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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CITY OF HUNTINGTON PARK;)
MICON CONSTRUCTION,)
INC.; MIRACLE PLAYGROUND)
SALES INC.; MIRACLE)
PLAYGROUND SALES OF)
SOUTHERN CALIFORNIA LLC;)
AND CITY OF MURRIETA,)
INDIVIDUALLY AND ON)
BEHALF OF ALL OTHERS)
SIMILARLY SITUATED,)
)
Plaintiffs,)
)
v.)
)
LANDSCAPE STRUCTURES;)
PEBBLE FLEX SERVICES)
COMPANY; AND DOES 1)
THROUGH 25, INCLUSIVE,)
)
Defendants.)
_____)

Case No. EDCV 14-00419-VAP
(DTBx)
**ORDER DENYING MOTION FOR
CLASS CERTIFICATION (DOC.
NO. 56)**
**[Motion filed on April 13,
2015]**

This purported class action involves a dispute over
alleged breach of warranty and unfair competition.
Plaintiffs are purchasers and owners, installers, and
distributors of playground pad surfaces, PebbleFlex and
AquaFlex, manufactured and sold by PebbleFlex Services
Company ("PFSC") and Landscape Structures, Inc. ("LSI").

1 Plaintiffs allege that PebbleFlex and AquaFlex do not
2 live up to representations of quality made by PFSC and
3 LSI. In their Motion for Class Certification ("Motion"
4 or "Mot." (Doc. No. 56)) Plaintiffs move to certify a
5 class of "individuals and entities that have had
6 PebbleFlex or AquaFlex installed in playgrounds, splash
7 pads, or other types of surfaces within the State of
8 California." For the reasons set forth below, the Court
9 DENIES Plaintiffs' Motion.

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I. BACKGROUND

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A. Factual Background

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The PebbleFlex and AquaFlex products are padded surfaces used to reduce injuries on dry and aquatic playgrounds, respectively. The surfaces consist of millions of small spherical rubber "pebbles" bound by a chemical binder. (J. Spence Decl. ¶ 5.) Plaintiffs allege that PebbleFlex and AquaFlex are very similar products in terms of manufacture and marketing. (J. Sepence Decl. ¶ 5; see Exh. A, B to J. Spence Decl.) Defendants claim the products are different. (Saluti Decl. ¶¶ 7-22, 24-33.) Between 2009 and 2011 AquaFlex was manufactured using a two-part aliphatic polyurethane binder system, which was substantially better in chlorine resistance than the single component binder formula used by PebbleFlex. (Id. at ¶ 24.) The AquaFlex installations were porous and nonporous depending on

1 whether the water play area was indoors or outdoors,
2 whereas the PebbleFlex installations were porous. (Id.
3 at ¶¶ 27-28.) Due to PebbleFlex and AquaFlex's different
4 chemical and physical compositions, each product was
5 installed differently. (Id. at ¶¶ 29, 32-35.)
6

7 In 2007, PFSC was formed to manufacture and sell the
8 PebbleFlex and AquaFlex product lines through
9 distributors Miracle Playground Sales ("MPS"). (Saluti
10 Decl. ¶¶ 7-8.) Also included in the supply chain was
11 certified PFSC installer Micon Construction, Inc.
12 ("Micon"). (Zazuetta Decl. ¶¶ 4-10.) In 2011, LSI
13 acquired the PebbleFlex and AquaFlex product lines from
14 PFSC through an asset sale. (Fuller Dep. 11:10-20, Exh.
15 L to Kennedy Decl.; Kraus Decl. ¶ 13.) LSI continued to
16 sell the products under the same name and market the
17 products in much the same way. (See Exhs. E, F to
18 Kennedy Decl.)
19

20 In various marketing materials and presentations
21 PebbleFlex and AquaFlex were represented as superior
22 products that would not crack, fade, or degrade for
23 several years because of a unique formula that binds the
24 pebbles together. (Espinosa Decl. ¶¶ 4, 6, 7, and Exhs.
25 A, B to Espinosa Decl.; Holle Decl. ¶ 4; K. Spence Decl.
26 ¶ 4; Exhs. A, B to K. Spence Decl.; Saluti Decl. ¶¶ 3,
27 12-13.) Some PebbleFlex and AquaFlex installations
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1 experienced problems, such as delamination, cracking,
2 separation, and color fading. (Holle Decl. ¶ 9; Saluti
3 Decl. ¶ 54.) Plaintiffs allege that PebbleFlex and
4 AquaFlex do not live up to their marketed representations
5 (Holle Decl. ¶ 9; K. Spence Decl. ¶ 9; Espinosa Decl. ¶¶
6 10-13), while Defendants argue that any problem is the
7 result of improper installation, vandalism, or both,
8 which is not within the scope of the PebbleFlex and
9 AquaFlex warranties. (Saluti Decl. ¶¶ 37-47; Vogt Decl.
10 ¶¶ 18-48.)

