UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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LYNDA CARTWRIGHT and LLOYD CARTWRIGHT on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

VIKING INDUSTRIES, INC., an Oregon Corporation, and Does 1 through 100, inclusive,

Defendants.

CASE NO. 2:07-CV-02159-FCD-EFB

MEMORANDUM AND ORDER

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This matter comes before the court on plaintiffs Lynda and Lloyd Cartwright's (collectively "plaintiffs") motion for class certification pursuant to Federal Rule of Civil Procedure 23. Defendant Viking Industries, Inc.'s ("Viking") opposes the motion. The court heard oral argument on the motion on September 4, 2009. For the reasons set forth below, plaintiffs' motion for class certification is GRANTED in part and DENIED in part.

BACKGROUND[1]

Plaintiffs are the owners of a residence in which defendant Viking's Series 3000 window products (the "windows" or "window products") are installed. (Plaintiffs' Complaint, filed Aug. 16, 2007 ("Compl."), ¶ 6). Specifically, plaintiffs purchased the windows from a distributor in March of 1991 while in the process of constructing their home. (Id. ¶ 27.) Plaintiffs brought this class action on behalf of themselves and persons in California who own or owned homes in which Viking Window Products have been installed. (Id. ¶ 1). Plaintiffs' claims are based on the defective nature of the Window Products and the damages caused by the defective Window Products. (Id. ¶ 13). The alleged defects in the windows include the failure to resist water and air intrusion, which created water damage in the home. (Id. ¶¶ 13, 19).

Plaintiffs further allege Viking made fraudulent omissions and misrepresentations concerning the Window Products. (Id. ¶ 15). Plaintiffs assert that defendant knew that the windows were

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[1] Defendant objects to the declarations of plaintiffs' experts submitted in support of the motion for class certification. "On a motion for class certification, the court may consider evidence that may not be admissible at trial." Mazza v. Am. Honda Motor Co., 254 F.R.D. 610, 616 (C.D. Cal. 2008) (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974)). At this stage in the litigation, "robust gatekeeping of expert evidence is not required; rather, the court should ask only if expert evidence is 'useful in evaluating whether class certification requirements have been met.'" Ellis v. Costco Wholesale Corp., 240 F.R.D. 627, 635 (N.D. Cal. 2007) (quoting Dukes v. Wal-Mart, Inc., 222 F.R.D. 189, 191 (N.D. Cal. 2004)). Accordingly, the court does not address the ultimate admissibility of plaintiffs' proffered evidence and considers it where it determines the evidence is sufficiently relevant and reliable and helpful to the resolution of plaintiffs' motion. See Mazza, 254 F.R.D. at 616; Ellis, 240 F.R.D. at 635-36.

defective, would fail prematurely, and were unsuitable for their advertised use, but concealed these material facts from consumers like plaintiffs. (Compl. ¶¶ 16-17.) Plaintiffs also assert Viking represented that the Window Products came with a "Lifetime Warranty," would be "free from defects in material and workmanship," and would perform in conformance with standards promulgated by the American Architectural Manufacturers Association ("AAMA"). (Id.) Plaintiffs claim these representations were false because the Window Products were defective, failed prematurely, and would not satisfy AAMA standards. (Id. ¶ 18).

By June of 1997, plaintiffs became aware of excess moisture near some windows and sills and contacted Viking concerning the moisture problems with the Window Products. (Id. ¶ 30). A Viking representative visited plaintiffs' residence in June 1997 and advised plaintiffs that the excess moisture was caused by problems with the heating and air conditioning unit. (Id.) Plaintiffs believed the Viking representative and allege they had no reason to suspect the Window Products were defective until they were advised of the pendency of the class action lawsuit, Deist, et al. v. Viking Industries, Case No. CV025771 (the "Deist action"), filed in the San Joaquin County Superior Court. (Id. ¶ 31). Plaintiffs claim the filing of the Diest action on February 17, 2005 tolled the running of the statute of limitations for claims related to the Window Products. (Id. ¶ 32).

On August 16, 2007, plaintiffs filed this civil class action against defendant, alleging eight causes of action: Strict Products Liability, Negligence, Breach of Express Warranty,

Breach of Implied Warranty, Violation of the Consumer Legal Remedies Act ("CLRA"), Violation of California's Unfair Competition Law ("UCL"), Fraudulent Concealment, and Restitution. (Id. ¶¶ 40-102; Notice of Removal, filed Sept. 21, 2007). Defendant removed the case to this court on September 21, 2007, and filed a motion to dismiss, which was denied on February 12, 2008.

Meanwhile, the Deist action continued to be litigated in state court. The parties in the Deist action have completed 22 depositions, 20 sets of interrogatories, 21 sets of requests for production of documents, 18 subpoenas for records pertaining to the Deist plaintiffs' homes, inspections of all the Deist plaintiffs' homes by Viking's experts, productions of thousands of pages of documents in response to subpoenas, and further investigation, surveys, testing, and statistical surveys. (Decl. of Mark J. Thacker ("Thacker Decl."), filed June 25, 2009, ¶ 3.) On July 14, 2008, the San Joaquin Superior Court issued an order on defendant's motion for summary adjudication, granting in part and denying in part. Some of the Deist plaintiffs' claims for strict liability, breach of warranties, and negligence were barred based upon the expiration of the statute of limitation or lack of privity. On April 9, 2009, the San Joaquin Superior Court certified the following two subclasses for Express and Implied Warranty causes of action:

1) **The Retail Purchaser Sub-Class.** All California property owners that purchased the Viking Series 3100 horizontal sliding, 3300 single hung or 3600 fixed windows that were manufactured between January 1989 and December 31, 1999, which were installed in their California homes and buildings who have not already released their claims about these windows or who are

> not presently a Plaintiff in a lawsuit, other than Deist v. Viking, that alleges the Window Products are defective. This subclass down not include owners of California buildings who acquired their Viking Series 3000 windows by purchasing a building.
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> 2) **The Original Home Purchaser Subclass.** All California property owners whose buildings have one or more of the Viking's aluminum window Series 3000 et seq. windows in them who are 1st occupant resident owners of buildings located in California that had Viking Series 3100 horizontal sliding, 3300 single hung or 3600 fixed windows installed in them when they purchased their home and which windows were manufactured between January 1989 and December 31, 1999, who have not already released their claims about these windows or who are not presently a Plaintiff in a lawsuit, other than Deist v. Viking, that alleges the Window Products are defective.

