

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 21190

MARK ELLIOTT, TOR AND MICHELLE)
GABRIELSON, MICHIMIRO AND YOKO)
KASHIMA, on behalf of themselves and all)
others similarly situated,)
Plaintiffs)

v.)

KB HOME NORTH CAROLINA, INC. and)
KB HOME RALEIGH-DURHAM, INC.,)
Defendants)

and)

KB HOME RALEIGH-DURHAM, INC.,)
Third-Party Plaintiff)

v.)

STOCK BUILDING SUPPLY, LLC,)
Third-Party Defendant)

**ORDER ON MOTIONS FOR
CLASS CLARIFICATION**

THIS MATTER comes before the Court upon Plaintiffs' Motion Regarding Modification of Class Notice and KB Home Raleigh-Durham Inc.'s Motion for Clarification or Modification of the Existing Class Certification Order or in the Alternative to Vacate That Order and Decertify the Class (collectively referred to as "the Motions"). The Court has considered the Motions, the memoranda filed in support of and opposition to the Motions, and other appropriate matters of record and FINDS and CONCLUDES as follows.

A. Background of Current Motions.

1. On December 5, 2008,¹ Plaintiffs filed a Class Action Complaint (the "Complaint") in this civil action as a putative class action against Defendant KB Home

¹ This action was on June 17, 2010, designated to this Court pursuant to Rules 2.1 and 2.2 of the General Rules of Practice for the Superior and District Courts.

Raleigh-Durham, Inc. ("KB Home") and KB Home North Carolina, Inc. The Complaint alleged that KB Home built Plaintiffs' homes in the "Twin Lakes" housing development in Cary, North Carolina with HardiePlank® siding, but without a "weather resistant barrier" ("WRB") underneath the HardiePlank®. The Complaint did not allege that homeowners outside of Cary had been impacted by Defendants alleged conduct, and Plaintiffs never sought to represent any homeowners in the State of North Carolina outside of these two developments. The Complaint raised claims for breach of contract, breach of express warranty, breach of implied warranty, negligence, negligence *per se*, unfair and deceptive trade practices, and negligent misrepresentation.

2. For a variety of reasons, Plaintiffs did not move to certify a class until March 31, 2011. Despite the fact that the only homes at issue were located in two housing developments in Cary,² Plaintiffs sought to represent a class of "[a]ll persons in the State of North Carolina who own a home that was constructed by Defendant KB Home without a weather-restrictive barrier behind the exterior veneer of HardiePlank cement fiber lap siding." Plaintiffs also did not include in their proposed class definition any date or dates for determination of home ownership for class members.³ On February 27, 2012, the Honorable John R. Jolly, Jr. issued an Order on Class Certification (the "Certification Order") and approved a Notice to be sent to potential class members. The Certification Order effectively adopted verbatim Plaintiff's proposed class definition. The Certification Order did not contain a specific date for setting the members of the class. The Certification Order also did not expressly address whether the class included only the original purchasers of the homes

² In their Memorandum in Support of Motion for Class Certification, Plaintiffs indicated that information from KB Home had revealed that there were 277 impacted homeowners, 275 of whom owned homes in the Twin Lakes development, and 2 of whom owned homes in a housing development named "Wynbrooke." Pls.' Mem. Supp. Mot. Class Certification 5.

³ *See* Mot. Class Certification 1.

from KB Home, or also included individuals who had purchased their homes from the original purchasers. The Certification Order also did not expressly provide that the class would be limited to those owners pursuing any particular claims that were raised by the Complaint. The Certification Order required that the Notice of the class action "be mailed to the Amberlee Homes⁴ and the Twin Lakes Homes by first-class United States Postal Service mail no later than Thursday, March 15, 2012."

3. On March 12, 2012, Judge Jolly issued an Order to Amend Notice of Class Action. The Order made certain minor changes to the Class Notice, but did not change the substance of the Certification Order.