11
12 Between 2009 and 2011, proposed class
13 representatives, City of Huntington Park and City of
14 Murrieta, both used PebbleFlex installations at parks in
15 their respective cities. (Espinosa Decl. ¶ 8-9; Kast
16 Decl. ¶ 9.) Neither used AquaFlex. (Espinosa Depo.
17 35:11-14; Kast Depo. 57:7-9.) MPS distributed, and Micon
18 installed, PebbleFlex in the Salt Lake Park projet and
19 Torrey Pines Park project for the City of Huntington Park
20 and City of Murrieta, respectively. (Espinosa Decl. ¶ 3,
21 8; Kast Decl. ¶ 8.)

22
23 Both cities contend that they chose PebbleFlex over
24 other less expensive products because of written
25 representations of quality made by PFSC marketing
26 materials (Espinosa Decl. ¶ 5; Kast ¶ 6.) and oral
27 representations made by MPS sales representatives. (K.
28

1 Spence Decl. ¶ 6; J. Spence Decl. ¶ 10; Espinosa Decl. ¶
2 4-5). Both cities also allege that cracks, crevices and
3 eventually holes appeared along with delamination and
4 discoloration. (Espinosa Decl. ¶¶ 10-11; Kolek Decl. ¶
5 3.) Initially, MPS, Micon, and PFSC inspected and made
6 repairs (Espinosa Decl. ¶ 12); however, by July 2013,
7 Micon informed the City of Huntington Park that it
8 believed there was a problem with the PebbleFlex product
9 itself and it would no longer repair product related
10 failures at the Salt Lake Park. (Id. at ¶ 13.) Bids to
11 remove the PebbleFlex installations and replace them with
12 other products are pending in both the City of Huntington
13 Park and City of Murrieta. (Espinosa Decl. ¶¶ 14-15;
14 Kolek Decl. ¶ 4.)

15

16 **B. Legal Background**

17 In January 2014, Defendants removed this purported
18 class action lawsuit, which sought to certify three
19 subclasses: (a) PebbleFlex or AquaFlex purchasers and
20 owners, (b) PebbleFlex or AquaFlex installers, and (c)
21 others in the supply chain who have incurred obligations
22 to purchasers. (Second Amended Complaint ("SAC") (Doc.
23 No. 32) ¶ 10.) Proposed class representatives allege
24 causes of action for California Business & Professions
25 Code § 17200 (unfair competition) and breach of warranty,
26 while each plaintiff individually alleges fraud.

27

28

1 In this Motion filed on April 15, 2015, Plaintiffs
2 are only seeking to certify purchasers of PebbleFlex or
3 AquaFlex (subclass "a") because there are not enough
4 members of subclasses "b" or "c" to meet the numerosity
5 requirement of Rule 23(a)(1). (Mot. at 1.) Thus,
6 Plaintiffs seek to certify a class of "individuals and
7 entities that have had PebbleFlex or AquaFlex installed
8 in playgrounds, splash pads, or other types of surfaces
9 within the State of California." (Id.)

10
11 On May 4, 2015 Defendants PFSC and LSI filed
12 oppositions to the Motion ("PFSC Opp.") and ("LSI Opp."),
13 respectively. On May 18, 2015, the Plaintiffs filed a
14 reply ("Reply").

15 16 **II. LEGAL STANDARD**

17 Recognizing that "[t]he class action is an exception
18 to the usual rule that litigation is conducted by and on
19 behalf of the individual named parties only," Federal
20 Rule of Civil Procedure 23 demands that two requirements
21 be met before a court certifies a class. Comcast Corp.
22 v. Behrend, 133 S.Ct. 1426, 1432 (2013).

23
24 A party must first meet the requirements of Rule
25 23(a), which demands that the party "prove that there are
26 in fact sufficiently numerous parties, common questions
27 of law or fact, typicality of claims or defenses, and
28

1 adequacy of representation." Behrend, 133 S.Ct. at 1432.
2 Although not mentioned in Rule 23(a), the moving party
3 must also demonstrate that the class is ascertainable.
4 Keegan v. Am. Honda Motor Co., Inc., 284 F.R.D. 504, 521
5 (C.D. Cal. 2012); Rodmakers, Inc. v. Newport Adhesives &
6 Composites, Inc., 209 F.R.D. 159, 163 (C.D. Cal. 2002)
7 ("Prior to class certification, plaintiffs must first
8 define an ascertainable and identifiable class.").

9
10 If a party meets Rule 23(a)'s requirements, the
11 proposed class must also satisfy at least one of the
12 requirements of Rule 23(b). Here, Plaintiffs invoke Rule
13 23(b)(3) (Mot. at 19), which demands that "the questions
14 of law or fact common to class members predominate over
15 any questions affecting only individual members, and that
16 a class action is superior to other available methods for
17 fairly and efficiently adjudicating the controversy."
18 Fed. R. Civ. P. 23(b)(3). The predominance inquiry
19 inherent in a Rule 23(b)(3) analysis asks "whether
20 proposed classes are sufficiently cohesive to warrant
21 adjudication by representation," focusing on "the
22 relationship between common and individual issues." In
23 re Wells Fargo Home Mortg. Overtime Pay Litig., 571 F.3d
24 953, 957 (9th Cir. 2009) (further noting that the express
25 purpose of Rule 23(b)(3) is to "achieve economies of
26 time, effort, and expense and promote [] uniformity of
27 decision as to persons similarly situated.").

