

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

**IN RE: ELK CROSS TIMBERS
DECKING MARKETING,
SALES PRACTICES AND
PRODUCTS LIABILITY
LITIGATION**

This Document Applies to: All Cases

Civil Action No.: 15-0018 (JLL)
(JAD)

MDL No. 2577

Honorable Jose L. Linares
Honorable Joseph A. Dickson

**FINAL ORDER
AND JUDGMENT GRANTING
FINAL APPROVAL OF CLASS
ACTION SETTLEMENT
AGREEMENT**

THIS MATTER having been opened to the Court by attorneys for Plaintiffs and attorneys for Defendant, by way of their joint motion for final approval of the proposed class action settlement (the "Settlement") in accordance with the Settlement Agreement (the "Agreement") dated September 16, 2016 [D.E. 108-1] and on the motion for an award of attorneys' fees and costs and approval of incentive awards dated December 12, 2016 [D.E. 117]; and

WHEREAS, the Court finds that it has jurisdiction over this Action and each of the Parties and all Settlement Class Members; and

WHEREAS the Court finds as follows: The Settlement was entered into at arm's length by experienced counsel and only after extensive negotiations presided

over by the Court. The Settlement is not the result of collusion. The Settlement is fair, reasonable, and adequate;

WHEREAS, the Court having reviewed Plaintiffs' Counsel's submissions in support of their request for attorneys' fees, including their time summaries and hourly rates, the Court finds that the request for attorneys' fees is reasonable and appropriate and the hourly rates of each Plaintiffs' Steering Committee firm are likewise reasonable and appropriate in a case of this complexity;

WHEREAS, the Court similarly finds that incentive awards to each Class Representative are fair and reasonable; and

WHEREAS, this Court conducted a hearing on February 27, 2017 and has fully considered the records of these proceedings, the representations, arguments and recommendations of counsel, and the requirements of the governing law; and for good cause shown;

IT IS THIS 27th day of February, 2017, ORDERED that the Joint Motion for Final Approval of the Settlement is hereby GRANTED. The Court further finds and orders as follows.

1. For purposes of this Order, the Court hereby adopts all defined terms as set forth in the Agreement;

2. The Court finds, for settlement purposes only, that all requirements of Fed.R.Civ.P. 23(a) and (b)(3) have been satisfied. The Court certifies a Settlement Class, as follows:

All purchasers (and Permitted Transferees of the underlying warranties) of: (1) Decking manufactured or sold by GAF or Elk between January 1, 2002 and December 31, 2012 and installed on their property on the Notice Date, or (b) Railways manufactured or sold by GAF or Elk between January 1, 2005 and December 31, 2012 and installed on their property on the Notice Date.

Excluded from the Class are: (1) any persons who previously executed and returned a release, or endorsed a check bearing a release, with regard to their Decking materials; (2) all persons and entities who timely exercise their rights under Federal Rule of Civil Procedure 23 to opt out of the Settlement; (3) GAF or any of its predecessors, successors, parent or subsidiary companies, affiliates, officers, directors, employees, agents, attorneys, representatives, insurers, suppliers, distributors, or vendors; (4) Class Counsel, and any member of Class Counsels' immediate family; and (5) the Judges, including Magistrates, to whom the cases within the MDL Litigation were assigned in the transferor courts, the Judges, including Magistrates, to whom the MDL Litigation is assigned, and any member of those Judges', including Magistrates', immediate family.

3. A list of all persons who have timely and validly requested to be excluded from the Settlement Class is annexed hereto as Exhibit A.

4. The record shows that notice has been given to the Settlement Class in the manner approved by the Court in its Preliminary Approval Order [D.E. 112]. The Court hereby finds that such notice constituted the best notice practicable under the circumstances. Said notice provided due and adequate notice of these proceedings and the matters set forth herein, including the terms of the Agreement, to all persons entitled to such notice, and said notice fully satisfied the requirements of Fed. R. Civ. P. 23, requirements of due process and any other applicable law. The Notice given by Defendant to state and federal officials pursuant to 28 U.S.C. § 1715 fully satisfied the requirements of that statute.

5. The Court finds, for settlement purposes only, that the proposed Settlement Class meets all the applicable requirements of Fed. R. Civ. P. 23, affirms certification of the Settlement Class, and approves the Settlement set forth in the Agreement as being fair, just, reasonable, and adequate.

