IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	)	Chapter 11
WCI COMMUNITIES, INC., et al.[1],	)	Case No. 08-11643 (KJC)
	)	Jointly Administered
Debtors.	)	
	)	**Re: Docket No. 1615, 1616**
	)	**Hearing Date: July 1, 2009 @ 11:00 A.M.**

DEBTORS' PRELIMINARY OBJECTION TO THE MOTION OF CINDY A. GOLDSTEIN FOR LEAVE TO FILE A CLASS PROOF OF CLAIM AND FOR CLASS CERTIFICATION AND MOTION OF CINDY A. GOLDSTEIN FOR ENTRY OF AN ORDER ALLOWING LATE FILED CLASS PROOF OF CLAIM

WCI Communities, Inc. ("WCI") and its affiliated debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the "Debtors"), hereby file this preliminary objection (the "Objection") to the Class Certification Motion of Cindy A. Goldstein ("Goldstein") for Leave to File Class Proof of Claim and for Class Certification (the "Class Certification Motion") [Docket No. 1616], and the Class Certification Motion of Cindy A. Goldstein for Entry of an Order Allowing Late Filed Class Proof of Claim ("Late Proof of Claim Motion")[Docket No. 1615], (collectively, "Motions") and respectfully represent as follows:

PRELIMINARY STATEMENT

By her Motions, Goldstein seeks permission to file a claim on behalf of a group of individuals who have allegedly suffered damages from defective drywall originating from China ("Chinese Drywall") installed in homes by WCI built in Florida. In order to file a class proof of

[1] The list of the Debtors and Tax Identification Numbers is located on the docket for Case No. 08-11643 (KJC) [Docket 64] and http://chapter11.epiqsystems.com/wcicommunities.

claim, Goldstein also requests that this Court certify a class for purposes of pursuing claims on theories of negligence, strict liability, breach of warranty, and negligent misrepresentation.

Class proofs of claims, however, if permitted at all, are used sparingly and only in very narrow circumstances. In order for this Court to allow a class proof of claim, Goldstein is required to show that not only has she met all of the requirements for maintaining a class action, but a class proof of claim is warranted. Goldstein's Class Certification Motion falls well short on both criteria. Goldstein has failed to provide *any* evidence, let alone enough evidence, to meet the burden of proof for maintaining a class action. Additionally, this case does not warrant the use of a class proof of claim.

Goldstein's attempt to persuade the Court that it should allow a class proof of claim and certify a class is futile. Contrary to her allegations, no injustice will occur if this Court denies her Motions. In fact, the interests of potential claimants are best protected by denying Goldstein's Motions. This Court has already implemented effective procedures to handle any Chinese Drywall claims of the putative class members. Allowing a class proof of claim is therefore unnecessary and will only complicate and delay the bankruptcy proceedings.

Because a class proof of claim is not appropriate in this case, and Goldstein has not, and cannot, satisfy the requirements for maintaining a class action, her Motions should be denied. At a minimum, the Court should postpone deciding the Class Certification Motion until the Debtors have had a chance to conduct discovery on the allegations proffered in support of class certification.

BACKGROUND

I. Jurisdiction

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

II. The Bankruptcy Cases

2. On August 4, 2008 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the "Bankruptcy Code") commencing these chapter 11 cases (the "Chapter 11 Cases"). The Debtors continue to operate their respective businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. On August 13, 2008, the United States Trustee appointed the Official Committee of Unsecured Creditors. No trustee or examiner has been requested or appointed in any of the Debtors' Chapter 11 Cases.

4. On February 24, 2009, the Court entered an order approving the Debtors' alternative dispute procedure (the "ADR Procedure") [Docket No. 1230], under which the Debtors were authorized to implement and utilize the ADR Procedure to settle disputed, unliquidated and contingent claims of any non-debtor party. The ADR Procedure is designed to resolve such claims expeditiously and efficiently, reducing the costs of claims administration and saving significant judicial resources. The ADR Procedure includes: (1) an initial assessment procedure that provides a mechanism for streamlined discovery to allow the Debtors and each putative claimant to evaluate and amicably resolve each disputed claim without undue expense; (2) a settlement offer exchange procedure intended to provide the Debtors and each putative

claimant the opportunity to exchange written settlement offers and engage in informal settlement negotiations; (3) a mediation procedure based on generally accepted mediation procedures of professional alternative dispute resolution organizations to provide a more formal mechanism for amicable resolution of disputed claims; (4) a voluntary binding arbitration procedure to provide a formal binding resolution should the Debtors and the putative claimant elect this option; and (5) a claim satisfaction procedure.

5. On June 8, 2009, the Debtors filed a Plan of Reorganization (the "Plan") [Docket No. 1739] and related Disclosure Statement [Docket No. 1741] in this Court.

III. Service of Notices Relating to the Plan of Reorganization and the Administrative Bar Date

6. All individuals or entities that purchased a home built by the Debtors in the last ten years (the "Home Purchasers") received notice of the commencement of the Chapter 11 Cases and separate actual and constructive notice that February 2, 2009 at 4:00 p.m. Prevailing Eastern Time was set as the last date and time by which proofs of claim must be filed in the Chapter 11 Cases or be forever barred (the "Bar Date") as set forth below.

7. On August 19, 2008, Julia Bealler of Epiq Bankruptcy Solutions, on behalf of the Debtors, served, among others, the Home Purchasers with actual notice of the *Notice of Commencement of Chapter 11 Bankruptcy Cases, Meeting of Creditors and Fixing of Certain Dates* ("Commencement Notice").[2]

8. On December 2, 2008, the Court entered the *Order Pursuant to Bankruptcy Rules 2002 and 3003 and Local Rule 3003-1: (i) Establishing a Bar Date for Filing Certain Proofs of Claim; (ii) Establishing Ramifications for Failure to Comply Therewith;*

[2] Notice of Commencement dated August 18, 2008 [Docket No. 140]; Affidavit of Mailing dated August 26, 2008 [Docket No. 255]; Supplemental Affidavit of Mailing dated October 1, 2008 [Docket No. 451].