28

1 District Courts are given broad discretion to grant
2 or deny a motion for class certification. Bateman v.
3 American Multi-Cinema, Inc., 623 F.3d 708, 712 (9th Cir.
4 2010). The party seeking class certification bears the
5 burden of showing affirmative compliance with Rule 23.
6 See Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551
7 (2011). This requires a district court to conduct a
8 "rigorous analysis" that frequently "will entail some
9 overlap with the merits of the plaintiff's underlying
10 claim." Id. Though, the merits can be considered only
11 to the extent they are "relevant to determining whether
12 the Rule 23 prerequisites to class certification are
13 satisfied." Amgen Inc. v. Conn. Ret. Plans & Trust
14 Funds, 133 S.Ct. 1184, 1195 (2013).

15 16 III. DISCUSSION

17 Plaintiffs seek to certify a class of "individuals
18 and entities that have had PebbleFlex or AquaFlex
19 installed in playgrounds, splash pads, or other types of
20 surfaces within the State of California." (Mot. at 1.)
21 Class certification requires the Court to engage in a
22 two-step analysis. First, it must determine whether the
23 four requirements of Rule 23(a) have been established:
24 (1) numerosity, (2) common questions of law or fact, (3)
25 typicality, and (4) adequate representation. See, e.g.,
26 Ellis v. Costco Wholesale Corp., 657 F.3d 970, 974 (9th
27 Cir. 2011). Second, Plaintiffs must satisfy at least one
28

1 of Rule 23(b)'s provisions. See Stearns v. Ticketmaster
2 Corp., 655 F.3d 1013, 1019 (9th Cir. 2011). When a party
3 invokes Rule 23(b)(3), as Plaintiffs do here, the Court
4 must decide whether "the actual interests of the parties
5 can be served best by settling their differences in a
6 single action." Hanlon v. Chrysler Corp., 150 F.3d 1011,
7 1022 (9th Cir. 1998). "When common questions present a
8 significant aspect of the case and they can be resolved
9 for all members of the class in a single adjudication," a
10 court may certify a class pursuant to Rule 23(b)(3). Id.

11

12 **A. Rule 23(a)**

13 "A class definition should be precise, objective and
14 presently ascertainable," such that it is
15 "administratively feasible to determine whether a
16 particular person is a class member." Allen v. Hyland's
17 Inc., 300 F.R.D. 643, 658 (C.D. Cal. 2014).

18

19 Here, the definition of the proposed class being
20 considered for certification is as follows:

21 Individuals and entities that have purchased
22 PebbleFlex or AquaFlex and incurred the costs of
23 their installation, where the PebbleFlex or
24 AquaFlex has failed to meet the representations
25 of quality, safety and/or longevity made by the
26 defendants or where the PebbleFlex or AquaFlex
27 has failed to meet the express warranty of

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1 quality, safety and/or longevity made by the
2 defendants.

3 (Motion at 8.)
4

5 The group of individuals and entities that have
6 purchased either PebbleFlex or AquaFlex, and incurred
7 costs because the products allegedly do not meet certain
8 articulated representations, is definite and can be
9 identified. It is administratively feasible for the
10 Court to determine whether a particular individual or
11 entity is a member of the class based on the above class
12 definition. Evidence such as sales materials, purchase
13 contracts, and repair orders could be used to identify
14 class membership. Moreover, Defendants do not argue that
15 the proposed class is unascertainable.
16

17 Accordingly, the Court finds that the members of the
18 proposed class are ascertainable.
19

20 **1. Numerosity**

21 Under Rule 23(a)(1), a class must be "so numerous
22 that joinder of all members is impracticable." Courts
23 have repeatedly held that classes comprised of "more than
24 forty" members presumptively satisfy the numerosity
25 requirement. See, e.g., DuFour v. BE LLC, 291 F.R.D.
26 413, 417 (N.D. Cal. 2013).
27
28

1 Plaintiffs' Motion cites Delarosa v. Boiron, Inc.,
2 275 F.R.D. 582, 587 (C.D. Cal. 2011), which states "[als
3 a general rule, classes of forty or more are considered
4 sufficiently numerous." At the motion hearing, however,
5 Plaintiff argued that a class of twenty was sufficiently
6 numerous, citing an unpublished opinion, Rannis v.
7 Recchia, 380 F. App'x 646 (9th Cir. 2010). Rannis held
8 that a district court "did not abuse its discretion in
9 determining that the class of 20 satisfies the numerosity
10 requirement." Rannis, 380 F. App'x at 650.

11
12 At the motion hearing, Plaintiffs' counsel suggested
13 that Rannis stood for the general proposition that a
14 class of twenty was sufficient for class certification.
15 A closer reading of Rannis reveals the court's holding
16 was more concerned with the discretion of the district
17 court to deny class decertification than with the
18 numerosity calculation at the class certification stage.
19 Rannis, 380 F. App'x at 651 ("District courts have broad
20 leeway in making certification decisions. Recchia has not
21 persuaded us that the district court's decision was a
22 clear abuse of discretion.").

