UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE KITEC PLUMBING SYSTEM PRODUCTS LIABILITY LITIGATION	)))))))	Case No. 09-md-2098

NOTICE OF OBJECTION OF CLASS MEMBER JEFF PALMER AND NOTICE OF INTENT TO APPEAR

COMES NOW, JEFF PALMER ("Objector"), Class Member to this action, by and through his undersigned counsel, and hereby files these Objections to the Proposed Class Action Settlement, gives notice of his counsel's intent to appear at the November 17, 2011, 2010, settlement hearing, and requests award of an incentive fee for serving as unnamed class member objector. Objector's address and class member status is reflected in his Declaration filed concurrently herewith, together with his signature, as directed in the Class Notice.

Objector raises the following issues with respect to the Proposed Settlement:

1. There is no information given to the class (or apparently the Court), about the value of the settlement, thereby precluding an honest assessment of the fairness to the class under Rule 23.

2. There is no information given to the class (or the Court), about the request for attorneys' fees in the amount of $25 million, precluding a true assessment of the reasonableness of the request.

3. There are persistent predominance and adequacy questions similar to those raised in *Amchem Products*, which may preclude certification, even for settlement purposes.

4. There is no information given as to the eight-year claims period, when the claims released must have occurred presently. This raises fairness questions.

5. The Claim Form is too long, confusing, demanding, and invasive.

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I.

NO INFORMATION IS PROVIDED ABOUT THE ESTIMATE OF THE HARM SUFFERED BY THE CLASS, PRECLUDING A FINDING OF REASONABLENESS

Rule 23 provides that a class action settlement must be "fair, adequate, and reasonable." While Defendants are theoretically parting with $125 million (with reversion rights), there is no information as to why $100 million is an adequate settlement fund for the class. Is the perceived harm greater than that, and if so, by how much? Absent this information, it seems premature to determine whether this figure is reasonable. This objector believes that information as to average amounts of claims, and projected claims rates (usually less than 10% of the entire class), together with a projected total exposure amount, are essential to a court's obligation in weighing the fairness of a settlement.

II.

THE REQUESTED ATTORNEYS' FEE MUST BE SUPPORTED WITH APPROPRIATE DOCUMENTATION

Class Counsel requests $25 million in fees, with no fee application filed with the Court. This blanket, unsupported request requires scrutiny by the Court, and the Class, as only reasonable fees are awardable under Rule 23: "In a class action settlement, the district court has an *independent duty* under Federal Rule of Civil Procedure 23 to the class and the public to ensure that attorneys' fees are reasonable and divided up fairly among plaintiffs' counsel." *In re High Sulfur Content Gasoline Products Liability Litigation,* 517 F.3d 220, 227 (5th Cir. 2008)(emphasis added). *See also, Strong v BellSouth Telecommunications, Inc.*, 137 F.3d 844, 849 (5th Cir. 1998): "To fully discharge its duty to review and approve class action settlement agreements, a district court must assess the reasonableness of the attorneys' fees."

The Fifth Circuit holds that "a district court is not bound by an agreement of the parties with regard to fees. . . . The court must scrutinize the agreed-to fees . . . and not merely ratify a pre-arranged compact." *Strong, supra,* at 849. Further, the blanket 25% request does not comport with Fifth Circuit jurisprudence using only lodestar calculations for

class actions: "This circuit uses the 'lodestar method' to calculate fees [and then applies the *Johnson v. Georgia* factors to justify them]." *Longden v. Sunderman,* 979 F.2d 1095, 1099 (5th Cir. 1992); *Strong, supra,* applying lodestar method. In fact, the court in *High Sulfur, supra,* affirmed that a court must use the lodestar method in class action cases: "This circuit requires district courts to use the 'lodestar method' to 'assess attorneys' fees in class action suits." 517 F.3d at 228.

Accordingly, Class Counsel's blanket request for $25 million cannot be approved by the Court before submission of time records for a lodestar analysis, as required by this Circuit. These records must be submitted for class, as well as Court, scrutiny:

> [The court] failed to fulfill its further duty to monitor legal fees by its perfunctory approval of the allocation determined by the Fee Committee. . . . The court made matters worse when it sealed the exhibit listing the individual fees and the record entries pertaining to fees and placed a gag order on the plaintiffs' attorneys. These actions not only kept the public in the dark about each plaintiffs' attorney's award but also prevented counsel from communicating with each other and with their own clients on the subject. The lack of transparency about the individual fee awards supports a perception that many of these attorneys were more interested in accommodating themselves than the people they represent. . . . The record lacks the attorneys' time and expense statements, letters, comments, hourly billing rates, and other materials allegedly submitted by the Fee Committee to the district court on or before the ex parte hearing on January 22, 2007. . . . Nor does the record contain a breakdown of the hours and rates claimed by each attorney or their respective lodestars.

High Sulfur, 517 F.3d at 229-30. This authority is clear: Class Counsel's fee request must be supported by their time records for perusal by the class, and the Court. This has not been done. The class must be given an opportunity to analyze the fee request after submission, and submit objections thereto if appropriate.

Accordingly, any approval of the fee request of $25 million is patently premature, and approval would be an abuse of discretion as the court determined in *High Sulfur.*

III.

THE NATURE OF THE HARM INDICATES THAT PREDOMINANCE IS LACKING, PRECLUDING CERTIFICATION

The nature of the harm indicates that there may be consumer fraud, warranty, breach of contract, and other individualized issues at stake in this litigation. Consumer protection

laws in the 50 states vary considerably, to say nothing of how Canadian law treats these issues. While these important differences do not always defeat class treatment of the litigation, it is the duty of the district court to inquire into whether it may be more appropriate to create subclasses based upon the varying remedies. While it may add time to the analysis, it ensures the fairness required under Rule 23.

a. Adequacy Issues

Under Rule 23(a), Class Counsel must show both that the interests of the representative party do not conflict with the interests of any of the absent class members and that class counsel is adequate. Rule 23(b) requires class claims to predominate over individual issues. The proposed settlement suffers the fatal flaw of potentially lacking under both of these requirements.

The remedy provided in this lawsuit, reimbursement of repair costs of defective plumbing, fails to differentiate between the remedies available to residents of the various states. This places class representatives at odds with other unnamed class members from different states that have more desirable consumer protection laws. This also compromises the adequacy of class counsel as a result of a possible conflict; representing named plaintiffs from one state at the potential expense of absent class members from different states (and countries).

Rule 23(a) operates to ensure that the lead plaintiffs are appropriate representatives for the individuals on whose behalf they litigate. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011). The requirements of Rule 23(a) "limit the class claims to those fairly encompassed by the named plaintiff's claims." *Id.*, citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982) (quoting *General Telephone Co. of Northwest v. EEOC*, 446 U.S. 318, 330 (1980)).

The conflicting consumer state statutes have the effect of making lead plaintiffs' claims and available remedies different from the absent class members they represent. This, by definition, makes lead plaintiffs inadequate to represent absent class members from

different states. Similarly, class counsel faces the very real conflict of being unable to adequately represent these same absent class members because the interests of the named plaintiffs are divergent from the rest of the class. See, Model Rules of Professional Conduct 1.8(g).

The differences can be highlighted most vividly in comparing a Montana resident to a New Mexico resident: in New Mexico, an aggrieved consumer is entitled to the greater of actual damages or $100, whichever is greater (N.M. Stat. Ann. §57-12-10(B)), while in Montana, a consumer can recover the greater of actual damages or $500 (Mont. Code Ann. §30-14-133W). (Doc. 98 at 3) This makes a claim in Montana five times more valuable than a claim in New Mexico and more valuable still than in a state with no enhanced damages for consumer injury. This disparity undermines, and perhaps defeats, adequacy, as well as predominance, under Rule 23.

In *Ortiz v. Fibreboard Corp.* 527 U.S. 815 (1999), the Supreme Court noted that one factor counseling against certification of the settlement class was the fact that certain claimants "had more valuable claims . . . the consequence being an . . . instance of disparate interests. *Id.* at 857. The Court therefore held that when class members have claims of varying strength or merit, it is an *abuse of discretion* to approve a settlement that treats them all the same." *Id.* The Montana resident described above has a more valuable claim than the New Mexico resident, giving them disparate interests. To treat them the same constitutes an abuse of discretion.

b. Predominance Issues.

Predominance tests whether a proposed class is sufficiently cohesive to support class treatment. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

Differences in the applicable state laws in this case go to the heart of the Class members' substantive claims and potential recoveries and, thus, undermine the cohesiveness of the class. The predominance inquiry "may not be watered down merely because the parties have entered a proposed settlement." *In re Grand Theft Auto Video Game Consumer*

Litigation 251 F.R.D. 139, 159-160 (S.D.N.Y. 2008), citing *Amchem Products,* 521 U.S. at 620; *Denney v. DeutscheBank AG* (2d Cir. 2006) 443 F.3d 253, 270; *In re Warfarin [Sodium Antitrust Litigation]* (3d Cir. 2004) 391 F.3d 516, 529-30.

The district court therefore has the responsibility to inquire into whether these consumer state issues would unfairly affect any class members. *Ficalora v. Lockheed California Co.,* 751 F.2d 995 (9th Cir. 1985). It may not be the province of a district court to summarily disregard the considered judgment of other states' legislature's judgments regarding the protection of its citizens: "State consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state's laws to sales in other states with different rules." *In re Bridgestone/Firestone Inc. Tires Prod. Liab. Litig.* 288 F.3d 1012, 1017 (7th Cir. 2002). Appellants maintain that it is an abuse of discretion to fail to create subclasses addressing each state's parameters regarding damages for consumer fraud , giving due respect to each state's laws: "Here, as in *Amchem,* legislative choices – even choices not to act – must be respected: 'Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court.' *In re Bridgestone/ Firestone, Inc.,* 288 F.3d 1012, 1020 (7th Cir. 2002)." *In re Relafen Antitrust Litig.,* 225 F.R.D. 14, 25, 346 F.Supp.2d 349 (D.Mass. 2004).

A settlement with subclasses is more closely aligned with the holding in *Phillips Petroleum v. Shutts,* 472 U.S. 797 (1985), in which the Supreme Court rejected the blanket application of the forum state's law when other state laws conflicted with it. The Court quoted the Supreme Court of Kansas' opinion, before discounting it:

> "The general rule is that the law of the forum applies unless it is expressly shown that a different law governs, and in case of doubt, the law of the forum is preferred. . . . Where a state court determines it has jurisdiction over a nationwide class action and procedural due process guarantees of notice and adequate representation are present, we believe the law of the forum should be applied unless compelling reasons exist for applying a different law. . . . Compelling reasons do not exist to require this court to look to other state laws to determine the rights of the parties involved in this lawsuit." 235 Kan. At 221-22. We think that this is something of a "bootstrap" argument. . . .

> Whatever practical reasons may have commended this rule to the Supreme Court of Kansas, . . . we do not believe that it is consistent with the decisions of this Court. . . . We therefore . . . reverse its judgment insofar as it held that Kansas law was applicable to all of the transactions which it sought to adjudicate.

472 U.S. at 821-23. Overall fairness is not a reason to approve a settlement:

> If a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b)(3), that vital prescription would be stripped of any meaning in the settlement context. . . . Even if Rule 23(a)'s commonality requirement may be satisfied by that shared experience [of asbestos exposure], the predominance criterion is far more demanding. . . . Differences in state law, the Court of Appeals observed, compound these disparities.

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623-24 (1997). The Supreme Court then cited a Second Circuit case, approving the creation of subclasses to satisfy the predominance inquiry:

> "Where differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups. The class representatives may well have through that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consent given by those who understand that their role is to represent solely the members of their respective subgroups." *In re Joint Eastern and Southern Dist. Asbestos Litigation,* 982 F.2d 721, 742-43 (1992).

Amchem, 521 U.S. at 627. As in *Amchem,* the class members in this case have widely-divergent claims; some know they have a system-wide problem spread throughout a hospital, while others may suffer harm in the future. The potential-damage members have a different interest than the present-damage members, which defeated predominance, and certification, in *Amchem.* These similarities should cause the Court to reconsider whether certification, even for settlement purposes, is truly appropriate.

IV.

THERE IS NO INFORMATION PROVIDED AS TO WHY THERE IS AN EIGHT YEAR CLAIMS PERIOD

The settlement provides for a generous eight year claims period. The claim, however, apparently must exist today. Why, then, is there an eight-year claims period? Does the

settlement cover claims which will arise during the next eight years? The settlement does not indicate that it does. This inherent ambiguity requires more explanation to the class, and to the Court.

V.

THE CLAIM FORM IS TOO INVASIVE, DEMANDING, AND CONFUSING

The Claim Form is 12 pages long. The last page, with a bar code, is "intentionally left blank." The instructions state that "all questions *must* be answered." (Emphasis in original.) This is a bit intimidating. The claim requests "all" cancelled checks. It requests that the claimant send in a piece of pipe. This is despite the fact, however, that the claimant may not have kept defective pipe if it has already been repaired, or the claimant may not have suffered damage yet, and does not wish to start dismantling his pipes.

Tax information should not be required for those who have already suffered the cost of a repair and are simply requesting reimbursement; it is not a taxable event. Accordingly, requesting people's social security numbers is overly broad and intrusive. It also seems overly intrusive and unnecessary to submit proof of ownership, requiring property tax documents. Simply proof of having the Kitec product in one's home or building should be sufficient; a photograph and other verifying evidence would seem more reasonable than providing personal tax documents. Further, this other verifying evidence is requested on the next page.

In fact, proving one's claim appears tantamount to proving a "federal case," one needs the following to submit a valid claim: social security number, when the property was acquired, by whom, who bought the property, who owns it now, provide a copy of the condominium agreement, proof of ownership such as property tax statement, plumbers reports, manufacturer warranties, installation date of the system, type of installation, amount of pipe installed, problems and types of damage, repair and replacement history, and names of contractors and plumbers. Additionally, the claimant must produce a plumbing sample. A

residential consumer will likely not have all of this information (or product). It is simply asking too much. There must be a simpler way of verifying who needs what repairs.

Further, the settlement does not address how the claimants who allegedly may suffer future plumbing failures are to be compensated, if at all. This class of claimants must be addressed in the settlement; this hearkens back to the predominance and adequacy issues raised above, and calls into question the true fairness of the settlement.

It begs the question: if Kitec is really going to pay everyone the cost of repair or reimbursement, then what is the need for the settlement at all? If there is a problem with the plumbing, Kitec can set up an in-house claims department to handle repair and replacement issues. This eliminates the need for these global releases, which in fact do not even eliminate the possibility of future suits, as there are provisions regarding collateral suits for indemnity and other related matters. It appears this settlement does not resolve much of anything at all, and places a huge onus on the claimant, while exacting a very broad release for defendants.

WHEREFORE, This Objector respectfully requests that this Court:

A. Upon proper hearing, sustain these Objections;

B. Upon proper hearing, enter such Orders as are necessary and just to adjudicate these Objections and to alleviate the inherent unfairness, inadequacies and unreasonableness of the proposed settlement.

C. Continue the Fairness Hearing until such time that this Objector has had an opportunity to review Class Counsel's Fee Application and for an opportunity to submit limited Discovery regarding said Fee Application.

D. Award an incentive fee to this Objector for its service as a named representative of Class Members in this litigation.

DATED: September 30, 2011

By: /s/ Christopher A. Bandas
Christopher A. Bandas

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By: _/s/ Joseph D. Palmer_____
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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2011, I electronically filed the foregoing with the Clerk of the Court of the United States District Court for the Northern District of Texas Dallas Division by using the USDC CM/ECF system.

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

___/s/ Christopher A. Bandas____

IN RE KITEC PLUMBING SYSTEM PRODUCTS

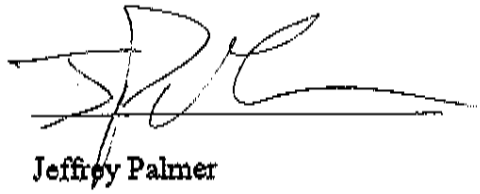
LIABILITY LITIGATION

Case No. 09-md-2098

DECLARATION OF CLASS MEMBERSHIP

I, Jeffrey Palmer, own and reside at 700 W. Walnut Street, Nocona, TX 76255. My telephone number is available through my attorney of record. The Kitec system is installed in my home, a single family residence.

September 30, 2011



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