6. Based upon the Court's familiarity with the claims and parties, the Court finds that Ken Burger, Frederick and Veronica Robertie, John Ross, Chad Sheridan, Robert Hoover and Judy Cohen, Thomas McGovern, Harrison Warren, Michael Narducci, Leanne Claxton, Jeff Ernst, Dorothy Kaiser, John Stidham, Arnold Williams and Cathy Phillips, Charles Denton, Dennis Turcheck, Christine Tuthill, Samir Khanna, Mark Giovanetti, John Shepherd, Donna and Johnathan Mapp, Dean Christofferson, Troy Koster, Steve Brown, Mark Law, John

Kuropatkin, Randy King, Robert Aspinwall, George Johnson, Edgar Rachor, Donald Vinson, Michelle Megerle, Douglas Smieja and Cheryl Johnson, and Joseph Campbell adequately represent the interests of the Settlement Class and hereby appoints them as Class Representatives for the Settlement Class.

7. The Court finds that the following attorneys and firms fairly and adequately represent the interests of the Settlement Class and hereby confirms them as Class Counsel pursuant to Rule 23:

Daniel K. Bryson
Scott Harris
Jeremy Williams
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8. The Court confirms the appointment of Heffler Claims Group, LLC as the Third Party Claims Administrator.

9. The Court finds, upon review of the Settlement and consideration of the nine factors enunciated in *Girsh v. Jepsen*, 521 F.2d 153, 157 (3d Cir. 1975), that the Settlement and the proposed reimbursement program from the Settlement are fair, reasonable, and adequate. Accordingly, the Settlement is finally approved by the Court.

10. The Final Approval Order and Judgment as provided under the Agreement should be entered. Such order and judgment shall be fully binding with respect to all members of the Class and shall have res judicata, collateral estoppel, and all other preclusive effect for all of the Released Claims as set forth in the Agreement.

11. The operative complaint in this action, the Second Amended Omnibus Master Class Action Complaint and Demand for Jury Trial [D.E. 83-1], and all related lawsuits pending in the Court are dismissed with prejudice, and the Released Claims against Defendant are released.

12. Specifically, as set forth in Section 8.1 of the Agreement, the “Released Parties” or “Released Party” means GAF and any and all past, present, and future parent companies, subsidiaries, predecessors, successors, divisions, affiliates, assigns, and their respective past, present, and future officers,

stockholders, directors, agents, employees, attorneys, insurers, or representatives.

“Released Parties” or “Released Party” also includes any and all past, present, and future vendors, distributors, retailers, dealers, contractors, and any other person or entity who sold, distributed and/or installed Decking materials, except to the extent that GAF denies a claim based on a causation defense contained in section 7.7 that was caused by a contractor or other entity, such as improper ventilation or installation, in which case this Release will not apply to the contractor or entity who installed the Claimant’s decking.

13. The “Released Claims” means and includes, in addition to all claims set forth in the Complaint, any and all claims, demands, rights, liabilities, actions, causes of action, proceedings, judgments, liens, obligations, damages, equitable, legal and administrative relief, interest, attorneys’ fees, expenses and costs, disbursements, losses, consequential damages, penalties, punitive damages, exemplary damages, damages based on a multiplication of compensatory damages, damages based on emotional distress and mental anguish, demands, obligations, rights, liens, entitlements, indemnities, and contributions of any kind or nature whatsoever related to Decking or Railways, whether known, unknown or presently unknowable, suspected or unsuspected, latent or patent, accrued or unaccrued, asserted or unasserted, fixed or contingent, liquidated or unliquidated, matured or unmatured, and whether based on federal or state statute, regulation, ordinance,

contract, common law, or any other source that has been, could have been, may be, or could be directly or indirectly alleged, asserted, described, set forth or referred to now, in the past, or in the future by the Settlement Class either in this MDL Litigation, or in any other court action or proceeding, or before any administrative or regulatory body, tribunal or arbitration panel. The “Released Claims” include, without limitation, all causes of action related to the design, specification, manufacture, production, promotion, advertising, sale, representation, distribution, or installation of Decking or Railways, or related to Qualified Damage or Mold Condition, without regard to whether such cause of action is or could be brought pursuant to common law, or any federal or state statute, regulation, or ordinance, including but not limited to federal or state statutes or regulations concerning unfair competition; unfair or deceptive methods of competition; unfair, deceptive, fraudulent, unconscionable, false or misleading conduct, acts, advertising or trade practices; consumer protection; or under the common law of any state as a claim for breach of contract, breach of express and implied warranties, reformation of warranty, breach of fiduciary duty, fraud, intentional misconduct, unjust enrichment, misrepresentation (negligent or otherwise), tort, negligence, breach of constructive trust, breach of the implied covenant of good faith and fair dealing, or any other common law or statutory basis. It is further agreed that the “Released Claims” include, without limitation, any and all claims for Mold Condition or color

fading or color deterioration of Decking or Railways. The Parties understand and agree that GAF's express limited warranties do not cover Mold Condition or color fading or color deterioration of Decking and Railways, and Settlement Class Members release any claim or assertion of such warranty rights. Except notwithstanding the foregoing, Released Claims do not include any claims that a claimant could assert against a contractor or entity for a successful causation defense asserted by GAF, i.e. improper ventilation or installation.