(iii) Approving Proof of Claim Form and Notice of Bar Date; and (iv) Approving Publication Notice and Publication Procedures (the "Bar Date Order").[3] The Bar Date Order provided in bold letters that the "**last day for filing proofs of claims in all of the above captioned cases is February 2, 2009 at 4:00 p.m. Prevailing Eastern Time.**" Bar Date Order, p. 6 (emphasis in original).

9. Pursuant to the Bar Date Order, on December 12, 2008, Julia Bealler of Epiq Bankruptcy Solutions, on behalf of the Debtors, served, among others, the Home Purchasers with actual notice of the *Notice of Establishment of Bar Date for Filing Proofs of Claim Against the Estates* (the "Bar Date Notice").[4] The Bar Date Notice provided in bold letters that the Bar Date was established as "**February 2, 2009 at 4:00 p.m. Prevailing Eastern Time**." Bar Date Notice, p. 2 (emphasis in original). In addition, on December 15, 2008, the Debtors published the notice of the Bar Date in the national editions of the *Wall Street Journal*, the *New York Times*, and the *Washington Post*, as well as the *Miami Herald*, the *Naples Daily News*, and the *Tampa Tribune*.[5]

OBJECTION

10. Before a court decides whether to permit a class proof of claim, "the proponent of the class claim must (1) make a motion to extend the application of [Federal Rule of Civil Procedure, rule 23 ("Rule 23")] to some contested matter, (2) satisfy the requirements of Rule 23, and (3) show that the benefits derived from the use of the class claim device are consistent with the goals of bankruptcy." *In re Musicland Holding Corp.*, 362 B.R. 644, 651 (Bank. S.D.N.Y. 2007) (citing *In re Woodward & Lothrop Holdings, Inc.*, 205 B.R. 365, 369

[3] Bar Date Order dated December 2, 2008 [Docket No. 799].

[4] Bar Date Notice, Exhibit A to Affidavit of Mailing dated December 24, 2008 [Docket No. 1171]; Affidavit of Mailing dated December 24, 2008 [Docket No. 1171].

[5] Notice of Publication dated January 6, 2009 [Docket No. 956].

(Bankr. S.D.N.Y. 1997). Here, Goldstein has failed to meet all three prongs. Because Goldstein cannot satisfy the requirements of Rule 23, making discussion of the other elements superfluous, we address this prong first.

I. Goldstein Has Not Satisfied the Requirements for Bringing a Class Action

11. Rule 23 consists of two parts. Rule 23(a) requires a showing that the purported class meets the elements commonly referred to as numerosity, commonality, typicality, and adequacy. *See Amchen Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997). If the class meets all of these prerequisite requirements, it also must fit into one of the requirements under Rule 23(b). *Id.* at 614.

A. Goldstein has failed to meet her burden that a Class should be certified

12. When evaluating the Rule 23 requirements, courts must determine whether class certification is appropriate after undergoing a "rigorous analysis." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). The party seeking class certification bears the burden of convincing the court that the requirements of Rule 23 are met. *See Unger v. Amedisys Inc.*, 401 F.3d 316, 320 (5th Cir. 2005) ("The party seeking certification bears that burden of establishing that *all* requirements of Rule 23 have been satisfied."). The Third Circuit has recently clarified the applicable standard of proof by holding that the class representative must establish that each of the prerequisites of class certification is met by a preponderance of the evidence. *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 320 (3d Cir. 2009) ("In other words, to certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23.") While the court does not need to be satisfied that the claim will be successful on the merits, bare allegations or conclusory statements

are insufficient to satisfy the requirements of Rule 23. *Morrison v. Booth*, 763 F.2d 1366, 1371 (11th Cir. 1985).

13. In determining whether the preponderance of the evidence standard has been met, the court must look to the factual record supporting certification, not merely accept the allegations of the party seeking to certify the class. *Unger*, 401 F.3d at 321 ("The plain text of Rule 23 requires the court to 'find' not merely assume, the facts favoring class certification."); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004) ("If it were appropriate for a court simply to accept the allegations of a complaint at face value in making class certification findings, every complaint asserting the requirements of Rule 23(a) and (b) would automatically lead to a certification order, frustrating the district court's responsibilities for taking a 'close look' at relevant matters, for conducting a 'rigorous analysis' of such matters, and for making 'findings' that the requirements of Rule 23 have been satisfied." (citations omitted)).

14. Goldstein's Class Certification Motion is devoid of *any* evidence supporting her allegations. Thus, as discussed in detail below, Goldstein fails to meet her burden on every requirement of Rule 23.

B. The Class is indefinite

15. A prerequisite to any class action is the existence of a definite class and that the purported class representative is a member of that class. *Jenkins v. Fidelity Bank*, 365 F. Supp. 1391, 1397 (E.D. Pa. 1973). The purported class must be defined in such a way that the members of the class are ascertainable. *Forman v. Data Transfer*, 164 F.R.D. 400, 403 (E.D. Pa. 1995). In order for a class to be sufficiently defined, the court must be able to determine, by using objective criteria, who is included in the class. MANUAL FOR COMPLEX LITIGATION (Fourth) § 21.222 (2004) ("An identifiable class exists if its members can be ascertained by reference to objective criteria. The order defining a class should avoid subjective standards (*e.g.*,

plaintiff's state of mind), or terms that depend on resolution of the merits (*e.g.*, persons who were discriminated against)."). Class definitions dependant upon an analysis into the merits of the case in order to determine membership are inappropriate for class certification. *Foreman*, 164 F.R.D. at 403 (holding that a class definition of "all residents and businesses who have received unsolicited facsimile advertisements" was inappropriate for class certification because the definition required the court to hold "a mini-hearing on the merits of each case" to determine membership in the class).

