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SUPERIOR COURT OF CALIFORNIA

CITY AND COUNTY OF PLACER

TIM MCADAMS, on behalf of himself, all others similarly situated, and as private attorney general, Plaintiff, v. MONIER LIFETILE LLC, a California limited liability company, MONIER-RAYMOND COMPANY, MONIER ROOF TILE, INC., a California corporation, MONIER COMPANY, MONIER, INC., a California corporation, and DOES 1 through 50, Defendants.	Case No. SCV 16410 **NOTICE OF MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL** Date: November 13, 2020 Time: 8:30 a.m. Dept.: 3 Judge: Hon. Michael W. Jones Complaint Filed: November 14, 2003

TO DEFENDANT AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 13, 2020 at 8:30 a.m. in Dept. 3 of this Honorable Court located at 101 Maple Street, Auburn, California, before the Honorable Michael W. Jones, Plaintiff, on behalf of himself and the Classes, will move this Court for an order (1) preliminarily approving the proposed settlement; (2) approving the proposed notice and authorizing its dissemination to the Class; and (3) setting a schedule for the final approval process including Class Counsel's motion for approval of attorneys' fees and expenses.

Plaintiff brings this motion pursuant to California Rule of Court 3.769 and the authorities set forth in the accompanying brief. This motion is based on this Notice of Motion and the following Memorandum of Points and Authorities; the Settlement Agreement and Release; the accompanying Declaration of Jeffrey Cereghino; the [Proposed] Order; the records and file in this action;; and on such other matters as may be presented before or at the hearing of the motion.

Dated: November 9, 2020

CEREGHINO LAW GROUP

Jeffrey B. Cereghino
Attorneys for Tim McAdams
and the Plaintiff Classes

MEMORANDUM OF POINTS AND AUTHORITIES

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I. INTRODUCTION[1]

This case was filed in late 2003. After eighteen years of litigation, a three-month trial, three appeals, ten mediations, more than 125 depositions, and more motions than we can remember, this case has reached a settlement.

Judge Edward Infante (Ret.) of JAMS mediated a resolution on October 22, 2020. The Parties agreed to settle the Class's claims for **$22,000,000** (the "Settlement Fund"), and administrative costs, attorneys' fees, costs and expenses, and the class representative service award for $22,710,000 (the "Fees and Administrative Costs Fund"), all of which is subject to this Court's approval.[2] This settlement arose in large part because of the Parties' continued disputes over the claims process, the Court's rulings related to the claims process (and anticipated appeals thereof), and disputes over the implementation of the Court of Appeal's directives. Declaration of Jeffrey B. Cereghino ("Cereghino Decl."), ¶ 4. The settlement agreement is attached as Exhibit 1 to the Declaration of Jeffrey Cereghino in Support of Motion for Preliminary Approval.

The Settlement Fund is to be allocated **100% to the benefit of the Classes**. It will be placed in an escrow account. The Parties shall designate an Escrow Agent who will deposit the Settlement Fund into a secure bank account ("Settlement Fund Escrow Account").

No sums allocated for Class Members' benefit will be used for Class Counsel's fees, additional claims administrative costs, class notice costs, future Referee fees, or the class representative service award. These will all be paid separately from the Fees and Administrative Costs Fund.

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[1] The arguments contained in this brief are made for settlement purposes only. Defendants have informed Plaintiff that although Defendants support preliminary approval and have reviewed this brief as to form, they reserve their right to contest any representations made by Plaintiff herein as it relates to the merits of the lawsuit, the propriety of class certification or the claims process, characterizations of the litigation to date, and any assessments or projections of the strengths or weakness of any contention on appeal.

[2] Capitalized terms not defined herein have the meanings provided them in the Parties' Settlement Agreement.

The claims period, which is the period of time for Claimants to submit their claims, closed on March 16, 2020. At this time, all claims have been submitted, and only those individuals who submitted claims will receive class notice.

Class Members whose claims are approved will receive a distribution from the Settlement Fund either following Final Approval and Judgment or after the Effective Date, as defined in the Settlement Agreement. The parties have already conducted extensive review of all Class Member claims, and Class Counsel will finalize that review and make final determinations of eligibility, subject to review by the Referee. Claimants whose claims are denied can appeal to the Referee, whose decision will be final.

Class Counsel anticipates that each approved Claimant will receive $3,705 if they own a residence, and $400 per 30 roofing squares if they own a commercial building. However, it is possible that each Class Member compensation may be reduced or increased on a pro-rata basis to ensure each Class Member receives equal payment or to fully exhaust the Settlement Fund. Cereghino Decl. ¶ 6.

Class Counsel has evaluated the benefits and risks of continuing the litigation. Because of Class Counsel's *Bleak House* history with this case, it is an understatement that Class Counsel know the risks of litigation and are unafraid of the additional effort, time, or expense in continuing to litigate this case. What does support the fairness and reasonableness of this settlement is the clear intent of Monier to appeal all the claims, the time it takes for an appeal to be completed, the appellate risks, and most importantly that making Class Members wait until perhaps 2023 to get compensated, after already waiting 17 years, is just too much for the Class Members to bear. It is time to resolve this case. And the proposed settlement will achieve a goal started in 2003 to compensate Class Members for their damages. Class Counsel firmly believe that this settlement is fair, adequate, and reasonable. It is clearly the product of an arms-length mediation conducted by an experienced and highly respected mediator. We request the Court enter preliminary approval of the Settlement Agreement, approve Class Notice, and set dates for the final approval hearing and related dates.

II. CASE HISTORY

Plaintiff Tim McAdams, on behalf of himself and all others similarly situated, alleged that Defendants Monier, Inc., Monier Lifetile LLC, Monier-Raymond Company, Monier Roof Tile, Inc., and Monier Company ("Monier"), on their own and through unwitting intermediaries in the housing sale and construction industries who parroted Monier statements or information, misrepresented that Monier's slurry-coated concrete roof tiles would last 50 years, have a permanent color, and be maintenance free. In fact, Monier knew, but failed to disclose, that the color composition of the roofs would erode away well before the end of the represented life span. *McAdams v. Monier, Inc*. ("*Monier III"*), No. C073435, 2015 WL 5968461, at *1-2 (Cal. Ct. App. Oct. 14, 2015) attached hereto as Exhibit A. In response to Plaintiff's allegations, Monier has denied any wrongdoing and has denied that it made any misrepresentation or failed to disclose any information

After extensive discovery, including more than fifty depositions in 2005, Plaintiff moved for class certification. Judge Lawrence Gaddis denied the motion, but the Court of Appeal reversed. Monier sought Supreme Court review. The Supreme Court granted review and held the case until it decided *In re Tobacco II Cases* (2009) 46 Cal. 4th 298. *McAdams v. Monier, Inc.* ("*Monier I*"), 60 Cal. Rptr. 3d 111 (Ct. App.), *as modified on denial of reh'g* (June 25, 2007), *review granted and opinion superseded sub nom., McAdams v. Monier*, 168 P.3d 869 (Cal. 2007). On remand after the Supreme Court's *In re Tobacco II* decision, the Court of Appeal reiterated that class treatment of the case is appropriate, concluding, "[t]he focus of the CLRA and the UCL class actions is on an alleged single, specific material misrepresentation involving a failure to disclose the particular fact of premature color erosion to bare concrete." *McAdams v. Monier, Inc* ("*McAdams II*"), 182 Cal. App. 4th 174, 192 (2010).

