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:

BRIAN DAVID SELTZER, individually and on behalf of all other similarly situated, Plaintiff, v. ATLAS ROOFING CORPORATION, Defendant.	No:. 1:13-cv-04217-TWT

PLAINTIFF BRIAN DAVID SELTZER'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 Seltzer and members of the proposed Ohio 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, unjust enrichment, negligent design, and the Ohio Products Liability Act ("OPLA"). Because Plaintiff has satisfied the requirements for class certification, the proposed Ohio 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, 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 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, unjust enrichment, negligent design, and the OPLA 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. To state a claim for breach of warranty under Ohio law, a plaintiff must allege: (1) the existence of a warranty; (2) the product failed to perform as warranted; (3) the plaintiff provided the defendant with reasonable notice of the defect; and (4) the plaintiff suffered an injury as a result of the defect. *McKinney v. Bayer Corp.,* 744 F. Supp. 2d 733, 753

(N.D. Ohio 2010). *See, e.g., Barden v. Hurd Millwork Co.,* 249 F.R.D. 316, 321 (E.D. Wis. 2008).

In Ohio, "[a]n implied warranty of merchantability obligates a seller to provide goods that are fit for their ordinary purpose. The warranty is breached when the goods are not of comparable quality to that generally acceptable for goods of that kind. Therefore, in order to prove that [defendant] breached the implied warranty of merchantability, the [plaintiffs] … [must] prov[e] that the problems they experienced with the [Atlas shingles] … were not ordinary problems experienced or associated with [shingles in general]." *Bako v. Crystal Cabinet Works,* 2001-Ohio-3244, at * 7-8 (Ct. App.).

Atlas has identified a number of defenses to Plaintiff's breach of warranty claims: (1) class members did not provide Atlas with notice of the defect; (2) variations in the warranties preclude the warranty from applying to certain class members; (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 5112, at *14. Here, Plaintiff can prove the prima facie case on his warranty claims through common evidence. As detailed in 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. At least 93 warranty claims have been filed in Ohio. (Plaintiffs' Motion for Class Certification (ECF #297-4) (**Tab 2**)). 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. *See, e.g., Muehlbauer v. GMC,* 431 F. Supp. 2d 847, 859 (N.D. Ill. 2006) (consumer

[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 warranties. *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).

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). Because Plaintiffs will rely on common evidence to satisfy the notice requirement, notice should be classified as a common issue.

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 K. 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 claim. *Id.* Such evidence is sufficient to establish waiver. *See, e.g., RHL Properties,*

L.L.C. v. Neese, 293 Ga. App. 838, 840-41 (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"). Having never insisted 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.[3] 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

[3] Regardless, notice is not a barrier to the 93 Ohioans who filed warranty claims. The claims themselves, which Atlas considered without complaint regarding timing, satisfy the notice requirement.

notice in order to bar a plaintiff's claim. *Wal-Mart v. Wheeler*, 262 Ga. App. 607, 609-11 (2003); *Terrill v. Electrolux Home Prods.*, 753 F. Supp. 2d 1272, 1287 (2010) (*citing Wheeler* and holding defendant's notice argument failed where no evidence of prejudice). Because Atlas has not shown prejudice resulting from the alleged failure of select class members to provide notice, the issue of pre-suit notice does not defeat Plaintiffs' warranty claims.

Common evidence will also be used to prove that Atlas had prior knowledge of the defect – 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 all warranties also cover 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. Yet, Ohio courts do not require privity for a breach of express warranty claim. *See e.g., Bobb Forest Prods. v. Morbark Indus.,* 151 Ohio App. 3d 63, ¶ 51 (2002) (*citing Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 246 (1958)); *Chic Promotion, Inc. v. Middletown Sec. Sys., Inc.*, 116 Ohio App. 3d 363 (1996); *Johnson v. Monsanto Co.*, 2002-Ohio-4613, ¶ 14 (2002). *Hahn v. Jennings*, 2004-Ohio-4789, ¶ 23 (2004). Thus, a manufacturer can be held liable by a purchaser for breach of an express warranty even though there is no privity between the two parties. *Caterpillar Fin. Servs. Corp. v. Harold Tatman & Son's, Enters.*, 2015-Ohio-4884, ¶ 12 (Ct. App.) (*citing Johnson*, 2002-Ohio-4613 at ¶ 14).

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 arise as a result of 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.[4] 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.

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.[5] But Atlas's argument on causation simply restates its defense on the merits, which is not relevant to class certification.[6]

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

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[4] *See* Atlas Roofing Corp.'s Answer to Plaintiff's Amended Class Action Complaint ("Answer") (Jan. 7, 2014) (Doc. No. 20) at 31 & 33-35 (Affirmative Defense No. 9 – Limitations & Affirmative Defenses Nos. 15, 17, 20, 21, 22, 23 – Causation).

[5] 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.

[6] *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 (1974)).

defect in every shingle that existed at the time it was sold,[7] and negate rejecting Atlas's arguments about alternative causes (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.[8] *See*, *e.g.*, *Brooks*, 2012 U.S. Dist. LEXIS 150717, at *18 (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").

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

Individualized issues of privity, statute of limitations, wind damage, and damages, as a matter of law, rarely predominate and, thus, typically do not defeat

[7] See Rutila Dep. (ECF #296-22), at 51 (198:14-17); at 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).

[8] Atlas recognizes that causation is an affirmative defense. *See* Atlas's Answer at 33-35 (Affirmative Defenses Nos. 15, 17, 20, 21, 22, 23).

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.

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

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

In order to establish a claim under the OPLA, the plaintiff must show "(1) the existence of a defect in the product at issue, (2) that the defect existed at the time the product left the hands of the manufacturer, and (3) the defect was the

direct and proximate cause of the plaintiff's injury." *Great N. Ins. Co. v. BMW of N. Am. L.L.C.*, 84 F. Supp. 3d 630, 649 (S.D. Ohio 2015). According to the OPLA, a product is defective in design or formulation if, at the time that it left the control of the manufacturer, the foreseeable risks associated with its design or formulation exceeded the benefits associated with that design or formulation. Ohio Rev. Code Ann. § 2307.75(4) (2010). The OPLA defines a products liability claim as one "that seeks to recover compensatory damages from a manufacturer or supplier for death, physical injury to person, emotional distress, or physical damage to property other than the product in question, that allegedly arose from . . .: (a) the design . . . [or] production . . . of that product; … [or] (c) any failure of that product to conform to any relevant representation or warranty." Ohio Rev. Code Ann. § 2307.71 (A)(13) (2010).

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

2. Classification of Common and Individual Issues.

Two of the OPLA's three elements can be satisfied with common proof. The first two elements ask whether the shingles contain a defect, and whether that defect was present in the shingles at the time they left Atlas's control. These questions both

hinge upon common evidence surrounding Atlas's common course of conduct in its manufacturing process.

Damages, the third element of the prima facie claim and a defense asserted by Atlas, is an issue that requires individualized evidence, as does inquires into the economic loss rule, proximate causation, and timeliness. As discussed above, damages involve an individualized inquiry, but do not predominate, and issues of timeliness and proximate causation are affirmative defenses which also do not predominate.

3. Common Issues Predominate Over Individual Issues.

Plaintiff's claim under the OPLA can almost entirely be proven using evidence common to the class, with the exception of damages, which includes an inquiry into the type of damages suffered (the economic loss rule). Allegations of solely economic loss under the OPLA do not abrogate the plaintiff's products liability claim; rather, it simply is reclassified as a common-law products liability claim. *Meta v. Target Corp.,* 74 F. Supp. 3d 858, 863-64 (N.D. Ohio 2015).

"Ohio law does not support circumscribing a plaintiff's right to the remedy of economic loss damages. Under Ohio law, the right to a remedy, and more specifically, a consumer's right to recover solely economic loss damages is well-established." *Huffman v. Electrolux N. Am., Inc.,* 961 F. Supp. 2d 875, 881-82 (N.D. Ohio 2013);

see also Glazer v. Whirlpool Corp. (In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.), 684 F. Supp. 2d 942, 949-50 (N.D. Ohio 2009)*; Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 42 Ohio St. 3d 40, 45 (1989). Accordingly, if a class member has suffered compensatory damages, he or she will be allowed to recover economic damages under the OPLA.

Since damages is a manageable individual issue that does not defeat predominance, so too is the issue of the type of damages suffered under the economic loss rule, which can easily be determined during the second phase of the proceedings.

C. The Unjust Enrichment Claim Satisfies the Predominance Requirement Because Plaintiff Can Prove Defect and Prior Knowledge on a Classwide Basis.

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

"To establish a claim for restitution, . . . a party must demonstrate (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment (unjust enrichment)." *Johnson v. Microsoft Corp*., 106 Ohio St. 3d 278, 286 (2005) (internal citations and quotation omitted).

As its defense, Atlas argues that the issue of privity will predominate because the first element, which requires that benefit be conferred on the defendant, allegedly requires that the plaintiff be a direct purchaser of the product.

2. Classification of Common and Individual Issues.

As previously demonstrated in Plaintiff's Opening Brief, the elements of unjust enrichment can be established by common proof. Plf.'s Brief in Support of Class Cert. (ECF #297-1), at 18-19. In sum, the unjust enrichment claims turn on common evidence of Atlas knowingly retaining payment for defectively manufactured shingles. Plaintiff can establish both Atlas's knowledge and retention of a benefit using class-wide evidence because these two elements hinge on common evidence – whether Atlas knew it was receiving a benefit through the sale of defective shingles and whether it knowingly retained those benefits.

Determining a class member's status as direct or indirect purchaser, contrary to Atlas's assertion, does not raise an individualized issue. A plaintiff need not be a direct purchaser to recover for unjust enrichment in Ohio. Ohio courts have upheld unjust enrichment claims brought by plaintiffs on behalf of a purported class that included both consumers who purchased the product directly from the manufacturer and consumers who purchased the product from a retailer. *Delahunt v. Cytodyne Techs*., 241 F. Supp. 2d 827, 836 (S.D. Ohio 2003) (in class action

case against a drug manufacturer and drug retailer on behalf of all persons who purchased the drug from defendants, the court denied defendants' motion to dismiss plaintiff's unjust enrichment claim). Further, even if Plaintiff must establish some individual issues related to the unjust enrichment claim during a later phase in the litigation, the class can still be certified. *See Lucio v. Safe Auto Ins. Co.*, 183 Ohio App. 3d 849, 858 (2009) ("[a]lthough there may be further proof required at trial to establish some aspects of the unjust-enrichment claims, this does not prevent a class action from being certified"). Plaintiff's claim for unjust enrichment does not present individualized issues.

3. Common Issues Predominate Over Individual Issues.

Commons Issues predominate with regard to Plaintiff's unjust enrichment claim because the claim does not present individualized issues.

D. The Negligent Design Claim Satisfies the Predominance Requirement Because Plaintiff Can Prove Defect and Prior Knowledge on a Class Wide Basis.

1. The Elements of the Negligent Design Claim and Atlas's Defenses.

To prove a claim for negligent design, Plaintiff must show that Atlas: (1) had a duty to design against reasonably foreseeable hazards; (2) breached that duty; and (3) plaintiff's injury was proximately caused by the breach. *Briney v.*

Sears, Roebuck & Co., 782 F.2d 585, 587 (6th Cir. 1986). The elements of negligent design can be proven on a class wide basis using common evidence.

As its defense, Atlas asserts that Plaintiff's negligent design claim is overwhelmed with individual issues related to defect, causation, damages, and timeliness, and is subject to the economic loss rule. As discussed above, affirmative defenses of proximate causation and timeliness do not defeat predominance, nor do individual damages inquiries. As discussed below, Atlas's defense related to the economic loss rule does is not applicable to common-law negligent design claims or does not predominate.