16. Here, the proposed class is defined as:

> All owners and residents of residential homes in the State of Florida built by WCI Communities, Inc., or any of its affiliated or related companies, containing drywall manufactured, sold, distributed, installed, or supplied by WCI *that emits excessive levels of sulfur*. All members of the class are seeking compensatory damages for damage to real and personal property, and injunctive and/or equitable relief for environmental and medical monitoring. WCI, its officers, directors, subsidiaries, or any person or other entity related to, affiliated with or employed by WCI are excluded from the class definition.

Class Certification Motion ¶10 (emphasis added). In order to be a member of the class, it must be shown that the individual owns or is a resident of a home built by WCI that contains drywall which emits "excessive levels of sulfur." Such a determination would require not only a determination on the merits as to what constitutes an "excessive level or sulfur" but also an inquiry into the conditions of each home of the purported class member to determine whether such excessive levels of sulfur are present. Determining who is a member of the purported class would require an examination of the merits of each class member's claim. As such, the class is not ascertainable and not appropriate for class certification.

C. Goldstein has failed to meet the requirements of Federal Rule of Civil Procedure 23(a)

1. Goldstein has failed to meet the numerosity requirement

17. Rule 23(a) provides that in order for a class action to be certified, the class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. Proc. 23(a)(1). The party seeking certification must provide more than conclusory allegations that joinder is impracticable. *Lloyd v. City of Philadelphia*, 121 F.R.D. 246, 249 (E.D. Pa. 1988); *Valentino v. Howlett*, 528 F.2d 975 (7th Cir. 1976) (conclusory allegations that the class is too numerous to allow joinder does not meet requirements of Federal Rule of Civil Procedure 23(a)). A proposed class representative may utilize discovery for purposes of showing numerosity and his or her failure to do so requires denial of class action status. *Reichlin v. Wolfson*, 47 F.R.D. 537, 540 (S.D.N.Y. 1969).

18. Fulfillment of the numerosity requirement depends on the facts of each case. *General Tel. Co. of the Northwest, Inc. v. Equal Employment Opportunity Commission*, 446 U.S. 318, 330 (1980). One of the main purposes of the class action device is to promote access to the legal system for persons with small individual claims. *See, e.g., Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 809 (1985) (finding that a class action was appropriate where the class members' claims averaged $100 per person, making it unrealistic for the class members to bring individual claims). If individual class members have a considerable financial stake in the dispute, joinder is likely practicable. *Block v. First Blood Ass'n*, 125 F.R.D. 39, 43 (S.D.N.Y. 1989) (where 57 class members each claimed between $50,000 to $400,000 in damages, joinder was practicable).

19. Goldstein has provided no evidence that joinder would be impracticable. Goldstein merely alleges that "defective Chinese Drywall was installed in thousands of homes in

the State of Florida, and, therefore, the exact number of homeowners with potential claims against WCI is unknown at this time." Class Certification Motion ¶ 24. Goldstein assumes, without any evidence, that the number of claims would be in the "thousands." *Id.* Even if Goldstein's assumption was true and the class included "thousands" of individuals, this allegation alone is insufficient to meet the numerosity requirement. *See, e.g.*, *In re W.R. Grace & Co.*, 389 B.R. 373 (Bankr. D. Del. 2008); *Daigle v. Shell Oil Co.*¸ 133 F.R.D. 600 (D. Colo. 1990).

20. In *Grace*, a hospital moved for class certification on behalf of a class of property owners whose buildings were allegedly contaminated with asbestos due to actions of the debtor. 389 B.R. at 374. Prior to claimant filing its motion for class certification, approximately 3,000 individual claims were filed for asbestos related property damage, only 158 of which remained at the time of the motion. *Id.* at 376-77. In determining whether claimant satisfied the numerosity requirement, the court explained that 158 putative class members was "certainly manageable in a bankruptcy context." *Id.* The court explained that the ability of the bankruptcy court to efficiently resolve such claims without a class action was shown by the fact that it had already resolved thousands of property damage claims. *Id.* at 377. Thus, the court found that the numerosity requirement had not been met and a class proof of claim was not warranted. *Id.*

21. In *Daigle*, plaintiffs filed a purported class action for personal injury and property damages allegedly caused by defendant's cleanup of a toxic waste disposal pond. 133 F.R.D. at 601. Plaintiffs asserted that the putative class consisted of over 4,000 potential claimants. *Id.* at 603. In determining whether the numerosity requirement was met, the court considered three factors: (1) the size of the proposed class; (2) the geographic dispersion of the

class members; and (3) whether the names of the class members were easily ascertainable. *Id.* In looking to these factors, the court found that "[d]espite the tremendous publicity surrounding this case, only seventy-eight people have expressed an interest in joining the suit, and all of them have already joined as named plaintiffs." *Id.* at 377. Additionally, the court found that the plaintiffs could ascertain the names of all potential class members and because the time frame of the lawsuit was recent it was unlikely that a significant number of the class members would no longer live in the area. *Id.* Thus, the court found that it was likely that all interested persons had already joined in the lawsuit and, therefore, joinder was practicable. *Id.*

22. Here, just as in *Grace* and *Daigle*, joinder is practicable. Despite Goldstein's assumptions, the number of homeowners potentially affected by the Chinese Drywall attributable to WCI is more likely to number in the hundreds, rather than the thousands. To date, over 70 homeowners have filed proofs of claim related to the use of Chinese Drywall in their homes. The media coverage devoted to problems with Chinese Drywall has been extensive. Request for Judicial Notice in Support of the Debtors' Objection to Motion of the Sound at Waterlefe, a Condominium, for Entry of an Order Requiring Debotors to Identify and Notify all Potential Defective Chinese Drywall Claimants of a Potential Defective Chinese Drywall Claim and to Enlarge Time to File Claims Arising from Defective Chinese Drywall ("Request for Judicial Notice") [Docket No. 1786]. As shown from the claims relating to Chinese Drywall filed pre-petition, the amounts sought by claimants are significant, ranging from $50,000 to over $1,000,000. Thus, akin to *Daigle*, it is likely that interested persons have already filed individual proofs of claim. Further, as shown in *Grace*, even if thousands of claims are filed, the bankruptcy court is capable of resolving each individual claim.