4. On March 15, 2012 ("the Notice Date"), the Notice was mailed to the addresses of all homes in the two subdivisions.⁵ KB Home contends, and Plaintiffs do not dispute, that that 38 of the original 277 individuals who purchased the homes from KB Home ("Original Purchasers") already had sold their homes to subsequent purchasers ("Pre-Notice Subsequent Purchasers") as of the Notice Date.⁶ In other words, as of March 15, 2012, notice was sent to 239 Original Purchasers and 38 Pre-Notice Subsequent Purchasers. No one who was mailed the Notice opted out of the class.

5. KB Home also contends, and Plaintiffs do not dispute, that since the Notice Date at least 79 more of the 239 Original Purchasers in the class have sold their homes ("Post-Notice Sellers") to new purchasers ("Post-Notice Purchasers").

6. As set out more fully in this Court's July 29, 2015 Opinion and Order, KB Home subsequently filed multiple appeals, and this matter was stayed for a lengthy time period. In

⁴ There is no explanation in the record for why Judge Jolly refers to some of the impacted homes being in Amberlee Homes development instead of the Wynbrooke development, but the parties are in agreement as to the homes involved whatever the correct name of the housing development.

⁵ Through subsequent discovery and investigation, the parties believe the number of homes in the potential class to be 277. Accordingly, the Court will use this figure for purposes of this Order.

⁶ KB Home Mem. Supp. Mot. 7.

March and May 2015, the undersigned held status conferences with counsel for the parties in an attempt to determine the procedural and factual posture of this case, including the impact of the passage of seven years since the filing of the Complaint, and over three years since the Certification Order, on the class issues. The Court also requested briefing from the parties on these questions.

7. On June 19, 2015, the parties filed the Motions. In their motion, Plaintiffs contend the existing class definition is "clear and its meaning plain." Plaintiffs' argue that the class includes the individuals who owned the 277 homes to which class Notice was mailed on March 15, 2012.⁷ Plaintiff seek only to have the Court clarify the class definition to state that it includes those "who owned a home *on March 15, 2012*."⁸

8. KB Home seeks "clarification or modification" of the class definition to "make clear that only direct purchasers who still own their homes as of the final judgment are members of the class."⁹ Accordingly, KB Home contends that the class should not include the 38 Pre-Notice Subsequent Purchasers, the 79 Post-Notice Sellers, or any other Original Purchaser who sells their home before a final judgment. Alternatively, KB Home requests "vacatur of the [Certification] Order, because the Order was based on pleadings and briefing explicitly limited to direct purchasers sharing a need for repair of their respective homes."¹⁰

B. Analysis.

9. The undersigned's authority to modify the Certification Order entered by Judge Jolly is limited by North Carolina Rule of Civil Procedure 23. *Dublin v. UCR, Inc.*, 115 N.C. App. 209, 219-20 (1994). Unlike its federal counterpart which "contemplates continuing review of the class certification status of an action," North Carolina's Rule 23 does not permit

⁷ Pls.' Mot. 2.

⁸ *Id.* (emphasis in original).

⁹ KB Home Mot. 1.

¹⁰ *Id.*

continuing review and modification of class certification. *Id.* at 219. "Thus, a tension is created between the trial judge's duty to exercise his or her discretion to see that the trial is conducted as fairly, efficiently and effectively as possible and the prohibition against overruling another judge's prior certification order." *Ruff v. Parex, Inc.*, 1999 NCBC LEXIS 6 at *2-3 (N.C. Sup. Ct. June 17, 1999). Nevertheless, an order granting class certification is interlocutory and "is subject to change at any time to meet the justice and equity of the case" and are "modifiable for changed circumstances." *Dublin*, 115 N.C. App. at 220 (quotations omitted). "[T]he change in circumstances must relate to the legal foundation or basis of the original certification order." *Ruff*, 1999 NCBC LEXIS 6 at *24. In *Ruff*, Judge Tenille of this Court explained the restrictions on the grounds for modifying a prior certification order as follows:

Rule 23 was designed as a tool for discretionary use by trial judges to manage claims efficiently and effectively and that decisions on how best to manage such claims may change as the legal process moves forward. The requirement that there must be a change in circumstances related to the legal foundation of the prior certification order serves to prevent the arbitrary change of class designation without reason or basis.