14. Notwithstanding Paragraphs 11 and 12,
 - a. this Release does not release GAF from claims for bodily injury, including claims for pain and suffering, emotional distress, mental anguish, or similar damages suffered as the result of such bodily injury.
 - b. Settlement Class Members will retain their rights, if any, under the terms of the applicable GAF express limited warranty under the following circumstances:
 - i. Settlement Class Members who have a claim for a manufacturing defect other than Qualifying Damage or Mold Condition, but only with respect to boards, handrail, or fascia for which they did not receive compensation under the settlement; or
 - ii. Settlement Class Members who discover Qualifying Damage that did not exist until after the Qualifying Damage Claims Period and who did not receive

compensation for the particular boards, handrail, or fascia at issue under the settlement.

- c. If a Settlement Class Member's Claim is denied, in whole or in part, based on improper installation (including improper ventilation due to improper installation) of the Decking materials, as set forth in section 7.7(b), (d) or (e) of the Agreement, this Release shall not release any person or entity who installed the Decking materials on that Settlement Class Member's property.
- d. For any claims that may be submitted pursuant to a Settlement Class Member's retention of his or her limited warranty rights, the fixed materials rate and the fixed labor rate (as identified in section 7.3 of the Agreement) for the Decking materials will apply under the applicable limited warranty, subject to any proration that may apply pursuant to the terms of the applicable limited warranty.

15. Upon the Court's entry of the Final Order and Judgment, all Settlement Class Members (on behalf of themselves and their agents, heirs, executors and administrators, successors, attorneys, representatives, and assigns), who have not properly and timely opted out of the Agreement pursuant to its terms

shall be conclusively deemed to have waived and released any and all provisions, rights and benefits conferred by § 1542 of the California Civil Code, which reads:

Section 1542. General Release – Claims Extinguished. A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor;

or by any law of any state or territory of the United States or any other jurisdiction or principle of common law, which is similar, comparable or equivalent to § 1542 of the California Civil Code, including, without limitation, Mont. Code Ann. § 28-1-1602, S.D. Codified Laws § 20-7-11, N.D. Cent Code § 9-13-02, and 18 Guam Code Ann. § 82602. Settlement Class Members acknowledge that they may hereafter discover facts or law other than or different from those which they know or believe to be true with respect to the claims which are the subject matter of this section. Nevertheless, it is the intention of each Named Plaintiff and each Settlement Class Member to fully, finally, and forever settle and release any and all known or unknown, suspected or unsuspected, contingent or non-contingent claim that would otherwise fall within the definition of Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts or law.

16. Settlement Class Members requesting exclusion from the Class shall not be entitled to receive any reimbursement as described in the Agreement.

17. Upon the occurrence of the Effective Date, as defined in section 4 of the Agreement, the Parties are ordered to implement each and every obligation set forth in the Agreement in accordance with the Agreement's terms and provisions.

18. The Court has reviewed Plaintiffs' Counsel's submissions in support of their request for attorneys' fees and costs, including their time summaries and hourly rates, and finds that the request for attorneys' fees is reasonable and appropriate and the hourly rates of each firm are likewise reasonable and appropriate in a case of this complexity.

19. Class Counsel is hereby awarded \$ 3,500,000 in attorneys' fees and expenses.

20. Each Class Representative is to receive an incentive award of \$ 4,000 plus an additional \$ 500 for each Class Representative whose Decking Materials were inspected by GAF as part of this litigation.

21. The awarded attorneys' fees and costs, and Class Representative incentive awards are to be paid and distributed in accordance with the Agreement.

22. The Court authorizes Lead Class Counsel to allocate the fee and cost award among Class Counsel.

23. Each and every term and provision of the Agreement shall be deemed incorporated into the Final Approval Order and Judgment as if expressly set forth and shall have the full force and effect of an Order of the Court.

24. The terms of this Final Approval Order and Judgment, and the Agreement are binding on the Plaintiffs and all other Settlement Class Members, as well as their heirs, executors and administrators, successors and assigns.

25. The Parties and their counsel are ordered to implement and to consummate the Agreement according to its terms and provisions.

