

**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
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This document relates to:

<p>BRYAN MAKOWSKI, individually and on behalf of all other similarly situated,</p> <p style="padding-left: 40px;">Plaintiff,</p> <p style="padding-left: 40px;">v.</p> <p>ATLAS ROOFING CORPORATION d/b/a MERIDIAN ROOFING COMPANY,</p> <p style="padding-left: 40px;">Defendant.</p>	<p style="text-align: center;">No.: 1:14-cv-03034-TWT</p>
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**PLAINTIFF BRYAN MAKOWSKI'S REPLY BRIEF
IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

I. INTRODUCTION

Plaintiff incorporates 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 Makowski and members of the proposed Kentucky class.

If Plaintiff prevails in showing that the manufacturing process caused the defect in the shingles and Atlas knew about the defect, he will have proven the core element of liability for breach of warranty, the Kentucky Consumer Protection Act (“KCPA”), negligence, negligent misrepresentation, and strict liability. Because Plaintiff has satisfied the requirements for class certification, the proposed Kentucky class should be certified.

II. TRIAL PLAN

Plaintiff incorporates by reference the facts and arguments set forth in 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, Plaintiff begins 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 Prods.*, 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 Plaintiff’s claims for breach of warranty, the KCPA, negligence, negligent misrepresentation, and strict liability further establishes that common questions predominate over individual ones.

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

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

Plaintiff argues that Atlas breached its express and implied warranties when it provided defective shingles to class members. In Kentucky, an express warranty is created when: (1) the seller makes an affirmation of fact or promise; (2) that relates to the goods; and (3) becomes part of the basis of the bargain between the parties. *Naiser*

v. Unilever U.S., Inc., 975 F. Supp. 2d 727, 733-34 (W.D. Ky. 2013) (citing Ky. Rev. Stat. Ann. § 355.2–313(1)(a)).

“To succeed on ... a [breach of implied warranty of merchantability] claim, Plaintiffs must show that the [product] they purchased w[as] unmerchantable.” *In re SIGG Switz. (USA), Inc. Aluminum Bottles Mktg. & Sales Practices Litig.*, 2011 U.S. Dist. LEXIS 3033, at *13 (W.D. Ky. Jan. 12, 2011). Goods are merchantable when they “are fit for the ordinary purposes for which goods of that description are used.” Ky. Rev. Stat. Ann. § 355.2-314(2)(c). According to Ky. Rev. Stat. Ann. § 355.2–602, if goods are defective, they may be rejected. *Id.* If the defect is not discovered until after acceptance, however, a revocation of the acceptance may be effected, and the buyer may have “the same rights and duties with regard to the goods ... as if he had rejected them.” *Id.*, at § 355.2–608(3).

Atlas has identified a number of defenses to Plaintiff’s breach of warranty claims: (1) variations in the warranties preclude the warranty from applying to certain class members; (2) a manufacturing defect did not cause Plaintiff’s shingles to fail; (3) certain class members are not in privity with Atlas, so they cannot assert a breach of implied warranty claim; (4) the statute of limitations bars certain class members’ claims; and (5) 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 5112, at *14. Here, Plaintiff’s prima facie case for breach of his warranty presents common issues that can be proven with common evidence as detailed in Plaintiffs Dishmans’ Opening Brief in Support of Class Certification (ECF #296-1) (“Dishman Opening Brf.”), at 12-14. Plaintiff’s expert, Dean Rutila, will testify that the shingles suffer from a common manufacturing defect manifested by a combination of blistering, cracking and granule loss that was visible on all 351 roofs he inspected and confirmed in the laboratory, and, as a result of the common defect, roofs with Atlas overlay shingles have effectively failed and need to be replaced because they cannot reliably withstand reasonably foreseeable weather events that will inevitably cause the roof to blow off or leak. Anthony Mattina, who has replaced Chalet shingles on more than 1,000 roofs in the Atlanta area due to this premature failure will confirm

Rutila's opinion and testify that the shingles are not fit for their intended purpose.¹ Moreover, the common evidence will show that Atlas warranted that its shingles were free from defect and excessive granule loss, *id.*, at 5-8, and that it uniformly denied warranty claims for cracks, blisters and granule loss in the absence of a leak.²

With respect to notice, the class will rely on common evidence of consumer complaints to establish that the notice requirement of Atlas's warranties has been satisfied for all class members.³ At least 58 warranty claims have been filed in Kentucky. Numerous courts have found that a defendant has constructive notice of a defect sufficient to meet the notice requirements of a warranty for all class members when such a large number of consumers bring the defect to its attention.

¹ Plaintiff also contends that the shingles are defective and violate applicable warranties because they are unsightly. While denying liability, Atlas agrees that blistering affects aesthetics and a shingle fails if it is not serving its aesthetic function. *See* Dep. of Meldrin Collins (ECF #296-10), at 58 (228:23-229:6) & **Tab 1** at 91:6-8.