This case went to trial in October 2012, after nine years of litigation had already taken place. The trial lasted 31 days. *Monier III*, 2015 WL 5968461, at *4.

The jury found that Monier was liable and awarded Plaintiff and the Class $7.41 million in damages, finding a class size of 2,000 people and multiplying that number by $3,705, the

average cost to recoat a Monier slurry-coated tile roof. *Id.* at *4-5.

Visiting Retired Judge Roger Picquet[3] took away the verdict. Pursuant to evidentiary and other rulings he had deferred until after the jury rendered its verdict, Judge Picquet excluded the statistical sampling method of Plaintiff's expert Dr. Gary Lorden and his accompanying expert opinion, and concluded that Plaintiff's case rested upon Dr. Lorden's testimony not only as to class size but liability and damages. Judge Picquet granted Monier's nonsuit motion and awarded $117,580 in litigation costs to Monier against Plaintiff Tim McAdams.

The Court of Appeal reversed Judge Picquet's grant of nonsuit and directed entry of judgment for the Plaintiff Class, concluding that there was sufficient evidence independent of Dr. Lorden's opinion to sustain the jury's verdict of class liability against Monier and class damages. *Monier III*, 2015 WL 5968461, at *12. The Court of Appeal concluded:

> The trial court is directed to enter judgment of class liability and damages for plaintiff on the CLRA action, based on the jury's findings of class liability and class damages ($3,705 per home) . . . . The matter is remanded to the trial court to determine class size and individual eligibility for recovery (such eligibility has been specified herein), through any methods that are appropriate, including representative statistical sampling or witness testimony or survey, or a claims process, individualized mini-hearings, or some other appropriate technique.

*Id.*at 15. This Court entered Interlocutory Judgment for the Plaintiff Classes on December 8, 2016.

As this Court is intimately aware, the Court supervised an 18-month long claims period and appointed a referee to oversee and facilitate that process (the "Referee"). Prior to the commencement of the claims period, on September 18, 2018, the parties engaged in multiple law and motion procedures to determine the class notice, the scope of the Referee's authority, claim protocols, and other related claims matters. The Class Notice, which was approved by the Court, was disseminated on or about September 18, 2018, and no Class Members opted to be excluded from the Class. Class Notice and the notice procedures are described in the Declaration of

[3] Judge Picquet presided in San Luis Obispo County prior to his retirement.

Jeffrey B. Cereghino, filed with this brief.

When the claims period began, it became quickly became apparent the number of claims filed vastly exceeded the jury's finding of 2,000 Class Members. As of the close of the claims period, 9,307 claims had been filed. Cereghino Decl., ¶ 5.

The approved claims process called for Claimants to submit a claim form to the independent claims administrator, Epiq Systems, which then performed an initial review of the claim to ensure that the claim form was complete and catalogued the claim form in an accessible format. Claimants were divided into tranches, and then "scored" by the Parties as approved, denied, or requiring more information. Cereghino Decl., ¶ 7. The Referee then reviewed the Parties' scoring and resolved disputes, subject to the Court's approval. The Referee made a series of rulings on tranches 1 and 2 of the claims. The Parties appealed these rulings to Judge Jones, who by and large confirmed them; Settlement Agreement, Section XI. CLAIM PROCESSING AND DISTRIBUTION OF SETTLEMENT.

The Court's rulings on tranches 1 and 2 enabled the Parties to fashion a Joint Stipulation and Order re Claims Review Protocols (Code of Civil Procedure § 638), which this Court approved on September 10, 2020. The Stipulation expedited the claims review process by reducing further submissions and briefing regarding challenges to each and every individual claim, while preserving the Parties' appellate rights. Cereghino Decl., ¶ 8.).

As of the date of this motion, the vast majority of claims have been reviewed and scored, and there are a small number of claims that remain unreviewed or deficient. Cereghino Decl. ¶ 9. Class Counsel believe that all of the claims will be reviewed and scored within 30 days of entry of a final approval order.

III. INFORMATION ABOUT THE SETTLEMENT

A. The General Settlement Terms.

The Settlement Agreement is simple and comprehensive. The parties agreed to settle the Class's claims for **$22,000,000**, and that Monier will make a separate payment of up to $22,710,000 for administrative costs, attorneys' fees, costs, and expenses, and the Service

Award, all of which is subject to the Court's approval. The $22,000,000 amount shall be allocated **100% to the Classes**. **No sums** will be used for Class Counsel's fees, administrative costs, class notice costs, future Referee fees, and the class representative service award. These will all be paid separately from the Fees and Administrative Costs Fund.

The Settlement Agreement provides for direct mail and e-mail notice to all Class Members by the Settlement Administrator, regardless of whether their claims are approved. Each Claimant was required, per the previously approved claim form, to advise the claim administrator of the address they wanted to use for all communications, including Class Notice. Cereghino Decl., ¶¶ 11-14.

Class Members, including Claimants whose claims remain to be reviewed and approved, will be afforded 30 days in which to object to the Settlement Agreement and/or Class Counsel fee request. In order to preserve the finality of the judgment and allow Class Members to receive compensation as soon as practicable, and consistent with the Court's prior order severing certain Class Member claims, any Class Member who objects to the Settlement shall have his or her claim and action against Monier severed so that he or she can only appeal with respect to his or her own claim without affecting the rest of the Class.

Additionally, Claimants whose claims are denied can appeal the denial of their Claim, and the Claimant's right to appeal the disposition of their Claim is not contingent upon filing an objection to the Settlement Agreement. A Claimant may appeal the denial of their Claim notwithstanding the fact that they did not object to the Settlement Agreement.