(Ex. A to Pls.' Request for Judicial Notice, filed May 22, 2009.) By order dated May 18, 2009, the San Joaquin Superior Court ordered that parties in the Deist action inform potential class members about the pendency of this action and plaintiffs' motion for class certification; the court directed notification that "[i]f the Cartwright claim is certified as a class action, you will have the option to opt-out of the Deist case and participate in the Cartwright case." (Ex. B to Request for Judicial Notice.)

On May 22, 2009, plaintiffs filed a motion to certify the following classes:

> All current and past owners of residential property in California in which Viking Series 3000 windows manufactured by Viking Industries Inc. between approximately March 1, 1991 and 1999 (the "Class Period") are or have been installed. The proposed class includes property owners who have replaced their Viking windows. Excluded from the Plaintiff Class are the Defendant, any entity in which Defendant has a controlling interest, and their legal representatives, heirs and successors, and any judge to whom this case is assigned, and any member of the judge's immediate family. Claims for personal injury are excluded from the claims of the Plaintiff Class which are alleged herein.

Warranty Subclass

> All original owners of residential property in California who are the first occupant resident owner in which Viking Series 3000 windows manufactured by Viking Industries Inc. between approximately March 1, 1991 and 1999 (the "Class Period") are or have been installed. The proposed class includes property owners who have replaced their Viking windows. Excluded from the class are named Plaintiffs in pending lawsuits against Viking Industries, Inc. relating to Series 3000 windows other than in Cartwright v. Viking; also excluded is the Defendant, any entity in which the Defendant has a controlling interest, and their legal representatives, heirs and successors, and any judge to whom this case is assigned, and any member of the judge's immediate family. Claims for personal injury are excluded from the claims of the Plaintiff Class which are alleged herein.

At oral argument, plaintiffs clarified that they sought certification of the warranty subclass only as to plaintiffs' express warranty claims. However, plaintiffs also asserted that, to the extent the court disagreed with their arguments regarding privity, the warranty subclass could be applied to the claims for both breach of express warranty and breach of implied warranties.

STANDARD

District courts have broad discretion in ruling on motions for class certification because "the district court is in the best position to consider the most fair and efficient procedure for conducting any given litigation." Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304, 1309 (9th Cir. 1977). However, before certifying a class, the court must "conduct a 'rigorous analysis' to determine whether the party seeking certification has met the prerequisites of Rule 23" of the Federal Rules of Civil Procedure. Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001) (citing Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1233 (9th Cir.

1996)). "The 'rigorous analysis requirement' means that a class is not maintainable merely because the complaint parrots the legal requirements of Rule 23." Communities for Equity, 192 F.R.D. 568, 570 (citing In re Am. Med. Sys., Inc., 75 F.3d 1069, 1079 (6th Cir. 1996)).

Under Rule 23(a), there are four threshold requirements applicable to all class actions: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of fact common to the class; (3) the claims and defenses of the representative party are typical of the claims and defenses of the class; and (4) the representative party will fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(a).

An action may be maintained as a class action where the above prerequisites are met and one of the conditions enumerated in Rule 23(b) is satisfied. As set forth below, plaintiffs move for certification under Rule 23(b)(2). Certification under Rule 23(b)(2) is proper where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

The burden is on the party seeking to maintain the action as a class action to establish a prima facie showing of each of the 23(a) prerequisites and the appropriate 23(b) ground for a class action. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019, 1022 (9th Cir. 1998); Mantolete v. Bolger, 767 F.2d 1416, 1424 (9th Cir. 1985). "[I]n adjudicating a motion for class certification, the

court accepts the allegations in the complaint as true so long as those allegations are sufficiently specific to perform an informed assessment as to whether the requirements of Rule 23 have been satisfied." Ellis, 240 F.R.D. at 635 (citing Blackie v. Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975). Generally, the merits of the class members' substantive claims is irrelevant, unless they overlap with certification issues. Id. (citing Eisen, 417 U.S. at 177-78). The operative determination is whether class claims "may be proven by evidence common to all class members," not whether the evidence will ultimately be persuasive. In re Live Concert Antitrust Litigation, 247 F.R.D. 98, 144 (C.D. Cal. 2007).

ANALYSIS

A. Rule 23(a)

1. Numerosity

The initial inquiry under Rule 23(a) is whether the class is sufficiently numerous that joinder of all members individually is "impracticable." Fed. R. Civ. P. 23(a)(1); see Communities for Equity, 192 F.R.D. at 571 ("Numbers alone are not dispositive when the numbers are small, but will dictate impracticability when the numbers are large."). "The requirement does not demand that joinder would be impossible, but rather that joinder would be extremely difficult or inconvenient." 5 Moore's Federal Practice § 23.22[1] (3d Ed. 2003).

The numerosity requirement imposes no absolute numerical limitation, but, rather, requires that the specific facts of each case be examined. General Tel. Co. v. E.E.O.C., 446 U.S. 318, 330 (1980). "Practicability of joinder depends on many factors,

including, for example, the size of the class, ease of identifying its numbers and determining their addresses, facility of making service on them if joined and their geographic dispersion." Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 878 (11th Cir. 1986) (upholding class certification where plaintiff identified thirty one individual class members and the class included future and deterred job applicants who were necessarily unidentifiable). Where the class is comprised of more than forty individuals, numerosity is generally satisfied. Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1553 (11th Cir. 1986); see also Leyva v. Buley, 125 F.R.D. 512, 515 (E.D. Wash. 1989) (holding that class consisting of 50 individuals met numerosity requirement). If class members are unknown or unidentifiable, then joinder of all class members is likely impracticable. See Jordan v. Los Angeles County, 669 F.2d 1311, 1319-20 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982) (holding that the numerosity requirement was met because "[t]he joinder of unknown individuals is inherently impracticable"); see also 5 Moore's Federal Practice § 23.22[3] (3d Ed. Supp. 2008) ("It is well established . . . that the party seeking class certification need not be able to prove the exact number of members of the proposed class or to identify each class member.").

In support of their motion for class certification, plaintiffs present evidence that Viking sold approximately one million windows during the proposed class period. Given expert testimony that an average residence has approximately 20 windows, it is likely that Viking windows were installed in approximately 50,000 residential units during the proposed class period.