² While Atlas paid some warranty claims for customer relations purposes, Atlas maintains that the problems at issue are not caused by manufacturing problems or covered by its warranty. *See* Dep. of Glynese R. Thomas (ECF #296-16) at 32 (125:1-17) (cracked shingle without leak is not a manufacturing defect); 33 (126:16-19) (blistering without a leak is not a defect); (126:23-127:4) (granule loss without a leak is not a defect) & 55 (215:14) (Atlas's position is that blistering is not a manufacturing defect).

³ Makowski Opening Brief In Support of Class Certification (ECF #305-1) ("Makowski Opening Brf."), at 4 and 7.

See, e.g., Muehlbauer v. GMC, 431 F. Supp. 2d 847, 859 (N.D. Ill. 2006) (consumer complaints provide constructive notice to manufacturers, which satisfies the notice requirement because requiring every single member of a class to provide notice “is not a reasonable proposition.”); *Martin v. Ford Motor Co.*, 765 F. Supp. 2d 673, 683 (E.D. Pa. 2011) (widespread complaints are sufficient to satisfy notice requirement); *Samuel-Bassett v. Kia Motors Am., Inc.*, 613 Pa. 371, 414 (2011) (finding that the class could prove notice and opportunity to cure through common evidence at trial where consumers notified the manufacturer of the defect and the manufacturer failed to repair the defect during production years).

Regardless of whether the notice requirement can be satisfied in this way, Plaintiff will prove, through common evidence, that Atlas has waived the requirement. In handling thousands of warranty claims involving the shingles, Atlas did not ask claimants to prove they filed the claim within 30 days of discovering a problem and, in fact, never denied a claim based on the notice requirement. Declaration of Amanda Mkamanga (Apr. 11, 2016) (“Mkamanga Dec.”), ¶ 3 (**Tab 2**). Indeed, Atlas did not even enforce the requirement when it knew the claimant knew of the problem more than 30 days before filing the claims. *Id.* Such evidence is sufficient to establish waiver. *See, e.g., RHL Properties, L.L.C. v. Neese*, 293 Ga. App. 838, 840-41 (Oct. 6, 2008) (“wherever a contract

provides for the forfeiture of rights on account of the failure of one of the parties to comply with certain express conditions as to notice ... courts will readily seize upon any fact or circumstance ... tending to show a waiver of strict compliance, and will seek to avoid the forfeiture and to leave the actual merits of the case open to investigation.”). Routinely failing to insist on compliance with the notice requirement in its ordinary business dealings with class members, Atlas should not be permitted to use the requirement to avoid certification.⁴ Regardless, whether Atlas has waived the requirement is a common issue, not an individualized one.

Even if the Court declines to find that Atlas waived its right to notice, denying Plaintiff a remedy for Atlas’s wrongful breach of warranty because Plaintiff allegedly did not provide notice runs counter to the UCC. Commentary to the UCC specifically provides that pre-suit notice “is designed to defeat commercial bad faith, not to deprive a good-faith consumer of his remedy.” UCC § 2-607(3)(a) cmt. 4. Courts have cited this comment regarding the liberal application of UCC remedies and the general purpose of the notice requirement and concluded that a defendant *must establish prejudice* from any alleged failure of notice in order to bar a plaintiff’s claim. *Wal-Mart v. Wheeler*, 262 Ga. App. 607,

⁴ Regardless, notice is not a barrier to the 58 Kentuckians who filed warranty claims. The claims themselves, which Atlas considered without complaint regarding timing, satisfy the notice requirement.

609-11 (2003); *Terrill v. Electrolux Home Prods.*, 753 F. Supp. 2d 1272, 1287 (S.D. Ga. 2013) (*citing Wheeler* and holding defendant's notice argument failed where no evidence of prejudice). Because Atlas has failed to demonstrate prejudice resulting from any alleged absence of notice, the issue of pre-suit notice does not defeat Plaintiff's warranty claims.

Common evidence will also be used to prove that Atlas had prior knowledge of the defect, strengthening an element of Plaintiff's claim that certain limitations of the warranty are unconscionable. Dishman Opening Brf., at 29-31. Atlas argues that the warranties changed over time (for example those issued after 2002 only cover leaks) and require individualized determinations of whether class members can avail themselves of the warranty. However, Plaintiff contends that the warranties all cover inherent manufacturing defects, without regard to whether a roof has leaked, and granule loss after six months. *Id.*, at 6-7. The meaning of the warranties is a common issue that must be resolved the same way for each class member. If the warranty is construed in Plaintiff's favor, no individualized determinations will be needed. Even if the warranties are construed to only apply to leaks, if the jury finds that Atlas concealed the defect, leading the Court to find the alleged limitation unconscionable, the warranties still will uniformly cover all class members.

Furthermore, Atlas argues that its express warranty does not benefit some class members because they were not the direct purchasers of the shingles. Under Kentucky law, however, “an actual and direct promise for the benefit of a third party will be sufficient to create privity between the promisor and the third party beneficiary” such that subsequent purchasers can enforce the express warranty against the manufacturer. *Louisville Gas & Elec. Co. v. Cont’l Field Sys.*, 420 F. Supp. 2d 764, 770 (W.D. Ky. 2005). Whether Atlas’s express warranty was intended to benefit subsequent owners of homes with shingles is a question common to the class. Plaintiff maintains that Atlas’s warranties expressly cover remote purchasers of its products. *See* Atlas Warranty ECF #296-26. Where warranties clearly extend coverage, Kentucky courts have permitted subsequent owners to allege breach of express warranty claims. *Williams v. Volvo-White*, 2003 WL 22681457, at *3 (Ky. Ct. Nov. 14, 2003) (holding that a subsequent purchaser could have privity with seller).

