic to the class and that the attorneys for the class representatives are experienced and qualified to prosecute the claims on behalf of the entire class." *Beck v. Maximus, Inc.*, 457

F.3d 291, 296 (3d Cir. 2006) (citation and quotation marks omitted); *see also* Rubenstein, *Newberg on Class Actions* § 3:54 (5th ed. 2015). Here, each plaintiff owns the same allegedly defective product as the absent Settlement Class Members do and suffered the same injuries, and so their interests are fully aligned with all other Settlement Class Members.

Second, class counsel must be adequate under Fed. R. Civ. P. 23(g). That requirement is satisfied here because Class Counsel have extensive experience in prosecuting complex product defect cases such as this one. *See* Ex. 2, Carella, Byrne, Cecchi, Olstein, Brody & Agnello, P.C. Law Firm Resume; Ex. 3 Kohn, Swift & Graf PC Resume; Ex. 4, Seeger Weiss LLP Resume. Any doubt on this score is dispelled by the vigorous manner in which Class Counsel have litigated this case for the past six and one-half years.

5. Predominance

In order to satisfy Rule 23(b)(3)'s requirement that common questions of law and fact predominate, "the predominance tests asks whether a class suit for the unitary adjudication of common issues is economical and efficient in the context of all the issues in the suit." *Sullivan*, 667 F.3d at 297 (quoting Rubenstein, *Newberg on Class Actions* § 4:25 (4th ed. 2010)). The touchstone of predominance is whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 597. The rule, however, "does *not* require a plaintiff seeking class certification to prove that every element of her claim is susceptible to classwide proof." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013) (internal quotation marks and alterations omitted). Rather, predominance is determined by whether "the efficiencies gained by class resolution of common issues are outweighed by individual issues." *Varacallo v. Massachusetts Mut. Life Ins. Co.*, 226 F.R.D. 207, 231 (D.N.J. 2005); *In re Mercedes-Benz Antitrust Litigation*, 213 F.R.D. 180, 186 (D.N.J. 2003)

(predominance requires that "common issues be both numerically and qualitatively substantial in relation to the issues peculiar to individual class members").

Common issues predominate here. The key question posed in this case—whether Defendants' legacy decking boards were defective and whether CPG International, Inc. and the AZEK Defendants were aware of the defects—are common ones. If resolved in one stroke, those issues would substantially advance the litigation.

Although the Settlement Class here is nationwide and involves the laws of multiple states, in the settlement context, differences in state law do not defeat predominance. *See Sullivan*, 667 F.3d at 299-303 (3d Cir. 2011) (explaining that "as long as a sufficient constellation of common issues binds class members together, variations in the sources and application of applicable laws will not foreclose class certification") (internal quotation marks omitted); *Gotthelf v. Toyota Motor Sales, U.S.A., Inc.*, 525 F. App'x 94, 102 n.13 (3d Cir. 2013) ("although variations in state laws can present difficulties in certifying a *litigation* class under Rule 23(a), "those variations are irrelevant to [the] certification of a *settlement* class.") (emphasis in original) (quoting *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 529 (3d Cir. 2004)). Because "the defendant's conduct was common as to all of the class members," common issues predominate despite "idiosyncratic differences" between state laws. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022-23 (9th Cir. 1998) (finding predominance satisfied where class members brought claims under "local variants of a generally homogenous collection of causes which include products liability, breaches of express and implied warranties, [] 'lemon laws, [and] state consumer protection laws").

6. Superiority

Finally, Rule 23(b)(3) requires that a showing that a "class action is superior to other available methods for fair and efficient adjudication of the controversy." Relevant

considerations include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action. Fed. R. Civ. P. 23.

A class action suit is superior to any other form of adjudication because it provides the best way of managing and resolving the claims at issue here. 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." *Hegab v. Family Dollar Stores, Inc.*, 2015 WL 1021130, at *4 (D.N.J. Mar. 9, 2015) (quoting *Georgine v. Amchem Prods.*, 83 F.3d 610, 632 (3d Cir. 1996)). The class action mechanism is superior to its alternatives, particularly with respect to settlements, because it ensures that the claims of the absent class members will be resolved efficiently. *O'Brien v. Brain Research Labs, LLC*, 2012 WL 3242365, at *9 (D.N.J. Aug. 9, 2012) (finding superiority because, *inter alia*, "denying certification would require each consumer to file suit individually at the expense of judicial economy"). Moreover, where individual claims are small, "a class action is almost automatically superior to alternative forms of adjudication[.]" Rubenstein, *Newberg on Class Actions* § 4:65 (5th ed.).

Consideration of judicial economy and prompt resolution of claims underscore the superiority of the class action in this case. By contrast, compensation resulting from litigation is highly uncertain and may not be received before lengthy, and costly, trial and appellate proceedings are complete. In addition, the Settlement removes the overwhelming and redundant costs of individual trials. *See Sullivan*, 667 F.3d at 310-12.

Manageability concerns, moreover, while "by [] far, the most critical concern in determining whether a class action is a superior means of adjudication," Rubenstein, *Newberg on Class Actions* § 4:72 (5th ed. 2015), are irrelevant in the settlement context. *See Amchem*, 521 at 620. In particular, because the class is proposed for settlement, manageability concerns presented by variances in state law do not defeat a finding of superiority. *See Sullivan*, 667 F.3d at 303-04 ("Because we are presented with a settlement class certification, we are not as concerned with formulating some prediction as to how variances in state law would play out at trial, for the proposal is that there be no trial. As such, we simply need not inquire whether the varying state treatments of [the] claims at issue would present the type of insuperable obstacles or intractable management problems pertinent to certification of a litigation class." (internal quotation marks, citations, and alterations omitted)). Simply put, state law variations are largely "irrelevant to certification of a settlement class." *Warfarin II*, 391 F.3d at 529.

C. The Court Should Approve the Proposed Notice Plan.

Plaintiffs also request that the Court approve the proposed Notice Plan. As outlined in the Preliminary Approval Order and the Settlement, the Notice Plan will include various forms of digital notice, e-mailing of long-form notices, publication of the short-form notice, a toll-free telephone number included in the notice, and an Internet website concerning the Settlement. The proposed Notice Plan is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Halley v. Honeywell International, Inc.*, 2016 WL 1682943, at *17 (D.N.J. Apr. 26, 2016) (quoting *Mullane v. Central Hanover Bank &Trust Co.*, 339 U.S. 306, 314 (1950)). The proposed Notice Plan will enable the Court to obtain personal jurisdiction over the class members and provides them with the opportunity to exclude themselves from the class. *In re*

Insurance Brokerage Antitrust Litigation, 282 F.R.D. 92, 109 (D.N.J. 2012) (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 306 (3d Cir. 1998)).

The proposed Notice Plan satisfies due process and Rule 23. As discussed above, the Notice Plan provides for a Settlement Class Notice. *See* Fed. R. Civ. P. 23(c)(2) (explaining that individual notice should be provided to all members who can be identified through reasonable effort). The Settlement Notice program is comprised of: (a) direct e-mail notice; (b) digital notice; (c) publication notice; (d) a Settlement Website that will allow the downloading and uploading of claim forms and will provide opt-out dates and claims submission deadlines; (e) a toll-free telephone number; and (f) a long-form notice, which, along with the Settlement, will be available on the Settlement Website. The Notice Plan informs Settlement Class Members how to submit a Claim Form, how to opt-out or object to the settlement, and the consequences of doing nothing. The Notice Plan thus satisfies due process and Rule 23. *See* Ex. 1(D); Settlement Agreement Exs. 1(C), 1(C) (notices); *see also Prudential*, 148 F.3d at 328 (approving notice that "provided all of the required information concerning the class members' rights and obligations under the settlement, [] detailed the procedure for opting out, entering an appearance, and filing objections, [] notified the [class members] that if they did not opt out of the class, they would be bound by the settlement[, and] explained the nature of the claims"); *see also Q+ Food, LLC v. Mitsubishi Fuso Truck of Am., Inc.*, No. 14-CV-06046-DEA, 2016 WL 7213278, at *3 (D.N.J. Oct. 26, 2016) (granting preliminary approval of settlement where defendant will make informational settlement website available to public, website will include copy of approval order, notice, settlement Agreement, and Claim Forms that may be downloaded and submitted online or by mail, and other important documents).

V. PROPOSED SCHEDULE

The Parties respectfully propose the following schedule regarding notice to Settlement Class Members and final approval of the Settlement.

IN RE AZEK: PROPOSED SETTLEMENT DEADLINES	
Mid-August 2017	Preliminary approval hearing (proposed)
October 17, 2017	Execution of Notice Plan begins (to run 30 days)
December 15, 2017	Deadline for objectors and opt-outs (i.e., at least 30 days after close of notice period)
January 22, 2018	Responses to objectors and opt-outs; motion for final settlement approval; motion for class counsel fees and plaintiff incentive awards
January 26, 2018	Deadline to file notice of intent to appear at final approval hearing (i.e., 10 days before final approval hearing)
February 5, 2018-February 9, 2018	Final Approval Hearing (proposed window) (i.e., at least 45 days after deadline to object)

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant preliminary approval of the proposed Settlement and enter the accompanying Preliminary Approval Order.

Dated: July 14, 2017

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