23
24 At the class certification stage, the Rannis court
25 certified a class of 74 potential members. Rannis, 380
26 F. App'x at 648. It was not until after the opt-out
27 notices were distributed that the class was reduced to
28

1 twenty members. The district court in Rannis denied the
2 defendant's decertification motion and the court of
3 appeals held that denial of the motion was not an abuse
4 of discretion. Rannis, 380 F. App'x at 649. Not
5 withstanding Rannis' lack of precedential value, the
6 facts and circumstances in Rannis are very different than
7 the facts and circumstance before this Court. Most
8 importantly, and as acknowledged in Rannis, district
9 courts have broad leeway in making certification
10 decisions.

11
12 Aggregating PebbleFlex and AquaFlex installation
13 projects in California, Plaintiffs argue that there are
14 approximately ninety class members. (Mot. at 15.) The
15 evidence to support this calculation is based on the
16 declaration of Audrey Kennedy, a legal assistant to
17 Plaintiffs' counsel. Kennedy arrived at the calculation,
18 using documents obtained during discovery, by combining
19 the number of PebbleFlex and AquaFlex installation
20 projects in California made by either PFSC or LSI.
21 (Kennedy Decl. ¶¶ 9-13; Exhs. G, H, I to Kennedy Decl.)

22
23 Defendants object to this calculation for three
24 reasons. First, Defendants contend that Kennedy's
25 statements are inadmissible because they lack personal
26 knowledge, lack foundation, and are hearsay. (PFSC Opp.
27 at 11; LSI Opp. at 20.) Second, Defendants argue that
28

1 Plaintiffs cannot combine PFSC and LSI installation
2 projects when calculating numerosity because owners of
3 projects contracted through LSI would have no standing to
4 pursue claims against PFSC and vice versa. (Id.) LSI is
5 effectively disclaiming liability for PebbleFlex and
6 AquaFlex installations sold by PFSC. Third, Defendants
7 argue that even if Kennedy's statements were admissible,
8 the total number of installation projects in California
9 is not evidence of class size because each project does
10 not represent a different class member. (Id.)
11

12 The Court does not find Defendants' evidentiary
13 objections persuasive because, as discussed in Part
14 III.D. infra, the evidentiary standards at the class
15 certification stage are relaxed. The Court does find
16 Defendants' second objection persuasive. In an asset
17 sale, a buyer is not generally liable for the obligations
18 of the selling corporation when the sale of assets is
19 completed in good faith, for adequate consideration, and
20 the selling corporation is left with sufficient assets to
21 meet its obligations; nevertheless, there are several
22 exceptions to this rule. See Pierce v. Riverside Mortg.
23 Sec. Co., 25 Cal. App. 2d 248 (1938).
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1 To determine if Plaintiffs can aggregate LSI and PFSC
2 installations to satisfy numerosity, the Court must
3 consider whether LSI is liable for the PebbleFlex and
4 AquaFlex products manufactured and sold by PFSC. This
5 inquiry will necessarily involve considering the merits
6 of the case. The Supreme Court has acknowledged that
7 such an inquiry is appropriate, and sometimes necessary,
8 to the extent that it is done to determine whether the
9 Rule 23 prerequisites to class certification are
10 satisfied. See Dukes, 131 S.Ct. at 2551. Here, an
11 inquiry into LSI's liability, which implicates the
12 merits, is necessary to determine whether Rule 23(a)'s
13 numerosity requirement is met because Plaintiffs are not
14 able to satisfy numerosity through PFSC or LSI
15 installations when considered separately.

16
17 Under the "*de facto* merger doctrine," a corporation
18 cannot escape liability by selling or transferring all of
19 its assets to another corporation when the transaction
20 amounts to a consolidation or merger of the two
21 corporations. See McClellan v. Northridge Park Townhome
22 Owners Ass'n, Inc., 89 Cal. App. 4th 746, 753 (2001).

23
24 Here, LSI acquired PFSC's PebbleFlex and AquaFlex
25 product lines in an asset sale in 2011. Following the *de*
26 *facto* merger doctrine, Plaintiffs must show that PFSC
27 sold all of its assets, not just the PebbleFlex and
28

1 AquaFlex product lines to LSI, amounting to the
2 consolidation of the two corporations. Plaintiffs have
3 failed to meet this burden. The details of this
4 transaction have not been submitted as evidence to show
5 that the sale of the PebbleFlex and AquaFlex product
6 lines from PFSC to LSI amounted to the "consolidation or
7 merger of the two corporations."
8