Id. at **24-25.

10. Accordingly, this Court can modify the Certification Order only if the record demonstrates a change in circumstance since February 27, 2012, that has altered the legal foundation upon which Judge Jolly based his decision to certify the class.

Summary of the Parties' Contentions

11. Plaintiffs contend that the legal foundation of the Certification Order has not changed, and that Judge Jolly's order should not be modified in any way except in order to clarify that only those individuals who owned the homes as of the notice date, March 15, 2012, are included in the class. Plaintiffs argue that class membership is implicitly pegged to the notice date since it was those individuals who received notice and elected not to opt out

of the class.¹¹ Plaintiffs acknowledge that there are 79 Post-Notice Sellers who, because they no longer own the home, no longer have an interest in having a WRB installed. Plaintiffs contend, however, that the Post-Notice Sellers may still have damages in the form of diminished amounts received for their homes when they sold them.¹² Plaintiffs argue that will result only in a difference "in the calculation of their *damages*,"¹³ which can be addressed through a separate damages phase. Plaintiffs do not seek to include in the class any Post-Notice Purchasers. Plaintiffs argue that KB Home's position that the class members should be limited to individuals who own the homes on the date a judgment is entered in this matter would create problems regarding the ascertainability of the class members and class manageability, and raise due process concerns.

12. KB Home contends that the class definition adopted by Judge Jolly was inherently flawed from the beginning because it failed to expressly limit the class to Original Purchasers.¹⁴ KB Home argues that in both the Complaint and in seeking class certification, Plaintiffs alleged that they sought to represent Original Purchasers, and that the allegations in the Complaint were exclusively directed towards harm caused to the Original Purchasers. Plaintiffs alleged and argued that the class members all had an interest in the same remedy: repair of any water damage to their homes and the installation of a WRB beneath the exterior siding. KB Home contends that no one other than Original Purchasers "was the subject of any evidence, argument or briefing" at the class certification stage, and the Certification Order fails to expressly address anyone other than Original Purchasers. Accordingly, KB Home argues that including the 38 Pre-Notice Subsequent Purchasers would not be proper.

¹¹ See Pls.' Mem. Supp. Mot. 3.

¹² *Id.* at 11.

¹³ *Id.*

¹⁴ KB Home Mem. Supp. Mot. 9-15.

13. KB Home also contends that the 79 Post-Notice Sellers cannot be included in the class as currently certified. KB Home argues that

Those who sold their home . . . after certification, are situated quite differently than those who still own their home. First, those owners may or may not have disclosed the absence of a [WRB] or the pendency of this litigation to their [] purchasers. If they did, that disclosure may or may not have had an impact on the sale price, an issue that that can only be determined on an individual basis. Absent an impact, the original homeowner may have no remaining damages of which to complain, particularly if, as is customary, the used home was sold "as is."¹⁵

KB Home contends that the Post-Notice Sellers not only have different damages claims from the Original Purchasers, they must also prove that they suffered damages in order to establish liability under some of the claims raised in the Complaint. KB Home argues that including the Post-Notice Sellers in the class will require mini-trials with regard to each of their individual claims. These subsequent sales, KB Home argues, constitute changed circumstances such that the undersigned can modify, or vacate, the Certification Order. Based on that authority, KB Home contends that the class should be modified to be limited to only those Original Purchasers who still own their homes as of the date a judgment is entered in this case.¹⁶

¹⁵ *Id.* at 8.

¹⁶ KB Home's motion for clarification and supporting brief both include in their titles mention of an alternative request that the Court decertify the class. Neither document, however, contains any express basis for or argument in support of decertification. Nevertheless, as discussed below, the Court concludes that a basis for decertification of the class does not exist at this time. To the extent KB Home's request is based on its request for "vacatur" in its motion, KB Homes alleges that it is entitled to vacatur because the briefing and pleadings underlying the Certification Order were "limited to direct purchasers sharing a need for repair of their respective homes." KB Home Mot. 1. Accordingly, this is not grounded in a "changed circumstance", but is a request for the undersigned to overrule Judge Jolly's Certification Order based on the circumstances that existed at the time that order was entered.