3. Common Issues Predominate Over Individual Issues.

Atlas’s remaining arguments concerning causation, statute of limitations, privity 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). 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. App. 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.⁵ Any affirmative defenses remaining after resolution of the common issues relating to Plaintiff’s liability case, as discussed above, can be resolved in the second phase of the litigation.

a) Causation

Atlas contends that individual issues of causation will predominate, namely what may have caused the roofs to blister, crack and loose granules other than a manufacturing defect.⁶ But Atlas’s argument on causation simply restates its defense on the merits, which is not relevant to class certification.⁷

⁵ See Atlas Roofing Corp.’s Answer to Plaintiff’s Amended Class Action Complaint (“Answer”) (Oct. 31, 2014) (Doc. No. 171) at 4 & 5-8 (Affirmative Defense No. 8 (Limitations) & Affirmative Defenses Nos. 14,16, 19, 20, 21, 22 (Causation)).

⁶ Atlas suggests that some or all of these problems could also be the result of installation errors, design errors or storm damage. Nonetheless, Atlas admits that moisture in the manufacturing problem contributed to blistering. **Tab 3**, at 32:20-24. (agreeing that moisture in the manufacturing process contributed to the blistering of the Chalet overlay shingles) and it was unable to solve the blistering problem. **Tab 4**, at 92:9-12; 215:22-216:1.

⁷ See *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 428 (4th Cir. 2003) (“The sufficiency of the evidence as to proximate cause presented by Plaintiffs goes to the merits of Plaintiffs’ case - an issue the Supreme Court has held courts may not consider in ruling on a motion for class certification”) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974)).

A jury could find, based on the testimony of Plaintiff's experts and Atlas's own documents, that excessive moisture in the manufacturing process caused a defect in every shingle that existed at the time it was sold,⁸ and it could reject Atlas's arguments about alternative causes, without the need for a roof by roof analysis. *See, e.g., Sanchez-Knutsen v. Ford Motor Co.*, 310 F.R.D. 529, 538 (S.D. Fla. 2015). Plaintiff, therefore can establish a prima-facie case of causation based upon common evidence. Atlas can argue that an intervening cause, such as a storm, was legally responsible for the damage suffered by a particular class member, but Atlas bears the burden of proof on this defense, *see, e.g., Morensi v. Evans*, 257 Ga. App. 670, 677 (2002), and its proof can be assessed in the second phase without creating predominance problems.⁹ *See, e.g., Brooks v. GAF Materials Corp.*, 2012 U.S. Dist. LEXIS 150717 at *18 (D.S.C. Oct. 19, 2012) (certifying class of owners of allegedly defective decking despite GAF's argument that "other things could have caused the shingles to fail such as improper installation or handling").

⁸ *See* Rutila Dep., ECF #296-22 at 51 (198:14-17); 62 (242:15-21) (moisture in manufacturing process likely cause of blistering); 51 (198:2-7) (moisture in manufacturing process contributes to cracking) & (198:8-11) (likely connection between moisture in manufacturing process and loss of granule).

⁹ Atlas recognizes that causation is an affirmative defense. *See* Atlas's Answer at 5-8 (Affirmative Defenses Nos. 14, 16, 19, 20, 21 22).

b) Privity, Statute of Limitations, Wind Damage, and Damages.

Individualized issues of privity, statute of limitations, and damages as a matter of law rarely predominate and, thus, typically do not defeat class certification. *See, e.g., Brooks*, 2012 U.S. Dist. LEXIS 150717, at *24-25, *clarified on denial of reconsideration*, 2013 U.S. Dist. LEXIS 15842 (D.S.C. Feb. 6, 2013) (inquiries into the statute of limitations “do not prevent class certification and the statute of limitations is not a complete bar to class certification in the Fourth Circuit”); *Brown*, 2016 U.S. App. LEXIS 5112, at *26 (the need for individualized proof of damages alone will not defeat class certification); *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) (same). That is particularly true in a case such as this one, where the common issues of defect and Atlas’s knowledge drive the litigation and any individual issues can be readily resolved in a second phase of the proceedings.

Atlas’s argument that proving damages will require complicated individualized determinations is based on a damages theory that Plaintiff has not asserted. Rutila found that at each property he inspected, “at least ten percent of the shingles have blisters, granule loss and/or cracking” (SGH Report, at 50) and concluded that each roof needed to be replaced. According to Atlas, Rutila’s conclusions require Plaintiff to inspect each class members roof to show that at

least ten percent of the shingles on a roof are damaged to recover replacement costs. However, that is not Rutila's opinion. His opinion – shared by Mattina – is that *all* the shingles must be replaced because none can withstand foreseeable weather events. *Id.*, at 53. Rutila has calculated replacement costs on a per square foot basis (subject to regional adjustments and complexity), *id.*, allowing class members to easily prove damages simply by showing the size of his or her roof. Even if that were not the case, class members can prove actual damages using estimates they obtain from roofers. *See, e.g., Allapattah Servs. v. Exxon Corp.*, 333 F.3d 1248, 1256-58, 1261 (11th Cir. 2003).