Joinder of all these parties would be impracticable. Accordingly, the numerosity requirement is fulfilled.[2]

2. Commonality

The next inquiry under Rule 23(a) is whether there exist "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "The fact that there is some factual variation among the class grievances will not defeat a class action . . . . A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2)." Rosario v. Livaditis, 963 F.2d 1013, 1017-18 (7th Cir. 1992). "All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Hanlon Corp., 150 F.3d at 1019. "[A] proposed class can consist of members with widely differing experiences as they relate to a common case but seek a common remedy for a common policy." See Parra v. Bashas', Inc., 536 F.3d 975, 978 (9th Cir. 2008); Communities for Equity, 192 F.R.D. at 572. The commonality preconditions of Rule 23(a)(2) have been described as "minimal," and "are less rigorous than the companion requirements of Rule 23(b)(3)." Hanlon v. Chrysler Corp., 150 F.3d at 1019; Grays Harbor Adventist Christian Sch. v. Carrier Corp., 242 F.R.D. 568, 572 (W.D. Wash. 2007).

In this case, plaintiffs set forth the following questions of law and fact, common to all prospective class members: (1)

[2] Defendant does not argue that the proposed class fails to meet the numerosity requirement.

whether the Series 3000 Windows are defective because they allow moisture to penetrate into the interior of the home, fail prematurely, and are unsuitable for use as a window product; (2) whether Viking knew of should have known that the Series 3000 Windows were defective; (3) whether Viking created and breached express warranties; (4) whether Viking breached the implied warranty of merchantability; (5) whether Viking violated the provisions of the CLRA; (6) whether Viking owed a duty of reasonable and ordinary care and whether it breached that duty. See Mazza, 254 F.R.D. at 618 (holding that commonality was established in a class action alleging claims for violations of California's Business and Professions code, unjust enrichment, and for violations of the CLRA). Accordingly, the commonality requirement is satisfied.[3]

3. Typicality

Next, Rule 23(a) requires that the "claims or defenses of the class representative must be typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (quoting Schwartz v. Harp, 108 F.R.D. 279, 282 (C.D. Cal. 1985)). "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of

[3] Defendant also does not argue that the proposed class fails to meet the commonality requirement.

the class." Id. While this requirement seemingly merges with the commonality requirement, the inquiry under typicality focuses on potential conflict[4] between the interests of the class representatives and the interests of the absent class members that would preclude certification. See Falcon, 457 U.S. at 157 n.3 (noting that typicality tends to merge with both commonality and adequacy of representation because it serves as a guidepost for determining "whether maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately represented in their absence").

The typicality requirement is "satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." Mazza, 254 F.R.D. at 618 (quoting Marisol v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997)). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members." Hanlon, 150 F.3d at 1020. "Courts look to whether class members have similar injuries, 'whether the action is based on conduct which is not unique to the named plaintiffs,' and whether other class members were injured by the same conduct." Mazza, 254 F.R.D. at 618 (quoting Hanon, 976 F.2d at

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[4] The inquiry into potential conflict also implicates the requirement under Rule 23(a)(4) and under constitutional due process standards that "absent class members must be afforded adequate representation before entry of a judgment which binds them." Hanlon, 150 F.3d at 1020 (citing Hansberry v. Lee, 311 U.S. 32, 42-43 (1940)).

508 (holding that class certification was inappropriate where the putative class representative was subject to a unique defense arising out of his specialized knowledge and that defense threatened to become the focus of the litigation)); see also Andrews Farms v. Calcot, Ltd., No. CV 07-0464, 2009 WL 1211374, *7 (May 1, 2009) ("Typicality is determined by the violation alleged to have occurred.").

Plaintiffs' claims are based upon defendant's alleged defective design and manufacture of window products. Specifically, plaintiffs assert that defendant's fraudulently and deceptively failed to disclose material facts about the nature of the defects so that consumers would purchase its product. Plaintiffs also assert that, in some cases, defendant made affirmative misrepresentations about its windows. In all instances, however, the injury suffered was the purchase of allegedly defective windows that failed to protect against water intrusion and damage. As such, because the purported class member's claims all arise from the same or similar course of conduct and resulted in the same or similar injury,[5] the typicality requirement is satisfied.[6]

4. Adequacy of Representation

The final prerequisite under Rule 23(a) is that the person representing the class must be able "fairly and adequately to protect the interests" of all members in the class. Fed. R. Civ.

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[5] Indeed, plaintiffs have represented that the proposed class will not seek consequential damages other than repair and replacement of windows. (Pls.' Reply at 28.)

[6] The court addresses defendant's arguments with respect to standing, notice, and privity, *infra*.

P. 23(a)(4). This element requires: "(1) that the proposed representative [p]laintiffs do not have conflicts of interest with the proposed class, and (2) that [p]laintiffs are represented by qualified and competent counsel." Dukes v. Wal-Mart, Inc., 509 F.3d 1168, 1185 (9th Cir. 2007).

Defendant's objections to the adequacy of representation are based primarily upon the same alleged conflicts discussed under the typicality requirement. As set forth above, the court finds that plaintiffs' claims are typical of the class.[7] Defendant raises no specific argument with respect to class counsel. However, plaintiffs' counsel has submitted declarations outlining their experience litigating class action lawsuits, administering class action settlement funds, and overseeing multi-year claim programs. Accordingly, representation is adequate.

B. Rule 23(b)(3)

"To qualify for certification under Rule 23(b)(3), a class must meet two requirements beyond the Rule 23(a) prerequisites." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997). First, the party seeking certification must demonstrate "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. Proc. 23(b)(3). Second, the party must demonstrate "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Id.

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[7] The court addresses adequacy of representation with the warranty sub-class, *infra*.

1. Predominance

The predominance inquiry under Rule 23(b)(3) "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem, 521 U.S. at 616; Grays Harbor, 242 F.R.D. at 573. Neither Rule 23 nor courts interpreting it have set forth "any ready quantitative or qualitative test for determining whether the common questions satisfy the rule's test." Mazza, 254 F.R.D. at 619 (citations and quotations omitted). However, the commonality requirements under this analysis are more rigorous than those required under Rule 23(a). Hanlon, 150 F.3d at 1022.