Current Class

14. Preliminarily, the Court must determine the parameters of the class as currently certified and whether any clarification¹⁷ needs to be made to the current definition to more accurately reflect the class certified by Judge Jolly. As noted above, the definition in the Certification Order included "[a]ll persons in the State of North Carolina" who owned a home constructed by KB Home with a WRB. The Certification Order does not expressly state a date on which an individual had to own the home, does not state whether the class is limited to Original Purchasers, does not expressly state whether it includes Pre-Notice Subsequent Purchasers, and does not address how Post-Notice Sellers will be treated.¹⁸

15. As an initial matter, neither party contends that the class includes, or was intended to include, any homeowners other than those in the Twin Lakes and Amberlee subdivisions in Cary, North Carolina. Accordingly, despite its broad wording, the Court concludes that the original class definition was limited to the affected homeowners in the two subdivisions, and did not include anyone outside of those subdivisions.

16. The Court also must determine whether Pre-Notice Subsequent Purchasers were included in the class definition. Plaintiff contends that the class must include those individuals who owned the homes as of the Notice Date, and therefore included both the 239 Original Purchasers and 38 Pre-Notice Subsequent Purchasers. KB Home appears to make two separate arguments regarding the 38 Pre-Notice Subsequent Purchasers. First, under the heading "Material Changed Circumstances Since Class Certification" in their brief, KB

¹⁷ The Court concludes, following a review of the applicable North Carolina case law on issue that is discussed herein, that amendment of a certification order entered by a prior Superior Court Judge in order to clarify the class definition does not require a showing of changed circumstances since it seeks only to have the Court make clear the class that was certified by the prior Judge and does not change the certified class.

¹⁸ Neither party seeks to include in the class the 38 Original Purchasers who sold their homes before the Notice Date. KB Home Mem. Supp. Mot. 19, n. 8.

Home states that the parties only learned of the presence of the Pre-Notice Subsequent Purchases through discovery conducted "since the [] certification order."¹⁹ KB Home seems to argue that the discovery of the 38 Pre-Notice Subsequent Purchasers constitutes a "changed circumstance." KB Home also, however, contends that since the Certification Order did not expressly discuss the Pre-Notice Subsequent Purchasers, the class definition should be deemed to not include them.²⁰ Although the Certification did not expressly discuss Pre-Notice Subsequent Purchasers, KB Home concedes that it raised the possibility that non-Original Purchasers might be the owners of the homes at issue when they briefed the class certification issues before Judge Jolly.²¹ KB Home also expressly raised an objection to the fact that the proposed class definition included non-original, subsequent purchasers.²² Accordingly, the Court concludes that Judge Jolly at least impliedly considered the existence of Pre-Notice Subsequent Purchasers, but nevertheless certified a class of the persons who *owned* the homes, and did not limit the class to original purchasers. The subsequent discovery of the specific number, and even identities, of the Pre-Notice Subsequent Purchasers is not a "change in circumstances [relating] to the legal foundation or basis of the original certification order." *Ruff*, 1999 NCBC LEXIS 6, *24. The Court concludes that the existence of the Pre-Notice Subsequent Purchasers is not a changed circumstance warranting modification of the certified class.

Changed Circumstances

17. As noted above, KB Home also contends that the fact that 79 additional Original Purchasers have sold their homes since the Notice Date, and became Post-Notice

¹⁹ *Id.* at 7.

²⁰ *Id.* at 9.

²¹ *Id.* at 5 (referencing KB Home's Brief in Opposition to Plaintiffs' Motion for Class Certification filed on May 9, 2011).

²² Pls.' Mem. Resp. KB Home Mot. 2-3.