9 At the motion hearing on June 8, 2015, Plaintiffs
10 acknowledged that the PFSC-LSI asset purchase agreement
11 was provided to Plaintiffs by Defendants. Plaintiffs'
12 counsel admitted he did not inquire further into the
13 nature of the agreement because he thought it went to the
14 merits of the case, which he believed were outside the
15 scope of class certification. This belief is erroneous
16 because, as noted above, a district court may consider
17 the merits of a case at the class certification stage so
18 long as it relates to one of Rule 23's requirements.
19 Here, the asset purchase agreement relates to the
20 numerosity requirement. Without evidence as to the
21 nature of the asset purchase agreement, the Court cannot
22 apply the *de facto* merger doctrine to the general rule
23 that a buyer is not liable for the obligations of a
24 selling corporation.
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1 The "product line exception," as articulated by the
2 California Supreme Court in Ray v. Alad Corp., 19 Cal. 3d
3 22 (1977), takes a different approach in holding a
4 successor corporation liable in products-liability cases.
5 In Ray, the Court found successor liability when a buyer
6 corporation acquired effectively all of a seller's assets
7 and continued to manufacture the same product line under
8 the same name and generally continued the seller's
9 business as before. Id. at 31. The court reasoned that
10 the responsibility of the successor to assume the risk
11 for the previously manufactured product was the price
12 which the buyer had paid for the seller's goodwill and
13 the buyer's ability to enjoy the benefits of that
14 goodwill. Id. at 34.

15
16 Here, rather than rebranding the products, LSI
17 continued to market and sell PebbleFlex and AquaFlex
18 under the same trade names, including the twenty-six LSI
19 project installations Kennedy used in her numerosity
20 calculation. The Court declines to extend the reasoning
21 in Ray to a breach of warranty context. Unlike the
22 plaintiffs in Ray, here, Plaintiffs have a remedy against
23 the original manufacturer, PFSC. Thus, Plaintiffs'
24 remedies were not destroyed by LSI's acquisition of the
25 PebbleFlex and AquaFlex product lines. Courts have held
26 that a buyer is not liable under the product line
27 exception when the selling corporation continued to exist

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1 after the acquisition. See Chaknova v. Wilber-Ellis Co.,
2 69 Cal. App. 4th 962 (1999). Here, as with the cases
3 cited above, the essential element of causation is
4 missing, since the successor's purchase did not cause
5 either the predecessor's dissolution or the destruction
6 of Plaintiffs' remedy.

7
8 Accordingly, the Court does not find LSI liable for
9 PFSC's obligations under either the *de facto* merger
10 doctrine or product line exception.

11
12 Defendants' third objection is persuasive.
13 Plaintiffs define the proposed class as the purchasers
14 and owners of installations (Mot. at 1); however,
15 Plaintiffs cite the number of installation projects as
16 evidence that the numerosity requirement is met. (Mot.
17 at 15 citing Kennedy Decl. ¶¶ 9-13.) Although it is true
18 that "[i]n determining whether numerosity is satisfied, a
19 court may consider reasonable inferences drawn from the
20 facts before it," Balasanyan v. Nordstrom, Inc., 294
21 F.R.D. 550, 558 (S.D. Cal. 2013); see Gay v. Waiters' &
22 Dairy Lunchmen's Union, 549 F.2d 1330, 1332 (9th Cir.
23 1977), the Court is now asked to make a reasonable
24 inference about the size of the proposed class of
25 installation owners from the number of installation
26 projects.

1 Defendants argue the maximum potential class size of
2 project owners with projects that incorporated
3 PebbleFlex, AquaFlex, or both, sold by PFSC is no more
4 than thirty-five. (PFSC Opp. at 11.) Further, they
5 contend that at least nine of the thirty-five project
6 owners only incorporated AquaFlex into their projects
7 (Saluti Decl. ¶ 56-58; Exh. A to Saluti Decl.), and only
8 twenty-three of the project owners incorporated
9 PebbleFlex into their projects. (Saluti Decl. ¶ 59.)
10

11 Plaintiffs argue in their Reply that "[t]he defense
12 provides no admissible evidence that the multiple
13 installations in various municipalities are owned by a
14 single entity." (Reply at 12). This suggests that
15 Defendants bear the burden of showing that numerosity is
16 not met, rather than Plaintiffs bearing the burden of
17 showing that numerosity is met. This suggestion is
18 misguided as Plaintiffs bear the burden of establishing
19 the four requirements of Rule 23(a). See Mantolete v.
20 Bolger, 767 F.2d 1416, 1424 (9th Cir. 1985).
21

22 Plaintiffs have not offered sufficient evidence that
23 the numerosity requirement is met, and the Court cannot
24 make a reasonable inference in this regard. Accordingly,
25 Plaintiffs have failed to establish the numerosity
26 requirement of Rule 23(a).
27
28

1 **2. Commonality**

2 Commonality requires Plaintiffs to demonstrate there
3 are "questions of law or fact common to the class." Fed.
4 R. Civ. P. 23(a)(2). Plaintiffs must demonstrate
5 "significant proof" that members of the class have
6 suffered the same injury, and not merely that they have
7 suffered violations of the same provision of law. Wal-
8 Mart, 131 S.Ct. at 2551. Plaintiffs' claims must depend
9 on a "common contention" and "[t]hat common contention .
10 . . must be of such a nature that it is capable of
11 classwide resolution – which means that determination of
12 its truth or falsity will resolve an issue that is
13 central to the validity of each one of the claims in one
14 stroke." Id.