Class treatment "does not in any way alter the substantive proof required to prove up a claim for relief." Alabama v. Blue Bird Body Co., Inc., 573 F.2d 309, 327 (5th Cir. 1978) (holding that predominance was not met where the impact of alleged anti-trust conduct by the defendant was an issue that must be proved with certainty and was unique to each particular plaintiff). Specifically, in products liability cases, fact issues that vary among individual plaintiffs can overwhelm the common question of the manufacturer's conduct. In re Masonite Corp. Hardboard Siding Prods. Liability Litigation, 170 F.R.D. 417, 424 (E.D. La. 1997); see Castano v. Am. Tobacco Co., 84 F.3d 734, 743 n.15 (noting that factual difference among the class members impacts the application of legal rules such as causation, reliance, comparative fault, and other affirmative defenses).

However, the Ninth Circuit has explicitly held that the need for individual "damage calculations alone cannot defeat certification." Yokoyama v. Midland Nat'l Life Ins. Co., No. 07-

16825, – F.3d –, 2009 WL 2634770, *6 (9th Cir. Aug. 28, 2009); see Blackie v. Barrack, 524 F.2d 891, 905 (9th Cir. 1975) ("The amount of damages is invariably an individual question and does not defeat class action treatment."). Furthermore, The Ninth Circuit has specifically upheld class certification where statute of limitations issues would have to be separated out for individual adjudication at the close of the class trial. Arthur Young & Co. v. U.S. Dist. Court, 549 F.2d 686, 696 (9th Cir. 1977); see also Grays' Harbor, 242 F.R.D. at 573 ("Class certification, under Rule 23(b)(3), is also not precluded by the need to address individual statute of limitations defenses.").[8]

a. Strict Products Liability and Negligence

With respect to their claims for strict products liability and negligence, plaintiffs' asserted injury arises from the allegedly defective windows allowing "water to penetrate into wall systems, other building system, and the interior of the of the structure" and the consequent cost to the purported class of repairing and replacing the windows. (Compl. ¶¶ 44-45, 52.) Defendant argues that common issues do not predominate with respect to these claims because individualized determinations of causation and damages are required. Plaintiffs assert that common issue predominate because they do not seek damages beyond repair and replacement of the windows.

[8] Defendants argue that common issues do not predominate as to all of plaintiffs' purported class claims because there are substantial statute of limitations defenses individual to each class member. Plaintiffs do not dispute that there may be individual issues among the class regarding the statute of limitation; rather, plaintiffs contend that such individualized issues do not necessarily foreclose class certification.

"[U]nder either a negligence or strict liability theory of products liability, to recover from a manufacturer, a plaintiff must prove that a defect caused injury." Merill v. Navegar, Inc., 26 Cal. 4th 465, 479 (2001).

Defendant presents evidence that damages and stains adjacent to windows can be the result of other causes, such as installation errors or condensation. (Decl. of Joel Wolf ("Wolf Decl."), filed June 25, 2009, ¶¶ 28-32; Decl. of Pete Cruz ("Cruz Decl."), filed June 25, 2009, ¶¶ 15-16.) Moreover, defendant also presents evidence that windows can be damaged after they are shipped by defendant due to rough handling, security alarm penetrations, and structural and soil movements; these post-shipment damages can result in impaired performance with respect to preventing water intrusion. (Cruz Decl. ¶ 17.) Defendant proffers evidence that indications of these post-shipping conditions were present on windows examined in the Deist action. Furthermore, plaintiff's expert, Jim Cassell, agreed that a variety of factors contributes to the performance assessment of a window, and that he would "have to totally investigate the area," including removing drywall, looking at framing, examining the exterior, and looking at how the window is put together. (Dep. of Jim Cassell ("Cassell Dep."), Ex. A to Decl. of Kevin P. Cody ("Cody Decl."), filed June 25, 2009, at 126-27.)

While plaintiffs may be able to present common proof relating to the design and manufacture of defendant's windows, the individualized determinations of causation with respect to the alleged class-wide injuries overwhelm these commonalities. Defendant is entitled to present its defenses, that damages to

the windows may have been caused by unrelated circumstances or by actions post-shipping, though a process which permits a thorough and discrete examination. See In re Masonite Corp., 170 F.R.D. at 425 (holding that common issues did not predominate where defendant was entitled to present defenses that the property damage was the result of poor home design, construction, maintenance, improper installation, and location, as opposed to defendant's design or manufacturing); Hicks v. Kaufmann & Broad Home Corp., 89 Cal. App. 4th 908, 922-23 (2d Dist. 2001) (holding that common issues did not predominate as to the plaintiffs' strict liability and negligence causes of action regarding property damage because "each class member would have to come forward to prove specific damage to her home . . . and that such damage was caused by cracks in the foundation, not some other agent"). While plaintiffs' limitation on requested damages addresses commonality issues with respect to individualized consequential damages for each class member, plaintiffs fail to address how the vast array of individualized causation issues could be properly adjudicated through class treatment. See Gartin v. S&M Nutec LLC, 245 F.R.D. 429, 439 (C.D. Cal. 2007) (holding that class certification was inappropriate on the plaintiff's negligence claims because individualized analyses of proximate cause issues predominated); In re Paxil Litig., 212 F.R.D. 539, 551 (C.D. Cal. 2003) (same).

Accordingly, the individual issues relating to causation militate against a finding that common questions predominate with respect to plaintiffs' strict liability and negligence claims. Therefore, class certification on these claims is inappropriate.

b. Breach of Warranty Claims

With respect to their claims for breach of express and implied warranty, plaintiffs allege that defendant's windows do not perform as warranted. (Compl. ¶¶ 57, 64.) Defendant argues that common issues do not predominate with respect to these claims because there are individual determinations with respect to privity and manifestation of damage.[9]

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[9] Defendant also asserts that individualized determinations must be made within the class regarding standing. In the context of a class action lawsuit, standing is generally "assessed solely with respect to class representatives, not unnamed members of the class." In re. Gen. Motors Corp. Dex-Cool Prods. Liab. Litig., 241 F.R.D. 305, 310 (S.D. Ill. 2007). "Once threshold individual standing by the class representative is met, a proper party to raise a particular issue is before the court, and there remains no further separate class standing requirement in the constitutional sense." 1 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 2:5 (4th ed. 2002 & Supp. 2006) (collecting cases); see 1 Conte & Newberg, Newberg on Class Actions § 2:7 (unnamed class members "need not make any individual showing of standing, because the standing issue focuses on whether the plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court."). Accordingly, there is no need for individualized factual determinations among the class regarding standing.