Sellers, constitutes changed circumstances authorizing the undersigned to modify the Certification Order. The Court must examine the impact of these 79 class members changing from Original Purchasers to Post-Notice Sellers and determine whether it alters the legal foundation of the Certification Order.

18. The requirements for maintaining a class action under Rule 23 of the North Carolina Rules of Civil Procedure are well-established. "Under Rule 23, a class exists 'when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members.'" *Beroth Oil Co. v. N.C. Dept. of Transp.*, 367 N.C. 333, 350 (2014). "This first step is known as the 'commonality and typicality' prong of the test . . . [t]he test is whether individual issues will predominate over common ones in terms of being the focus of the litigants' efforts." *Blitz v. Agean, Inc.*, 2013 N.C. App. LEXIS 615 at **6 (N.C. Ct. App. 2013). It is not adequate that a Plaintiff merely identify common contentions that will arise. Instead, "[t]hat common contention . . . must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2551 (2011); *see Blitz*, 2013 N.C. App. LEXIS 615 at **7 ("[A] common question is not enough when the answer may vary with each class member and is determinative of whether the member is properly part of the class." (internal citation omitted)).

19. If the Court is satisfied that a class exists, the party seeking certification also must establish, *inter alia*, that: (1) the named representatives will fairly and adequately represent the interests of all members of the class; (2) there are no conflicts of interest between the named representatives and members of the class; and (3) adequate notice will be given to all members of the class. *Neil v. Kuester Real Estate Servs.*, 2014 NC App. LEXIS

1130 **15-16 (2014).²³ "When all the prerequisites are met, it is left to the trial court's discretion whether a class action is superior to other available methods for the adjudication of the controversy" and "[t]he usefulness of the class action device must be balanced . . . against inefficiency or other drawbacks." *Id.* at **16.

20. Here, the Court must first examine whether there are changed circumstances in this case that have impacted whether a common issue of law or fact predominates over issues affecting only individual members of the class; in other words, whether a Rule 23 class still exists. *Beroth Oil Co.*, 367 N.C. at 350. The Court also must determine whether there are changed circumstance that affected the other prerequisites for maintaining a class action, such as whether the named representatives are still able to adequately represent the interests of all class members or have developed conflicts with class members, and whether the class has received adequate notice. Finally, the Court must consider, in light of any changed circumstances, whether a class action remains a superior method for resolving the claims involved in this action, including whether there now exist inefficiencies or drawbacks to proceeding with a class.

21. KB Home argues that the changed status of the 79 Post-Notice Sellers significantly alters the legal premises on which the class was certified: the ability to make class-wide determinations on the issues of liability and damages.²⁴ KB Home contends that the class was certified on the basis that all class members suffered the same injury and were interested in the same relief, repair of their homes by the installation of a WRB underneath

²³ The Court concludes that the other prerequisites to a class action as provided by the appellate courts either are not applicable to this action or are not impacted by the changed circumstance in this case (i.e., adequacy of representation of out-of-state class members, numerosity, etc.).

²⁴ The record evidence does not disclose whether the 79 Post-Notice Sellers were all Original Purchasers or whether they included Pre-Notice Subsequent Purchasers. If we assume that all 79 Post-Notice Sellers were Original Purchasers, this would mean that the class (as of the date the number Post-Notice Sellers was determined) would include 160 Original Purchasers, 38 Pre-Notice Subsequent Purchasers, and 79 Post-Notice Sellers.

the exterior siding.²⁵ KB Home correctly asserts that the Post-Notice Sellers no longer own the homes and no longer share a common interest with other class members in having WRB installed.²⁶ Instead, whether or not a Post-Notice Seller has suffered any injury at all will require an individualized inquiry into whether or not they sold their homes for full value or, alternatively, had to sell at a discounted price reflecting the lack of the WRB.²⁷ Plaintiffs concede that Post-Notice Sellers have different damages from those who still own their homes, but contend that the Certification Order "already recognized that damages in this case may be individualized" and "certified the class because common issues of liability predominated."²⁸ Plaintiffs have not addressed the impact that the changed nature of these damages have on liability issues.