Similarly, statute of limitations issues regarding the warranty claims can be handled in a second phase without creating predominance problems. Under its own analysis, Atlas has no statute of limitations defense with regard to a large percentage of the proposed class who purchased their shingles within four years of the filing of this action. For other class members, Atlas will have an opportunity in the second phase to discover the facts and obtain an individualized determination for each class member who participates. Because Plaintiffs can establish their affirmative case concerning liability using class-wide evidence, and Atlas's affirmative defenses can be resolved effectively in the second phase of the

proceedings, the predominance requirement has been met and the class thus should be certified.

B. The Strict Products Liability Claim Satisfies the Predominance Requirement Because Plaintiff Can Prove Product Defect on a Classwide Basis.

1. The Elements of the Strict Products Liability Claim and Atlas's Defenses.

In Kentucky, a party whose person or property is injured by a product can bring suit for that injury under three different theories: (1) breach of warranty under the Uniform Commercial Code, (2) negligence, or (3) strict liability in tort. *See Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 535 (Ky. 2003), (citing *Williams v. Fulmer*, 695 S.W.2d 411 (Ky. 1985)). For strict liability claims, Kentucky follows Section 402A of the Restatement (Second) of Torts.

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441, 446-47 (Ky. Ct. App. 1965).

In defense (in addition to the defenses of statute of limitations, causation, and damages discussed above), Atlas argues that Plaintiff's strict products liability claim is barred by the economic loss rule. As discussed below, Atlas's defenses either does not apply to Plaintiff's claim or does not predominate.

2. Classification of Common and Individual Issues.

As previously demonstrated in Plaintiff's Opening Brief, each of the elements of strict products liability can be established by common proof. Makowski Opening Brf., at 14-16. In sum, whether the shingles are manufactured and sold in a defective condition turns on Atlas's common course of conduct in its manufacturing process. Similarly, answers to the questions of whether Atlas is in the business of selling shingles and whether the shingles reach the user without substantial change in condition all present common issues that surround Atlas's conduct and classification as a seller.

Furthermore, Atlas argues that individual issues related to the economic loss rule would predominate. But this defense because, in Kentucky, the economic loss rule does not apply to consumer transactions. *See State Farm Mut. Auto. Ins. Co. v. Norcold, Inc.*, 89 F. Supp. 3d 922, 928 (E.D. Ky. 2015) (discussing *Real Estate Mktg.*

v. Franz, 885 S.W.2d 921, 926 (Ky. 1994); *Mt. Lebanon Pers. Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845, 848-49 (6th Cir. 2002)).

Last, Atlas argues that damages require individualized proof. As discussed above, damages involve an individualized inquiry, but do not predominate.

3. Common Issues Predominate Over Individual Issues.

Aside from damages, all elements of the prima facie claim turn on Atlas's own conduct and can be resolved on a classwide basis. And as discussed above, although damages is an individualized issue, it does not predominate.

The predominance requirement is satisfied with respect to the claim for strict products liability.

C. The Kentucky Consumer Protection Act Claim Satisfies the Predominance Requirement Because Plaintiff Can Prove Defect and Prior Knowledge on a Classwide Basis.

1. The Elements of the Kentucky Consumer Protection Act Claim and Atlas's Defenses.

Plaintiff also argues that Atlas violated the KCPA. Ky. Rev. Stat. Ann. § 367.110. The KCPA prohibits “[u]nfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce.” *Id.*, at § 367.170(1). The words “unfair, false, misleading or deceptive” are “defined in terms generally understood and perceived by the public.” *Corder v. Ford Motor Co.*, 285 F. App'x 226, 227-28 (6th Cir. 2008), citing *Smith v. GMC*, 979 S.W.2d 127, 131 (Ky. Ct. App. 1998)). In

order prevail, Plaintiff must prove that “(1) [he] purchased [the product] primarily for personal, family, or household purposes; (2) [he] suffered an ascertainable loss; and (3) the loss was a result of an unfair, false, misleading, or deceptive act or practice.” *Corder v. Ford Motor Co.*, 297 F.R.D. 572, 577 (W.D. Ky. 2014).

As its defenses, Atlas claims that Plaintiff cannot uniformly show that a class member’s purchased the product for personal, family, or household use. Atlas also raises statute of limitations defenses. As discussed below, Atlas’s defenses either does not apply to Plaintiff’s claim or does not predominate.

2. Classification of Common and Individual Issues.

As previously demonstrated in Plaintiff’s Opening Brief, each of the elements of the KCPA can be established by common proof. Makowski Opening Brf., at 16-18. In sum, determining the materiality of an omission from the standpoint of a reasonable consumer, problems with Atlas’s uniform approach to sales, marketing, and warranty claims concerning the shingles, all present common issues suitable for class treatment.

Whether a class member’s reason for purchasing the shingles was for personal, family, or household use in an issue that requires individualized evidence, but does not predominate. As previously mentioned, damages involve an individualized inquiry, but also do not predominate.