Similarly, defendant contends that individualized determinations will need to be made with respect to notice. First, it is unclear under the circumstances of this case whether notice is required. See In re HP Inkjet Printer Litig., No. C 05-3580, 2006 WL 563048 (N.D. Cal. Mar. 7, 2006) ("[T]imely notice of a breach under California law is no longer required where the action is against a manufacturer on a warranty that arises independently of a contract of sale, such as a manufacturer's express warranty.") (citing Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 61 (1963)). Second, notice may be given after commencement of suit. Id. (citing Hampton v. Gebhardt's Chili Powder Co., 294 F.2d 172, 174 (9th Cir. 1961)). Third, whether plaintiffs and the class were required to give notice and/or whether they provided sufficient notice are questions that are likely common to the class. Accordingly, there is no need for individualized factual determinations among the class regarding notice.

i. Privity: Express Warranty Claims

Plaintiffs have designated a warranty subclass, consisting of all original owners of residential property in California who are the first occupant resident owners in which window products were installed, for their claim for breach of express warranty. This subclass includes both original owners who bought new homes in which the windows were installed as well as original owners who purchased the windows themselves through distributors.

"The general rule is that privity of contract is required in an action for breach of either express or implied warranty and that there is no privity between the original seller and a subsequent purchaser who is in no way a party to the original sale." Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 695 (1954); see Blanco v. Baxter Healthcare Corp., 158 Cal. App. 4th 1039, 1059 (4th Dist. 2008). There is a well-established exception to the privity rule when the purchaser of a product relied on representations made by the manufacturer in labels or advertising. Fundin v. Chicago Pneumatic Tool Co., 152 Cal. App. 3d 951, 957 (4th Dist. 1984); see Burr, 42 Cal. 2d at 696. Further, under California Civil Code § 1559, a third party beneficiary can enforce a contract made expressly for his benefit. Cal. Civ. Code § 1559 (2007); see Shell v. Schmidt, 126 Cal App. 2d. 279 (1954) (finding that the plaintiffs purchasing homes constituted the class intended to be benefitted, and holding that the contract must therefore be for their benefit). A contract made expressly for a third party's benefit does not need to specifically name the party as the beneficiary; the only requirement is that "the party is more than incidentally

benefitted by the contract." See Shell, 126 Cal. App. 2d at 290; see also Gilbert Financial Corp. v. Steelform Contracting Co., 82 Cal. App. 3d 65, 69 (1978) (finding that the plaintiff, as the owner of the building, was an intended beneficiary of the contract between the general contractor and the subcontractor).

In this case, the court has previously held that named plaintiffs, who purchased the windows directly from distributors had alleged sufficient facts demonstrating that privity exists between Viking and plaintiffs as third party beneficiaries. The Deist court also held, in ruling on defendant's motion for summary adjudication, that the plaintiffs that were original homeowners of new homes in which defendant's window products were installed had raised at least a triable issue of fact that they were also intended beneficiaries of the lifetime warranty at issue in this case. Pursuant to the allegations and a reasonable reading of the warranty at issue, such plaintiffs fit Viking's definition of "original homeowners" who are covered by the warranty. The court agrees with the reasoning of the Deist court. Accordingly, for purposes of class certification, plaintiffs have sufficiently demonstrated that individualized issues relating to privity will not predominate.[10]

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[10] Defendant also asserts that named plaintiffs cannot adequately represent owners of Viking windows who did not buy them directly from a distributor. As an initial matter, the proposed warranty subclass does not distinguish between retail owners and home owners, as the state court classes do. Moreover, to the extent any privity issues exist, the theory of third party beneficiary recovery likely applies to all members of the warranty subclass. Therefore, the court finds named plaintiffs to be adequate representatives. However, nothing prevents defendant from raising this argument at a later stage in the

(continued...)

ii. Privity: Implied Warranty Claims

With respect to the implied warranty claims, plaintiffs seek to bring claims on behalf of all owners of Viking windows, not just those in the warranty subclass. However, at oral argument, plaintiffs argued that, in the alternative, they would bring the implied warranty claims solely on behalf of the proposed warranty subclass.

As set forth above, the privity requirement applies to claims for breach of implied warranty. The Deist court, relying on representations regarding implied warranty rights of owners who had bought the windows directly or who were first time homeowners with windows installed, held that there were at least triable issues of fact with respect to privity. However, the broad class proposed by plaintiffs extends beyond those "original owners"; plaintiffs have failed to raise an argument with respect to privity for those class members. Indeed, the Deist court held that these plaintiffs failed to raise an inference that they were the intended beneficiaries of an implied warranty. As such, there are individualized issues relating to privity within the broad class. Further, named plaintiffs, who do not suffer from the more challenging issues of privity, cannot adequately represent members of the class who do. Accordingly, the court denies certification of the proposed class with respect to plaintiffs' claims for breach of implied warranty. However, for the reasons set forth above in the court's discussion of

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[10](...continued)
litigation to the extent conflicts among the class become apparent.

plaintiffs' claims for breach of express warranty, plaintiffs have sufficiently demonstrated that individualized issues relating to privity will not predominate if the implied warranty claims are pursued solely by the warranty subclass.

iii. Manifestation of Damage

Finally, defendant argues that individualized issues of law and fact predominate within the warranty subclass because plaintiffs' warranty claims require individual proof of malfunction.

"[P]roof of breach of warranty does not require proof the product has malfunctioned but only that it contains an inherent defect which is substantially certain to result in malfunction during the useful life of the product. The question whether an inherently defective product is presently functioning as warranted goes to the remedy for the breach, not proof of the breach itself." Hicks, 89 Cal. App. 4th at 918. If a plaintiff can demonstrate that their products contain an inherent defect that is "substantially certain to result in malfunction during the useful life of the product," the plaintiff has established a breach of express and implied warranties. Id. at 923 (noting that it was not necessary for each individual class member to prove inevitable injury before recovering damages to repair the defect and prevent injuries); see also Anthony v. Gen'l Motors, 33 Cal. App. 3d 699, 702, 704-05 (1973) (holding that it is "unnecessary to produce individualized evidence [of] wheel failure or personal injury or property damages as a result of wheel failure" and that allegations of a common inherent defect is "exactly the sort of common issue for which class actions are

designed"); In re Ford Motor Co. E-350 Van Products Liability Litigation (No. II), No. 03-4558, MDL No. 1687, 2008 WL 4126264, at *14 (D. N.J. Sep. 2, 2008) (applying California breach of warranty law in multistate class action and stating that "[a] California court likely would not find that product malfunction is a necessary element of [plaintiff's] breach of warranty claims.").