23. Goldstein ignores the realities of bankruptcy court. Virtually every large Chapter 11 case involves thousands of claims. Many will have tens of thousands. Bankruptcy courts are uniquely qualified to handle such claims and requiring each putative class member to file a claim is not unduly burdensome for the claimant or the Court. In this case, the Debtors already have approximately 4,000 claims filed against them and have developed specialized procedures to efficiently deal with them, including through the ADR Procedure. Therefore, a class proof of claim is not warranted.

2. Goldstein has failed to meet the Commonality Requirement

24. Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Fed. R. Civ. Proc. 23(a)(2). The commonality requirement is not met if the issue in the action is inherently of an individual nature, requiring case-by-case decisions. *PBA Local No. 28 v. Woodbridge Policy Dept.*, 134 F.R.D. 96 (D.N.J. 1991). Cases where commonality is not met include those involving issues of causation, comparative fault, statute of limitations, and **variable damages**. *See*, *e.g., Badillo v. American Tobacco Co.*, 202 F.R.D. 261, 264 (D. Nev. 2001); *Perez v. Government of the Virgin Islands*, 109 F.R.D. 384, 387 (D.V.I. 1986) (class certification inappropriate in tort action based on negligence).

25. Here, a plethora of variables exist among the class, including the percentage of defective drywall in each putative class member's home, the damage caused by the drywall, whether other factors contributed to such damage, and whether the configurations of each home affects the amount of damage allegedly caused by defective drywall, just to name a few. Additionally, Goldstein has made no showing that there are common legal standards governing all putative class members. For example, there is no evidence that all of the putative class members signed the same purchase agreements or had the same warranties. Goldstein also

fails to explain how her claims, as a direct purchaser of a home from WCI, will present common legal and factual issues with putative class members who purchased homes from third parties, or how her claims are common to "residents," which presumably includes renters. Perhaps, most egregiously, she has failed to explain how commonality can exist among a putative class that will likely be comprised of some individuals suffering a wide range of personal injuries. Finally, WCI also has individualized defenses to each putative class member's claim based on the statute of limitations and contributory negligence. The multitude of differences that will exist among each individual's claim defeat any showing of commonality.

3. Goldstein has failed to show that her claims are typical of those she seeks to represent

26. The typicality requirement seeks to ensure that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. Proc. 23(a)(3). The typicality requirement involves an inquiry to assess "whether the named plaintiffs have incentives that align with those of absent class members so that the absentees' interests will be fairly represented." *Georgine v. Amchen Products, Inc.*, 83 F.3d 610, 631 (3d Cir. 1996). When claims are based on a variety of acts by the defendant affecting the putative class members differently, the class representative's claims will not satisfy the typicality requirement. *Danvers Motors Co, Inc. v. Ford Motor Co.*, 543 F.3d 141, 150 (3d Cir. 2008). To meet the typicality requirement, the interests of the proposed representative and the putative class members must be closely aligned so that a representative who litigates for his or her own interests also litigates on behalf of the putative class. *McKernan v. United Technologies Corp.*, 120 F.R.D. 452, 455 (D. Conn. 1988).

27. Here, Goldstein, the proposed class representative, alleges that her claims are typical of other putative class members based merely on allegations that "Like other Class

Members, the Class Representative has been damaged by the presence of Chinese Drywall in her home . . ." and "the Class Representative and other Class Members have also been exposed to the same substances that could cause them physical harm." Class Certification Motion ¶ 28. Based on these vague allegations, the proposed class representative summarily concludes that her "interests are aligned with the interests of other members of the class." *Id.*

28. These statements, devoid of any factual support whatsoever, are a far cry from meeting the requirement of typicality. Goldstein's utter lack of evidence makes it impossible to determine whether her claims are typical of the putative class.[6] For example, the Class Certification Motion alludes to the fact that some putative class members may seek damages for health problems potentially caused by Chinese Drywall. Class Certification Motion ¶ 4. The proofs of claim already filed show that claimants seek compensation for various personal injuries. Goldstein, however, nowhere alleges any personal injury herself, or the desire to seek compensatory damages for health problems on behalf of those putative class members who may have such claims. Goldstein also fails to explain how her claims, as a direct purchaser of a home from WCI, are typical of those who purchased their homes from a third party or those who are renters. These individuals will likely have interests different from those of Goldstein. Goldstein cannot avoid her typicality problems by providing no evidence of her own, or of other members of the putative class.

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[6] Dr. David Krause, a toxicologist with the Florida Department of Health who is conducting tests on the Chinese Drywall in a home build by WCI to determine whether the Chinese Drywall may affect the residents' health, explained in an article in the *Miami Herald* that the findings from one house are not necessarily applicable to another, because "Each home is unique" and "Each person's own health is unique." Request for Judicial Notice, #87 (Nirvi Shah, *Parkland home tested for drywall emissions*, Miami Herald, June 11, 2009, http://www.miamiherald.com/business/story/1091947.html.) [Docket No. 1786].

4. Goldstein has failed to meet the adequacy requirement

29. Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. Proc. 23(a)(4). The adequacy requirement encompasses two components: (1) the named plaintiff's interests must be aligned with the putative class members such that there are no conflicts among the class; and (2) "class counsel must be qualified and must serve the interests of the *entire* class." *Georgine*, 83 F.3d at 630 (emphasis in the original).