15
16 "Plaintiffs need not show that every question in the
17 case, or even a preponderance of questions, is capable of
18 classwide resolution. So long as there is 'even a single
19 common question' a would-be class can satisfy the
20 commonality requirement of Rule 23(a)(2)." Wang v.
21 Chinese Daily News, Inc., 737 F.3d 538, 544 (9th Cir.
22 2013) (quoting Wal-Mart, 131 S.Ct. at 2556.) Thus,
23 commonality exists even "[w]here the circumstances of
24 each particular class member vary but retain a common
25 core of factual or legal issues with the rest of the
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1 class." Evon v. Law Offices of Sidney Mickell, 688 F.3d
2 1015, 1029 (9th Cir. 2012) (quoting Parra v. Bashas',
3 Inc., 536 F.3d 975, 978-79 (9th Cir. 2008)).
4

5 Plaintiffs proffer four possible common questions
6 capable of classwide resolution: (1) whether the design
7 of PebbleFlex and AquaFlex is defective; (2) whether
8 identical representations and warranties disseminated to
9 the class were false; (3) whether LSI is liable for the
10 conduct of PFSC as its successor; and (4) the measure of
11 damages. (Mot. at 16.) Defendants offer a number of
12 objections. (PFSC Opp. at 12-14.)
13

14 First, Defendants argue that the questions of law or
15 fact between proposed class members who own projects with
16 PebbleFlex and proposed class members who own projects
17 with AquaFlex are not common because the two products are
18 manufactured, installed, and marketed differently. (PFSC
19 Opp. at 13.) As a result of these differences,
20 Defendants argue, the resolution of factual and legal
21 questions concerning representations and advertising
22 related to PebbleFlex will not resolve the same questions
23 concerning representations and advertising related to
24 AquaFlex. (Id.) Plaintiffs' Reply argues that
25 PebbleFlex and AquaFlex are "virtually the same product"
26 marketed, sold, and installed in the same way. (Reply at
27 9.)
28

1 The Court finds that proposed class members lack
2 commonality with respect to whether the design of
3 PebbleFlex and AquaFlex is defective because the products
4 are manufactured and installed differently. (Saluti
5 Decl. ¶¶ 11-22, ¶¶ 24-34.) The differences in product
6 manufacturing would make it difficult to resolve, in "one
7 stroke," the question of whether the products are
8 defective. Defendants offer the declaration of Gerald
9 Saluti, a Ph.D. in Organic Chemistry, to describe how
10 PebbleFlex and AquaFlex are manufactured and installed
11 differently. (Saluti Decl. ¶¶ 2, 24-34.) Plaintiffs
12 have not offered sufficient evidence that an inquiry into
13 the method of PebbleFlex and AquaFlex manufacturing would
14 yield common issues of fact. Plaintiffs carry the burden
15 of showing commonality with respect to the design
16 question, and have failed to carry this burden.

17
18 Second, with respect to whether identical
19 representations and warranties disseminated to the class
20 were false, the Court finds there exists common questions
21 of law or fact because PebbleFlex and AquaFlex were
22 marketed in very similar ways by both PFSC and LSI. The
23 PebbleFlex and AquaFlex sales brochures distributed by
24 both PFSC and LSI make very similar representations with
25 regards to durability, safety, and aesthetic longevity.
26 Moreover, both products failed. (See Exhs. A. B to J.
27 Spence Decl.; Exhs. E, F to Kennedy Decl.) The Court can
28

1 make a reasonable inference based on the representations
2 made in the sales brochures, and the evidence of product
3 failure that there exists common questions of law or fact
4 as to the truth or falsity of the representations.
5

6 Third, Defendants argue that public entity class
7 members lack commonality with private project owners
8 because public project owners rely on advertising
9 differently than private project owners. (PFSC Opp. at
10 13.) While it is true that California cities, unlike
11 private owners, are prohibited from requiring specific
12 brand or trade name materials or products in project bid
13 specifications (See California Public Contract Code §
14 3400(b)), this does not mean that product representations
15 are not considered by public entities when creating such
16 specifications. Plaintiffs do not need to show that
17 public and private entities used or relied on PebbleFlex
18 or AquaFlex representations in identical ways because, as
19 noted above, commonality exists even "[w]here the
20 circumstances of each particular class member vary but
21 retain a common core of factual or legal issues with the
22 rest of the class." Evon, 688 F.3d at 1029.
23

24 Fourth, Defendants argue that acts of vandalism
25 differ on each project and directly relate to Plaintiffs'
26 claims. (PFSC Opp. at 14.) The Court finds that even if
27 individual acts of vandalism differ between projects,
28

1 there still exists the overall common question as to
2 whether failures such as cracks, crevices, and holes were
3 a result of the quality of the product itself or acts of
4 vandalism as a whole.

5
6 Fifth, Defendants argue that proposed class member
7 damages lack commonality because each project restitution
8 and repair claim would need to be calculated on a
9 project-by-project basis; however, damage calculations
10 alone cannot defeat class certification. Yokoyama v.
11 Midland Nat. Life Ins. Co., 594 F.3d 1087, 1094 (9th Cir.
12 2010) ("We have said that '[t]he amount of damages is
13 invariably an individual question and does not defeat
14 class action treatment.'").

15
16 Not all of Plaintiffs' proposed common questions are
17 appropriate for classwide resolution; however, not every
18 question in the case need be capable of classwide
19 resolution so long as there is "even a single common
20 question" of commonality. Wang, 737 F.3d at 544.
21 Accordingly, the Court finds that the second, third, and
22 fourth proposed questions are sufficiently common to the
23 class.

1 **3. Typicality**

2 Class representatives must have claims that are
3 "typical of the claims" of the other members of the
4 class, in order to ensure that "the named plaintiffs'
5 claim and the class claims are so interrelated that the
6 interests of the class members will be fairly and
7 adequately protected in their absence." Gen. Tel. Co.
8 Sw. v. Falcon, 457 U.S. 147, 158 n.13 (1982) (citing Rule
9 23(a)(3)). The standard for determining typicality is a
10 permissive one, and asks only whether the claims of the
11 class representatives are "reasonably co-extensive with
12 those of absent class members; they need not be
13 substantially identical." Hanlon v. Chrysler Corp., 150
14 F.3d 1011, 1020 (9th Cir. 1998).

15
16 Defendants argue that unique defenses exist to the
17 proposed class representatives' claims; however, the
18 defenses raised are not so unique as to make the claims
19 of proposed class representatives not typical. First,
20 PebbleFlex and AquaFlex marketing materials contained
21 representations regarding installations. Therefore, that
22 different installers may have installed the products
23 improperly is not a unique defense. Second, Defendants'
24 claim that proposed class representatives' installations
25 experienced high levels of vandalism is not a unique
26 defense because vandalism of any kind is not covered by
27 the product warranties.

28

1 Defendants also argue that the proposed class
2 representatives do not own AquaFlex installations, thus
3 rendering their claims not typical of the class as a
4 whole. PebbleFlex and AquaFlex were manufactured
5 differently. This makes a determination about
6 defectiveness for each product different. Since the
7 proposed class representatives do not include AquaFlex
8 installation owners, their claims are different, and not
9 typical, of the whole class, which includes AquaFlex
10 installation owners. As noted above, Plaintiffs have not
11 offered sufficient evidence to show that PebbleFlex and
12 AquaFlex are similar enough to makes claims by PebbelFlex
13 owners typical of AquaFlex owners.

14

15 Accordingly, the proposed class representatives set
16 forth claims that are not typical of the other members of
17 the class.

18

19 **4. Adequacy of Representation**

20 The fourth Rule 23(a) requirement is that Plaintiffs
21 "fairly and adequately protect the interests of the
22 class." Fed. R. Civ. P. 23(a)(4). The adequacy inquiry
23 requires the Court to make two determinations: (1)
24 whether the named plaintiffs and class counsel have any
25 conflicts of interest with other class members; and (2)
26 whether counsel and the class representatives will
27 "vigorously prosecute the action on behalf of the class."

28

1 Ries v. Arizona Beverages USA LLC, 287 F.R.D. 523, 540
2 (N.D. Cal. 2012) (citing Ellis v. Costco Wholesale Corp.,
3 657 F.3d 970, 985 (9th Cir. 2011)).

4
5 Defendants argue that the proposed class
6 representatives are not adequate representatives for the
7 class because (1) a conflict exists between all class
8 members, on the one hand, and MPS and Micon on the other
9 hand; and (2) a separate conflict exists between the
10 proposed class representatives, and MPS and Micon.
11 Neither of these alleged conflicts bar class
12 certification because they are not conflicts between
13 proposed class members. Defendants have not provided any
14 authority, binding or otherwise that would require the
15 Court to deny class certification because of conflicts
16 between the proposed class as a whole and other non-class
17 member plaintiffs. Though a conflict does not exist
18 between class members or proposed class representatives,
19 the Court finds that the proposed class representatives
20 do not have the same incentives as other class members to
21 prosecute vigorously all the claims in the case because
22 the class representatives are not typical of the entire
23 class. Hence, the proposed class representatives are not
24 adequate representatives.

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1 The Court finds that Plaintiffs have sufficiently
2 established commonality, but have not established
3 numerosity, typicality or adequate representation.
4 Accordingly, Plaintiffs have not established the
5 requirements of Rule 23(a).

6
7 **C. Rule 23(b)**

8 When invoking Rule 23(b)(3), the party seeking class
9 certification bears the burden of showing that the
10 following two criteria are met: (1) the questions of law
11 or fact common to members of the class predominate over
12 any questions affecting only individual members, and (2)
13 that a class action is superior to other available
14 methods for the fair and efficient adjudication of the
15 controversy. See In re Wells Fargo, 571 F.3d at 957.