In this case, plaintiffs' claims are based on their allegations and their experts' opinions that defendant's windows suffer from an inherent defect that makes it substantially likely that they will fail before the end of their expected, useful life. The question of whether defendant's window products are inherently defective is the predominate, common question as to all warranty sub-class members.

Defendant's reliance on American Suzuki for the assertion that individualized manifestations issues will predominate is misplaced. Am. Suzuki Motor Corp. v. Superior Court, 37 Cal. App. 4th 1291 (2d Dist. 1995). In American Suzuki, the plaintiffs brought claims for breach of implied warranty, alleging the design of the Samurai, a sport utility vehicle manufactured by defendant, "'create[d] an unacceptable risk of a deadly roll-over accident when driven under reasonably anticipated and foreseeable driving conditions . . . .'" Id. at 1293. The court granted defendant's petition for a writ of mandate decertifying the class because there was insufficient evidence of a defect, in that "nearly all" of the vehicles were not involved in rollover accidents; rather, the evidence demonstrated that "the vast majority of the Samurais sold to the

putative class 'did what they were supposed to do as long as they were supposed to do it.'" Id. at 1298-99. As such, the implied warranty claims in American Suzuki "were not decided on the ground a defect must have resulted in the product malfunctioning in order to give rise to a suit for breach of warranty. Rather, they were decided on the ground that since there was no history of the products failing they were not, as a matter of law, defective." Hicks, 89 Cal. App. 4th at 923-24. Under the evidence presented in support of this motion, the court cannot find that defendant's products were, as a matter of law, not defective. As such, the facts of American Suzuki are inapposite.

Accordingly, for the foregoing reasons, the court finds that common issues of fact predominate with respect to plaintiff's claims for breach of express and implied warranties as brought on behalf of the warranty subclass.

c. CLRA, UCL, and Fraudulent Concealment

With respect to their claims for violation of the Consumer Legal Remedies Act and California's Unfair Competition Law, plaintiffs allege that defendant fraudulently concealed the defective nature of the window products and deceptively advertised that the window products were free from defects in order to induce plaintiffs and class members to purchase them.[11]

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[11] Under their allegations referencing violations under the UCL, plaintiffs specifically assert that defendant engage in "unfair, deceptive, untrue, or misleading advertising" as set forth in Business and Professions Code § 17500, California's False Advertising Law. To state a claim under that section, plaintiffs must demonstrate that members of the public are likely to be deceived. Mazza, 254 F.R.D. at 627 (citing Day v. AT&T, 63 Cal. App. 4th 325, 332 (1st Dist. 1998)). The standard is that (continued...)

(Compl. ¶¶ 78-85.) Defendant contends that individual factual issues preclude certification because each class member "must establish some form of reliance." (Def.'s Opp'n at 22.) Plaintiffs contend that reliance is shown by materiality, which does not require an individual inquiry.

"Reliance raises individual issues such as credibility and state of mind; therefore, class certification [under Rule 23(b)(3)] is generally inappropriate where reliance is an issue." Grays Harbor, 242 F.R.D. at 573. California courts have held that relief under the UCL is available without individualized proof of deception, reliance, and injury. Fletcher v. Sec. Pac. Nat'l Bank, 23 Cal. 3d 442, 451 (1979); Mass. Mutual Life Ins. Co. v. Superior Court of San Diego, 97 Cal. App. 4th 1282, 1288-95 (4th Dist. 2002); Corbett v. Superior Court, 101 Cal. App. 4th 649, 672 (1st Dist. 2002). Furthermore, with respect to claims brought under the CLRA or that sound in fraud, a presumption of reliance overcomes the individual nature of the reliance inquiry. Grays Harbor, 242 F.R.D. at 573.

A presumption of reliance is appropriate in cases sounding in fraud where the plaintiffs "have *primarily* alleged omissions, even though the [p]laintiffs allege a mix of misstatements and omissions." Id. (citing Binder v. Gillespie, 184 F.3d 1059, 1064 (9th Cir. 1999)). In Grays Harbor, the court granted the plaintiffs' motion for class certification on claims for

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[11](...continued)
of a "reasonable consumer," and proof of actual deception or confusion caused by misleading statements is not required. Id. Therefore, this claims is subject to common proof by the class.

actionable misrepresentation, the Washington Consumer Protection Act, unjust enrichment, and breach of express warranty arising out of allegedly defective furnaces manufactured by the defendant. The court held that even though the claims were grounded in fraud allegations, plaintiffs had sufficiently demonstrated that common questions predominated because the primary issue was not the information each class member received, but rather, what information the defendant allegedly concealed "in light of what consumers reasonably expect." Id. Similarly in Mazza v. American Honda Motor Corp., 254 F.R.D. at 625-26, and Chamberlan v. Ford Motor Corp., 223 F.R.D. 524, 526-27 (N.D. Cal. 2004),[12] California district courts held that a presumption of reliance was appropriate, and thus common issues of law and fact predominated, in claims brought pursuant to the CLRA for failure to disclose alleged design defects. See also Mass. Mutual, 97 Cal. App. 4th at 1292 (noting that plaintiffs pursuing claims under the CLRA "satisfy their burden of showing causation as to each by showing materiality as to all"); cf. Gartin, 245 F.R.D. at 437-39 (holding the common issues did not predominate where the plaintiff's fraud and CLRA claims were based upon affirmative misrepresentations and a presumption of reliance did not apply).

In this case, the gravamen of plaintiffs' allegations is that defendant fraudulently and deceptively concealed material information about the defective nature of the window products. Specifically, plaintiffs proffer evidence that the lower corners

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[12] The Ninth Circuit upheld the district court's certification of the plaintiff class. Chamberlan v. Ford Motor Co., 402 F.3d 952, 962 (9th Cir. 2005).

of defendant's window products are not water tight and require the appropriate sealant to be properly applied. (Decl. of Antoine Chamsi ("Chamsi Decl."), filed May 22, 2009, ¶¶ 24-26; Decl. of James Cassell ("Cassell Decl."), filed May 22, 2009, ¶¶ 14, 23, 26.) Plaintiffs also proffer evidence that the selected sealant was ineffective and that the sealant was poorly or inadequately applied. (Chamsi Decl. ¶¶ 26, 30-42; Cassell Decl. ¶¶ 27-34.) Plaintiffs allege that defendants knew about these inherent defects at the lower joints, but failed to inform consumers about them.