30. Factors the Court considers when determining whether a proposed representative is adequate include, but are not limited to, whether the representative: (1) will assert the interests of the putative class with forthrightness and vigor, *see In re Cendant Corp. Lit.*, 264 F.3d 201, 265 (3d Cir. 2001); (2) has knowledge and is involved in the suit, *In re Goldchip Funding Co.*, 61 F.R.D. 592, 594-95 (M.D. Pa. 1974); and (3) has the same interests and has suffered the same injury as the putative class, *Santiago v. City of Philadelphia*, 72 F.R.D. 619, 625 (E.D. Pa. 1976).

31. To attempt to satisfy this requirement, the proposed class representative concludes that she "does not have any interests that are adverse to the interests of unnamed Class Members" allegedly because "her claims and cause of action all arise out of the same course of conduct of WCI and she asserts the same legal theories against WCI that other Class Members will assert." Class Certification Motion ¶ 32. Further, Goldstein alleges that she "is represented by qualified bankruptcy counsel that has experience in litigating bankruptcy issues related to mass torts. She is also represented by other counsel with a wealth of experience in class action litigation, mass torts litigation, and litigation involving defective and harmful products." *Id.*

Based on these bald assertions, Goldstein alleges that she has met the adequacy requirements of Rule 23.

32. Clearly, in making such allegations without any factual showing, the proposed class representative has not met the preponderance of the evidence standard. Goldstein has provided no evidence of her own claims, let alone any admissible evidence of claims of putative class members, or of her fitness to serve as a class representative. The utter lack of evidence supplied in the motion and blatant failure to even attempt to properly meet the burden of proof not only calls into question her own fitness as a class representative but also her assertion that her chosen class counsel are well-qualified to represent the class. Thus, the Court cannot find that Goldstein is an adequate representative.

D. Goldstein Does Not Satisfy any of the Requirements for Maintaining a Class Action under Federal Rule of Civil Procedure 23(b)

33. In addition to meeting her burden on all of the requirements of Rule 23(a), which she has not, Goldstein's claim must also fit into one of the requirements of Rule 23(b).

1. Goldstein cannot maintain a class action pursuant to Rule 23(b)(1)

34. Rule 23(b) provides that a class action is maintainable under the following conditions:

> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

Fed. R. Civ. Proc. 23(b)(1).

35. An action is appropriately maintained as a class action under Rule 23(b)(1) if a class action "is necessary to prevent possible adverse effects, either on parties opposing the class or on absent class members, that might result if separate actions had to be brought." 6A FEDERAL PROCEDURE, LAWYERS EDITION, Class Actions § 12:170 (West 2004). When a suit involves individual issues, it is not appropriately certified under this section. *Banks v. Travelers Ins. Co.*, 60 F.R.D. 158, 163 (E.D. Pa 1973) (denying class certification for failure to meet requirements of Rule 23(b) "because so many factual issues exist, there is little risk of inconsistent adjudications which would impose 'incompatible standards of conduct' for [defendant]; nor would the adjudications with respect to individual matters be dispositive of the interests of the persons not parties to the action; nor would other actions substantially impair or impede their ability to protect their interests"). Class certification under Rule 23(b)(1) is appropriate to protect a defendant from incompatible adjudications which would prevent a defendant from complying with one judgment without violating the terms of another. *Henson v. East Lincoln Tp.,* 814 F.2d 410 (7th Cir. 1987).

36. The proposed class representative argues that her common law claims are maintainable as a class action under this provision because her claims "all arise out of a consistent practice of building and selling homes containing defective Chinese Drywall to the Class Members." Class Certification Motion ¶ 17. As shown above, however, the multitude of factual circumstances involved in each individual's claim make certification pursuant to Rule 23(b)(1) inappropriate. Furthermore, allowing individual claims to go forward would not subject WCI to incompatible standards of conduct because each individual's claim is factually different. Separate adjudications would also not be dispositive of the interests of persons not parties to the

action, or impair or impede their ability to protect their interests because each individual would be able to file his or her own proof of claim and that claim would be resolved based upon the particular facts relevant to his or her own circumstances. Here, because the bankruptcy court will be resolving all claims, there is no risk of inconsistent judgments. Thus, a class action is not maintainable under Rule 23(b)(1).

2. Goldstein cannot maintain a class action pursuant to Rule 23(b)(2)

37. A class action may be maintained under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." This rule does not apply where varying solutions to an individual's claims are required by the court for the various factual situations. *Hayes v. Seaboard Coast Line R. Co.*, 46 F.R.D. 49 (S.D. Ga. 1969); *Doninger v. Pac. Northwest Bell, Inc.*, 564 F.2d 1304, 1313-14 (9th Cir. 1977). Furthermore, where damages are the primary remedy sought in the action and equitable relief is incidental, a class action may not be certified under Rule 23(b)(2). *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986). A product liability class action is specifically a type of action for which Rule 23(b)(2) is not appropriate. *Id.*

38. Recognizing that her product liability case cannot be maintained as a class action pursuant to Rule 23(b)(2), Goldstein attempts to attain class certification by simply alleging the necessity of equitable relief in the form of medical monitoring. However, as is clear from the causes of actions alleged, the primary goal of the claim is recovery of compensatory damages. Thus, a class is not maintainable under Rule 23(b)(2).

3. Goldstein does not meet the requirements for maintenance of a class action under Rule 23(b)(3)

39. In order to satisfy the requirements of Rule 23(b)(3), the party seeking certification must show that common questions of law or fact predominate over questions affecting only individual members and that the class action is superior to any other available methods for the fair and efficient adjudication of the controversy.

40. Goldstein alleges that common questions predominate because "the Class Members' claims all arise out of WCI's conduct relating to building and selling of homes constructed with defective Chinese Drywall" and "WCI's liability for its conduct will be the central issue in resolving the Class Members' claims."