3. Common Issues Predominate Over Individual Issues.

Plaintiff's claim under the KCPA can almost entirely be proven using evidence common to the class, with the exception of reason for purchase and damages. But Kentucky courts have found that issues related to a plaintiff's reason for purchase under the KCPA is not a significant hurdle that will bar class certification. *Merck & Co., Inc. v. Ratliff*, 2012 Ky. App. LEXIS 31, at *14 (Ct. App. Feb. 10, 2012) (emphasis in original) (Agreeing that the KCPA "require[s] that the plaintiff's economic loss resulte[d] from [defendant's] unlawful practices, but did not require that the plaintiff's purchase of [the product] be caused by the unlawful practice. Under this interpretation, causation need not be shown with respect to each individual class member's decision to purchase [the product], but merely that a loss resulted from the practice").

Here, Plaintiff can establish an unfair, misleading or deceptive act 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 and no reasonable customer would have knowingly paid for shingles that prematurely fail and have to be replaced within ten years. Even if an individual determination of a class members' reason for purchase is required, it is merely a

manageable individual issue that Atlas may assert as a defense during Phase Two of the proceedings. Additionally, statute of limitations does not defeat predominance, as discussed above.

The predominance requirement is satisfied with respect to the claim under the KCPA.

D. The Negligence and Negligent Misrepresentation Claims Satisfy the Predominance Requirement Because Plaintiff Can Prove Negligence on a Classwide Basis.

1. The Elements of the Negligence and Negligent Misrepresentation Claims and Atlas's Defenses.

Plaintiff asserts causes of action against Atlas for negligence and negligent misrepresentation concerning the shingles. In Kentucky, a consumer may recover for pecuniary loss if a defendant negligently supplies false information in a business transaction, intending the information to influence the consumer decision and causing the consumer's justifiable reliance upon the information. *Presnell Constr. Managers, Inc. v. EH Constr., L.L.C.*, 134 S.W.3d 575, 580 (Ky. 2004). Atlas again argues that individual issues that would arise due to the application of the economic loss rule would predominate, as well as individual issues of reliance.

2. Classification of Common and Individual Issues.

Here, in a case premised upon an inherent product defect, all elements of negligence and negligent misrepresentation can be proven with common evidence.

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 ... negligence claims premised on a universal and inherent product defect, however, plaintiffs may rely on common evidence to establish a prima facie case...”); *Brooks*, 2012 U.S. Dist. LEXIS 150717, at *3, n.1 (granting class certification for, *inter alia*, negligence claim in case involving defective shingles).

Atlas claims that reliance and the economic loss rule and damages would present individual issues.

While reliance must be proven for each class member, it does not predominate. Moreover, as discussed above, the economic loss rule does not apply to consumer transactions and, therefore, does not raise individualized issues. *State Farm Mut. Auto. Ins. Co.*, 89 F. Supp. 3d, at 928. Damages present an individual issue.

3. Common Issues Predominate Over Individual Issues.

The common evidence will show that Atlas knowingly conveyed false information to the class regarding the ability of the shingles to perform in accordance to established industry standards. Moreover, Plaintiff’s expert will testify that the shingles suffer from a manufacturing defect which uniformly affected their performance across the entirety of the class.

The need to prove individual damages rarely causes predominance problems and does not do so here, as discussed above. Further, Plaintiff demonstrated on pages 33 and 34 of their opening brief, how reliance can be proven 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.¹⁰ Atlas ignores how Plaintiff proposes to prove reliance and simply points out that reliance cannot be presumed, a point of law with which Plaintiff does not disagree. Atlas's silence is telling.

The predominance requirement is satisfied with respect to the claim under the KCPA.

¹⁰ Proving reliance circumstantially is easier here because, unlike in the typical case where reliance creates predominance problems, Plaintiff has 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, ¶ 7 (2002) (reliance on different TV advertisements) with *Klay*, 382 F.3d, at 1258 (reliance on uniform misrepresentations in bills could be proved circumstantially).

IV. THE PROPOSED CLASS IS ASCERTAINABLE 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 courts have found in similar class actions involving defective construction materials and other products. 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.

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

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

VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant his Motion for Class Certification.

Dated: April 11, 2016.

Respectfully submitted,

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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 11th 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:

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/s/ Daniel K. Bryson

Daniel K. Bryson

**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:

BRYAN MAKOWSKI, individually
and on behalf of all other similarly
situated,

Plaintiff,

v.

ATLAS ROOFING CORPORATION
d/b/a MERIDIAN ROOFING
COMPANY,

Defendant.

No.: 1:14-cv-03034-TWT

**PLAINTIFF BRYAN MAKOWSKI'S APPENDIX OF EXHIBITS RELIED
UPON IN SUPPORT OF HIS REPLY BRIEF
IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

Tab: Description:

1. Excerpts from the deposition of Kenneth M. Lies taken on November 12, 2015.
2. Declaration of Amanda K. Mkamanga dated April 11, 2016.
3. Excerpts from the deposition of Hazem Shanab taken on December 17, 2014.
4. Excerpts from the deposition of Dale Rushing taken on January 20, 2015.