B. Attorneys' Fees and Expenses; Administrative Costs

Subject to the Court's approval, Monier has agreed to pay Class Counsel $22,710,000 for fees, costs, expenses, class notice, Epiq, the Referee and class representative service award. This sum does not diminish the Settlement Fund for Class Members by one penny. As previously stated, it includes future expenses that will be incurred in the administration of the claims process. In brief, every future cost or expense is covered from this fund. Cereghino Decl., ¶ 8. Class Counsel will prepare a motion for their fee requests which includes future

compensation to the Settlement Administrator, the Referee, the costs of Class Notice, the class representative service award, and costs incurred shortly after the dissemination of Class Notice and on the date scheduled by this Court.

It should be noted that the Parties did not negotiate any agreement on Class Counsel fees and expenses or any other issue with respect to attorneys' fees or expenses until after mediator Judge Infante, informed the Parties they reached an agreement on class relief. Cereghino Decl., ¶ 9.

B. Class Representative Service Award

The Settlement Agreement provides that Class Counsel may request that the Court approve a service award for Class representative Tim McAdams. Cereghino Decl., Exh. 1 at Section X., p. 19. The Class representative's agreement to the Settlement is not conditioned in any manner on the granting of a service award or its amount. Cereghino Decl., ¶ 10. Class Counsel will seek the Court's approval of the agreed-upon service award of $20,000 in conjunction with the motion for approval of attorneys' fees.

C. Release of Claims

Under the settlement, each Class Member and all Releasing Parties, as defined in the Settlement Agreement and including all those who submitted claims, will be deemed to have released all Released Claims, including any and all claims, demands, rights, liabilities and causes of action of every nature and description whatsoever, known or unknown, suspected or unsuspected, asserted or that might have been asserted, by Plaintiff or any Settlement Class Member, against Monier and the Released Parties arising during the class period, out of or related to the facts giving rise to the subject matter of the operative Complaint in this case as more fully described in Section XII of the Settlement Agreement.

D. Notice

Pursuant to the Settlement Agreement, Class Counsel has prepared a proposed Class Notice. The Class Notice plan is described in the Declaration of Jeffrey B. Cereghino. Subject to

Court approval, this Notice Plan involves direct notice by U.S. Mail, and e-mail where available, to all Class Members whose address information was provided in their submitted claims form.

The Notice will contain information directing the readers how to object to the settlement and proposed fee award. The Settlement Administrator will compile the objections.

The proposed Class Notice is attached as Exhibit 2 to the Cereghino Declaration.

The Class Notice informs Class Members of the nature of the action and the claims made, the litigation background, the terms of the agreement (including the definition of the Classes), the relief provided by the Settlement Agreement, Class Counsel's request for fees and expenses, and the scope of the release and binding nature of the settlement on Class Members. It also describes the procedure for objecting to the settlement and states the date and time of the final approval hearing, advising that the date may change and to check the settlement website. *See* Cereghino Decl., Exh. 2

The cost of Class Notice administration shall be paid from the Fees and Administrative Costs Fund. Cereghino Decl., ¶ 13.

IV. ARGUMENT

A. The Court Should Grant Preliminary Approval.

1. The Standard for Preliminary Approval

California Rule of Court 3.769(a) provides: "A settlement or compromise of an entire class action, or of a cause of action in a class action, or as to a party, requires the approval of the court after hearing." Judicial proceedings under the Federal Rule of Civil Procedure have led to a defined procedure and specific criteria for settlement approval in class action settlements, described in the *Manual for Complex Litigation,* Fourth (Fed. Judicial Center 2004) ("*Manual*") §§ 21.61, 21.63.[4]

The approval process typically involves two steps. First, the settlement is approved

[4] The California Supreme Court has authorized and urged state trial courts to use Rule 23 and federal case law for guidance in deciding class action issues. *See Vasquez v Superior Court*, 4 Cal. 3d 800, 821 (1971).

preliminarily following the submission by the parties of relevant information concerning the terms of the settlement and the history of the litigation. Second, after notice of the proposed settlement is given to the class, the Court conducts a final approval hearing, also known as a fairness hearing. *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.,* 221 F.R.D. 523 (C.D. Cal. 2004). Ultimately, to approve the proposed settlement, the Court must determine that it is fair, reasonable and adequate. *7-Eleven Owners for Fair Franchising v Southland Corp.*, 85 Cal. App. 4th 1135, 1147 (2000) (citing *Dunk v Ford Motor Co*., 48 Cal. App. 4th 1794, 1802 (1996)).

At the preliminary approval stage, the Court makes an "initial evaluation" of the fairness of the proposed settlement on the basis of written submissions and informal presentations from the settling parties.

The California standard for approval of class action settlements is similar to the federal standards; the settlement should be fair, reasonable and adequate for class members overall. *Dunk*, 48 Cal. App. 4th at 1801.

As the court observed in *Officers for Justice v. Civil Serv. Comm'n of City & County. of San Francisco*, 688 F.2d 615, 626 (9th Cir. 1982), "[t]he district court's role in evaluating a proposed settlement must be tailored to fulfill the objectives outlined above. In other words, the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned. Therefore, the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits." The Court has broad discretion to determine whether the settlement is fair. *Rebney v Wells Fargo Bank*, 220 Cal. App. 3d 1117, 1138 (1990).

A presumption of fairness exists where the settlement is reached through arm's-length negotiations, sufficient investigation has taken place to allow counsel and the Court to act intelligently, and counsel is experienced in similar types of litigation. According to the *Dunk*

court, "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." 48 Cal. App. 4th at 1802; *see also* Newberg & Conte, Newberg on Class Actions, § 13:45 (5th ed. 2011); *7-Eleven Owners for Fair Franchising v Southland Corp.,* 85 Cal. App. 4th at 626. Thus, at this stage, so long as the settlement falls into the range of possible approval, giving deference to the result of the parties' arm's-length negotiations and the judgment of experienced counsel following sufficient investigation, the settlement should be preliminarily approved and a final fairness hearing scheduled.

2. The Proposed Settlement Is Fair and Within The Range of Possible Approval.

The proposed Settlement in this case is fair, reasonable and adequate, and clearly falls within the range of possible approval. Courts usually adopt "an initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for court approval." 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 11:41, at 90. Here, the Parties negotiated the proposed Settlement Agreement at arm's length, after 17 years of extensive, vigorous litigation.

a. The Settlement Is the Result of Serious, Arm's-Length, and Informed Negotiations.