41. Case law, however, demonstrates that similar cases fail to meet the commonality and predominance requirement. *See, e.g., Georgine,* 83 F.3d 610; *Caruso v. Celsius Insulation Resources, Inc.*, 101 F.R.D. 530 (M.D. Pa. 1984). In *Georgine*, plaintiffs and defendants sought court approval of a class action settlement for the claims of individuals claiming to have been exposed to asbestos products. *Id.* at 617. The underlying complaint asserted causes of action, including: "(1) negligent failure to warn, (2) strict liability, (3) breach of express and implied warranty, (4) negligent infliction of emotional distress, (5) enhanced risk of disease, (6) medical monitoring, and (7) civil conspiracy." *Id.* at 620. A class was conditionally certified for purposes of settlement and several objectors appealed. *Id.* at 622. The Third Circuit Court of Appeals evaluated whether a class was properly certified. *Id.* at 624. Recognizing the interplay of the commonality and predominance requirements, the court analyzed the requirements together. *Id.* at 626. In evaluating whether the commonality and predominance requirements for class certification were met, the Third Circuit Court of Appeals recognized that there were several common questions among the claims of the class but "beyond

the broad issues, the class members' claims vary widely in character." *Id.* at 626. For example, the Court of Appeals explained that "Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods." *Id.* Further, each class member had various degrees of physical injury, or none at all. *Id.* And, "each has a different history of cigarette smoking, a factor that complicates the causation inquiry." *Id.* These factual differences splintered into legal differences, "including matters of causation, comparative fault, and the types of damages available to each plaintiff." *Id.* at 627.

42. The Court of Appeals further explained that in product liability actions, as opposed to mass tort actions where one common event causes damages to all plaintiffs, individual issues likely outnumber common issues. *Id.* at 628. In product liability actions, "no single happening or accident occurs to cause similar types of physical harm or property damage. No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member . . . ." *Id.* Further, a defendant's affirmative defenses may also depend on the facts peculiar to each plaintiff's case. *Id.* Thus, based on the multitude of likely differences among the class members and "the huge number of important individualized issues overwhelm[ing] any common question," the Court of Appeals held that plaintiffs failed to meet the predominance requirement. *Id.* at 630.

43. In *Caruso*, plaintiff brought a class action against a manufacturer of urea formaldehyde foam insulation alleging negligence, strict liability, breach of warranty and intentional tort. 101 F.R.D. at 532. The court first found that the requirements of Rule 23(a) were met. *Id.* In analyzing whether the action was maintainable under Rule 23(b)(3), the court found numerous individual questions presented by the case, such as "varying property damages, varying levels of formaldehyde, nature of representations made, nature of exposure, time the

injury was discovered, and the existence of superseding and intervening causes. *Id.* at 535. Thus, the court found that common issues did not predominate. *Id.*

44. Here, the situation is similar to that of *Georgine* and *Caruso*. Although the Class Certification Motion on its face may appear to allege common questions, even if such common questions do exist, they do not predominate. Just as *Georgine,* common questions cannot predominate here because putative class members will have been exposed to different amounts of Chinese Drywall, for different amounts of time, in different ways, and over different periods. Putative class members will also have varying damage to their personal property, real property, and physical health, and such damage may be partially attributable to existing conditions. Similar to *Caruso*, there will be varying property damage, different amounts of Chinese Drywall used in the putative class members' homes, different levels of exposure, and potentially different superseding and intervening causes.

45. In addition to showing predominance, the party seeking certification must show that a class action is the best way to adjudicate the claims. *Georgine,* 83 F.3d at 633. Rule 23(b)(3) provides a non-exhaustive list of pertinent factors to consider in the superiority examination:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

46. The first criterion is particularly applicable here. Members of a class have been found to have a vital interest in controlling their own litigation in actions involving personal

injuries and purchases of homes. *Hobbs v. Northeast Airlines, Inc.*, 50 F.R.D. 76 (E.D. Pa. 1970); *Crasto v. Kaskel's Estate*, 63 F.R.D. 18, 24 (S.D.N.Y. 1974) (holding that a class action was not the superior means of adjudicating claims because the claims involved the "purchase of homes, a significant aspect of the class members' lives is vitually affected"). Here, where personal injury and property damages are alleged, each Claimant has an interest in bringing their own claim. This is evidenced by the fact that 63 putative class members have already opposed the class action. Class Certification Motion of Certain Florida Chinese Drywall Claimants for Appointment of Committee ¶ 11 ("Furthermore, the Drywall Claimants specifically are opposed to inclusion as members of any yet to be certified class and want to maintain their independence . . . .").

47. In addition to the criteria above, the superiority determination involves consideration of alternative methods of adjudication, including a comparison of the fairness and efficiency of other methods against that of a class action. *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir. 1974); *Georgine v. Amchen Products, Inc.*, 83 F.3d 610 (3d Cir. 1996). The bankruptcy court is uniquely designed to efficiently handle thousands of claims. In the case at hand, an alternative dispute resolution forum has already been established and is fully capable of adjudicating each individual claim. This forum is ideal, as it preserves the interest of each putative class member to control his or her own claim.

48. Goldstein has failed to show that commonality predominates and that class adjudication is the superior method of resolving claims. Thus, a class action cannot be maintained pursuant to Rule 23(b)(3).

II. Discovery is Necessary to Determine Whether a Class Action is Appropriate

49. Goldstein has not met her burden of showing that her claims are appropriately brought on behalf of a class and, therefore, her motion for class certification should be denied. If, however, this Court does not deny Goldstein's motion, Debtors request an opportunity to conduct discovery regarding the class certification issues in order to defend themselves against a motion for class certification prior to the Court's decision as to whether to certify a class. For example, in order to adequately evaluate whether commonality exists, Debtors need to take the depositions of a sampling of the class members. To evaluate whether Goldstein is an adequate representative and whether her claims are typical, Debtors need to take her deposition. Propounding interrogatories and hiring expert witnesses may also be necessary. Thus, Debtors request the Court to enter a scheduling order allowing sufficient time to investigate fully the class claims.

