

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

**IN RE: ATLAS ROOFING  
CORPORATION CHALET  
SHINGLE PRODUCTS LIABILITY  
LITIGATION**

**MDL DOCKET No.: 2495**

1:13-MD-2495-TWT

This document relates to:

GEORGE CROTZER and SUSAN  
CROTZER, individually and on behalf  
of all other similarly situated,

Plaintiffs,

v.

ATLAS ROOFING CORPORATION,

Defendant.

No.: 1:14-cv-00831-TWT

**PLAINTIFFS GEORGE CROTZER AND SUSAN CROTZER'S  
REPLY BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

## **I. INTRODUCTION**

Plaintiffs incorporate and join all sections of *Dishman et al. v. Atlas Roofing Corporation*, Docket No. 1:13-CV-02195 (“Dishman Reply Brf.”) as further identified herein. Accordingly, this Reply Brief will be strictly limited to facts and legal issues unique to the Crotzers and members of the proposed Alabama class.

If Plaintiffs’ prevail in showing that the manufacturing process caused the defect in the shingles and Atlas knew about the defect, they will have proven the core element of liability for breach of warranty, fraudulent concealment, the Alabama Extended Manufacturers Liability Doctrine (“AEMLD”), the Alabama Deceptive Trade Practices Act (“ADTPA”), negligence, and unjust enrichment. Because Plaintiffs have satisfied the requirements for class certification, the proposed Alabama class should be certified.

## **II. TRIAL PLAN**

Plaintiffs incorporate by reference the facts and arguments set forth in the Section II (“Trial Plan”) of the Dishman Reply Brief.

## **III. THE PROPOSED CLASS SATISFIES ALL REQUIREMENTS OF RULE 23(B)(3).**

Because Atlas primarily disputes class certification by alleging that individual issues predominate over common issues, Plaintiffs begin by establishing predominance and then discuss the requirements of Rule 23(a) and certification

pursuant to Rule 23(c)(4). The Eleventh Circuit recently offered a three-step approach to determine whether predominance is satisfied. *See Brown v. Electrolux Home Products, Inc.*, 2016 U.S. App. LEXIS 5112, at \*14 (11th Cir. Mar. 21, 2016). First, the district court must “identify the parties’ claims and defenses and their elements.” *Id.* Second, the district court should “classify these issues as common questions or individual questions by predicting how the parties will prove them at trial.” *Id.* Third, the district court should determine whether common issues predominate over the individual issues. *Id.* Application of this three-part approach to Plaintiffs’ claims for breach of warranty and fraudulent concealment further establishes that common questions predominate over individual ones.

**A. The Warranty Claims Satisfy the Predominance Requirement Because Plaintiffs Can Prove Defect and Prior Knowledge on a Classwide Basis.**

**1. The Elements of the Warranty Claims and Atlas’s Defenses.**

Plaintiffs argue that Atlas breached its express and implied warranties when it provided defective shingles to class members. To prevail on a breach of express warranty claim, Plaintiffs must show that Atlas created an express warranty and failed to conform to it. *See Ex parte GMC*, 769 So. 2d 903, 911-12 (Ala. 1999) (citations and internal quotation marks omitted).

Atlas has identified a number of defenses to Plaintiffs' breach of express and implied warranty claims: (1) class members did not provide Atlas with notice of the defect or an opportunity to cure; (2) some class members cannot or did not avail themselves of the warranty; (3) a manufacturing defect did not cause Plaintiff's shingles to fail; (4) certain class members are not in privity with Atlas, so they cannot assert a breach of implied warranty claim; (5) the statute of limitations bars certain class members' claims; and (6) class members have individualized damages determinations. As discussed below, all of these defenses implicate evidence common to the class or present individualized issues that do not predominate over the core common issues – the existence of a manufacturing defect and Atlas's knowledge of the defect.

## **2. Classification of Common and Individual Issues.**

“Common questions are ones where the same evidence will suffice for each member, and individual questions are ones where the evidence will vary from member to member.” *Brown*, 2016 U.S. App. LEXIS, at \*14. Here, Plaintiffs' prima facie case for breach of express and implied warranties presents common issues and evidence suitable for class certification. Plaintiffs incorporate by reference Section III.A.2 (“Classification of Common and Individual Issues”) of the Dishman Reply Brief.