One indication of whether a settlement is fair and reasonable is whether it is the product of serious, arm's-length negotiations. Such negotiation and the 17 years of litigation minimize any concerns that the Settlement Agreement and Release might be the result of collusion among opposing parties or their counsel to undermine the interests of the class for their own benefit.

The Settlement in this case easily meets that standard. Class Counsel have litigated this case for 17 years, through three appeals, a three-month trial, numerous motions including many that had the potential to be dispositive, hundreds of depositions, $1.6 million in costs and expenses paid by Class Counsel. Additionally, Judge Edward Infante (Ret.) presided over a

formal, arm's-length and adversarial mediation, which culminated in this settlement. *See* Cereghino Decl., ¶¶ 3, 4.

Without question, the settlement emerged from a formal, arm's-length negotiation process between the parties.

c. The Settlement Terms Are Fair and Reasonable.

There can be little doubt that the proposed Settlement reflects the probabilities of success and represents a fair and reasonable compromise. "So long as the record ... is adequate to reach an intelligent and objective opinion of the probabilities of success should the claim be litigated and form an educated estimate of the complexity, expense and likely duration of such litigation, . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise, it is sufficient." *Dunk*, 48 Cal. App. 4th at 1802 (internal quotations omitted).

The Settlement also accounts for the vigorous defenses articulated by Defendant, and the risks of those arguments on appeal.

This Court is cognizant of the arguments likely to be raised by Monier on appeal. The possibility of the Court of Appeal determining for example that one Monier objection category required further investigation or Claimant contact would extend the claims process for months if not years. These timing factors militate toward accelerating payment too Class Members. They have waited long enough.

There can be no doubt that this proposed Settlement falls well within the range of possible approval.

2. The Court Should Approve the Proposed Settlement Notice and Authorize Its Dissemination.

In any proceeding that is to be accorded finality, due process requires that interested parties be provided with notice reasonably calculated, under the circumstances, to apprise them of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). California Rule of Court 3.769(d) provides that if the Court grants Plaintiffs' motion for preliminary approval, its

order must include the time, date, and place of the final approval hearing; the notice to be given the Class, and any other matters deemed necessary for the proper conduct of a settlement hearing.

Due process consideration means settlement notices must fairly apprise the class members of the terms of the proposed compromise and give class members sufficient information to decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object to the settlement. *Mullane*, 339 U.S. at 314. Additionally, the notice must be designed so as to have a reasonable chance of reaching a substantial percentage of the class members. *Id.* at 318 (explaining notice must be reasonably calculated to reach interested parties). California Rule of Court ("CRC") 3.766(d) articulates the content of the proposed notice for an "opt-out" class. First and foremost, the proposed notice must be approved by the Court. The notice must contain the following:

> (1) A brief explanation of the case, including the basic contentions or denials of the parties.
> (2) A statement that the court will exclude the member from the class if the member so requests by a specific date.
> (3) A procedure for the member to request exclusion from the class.
> (4) A statement that the judgment, whether favorable or not, will bind all members who do not request exclusion.
> (5) A statement that any member who does not request exclusion may, if the member so desires, enter an appearance through counsel.

CRC 3.766(d).

Here, the proposed Notice and the method of dissemination meet each of these requirements. The Settlement Administrator will send the Class Notice to all Class Members and Claimants via U.S. direct mail. The Notice provides clear and concise information with respect to all the relevant aspects of the litigation, including (a) the class definition and statement of claims; (b) the litigation history; (c) the terms of the Settlement Agreement; (d) the binding effect of any judgment approving the settlement, (e) the right to (and procedure for) objecting to the settlement; (g) who to contact to obtain additional information regarding the settlement or the litigation; (h) the manner in which compensation will be provided to the Class

Representative to compensate him for his service to the Class; and (g) the manner in which Class Counsel will be compensated. Additional information and relevant documents will be made available if requested by the Class Member. Thus, the Notice provides all the information necessary for Class Members to make informed decisions with respect to whether they object to the settlement or attorney fee request. Cereghino Decl., ¶ 14.

Accordingly, the content and method of dissemination of the proposed Notice fully comports with the requirements of due process and applicable case law. The Court should approve the proposed Notice and direct that it be distributed as agreed by the parties.

A. The Court Should Schedule a Fairness Hearing and Approve the Proposed Preliminary Approval Order.

Once the Court has ruled on the motion for preliminary approval, the times for providing notice will begin to run. Assuming the Court grants this motion for preliminary approval on November 1320, 2020, the Parties propose the following deadlines:

	EVENT	DATE
1.	Individual class notice mailed. (within thirty days of preliminary approval order)	**November 27, 2020**
2.	Class Counsel to file petition for award of attorneys' fees and reimbursement of expenses. (21 days before final approval hearing)	**By December 23, 2020**
3.	Class Member Objections (14 days before final approval hearing)	**By December 31, 2020**
4.	Class Member Notices of Intention to Appear (14 days before final approval hearing)	**By December 31, 2020**
5.	File declaration that approved notice plan was carried out (14 days before final approval hearing)	**By December 31, 2020**

	EVENT	DATE
6.	Plaintiff or Defendant's response to any objections filed (7 days before final approval hearing)	**By January 7, 2020**
7.	Final Approval Motion Filed (21 days before final approval hearing)	**By December 23, 2020**
8.	Fairness Hearing	**By January 15, 2020**

V. CONCLUSION

For the foregoing reasons, Plaintiff and Class Counsel respectfully request that the Court grant this motion for preliminary approval; approve the content and authorize the dissemination of the proposed settlement Notice; schedule a fairness hearing; and adopt the proposed schedule of events and deadlines.

Dated: November 9, 2020

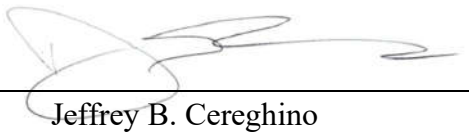

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EXHIBIT A

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Only the Westlaw citation is currently available.

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, Third District, California.

Tim MCADAMS, Plaintiff and Appellant,
v.
MONIER, INC., Defendant and Respondent.

C073435
|
Filed 10/14/2015

(Super. Ct. No. S–CV–0016410)

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Opinion

BUTZ, J.

***1** This case is before us for the third time. The third time's not always the charm. Once again, this matter is going back.

This case is a misrepresentation-based class action under the Consumers Legal Remedies Act (CLRA) (Civ.Code, §§ 1750 et seq., 1770, subds. (a)(5) & (7)) and the unfair competition law (UCL) (Bus. & Prof.Code, §§ 17200 et seq., 17500). Plaintiff Tim McAdams, on behalf of himself and all others similarly situated (plaintiff), alleges that defendant Monier, Inc. (Monier), on its own and through unwitting intermediaries in the housing sale and construction industries (parroting Monier statements or information), represented that Monier's slurry-coated concrete roof tiles would last 50 years, would have a permanent color, and would be maintenance-free, when, in fact, Monier knew, but failed to disclose, that the color composition of its roof tiles would erode away well before the end of the represented 50–year lifespan. In short, as we said on remand in *McAdams v. Monier, Inc.* (2010) 182 Cal.App.4th 174 (*McAdams II*),[1] "[t]he focus of the CLRA and the UCL class actions is on an alleged single, specific material misrepresentation involving a failure to disclose the particular fact of premature color erosion to bare concrete ..." (*id.* at p. 192).

Here, we conclude the trial court properly excluded a plaintiff expert's statistical sampling testimony concerning class size, but improperly determined that this testimony also constituted the evidence of class liability and class damages. Accordingly, we shall reverse the judgment and the award of costs to Monier, and remand the matter for the class size to be determined and for further proceedings based on that figure.

FACTUAL AND PROCEDURAL BACKGROUND

Our first two encounters with this case concerned class certification and bookended an intervening California Supreme Court case—*In re Tobacco II Cases* (2009) 46 Cal.4th 298 (which concerned issues of standing under the UCL in light of a 2004 initiative measure, Prop. 64). From these encounters, we ultimately concluded that the trial court erred in denying class certification to the CLRA and the UCL classes; and we agreed with *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1293, that an " 'inference of common reliance' " may be applied to a CLRA class that alleges a material misrepresentation consisting of a failure to disclose a particular fact in light of other information that is disclosed. (*McAdams II, supra,* 182 Cal.App.4th at pp. 178–179.)

In *McAdams II,* in light of this " 'inference of common reliance,' " we also added the following "proviso" to the

definition of the CLRA and UCL classes: "[T]he members of these classes, prior to purchasing or obtaining their Monier roof tile product, had to have been exposed to a statement along the lines that the roof tile would last 50 years, or would have a permanent color, or would be maintenance-free." (*Id.* at pp. 178–179; see *id.* at p. 184; see also *In re Tobacco II Cases, supra,* 46 Cal.4th at p. 324.) This "proviso" was based on the principle of law that fraud or deceit, in the CLRA (and the UCL) context, may consist of the suppression of a known fact (i.e., premature color erosion) by one who gives information of other facts (i.e., 50–year life, permanent color, or maintenance-free), which are likely to mislead given the suppression of that known fact. (*McAdams II, supra,* 182 Cal.App.4th at p. 185.)

***2** The CLRA and UCL classes essentially comprised Californians who owned homes for personal use with slurry-coated roof tiles sold by Monier between January 1978 and August 14, 1997 (or who previously owned such a home and paid to replace or repair such tiles), and who satisfied the *McAdams II* proviso. (See *McAdams II, supra,* 182 Cal.App.4th at pp. 179–180.)

To determine whether someone satisfied the *McAdams II* proviso, plaintiff employed a statistical expert, Gary Lorden, Ph.D. Dr. Lorden's statistical sampling method used a sample of 22 individuals who owned homes with the roof tiles at issue, and attempted to extrapolate from this sample the number of individuals who had been exposed (out of 127,746, the estimated number of California homes with the roof tiles at issue, a number determined by a different expert) to at least one of the three Monier statements in "the proviso," prior to purchasing or obtaining their Monier roof tiles. We will discuss Dr. Lorden's statistical sampling method in greater detail when we discuss the trial court's exclusion of his testimony, but this is as far as we need to go now.

Trial began in October 2012 and lasted 31 days.

To prove Monier's liability, plaintiff deposed the 22 homeowners in the sample Dr. Lorden used and had 16 of them, along with class representative Tim McAdams and three other homeowners, testify at trial. These witnesses testified essentially (1) they were told, most commonly from intermediaries in the housing industry but occasionally from Monier literature, that their slurry-coated Monier roof tiles would last 50 years, or would retain permanent color, or would be maintenance-free; and (2) they relied on these representation(s) to their detriment, as the color of their roofs eroded prematurely, usually to bare, gray concrete. Plaintiff also (1) had nine former Monier employees testify, especially regarding Monier's relevant marketing practices; (2) presented Monier marketing literature on the slurry-coated roof tiles; (3) presented a damages expert, Phillip Waier, who opined that the average cost to recoat a Monier tile roof is $3,705; and (4) presented an accounting expert, Clifford Kupperberg, who estimated the total number of home roofs in California with the Monier slurry-coated tiles at issue at 127,746.

Monier countered at trial with testimony from (1) six (of the 22) sampled homeowners not called by plaintiff as well as 31 additional homeowners (via deposition testimony), (2) several former Monier employees, and (3) two experts of its own (who criticized plaintiff's "proviso" sampling method).

The jury, in a verdict form with special interrogatories, found that Monier made a material misrepresentation to plaintiff—i.e., the Monier slurry-coated roof tiles would last 50 years, or would have permanent color, or would be maintenance-free, while failing to disclose that the color coat would deteriorate in less than 50 years—and that plaintiff relied upon this misrepresentation to its detriment (damage). Using Dr. Lorden's statistical sampling method, the jury found there were 2,000 class members. The jury awarded plaintiff $7.41 million in damages (the class size of 2,000 multiplied by $3,705—the average cost to recoat a Monier slurry-coated tile roof). This amount of damages constituted a small portion of the class size and the damages that plaintiff had sought.

***3** Pursuant to evidentiary and other rulings deferred until after the jury rendered its verdict, the trial court excluded Dr. Lorden's statistical sampling method and accompanying expert opinion, finding that it lacked a reasonable basis for accuracy. The trial court also concluded that since plaintiff's case rested upon Dr. Lorden's method and opinion not only as to class size but also as to class liability and damages, there was no longer any relevant evidence before the fact finder as to class size, liability, or damages.

Consequently, the trial court (1) granted Monier's motion for nonsuit as to the jury-tried CLRA action and Monier's motion for judgment on the court-tried UCL action (the UCL action was based on the same material misrepresentation as the CLRA action (*McAdams II, supra,* 182 Cal.App.4th at p. 188));[2] (2) entered judgment for Monier; and (3) ordered plaintiff to pay Monier's litigation costs of $117,580.05.

Plaintiff appeals the judgment and the award of costs to Monier.[3] We conclude the trial court did not abuse its

discretion in excluding Dr. Lorden's expert testimony concerning *class size.* But we also conclude the trial court erroneously found that Dr. Lorden provided plaintiff's only evidence on *class liability* and *damages* as well; and therefore the trial court erroneously granted nonsuit to Monier on the CLRA action, judgment to Monier on the UCL action, and costs to Monier. In short, the trial court erroneously conflated plaintiff's evidence on the *extent* of class liability (i.e., class size) with the *fact* of class liability. The jury, as the fact finder here on the CLRA action and pursuant to special interrogatories in its verdict form, found that plaintiff had established the fact of class liability and the fact of class damages; and this was done through other evidence that is unchallenged here, and which the trial court effectively accepted as the fact finder in the court-tried UCL action.

DISCUSSION

I. The Trial Court Did Not Abuse Its Discretion in Excluding Dr. Lorden's Statistical Sampling Method and Accompanying Expert Opinion

Dr. Lorden testified as to the size of the class using the statistical method of random sampling and extrapolation. (See *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 746 (*Bell*).) The goal of Dr. Lorden's method, in line with the goal of statistical sampling generally, was to use a representative sample of the 127,746 subject homeowners to extrapolate to the whole. (See *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 38 (*Duran*).)[4]

Plaintiff's CLRA and UCL class actions were both based on the same material misrepresentation—i.e., against the backdrop of one of the three statements that Monier, or an intermediary parroting Monier, made (i.e., 50–year life, permanent color, or maintenance-free), Monier failed to disclose that it knew that the color on its slurry-coated roof tiles eroded prematurely. (*McAdams II, supra,* 182 Cal.App.4th at pp. 186, 188.) As we stated in *McAdams II,* "an 'inference of common reliance' may be applied to a CLRA class [and a UCL class] that alleges a material misrepresentation consisting of a failure to disclose a particular fact." (*Id.* at p. 178; see *id.* at p. 184.)

***4** The trial court found Dr. Lorden's statistical sampling method lacked a reasonable basis for accuracy.

As described by plaintiff, Dr. Lorden's method comprised three steps: (1) a random (i.e., representative) sample of the population of the 127,746 California homeowners who had purchased or acquired Monier slurry-coated tile roofs (the sample here comprised 22 homeowners); (2) based on whatever percentage of this sample the jury believed had been exposed to a Monier misrepresentation prior to that purchase or acquisition (statement of 50–year life, permanent color, or maintenance-free, against a failure to disclose premature color erosion), Dr. Lorden extrapolated that percentage to the overall population of the 127,746 homeowners (an essential element of Dr. Lorden's method, then, was to have the representative homeowners testify at trial, and have *the jury* decide how many of those homeowners met "the proviso" of *McAdams II*); and (3) Dr. Lorden provided the jury with a chart, listing those numbers, corresponding to each percentage the jury could possibly assign. In this way, Dr. Lorden's results would yield the total number of California homeowners with Monier slurry-coated tile roofs who satisfied "the proviso," and thus were members of the class. Using Dr. Lorden's method, the jury found there were 2,000 class members.

In reviewing a trial court's exclusion of an expert witness's opinion testimony as lacking a reasonable basis, we ask whether the trial court abused its discretion. (*Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564.) We find no abuse here.

The critical step in Dr. Lorden's statistical sampling method was to obtain a *representative* sample of the 127,746 population. To do this, 29 clusters of residential development, comprising just over 4,700 homes, were identified statewide that had Monier slurry-coated tile roof homes. Sixteen of these clusters were drawn from a survey that Monier had done in 2005; the remaining 13 were identified by plaintiff. The goal was to depose a representative homeowner from each of the 29 clusters. Plaintiff's counsel sent a letter and attached questionnaire randomly to 444 homeowners across the 29 clusters. Plaintiff deposed 22 of the homeowners; 16 of whom testified for plaintiff at trial.[5]

In the recent decision of *Duran, supra,* 59 Cal.4th 1, issued after the trial here, our state Supreme Court critiqued a statistical sampling method, in the process providing a primer on statistical sampling. As *Duran* emphasized, the essence of such a method, which is based

on inferential statistics and probability theory, is to obtain a sample that is sufficiently representative of a whole population so as to fairly support inferences about the whole. (*Duran, supra,* 59 Cal.4th at p. 38.)

As we shall explain, the trial court, for several reasons taken together, did not abuse its discretion in essentially finding that the method Dr. Lorden used was not based on a representative sample. Indeed, the trial court's ruling excluding Dr. Lorden's statistical sampling testimony was prescient in many respects, in light of the criticisms *Duran* leveled at the statistical sampling method at issue there.

***5** First, the sample size here was small. "A sample must be sufficiently large to provide reliable information about the larger group. 'How many cases need to be sampled? This depends in large part on the variability of the population. The more diverse the population, the larger the sample must be in order to reflect the population accurately....' [Citation.] ... [¶] ... [¶] ... With input from the parties' experts, the [trial] court must determine that a chosen sample size is statistically appropriate and capable of producing valid results within a reasonable margin of error." (*Duran, supra,* 59 Cal.4th at p. 42.)

In *Duran,* the class consisted of 260 employees who sued for unpaid overtime, claiming they had been misclassified as exempt from overtime compensation under the outside salesperson exemption law. (*Duran, supra,* 59 Cal.4th at p. 12.) The *Duran* court found the sample size there of 20 (plus the two named plaintiffs) "[w]as [t]oo [s]mall" for determining the fact of class liability and damages. (*Id.* at p. 42; see *id.* at pp. 33, 35, 37, 39–40.) Admittedly, the class in *Duran* may have been more variable than the class here (given the *Duran* employees' various work schedules), and Dr. Lorden's expert testimony was designed to determine class size rather than to determine the fact of class liability or damages (i.e., Dr. Lorden provided an extrapolation method for the jury to use in determining the number of homeowners, out of the 127,746, who met the "proviso" we set forth in *McAdams II*). But here, we have a sample of only 22 out of a (potential) class of 127,746. As the trial court noted, Dr. Lorden testified that taking 88 depositions (rather than the 22) would have reduced the margin of error by 50 percent (this fact also demonstrates that the sample of 22 may have an intolerably large margin of error). (*Duran, supra,* at p. 46.) In contrast, in *Bell, supra,* 115 Cal.App.4th 715, which upheld a statistical method of random sampling and extrapolation for the determination of aggregate classwide damages in a class action for unpaid overtime, the parties deposed a sample of 295 employees out of a class of 2,402, which yielded a small margin of error. (*Bell, supra,* at p. 724; see *id.* at pp. 746–756; see also *Duran, supra,* 59 Cal.4th at p. 42.)

Second, the random nature of the sample of 22 is questionable. "A sample must be randomly selected for its results to be fairly extrapolated to the entire class.... 'A "random sample" is one in which each member of the population has an equal probability of being selected for inclusion in the sample.' " (*Duran, supra,* 59 Cal.4th at p. 43.)

The low response rate to plaintiff counsel's 444 letters (with attached questionnaire) may have resulted in "nonresponse bias" in the sample of 22 (i.e., those who do not respond have no probability of inclusion in the sample). (*Duran, supra,* 59 Cal.4th at p. 43.) Also, the letter and questionnaire from plaintiff's counsel—while it did not mention "the proviso"—sought, as the trial court noted, the homeowners' "assistance" in making plaintiff's case at trial. As the trial court recognized, this placed plaintiff's counsel directly into administering and implementing the statistical sampling method. This letter and questionnaire, therefore, may have also resulted in "selection bias" in the sample of 22 (i.e., a nonrandom criterion or a selective inclusion or exclusion in choosing the sample). (*Duran,* at p. 43.) Contrast this process with a "double blind" survey in which the questioner and the respondent do not know the survey's sponsor or the survey's purpose.

***6** Third, as the trial court observed, the essential element of the statistical sampling method here—the use of live testimony to prove or disprove satisfaction of "the proviso"—was not developed or created by Dr. Lorden (but rather by plaintiff's counsel), and was not based on any prior studies or research in the relevant fields of statistics or surveys. Furthermore, plaintiff had only 16 of the 22 homeowners testify at trial (plaintiff had deposed all 22, and Monier presented at trial the testimony of the other six).

Fourth, and finally, Dr. Lorden significantly criticized the homeowner survey method that Monier undertook in 2005, when class certification was at issue, but nevertheless relied on this survey to obtain 16 of the 29 clusters of relevant residential development used in drawing the sample of 22.

For these reasons, taken together, we conclude the trial court did not abuse its discretion in excluding Dr. Lorden's expert testimony.

II. The Trial Court Erroneously Granted Monier's Motions for Nonsuit (CLRA action) and for Judgment (UCL action)

In granting these two motions, the trial court ruled: "[P]laintiff's case rests upon the methodology and expert opinion of Dr. Lorden.... [H]is opinions [have been] excluded. Therefore, there is no legally relevant evidence before the fact-finder as to the size of the class, the liability of [Monier] or the amount of damages. [Monier's] motion for nonsuit as to the CLRA cause of action is granted. [Monier's] motion for judgment on the UCL cause of action is granted." Based on this ruling, the trial court granted judgment to Monier.

We conclude the trial court erred. Basically, the trial court confused the *extent* of class liability (Dr. Lorden's statistical sampling method and expert opinion) with the *fact* of class liability and damages (established through other evidence at trial, not challenged on a cross-appeal here).

Monier's motion for judgment on the UCL action was subsumed within its motion for nonsuit on the CLRA action. Thus, the review of the nonsuit motion is the pivotal review.

"In reviewing a grant of nonsuit, we '[evaluate] the evidence in the light most favorable to the plaintiff.' [Citation.] We will not sustain the judgment ' "unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law." ' " (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.)

Dr. Lorden's excluded statistical sampling method was designed to measure the number of individuals—out of the trial court-accepted and jury-determined figure of 127,746 relevant California homes—who met the class-membership "proviso" we set forth in *McAdams II* (i.e., prior to purchasing or obtaining their Monier roof tile product, they were exposed to a statement of 50–year life, permanent color, or maintenance-free), and thus were members of the CLRA and the UCL classes.[6] Dr. Lorden's excluded testimony, then, concerned the *extent* of the class—i.e., the *size* of the class.

Other evidence at this lengthy trial established the fact of class *liability* and class *damages.*

To establish the fact of class liability, plaintiff presented (1) the testimony of 20 relevant homeowners, (2) nine additional witnesses regarding Monier's relevant marketing practices, and (3) Monier's relevant marketing literature. Monier countered with a litany of relevant witnesses of its own. As *Duran* recognized, "[c]ertainly class counsel are entitled to select named plaintiffs [and, we add, unnamed plaintiffs] [to testify] in a manner that enhances their position"—here, plaintiff's position on class liability. (*Duran, supra,* 59 Cal.4th at p. 43.)[7]

***7** To establish the fact of class damages, plaintiff presented testimony from a damages expert, Phillip Waier, who opined that the average cost to recoat a Monier tile roof was $3,705. (See *Bell, supra,* 115 Cal.App.4th at p. 751 [in a class action, if appropriate, a trial court has the discretion to weigh the calculation of average damages that are imperfectly tailored to the facts of particular class members with the opportunity such a calculation affords to vindicate an important statutory policy without unduly burdening the courts].) Again, the jury and the trial court found this figure acceptable, and it is not challenged in a cross-appeal.

Pursuant to special interrogatories in its verdict form, the jury found that plaintiff relied on a material misrepresentation from Monier (failure to disclose premature color erosion) to plaintiff's damage.

Consequently, the trial here determined the fact of class liability and the fact of class damages. What the trial has not yet determined—in light of the proper exclusion of Dr. Lorden's statistical sampling testimony—is the number of individuals in the class. The remand will determine that (and each class member will have to show his or her eligibility for recovery—i.e., he or she has or had a Monier slurry-coated color concrete tile roof at issue with premature color erosion).[8]

***8** In the end, the simplest way to look at this is if the trial court were correct in deeming Dr. Lorden's excluded testimony as the only legally relevant evidence on class size, liability, and damages, there would have been no need for the parade of witnesses and evidence, and the weeks of trial, regarding the facts of class liability and class damages. For plaintiff's case, Dr. Lorden alone would have sufficed.

We conclude the trial court erroneously granted Monier's motions for nonsuit (the CLRA action) and for judgment (the UCL action).[9]

DISPOSITION

The judgment and the award of costs to Monier are reversed. The trial court is directed to enter judgment of class liability and damages for plaintiff on the CLRA action, based on the jury's findings of class liability and class damages ($3,705 per home (see *Bell, supra,* 115 Cal.App.4th at pp. 746–756)). The matter is remanded to the trial court to determine class size and individual eligibility for recovery (such eligibility has been specified herein), through any methods that are appropriate, including representative statistical sampling or witness testimony or survey, or a claims process, individualized mini-hearings, or some other appropriate technique. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1054 (conc. opn. of Werdegar, J.); see *Duran, supra,* 59 Cal.4th at pp. 33, 40, fn. 34 (maj. opn.) [applying that footnote's observation here, we remind the parties that now that the fact of class liability and the fact of class damages have been established, both sides may benefit from a fair, cost-effective approach to determining class membership]; see also *id.* at p. 55 (conc. opn. of Liu, J.).) Since the UCL action is subsumed within the CLRA action and since the trial court excluded only Dr. Lorden's testimony, the trial court is directed to enter judgment of class liability and damages for plaintiff on the UCL action, and to impose, on remand, an appropriate remedy for the UCL claim, if necessary. Monier's abandoned cross-appeal is dismissed. Plaintiff is awarded his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

We concur:

BLEASE, Acting P.J.

HOCH, J.

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Footnotes

1 In light of the substantial prior history of this case, and for the sake of clarity, we shall refer to our February 24, 2010 opinion on remand as *McAdams II*. (*McAdams II, supra,* 182 Cal.App.4th 174.) An unpublished opinion filed on May 30, 2007 (case No. C051841) constitutes *McAdams I*; today's opinion represents *McAdams III*.

2 An action under the UCL, which is limited to injunctive, restitutionary and related relief, is tried to the court. (See *McAdams II, supra,* 182 Cal.App.4th at p. 188.)

3 Monier filed a notice of cross-appeal, but has abandoned it.

4 The 127,746 figure—which the trial court found was sufficiently supported and acceptable and which the jury used, and which is not challenged in a cross-appeal—was provided by plaintiff's accounting expert, Clifford Kupperberg. Kupperberg based this figure on census data of housing starts, invoice and production numbers from Monier's files, and testimony of Monier's employees regarding sales figures and market shares.

5 Monier presented at trial the deposition testimony of the remaining six homeowners.

6 And, again, the 127,746 figure was established by plaintiff's accounting expert, Clifford Kupperberg, and is not challenged in a cross-appeal.

7 But, as *Duran* cautioned in its very next sentence, "that tactical choice should not compromise the statistical approach required for random sampling." (*Duran, supra,* 59 Cal.4th at p. 43.) These two observations from *Duran* allow us to reconcile (1) the improper use of Dr. Lorden's sample of 22 as insufficiently representative to measure how many homeowners satisfied "the proviso" of *McAdams II,* with (2) the proper use of the same sample from

which to draw witnesses on plaintiff's behalf to establish Monier's liability.

[8] In *McAdams II,* we stated regarding the issue of individual damages (in considering whether a class could be *certified* here): " 'A class action can be maintained even if each class member must at some point individually show his or her eligibility for recovery or the amount of his or her damages, so long as each class member would not be required to litigate substantial and numerous factually unique questions to determine his or her individual right to recover.' [Citation.] Here, the claims of all class members ' "stem from the same source" '—Monier's failure to disclose that the color composition of its roof tiles may erode to bare concrete prematurely. [Citation.] To obtain damages, each class member [(1)] will have to show the representation made to him or her that accompanied this failure to disclose (e.g., 50–year/lifetime, permanent color, maintenance-free, or the like) and [(2)] will have to show the amount of his or her damages. But these two showings do not invoke 'substantial and numerous factually unique questions to determine [the] individual right to recover' damages, and therefore are not a proper basis on which to deny class certification." (*McAdams II, supra,* 182 Cal.App.4th at pp. 186–187.)
Now that the class *trial* has taken place, we want to clarify the procedure on remand in light of these two required showings specified in *McAdams II*.
First, as we have made clear in this opinion, a representative statistical sampling method (or an equivalent method) can be used to show the number of individuals who satisfy the *McAdams II* proviso—i.e., who, prior to purchasing or obtaining their Monier roof tile product, were exposed to a statement of 50–year life, permanent color, maintenance-free, or the like. Such a showing will meet the first requirement of *McAdams II* that each class member must show the representation made to him or her that accompanied the failure to disclose.
Second, determining damages in terms of an aggregate classwide damages figure was proper here (e.g., at trial, the jury found there were 2,000 class members, and multiplied this figure by $3,705—the average cost to recoat a Monier slurry-coated tile roof—to arrive at an aggregate classwide damages figure of $7.41 million). As the *Bell* court noted, "[I]t [is] within the discretion of the trial court to weigh the disadvantage of statistical inference—the calculation of average damages imperfectly tailored to the facts of particular employees [who comprise the class]—with the opportunity it afford[s] to vindicate an important statutory policy without unduly burdening the courts.... '[An appellate court's] review of a trial court's plan for proceeding in a complex case is a deferential one that recognizes the fact that the trial judge is in a much better position than an appellate court to formulate an appropriate methodology for a trial.' " (*Bell, supra,* 115 Cal.App.4th at p. 751.) And, as *Bell* added, "[T]he proof of aggregate [classwide] damages ... by [a representative] statistical inference reflect[s] a level of accuracy consistent with due process under the [*Connecticut v.*] *Doehr* [(1991) 501 U.S. 1, 11] [115 L.Ed.2d 1] balancing test [(under that test, the question whether a procedural device used in judicial proceedings to deprive a defendant of property comports with due process is determined by a balancing of private and governmental interests with the risk of erroneous deprivation)]. This conclusion is supported by persuasive authority." (*Bell, supra,* at p. 755.)
So, using a calculation of aggregate classwide damages is proper here—if that calculation uses a class size number (as a multiplicand) that has been determined from a representative statistical sampling method (or an equivalent method). And such a calculation will meet the second requirement of *McAdams II* that each class member must show the amount of his or her damages, so long as each class member has shown his or her eligibility for recovery (i.e., he or she has or had a Monier slurry-coated color concrete tile roof at issue with premature color erosion). (See *McAdams II, supra,* 182 Cal.App.4th at p. 186 [" 'A class action can be maintained even if each class member must at some point individually show his or eligibility for recovery *or* the amount of his or her damages ...' " (italics added)].)

[9] In its respondent's brief, Monier presents an undeveloped argument that the judgment can be affirmed on the independent ground that plaintiff failed to prove delayed discovery for statute of limitation purposes as to absent class members. In a special interrogatory in its verdict form, the jury found, on the issue of statute of limitations, that Monier did not prove that plaintiff's claimed harm occurred before November 14, 2000. Plaintiff filed his original complaint in November 2003. The shortest statute of limitations that applies here, the CLRA, is three years. (Civ.Code, § 1783; see *id.,* § 1770.) Against this backdrop, we consider the question of statute of limitations settled against Monier.

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