26. Other than as set forth herein, the parties shall bear their own costs and attorneys' fees.

27. The releases set forth in the Agreement are incorporated by reference. All Settlement Class Members, as of the Court's entry of the Final Approval and Judgment, shall be bound by the releases set forth in the Agreement whether or not they have availed themselves of the benefits of the Settlement.

28. The Parties are authorized, without further approval from the Court, to agree in writing and to adopt such amendments, modifications, and expansions of the Agreement as are consistent with the Final Approval Order and Judgment.

29. No Settlement Class Member, either directly, representatively, or in any other capacity (other than a Settlement Class Member who validly and timely submitted a valid request for exclusion), shall commence, continue, or prosecute any action or proceeding against Defendant or any other Releasee as set forth in the Agreement in any court or tribunal asserting any of the Released Claims, and are hereby permanently enjoined from so proceeding.

30. Without affecting the finality of the Final Approval Order and Judgment, the Court shall retain continuing jurisdiction over the Action, the Parties and the Settlement Class, and the administration, enforcement, and interpretation of the Settlement. Any disputes or controversies arising with respect to the Settlement shall be presented by motion to the Court, provided, however, that nothing in this paragraph shall restrict the ability of the Parties to exercise their rights as described above.

31. Neither the Agreement, nor the fact thereof, nor any of its terms and provisions, nor any of the agreements, negotiations, or proceedings connected with it, nor any of the documents or statements referred to therein shall be:

- a. Offered or received as evidence of or construed as or deemed to be evidence of liability or a presumption, concession or an admission by the Defendant of the truth of any fact alleged or the validity of any claim that has been, could have been or in the future might be asserted in the Action or in any litigation, or otherwise against the Defendant, or of any proposed liability, negligence, fault, wrongdoing or otherwise of the Defendant;
- b. Offered or received as evidence of or construed as or deemed to be evidence of a presumption, concession or an admission of any purported violation of law, breach of duty, liability, default,

wrongdoing, fault, misrepresentation or omission in any statement, document, report, or financial statement heretofore or hereafter issued, filed, approved or made by Defendant or otherwise referred to for any other reason, other than for the purpose of and in such proceeding as may be necessary for construing, terminating or enforcing the Agreement;

- c. Deemed to be or used as an admission of any liability, negligence, fault, or wrongdoing of Defendant in any civil, criminal, or administrative proceeding in any court, administrative agency, or other tribunal;
- d. Construed as a concession or an admission that Class Representatives or the Settlement Class Members have suffered any injury or damage; or, as an admission or concession that the consideration to be given in the Settlement represents the amount which could be or would have been awarded to the Class Representatives or the Settlement Class Members, after trial.

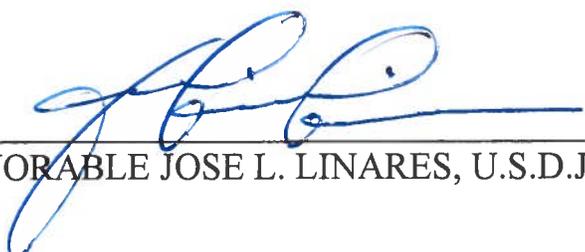
32. In the event that the Settlement does not become effective according to the terms of the Agreement, this Final Order and Judgment shall be rendered null and void, shall be vacated, and all orders entered and releases delivered in

connection herewith shall be null and void to the extent provided by and in accordance with section 16.3 of the Agreement.

33. In the event that the Settlement becomes effective according to the terms of the Agreement, the terms of the Agreement and of this Final Order and Judgment shall be forever binding on the Parties and all Settlement Class Members, as well as on their respective heirs, executors, administrators, predecessors, successors, affiliates and assigns. The opt out(s) identified in Exhibit A to this Order are excluded from the Settlement Class pursuant to request and are not bound by the terms of the Settlement.

34. For the foregoing reasons, the Court **GRANTS** the Parties' Joint Motion for Final Approval [D.E. 124] and Plaintiffs' Motion for Attorneys' Fees and Expenses [D.E. 117]. There being no just reason to delay, the Clerk is directed to enter this Final Approval Order and Judgment forthwith and designate this case as closed. The operative complaint in this action, the Second Amended Omnibus Master Class Action Complaint and Demand for Jury Trial [D.E. 83-1], and all related lawsuits pending in the Court are dismissed with prejudice.

SO ORDERED, this 27th day of FEB, 2017.



HONORABLE JOSE L. LINARES, U.S.D.J.

EXHIBIT A

Opt Out Requests

NAME	ADDRESS
Joyce Wieseler	17861 356 th Ave. Orient, SD 57467