Based upon these allegations as well as plaintiffs' submitted evidence in support thereof, the court finds that a presumption of reliance is appropriate and thus, that common issues of fact predominate with respect to plaintiffs' CLRA, UCL, and fraudulent omission claims.

d. Restitution/Unjust Enrichment

Finally, with respect to their claims for restitution and unjust enrichment, plaintiffs allege that defendant was unjustly enriched at the expense of plaintiff and the class due to the conduct alleged in their aforementioned claims. Defendant contends, for the same reasons argued above, that individual factual issues preclude certification.

Under California law, "'Unjust Enrichment' does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so." Lauriedale Assocs., Ltd. v. Wilson, 7 Cal. App. 4th 1439, 1448 (1st Dist. 1992). Plaintiff may recover restitution damages; "a term which modernly has been extended to include not

only the restoration or giving back of something to its rightful owner, but indemnification." Id.; see also Mazza, 254 F.R.D. at 627. Generally, in order to be entitled to such recovery, a plaintiff must demonstrate a defendant's (1) "receipt of a benefit; and (2) unjust retention of the benefit at the expense of another." Mazza, 254 F.R.D. at 627 (citing Lectrodryer v. SeoulBank, 77 Cal. App. 4th 723, 726 (2000)).

In this case, as set forth above, the crux of plaintiffs' claims is that defendant unjustly retained the benefits of its sale of window products to consumers after it failed to disclose material facts about the defective nature of those products. For the same reasons discussed above with respect to plaintiffs' CLRA, UCL, and fraudulent concealment claims, the court finds that common issues of fact predominate. See Mazza, 254 F.R.D. at 627 (holding common issues of fact predominated with respect to the plaintiffs' unjust enrichment claim that arose from the defendant's failure to disclose that the product at issue did not perform reliably).

2. Superiority

The superiority requirement of Rule 23(b)(3) requires that plaintiff demonstrate that a class action is "superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3) sets forth four factors for consideration: (1) the class members interests in individually controlling the litigation; (2) the desirability of concentrating the litigation in the particular forum; (3) the extent and nature of any litigation over the same matter already begun by class

members; and (4) the likely difficulties in managing the class action.[13]

Under the circumstances of this case, individual prosecution of the claims is impractical. First, because many of the claims arise out of alleged material omissions about defendant's window products, there may be many class members that are not even aware they have potentially suffered an injury as a result of deceptive or fraudulent conduct. See Grays Harbor, 242 F.R.D. at 563-74. Second, as plaintiffs seek primarily restitution and the cost of replacement or repair, each claim is for a relatively small amount of damages relative to the cost of litigating these claims. See Mazza, 254 F.R.D. at 628 (holding that individual class members do not have a strong interest in controlling the litigation where potential damages amount to approximately $4000). This is particularly true in this case, where plaintiffs' evidence is comprised of multiple expert opinions.

Moreover, it is desirable to litigate the claims in California, where the named plaintiffs and class members reside or resided. See Grays Harbor, 242 F.R.D. at 574. Further, all claims are brought pursuant to California law.

Defendant contends that the pending Deist action, which was initiated over two years before this action, precludes a finding

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[13] In arguing that the class would be difficult to manage, defendant reiterates the same arguments addressed above, that individual issues within the class predominate and thus, class treatment is unmanageable. However, for the reasons set forth above, plaintiffs have sufficiently demonstrated that common issues predominate as to most of their claims. Individualized determinations of damages or statute of limitations issues can be made after common questions of liability are decided. See Yokoyama, 2009 WL 2634770, at *6; Arthur Young & Co., 549 F.2d at 696; Grays Harbor, 242 F.R.D. at 574.

of superiority. However, defendant failed to cite any legal authority to support this assertion in his opposition.[14] At oral argument, defendant *for the first time* asserted that the Ninth Circuit's decision in Kamm v. California City Developments Co., 509 F.2d 205 (9th Cir. 1975), precludes a finding of superiority. In Kamm, the plaintiffs brought a putative class action for various claims arising out of the defendants' land promotion scheme. Prior to the initiation of plaintiffs' suit, the Attorney General and the Real Estate Commissioner of California had brought an action against four of the five defendants, in which a permanent injunction and final judgment on a settlement agreement had already been filed. Id. at 207-08. The settlement agreement provided for offers of restitution of principal payment to certain purchasers as well as an agreement that defendant would use its "best efforts to establish and implement a program

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[14] At the outset of its legal argument, defendant cites the Colorado River abstention doctrine in support of its assertion that there is no reason for this court to certify a class based upon facts identical to those underpinning the Deist action. This doctrine provides that abstention is based upon "considerations of [w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). Further, a court may stay or dismiss an action where it is clear that a pending "parallel state proceeding will end the litigation." Intel Corp. v. Advanced Micro Devices, Inc., 12 F.3d 908, 913 (9th Cir. 1993) (citing Gulfstream, 485 U.S. at 277).

First, defendant does not move to stay or dismiss the action, and thus, invocation of the Colorado River doctrine is procedurally improper. Second, the Deist action would not end this litigation as plaintiffs are not named plaintiffs in that litigation, and the Deist action does not assert all theories advanced by plaintiffs in this case. Finally, defendant fails to cite any authority or make any compelling argument that the rationale supporting Colorado River abstention should be applied in a class certification context. As such, defendant's argument is devoid of merit.

to settle future disputes," including rendering quarterly reports to the Attorney General setting forth the names of complainants, the general nature of the complaints, and the disposition. Id. at 208. The defendants were also permanently enjoined from engaging in the fraudulent conduct at issue. Moreover, the state court retained jurisdiction over the matter, and nothing precluded any purchaser from instituting an individual action against the defendants for any alleged damage. Under these circumstances, the Ninth Circuit upheld the district court's dismissal of the plaintiffs' class complaints for lack of superiority because (1) significant relief had been realized through the state court action, including restitution, a permanent injunction, and the defendant's agreement to establish a program to settle future disputes; (2) a class action would duplicate and potentially negate aspects of the state action; (3) the state court retained jurisdiction; and (4) individual claimants still retained the ability to press their own claims and seek damages. Id. at 212.