2. Classification of Common and Individual Issues.

The first two elements of the negligent design claim are common issues because they will turn on common evidence of whether the shingles are defective. In sum, whether Atlas had a duty to design against reasonably foreseeable hazards turns on common evidence because in Ohio "the existence of duty largely depends on the foreseeability of the injury." *White v. Smith & Wesson*, 97 F. Supp. 2d 816, 828 (N.D. Ohio 2000) (citations omitted). Atlas's common course of conduct of failing to tell customers about the defective nature of the shingles and whether Atlas itself was able to foresee possible economic injury is an issue common to the class. Similarly,

whether Atlas is in breach of its duty is a common issue that will be determined by the answer to a common question – that is whether the shingles are defective.

Contrary to Atlas's contention, the injury can be purely economic because the economic loss rule does not apply to common law negligence claims in Ohio. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 45 F. Supp. 3d 706, 712 (N.D. Ohio 2014) ("a plaintiff may bring a negligent design claim to recover economic loss . . . connected to alleged damage to or decreased value of a defective product — which loss may or may not be caused by a safety-related defect"); *Chemtrol*, 42 Ohio St., at 44; *Queen City Terminals, v. Gen. Am. Transp. Corp.*, 653 N.E.2d 661, 667 (Ohio 1995).

3. Common Issues Predominate Over Individual Issues.

Plaintiff's claim for negligent design can almost entirely be proven using evidence common to the class, with the exception of causation which, as discussed above, is an affirmative defense that the 11th Circuit has held does not defeat predominance. Accordingly, common issues predominate with respect to Plaintiff's negligent design claim.

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.[9] *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 Breif, 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 ("Alternatively, 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

[9] Because all members of the proposed Rule 23(b)(3) class are seeking damages, Plaintiffs no longer request certification under Rule 23(b)(2).

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
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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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This the 11th day of April, 2016.

/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:

BRIAN DAVID SELTZER, individually and on behalf of all other similarly situated, Plaintiff, v. ATLAS ROOFING CORPORATION, Defendant.	No:. 1:13-cv-04217-TWT

PLAINTIFF BRIAN DAVID SELTZER'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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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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This the 11th day of April, 2016.

/s/ Daniel K. Bryson
Daniel K. Bryson

TAB 1

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

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

TAB 1

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

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

A. Yes, I believe you can.

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

A. Yes.

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

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

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

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

Q. That that --

A. That's something that it provides?

Q. No.

A. I'm not understanding.

TAB 2

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.

TAB 2

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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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 HAZEM SHANAB
Atlanta, Georgia
December 17, 2014

Reported by:
JoRita B. Meyer, RPR, RMR, CRR, CCR

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But I'm sure there was a lot of efforts.
Q. Well, just to be clear, sir, you're here today to answer the questions that are posed to you in the clearest way you can. And if there's anything I ask you that you simply don't know the answer to, you are welcome to say: I don't know.
So let's go back to my question, sir. And with regards to the efforts by Atlas to eliminate moisture from the manufacture of the Chalet shingle, do you recall any other efforts besides the three you've told me, which is renting a chiller, purchasing a vacuum oven, and killing the overspray?
A. I'm trying to answer your questions. But if you don't give me the opportunity to tell you the background around the answer, then I think you're just handcuffing the answer.
I'm trying to give you a very precise, accurate answer because I think that's what you deserve and that's what you need. But, unfortunately, you're not giving me the opportunity. You try to -- all the effort you keep sticking to, so I don't know what all the

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effort. And I keep telling you the answer.
Q. Are you aware of any besides the three you've told me so far, sir? Easy question.
A. As I sit here today, in this room, you know, I need to think was there -- there was a lot of efforts by a lot of folks, and it was not just we were just looking at moisture.
Q. Well, let's stay with moisture for just a second and then we'll come back to what else you all looked at. All right?
With regards to the efforts to eliminate moisture from the manufacture of the Chalet shingle, tell us, if you would, please, why Atlas was making an effort to eliminate moisture from the manufacture of the Chalet shingle.
A. That question I can understand. And thank you.
Really, as a researcher -- and maybe you can appreciate this -- we were trying to see, among all the factors that may contribute to asphalt blistering or shingle blistering, what can we do in our own processes -- our own

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backyard, if you would -- that may potentially contribute to this blistering.
So we were trying to make sure that we're covering, turning every stone, looking at every -- under every rock. That's what we were after, just to see: Can we do anything?
Q. Is there any other reason, sir, besides the answer you just gave as to why Atlas was making a concerted effort to eliminate the moisture from the manufacture of the Chalet shingle?
A. We are -- we were trying to eliminate moisture in all our product lines. Does that put it in perspective?
Q. I'm only asking you about the manufacture of the Chalet shingle, sir.
A. I understand. No, we were just looking at -- you know, moisture is not good for our process.
Q. Have you ever had a reason to believe that moisture in the manufacturing process could have been contributing to the blistering of the Chalet overlay shingle?
A. Yes.

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Q. And what was the theory behind that, please?
A. I had a lot of theories. I thought maybe it gets in there and eventually it gets out. So that's kind of what one of the theories were.
Q. What other theories do you have? And then I'll come back and ask you in more detail about those theories.
A. Basically, that it got into the membrane. And that's kind of, you know, the theory.
Q. That moisture would get into the membrane during the manufacturing process?
A. Yeah, I speculated that perhaps there is a chance, and I wanted to look at the speculation.
Q. Okay. And then you referenced it getting out. What does that have to do with blistering?
A. At the time, one of the speculations I made is: Could it be moisture? And could it be something in our process? So that's -- that was the speculation back then.

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

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shingles that we've had blistering claims on. I'm not aware of any particular study, investigation, that sort of thing. But claims, yes.

Q What other type of shingles are you aware of claims on, blistering claims?

A I'd say over the course of my career, all of them.

Q All Atlas' shingles have had blistering claims?

A I -- most of them. Let's just say it that way, I -- only because I'm not -- I don't know every single product that we've made. But I'd say a good many of them, we've had a claim or claims over the years filed for blistering.

Q Have any of the product lines, any of the Atlas shingle product lines, had more blistering claims than the other product lines?

A I don't have the data. I don't know.

Q Okay. And you are -- you are currently, and have been for some eight years now, the vice president of manufacturing in charge of all five roofing plants, correct?

A That is correct.

Q And the vice president of manufacturing

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for Atlas is unaware as to whether or not any of the Atlas shingle product lines have had more blistering claims than any other product line?

A I am unaware, yes.

Q Let's go forward in time on the Chalet.

As I understand it, the overlay modifications we've been looking at from late 2003 and early 2004 were implemented by the end of 2004?

A Or the first of 2005, yeah.

Q And did these modifications solve the blistering issue?

MR. WEATHERHOLTZ: Objection.

THE WITNESS: Which blistering issue are you referring to?

BY MR. LUCEY:

Q The ones you were attempting to solve by making modifications.

A We didn't recognize this as an issue that was specific to these modifications. Or at least I didn't.

Q Okay. Sir, was the Chalet quality issue that you referred to as "the biggest quality issue at Hampton" on March 23, 2004 solved by the modifications that were implemented by early 2005?

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A What we solved was -- what we attempted to solve was removing variability, improving our process, and our people.

Q Was the blistering solved?

A What blistering?

Q In the Chalet shingle.

A I mean, we know there's a whole lot of different reasons why a shingle, Chalet or any other, will blister. So to answer your question, then, we solved -- we didn't solve any of those, or any of those other opportunities, or other possibilities. We knew that. We knew that there were other ways that -- and we weren't -- we weren't attempting to solve those. We were trying to improve our process and take out anything that we might be doing that would be part of the cause.

Q So blistering continued?

A The number of the claims continued, yes.

Q And y'all would check those claims to see whether or not they had, in fact, blistered, correct?

A When you say "y'all" --

Q Atlas.

A Atlas, through our process of the claims

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filed, yes, we -- we go through the process of investigating.

Q And Atlas continued to see blisters on these claims being made by consumers, correct?

A We continued to see claims.

Q And you checked for blisters on these roofs, correct?

A We checked for whatever they were complaining about, whatever the claim was for.

Q And you confirmed the existence of blisters on many of these claims' roofs, correct?

MR. WEATHERHOLTZ: Objection.

THE WITNESS: Many? I don't -- that's too vague of a term, I guess.

BY MR. LUCEY:

Q How about "some"?

A We would, yes, see some blistering on some shingles on roofs. Yes.

Q Tell me, if you would, please, what efforts, if any, you're aware of that Atlas made to investigate the cause of blistering on the Chalet overlay shingle after early 2005.

A Repeat the question, please.

MR. LUCEY: Read the question back,

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was some general history on Chalet, some general discussion about how shingles are made in general. I think we talked about some of the raw materials that go into making the shingle. But I don't remember specifically talking about theories behind it.

You know, I think our goal by going into the meeting was, they could help us figure out those things.

Q Sir, do you deny that the purpose of the Georgia Tech consultation was with regards to learning the cause of the blistering of the overlay shingle?

MR. WEATHERHOLTZ: Objection.

THE WITNESS: You asked me if we discussed these theories. To my knowledge, we didn't discuss any theories.

When Mel reached out to Georgia Tech, I can't say for sure what his goal was as far as identifying things that were happening in our process that were showing up in the -- the vacuum oven or, you know, things that were happening out in the field. I don't know that we knew what we would get out of Georgia Tech.

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BY MR. LUCEY:

Q Let's try a simple approach. Did y'all discuss blistering with Georgia Tech?

A I'm sure that blistering was discussed, yes.

Q Was the purpose of the consult to solve the blistering issue?

MR. WEATHERHOLTZ: Objection.

THE WITNESS: The purpose of the consult or the meeting was to give them an overview of what we had experienced up until then.

BY MR. LUCEY:

Q Regarding blistering?

MR. WEATHERHOLTZ: Objection.

THE WITNESS: Regarding Chalet, the process, the raw materials, that sort of thing.

BY MR. LUCEY:

Q You deny you consulted with Georgia Tech purely for the purpose of solving the Chalet blistering?

MR. WEATHERHOLTZ: Objection.

THE WITNESS: I don't think we ever thought we would solve blistering. There's just too many other variables that are out there beyond our control. So no, I don't think that was the purpose of the meeting.

I think the purpose of the meeting was to see if they could help us understand how raw materials and changes in our process might be affecting what we're doing.

BY MR. LUCEY:

Q Sir, can you tell us what the title of the background paper is that Atlas provided to Georgia Tech for the consultation?

A I'm sorry. I don't -- background paper?

Q Yes. Plaintiffs' Exhibit 123. This was provided to Georgia Tech, correct?

A Yes.

Q And it provides background, correct?

A It provides a problem statement, product history, manufacturing -- I mean, I'm missing your question.

Q What is the title of the document?

A "Overlay Shingle Blistering Overview for Georgia Tech Research Institute."

Q Now, do you still deny you consulted with Georgia Tech on the blistering issue?

MR. WEATHERHOLTZ: Objection.

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THE WITNESS: We consulted with Georgia Tech on various things that were done in our process. We discussed Chalet. We discussed raw materials. But there never was a -- a feeling that by doing this, this was going to eliminate blistering.

Again, there's just too many -- too many reasons, too many causation -- too much causation.

BY MR. LUCEY:

Q You were simply trying to reduce blistering?

A We were simply trying to see where they might be able to help us in our efforts.

Q To reduce blistering?

MR. WEATHERHOLTZ: Objection.

THE WITNESS: To improve our process, to take out unknowns, raw material, that sort of thing.

BY MR. LUCEY:

Q And, sir, have you ever heard at Atlas the theory that the blistering might have something to do with the use of SBS rubber in the modified asphalt?