### 3. Common Issues Predominate Over Individual Issues.

Atlas's remaining arguments concerning causation, notice, applicability of the warranty, privity to assert implied warranty claims, statute of limitations, and damages do not defeat predominance. Rule 23(b)(3) "does not require a plaintiff. . . to prove that each elemen[t] of [her] claim [is] susceptible to classwide proof." *Amgen, Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1196 (2013) (citation omitted). Instead, "[t]he predominance requirement is satisfied 'if resolution of some of the legal or factual questions that qualify each *class member's case* as a genuine controversy can be achieved through generalized proof, *and if these particular issues are more substantial* than the issues subject only to individualized proof.'" *Catholic Health Care W. v. US Foodserv. (In re US FoodServ. Pricing Litig.)*, 729 F.3d 108, 118 (2d Cir. 2013) (internal citation omitted) (emphasis added). If the most substantial issues in controversy will be resolved through common proof, class certification will generally achieve the economies of litigation that Rule 23(b)(3) envisions. *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2014 U.S. Dist. LEXIS 180914, at \*193-194 (E.D.N.Y. Oct. 15, 2014). Stated differently, "[a] single common issue may be the overriding one in litigation, despite the fact that the suit also entails numerous remaining individual questions." *Buford v. H & R Block*, 168 F.R.D. 340, 356 (S.D. Ga.

1996) (citing 1 Newberg on Class Actions § 4.25). The common issues of product defect and Atlas's knowledge of the defect are obviously more substantial and complicated than any individual ones.

That conclusion is particularly true here because the individual issues Atlas enthusiastically points to arise only as a result of its affirmative defenses. The Eleventh Circuit has recently reaffirmed the well-established rule that individual affirmative defenses do not defeat predominance. *Brown*, 2016 U.S. Dist. LEXIS 5112 at \*28-29 (“The general rule, regularly repeated by courts in many circuits, is that ‘[c]ourts traditionally have been reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members.’”) Atlas itself recognizes that the issues of causation and statute of limitations are affirmative defenses.<sup>1</sup> Any affirmative defenses remaining after resolution of the common issues relating to Plaintiffs' liability case, as discussed above, can be resolved in the second phase of the litigation.

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<sup>1</sup> See Atlas Roofing Corp.'s Answer to Plaintiffs Amended Class Action Complaint (“Answer”) (Jan. 13, 2016) (Doc. No. 44) at 4 & 7-9 (Affirmative Defense No. 8 – (Limitations) & Affirmative Defenses Nos. 18, 20, 22, 23, 24, 25, 26 – (Causation)).

**a) Causation**

Plaintiffs incorporate by reference the facts and arguments set forth in Section III.A.3(a) (“Common Issues Predominate Over Individual Issues: Causation”) section of the Dishman Reply Brief.

**b) Notice**

As discussed above, Plaintiffs contend that Atlas waived its requirement that class members provide notice pursuant to the terms of the warranty when it did not enforce the requirement against warranty claims brought by owners of its products. *See Stewart v. Bradley*, 15 So. 3d 533, 543-44 (Ala. App. 2008) (finding that a party can waive its rights through course of conduct inconsistent with any other intention.) Even if the Court finds that Atlas did not waive the notice requirement, whether individual class members provided notice does not raise insurmountable individualized issues because class members can either show proof of notice they provided to Atlas or not. Furthermore, notice can be determined by Atlas’s own warranty data records. Even if class members must provide individual evidence of notice, Alabama courts have certified class actions alleging breach of warranty claims. *See, e.g., Cheminova Am. Corp. v. Corker*, 779 So. 2d 1175, 1178 (Ala. 2000) (certifying a class alleging a breach of express and implied warranty claims against the manufacturer of a defective product); *Ex parte Masonite Corp.*, 681 So.

2d 1068, 1075 (Ala. 1996) (denying the right to appeal class certification of a class that alleged, in part, breach of warranty claims). The discreet individual issue of notice does not predominate over the more fundamental question of whether Atlas warranted a product that contained a manufacturing defect.