22. The Court cannot conclude that the potential for Post-Notice Sellers having different damages from other class member is a changed circumstance that alters the legal foundation upon which the class was certified. Such individual differences in damages, by themselves, are not sufficient to defeat class certification where they do not predominate over common questions of law or fact affecting the entire class. *Faulkenberry v. Teachers' and State Employees' Ret. Sys.*, 345 N.C. 683, 698 (1997); *Pitts v. Am. Sec. Ins., Co.*, 144 N.C.App. 1, 12 (2001).

23. The more troubling impact of the changed status of the Post-Notice Sellers is the difficulty it will create in establishing liability under several of the claims alleged in the Complaint. A number of Plaintiffs' claims will require Plaintiffs to prove that they suffered

²⁵ Certification Order ¶ 14 ("KB Home's actions will require Plaintiffs and class members to remedy the defective construction and perform remedial repairs to their homes.").

²⁶ KB Home Mem. Supp. Mot. 7-9.

²⁷ *Id.*

²⁸ Pls.' Mem. Supp. Mot. 11 ("Plaintiffs recognize that [Post-Notice Sellers] have *damages* that differ from the class members who are still owners as the sellers' damages rest on a diminution-in-value theory, while the present owners' damages rest on a cost-of-repair theory.") (emphasis in original).

an injury as a result of KB Home's conduct in order to establish liability.²⁹ Whether the Post-Notice Sellers were injured will be dependent on the fact-specific circumstances surrounding the sale of their homes. In addition, it seems highly likely that the number of Post-Notice Sellers in the class will grow significantly between the date of this Order and the date of a final judgment in this case.³⁰ This creates, at the very minimum, a number of individual issues that will need to be resolved to establish liability on certain claims. The Court concludes that the change in status of the 79 Post-Notice Sellers in the class, to the extent it requires them to individually establish injury in order to prevail on certain claims, is a changed circumstance. The question that must be answered, of course, is whether there has been "a change in circumstances related to the legal foundation of the prior certification order" that would warrant modification of the Certification Order. *Ruff*, 1999 NCBC LEXIS 6, at *32.

24. The foundation of Judge Jolly's conclusion that Plaintiffs had established that a class existed is found in paragraph 21 of the Certification Order.

In the instant action, the Claims of every member of the proposed class arise from the same common nucleus of operative alleged facts (i.e., KB Home constructed each class member's home without a weather-restrictive barrier). Similarly, each and every class member has an interest in the same overarching question of law (i.e., whether KB Home violated applicable North Carolina Building Codes and applicable manufacturer's recommendations by failing to install a weather-restrictive barrier behind the exterior veneer of the HardiPlank).

²⁹ See, e.g., *Brinkman v. Barrett Kays & Assocs., P.A.*, 155 N.C. App. 738, 742 (2003) (recognizing that negligent misrepresentation arises when "(1) a party justifiably relies, (2) *to his detriment*, (3) on information prepared without reasonable care, (4) by one who owed the relying party a duty of care.") (emphasis added); *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 664 (1995) ("To establish a prima facie claim for unfair trade practices, the plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce . . . , and (3) the act proximately caused injury to the plaintiff.").

³⁰ Although the exact date upon which the parties concluded that there are 79 Post-Notice Sellers is not in the record, if one assumes that these sales occurred over the approximately three years from the Notice Date to the date of the hearing before this Court on March 6, 2015, this would be an average of approximately 26 sellers per year among the class members.

Judge Jolly found that the answer to the question of whether KB Home's conduct violated the building code "will be critical to determining KB Home's liability for *all* of the class members and their Claims" and that this issue "provide[s] the basis for this action and predominate over any issue affecting only individual class members."³¹

25. The changed circumstances present in this case have not impacted the foundation of Judge Jolly's conclusion that there is a common question of law – whether the failure to install a WRB violated the then-existing building code or other duty owed by KB Home – that binds all of the class members together. Liability for each of the Plaintiffs' claims is premised on the answer to this common question of law, and the answer will not "vary with each class member" and will not be "determinative of whether the member is properly part of the class." *Blitz*, 2013 N.C. App. 615 at **7. If KB Home violated the applicable building code, then it is potentially liable to each class member under one or more claims for some type of injury. If it did not, Plaintiff are unlikely to be able to prove liability on any of the claims. Accordingly, the answer to this question remains the single most important issue in this lawsuit affecting the class members and the changed status of the 79 Post-Notice Sellers does not change the legal foundation of Judge Jolly's conclusion.