16
17 **1. Predominance**

18 Defendants re-state their reasons against finding
19 commonality and typicality of the proposed class
20 representatives when they argue that common issues of law
21 or fact do not predominate over individual issues. By
22 definition every member of the proposed class either
23 purchased a PebbleFlex installation, AquaFlex
24 installation, or both. Though both the breach of
25 warranty and unfair competition causes of action involve
26 overlapping sets of facts, namely similar written
27 representations regarding the quality of PebbleFlex and
28

1 AquaFlex, there were also oral representations made by
2 MPS sales representatives. An inquiry into the nature of
3 these oral representations will differ from deal to deal,
4 sales representative to sales representative, and product
5 to product. This sort of individualized inquiry weighs
6 against predominance. There may also be limited
7 individualized inquiries as to the level of vandalism and
8 damages to a particular owner.

9

10 Reasonable inferences can be made based on the
11 evidence cited that written representations, in the form
12 of marketing brochures, were similar for both PebbleFlex
13 and AquaFlex. However, there are a number of individual
14 issues of fact, such as whether the different methods of
15 manufacture led to product failure or whether the oral
16 representations were consistent across class members,
17 which weighs against predominance. Accordingly, the
18 Court finds that common issues narrowly predominate.

19

20 **2. Superiority**

21 In addition to the predominance requirement of Rule
22 23(b)(3), a court must also find "that a class action is
23 superior to other available methods for fairly and
24 efficiently adjudicating the controversy." Fed. R. Civ.
25 P. 23(b)(3).

26

27

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1 Defendants argue that individual lawsuits would be
2 superior because it would give proposed class members the
3 opportunity to argue individualized damages. As noted
4 above, the amount of damages is usually an individual
5 question, but that alone does not defeat class action
6 treatment.

7
8 Plaintiffs argue a single class action lawsuit is
9 superior to multiple individual lawsuits because some of
10 the evidence needed to prove the breach of warranty and
11 unfair competition causes of action would be very similar
12 across class members; however, in this case, there are a
13 number of issues specific to individual purchasers.
14 Since the Court found that Plaintiffs cannot meet
15 numerosity, multiple suits would not be an inefficient
16 method for adjudicating the controversy. Class action
17 litigation is not superior to multiple individual
18 lawsuits. Accordingly, Plaintiffs have not established
19 the requirements of Rule 23(b).

20
21 **D. Evidentiary Objections**

22 The Ninth Circuit has not directly addressed the
23 evidentiary standard at the class certification stage;
24 however, other "courts have held that on a motion for
25 class certification, the evidentiary rules are not
26 strictly applied and courts can consider evidence that
27 may not be admissible at trial." Parkinson v. Hyundai

1 Motor Am., 258 F.R.D. 580, 599 (C.D. Cal. 2008) (quoting
2 Rockey v. Courtesy Motors, Inc., 199 F.R.D. 578, 582
3 (W.D. Mich. 2001)); see, e.g., Syed v. M-I, L.L.C., 2014
4 WL 6685966, at *6 (E.D. Cal. Nov. 26, 2014); see also
5 Davis v. Social Service Coordinators, Inc., 2012 WL
6 3744657, *7 (E.D. Cal. Aug. 28, 2012) ("Many courts have
7 relaxed the evidentiary requirements for plaintiffs at
8 the conditional certification stage because the evidence
9 has not been fully developed through discovery and the
10 evidence will be subjected to greater scrutiny at the
11 second stage"); see also Dominguez v. Schwarzenegger, 270
12 F.R.D. 477, 483 n. 5 (N.D. Cal. 2010) ("[U]nlike evidence
13 presented at a summary judgment stage, evidence presented
14 in support of class certification need not be admissible
15 at trial.").

16
17 Defendant PFSC filed along with its Opposition a
18 supplemental objection ("Supp. Obj." (Doc. No. 58)) to
19 Plaintiffs' supporting declarations as admissible
20 evidence. While many of PFSC's objections would be
21 sustained at trial, PFSC provides no authority, binding
22 or otherwise, to support its argument that such evidence
23 is inadmissible during the class certification stage. On
24 the contrary, the Court finds persuasive authority
25 holding that at the class certification stage evidentiary
26 requirements should be relaxed. Accordingly, the

27
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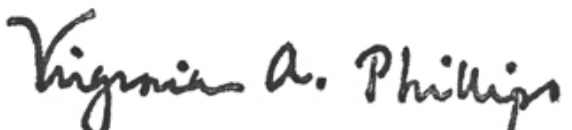
1 evidence found in declarations provided by both
2 Plaintiffs and Defendants is admissible with respect to
3 determining class certification.

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IV. CONCLUSION

While Plaintiffs are able to show that there exists some common questions of law or fact, they are unable to show numerosity, typicality and adequacy of representation. Hence, Rule 23(a) is not met. Rule 23(b) is similarly not met because while common issues narrowly predominate, the Plaintiffs are unable to show that class action litigation is superior to individual law suits. For the foregoing reasons, the Court DENIES certification of the following class: "individuals and entities that have had PebbleFlex or AquaFlex installed in playgrounds, splash pads, or other types of surfaces within the State of California."

Dated: June 27, 2015



VIRGINIA A. PHILLIPS
United States District Judge