III. A Class Proof of Claim Should Not Be Permitted

50. Even if Goldstein could show that her claim can proceed as a class action pursuant to Rule 23, which she cannot, the Court should decline to allow a class proof of claim.

A. The Court should not expand Rule 7023 to allow a class proof of claim

51. Although not mandatory, bankruptcy courts have permitted class proofs of claim when Rule 23 is satisfied. *See, e.g., In re Kaiser Group Int'l, Inc.,* 278 B.R. 58 (Bankr. D. Del. 2002); *In re American Reserve Corp.,* 840 F.2d 487 (7th Cir. 1988). Courts allowing class proofs of claim find authority to do so by expanding Rule 7023 of the Federal Rules of Bankruptcy Procedure ("Rule 7023"), which allows class certification in adversary actions by incorporating Rule 23 to contested matters. *Kaiser*, 278 B.R. at 62. Pursuant to these

authorities, however, it is within the Court's discretion to decide whether to expand Rule 7023 to contested matters. *In re Musicland Holding Corp.*, 362 B.R. 644, 650 (Bank. S.D.N.Y. 2007).

52. On the other hand, several courts have held that a class proof of claim is improper. *See In re Allegheny Intern., Inc.*, 94 B.R. 877, 879 (Bankr. W.D. Pa. 1988) ("neither the Code nor the Rules explicitly provides for the filing of a class proof of claim"); *In re Standard Metals Corp.*, 817 F.2d 625, 630 (10th Cir. 1987) ("class proofs of claim violate the statutory scheme of the Act and the Rules"); *In re First Plus Financial Inc.,* 248 B.R. 60, 67-73 (Bankr. N.D. Tex. 2000); *In re Great Western Cities, Inc. of New Mexico*, 107 B.R. 116 (N.D. Tex. 1989) (holding class proofs of claim to be impermissible, but the district court later found the claims to be group claims because the names of all putative claimants were listed); *In re Texaco Inc.*, 81 B.R. 820 (Bankr. S.D.N.Y. 1988).

53. Because the right to file a class proof of claim is not absolute, bankruptcy courts must utilize the class action device sparingly. *Musicland*, 362 B.R. at 650; *In re Ephedra Products Liability Litigation*, 329 B.R. 1, 5 (Bankr. S.D.N.Y. 2005); *In re Sacred Heart Hospital of Norristown*, 177 B.R. 16, 18 (Bankr. E.D. Pa 1995). As explained by the *Ephedra* court, "bankruptcy significantly changes the balance of factors to be considered in determining whether to allow a class action and that class certification may be 'less desirable in bankruptcy than in ordinary civil litigation.'" 329 B.R. at 5 (*citing In re American Reserve Corp.*, 840 F.2d at 493).

54. In deciding whether the court should extend Rule 23 to a proof of claim, courts consider: (1) whether the class was already certified outside of bankruptcy; (2) whether putative class members received notice of the bar date; and (3) whether class certification will cause undue delay in the administration of the case. *Sacred Heart*, 177 B.R. at 21-23.

55. In *Sacred Heart*, former employees of the debtor sought to file a class proof of claim for claims arising under the Workers Adjustment and Retraining Notification Act ("WARN Act"). 117 B.R. at 18. In evaluating whether to allow a class proof of claim, the court stated that,

> we believe that the class proof of claim device may be utilized in appropriate contexts, but that such contexts should be chosen most sparingly. The situation where a class has been certified pre-petition by a nonbankruptcy court and the representative files a claim on behalf of a class of parties the adequacy of the representation of whose interests is uncertain, or where a class action has been filed a considerable time pre-petition and allowed to proceed as a class action in a nonbankruptcy forum, are the best candidates for such treatment.

Id. at 22. The court further explained, "if putative unnamed class members have clearly received actual or constructive notice of the bankruptcy case and the bar date, denial of the implementation of the class proof of claim device appears advisable." *Id.* In analyzing these factors, the court noted that not only was the class not certified pre-petition, but many, if not all, of the debtor's former employees received notice of the bar date and 120 former employees filed individual proofs of claim. *Id.* at 18-20. Further, the court found:

> it is manifestly clear that it would be unwarranted, unfair, and possibly violate the due process rights of other creditors of the Debtor to effectively extend the bar date to benefit (1) the members of the putative class who failed to exercise vigilance; and (2) the pocketbook of the putative class counsel, who obviously will seek a contingency fee. . . .

Id. at 24. Thus, the court held that a class proof of claim was unwarranted. *Id.*

56. Here, just as in *Sacred Heart*, Goldstein seeks leave to file a class proof of claim although no class has been certified outside of the bankruptcy proceedings. Furthermore, all putative class members received actual notice of the bar date, as notice was sent to everyone who purchased a home from WCI in the past ten years. Notice of the bar date was also published

in several newspapers. Similar to *Sacred Heart*, the effectiveness of such notice is apparent as approximately 70 claimants have already filed individual proofs of claim. Putative class members have also already opposed inclusion in a class. Motion of Certain Florida Chinese Drywall Claimants for Appointment of a Committee ¶ 11, [Docket No. 1705]. Thus, this case does not warrant the use of a class proof of claim.

57. Goldstein's argument that a class proof of claim is warranted because putative class members may not have had knowledge that they had a claim against WCI until after the bar date had passed, Class Certification Motion ¶ 15, is unpersuasive and misapplies the law. Goldstein points to no authority, however, to support her position that this is a factor the court should consider when deciding if a class proof of claim is appropriate. In *Sacred Heart*, it was inconsequential whether the putative class members knew that they may have had WARN Act claims prior to the bar date; the issue was whether the putative class members had notice of the bar date.