26. More importantly, this question of law common to all class members predominates over other issues of fact or law in this case because its resolution "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2550-51. "What matters to class certification . . . is not the raising of common 'questions' -- even in droves -- but, rather the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. *Id.* Here, the

³¹ Cert. Order ¶ 22 (emphasis in original).

answer to the question of whether the failure to install a WRB violated the then-existing building code will "drive the resolution" of Plaintiffs' claims.

27. Deciding whether a common question predominates over individual questions "requires a qualitative assessment," and not simply a determination of whether there are more common questions or individual questions. *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013). A question "central to the validity of each one of the claims in a class action . . . can justify class treatment." *Id.* In *Butler*, the Seventh Circuit Court of Appeals considered its previous approval of the certification of two classes of Sears' customers who had purchased allegedly defective washing machines from Sears. The Seventh Circuit held that the two classes had properly been certified even though class members would have different damages from one another and there might be class members who suffered no injury at all because "[t]here is a single, central, common issue of liability: whether the Sears washing machine was defective" that was essential to the determination of liability and predominated over individual issues in the case. *Id.* at 801-02. Similarly, the Court concludes that despite the changed circumstance, the issue of whether KB Home violated the building code by failing to install the WRB still predominates over individual issues in this action.

28. The Court, however, concludes that the changed circumstances require modification of the class definition to include a subclass consisting solely of Post-Notice Sellers.³² While the changed circumstances do not necessarily create conflicts between the named Plaintiffs and Post-Notice Sellers, the changed circumstances impact the legal foundation upon which Judge Jolly concluded that the named Plaintiffs were adequate representatives for all members of the class. The originally certified class was composed of only individuals who currently owned the homes at issue (Original Purchasers and Pre-

³² Plaintiffs have proposed the creation of such a subclass. Pls.' Mem. Resp. KB Home Mot. 13-14.

Notice Subsequent Purchasers). Those individuals were aligned in the injury they had suffered and in their interest in having their homes repaired through installation of a WRB. Plaintiffs concede that the Post-Notice Sellers no longer have an interest in repairs, and will seek damages different from those who still own their homes. In addition, as noted above, there are at least some claims on which the Post-Notice Sellers will have to establish individual damages arising from the sales of their homes that will require different proof than the proof required by current owners.

29. The changed circumstances which give rise to this Court's decision to modify the class definition to include a subclass also impact the legal foundation for Judge Jolly's conclusion that the named Plaintiffs would adequately represent the absent class members.³³ In order make sure that the members of the subclass are adequately represented, the Plaintiffs will be required to add a Post-Notice Seller as a named Plaintiff to represent the interests of the Post-Notice Sellers subclass.³⁴

30. The changed circumstances do not impact the adequacy of notice provided to the class. The class consists solely of those individuals who received the original Notice. Plaintiffs do not seek to represent those individuals who purchased homes from the Post-Notice Sellers, and no additional notice to individuals regarding the right to assert a claim or participate in the class action need be made

31. Finally, in light of the changed circumstances, the Court must decide in its "discretion whether a class action is superior to other available methods for the adjudication of the controversy" and "[t]he usefulness of the class action device must be balanced, [], against inefficiency or other drawbacks." *Neil v. Kuester Real Estate Servs.*, 2014 NC App. LEXIS 1130 **16. Clearly, the changed status of the Post-Notice Sellers has created

³³ Cert. Order ¶¶ 24-29.