While defendant's counsel adamantly asserted at oral argument that the Ninth Circuit's decision in Kamm precludes certification of plaintiffs' class claims because of the pending Deist action, the court finds that the facts of Kamm are wholly distinguishable from the facts before the court in this case, and thus, the holding in Kamm is inapplicable. First and most importantly, there has been no relief accorded or judgment rendered in the Deist action. Rather, the state court only recently certified two classes, smaller than the broad class advanced in this case, solely for claims of breach of express and

implied warranties; there has been no significant relief for any class members. Further, the pending state court action was not brought on behalf of the public or by a state agency. Defendant fails to cite any case law where courts have held Kamm or its reasoning to be persuasive in the absence of a prior state action or investigation. Cf. Brown v. Blue Cross & Blue Shield of Michigan, Inc., 167 F.R.D. 40, 46 (E.D. Mich. 1996) (citing Kamm and denying a motion for class certification where "[t]he agreement entered into by the State and defendant covers all members of the proposed class ... and provides full co-pay relief on all but de minimis claims"); Ostrof v. State Farm Mut. Auto. Ins. Co., 200 F.R.D. 521, 532 (D. Md. 2001) (explaining that the Maryland Insurance Agency had investigated the accused practices and that "[i]n any event, as a supplement to administrative proceedings, the small claims courts" are perfectly adequate); Wechsler v. Southeastern Props., Inc., 63 F.R.D. 13, 16-17 (S.D.N.Y. 1974) (finding that an action in state court by the attorney general justified dismissal of class action); see also Thornton v. State Farm Mut. Auto Ins. Co., Inc., No. 1:06-cv-00018, 2006 WL 3359482, at *3 (N.D. Ohio Nov. 17, 2006) (finding that a class action was not superior where the Attorneys General for 49 states had already "expended substantial effort to come to a nationwide agreement"); Caro v. The Proctor & Gamble Co., 18 Cal. App. 4th 644, 659-61 (4th Dist. 1993) (finding that class action treatment would not serve a substantial benefit where the defendant had already entered into an agreement with the FDA, the California Attorney General, and California county District

Attorneys). Therefore, defendant's reliance on Kamm is misplaced.[15]

Rather, courts often certify concurrent class actions arising from similar facts. In re Wells Fargo Home Mortgage Overtime Pay Litig., 527 F. Supp. 2d 1053, 1069 (N.D. Cal. 2007) (concurrent FLSA and UCL class actions); Romero v. Producers Dairy Foods, Inc., 235 F.R.D. 474, 491 (E.D. Cal. 2006); see Anthony, 33 Cal. App. 3d at 708 ("[T]he pendency of another action, whether in class action cases or otherwise, is not a ground for dismissal."). Further, the claims and purported class in this action are broader than those in the Deist action. Cf. Becker v. Schenley Indus., Inc., 557 F.2d 346, 348 (2d Cir. 1977) (holding that class action was not superior where *identical* claims were brought in the same court on behalf of a class to which the plaintiffs necessarily belonged and the plaintiffs refused to intervene despite explicit invitation by the court to do so); Avritt v. Reliastar Life Ins. Co., 07-1817, 2009 WL 455808 (D. Minn. Feb. 23, 2009)(holding that a class action was not superior based upon both predominance issues as well as a similar nationwide class action pending in state court). Specifically, in contrast to the certified class in the Deist action, which consists only of original owners who still remain current owners of window products, plaintiffs' proposed class consists of (1) original owners who are also current owners; (2) current owners who were not original owners; and (3) former

[15] The court notes that defendant's repeated and unqualified representations, in direct response to very specific questions from the court, regarding the extent of Kamm's applicability were misleading.

owners. Moreover, in contrast to the sole claims for breach of express and implied warranties brought by the class in Deist, plaintiffs assert class claims for violations of the CLRA and UCL, fraudulent concealment, and unjust enrichment.[16] Indeed, the state court required that putative class members be advised of the pendency of this action and the potential ability to opt out of the Deist action if plaintiffs prevail on their class certification motion.

Accordingly, the court finds that, for those claims in which common issues of law and fact predominate, class treatment is superior under Rule 23(b)(3).

CONCLUSION

For the foregoing reasons, plaintiffs' motion for class certification is GRANTED in part and DENIED. The court denies class certification with respect to plaintiffs' claims for strict liability and negligence. The court certifies the following class with respect to plaintiffs' CLRA, UCL, fraudulent concealment and unjust enrichment claims:

> All current and past owners of residential property in California in which Viking Series 3000 windows manufactured by Viking Industries Inc. between approximately March 1, 1991 and 1999 (the "Class Period") are or have been installed. The proposed class includes property owners who have replaced their Viking windows. Excluded from the Plaintiff Class are the Defendant, any entity in which Defendant has a controlling interest, and their legal representatives, heirs and successors, and any judge to whom this case is assigned, and any member of the judge's immediate family. Claims for personal injury

[16] As set forth above, plaintiffs failed to demonstrate that common issues of law and fact predominate with respect to plaintiffs' purported class claims for negligence and strict liability.

> are excluded from the claims of the Plaintiff Class which are alleged herein.

The court also certifies the following subclass with respect to plaintiffs' breach of express and implied warranty claims:

> All original owners of residential property in California who are the first occupant resident owner in which Viking Series 3000 windows manufactured by Viking Industries Inc. between approximately March 1, 1991 and 1999 (the "Class Period") are or have been installed. The proposed class includes property owners who have replaced their Viking windows. Excluded from the class are named Plaintiffs in pending lawsuits against Viking Industries, Inc. relating to Series 3000 windows other than in Cartwright v. Viking; also excluded is the Defendant, any entity in which the Defendant has a controlling interest, and their legal representatives, heirs and successors, and any judge to whom this case is assigned, and any member of the judge's immediate family. Claims for personal injury are excluded from the claims of the Plaintiff Class which are alleged herein.

The court appoints Lynda Cartwright and Lloyd Cartwright as class representatives. The court appoints David M. Birka-White, of Birka-White Law Offices, and Robert J. Nelson, of Lieff, Cabraser, Heimann & Bernstein LLP, as class counsel.

IT IS SO ORDERED.

DATED: September 11, 2009

FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE