

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DONALD ELIASON, et al.,
Individually and on behalf of all others
similarly situated,

PLAINTIFFS,

-vs-

GENTEK BUILDING PRODUCTS, INC., et
al.,

DEFENDANTS

CASE NO. 1:10cv2093

JUDGE BENITA Y. PEARSON

MOTION TO ENFORCE CLASS ACTION SETTLEMENT AGREEMENT

Named Plaintiff Douglas Lamm and Gregory Anderson, a member of the Class certified by this Court on March 5, 2013, hereby move this Court to enforce the Settlement Agreement entered into by the parties and approved by this Court on August 1, 2013. Movants further request that reasonable attorney fees be awarded for bringing this motion.

In further support of this Motion, Movants submit contemporaneously their Memorandum of Law in support of this Motion to Enforce Class Action Settlement.

Dated: September 14, 2016

Respectfully Submitted,

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Lead Counsel for the Class

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of Ohio by using the CM/ECF system on September 14, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

In addition, a copy of the foregoing and its accompanying Memorandum and Exhibits will be served via email and certified mail upon Defendants and their counsel at the following address on September 14, 2016.

Anthony Cespedes
Assistant General Counsel
Associated Materials
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Cuyahoga Falls, Ohio

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO ENFORCE
CLASS ACTION SETTLEMENT AGREEMENT**

INTRODUCTION

Named Plaintiffs filed the underlying action on September 20, 2010, alleging that Defendant Gentek Building Products (“Gentek”) manufactured siding with a defect that caused the paint on the siding to peel, and that it failed to comply with the lifetime warranty it issued covering that siding. On August 1, 2013, this Court certified a class defined as “all persons, organizations, municipalities, corporations and entities that own property, whether commercial or residential, on which Gentek Steel Siding was applied during the period January 1, 1991 through March 15, 2013, that are covered by a Gentek Steel Siding warranty and which siding experienced Steel Peel”, and gave final approval to a settlement between the parties.

In general terms, the Settlement Agreement outlined a claims process which Gentek agreed to follow going forward, and offered Class Members enhanced benefits under their existing warranty. Included within the terms of the settlement are the following requirements:

1. Gentek must provide replacement siding if the structure containing the warranted siding is experiencing peeling on 3 of 4 separate faces, or 75% or more of all faces. See Settlement Agreement ¶ 30(c)(v) (Doc #: 148-1); Long Form Notice pg. 5. (Doc 148-2)
2. If Gentek is unable to repair the siding within 18 months of accepting the claim, it must offer the homeowner a choice of either replacement siding or \$8,000 in cash. See Settlement Agreement ¶ 30(d).
3. Gentek must accept specified methods of proof that the class member submitting the claim purchased siding covered by the settlement. Included among these methods is submission of a sample of the siding. See Settlement Agreement ¶ 30(a).
4. Sums that are otherwise due to Gentek under the terms of the warranty are only to be charged once, at the time the first claim is submitted. See Settlement Agreement ¶ 30(c)(vii).

As explained below, Gentek has failed to comply with these provisions of the Settlement Agreement, to the detriment of the Certified Class.

ARGUMENT OF LAW

I. THIS COURT HAS AUTHORITY TO ENFORCE THE CLASS ACTION SETTLEMENT AGREEMENT.

The Settlement Agreement is judicially enforceable. This Court approved and adopted the Agreement in its entirety, maintaining jurisdiction for enforcement purposes. Final Order And Judgment Approving Class Action Settlement at ¶¶ 13-14 (Doc. No. 148) Plainly, this Court has the authority, as well as the obligation, to enforce the Agreement. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994); *Bostick Foundry Co. v. Lindberg*, 797 F.2d 280, 2820283 (6th Cir. 1986).

The law guiding enforcement of the Settlement is well-established. The Settlement Agreement is a contract, *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378; 112 S. Ct. 748; 116 L. Ed. 2d 867 (1992), and is therefore generally construed and enforced as such. *Smith v. ABN Amro Mortg. Grp. Inc.*, 434 F. App'x 454, 460 (6th Cir. 2011) (citing *Bamerilease Capital Corp. v. Nearburg*, 958 F.2d 150, 152 (6th Cir. 1992)).

II. GENTEK HAS FAILED TO OFFER THE SETTLEMENT BENEFITS TO CLASS MEMBERS EXPERIENCING PEELING ON MORE THAN 75% OF THE STRUCTURE

The Settlement Agreement requires Gentek to offer replacement siding to any class member whose structure is experiencing peeling on 75% or more of the structure's faces. Specifically, the Settlement Agreement provides:

(v) If replacement is given or chosen as a remedy, whether pursuant to paragraphs (i), (ii) or (iii) above, the replacement siding provided will match the existing siding, if Defendants have or can obtain existing siding. If the siding color is no longer available, the Class Member may select a replacement color from the same product line which would maintain their current warranty coverage. If 3 of 4 separate faces of a building (or 75% or more of all faces) are affected, Defendants will replace the siding on the entire structure in the Class Member's color of choice, subject to availability.

Settlement Agreement ¶ 30(c)(v). Likewise, the Notice approved by this Court and published on the settlement website explains:

If three of four separate faces of a structure (or 75% or more of all faces) are affected, Gentek will replace the siding on the entire structure in the Class Member's color of choice, subject to availability.

Long Form Notice ¶ 11, pg. 4. The terms of the settlement are clear, yet Gentek has refused to provide replacement siding for at least two class members whose structures are peeling on more than 75% of all faces.

Greg Andersen is a class member and resident of Eden Prairie, Minnesota. Mr. Anderson submitted a claim for two walls of his home just prior to approval of the Settlement. Shortly thereafter, he noticed small cracks on the remaining walls of the home. Mr. Anderson promptly notified Gentek of the additional peeling. In response, Gentek demanded pictures which would show both the small cracks and the orientation of the wall containing that siding. Given the size of the cracks, capturing the photo demanded by Gentek was impossible.

Class counsel discussed this conundrum with Gentek's counsel in late August, 2013, and Gentek agreed to send an inspector to the home. This never happened, and Gentek denied Mr. Anderson's claim.

Mr. Anderson re-submitted his claim earlier this year, when the peeling on the remaining walls became more pronounced. Gentek accepted the claim as to all walls, but did not offer him replacement siding as it is required to do under the Settlement Agreement. Instead, Gentek offered only to repair the siding or pay Mr. Anderson the sum of \$1,898 in lieu of repair. Exhibit 1 is a copy of the offer received by Mr. Anderson.

Nancy and Lyle Alexson are residents of Ham Lake, Minnesota. In June, 2016, the Alexsons submitted a claim for peeling siding on 80% of their home's faces. Included in their claim submission was a report by a private investigator detailing the extent to which the siding was peeling and cracking. Despite this, Gentek initially denied the claim, then approved it as to all walls after correspondence with the Allison's attorney. As with Mr. Anderson, Gentek offered only to repair the siding or pay the sum of \$3,341 in lieu of repair. Exhibit 2 is a copy of the offer received by Mr. and Mrs. Alexson.

These offers do not satisfy Gentek's obligations under the Settlement Agreement.

In correspondence with Class Counsel, Gentek has expressed its belief that the 75% Replacement Provision only applies if the Class Member has had two prior claims with respect to the affected walls. That is not a fair interpretation of the Settlement Agreement. Moreover, given Gentek's position, it is reasonable to assume that Mr. Anderson and Mr. and Mrs. Alexson are not the only class members who have been denied their benefits under the settlement.

With respect to this provision of the Settlement Agreement, Movants request that Gentek be required to offer a choice of replacement siding or \$8,000 in cash to any Class Member (i) who has submitted a claim after the effective date of the Settlement Agreement and (ii) whose claim shows that 75% or more of the structure is peeling, without regard to whether the siding has already been repaired. If Gentek cannot reasonably identify the Class Members who meet the criteria above, Movants request that Notice be issued, at Gentek's expense, to the Class as a whole, informing the Class that certain members may not have received benefits to which they were entitled under the Settlement.

III. GENTEK HAS FAILED TO OFFER SETTLEMENT BENEFITS TO CLASS MEMBERS WHOSE CLAIMS HAVE BEEN PENDING FOR LONGER THAN 18 MONTHS

The Settlement Agreement requires Gentek to complete warranty work within 18 months of the date a warranty claim is “perfected” - defined in the Settlement Agreement as the date that the class member submits a valid proof of purchase and Gentek’s Self-Inspection Report.

Settlement Agreement ¶ 30(d). If Gentek fails to complete the repair within 18 months, it must offer the class member a choice of either replacement siding or \$8,000 in cash. This provision is subject to a cap which limits the number of repairs in any calendar year to 750.

Gentek recently provided counsel with a spreadsheet showing claims history dating back to 2009. Based on that data, it does not appear that the number of claims has exceeded the cap at any time since the settlement.

Approximately 48 class members have been waiting longer than 18 months for a repair; and, according to Gentek’s own data, several of these are still awaiting a repair. According to the Settlement Agreement, Gentek must offer those class members a choice of replacement siding or \$8,000 in cash.

Gentek admittedly has not done so, as evidenced by the email attached as Exhibit 3. When class counsel asked if those awaiting refinishing have been offered the benefits under the settlement, Gentek’s counsel replied “I think some have”. Exhibit 3. This does not comport with the terms of the Settlement Agreement.

With respect to this provision of the Settlement Agreement, Movants request that Gentek be required to offer a choice of replacement siding or \$8,000 in cash to any Class Member who (i) either had a claim pending as of the effective date of the Settlement OR who has submitted a claim after the effective date of the Settlement Agreement and (ii) did not have repairs completed within the 18 month period specified in the Settlement Agreement, without regard to whether the siding has already been repaired. If Gentek cannot reasonably identify the Class Members who meet the criteria above, Movants request that Notice be issued, at Gentek’s expense, to the Class

as a whole, informing the Class that certain members may not have received benefits to which they were entitled under the Settlement.

IV. GENTEK IS REQUIRING PROOF OF THE WARRANTY IN A MANNER THAT CONTRADICTS THE TERMS OF THE SETTLEMENT

The various warranties issued by Gentek require that the purchaser submit a proof of purchase in order to obtain warranty service. Prior to the Settlement, Gentek required that the purchaser submit either a completed warranty form or a copy of the original contract or invoice for the siding. Exhibit 4. As part of the Settlement, Gentek agreed that it would accept the following as proof of purchase:

- (i) A copy of the warranty that covers their siding;
- (ii) An invoice referencing Defendant's siding;
- (iii) A receipt referencing Defendant's siding;
- (iv) An affidavit from the distributor attesting to the fact that they sold Defendant's siding to or for the benefit of the Class Member, along with the approximate date of installation. Defendants will provide a form of affidavit for Class Members to use for this purpose;
- (v) A sample of the siding (minimum 1 foot) that defendants are able to verify as one of their products.

Settlement Agreement ¶ 30(a).

During Settlement negotiations, the parties agreed upon a form letter to be sent with Gentek's claim packet. A copy of that form letter is attached as Exhibit 5. It specifically informs Class Members of the acceptable forms of proof of purchase.

Gentek is not sending the agreed upon letter to Class Members. Instead, it is sending correspondence to Class Members indicating that acceptable forms of proof of purchase are "a dated copy of original invoice, warranty or contract specifying product & brand". Exhibit 6. This varies greatly from the letter agreed upon by counsel, and is misleading to Class Members.

Compounding this issue is the fact that Gentek appears to be providing misleading information to Class Members through its oral communications. Cathy Mietlowski is a Class

Member from Tonawanda, New York. Ms. Mietlowski's Declaration, describing her experience with Gentek, is attached hereto as Exhibit 7. As set forth therein, Ms. Mietlowski submitted her warranty claim to Gentek in June 2014. As proof of purchase, she submitted an affidavit from the individual she assumed was the distributor of her siding. Gentek denied her claim on the ground that the individual was a contractor and not a distributor. When Ms. Mietkowsky contacted Gentek about submitting a siding sample, she was told that the siding sample she submitted would have to be one with a serial number stamped on the back. Ms. Mietkowsky was concerned about how to obtain a stamped sample, and contacted Gentek a second time. It was only then that Ms. Mietlowski was informed that the siding did not need to bear a serial number.

By engaging in the conduct described above, Gentek is misleading Class Members about their rights under the Settlement Agreement.

With respect to this provision of the Settlement Agreement, Movants request that Gentek be required to (1) identify any Class Member who (a) has been sent a claim packet since the date of the Settlement and (b) did not have a claim approved following receipt of that packet (either due to a failure to return that claim packet or a denial by Gentek), and (2) send those Class Members a corrected letter advising them that a claim may be submitted using any of the acceptable methods of proving purchase, as listed in the Settlement Agreement.

V. GENTEK IS CHARGING CLASS MEMBERS FOR WARRANTY WORK AFTER THE INITIAL CLAIM IN VIOLATION OF THE SETTLEMENT AGREEMENT

The terms of Gentek's various warranties require that the property owner pay it \$100 "for each incident under the warranty". In addition, a property owner to whom the warranty has been transferred from the original owner (referred to herein as a "second owner") is required to pay a pro-rated portion of Gentek's cost of performing warranty work.

The Settlement Agreement prohibits Gentek from charging any sum under the warranty beyond the first claim made by the property owner. Specifically, the Settlement Agreement provides:

Any sums due to Gentek under the applicable warranty for a Steel Peel claim shall be paid only at the time the first claim for Steel Peel is submitted by the Class Member.

Settlement Agreement ¶ 30(c) (vii).

Joyce Thares is a Class Member and resident of Great Falls, Montana. Ms. Thares' Declaration, describing her experience with Gentek, is attached hereto as Exhibit 8. Ms. Thares is a second owner of a structure covered with Gentek siding. She submitted a claim for peeling siding to Gentek in 2014, and paid \$274.05 to Gentek for it to perform a repair to the siding.

Ms. Thares submitted a second warranty claim to Gentek in 2016. Gentek charged her \$283.50 for this claim.

By charging for warranty work for claims beyond the first, Gentek is in violation of the Settlement Agreement.

With respect to this provision of the Settlement Agreement, Movants request that Gentek be required to refund any funds collected from Class Members for warranty work on any claim other than the first, and be required to include a statement in the correspondence that accompanies the claim packet that fees are only due for the first claim.

VI. GENTEK SHOULD BE REQUIRED TO PROVIDE CLASS COUNSEL WITH REGULAR REPORTS CONCERNING ITS COMPLIANCE WITH THE SETTLEMENT AGREEMENT

As part of the Settlement, the parties agreed that Gentek would provide class counsel with periodic reports showing the status of warranty claims filed pursuant to the Settlement. The parties expected to be able to do this informally, but Class Counsel now believes that it is in the interests of the Class to formally require specific reports regarding claims activity.

Movants therefore request that going forward, Gentek be required to provide Class Counsel with a report that contains the following information for each claim received:

1. The name, address, phone number, and email address of the Class Member;
2. The date the Class Member's claim information was received by Gentek;
3. The number of walls included in the claim;
4. The date that Gentek made a determination of whether to accept the claim;
5. If the claim is denied, the reasons for the denial;

6. If the claim is accepted, the type of remedy (repair, replacement, cash settlement) offered to the Class Member;
7. If the claim is accepted, a statement as to the number of previously accepted claims, both as to the Class Member and as to the particular walls at issue;
8. A description of any charges demanded by Gentek in connection with the claim; and
9. If the claim is accepted, the date work is, or is expected to be, completed.

CONCLUSION

Gentek has breached the Settlement Agreement, to the detriment of the Class. Without action by this Court, it will continue to do so. For all of the reasons stated above, Movants respectfully request that this Court judicially enforce the Settlement Agreement in the manner requested above, and award reasonable attorney fees and costs associated with this Motion.

Dated: September 14, 2016

Respectfully Submitted,

LAW OFFICES OF BARBARA QUINN SMITH

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