Dated: April 11, 2016

By: /s/Daniel K. Bryson

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This the 11th day of April, 2016.

/s/ Daniel K. Bryson

Daniel K. Bryson

Kenneth M. Lies, AIA

Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

IN RE: ATLAS ROOFING)
CORPORATION CHALET SHINGLE)
PRODUCTS LIABILITY) MDL Docket No. 2495
LITIGATION) ALL CASES
)
)

VIDEOTAPED DEPOSITION OF KENNETH M. LIES, AIA
(Taken by Plaintiffs)
November 12, 2015

9:37 a.m.

Suite 2400
171 17th Street N.W.
Atlanta, Georgia

Reported by:

F. Renee Finkley, RPR, RMR, CRR, CLR, CCR-B-2289

Kenneth M. Lies, AIA

Page 91

1 A. It needs to be -- it has to be water
2 shedding. That's a primary function. It has to be
3 resistant to wind. It has to serve its aesthetic
4 function. Those are the three main things, I
5 believe.

6 Q. So you could have a shingle failure if the
7 shingle is not serving its aesthetic function?

8 A. Yes, I believe you can.

9 Q. In your opinion, on the aesthetic function
10 is that it's fine?

11 A. Yes.

12 Q. And I believe we've already established
13 though that you don't have any peer-reviewed
14 literature to -- that discusses aesthetic function
15 for a shingle, correct?

16 A. I don't understand what you just asked.

17 Q. You don't have any peer-reviewed
18 literature that discusses aesthetic function for a
19 shingle?

20 A. What, that that's a proper --

21 Q. That that --

22 A. That's something that it provides?

23 Q. No.

24 A. I'm not understanding.

**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 Hon. Thomas W. Thrash, Jr.
--	---

This Document Relates to All Actions

DECLARATION OF AMANDA K. MKAMANGA

I, Amanda K. Mkamanga, declare as follows pursuant to 28 U.S.C. § 1746:

1. I am a paralegal in the law firm of Whitfield Bryson & Mason LLP, one of the law firms of record for Plaintiffs.
2. I have reviewed all of the Atlas claims files produced in this litigation. These documents appear to have been submitted pursuant to the terms of Atlas's Limited Warranty. On the basis of this review, I offer the following observations:
 - a. Since **January 1, 2002**, Class Members have submitted thousands of warranty claims related to blistering, cracking, or granule loss of their shingles.

b. Atlas does not appear to require claimants to prove that they have filed their claim in accordance with the warranty's 30-day notice requirement. Atlas's claim intake form does not have a field relevant to this requirement.

3. I was unable to identify any claims where Atlas denied the claim on the basis of the claimant's failure to comply with the 30-day notice requirement.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on this 11th day of April, 2016.

s/ Amanda Mkamanga
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Hazem Shanab

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MDL Docket No. 2495

ALL CASES

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IN RE: ATLAS ROOFING CORPORATION
CHALET SHINGLE PRODUCTS
LIABILITY LITIGATION

-----X

VIDEOTAPED DEPOSITION OF HAZEM SHANAB

Atlanta, Georgia

December 17, 2014

Reported by:

JoRita B. Meyer, RPR, RMR, CRR, CCR

<p style="text-align: right;">Page 30</p> <p>1 But I'm sure there was a lot of efforts. 2 Q. Well, just to be clear, sir, you're 3 here today to answer the questions that are 4 posed to you in the clearest way you can. And 5 if there's anything I ask you that you simply 6 don't know the answer to, you are welcome to 7 say: I don't know. 8 So let's go back to my question, sir. 9 And with regards to the efforts by Atlas to 10 eliminate moisture from the manufacture of the 11 Chalet shingle, do you recall any other efforts 12 besides the three you've told me, which is 13 renting a chiller, purchasing a vacuum oven, 14 and killing the overspray? 15 A. I'm trying to answer your questions. 16 But if you don't give me the opportunity to 17 tell you the background around the answer, then 18 I think you're just handcuffing the answer. 19 I'm trying to give you a very 20 precise, accurate answer because I think that's 21 what you deserve and that's what you need. 22 But, unfortunately, you're not giving me the 23 opportunity. You try to -- all the effort you 24 keep sticking to, so I don't know what all the</p>	<p style="text-align: right;">Page 32</p> <p>1 backyard, if you would -- that may potentially 2 contribute to this blistering. 3 So we were trying to make sure that 4 we're covering, turning every stone, looking at 5 every -- under every rock. That's what we were 6 after, just to see: Can we do anything? 7 Q. Is there any other reason, sir, 8 besides the answer you just gave as to why 9 Atlas was making a concerted effort to 10 eliminate the moisture from the manufacture of 11 the Chalet shingle? 12 A. We are -- we were trying to eliminate 13 moisture in all our product lines. Does that 14 put it in perspective? 15 Q. I'm only asking you about the 16 manufacture of the Chalet shingle, sir. 17 A. I understand. No, we were just 18 looking at -- you know, moisture is not good 19 for our process. 20 Q. Have you ever had a reason to believe 21 that moisture in the manufacturing process 22 could have been contributing to the blistering 23 of the Chalet overlay shingle? 24 A. Yes.</p>
<p style="text-align: right;">Page 31</p> <p>1 effort. And I keep telling you the answer. 2 Q. Are you aware of any besides the 3 three you've told me so far, sir? Easy 4 question. 5 A. As I sit here today, in this room, 6 you know, I need to think was there -- there 7 was a lot of efforts by a lot of folks, and it 8 was not just we were just looking at moisture. 9 Q. Well, let's stay with moisture for 10 just a second and then we'll come back to what 11 else you all looked at. All right? 12 With regards to the efforts to 13 eliminate moisture from the manufacture of the 14 Chalet shingle, tell us, if you would, please, 15 why Atlas was making an effort to eliminate 16 moisture from the manufacture of the Chalet 17 shingle. 18 A. That question I can understand. And 19 thank you. 20 Really, as a researcher -- and maybe 21 you can appreciate this -- we were trying to 22 see, among all the factors that may contribute 23 to asphalt blistering or shingle blistering, 24 what can we do in our own processes -- our own</p>	<p style="text-align: right;">Page 33</p> <p>1 Q. And what was the theory behind that, 2 please? 3 A. I had a lot of theories. I thought 4 maybe it gets in there and eventually it gets 5 out. So that's kind of what one of the 6 theories were. 7 Q. What other theories do you have? And 8 then I'll come back and ask you in more detail 9 about those theories. 10 A. Basically, that it got into the 11 membrane. And that's kind of, you know, the 12 theory. 13 Q. That moisture would get into the 14 membrane during the manufacturing process? 15 A. Yeah, I speculated that perhaps there 16 is a chance, and I wanted to look at the 17 speculation. 18 Q. Okay. And then you referenced it 19 getting out. What does that have to do with 20 blistering? 21 A. At the time, one of the speculations 22 I made is: Could it be moisture? And could it 23 be something in our process? So that's -- that 24 was the speculation back then.</p>

Dale Rushing

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MDL Docket No. 2495

ALL CASES

-----X

IN RE: ATLAS ROOFING CORPORATION
CHALET SHINGLE PRODUCTS
LIABILITY LITIGATION

-----X

VIDEOTAPED DEPOSITION OF DALE RUSHING

Atlanta, Georgia

January 20, 2015

Reported by:

JoRita B. Meyer, RPR, RMR, CRR, CCR

<p style="text-align: right;">Page 90</p> <p>1 shingles that we've had blistering claims on. I'm 2 not aware of any particular study, investigation, 3 that sort of thing. But claims, yes. 4 Q What other type of shingles are you aware 5 of claims on, blistering claims? 6 A I'd say over the course of my career, all 7 of them. 8 Q All Atlas' shingles have had blistering 9 claims? 10 A I -- most of them. Let's just say it that 11 way, I -- only because I'm not -- I don't know every 12 single product that we've made. But I'd say a good 13 many of them, we've had a claim or claims over the 14 years filed for blistering. 15 Q Have any of the product lines, any of the 16 Atlas shingle product lines, had more blistering 17 claims than the other product lines? 18 A I don't have the data. I don't know. 19 Q Okay. And you are -- you are currently, 20 and have been for some eight years now, the vice 21 president of manufacturing in charge of all five 22 roofing plants, correct? 23 A That is correct. 24 Q And the vice president of manufacturing</p>	<p style="text-align: right;">Page 92</p> <p>1 A What we solved was -- what we attempted to 2 solve was removing variability, improving our 3 process, and our people. 4 Q Was the blistering solved? 5 A What blistering? 6 Q In the Chalet shingle. 7 A I mean, we know there's a whole lot of 8 different reasons why a shingle, Chalet or any 9 other, will blister. So to answer your question, 10 then, we solved -- we didn't solve any of those, or 11 any of those other opportunities, or other 12 possibilities. We knew that. We knew that there 13 were other ways that -- and we weren't -- we weren't 14 attempting to solve those. We were trying to 15 improve our process and take out anything that we 16 might be doing that would be part of the cause. 17 Q So blistering continued? 18 A The number of the claims continued, yes. 19 Q And y'all would check those claims to see 20 whether or not they had, in fact, blistered, 21 correct? 22 A When you say "y'all" -- 23 Q Atlas. 24 A Atlas, through our process of the claims</p>
<p style="text-align: right;">Page 91</p> <p>1 for Atlas is unaware as to whether or not any of the 2 Atlas shingle product lines have had more blistering 3 claims than any other product line? 4 A I am unaware, yes. 5 Q Let's go forward in time on the Chalet. 6 As I understand it, the overlay 7 modifications we've been looking at from late 2003 8 and early 2004 were implemented by the end of 2004? 9 A Or the first of 2005, yeah. 10 Q And did these modifications solve the 11 blistering issue? 12 MR. WEATHERHOLTZ: Objection. 13 THE WITNESS: Which blistering issue are 14 you referring to? 15 BY MR. LUCEY: 16 Q The ones you were attempting to solve by 17 making modifications. 18 A We didn't recognize this as an issue that 19 was specific to these modifications. Or at least I 20 didn't. 21 Q Okay. Sir, was the Chalet quality issue 22 that you referred to as "the biggest quality issue 23 at Hampton" on March 23, 2004 solved by the 24 modifications that were implemented by early 2005?</p>	<p style="text-align: right;">Page 93</p> <p>1 filed, yes, we -- we go through the process of 2 investigating. 3 Q And Atlas continued to see blisters on 4 these claims being made by consumers, correct? 5 A We continued to see claims. 6 Q And you checked for blisters on these 7 roofs, correct? 8 A We checked for whatever they were 9 complaining about, whatever the claim was for. 10 Q And you confirmed the existence of 11 blisters on many of these claims' roofs, correct? 12 MR. WEATHERHOLTZ: Objection. 13 THE WITNESS: Many? I don't -- that's too 14 vague of a term, I guess. 15 BY MR. LUCEY: 16 Q How about "some"? 17 A We would, yes, see some blistering on some 18 shingles on roofs. Yes. 19 Q Tell me, if you would, please, what 20 efforts, if any, you're aware of that Atlas made to 21 investigate the cause of blistering on the Chalet 22 overlay shingle after early 2005. 23 A Repeat the question, please. 24 MR. LUCEY: Read the question back,</p>

<p style="text-align: right;">Page 214</p> <p>1 was some general history on Chalet, some general 2 discussion about how shingles are made in general. 3 I think we talked about some of the raw materials 4 that go into making the shingle. But I don't 5 remember specifically talking about theories behind 6 it. 7 You know, I think our goal by going into 8 the meeting was, they could help us figure out those 9 things. 10 Q Sir, do you deny that the purpose of the 11 Georgia Tech consultation was with regards to 12 learning the cause of the blistering of the overlay 13 shingle? 14 MR. WEATHERHOLTZ: Objection. 15 THE WITNESS: You asked me if we discussed 16 these theories. To my knowledge, we didn't 17 discuss any theories. 18 When Mel reached out to Georgia Tech, I 19 can't say for sure what his goal was as far as 20 identifying things that were happening in our 21 process that were showing up in the -- the 22 vacuum oven or, you know, things that were 23 happening out in the field. I don't know that 24 we knew what we would get out of Georgia Tech.</p>	<p style="text-align: right;">Page 216</p> <p>1 there beyond our control. So no, I don't think 2 that was the purpose of the meeting. 3 I think the purpose of the meeting was to 4 see if they could help us understand how raw 5 materials and changes in our process might be 6 affecting what we're doing. 7 BY MR. LUCEY: 8 Q Sir, can you tell us what the title of the 9 background paper is that Atlas provided to Georgia 10 Tech for the consultation? 11 A I'm sorry. I don't -- background paper? 12 Q Yes. Plaintiffs' Exhibit 123. This was 13 provided to Georgia Tech, correct? 14 A Yes. 15 Q And it provides background, correct? 16 A It provides a problem statement, product 17 history, manufacturing -- I mean, I'm missing your 18 question. 19 Q What is the title of the document? 20 A "Overlay Shingle Blistering Overview for 21 Georgia Tech Research Institute." 22 Q Now, do you still deny you consulted with 23 Georgia Tech on the blistering issue? 24 MR. WEATHERHOLTZ: Objection.</p>
<p style="text-align: right;">Page 215</p> <p>1 BY MR. LUCEY: 2 Q Let's try a simple approach. Did y'all 3 discuss blistering with Georgia Tech? 4 A I'm sure that blistering was discussed, 5 yes. 6 Q Was the purpose of the consult to solve 7 the blistering issue? 8 MR. WEATHERHOLTZ: Objection. 9 THE WITNESS: The purpose of the consult 10 or the meeting was to give them an overview of 11 what we had experienced up until then. 12 BY MR. LUCEY: 13 Q Regarding blistering? 14 MR. WEATHERHOLTZ: Objection. 15 THE WITNESS: Regarding Chalet, the 16 process, the raw materials, that sort of thing. 17 BY MR. LUCEY: 18 Q You deny you consulted with Georgia Tech 19 purely for the purpose of solving the Chalet 20 blistering? 21 MR. WEATHERHOLTZ: Objection. 22 THE WITNESS: I don't think we ever 23 thought we would solve blistering. There's 24 just too many other variables that are out</p>	<p style="text-align: right;">Page 217</p> <p>1 THE WITNESS: We consulted with Georgia 2 Tech on various things that were done in our 3 process. We discussed Chalet. We discussed 4 raw materials. But there never was a -- a 5 feeling that by doing this, this was going to 6 eliminate blistering. 7 Again, there's just too many -- too many 8 reasons, too many causation -- too much 9 causation. 10 BY MR. LUCEY: 11 Q You were simply trying to reduce 12 blistering? 13 A We were simply trying to see where they 14 might be able to help us in our efforts. 15 Q To reduce blistering? 16 MR. WEATHERHOLTZ: Objection. 17 THE WITNESS: To improve our process, to 18 take out unknowns, raw material, that sort of 19 thing. 20 BY MR. LUCEY: 21 Q And, sir, have you ever heard at Atlas the 22 theory that the blistering might have something to 23 do with the use of SBS rubber in the modified 24 asphalt?</p>