³⁴ Plaintiffs have volunteered to do so. Pls.' Mem. Resp. KB Home Mot. 14, n.6.

additional individualized questions, both with regard to liability for certain claims and damages, which make a class action a less efficient means for resolving all of the claims and all of the issues raised in this action. Nevertheless, the central issue that will drive answers to the liability and damages questions for Original Purchasers, Pre-Notice Subsequent Purchasers, and Post-Notice Sellers is whether or not KB Home was required to install a WRB on the homes at issues. Determination of that question will efficiently, and in one stroke, create a much smaller and easier set of questions to be answered regarding the claims of all class members. Even if the answer to the question requires some additional individualized inquiries to reach a final judgment, the class action vehicle remains a more efficient method for resolving the claims of the class members than would potentially 277 or more separate lawsuits and trials. As noted above, the Court retains the authority to make further necessary rulings in order to efficiently conclude this matter if necessary, and in its discretion concludes that this matter is still best pursued as a class action.

32. The Court also has taken into consideration (a) the long period of time that this case has been pending, (b) the fact that class members, and particularly those who still own the homes, have a strong interest in having their homes repaired, (c) that the parties have already conducted extensive investigation and discovery, and (d) that decertification or significant modification of the class at this point in time could lead to confusion among class members and potential loss of rights. *Ruff*, 1999 NCBC LEXIS 6, *9-11. Accordingly, the Court concludes in its discretion that a class action remains the most efficient means of resolving the claims in this case.

NOW THEREFORE, based upon the foregoing, it hereby is ORDERED that:

33. Plaintiffs' Motion Regarding Modification of Class Notice is GRANTED in part, and DENIED in part.

34. KB Home Raleigh-Durham Inc.'s Motion for Clarification or Modification of the Existing Class Certification Order or in the Alternative to Vacate That Order and Decertify the Class is GRANTED in part, and DENIED in part.

35. The class shall be definition shall be clarified to define the class as follows:

All persons in the State of North Carolina who owned a home on March 15, 2012, in the Twin Lakes Homes or Amberlee Homes developments in Cary, North Carolina constructed by Defendant KB Home without a weather-restrictive barrier behind the exterior veneer of HardiePlank cement fiber lap siding. Excluded from the Class are: (a) any judge or magistrate presiding over this action and members of their families; (b) any Defendant and/or Third-Party Defendant and any entity in which any Defendant and/or Third-Party Defendant have a controlling interest or which has a controlling interest in any Defendant and/or Third-Party Defendant and its legal representatives, assigns and successors of any Defendant and/or Third-Party Defendant; and (c) all persons who properly execute and file a timely request for exclusion from the Class.

36. The class shall be modified to include the following subclass of Post-Notice Sellers defined as follows:

All persons in the State of North Carolina who owned a home on March 15, 2012, in the Twin Lakes Homes or Amberlee Homes developments in Cary, North Carolina constructed by Defendant KB Home without a weather-restrictive barrier behind the exterior veneer of HardiePlank cement fiber lap siding but who sold the home after March 15, 2012. Excluded from the Class are: (a) any judge or magistrate presiding over this action and members of their families; (b) any Defendant and/or Third-Party Defendant and any entity in which any Defendant and/or Third-Party Defendant have a controlling interest or which has a controlling interest in any Defendant and/or Third-Party Defendant and its legal representatives, assigns and successors of any Defendant and/or Third-Party Defendant; and (c) all persons who properly execute and file a timely request for exclusion from the Class.

37. Plaintiffs are ORDERED to file with the Court an amendment to the Complaint to add as a named Plaintiff a Post-Notice Seller to represent the interests of the Post-Notice Sellers subclass.

38. All other relief requested in Plaintiffs' Motion Regarding Modification of Class Notice and KB Home Raleigh-Durham Inc.'s Motion for Clarification or Modification of the

Existing Class Certification Order or in the Alternative to Vacate That Order and Decertify the Class is DENIED.

This the 25th day of September, 2015.

/s/ Gregory P. McGuire
Gregory P. McGuire
Special Superior Court Judge
for Complex Business Cases