58. Here, the putative class members had actual notice of the bar date. Nevertheless, creditors who individually seek to file late proofs of claim are entitled to do so. Under Rule 9006(b)(1), a bankruptcy court may permit a late filing if the movant's failure to comply with an earlier deadline "was the result of excusable neglect." Fed. R. Bankr. P. 9006(b)(1). In *Pioneer Investment Services Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380 (1993), the Supreme Court articulated the meaning of "excusable neglect" in the context of enlarging the time for filing a proof of claim. While explaining that all relevant circumstances surrounding the movant's omission must be considered, the Court provided a list of factors to consider: (1) the danger of prejudice to the debtor; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control

of the movant; and (4) whether the movant acted in good faith. Id. at 395-96. "The burden of proving excusable neglect lies with the late-claimant." *Jones v. Chemetron Corp.*, 212 F.3d 199, 205 (3d Cir. 2000). Late claims may be allowed under Rule 9006(b)(1) if the late claimant carries his burden of proving excusable neglect under the Pioneer factors. Indeed, each time a late claim has been filed in these Chapter 11 Cases, the Debtors have performed an "excusable neglect" analysis under Pioneer and Rule 9006(b)(1) to determine whether an objection to such a late claim was warranted. To date, the Debtors have not objected to any late filings claiming defective Chinese Drywall based on their determination that each such claim satisfied the excusable neglect standard. Thus, the danger of excluding claimants, Goldstein's principle argument for allowing a class proof of claim is not present here.

59. Goldstein also argues that "allowing the Class Representative to file the Class Claim would not unduly delay the Debtors' reorganization proceedings" because "Debtors have not filed a plan of reorganization." Class Certification Motion ¶ 18. This is incorrect, because on June 8, 2009, the Debtors filed the Plan and related Disclosure Statement in this Court.

60. Goldstein has also ignored the inherent consumption of time associated with class litigation. *See Ephedra*, 329 B.R. at 5. As explained in *Ephedra*, class litigation causes significant delays because, "Pre-certification discovery would be needed . . ." and "if the classes were certified, notice to class members followed by discovery on the merits and the bankruptcy equivalent of a trial would further delay distribution." *Id.* Similarly, here, the time necessary to litigate a class claim will be substantial and will cause undue delay.

61. This case does not present the type of narrow situation where application of the class claim procedure is necessary. A class has not already been certified, putative class

members had actual notice of the bar date, numerous claimants have already filed individual claims and have opposed participation in a class action, and allowing a class proof of claim will only serve to unduly delay the reorganization proceedings. Thus, the Court should decline to allow a class proof of claim.

B. The Use of a Class Action is Inconsistent with the Goals of Bankruptcy

62. In addition, allowing a class action makes little sense in bankruptcy, which provides most, if not all, of the protections that Rule 23 was designed to provide, including:

- Creating a forum for efficient resolution of similar, small individual claims which would be uneconomical for separate matters;
- Protecting persons otherwise unaware of their rights;
- Providing judicial economy and efficiency by eliminating unnecessary, duplicative, or multiple litigation;
- Protecting defendants from inconsistent obligations; and
- Creating the mechanism for private attorney general suits to enforce laws and deter wrongdoing unremedied by government regulatory action.

See Alexander D. Bono, *Class Action Proofs Of Claim In Bankruptcy*, 96 COM. L.J. 297, 309 (1991). Additional litigation protections are unnecessary in bankruptcy, as all claimants are fully protected by the Bankruptcy Code and Rules which provide significant protections, including:

- The requirements that creditors receive notice of various proceedings;
- The ability to divide creditors into classes;
- The provision for creditors' committees;
- The mandate for court approval of all settlements and dismissals;
- The provision for distribution of the estate to all who file a proof of claim or are properly scheduled by the debtor; and
- The simplicity and inexpensive method of filing a proof of claim, which does not require a claimant to have counsel.

Id. at 311-12; *see also In re Esphedra Products Liability Lit.*, 329 B.R. 1, 9 (Bankr. S.D.N.Y. 2005) (finding that the "superiority of the class action vanishes when the 'other available method' is bankruptcy, which consolidates all claims in one forum and allows claimants to file proofs of claim without counsel and at virtually no cost"). Further, this Court has already

approved an alternative dispute resolution procedure designed to promote the efficient resolution, by settlement or arbitration, of claims against the Debtors.

63. Additionally, allowing class proofs of claim may interfere with the successful and timely reorganization of the Debtors and the operation of the Bankruptcy Code. Bankruptcy scholars have noted that permitting class proofs of claim can create problems such as:

- Difficultly in quantifying the dollar value or amount of the class action claim by the bar date;
- Filing a class proof of claim tolls the claims bar date for unnamed class members;
- Class action lawsuits are generally expensive, including class certification, extensive discovery, experts, arguments and hearings;
- Class proofs of claim may delay distribution while determinations are made whether the class action properly exists and, if so, what damages are appropriate; and
- Class actions create issues concerning voting and diminish the individual creditor's voting rights.

See Bono, 96 COM. L.J. at 327-30; *see also* Luisa Kaye, *Note: The Case Against Class Proofs of Claim in Bankruptcy*, 66 N.Y.U. L. Rev. 897, 926 (1991) (discussing similar policy concerns with permitting class proofs of claim).

64. Because the Bankruptcy Court is uniquely situated to resolve claims, the Court should not allow a class proof of claim.

IV. The Court Should Deny the Late Proof of Claim Motion

65. Because Goldstein has not met the requirements for filing a class proof of claim, the Court should deny her request for entry of an order allowing a late filed class proof of claim. Just as other individual claimants have done, Goldstein can request, individually, to file a late proof of claim. Debtors will then determine whether to object to her individual late proof of claim just as they have done with the others.

CONCLUSION

For the foregoing reasons, WCI respectfully submits that the Class Certification Motion should be denied.

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Wilmington, Delaware

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