**c) Privity and Applicability of the Warranty.**

Individual defenses of whether a class member is covered by the warranty because, for example, the class member is not in privity with Atlas or does not own a home with Atlas Chalet or Stratford Shingles, also do not predominate over common issues of defect and knowledge. As discussed above, class members can answer whether they were or were not in privity with Atlas in the same manner. In the second phase of the proceedings, class members will be asked to disclose the party who sold them shingles by way of interrogatories or a court-approved questionnaire. At that point, Atlas will have an opportunity to raise the issue of privity and seek to preclude certain class members from recovery.

Atlas's point that certain class members cannot benefit from the warranty because they do not own a home with the appropriate shingles or have already received payment for the defect does not predominate because, as discussed above, these affirmative defenses tend to apply to a limited number of plaintiffs and can be readily sorted out through the use of interrogatories or Court-approved

questionnaires. *See Smilow v. Sw. Bell Mobile Sys.*, 323 F.3d 32, 39 (1st Cir. 2003) (collecting authority and noting that “[c]ourts traditionally have been reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members.”) Alabama Courts have scheduled “initial trials on a single issue, such as whether a particular product is defective” as a way to address major issues common to the class while preserving the defendant’s opportunity to assert individual affirmative defenses against select class members in the second stage of litigation. *Ex parte Masonite Corp.*, 681 So. 2d, at 1075. Because Atlas’s affirmative defenses will only apply to select class members, the common issues of defect and knowledge still predominate.

**d) Statute of Limitations, Wind Damage, and Damages.**

Plaintiffs incorporate by reference the facts and arguments set forth Section III.A.3b (“Common Issues Predominate Over Individual Issues: Statute of Limitations and Damages”) of the Dishman Reply Brief.

**B. The Fraudulent Concealment Claim Satisfies the Predominance Requirement Because Plaintiffs Can Prove Defect and Prior Knowledge on a Classwide Basis.**

**1. The Elements of the Fraudulent Concealment Claim and Atlas’s Defenses.**

Plaintiffs also argue that Atlas fraudulently concealed the defect in the shingles from class members. To prevail on their claim of fraudulent concealment, Plaintiffs

must prove: “(1) that the defendant had a duty to disclose material facts, (2) that the defendant concealed or failed to disclose those facts, and (3) that the concealment or nondisclosure induced the plaintiff to act to his injury.” *Altmayer v. Daphne*, 613 So. 2d 366, 369 (Ala. 1993). Plaintiffs can establish most of these elements through common proof.

Atlas asserts two defenses – (1) Plaintiffs cannot uniformly show that Atlas had the duty to disclose the defect and (2) Plaintiffs cannot prove class-wide reliance on Atlas’s representations about the shingles. As discussed below, Atlas’s defenses either present a common issue that Plaintiffs can answer using common evidence or do not predominate.

## **2. Classification of Common and Individual Issues.**

Atlas engaged in a conscious common course of conduct to conceal the defect from its customers. Atlas does not assert it disclosed the defect to some class members, but not others. As a result, whether Atlas concealed the defect is a question that will be answered the same for each class member. Similarly, Atlas’s concealment of material facts will be a common issue that can be proved by common evidence. Atlas relies on *Mason v. Chrysler Corp.*, 653 So. 2d 951, 954 (Ala. 1995) to argue that each class member would have to show a confidential relationship with Atlas to establish its duty to disclose. But Atlas reads *Mason* too narrowly. The Alabama

Supreme Court has recognized that “[a] duty to speak can arise from the relation of the parties, **the value of the particular fact, the relative knowledge of the parties, and other circumstances.**” *Indep. Life & Accident Ins. Co. v. Harrington*, 658 So. 2d 892, 896 (Ala. 1994) (emphasis added); *see also Mason*, 653 So. 2d at 954 (“A duty to communicate can arise from a confidential relationship between the plaintiff and the defendant, from the particular circumstances of the case, or from a request for information”) (emphasis added). In particular, the Court has found a duty to disclose “where one party has superior knowledge of a fact and the other party’s having the same knowledge would cause the other party to take a different course of action... if the other party cannot discover the fact himself.” *Id.* The class can show using common evidence of Atlas’s conduct that Atlas had a duty to disclose the know defects to all class members.<sup>2</sup>

Whether the facts Atlas concealed were material is also a common issue that can be determined by the answer to a common question – that is whether a person exercising reasonable care could have discovered the shingles were defective. The

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<sup>2</sup> Even if the Court views the duty to disclose as an individual issue, as discussed above, courts approach the predominance inquiry by evaluating whether the most material issues are common to the class. Whether the class sufficiently alleges the existence of a defect predominates over whether Atlas had a duty to disclose because Plaintiffs have no cause of action for fraudulent concealment if Atlas did not produce shingles that contained a manufacturing defect. If Atlas had nothing to disclose, Plaintiffs cannot successfully show that the shingles were defective.

element of intent can be satisfied by showing that Atlas had actual knowledge of the defect before selling the product and concealed the truth to induce the sale. *Lacy v. Morrison*, 906 So. 2d 126, 130 (Miss. Ct. App. 2004); *Cf. Lisk v. Lumber One Wood Preserving, LLC*, 792 F.3d 1331, 1339 (11th Cir. 2015) (finding that intent can be inferred when manufacturer “knew its wood was bound for end users and that they would suffer substantial harm if the wood did not conform to the warranty.”)

### **3. Common Issues Predominate Over Individual Issues.**

The need to prove individual damages rarely cause predominance problems and does not do so here, as discussed above. Further, Plaintiffs demonstrated, on pages 33 and 34 of their opening brief, how reliance can be proved for each class member based on common circumstantial evidence, an approach approved by the Eleventh Circuit in *Klay v. Humana, Inc.*, 382 F.3d 1241, 1258 (11th Cir. 2004). Simply put, each class member purchased the shingles; there is no evidence that any customer knew or could have known the shingles were defective before buying them; and no customer would have knowingly paid for shingles that prematurely fail and have to be replaced within ten years.<sup>3</sup> Atlas ignores how Plaintiffs propose to prove

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<sup>3</sup> Proving reliance circumstantially is made easier here than because, unlike in the typical case where reliance creates predominance problems, Plaintiffs have not been exposed to different representations. *Compare Jones v. ConAgra Foods, Inc.*, 2014 U.S. Dist. LEXIS 81292 at \*23 (N.D. Cal. June 13, 2014) (reliance on labels that changed over time) and *Aronson v. Greenmountain.com*, 2002 Pa. Super 316,

reliance and simply points out that reliance cannot be presumed, a point of law with which Plaintiffs do not disagree. Atlas's silence is telling.

Where, as here, Plaintiffs do not experience “a material variation in the representations made or in the kinds or degrees of reliance[,]” Alabama courts have found that the individual question of reliance does not predominate. *Ex parte Household Retail Servs., Inc.*, 744 So. 2d 871, 881 (Ala.1999). Plaintiffs can establish reliance through circumstantial evidence common to the entire class because of the nature of the products and the information Atlas uniformly concealed. Simply put, there is no evidence that any customer knew or could have known of the defective nature of the shingles before buying them; and no reasonable customer would have knowingly paid for shingles that prematurely fail and have to be replaced within ten years when reliable products were readily available. Indeed, if Atlas had disclosed the problem to customers from the beginning, the shingles likely would have been taken off the market a decade earlier.

The predominance requirement is satisfied for fraudulent concealment.

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¶ 7 (2002) (reliance on different TV advertisements) *with Klay*, 382 F.3d at 1258 (reliance on uniform misrepresentations in bills could be proved circumstantially).

**C. Plaintiffs' AEMLD Claim Satisfies the Predominance Requirement Because Plaintiffs Can Prove Defect and Prior Knowledge on a Classwide Basis.**

**1. The Elements of an AEMLD Claim and Atlas's Defenses.**

Plaintiffs' claim under the Alabama Extended Manufacturers' Liability Doctrine ("AEMLD") requires proof that the class members sustained damage to their property caused by a product that was defective when it left the manufacturer's control. *Yamaha Motor Co. v. Thornton*, 579 So. 2d 619, 621 (Ala. 1991). The "plaintiff must affirmatively show that the product was sold with a defect or in a defective condition." *Jordan v. Gen. Motors Corp.*, 581 So. 2d 835, 836-37 (Ala. 1991). Common evidence will show that the shingles were defective at the time they were manufactured and thus suffered from the same latent problems, making certification of the AEMLD claim appropriate.

Atlas argues that class members would need to individually present evidence of: (1) damages beyond the value of the shingles because the economic loss rule applies to the AEMLD; (2) the unreasonably dangerous nature of their shingles; (3) compliance with the statute of limitations; and (4) the amount of damages.

**2. Classification of Common and Individual Issues.**

Plaintiffs can largely establish their AEMLD claim through common evidence that Atlas manufactured and sold shingles that contained a defect caused

by the manufacturing process and, therefore, present from the time the shingles left Atlas's control to when the shingles reached class members.

Whether the shingles are unreasonably dangerous is also an issue common to the class because common proof can establish that a defective product is "one that is unreasonably dangerous, i.e., one that is not fit for its intended purpose or that does not meet the reasonable expectations of the ordinary consumer." *Beam v. Tramco, Inc.*, 655 So. 2d 979, 981 (Ala. 1995). Plaintiffs will assert, through expert testimony, that Atlas manufactured the shingles using excessive moisture that subsequently caused blisters, granule loss, and other defects in the shingles of all class members, and the defect rendered the shingles unfit for their intended purpose. As such, the shingles did not meet the reasonable expectations of class members.

Atlas's defenses concerning the economic loss rule, statute of limitations, and damages present individual issues that do not predominate.

### **3. Common Issues Predominate Over Individual Issues.**

As discussed above, Atlas's defenses concerning the statute of limitations and damages typically do not predominate over common issues of defect and knowledge at the class certification stage. *See supra*. Atlas's point that the economic loss rule will bar the claims of certain class members simply presents a

damages issue that can be readily resolved in the second phase of the litigation using conventional discovery tools. While these issues require some investigation into individualized facts, the courts have repeatedly held that individual queries of this nature will rarely defeat class certification.

**D. Plaintiffs' ADTPA Claim Satisfies the Predominance Requirement Because Plaintiffs Can Prove Unfair and Deceptive Trade Practices on a Classwide Basis.**

**1. The Elements of the ADTPA and Atlas's Defenses.**

To allege a claim under ADTPA, Plaintiffs must show that the complainant (1) is a "consumer," (2) made pre-suit demand, (3) suffered from the commission of "one or more of the acts or practices declared unlawful under" Section 8-19-5, and (4) incurred money damages. 21 Ala. Code § 8-19-10(a). Atlas argues that Plaintiffs will need to engage in individualized inquiries as to whether class members: (1) are consumers, (2) made a pre-suit demand, and (3) establish reliance, causation, and damages. For the reasons discussed below, the individual issues do not predominate over common issues with regard to Plaintiffs' ADTPA claim.

**2. Classification of Common and Individual Issues.**

Class members can answer the primary inquiry under ADTPA about Atlas's unfair and deceptive trade practices through evidence common to the class.

Common evidence shows that the shingles were defective at the time they were manufactured and suffered from latent manufacturing defects that cause blistering, cracking, granule loss and ultimately premature failure. The common evidence further shows that Atlas represented its shingles in an unfair and deceptive manner that violated several provisions of the ADTPA. *See* Plaintiffs' Brief in Support of Class Certification (ECF #302-1) ("Crotzer Opening Brf."), at 20-21. The evidence of each class member's claim turns on the identical and common proof of the latent defects in the shingles and the misrepresentations by Atlas, making certification of the ADTPA claim appropriate.

Atlas's arguments that Plaintiffs must prove that they are consumers, sent a pre-suit demand, and established reliance, causation, and damages all raise individualized issues that, ultimately, do not predominate over the common issue of Atlas's unfair and deceptive trade practices.

### **3. Common Issues Predominate Over Individual Issues.**

As discussed above, whether class members provided a pre-suit demand and established reliance, causation, and damages are individual issues that do not predominate over the primary issue that Atlas engaged in unfair and deceptive trade practices against class members. *See supra*. Atlas's point that class members must prove that they are consumers, also, does not predominate for two reasons. First, as

discussed above, the defense that class members are not consumers does not apply to a majority of the class and, therefore, does not counsel against certification. Second, whether a class member is a consumer can readily be determined in the second phase of the proceedings. *See supra*.

**E. Plaintiffs’ Negligence Claim Satisfies the Predominance Requirement Because Plaintiffs Can Prove Defect on a Classwide Basis.**

**1. The Elements of the Negligence Claim and Atlas’s Defenses.**

To assert a negligence claim, Plaintiffs must allege the following four elements – “(1) duty, (2) breach of duty, (3) proximate cause, and (4) injury. *Ison Logging, L.L.C. v. John Deere Constr. Equip. Co.*, 2000 U.S. Dist. LEXIS 18250, at \*41 (S.D. Ala. Oct. 12, 2000). As applied to the facts, Plaintiffs must effectively show that the product is defective and the manufacturer failed to exercise due care in the product’s manufacture, design, or sale. *McMahon v. Yamaha Motor Corp.*, 95 So.3d 769, 772 (Ala. 2012) (*citing Atkins v. American Motors Corp.*, 335 So.2d 134, 139 (Ala. 1976)). Atlas argues that individual issues predominate because Plaintiffs must show: (1) damages to goods other than the product since the economic loss rule applies to negligence claims; (2) privity; and (3) causation. For the reasons discussed below, the individual issues do not predominate over common issues with regard to Plaintiffs’ negligence claim.

## **2. Classification of Common and Individual Issues.**

Plaintiffs rely on common evidence to prove that Atlas had a duty to manufacture products without a defect and Atlas breached that duty by selling shingles that contain a universal manufacturing defect. *See supra; see also Cox v. Zurn Pex, Inc. (In re Zurn Pex Plumbing Prods. Liab. Litig.)*, 644 F.3d 604, 619 (8th Cir. 2011) *cert. dismissed*, 133 S. Ct. 1752 (2013) (“In the case of warranty and negligence claims premised on a universal and inherent product defect, however, plaintiffs may rely on common evidence to establish a prima facie case . . .”)

Atlas’s issues concerning privity, damages, and causation present individual issues that do not predominate.

## **3. Common Issues Predominate Over Individual Issues.**

Plaintiffs all but establish their cause of action for negligence through class-wide proof that Atlas sold a product containing a manufacturing defect. As discussed above, class members can handily resolve the issue of privity in the second phase of the trial proceedings and resolve the issue of causation in the first trial. *See supra*. Atlas argues that the application of the economic loss rule creates untenable individualized issues, but the economic loss rule pertains to establishing damages, an individualized issue that does not preclude certification. *Id.* Therefore,

Plaintiffs' common evidence of Atlas's negligence predominates over any individualized inquiries.

**F. Plaintiffs' Unjust Enrichment Claim Satisfies the Predominance Requirement Because Plaintiffs Can Prove Defect and Prior Knowledge on a Classwide Basis.**

**1. The Elements of the Unjust Enrichment Claim and Atlas's Defenses.**

To allege a claim for unjust enrichment, "the plaintiff must show that the defendant holds money which, in equity and good conscience, belongs to the plaintiff or holds money which was improperly paid to defendant because of mistake or fraud." *White v. Microsoft Corp.*, 454 F. Supp. 2d 1118, 1132 (S.D. Ala. 2006). The retention of money is unjust if: "(1) the donor of the benefit ... acted under a mistake of fact or in misreliance on a right or duty, or (2) the recipient of the benefit ... engaged in some unconscionable conduct, such as fraud, coercion, or abuse of a confidential relationship." *Wyeth, Inc. v. Blue Cross & Blue Shield of Ala.*, 42 So. 3d 1216, 1225-27 (Ala. 2010).

Atlas argues that Plaintiffs cannot establish a claim for unjust enrichment using common evidence because only individual evidence can show a benefit paid directly to Atlas. Moreover, Atlas claims that Plaintiffs must present individual evidence of whether the warranty applies to their shingles because class members

cannot allege both a claim for breach of express warranty and unjust enrichment. For the reasons discussed below, these issues are common issues.

## **2. Classification of Common and Individual Issues.**

Plaintiffs establish the prima facie elements of their unjust enrichment claim largely through common evidence. Plaintiffs will show that Atlas engaged in fraudulent conduct by presenting common evidence that Atlas sold defective products, but never informed consumers and, in fact, affirmatively represented that the products were not defective after learning about the defect. Plaintiffs will also show that Atlas received an unjust benefit from class members' purchase of the product when, had the class known about the defect, they would not have purchased the shingles.

Although Atlas contends that the class will need to show individual proof of a benefit provided directly to Atlas, rather than through a builder, courts in the Eleventh Circuit have allowed indirect purchasers to allege unjust enrichment claims. *MacMorris v. Wyeth, Inc.*, 2005 U.S. Dist. LEXIS 46657, at \*13 (M.D. Fla. June 27, 2005). Moreover, establishing that Atlas received some benefit from the class members purchasing the shingles is a low bar. *Family Care v. Fox*, 642 So. 2d 486, 488 (Ala. App. 1994) (“Whenever one person adds to the other's advantage in any form, whether by increasing his holdings or saving him from expense or

loss, he has conferred a benefit upon the other.”) Class members will show, through common evidence, that they uniformly purchased Atlas shingles and that Atlas received a benefit from the class’s purchase of the products based on fraudulent representations.

Atlas’s claim that Plaintiffs will also present individual issues as to whether the warranty applies to them because class members cannot allege an unjust enrichment claim in conjunction with a breach of warranty claim is also a common issue. Whether Atlas’s limited warranty can serve as the basis for Plaintiffs’ breach of warranty claim is an issue common to the class. The answer to that question will determine whether the class, as a whole, can allege a claim for unjust enrichment. Because Plaintiffs may plead unjust enrichment in the alternative to a breach of warranty claim, at this juncture the class’s unjust enrichment claim does not pose an individualized issue. *Danny Lynn Elec. & Plumbing, L.L.C. v. Veolia Es Solid Waste Se., Inc.*, 2011 U.S. Dist. LEXIS 78557, at \*16 (M.D. Ala. July 19, 2011).

### **3. Common Issues Predominate Over Individual Issues.**

Common issues predominate with regard to Plaintiffs’ unjust enrichment claim because it presents no individualized issues.

**IV. THE PROPOSED CLASS IS ASCERTIANABLE AND SATISFIES ALL REQUIREMENTS OF RULE 23(A).**

Plaintiffs have shown that the class is ascertainable, the requirements of Rule 23(a) have been met, and certification under Rule 23(b)(3) is appropriate, as many other courts have found in similar class actions involving defective construction materials and other products.<sup>4</sup> *See, e.g., Thomas v. La.-Pac. Corp.*, 246 F.R.D. 505 (D.S.C. 2007). Nonetheless, Atlas asserts that the class is not ascertainable and – without any real analysis, using less than a page of its brief – challenges the existence of commonality, typicality and adequacy. Atlas is wrong for the reasons set forth in Section IV (“The Proposed Class Is Ascertainable And Satisfies All Requirements Of Rule 23(A)”) of the Dishman Reply Brief incorporated here by reference.

**A. The Adequacy Requirement Has Been Satisfied.**

Plaintiffs maintain that Atlas’s unique argument regarding the Crotzers’ adequacy as class representatives does not defeat certification. Atlas argues that Plaintiffs are inadequate due to an alleged conflict of interest between the Crotzers and the class. Specifically, Atlas asserts that the Crotzers want to show that the shingles are defective, whereas class members who want to sell there homes would

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<sup>4</sup> Because all members of the proposed Rule 23(b)(3) class are seeking damages, Plaintiffs will no longer seek certification under Rule 23(b)(2).

not. The instant litigation, however, does not present a conflict. Class members who are in the market to sell their homes will benefit from a finding that the shingles contain a defect because Atlas, rather than the individual class members, will incur the financial burden of roof replacement. If class members feel that there is no defect in the shingles and they want to list their homes without disclosing the defect, then they can simply opt-out of the litigation. At bottom, the litigation does not give rise to a material conflict between the class representatives and the class because class members who do not opt-out will receive a benefit from the jury finding Atlas liable for manufacturing defective roof shingles.

**V. ALTERNATIVELY, THE COMMON ISSUES MAY BE CERTIFIED PURSUANT TO RULE 23(C)(4).**

Plaintiffs incorporate by reference the facts and arguments set forth in Section V (“Alternatively, The Common Issues May Be Certified Pursuant To Rule 23(c)(4)”) of the Dishman Reply Brief.

**VI. CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Class Certification.

Dated: April 11, 2016.

Respectfully submitted,

/s/Daniel K. Bryson

Daniel K. Bryson  
Whitfield Bryson & Mason LLP  
900 W. Morgan Street  
Raleigh, NC 27603  
Tel: 919-600-5000  
Fax: 919-600-5035  
Email: dan@wbmlp.com  
*Plaintiffs' Co-Lead Counsel*

Christopher L. Coffin  
Pendley, Baudin & Coffin, LLP  
1515 Poydras Street, Suite 1400  
New Orleans, LA 70112  
Tel: 504-355-0086  
Fax: 504-523-0699  
Email: ccoffin@pbclawfirm.com  
*Plaintiffs' Co-Lead Counsel*

Kenneth S. Canfield  
GA Bar No.: 107744  
Doffermyre Shields Canfield &  
Knowles, LLC  
1355 Peachtree Street, Suite 1600  
Atlanta, GA 30309  
Tel: 404-881-8900  
Email: kcanfield@dsckd.com  
*Plaintiffs' Liaison Counsel*

On the Brief:

Gary E. Mason  
Ben Branda  
Whitfield Bryson & Mason LLP  
1625 Massachusetts Ave, Suite 605  
Washington, DC 20036  
Tel: 202-429-2290  
Fax: 202-429-2294  
Email: gmason@wbmlp.com  
bbranda@wbmlp.com

Stan Baudin  
Pendley, Baudin & Coffin, LLP  
1515 Poydras Street, Suite 1400  
New Orleans, LA 70112  
Tel: 504-355-0086  
Fax: 504-523-0699  
Email: sbaudin@pbclawfirm.com

*Counsel for Plaintiffs*

### **LOCAL RULE 7.1 COMPLIANCE CERTIFICATE**

Pursuant to L.R. 7.1D, this is to certify that the foregoing pleading complies with the font and point selections approved by the Court in L.R. 5.1B. The foregoing pleading was prepared on a computer using the Times New Roman font (14 point).

This the 11<sup>th</sup> day of April, 2016.

*/s/ Daniel K. Bryson*  
\_\_\_\_\_  
Daniel K. Bryson

**CERTIFICATE OF SERVICE**

I, Daniel K. Bryson, do hereby certify that the foregoing was electronically filed through the CM/ECF system for the Northern District of Georgia, which will send a notice of electronic filing to the following attorneys of record:

Joel G. Pieper  
William M. Ragland, Jr.  
Womble Carlyle Sandridge & Rice,  
LLP  
271 17<sup>th</sup> Street, N.W., Suite 2400  
Atlanta, GA 30363-1014  
Email: [jpiper@wcsr.com](mailto:jpiper@wcsr.com)  
Email: [wragland@wcsr.com](mailto:wragland@wcsr.com)

Keith A. Clinard  
Womble Carlyle Sandridge & Rice,  
LLP  
One West Fourth Street  
Winston-Salem, NC 27101  
Email: [kclinard@wcsr.com](mailto:kclinard@wcsr.com)

Henry B. Smythe, Jr.  
James E. Weatherholtz  
Womble Carlyle Sandridge & Rice,  
LLP  
PO Box 999  
Charleston, SC 29402  
Email: [hsmythe@wcsr.com](mailto:hsmythe@wcsr.com)  
Email: [jweatherholtz@wcsr.com](mailto:jweatherholtz@wcsr.com)

This the 11<sup>th</sup> day of April, 2016.

*/s/ Daniel K. Bryson*

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Daniel K. Bryson